

## HEARING EXAMINER MINUTES – MARCH 16, 2006

### CALL TO ORDER:

The March 16, 2006 meeting was convened by the Hearing Examiner, Sue Tanner, at 9:00 a.m. Tony Leavitt, Craig Salzman, Nancy Cox and Jeremy McMahan represented the Department of Planning and Community Development and Oscar Rey represented the City Attorney's office.

### PUBLIC HEARING: Rosinski Reasonable Use; File No. ZON05-00016

Hearing Examiner Sue Tanner explained this was a remand from Kirkland City Council on Rosinski Reasonable Use appeal. Mr. Rosinski applied for reasonable use exception to the City's wetland regulations, staff recommended denial. The Hearing Examiner held a hearing and recommended denial to the City Council. Mr. Rosinski challenged that recommendation and the City Council reconsidered and remanded to the Hearing Examiner with five questions regarding the basis for the decision. The Hearing Examiner responded to the Council's questions and changed the decision to a recommendation of approval.

The City Council again considered the application and remanded to the Hearing Examiner again, directed the hearing be reopened to take additional evidence and consider following questions: 1) with regard to KZC 90.140(2), is there an onsite alternative to the proposal that is feasible and reasonable considering possible changes in site layout, reductions in density and similar factors? By way of example and not limitation is there any alternative structure or location for any structure on the site that would be feasible and reasonable? and 2) determine the least sized structure, in terms of square footage and impervious surface area, necessary to meet reasonable use requirements under the current law.

KZC 152.90.2(b) requires a remand hearing be held within 28 calendar days of the date of the City Council motion; that requirement was waived by the applicant's counsel. Ms. Tanner requested staff and the applicant also address how to determine whether a use is reasonable under KZC 90.140(2) whether it was other houses in area regardless of when built, what would be allowed on the property without the Critical Areas Ordinance, what size houses or impervious surfaces other jurisdictions allowed under their reasonable use exceptions and codes, impacts on wetlands, desires of the applicant, what review reports say, or whether the use passes a takings or due process test? She asked how the original or proposed alternative met that criteria.

Ms. Tanner swore in Planner Tony Leavitt. Mr. Leavitt identified the property in 9500 block of Slater Avenue. In regard to first question posed by the Council regarding an alternative proposal, staff recommended the applicant consider proposing an alternative site plan that would lessen the impact on the buffer, which the applicant agreed to do. The original proposal was for a new single family residence with gross floor as defined by the KZC of 3,045 square feet, lot coverage as defined by the KZC of 2,666 square feet, the wetland buffer impact was 4,060 square feet. The structure complied with zoning setback requirements and proposed the use of impervious concrete for all paved surface.

The alternate proposal is for a single family residence of with a gross floor area as defined by the KZC of 2,391 square feet and total square footage of 3,270. He noted the KZC's definition of gross floor area did not include daylight basements if certain criteria are met which the proposed basement appeared to meet. The total lot coverage of the new proposal is 1,943 square feet and the wetland

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buffer impact would be reduced to 3,558 square feet. The structure would comply with all setback requirements except for the required front setback which the applicant proposes to reduce from the required 20 feet to 11.5 feet as allowed in the reasonable use criteria. The applicant also proposes to use pervious concrete for all paved surfaces. He displayed a site plan comparing the two proposals and explained the disturbance area was now 36 feet from the wetland buffer and the total area of enhancement would increase from 5,711 to 6,180 square feet.

He relayed comments from the City's wetland consultant, The Watershed Company, that concluded the proposed changes reduced the loss of buffer function and were advantageous to the wetland. The consultant also recommended the same changes and additions to the mitigation plan as previously requested. He referred to Attachment 7 of the Staff Memorandum, information from the King County Assessor's office regarding homes built within the past ten years within 1000 feet of the subject property. A total of 21 homes had been constructed and one was currently under construction in this area with an average size of 3,102 square feet; the applicant's proposal was 3,270 square feet.

With regard to the second question, determine the least sized structure required by current law, Mr. Leavitt conveyed the opinion of the City Attorney that current law provided little guidance. While the GMA required cities and counties to adopt critical area regulations, there was no statutory requirement that municipalities provide a reasonable use process although many cities and counties have included a reasonable use process in an attempt to avoid liability from due process and takings. He referred to KZC 90.140 reasonable use that states in part the chapter was not intended to deny reasonable use of a lot, tract or parcel. The decision maker shall determine whether application of the chapter will deny reasonable use and whether the proposed use and activity are a reasonable use of the property.

Ms. Tanner asked Mr. Leavitt's opinion regarding the criteria that should be used to determine a reasonable use. Mr. Leavitt answered the applicant had made a good attempt with their latest proposal to remedy the City Council's concerns with their previous proposal via solutions that have less impact on wetland buffer.

Ms. Tanner swore in Duana Kolouskova, attorney for applicant. Ms. Kolouskova found the Hearing Examiner's question regarding a takings and substantive due process to be a fundamental question because reasonable use a remedy to avoid that constitutional violation. She referred to several examples of reasonable use applications approved within the past year by other jurisdictions, examples that may be comparable to Kirkland with regard to jurisdiction size, economic segments of the population and types of housing. She noted in situations where there was not a long history of reasonable use applications it was appropriate for the Hearing Examiner to consider other jurisdiction's decisions. She commented it was also appropriate to compare what was proposed on this lot to what had been constructed in the vicinity of the subject property as long as it was recent construction versus houses built 60-100 years ago when living standards were very different. She commented the Hearing Examiner's analysis must consider what was feasible and reasonable, not the bare minimum that would limit the applicant to a home with one bedroom, one bathroom and a living space but a reasonable single family dwelling house family to house a family and their vehicle that was consistent with the surrounding area and not economically damage the applicant.

Ms. Kolouskova referred to two site plans available for the Hearing Examiner's consideration and approval, pointing out the goal of the alternative site plan was to include further mechanisms to protect

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the environment within and outside buffer such as the use of pervious concrete. She commented this innovative design technique could allow this project to be used as demonstration project. She pointed out staff and the City's wetland consultant supported the original site plan and made a finding that the original site plan was feasible and reasonable. The Council did not dictate a particular layout or state they did not like the original site plan but wanted applicant to consider whether there was another way to configure the house.

Ms. Kolouskova explained the house was in a similar location on the alternative site plan, the southwest corner of property, as that was the area furthest from wetland and was the only portion of property not encumbered by a critical area or buffer. Both site plans comply with bulk regulations regarding setbacks with the exception of the proposed reduction in the front setback which staff supported via the reasonable use exception. Ms. Kolouskova advised their materials contained information regarding pervious concrete.

Ms. Kolouskova provided a comparison of percentages and statistics between the original site plan and the alternative/revised site plan which Ms. Tanner entered as Exhibit A. Ms. Kolouskova referred to a discrepancy throughout process regarding the actual lot size; the general rule is lot size is based on ordinary high water mark. In this case that has been surveyed to be 15,585 square feet. It is their understanding that for the Forbes Lake area the City relied on a survey conducted for a condominium complex constructed several years ago that based their assessment on the 245.5 contour line. If the 246 contour line were used the lot size was 7,932 square feet. The comparison provides percentages based on both lot size determinations; however, when comparing this property to other jurisdictions, other jurisdictions based their lot size on the ordinary high water mark.

Ms. Kolouskova pointed out the difference in the plans in impervious surface for the building footprint versus what City considers to the floor area ratio. Their opinion was the relevant analysis for the Hearing Examiner was an examination of the impervious surface footprint of building as that was what impacted the wetland not total square footage of a structure. The impervious surface in the original site plan was slightly over 2,600 square feet, much of which was driveway, patio, sidewalks, etc. Under the alternative/revised site plan the applicant reduced the impervious surface to 1300 square feet. Even with 7,900 square foot lot size, the impervious coverage was only 16.39%, a small impact to the wetland buffer and no impact to the wetland. She relayed the applicant's willingness to comply with the mitigation requirement that the City's wetland consultant recommended, resulting in enhanced wetland functions and values by construction of the house.

Ms. Kolouskova pointed out the alternate site plan included the basement square footage which was not included in the original site plan, thus the floor area ratio in the alternate/revised site plan appeared to be larger however, the applicant intended to make the basement daylight which would not count toward the floor area ratio and reduced the floor area ratio to 2,391 sq feet. She recommended the Hearing Examiner use the 2,391 floor area ratio when comparing the proposal to surrounding homes in area. She requested the Hearing Examiner recommended approval of the reasonable use to the Council based on either the original or the revised site plan.

With regard to Ms. Kolouskova suggestion that she consider houses of recent construction, Ms. Tanner asked whether that should be houses constructed before or after the ordinance was passed. Ms. Kolouskova answered she was not certain whether it made a significant difference as each

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property was unique. Although recent information was likely the most indicative, consideration should be given to whether a volume of comparables existed to provide sufficient guidance.

With regard to her comment that the consideration should not be the bare minimum but a structure to house a family and their vehicles and not economically damage the applicant and asked whether there was a minimum size house that would prevent economic damage. Ms. Kolouskova answered she was unable to give square footage answer. The City must base their decision on the proposal presented by the applicant and comparables. This proposal represented the least size structure on the site that minimized impacts to the wetland buffer as well as included innovative techniques.

Ms. Tanner swore in Charlie Rosinski. Mr. Rosinski, 45520 SR 2, Gold Bar, requested the addition of a 5x10 deck off the main floor above pervious concrete deck (which he proposed previously in an email to Mr. Leavitt). He explained his intent with the alternative site plan was to reduce footprint to lessen the impact on the wetland buffer. He reiterated this was the least size house that was economically feasible.

### Public Testimony

Ms. Tanner swore in Maxine Keesling, owner of lots 1, 2 and 3 on Forbes Lake. Ms. Keesling commented when Mr. Rosinski's reasonable use exception was discussed at the February 7 City Council meeting, no one mentioned the zoning was 12 unit/acre or the presence of the apartments built 30 feet from the lake edge, or the large amounts of Costco impervious surface south of the lake. As there was no mention of the harmful impacts to lake from those large amounts of impervious surface, she assumed there were none. She pointed out the lack of available land in Kirkland for residential growth. She did not support unnecessarily restricting development to a tiny dwelling that could house only a single person or a couple and would unreasonably deny children the use of this safe body of water. She pointed out several years ago a joint King County/Kirkland task force determined Forbes Lake was basically a stormwater runoff facility for the NE 85<sup>th</sup> Street Coordinator and the Bridle Trails area. She referred to a State Attorney General 1993 advisory memorandum memo that recommended regulations requiring that all a particular parcel be left in substantially a natural state be carefully reviewed. She recommended these issues be considered in Hearing Examiner's recommendation to City Council. Ms. Keesling submitted written material which Ms. Tanner entered as Exhibit B.

Mr. Leavitt advised the deck proposed by Mr. Rosinski was acceptable to staff as long as it was 5 feet from edge of disturbance area, above the patio and was an impervious surface. He clarified the King County Assessor's information contained in Attachment 7 included all square footage and did not exclude daylight basements.

At 9:48 a.m., hearing no further testimony, the Ms. Tanner advised the record would remain open for her site visit and would be closed when she completed the visit later today. 9:48

### **PUBLIC HEARING: Morgan Code Enforcement Appeal; File No. APL06-0001**

Ms. Tanner reviewed the background of this item, an appeal of three Civil Infraction Notices issued to WRO Development LLC and Sharon Morgan for violations of various sections of the KCC on property located at 8241, 8249, 8251 - 122<sup>nd</sup> Avenue NE, Kirkland.

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Code Enforcement Officer Craig Salzman explained the citations in the case had been consolidated for the convenience of the appellant and the city. The main citation was junk accumulation on three properties owned jointly by WRO or Sharon Morgan. One of assertions of the citation was an accumulation of junk and vehicle parking on the lawn area at 8249 - 122<sup>nd</sup> Avenue NE. He advised the witness providing testimony, Neil Goldberg, must leave the hearing at 10:00 a.m.

Jack Borland, attorney representing the Morgans, asked for a short continuance. He explained this appeal was part with other litigation that was occurring in which they were in settlement negotiations. He learned this morning Mr. Morgan's father who resides in San Francisco is seriously ill. He requested a continuance to allow time for the family and to address other matters which may be resolved and could be coordinated with the settlement action with City. Mr. Salzman recommended the Hearing Examiner take Mr. Goldberg's testimony first. Ms. Tanner agreed.

Ms. Tanner swore in Neil Goldberg, 8259 – 122<sup>nd</sup> Avenue NE, Kirkland, who advised he purchased the building next door, which he leases, a year ago. He explained as the new neighbor he approached Mr. Morgan regarding the situation and to inform him of the new ownership. Mr. Morgan agreed to move trucks/automobiles parked against fence that were of concern to tenants of the building. The vehicles were later returned when the City informed him the vehicle could not be parked on the new location, a vacant lot. He expressed disappointment with his inability to resolve situation.

Mr. Borland asked whether Mr. Goldberg was told by the previous owner when he purchased the building that he was required to put up screening between his property and the Morgans. Mr. Goldberg answered no. Mr. Borland asked whether he was aware of lawsuit between Morgan and the building's previous owner regarding screening. Mr. Goldberg recalled a document was signed by the previous owner indicating they were responsible for the lawsuit and indemnifying him against the lawsuit.

At Mr. Salzman's request, Ms. Tanner declared a brief recess to discuss the continuance.

Mr. Borland renewed the request for a continuance and expressed no objection to taking additional testimony. Mr. Salzman requested the other witness who was present be allowed to testify. He explained Mr. Borland had proposed a resolution to all issues; however, it was the same proposal that was presented two years ago prior to a hearing, the matter was continued and there was no follow through by the appellant. Ms. Tanner suggested continuing the hearing to April 6 and staff agreed.

Ms. Tanner swore in Sharon Velozo, 8245 122<sup>nd</sup> Avenue NE, Kirkland. Ms. Velozo advised there had been an on-going problem on the property for 20 years. The vehicles mentioned by Mr. Goldberg were moved and returned to the property as a result of complaints she filed on all three properties the Morgans own. She described problems that have resulted from the Morgan's ingress/egress easement on her driveway that resulted in her having the vehicles towed, Mr. Morgan took them to court and lost and later had the vehicles towed back to the property. She explained when complaints were filed on 8249, vehicles were moved to adjacent properties they own. She expressed concern with the debris/junk on the Morgan's property devaluing her property and their recent removal of trees that exposed the vehicles and junk.

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Ms. Velozo referred to photos of the vehicles, debris, house, canopy, etc., commenting the junk is transferred from one property to another every weekend. She summarized the vehicles were not roadworthy, two of the houses in front were unrentable with debris inside and out. She pointed out her property was surrounded by properties owned by the Morgan's and their RV was illegally parked on the easement.

Mr. Borland referred to photograph of the RV and asked whether it was parked on the Morgan's driveway. Ms. Velozo responded the driveway was hers and their easement was ingress/egress only. Mr. Borland pointed out the easement allowed the Morgans utilities and asked whether Mr. Morgan had made an effort to repair a leak. Ms. Velozo advised he dug a hole in the driveway but did not complete the repair so she filled the hole. Ms. Tanner relayed her understanding that the Morgans had an ingress/egress and utility easement.

Ms. Tanner swore in Jess Paddy, 8245 122<sup>nd</sup> Avenue, Kirkland, who concurred with Ms. Velozo's comments. He advised he had lived in the residence for five years and during that time the three properties were in disrepair and continue to decline. He tried to maintain amicable rapport with the Mr. Morgan but he ignored the situation and was not willing to work with the neighbors. Regarding size of easement and way the RV is parked on easement, they have measurements to show how much the RV is infringing.

At 10:22 a.m., Ms. Tanner continued the hearing to April 6 at 9:00 a.m.

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Nancy Cox, Development Review Manager  
Department of Planning and Community Development

Recording Secretary: Jeannie Dines  
NORTHSHORE BUSINESS SERVICE