

**CITY OF KIRKLAND  
HEARING EXAMINER FINDINGS,  
CONCLUSIONS AND DECISION**



**APPLICANT:** City of Kirkland Parks Department

**FILE NO:** SHR 17-00775

**APPLICATION:**

1. Site Location: 9703 N Juanita Drive
2. Requests: The Applicant, the City of Kirkland Parks Department (“Parks”), requests three shoreline variances to complete park improvements at Juanita Beach Park:
  - a. Variance 1 (Bathhouse): Relocation and redevelopment of an existing “bathhouse” structure, which would include restrooms, outdoor shower, lifeguard office, concessions stand, and boat rental concession, with the objective of moving closer to the shoreline and the far west end of the grassy area of the park next to Juanita Creek. Current 8000 square foot bathhouse would be removed, and new facility would include approximately 8800 square feet of impervious surface, a net gain of 800 square feet of impervious surface. New structure would be located within the inner 75 % of the standard wetland buffer for Wetland A (Type II) and within Juanita Creek buffer.
  - b. Variance 2 (Fill of Wetlands C (Type III) and D (Type IV)): Fill of two shoreline wetlands to provide a grassy picnic and play area for the public to better enjoy the lake shoreline. Total permanent wetland impact is 8180 square feet.
  - c. Variance 3 (Elimination of Wetland Buffer Establishment): Elimination of wetland buffer establishment requirement around the compensatory mitigation site for filling of Wetlands C and D.
3. Review Process: Process IIA, the Hearing Examiner conducts a public hearing and makes a final decision for the City. If the variance request is approved, the decision will be reviewed by the Washington State Department of Ecology. If the variance request is denied, the decision is appealed to the Washington State Shoreline Hearings Board.
4. Key Issues:
  - Compliance with KZC141.70 criteria

- Compliance with WAC 173-27-140 approval criteria
- Compliance with WAC 173-27-170 approval criteria
- Compliance with Process IIA Permit approval criteria

**SUMMARY OF RECOMMENDATION AND DECISION:**

Department	Approve all with conditions
Hearing Examiner	Deny all variance requests

**PUBLIC HEARING:**

The Hearing Examiner held a public hearing on the variance requests on May 30, 2018 and June 21, 2018 at City Hall, 123 Fifth Avenue, Kirkland, Washington. A verbatim recording of the hearing is available at the City Clerk's office. The minutes of the hearing and the exhibits are available for public inspection in the Department of Planning and Community Development. The Hearing Examiner visited the site prior to the May 30, 2018 hearing.

**TESTIMONY AND PUBLIC COMMENT:**

A list of those who testified at the public hearing, and a list of the exhibits offered at the hearing are included at the end of this Decision. The testimony is summarized in the hearing minutes.

For purposes of this recommendation, all section numbers refer to the Kirkland Zoning Code ("KZC" or "Code") unless otherwise indicated.

**FINDINGS, CONCLUSIONS AND DECISION:**

Having considered the evidence in the record and reviewed the site, the Hearing Examiner enters the following:

**Findings of Fact and Conclusions:**

**A. Site Description**

The Facts and Conclusions on this matter set forth at Subsection II.A of the Staff Report are accurate and supported by the record, and therefore are adopted by reference as the Hearing Examiner's Findings and Conclusions except for the portion of the narrative under A.1.b, which is omitted. In addition, while there are five wetlands on the southern side of the park, there is at least 10,000

square feet<sup>1</sup> of buildable area that remains outside of the wetland features and their buffers.<sup>2</sup>

## **B. Background and Juanita Beach Master Plan**

1. Juanita Beach Park was established when Lake Washington was lowered, due to the installation of the Montlake Cut and the connection of Lake Washington with the Puget Sound through the ship canal and Hiram Chittenden Locks. Over the past 100 years, the park has operated under both private and public ownership. The site was originally a private beach destination until it was purchased by King County in 1965. The current bathhouse was constructed around 1965, and the park has been operating continuously ever since.<sup>3</sup>

King County Parks owned and maintained the park until it was purchased by the City of Kirkland in 2002. On May 16, 2006 the Kirkland City Council adopted Resolution R-4570, which adopted the Juanita Beach Park Master Plan. Adoption of the Master Plan took four years, with public input into the process.

The Plan provides a conceptual drawing of the master plan within the document and numerous policies.<sup>4</sup> With respect to the “bathhouse” concept, the plan indicates that this idea is no longer appropriate for the park, as people do not leave their valuables in self-locking lockers and are more likely to change into swimsuits in the bathroom.<sup>5</sup> In accordance with that idea, the “bathhouse” in this proposal is simply bathroom facilities with an outdoor shower. Similar to this proposal, the plan also calls for a 340 square-foot concession stand, a 240 square-foot lifeguard office, and a 100 square-foot boat rental office with a 700 square-foot boat storage room. An additional 50 square-foot area would provide space for a small mechanical/utility room.<sup>6</sup>

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<sup>1</sup> The number appears to range between 10,000 square feet and 15,000 square feet, depending upon whether the buffer for Wetland C is included as part of the constrained area. Testimony of Christian Geitz, June 21, 2018 hearing. Wetland C was impacted as part of Phase I of this project. According to the decision approving Phase I, the wetland and its buffer remained a grassy lawn area without a buffer and protective fencing or vegetation. Exh. 2 at 171. Under the zoning code at that time, it was treated as a wetland modification because a city-owned park with a degraded wetland could not be considered a nonconforming use. Therefore, any existing lawn area within the wetland and its buffer could only remain if it were considered an impact that required compensatory mitigation. Exh. 2 at 171-72.

<sup>2</sup> See Exh. 2 (Staff Memo dated June 21, 2018) at 4.

<sup>3</sup> Exh. 1 at 4.

<sup>4</sup> Exh. 2 at Enclosure 4 and 5.

<sup>5</sup> Exh. 2, Enclosure 5 at 135.

<sup>6</sup> *Id.* at 135-36.

2. The Plan is also very specific about opportunities for restoration of Juanita Creek and the numerous wetlands on the properties. It states:

#### Riparian Buffer Enhancement

Opportunities for enhancement of Juanita Creek as it flows through Juanita Beach Park are numerous. . . Some key opportunities include:

- Remove invasive species within the stream buffer
- Establish a wider buffer for the creek by planting native species within the 75-foot buffer
- Develop trails in the outer 50% of the buffer to allow some human access along the creek but minimize uncontrolled access to the creek banks
- Relocate buildings currently located within the 75-foot creek buffer to outside the creek buffer

#### Wetlands

Opportunities for enhancement of the wetlands adjacent to Juanita Creek in Juanita Beach Park include:

- Restore and enhance vegetation within the wetlands by planting native wetland species.
- Diversify the vegetation structure and species by planting a mixture of trees, shrubs, and herbaceous species.
- Remove invasive species within the wetlands.
- Establish a wider buffer for the wetlands by planting native species within the 100-foot buffer.<sup>7</sup>
- Relocate buildings currently located within the 100-foot wetland buffer to outside the wetland buffer.
- Develop trails in the outer 50% of the buffer to allow some human access along the wetlands and creek but minimize uncontrolled access to the creek banks.

3. The re-development of the park on the south side of Juanita Drive is planned in two phases. This proposal is Phase 2. Phase 1 was completed in 2011.<sup>8</sup>

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<sup>7</sup> This buffer is now 125 feet. KZC 83.510.

<sup>8</sup> See Exh. 2, Enclosure 9 at 164.

a. Phase 1 consisted of:

- Shoreline promenade with seating wall along the beach, traversing through Wetland E (in this project called Wetland C), which was considered wetland and buffer modification (including wetland disturbance, cut and fill).
- A circular community commons with a stage (amphitheatre, pedestrian paths, boardwalk, involving reduction of Wetland E's buffer from 50' to 34' in width).
- Rehabilitation of Juanita Creek involving excavation in the stream's ordinary high water mark to create a hydraulic connection between the Oxbow Marsh and stream, removing bank armoring, new bank stabilization and restoration of fish and wildlife habitat.
- New Oxbow Marsh wetland resulting in impacts to existing wetlands and Juanita Creek buffer but creating new wetland and habitat for fish and wildlife.
- A new pedestrian-only bridge over Juanita Creek that currently provides access from the park to the west side of the stream.
- Pedestrian pathways and boardwalks through the Oxbow Marsh, Juanita Creek buffer and Wetland E.

b. Phase 1 Mitigation and Relationship to Phase 2.

As part of the mitigation for these improvements and of relevance to the request to fill Wetland C in Phase 2 is an area in front of the existing lawn which was labeled as "paper fill."<sup>9</sup> The Phase 1 decision specified that even though no buffer was provided for this area, but no grading fill, paving or construction activity could occur.

In the Phase 2 project, Parks states that it completed 5895 feet of wetland creation and 2948 square feet of wetland rehabilitation as mitigation for the paper fill.<sup>10</sup> The staff asserts that this translates to 7369 square feet of "advance mitigation," meaning that Phase 2 can now use this area as mitigation for impacts in Phase 2. As a result, staff calculates there only needs to be a total of 811 feet of new mitigation to address the impacts of Phase 2.

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<sup>9</sup> While there is no explicit definition of "paper fill," it is treated as a hypothetical wetland fill, and is a mechanism for allowing development to intrude into a buffer beyond that authorized by buffer averaging when there is no other reasonable development plan.

<sup>10</sup> Exh. 1, Attachment 5 at 79.

### **C. Variance Requests**

1. The details of the request for Variance 1 (bathhouse variance) are found at Exhibit 1 pages 24-25 at L.1.a-h. The Examiner incorporates this description by reference.
2. The details of the request for Variance 2 (wetland fill variance) area found at Exhibit 1 page 14 at J.1.a-e. The Examiner incorporates this description by reference.
3. The details of the request for Variance 3 (buffer mitigation reduction variance) are found at Exhibit 1 page 22 at K.1.a-h. The Examiner incorporates this description by reference.

### **D. Public Comment**

The Facts and Conclusions on this matter set forth at Subsections II.B of the Staff Report are accurate and supported by the record, and therefore are adopted by reference as the Hearing Examiner's Findings and Conclusions.

#### Additional Facts:

1. One written public comment was submitted in advance of the public hearing on May 30, 2018.<sup>11</sup> King County Wastewater Treatment Division requests that the City submit construction drawings for the project, so it may assess potential impacts to an existing trunk pipe located nearby.
2. A resident of a condominium development across the street from the park testified at the hearing on May 30, 2018 and expressed concern about the height of the relocated facilities buildings and interference with views. She also expressed concern that the notice of the hearing was inadequate.

### **E. State Environmental Policy Act (SEPA)**

A Determination of Nonsignificance ("DNS") was adopted by the City on May 2018.<sup>12</sup> No appeals were filed.

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<sup>11</sup> See Exh. 1, Attachment 8.

<sup>12</sup> See Att. 9.

## **F. Approval Criteria for Shoreline Variance**

1. KZC 141.70.3.d provides the criteria governing shoreline variances. In this case, Parks has the burden of proof to establish the following state-mandated standards that must be met:
  - WAC 173-27-140 (general permit criteria for all shoreline permits)
  - WAC 173-27-170 (specific variance criteria)
2. In addition, KZC 83.500.12.b establishes the following additional criteria for shoreline variances:

Decisional Criteria – The City may grant approval of a shoreline variance only if all of the following criteria are met:

- 1) No other permitted type of land use for the property with less impact on the sensitive area and associated buffer is feasible;
- 2) The proposal has the minimum area of disturbance;
- 3) The proposal maximizes the amount of existing tree canopy that is retained;
- 4) The proposal utilizes to the maximum extent feasible innovative construction, design, and development techniques, including pervious surfaces, that minimize to the greatest extent feasible net loss of sensitive area functions and values;
- 5) The proposed development does not pose an unacceptable threat to the public health, safety, or welfare on or off the property;
- 6) The proposal meets the mitigation, maintenance, and monitoring requirements of this chapter;
- 7) The granting of the shoreline variance will not confer on the applicant any special privilege that is denied by this

chapter to other lands, buildings, or structures under similar circumstances.

3. It is often the case that local governments adopt shoreline variance criteria that vary to some degree from the state minimum criteria. WAC 173-27-210, as interpreted by the Washington Supreme Court, requires that if more than one set of variance criteria is applicable, the more restrictive should be applied.<sup>13</sup> Because the local standards do not require the applicant to demonstrate extraordinary circumstances or that the denial of the request will deprive the applicant of all reasonable use of the property, the Examiner finds that the state administrative criteria contained in WAC 173-27-170 are more restrictive than those in KZC 83.500.12.b, and therefore will use the WAC requirements to analyze these variance requests.
4. A variance request requires a high threshold for approval. As the Shoreline Hearings Board has stated:

Variances are, in effect, exemptions from the statutory and regulatory requirements enacted to preserve the natural resources of the state. As such, they are to be narrowly construed in order to give maximum effect to the policy underlying the general rule. . . Variances shall be allowed “only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.” These cases emphasize the high threshold necessary to justify a shoreline variance.<sup>14</sup>

While park planners have laudable objectives to increase public access and to create the best park design based on public input, in this case those objectives conflict with regulations protecting natural resources and the shoreline. As noted by a staff member at the hearing, City policy for the shoreline has two competing and sometimes conflicting objectives: 1) increasing protection and restoration of shoreline natural resources; and 2) increasing public access.

When faced with these competing objectives in the context of these variance requests, the scope of discretion is very narrow. The criteria are designed to provide an exception only for those in unique circumstances where no other

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<sup>13</sup> *Buechel v. Wash. State Dept. of Ecology*, 125 Wn.2d 196, 207, 854 P.2d 910 (1994); *Caldwell v. Wash. State Dept. of Ecology, et al.*, SHB No. 11-012 (Findings of Fact, Conclusions of Law, and Order) at 15 (2012); see also *Citizens for Rational Planning, et al. v. Whatcom Cy., et al.*, 172 Wn.2d 384 (2011) (SMA is a state legislation and the state maintains decision-making authority).

<sup>14</sup> *Caldwell, supra*, at 12 (citations omitted); see *Marbeheim Point, LLC v. Wash. State Dept. of Ecology, et al.*, SHB No. 17-016 at 8-9.

reasonable use of the property is possible. The criteria do not provide an exception to approve a variance on the basis that the proposal will provide increased public access to the shoreline.<sup>15</sup> In addition, the criteria provide no discretion to grant a variance based on design considerations.

5. WAC 173-27-140 provides more general criteria for approval of any development in the shoreline.

**WAC 173-27-140: Review criteria for all development.**

*(1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.*

*(2) N/A.*

This criteria measures two components- consistency with the SMA itself, and consistency with the local SMP.

a. Consistency with the SMA.

- i. The Shoreline Management Act (SMA) is a landmark state law<sup>16</sup> that requires adoption of local policies and regulation through a Shoreline Master Program (SMP). The function of the SMA is to provide a state framework for managing, accessing, and protecting shorelines.<sup>17</sup>
- ii. The south section of Juanita Beach Park is largely within shoreline jurisdiction. The project area is completely within shoreline jurisdiction, taking advantage of the sandy shoreline adjacent to Lake Washington, which is categorized as a “shoreline of statewide significance.”<sup>18</sup> As stated above, the swimming beach has been in existence for approximately 100 years. The park provides the public with access to the shoreline, a principal goal of the SMA.

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<sup>15</sup> There is no evidence in the record that the Phase 2 improvements would increase public access.

<sup>16</sup> The Washington Supreme Court has ruled that although the SMA is implemented through local policies and regulations, it is ultimately a state law and a product of state action. It governs nearly every aspect of adoption and amendment of SMPS, the ultimate approval of which resides with the State Department of Ecology. *Citizens for Rational Planning, et al. v. Whatcom Cy., et al.*, 172 Wn.2d 384 (2011).

<sup>17</sup> Department of Ecology, Shoreline Master Program Handbook at Chapter 2.

<sup>18</sup> Shorelines of statewide significance are legislatively defined at RCW 90.58.030(2)(f) and include lakes with a surface acreage of one thousand acres or more measured at the ordinary high water mark, which includes Lake Washington. *See* RCW 90.58.030(2)(f)(ii).

The SMA<sup>19</sup> establishes an order of use priorities specifically for shorelines of statewide significance. For those shorelines, SMPs are required to give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long-term over short-term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.<sup>20</sup>

iii. RCW 90.58.020 provides important foundation for reviewing these variance requests. While compliance with the SMP will provide more specific context for measuring consistency of the proposal with the SMA and SMP, this legislative prioritization is foundational. These policies express a clear priority of preserving and protecting the natural resources of shorelines of statewide significance as a top priority. However, consistency should be measured through review of the policies of the SMP.

b. Consistency with Kirkland's SMP

Review of SMP and Comprehensive Plan policies (which are incorporated by the SMP) provides a detailed picture of the City's priorities for the City's shoreline. These policies are in contained in full in the staff recommendation.<sup>21</sup>

i. General Consistency

The plan policies and text reveal a City with a robust parks system that prioritizes both public access and protection and enhancement of ecological features and functions. The City currently has 14 waterfront parks, offering a diversity of experiences for the user. Park activities and facilities include public docks and fishing access, boat moorage, boat launches, swimming,

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<sup>19</sup> RCW 90.58.020 and .030.

<sup>20</sup> See also WAC 173-26-181 & 173-26-251.

<sup>21</sup> Exh. 2 at Enclosure 1.

interpretative trails and picnicking.<sup>22</sup> The Park system has three waterfront swimming beaches.<sup>23</sup>

As noted above, while some of the policies and the implementation measures in the Juanita Bay Master Plan explicitly call for improvements near the shoreline at the west end of the lakefront promenade (as proposed here), there are other policies that require “management of natural areas within shoreline parks to protect and restore ecological functions, values, and features.”

These policies provide no clear guidance regarding whether the variances should be approved or denied. They can be interpreted either way.

ii. Shoreline Environment Designation Consistency

The project site contains two shoreline environments: Urban Conservancy and Urban Mixed.<sup>24</sup> As the names suggest, development is more appropriate in the Urban Mixed Shoreline Environment. The Urban Conservancy Shoreline Environment is the eastern edge of the 75-foot Juanita Creek buffer.<sup>25</sup> According to the maps contained in the record, a portion of the bathhouse development is within the buffer.<sup>26</sup> In addition, there is a ten-foot setback from the buffer.<sup>27</sup>

Wetland D is located partially within the Juanita Creek buffer and therefore within the Urban Conservancy designation.<sup>28</sup> Wetland D was not discovered at the time of the adoption of the current SMP.

The bathhouse proposal is problematic in that it does encroach into the Juanita Creek buffer, which retains the Urban Conservancy designation. It also encroaches into Wetland A’s inner buffer. Although much of the buffer area may not be in Urban Conservancy, developing its buffer with a large building

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<sup>22</sup> See Narrative under Goal SA-18 (reprinted in Appendix).

<sup>23</sup> *Id.*

<sup>24</sup> See Policy SA 2-2 at Exh. 2, Enclosure 1 at 16 (Urban Conservancy) & Policy SA 2-5 at Exh. 2, Enclosure 1 at 18 (Urban Mixed).

<sup>25</sup> KZC 83.90.1. b.2. e.2.

<sup>26</sup> See Exh. 1, Attachment 5 at 97.

<sup>27</sup> The applicant did not request a variance from the shoreline setback. See KZC 83.190.2.

<sup>28</sup> The current SMP was adopted by Ord. 4251, formally adopted by the Kirkland City Council on August 3<sup>rd</sup>, 2010. The contents of the SMP were finalized by December 2009, but the Council waited to formally adopt it until after the Department of Ecology had reviewed it. The Hearing Examiner takes official notice of Ord. 4251. In testimony at the hearing, Amy Summe stated repeatedly that Wetland D was not discovered until sometime after the completion of Phase 1, which was in 2011.

threatens the resource.<sup>29</sup> Because Urban Conservancy designation prioritizes ecological restoration of critical areas, the proposed bathhouse development appears to be inconsistent with the designation.

6. WAC 173-27-170 contains the specific variance criteria that must be addressed to approve a shoreline variance. All three variances are addressed below in the sections below.

**WAC 173-27-170: Review criteria for variance permits.**

- i. Purpose Statement and Extraordinary Circumstances (Preamble and WAC 173-27-170) (applicable to all three variances)

*The purpose of a variance permit is strictly limited to granting relief from specific bulk, dimensional or performance standards set forth in the applicable master program where there are extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of the master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020.*

*(1) Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect. (emphasis added).*

Juanita Beach Park is a sandy swimming beach that provides public access to the Lake Washington shoreline, one of the primary goals of the SMA and the Kirkland SMP. This park is a treasured public asset and will hopefully remain so in perpetuity, whether or not shoreline variances are granted for this proposal. Under consideration here is whether specific improvements proposed for the park should be approved as proposed. Because Lake Washington is a shoreline of statewide significance, this variance criterion specifically addresses the use priorities established by RCW 90.58.020 as enumerated above.

Parks asserts that denial of the permit would thwart the policy of the SMA, which is to balance public access, environmental protection and appropriate

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<sup>29</sup> Exh. 1, Attachment 7.

use.<sup>30</sup> However, there is no evidence in the record that demonstrates that denial of this project would thwart public access to the shoreline or in any way change the water-dependent use, which is that of a swimming beach. There is ample room on the property to locate improved areas outside of the buffers and critical areas of this site.<sup>31</sup> While it may not be the configuration that is desired by Parks, that is not the standard applied by the SMA. The criteria listed above do not place public convenience on the list of priorities. While public access is the fifth priority, protection of the resource ranks above public access. Moreover, public access is not limited through denial of these variances. At most, public convenience may be slightly diminished, as swimmers may have to walk a little farther to the bathroom facilities and the mowed areas of the park may on occasion be wet. The public can enjoy access without granting the variances. In addition, the City operates two other parks with waterfront swimming beaches on Lake Washington a short distance away from this park.<sup>32</sup>

As stated above, variance requests face a high threshold for approval. While Parks has done a comprehensive job of providing information regarding the desire to build park facilities in this configuration, it has not demonstrated “extraordinary circumstances relating to the physical character or configuration of the property such that the strict implementation of the master program will impose unnecessary hardships or thwart the policies of RCW 90.58.020.” The staff report and testimony describe the Parks Department’s proposal as the need to upgrade the facilities and move them closer to the beach for the convenience of the swimmers. They also describe the need to fill Wetlands C and D as “the need to provide more grass picnic areas close to the beach.”<sup>33</sup>

To support these variance requests, Parks is required to demonstrate more that there are unusual physical circumstances or characteristics of the property that will otherwise preclude its use if the improvements are not approved in the manner proposed.<sup>34</sup> Normally, this criterion requires demonstration that there is no other possible configuration of the use on the property. Parks has not met this burden.<sup>35</sup> The desire for a park configuration meeting certain design criterion is not the type of

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<sup>30</sup> Att. 12 at 302-03.

<sup>31</sup> See *ftnt. 4, supra*.

<sup>32</sup> See *Baldwin, et al. v. Pierce Cy., et al.*, SHB 17-005c at 23 (Board affirms Ecology denial of dock permit finding that there were convenient alternatives).

<sup>33</sup> Exh. 1 at 6-7.

<sup>34</sup> See *Nelson, supra*, at para. 6.

<sup>35</sup> Exh. 1, Att. 12 at 302.

'extraordinary circumstance relating to the physical character or configuration of the property' contemplated by WAC 173-27-170. As Parks has not provided any other argument for how it meets this criterion, the Examiner concludes that it has not been met.

- ii. Criteria for Variances Landward of the OHWM (WAC 173-27-170 (2))  
(Applicable only to Variance 1 (bathhouse))

*(2) Variance permits for development and/or uses that will be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(c), and/or landward of any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following: (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property; (b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions; (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment; (d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area; (e) That the variance requested is the minimum necessary to afford relief; and (f) That the public interest will suffer no substantial detrimental effect.*

**A. Reasonable Use Criteria**

*(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;*

WAC 173-27-170(2)(a) requires examination of whether the strict application of the bulk, dimensional or performance standards set forth in

the SMP precludes or significantly interferes with, reasonable use of property. The determination of the reasonableness of the use is an objective standard and is not based on the desires of a particular applicant.<sup>36</sup> The question is whether the redevelopment of the principal use in the manner proposed, in this case the park use, is necessary to have reasonable use of the property.<sup>37</sup> The answer to this question is clearly no.<sup>38</sup> The City already operates a public park with an existing bathhouse and has done so for many years.<sup>39</sup>

As stated above, the bathhouse itself currently exists in another location. While safety is one justification for the proposed re-location of the bathhouse, Parks has not demonstrated that this building could not be redeveloped in its current site, and/or re-oriented to allow for better visibility for law enforcement. In doing so, the bathhouse could be taken partially out of shoreline jurisdiction altogether, and it could be removed from the Wetland E buffer, thereby reducing impacts within the critical areas in the shoreline.<sup>40</sup> In addition, there is a convenience rationale for having the bathrooms located in the middle of the park, rather than the far west end of the park in a stream and wetland buffer. The Examiner concludes that Parks has failed to demonstrate compliance with criteria (2)(a) of WAC 173-27-170.

#### **B. Hardship Criteria**

*(b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;*

As stated above, Parks has not described any hardship within the meaning of this criteria. The desire for a particular configuration of amenities in the park does not constitute hardship. Parks has not demonstrated that

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<sup>36</sup> *Garlick v. Whatcom Cy.*, SHB No. 95-6 (1995).

<sup>37</sup> *See Tulalip Tribes v. Snohomish Cy, et al.*, SHB 14-007 (2014) (demonstration of 'no reasonable use of property' inadequate when existing home already on the site).

<sup>38</sup> *See also Buechel, supra*, at 207-210.

<sup>39</sup> *See Nelson, supra*, at para. 8 (citing *Buechel*).

<sup>40</sup> *See Exh. 1, Attachment 5 at 97.*

these amenities could not be provided at all or that the park could not be enjoyed as a recreational use without some or all of them.<sup>41</sup>

In addition, Parks seeks to justify placing the bathhouse in the buffer by highlighting the fact that the buffer is degraded and contains a concrete sidewalk.<sup>42</sup> As the concrete sidewalk was placed in buffer by Parks, Parks may not rely on this fact as a justification to further degrade the buffer under this criterion.

Moreover, as public land, this existing degraded buffer provides possible restoration and enhancement opportunities to better protect Juanita Creek and Wetland A. If the bathhouse is placed in this location, the result would be a permanent buffer encroachment destroying any opportunity for restoration.<sup>43</sup> It will also draw more public use into this sensitive part of the park landscape

Because Parks does not meet the first two criteria, there is no need to apply all the other criteria, except for WAC 176-27-170 (2)d).

### **C. Grant of Special Privilege Criteria**

***(d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area.***

The Examiner concludes that the grant of Variance 1 would provide a special privilege not enjoyed by other properties in the area. Parks justifies the variance under this criteria by stating that it is for a public park rather than a private landowner. However, the variance criteria provide no special exception for public projects or for variances based on increased public access. In addition, the City's Comprehensive Plan urges the City to "promote and model these practices and others, including . . . by maintaining model sensitive area buffers . . ." <sup>44</sup> The grant of a variance here would be inconsistent with Comprehensive Plan policy E-1.5.

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<sup>41</sup> Cf. *Buechel, supra*, at 209 (court rejected argument that recreational use is unreasonable because single-family residential use must be given priority).

<sup>42</sup> Testimony of Amy Semme, May 30, 2018 public hearing.

<sup>43</sup> See Letter of Watershed Company dated March 30, 2018, Exh. 1, Attachment 7 at 278.

<sup>44</sup> See Comprehensive Plan Policy E-1.5 (Environment) and narrative accompanying it.

**D. Conclusion re Variance 1 (Bathroom Variance):** As Parks has failed to meet its burden of proof on at least three of six variance criteria, the Examiner denies the variance request for re-location of the bathroom.

iii. Criteria for Variances in Wetland (WAC 173-27-170 (3)) (Applicable to Variance 2 and 3 (wetland fill and buffer modification))

*(3) Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(c), or within any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following:*

*(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property;*

*(b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section; and*

*(c) That the public rights of navigation and use of the shorelines will not be adversely affected.*

**A. Reasonable Use Criteria**

*(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property;*

The analysis of this criteria is much the same for this variance as it was for the bathroom variance. This park has been operating for over 100 years, and in a similar configuration since at least the 1960's. Parks justifies this variance by stating that

Usable open space at this popular park for seating sunbathing, play, picnicking, and other activities is at a premium. Currently large areas of the available mowed lawn are too wet, which limits their use for much of the year.<sup>45</sup>

While the condition and location of these wetlands may not be desirable, they are not precluding reasonable use of the property, as Parks clearly indicates in the statement above. Because that is the standard at issue here is reasonable use of property, the Examiner finds that Parks has not met

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<sup>45</sup> Exh. 1, Attachment 5 at 73.

its burden to show that the condition of the property precludes all reasonable use of the property.

*(b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section;*

This subsection refers to the criteria of WAC 173-27-170 (2) (b) – (f). Just as the bathhouse variance request failed to meet at least three of the criteria, the wetland fill proposal also fails to meet the same three the criteria. The findings and conclusions are below.

**B. Hardship Criteria**

*(b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;*

Because Parks has failed to demonstrate that no reasonable use is left on the property without the grant of the variance, there is no “hardship” to analyze. Therefore, further examination of this criteria is unnecessary. The Examiner concludes that Parks has failed to demonstrate that there is a hardship related to the property that justifies the variance.

**C. Grant of Special Privilege Criteria**

*(2)(d) That the variance will not constitute a grant of special privilege not enjoyed by other properties in the area.*

Parks asserts that because Juanita Beach Park is heavily used, and it is one of only three parks in Kirkland with swimming beaches, the fill of the wetlands is necessary.<sup>46</sup> While the City’s shoreline property serves the public rather than a private landowner, there is no public access or convenience exception in the criteria. The variance to allow filling wetlands for creating an optimal lawn area would be a special privilege that other land owners similarly situated would not enjoy under the regulations.

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<sup>46</sup> Testimony of Amy Semme, May 30, 2018 public hearing.

**D. Conclusion re Variance 2 (Fill of Wetland and B):** As Parks has failed to meet its burden of proof on at least three of six variance criteria, the Examiner denies the variance request to allow filling of Wetlands C and D.<sup>47</sup>

**E. Conclusion re Variance (Buffer Mitigation Reduction):** As stated above, Parks requests elimination of new wetland buffer establishment requirement around the compensatory mitigation site for filling of Wetlands C and D. As the Examiner has denied the variance for filling Wetlands C and D, this variance request is also denied.

### **G. Process IIA Decisional Criteria**

The applications for the three shoreline variances are denied under the applicable decision criteria adopted under KZC 140.71. Therefore, they are not consistent with the public health, safety and welfare.

### **H. Conclusions**

1. The Examiner has jurisdiction over this matter pursuant to KZC 141.170 and 150.65.
2. The Examiner has reviewed the evidence in the record and the testimony at the public hearings and concludes that Parks has failed to meet its burden to demonstrate that any of these three variance requests should be granted.
3. Because the Examiner has concluded that Parks has failed its burden to justify its variance requests, she need not address the avoidance criteria or the mitigation proposed by Parks.

### **Decision:**

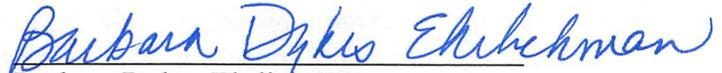
Based upon the foregoing findings of fact and conclusions, the Hearing Examiner **DENIES** the following shoreline variance requests by Parks for the Juanita Beach Park:

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<sup>47</sup> Another troublesome aspect of this request is the assertion that Parks should receive "credit" for 7369 square feet of wetland mitigation completed as part of Phase 1 because of the paper fill of Wetland E (now Wetland C). Fortunately, the Examiner need not resolve this issue as a part of this case. Reviewing the decision made on Phase 1, however, there does not appear to be any support for this assertion. This area was never identified as "advance mitigation"; instead it indicated that because the City could not claim that the lawn area was a nonconforming use, retaining the area as lawn without restoring it (paper fill) was considered an impact that had to be compensated with mitigation. Exh.2, Attachment 9 at 171-72.

1. Variance 1 (bathhouse variance);
2. Variance 2 (fill of Wetlands C and D); and
3. Variance 3 (buffer mitigation reduction).

Entered this 28<sup>th</sup> day of June, 2018.

  
Barbara Dykes Ehrlichman  
Hearing Examiner

**EXHIBITS:**

The following exhibit was entered into the record:

- Exhibit 1 Department's Advisory Report with Attachments 1 -17 (May 30, 2018).  
Exhibit 2 Department's Advisory Report with Enclosures 1-9 (June 21, 2018).

**PARTIES OF RECORD:**

Parks Department  
Anneke Davis, City of Kirkland CIP  
Planning and Building Department  
Amy Semme, Shannon & Wilson Inc.  
Darlene Warren

**CHALLENGES AND JUDICIAL REVIEW:**

The following is a summary of the deadlines and procedures for challenges and appeals. Any person wishing to file or respond to a challenge or appeal should contact the Washington State Environmental and Land Use Hearings Office for further procedural information.

Section 141.70.e.3 of the Zoning Code allows the Hearing Examiner's decision to be challenged by the applicant or any person who submitted written or oral comments or testimony to the Hearing Examiner. Appeals of a shoreline variance permit decision shall be to the State Shoreline Hearings Board and shall be filed within 21 days of the filing date of the decision which is defined in RCW 90.58.180 and .140(6)(a) as the date of actual receipt by the Department of Ecology of the decision. Please see WAC 463-08-340 and WAC 461-08-345 for further details on filing an appeal with the Shoreline Hearings Board and <http://www.eluho.wa.gov/>

**BEFORE THE HEARING EXAMINER  
CITY OF KIRKLAND**

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached **Findings, Conclusions, and Decision** to each person listed below, or on the attached mailing list, in the matter of **City of Kirkland Parks Department**, Hearing Examiner Files: **SHR17-00775**, in the manner indicated.

<b>Party</b>	<b>Method of Service</b>
Christian Geitz City of Kirkland Planning and Building Dept. 123 Fifth Ave Kirkland, WA 98033 cgeitz@kirklandwa.gov  Planning and Building Admin pbadmin@kirklandwa.gov	<input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

Dated: June 28, 2018

  
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Alayna Johnson  
Legal Assistant