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THE HEARING EXAMINER OF THE CITY OF KIRKLAND

IN RE:

Watershed Cottages

Appeal of Process I Approval

ZON21-00113

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND FINAL DECISION

OVERVIEW

Elizabeth Lyons and several other neighbors have appealed a Process I decision issued by the Planning Director approving an eight-cottage development to be located at 4559 112th Avenue NE. The appeal is denied and decision of the Planning Director sustained with a couple minor revisions.

One of the two revisions involves the project geotechnical reports. The Appellants expressed considerable concern over the fact that the geotechnical report for the eight-cottage project is based upon a geotechnical analysis done for a prior proposed single-family home. The Applicant's geotechnical engineer found the single-family home analysis to be sufficient for the cottage development and this was confirmed by peer review from another licensed geotechnical engineer. However, the Applicant's geotechnical conclusions regarding the applicability of the single-family home analysis were limited to specific components of the cottage proposal design. City regulations require a geotechnical report to support the more generalized conclusion that the project can be undertaken safely if the measures/recommendations of the geotechnical report are incorporated into the project plans. This Decision requires the Applicant's

1 geotechnical report to include this conclusion as well as any necessary additional
2 analysis/recommendations to support that conclusion.

3 The second revision required by this Decision is a clarification to the Process I approval
4 of the Applicant's tree retention plan. The retention plan approved by the Process I
5 decision only proposes to retain one tree. The staff's appeal memo and comments made
6 by the Appellants make clear that both parties believe that the Applicant will retain
7 thirteen trees on the project site. There is nothing in the record that directly explains
8 this distinction. However, the Process I decision does subject the Applicant's tree
9 retention plan to a list of development notes, which include a finding that 13 existing
10 trees qualify as "high retention value" trees. As best as can be made out from the record,
11 it appears that the City intends to require retention of these "*high retention value trees*,"
12 although the Process I decision does not make that very clear. This Decision clarifies
13 that the thirteen "high retention value" trees must be retained unless the Applicant
14 demonstrates during building permit or grading permit review that they meet City
15 standards for removal.

16 The Appellants have done an admirable job and spent an extensive amount of time
17 doing everything they can to protect their community from the impact of the cottage
18 development. They may not have appreciated the obstacles they faced in this task.
19 The regulations that address development impacts are detailed and have evolved over
20 decades to address every conceivable impact that could affect a community, to the
21 extent that state law authorizes those impacts to be addressed. Those regulations, in
22 turn, have been implemented and applied for this project by an army of experts
23 including geotechnical engineers, traffic engineers, arborists, planners and civil
24 engineers.

25 In this proceeding, the Appellants had the burden of proof to show that the regulations
26 protecting their neighborhood were inadequate and that the technical expertise used to
27 apply them was in error. Even with land use lawyers and expert witnesses, the
28 Appellants likely would very likely have been hard pressed to find any deficiencies in
29 the City's permit review. City staff have made a strong effort to ensure that all impacts
30 are mitigated to the maximum extent legally authorized.

At the hearing some Appellants eloquently argued that the staff was not exercising their
discretion as much as they could to reduce density or otherwise minimize project
impacts. That position is very likely incorrect. Anything more the staff could do to
minimize the project with the administrative record developed in this proceeding would
likely not be legally supportable. Any decision to reduce density or otherwise
significantly restrict the project would likely get overturned on judicial appeal with
damages claims assessed in the hundreds of thousands of dollars or even millions. As
discussed in the conclusions of law below, if reasonable minds can disagree on how

1 vague and subjective standards have been applied, the courts will invalidate them.
2 Whenever City staff is given significant discretion on a permitting issue that is based
3 upon aspirational goals or subjective standards, those standards can only be enforced to
4 the extent that reasonable minds couldn't disagree on their application.

5 Finally, the Appellants written closing emphasizes that a significant number of
6 community residents are opposed to the project and are particularly concerned about
7 traffic impacts. The courts have repeatedly made clear that land use decisions cannot be
8 based upon community opposition, but rather must be based upon the standards adopted
9 in zoning codes. *See Westmark Development Corporation v. Burien*, 166 P.2d 813
10 (2007)(10.7-million-dollar judgment for basing permitting delay/decisions on political
11 pressure); *Maytown Sand and Gravel LLC v. Thurston County*, 198 Wn. App. 560
12 (2017)(12-million-dollar judgment for basing permitting decision on political pressure).
13 The City has adopted extensive road and traffic standards that govern new development.
14 These standards address issues such as congestion, off-site traffic mitigation and road
15 design. The Appellants have not been able to identify any standards violated by the
16 proposal. They also did not provide any qualified testimony that the trip generation
17 from the proposal would create safety issues that traffic engineers would find necessary
18 to be addressed according to the standards of their profession. As found by the City's
19 traffic engineer, the conditions of the access roads serving the project site are not
20 unusual in urban settings. Given the evidence in the record, the City has no legal basis
21 to support project revisions or off-site traffic improvements to deal with the minor
22 amount of traffic generated by the proposal.

23 A final very valid issue of public concern is impacts to trees on abutting properties. At
24 least a couple neighbors were concerned about damage to the trees on their abutting
25 property that could be caused by root damage caused by construction activity on the
26 project site. This is another area where the City's hands are legally tied. As outlined in
27 the Conclusions of Law below, the courts consider roots from a tree on one parcel that
28 encroach into an adjoining parcel to constitute a nuisance. The courts further authorize
29 property owners subject to that nuisance to remove the roots up to their property lines,
30 even if that damages the tree on the adjoining parcel. Cities can only make developers
mitigate against problems they create. Roots considered to be nuisances would likely
not qualify as problems caused by the developer, but rather problems caused by the
abutting property owner. The most the City can likely do given this legal background is
require monitoring of potential tree damage and associated notice to affected tree
owners. The City has required that notice of the Applicant and has done all it likely
legally can do to address damage to neighboring trees.

TESTIMONY

1 A computer-generated transcript has been prepared for the hearing to provide an
2 overview of the hearing testimony. The transcript is provided for informational purposes
3 only as Appendix A. A virtual public hearing on the application was held on August 4,
4 2022. The hearing was held open through August 16, 2022 for submission of written
closing and rebuttal from the parties.

5 EXHIBITS

6 At the August 4, 2022 hearing, the seven enclosures identified at Page 8 of the August 4,
7 2022 staff report were admitted into the record as Exhibits 1. The staff power point,
8 presented at the August 4, 2022 hearing, was admitted as Exhibit 2. A Power Point from
9 Mr. Ziembra was admitted as Exhibit 3. City written closing argument was admitted as
10 Exhibit 4, Applicant's closing as Exhibit 5 and Appellants' closing as Exhibit 6.

11 FINDINGS OF FACT¹

- 12 1. Parties. The Applicant is Dominique Rubal. The Appellant is Elizabeth Lyons,
13 residing at 4705 112th Ave NE, Kirkland, WA 98033. Ms. Lyons' appeal states
14 that her appeal was also filed on behalf of Matthew Lyons, Nicole Desmul, Sam
15 Ziembra, Aaron Bosworth, Jennifer Bosworth, Edward Sheets, Mary Rawson
Foreman-Rorrer, and Kirk Rorrer.
- 16 2. Decision Under Appeal. Ms. Lyons appeals the Process I approval of an eight
17 cottage development located at 4559 112th Avenue NE. The Planning Director
18 approved the Process I application by decision dated May 5, 2022.
- 19 3. Appeal. Ms. Lyons filed her appeal on May 25, 2022. As outlined in the staff
20 report, her appeal raised the following issues:
 - 21 1. A deficient geotechnical review;
 - 22 2. Changes to the project from the initial submittal;
 - 23 3. Insufficient stormwater management review;
 - 24 4. Inadequate pedestrian and vehicular safety considerations;
 - 25 5. Inadequate tree protection;
 - 26 6. Violation of design standards and guidelines for cottage developments within
the geographic boundaries of the former Houghton Community Municipal
Corporation; and
 - 27 7. Failure to address impacts of eight cottage units including waste management
28 and water quality.

30 ¹ For purposes of clarity in organization, some findings of fact include conclusions of law and vice-versa.

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4. Geotech Report. The geotechnical analysis submitted by the Applicant complies with the City’s geological hazardous requirements for assuring a safe building site.

A geotechnical report was required for the project site because it contains a landslide hazard area, an erosion hazard area and a seismic hazard area. An April 20, 2020 geotechnical report was initially prepared for the project site with plans for replacement of an existing single-family residence with a new single-family residence. See P. 290 pdf². That geotechnical report concluded that the proposed single family development site development “*can be undertaken safely as long as the measures and recommendations of this geotechnical report are incorporated into the project plans.*” In a subsequent January 29, 2021 geotechnical report for the cottage housing development under appeal, the same geotechnical firm (RGI) concluded as follows:

Based on reviewing the preliminary Watershed Cottages plans and referenced reports, the recommendations in our Geotechnical Engineering Report and LID Infiltration Feasibility Study regarding earthwork, foundations, retaining walls, slab-on-grade construction, drainage, utilities, and pavements will support the proposed Watershed Cottages development.

P. 323 pdf.

The RGI analysis was subject to peer review from AESI. AESI submitted a report concluding that the RGI analysis generally meets KZC requirements. P. 386 pdf. The AESI analysis required RGI to supplement its report with answers to a couple questions. RGI submitted the required supplemental information and AESI found the supplement to be sufficient. P. 388 and 396 pdf.

The Appellants’ primary concern with the RGI analysis was that it was initially done for construction of a single-family home and its conclusions and recommendations were adopted for the eight-cottage home proposal without modification. On its face this is certainly cause for concern, but as previously noted, AESI independently verified that these conclusions met KZC requirements. The Appellants provided no expert or any qualified testimony to the contrary.

²Exhibit 1 was submitted by City staff as a 461-page pdf. For ease of reference, many of the exhibit citations in this decision reference use the Exhibit 1 pdf numbering as P. X pdf.

1 Beyond the lack of expert opinion to dispute the findings of the two
2 geotechnical engineers supporting the Applicant's proposal, the record on its
3 face plausibly supports those expert conclusions. The test pits for the single-
4 family home construction in the original April 29, 2020 geotechnical report were
5 dispersed throughout the entire project site for the eight-cottage proposal. The
6 conclusions of that geotechnical report were largely dependent upon the stability
7 and composition of those soils, not as much the proposed construction. It is
8 entirely plausible that with those essential soil characteristics at hand, the two
9 geotechnical experts were able to extrapolate to how those soils would support
10 eight cottages as opposed to one single-family home. Further, as noted in the
11 staff report, the amount of lot coverage proposed for the eight-cottage
12 development was comparable to that proposed for the single-family residence.
13 Finally, the detention pond was proposed in the same location for both
14 developments.

15 In their written closing argument, Ex. 5, p. 13, the Appellants did not find
16 AESI's reasoning for acceptance to be adequately explained. However, the
17 Appellants did not provide any geotechnical basis as to why they found the RGI
18 response to be deficient. As previously noted, the Appellants have the burden of
19 proof. Two licensed geotechnical engineers have found the site suitable for
20 development of the proposal. The Appellants have provided no expert opinion
21 to the contrary or any geotechnical reason why the project site would be unsafe,
22 other than to render the non-expert opinion that geotechnical data collected in
23 the original RGI report was inadequate to reach the conclusion that the cottages
24 development could be built safely.

25 In summary, given the lack of expert opinion to support the Appellants, the
26 dispersion of the test pits and the similarity in lot coverage between the single-
27 family project and the development project, it is determined that the Applicant
28 has adequately established that it has met KZC standards.

29 Another point of concern raised by the Appellants was that the January 29, 2021
30 report recommended that RGI should complete a plan review of the proposal's
final plan set when it is completed. P. 323 pdf. The Appellants believed that this
subjected the project to potential additional geotechnical changes that would be
done without public oversight. However, as testified by the Applicant, the follow
up recommendation from RGI is standard for geotechnical reports. The follow
up work just provides verification that the conclusions and recommendations
made in the geotechnical report for the general design level of review for are
still valid when the final construction drawings are put together in subsequent
permit review. The fact that RGI takes the added measure of assuring that its
recommendations adequately provide for safe construction is not a measure used

1 to avoid public oversight, but rather a responsible monitoring tool to ensure that
2 RGI's expertise is ultimately consistent with final construction plans.

3 Although the record is fairly clear that the April 29, 2020 single-family
4 geotechnical report can be used for the proposed cottage development, the
5 conclusions as quoted above regarding the applicability of the report fall a little
6 short from what is required by the KZC. KZC 85.15.3m requires the geotech
7 report to conclude that "*the project can be undertaken safely as long as the*
8 *measures/recommendations of the geotechnical report are incorporated into the*
9 *project plans.*" The January 29, 2021 supplement, as quoted above, went to
10 great lengths to explain how individual components of the April 29, 2020
11 analysis applied to the proposed cottage development. That report failed,
12 however, to make the generalized statement that overall the construction would
13 be safe. Consequently, the report will have to be supplemented with this
14 required conclusion as well as any analysis and recommendations necessary to
15 reach that conclusion.

16 The Appellants also raised a concern over lack of public comment over revisions
17 to retaining wall height. In remedying grade changes identified in peer review,
18 RGI noted that the height of retaining wall(s) may have to be increased to over
19 four feet and that retaining walls over four feet are required to be approved by
20 building permits. The Applicant has filed for a modification request, P. 398 pdf,
21 that identifies the heights of these retaining walls. The proposed heights for
22 these retaining walls reach 6.5 feet and combined fence and retaining wall
23 height is 9.5 feet in some limited portions of the project site. The Appellants
24 were given this information in advance of the hearing and could have
25 commented on the issue at the appeal hearing or even before³.

26 The rights of other members of the public to comment on the extended height of
27 the retaining walls is a little more complicated, but is in part resolved by the fact
28 that increases in building height can be approved separately by building permits
29 and modification request, both of which do not require public comment periods.
30 It is also pertinent that, as governed by KZC 115.115.2, the modification can not
be approved if they create substantial detrimental impacts or they are not
mitigated with terraced vegetation or similar aesthetic measures that reduce the
appearance of mass. With these limitations, if approved the walls would have
minor impacts on adjoining properties and would thus qualify as minor revisions
that do not trigger further public review. Given these factors, using the
standards outlined in Finding of Fact No. 6, the requested revisions to retaining

³ The record is unclear as to when the modification request was made available to the Appellants. The modification request was filed before the filing of the subject appeal.

1 wall height are not found significant enough to trigger additional public
2 comment.

- 3 5. Geologic Hazards Adequately Addressed. The geologic hazards of the project
4 site have been adequately addressed in the geotechnical report prepared by RGI
5 and the peer review report provided by AESI.

6 Section II2 of the appeal asserts that the City has not adequately addressed the
7 geologic hazards of the site, comprised of an Erosion Hazard Area, a Landslide
8 Hazard Area, and a Seismic Hazard Area. The geotechnical report prepared by
9 the Applicant acknowledges all three areas and addresses the development
10 constraints caused by all three areas. As discussed in Finding of Fact No. 4, the
11 geotechnical report and associated peer review were conducted by licensed
12 geotechnical engineer. As conditioned, the report is required to reach the
13 conclusion that with recommended mitigation the project site is safe to develop
14 for the proposal. The Appellants have not provided any expert testimony or
15 opinion providing for a contrary opinion. Given these circumstances it must be
16 determined that the geologic hazards of the site are adequately addressed.

- 17 6. Project Changes. Changes in the project since expiration of the public comment
18 and appeal period do not necessitate a new comment/appeal period.

19 The Appellants asserts that a new comment period should have been provided
20 because of changes in the proposal subsequent to the comment period. As
21 examples, the Appellants identify reductions in the sizes of the cottages and the
22 addition of retaining walls to the proposed open space area.

23 As noted in the appeal staff report, changes to projects are common as they go
24 through permit review. There are no express standards in the KZC or in case
25 law for when a new comment period is warranted due to such changes. A
26 logical standard for such situations is whether the changes are significant
27 enough to create material adverse impacts to the environment or surrounding
28 community. If not, no one missed a meaningful opportunity to comment on
29 changes made after the comment period.

30 The changes identified by the Appellants are minor and do not create any
significant changes that would adversely affect them or the environment. The
reduction in home size reduces the impacts of the proposal and the retaining
walls, limited to the central portion of the site, do not create any significant
impacts.

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7. Stormwater Review Sufficient. The proposal adequately mitigates against stormwater impacts, which includes off-site stormwater flows and protection of water quality.

The Appellants assert that the proposal fails to adequately address stormwater impacts due to the significant stormwater flows that will be caused by the addition of impervious surface and removal of trees. The Appellants also cite concerns with impacts to water quality.

As required by state law, the City has adopted via KZC 15.52.060 the 2021 King County Surface Water Design Manual. The Manual, containing hundreds of pages of detailed and rigorous standards governing stormwater control, is based upon requirements set by the Washington State Department of Ecology, which in turn is exercising its responsibilities under the federal Clean Water Act. RCW 90.52.040 and RCW 90.48.010 requires such manuals to provide all known available and reasonable methods of treatment, prevention and control. To this end, the King County manual is regularly updated to ensure that the latest science and technology regarding stormwater control is implemented into new construction.

The Applicant has prepared a Preliminary Technical Information Report (TIR), P. 153 pdf, that established to the satisfaction of the City’s public works staff that the proposal conforms to the King County stormwater manual. Most notably, the Applicant is required to design a stormwater control system that ensures that off-site flows not exceed pre-development (forested) levels. The manual requires extensive water quality treatment as well. Section 5 of the TIR proposes to meet these stormwater runoff standards by directing a majority of the site's impervious and pervious surfaces to a catch basin along the private access road. From there the stormwater will be conveyed via a subgrade 12-inch conveyance system to a 4'x6' Biol I Biofilter System, prior to entering a detention vault. The detention vault and conveyance system has been designed and sized to assure that off-site flows don’t exceed pre-developed conditions as required by the stormwater manual. The manual also includes detailed standards for water quality treatment, which as previously noted adopts all known available and reasonable methods of treatment, prevention and control.

The Appellants have not identified any errors in the calculations and proposed stormwater design in the TIR. They have not identified any nonconformance to the City’s stormwater standards or any deficiencies in those standards in relation to impacts to surrounding properties or to water quality. Given the extensive expertise in both the promulgation of the City’s stormwater regulations and their implementation in the TIR, as well as the absence of any expert testimony to the

1 contrary, the TIR and associated stormwater standards are found to adequately
2 mitigate against stormwater impacts.

3 In their written closing, Ex. 6, p. 16, the Appellants assert that the significant
4 increase in stormwater flows generated by the proposal necessitated peer review
5 of the drainage report. The City's public works department reviewed the report
6 and did not see any need for peer review. The Appellants have the burden of
7 proof. If they believe any of the calculations and/or design in the stormwater
8 report was in error, they had the burden of establishing those errors with
9 qualified expert testimony or other competent evidence that outweighed the
10 expertise of City staff and the author of the Applicant's stormwater analysis.

11 The Appellants also assert in their written closing, Ex. 6, p. 16, that the
12 Applicant's stormwater analysis doesn't adequately address climate change. As
13 previously noted, the City's stormwater regulations are designed to incorporate
14 all known available and reasonable methods of treatment, prevention and
15 control. The City Council's adoption of its stormwater regulations is a
16 legislative determination that those regulations are adequate to address
17 stormwater impacts. If those stormwater regulations are not sufficient to address
18 climate change, the Appellants had the burden to demonstrate how. This
19 Decision must be based upon the evidence in the record of this proceeding. The
20 Appellants assertion without more that climate change renders the City's
21 stormwater regulations insufficient does not meet the Appellants' burden of
22 proof and does not provide any legally defensible basis to require more from the
23 Applicant.

24 8. Transportation Safety. The proposal provides for adequate pedestrian and
25 vehicular safety.

26 The Appellants believe that the proposal will substantially increase traffic and
27 thereby endanger pedestrians and children playing on the currently fairly quiet
28 roads that access the project site.

29 Although the proposal likely will decrease the safety of the roads by a marginal
30 amount, the post-development traffic of those roads will not be more than that
typically associated with residential streets. The Transportation Engineer
provided a memo responding to concerns about pedestrian and traffic safety
concerns (see Attachment 6 in Enclosure 1). The Transportation Engineer
subsequently provided another memo with responses to the appeal letter (see
Enclosure 7).

1 The Appellants have shown pictures of the quiet residential character of the
2 project access roads as well as children playing on those roads. There is nothing
3 to suggest that these roads are markedly different from other neighborhood
4 roads or that the additional traffic generated by the proposal will make the roads
5 any less safe than other neighborhood roads in the City. The Appellants claim
6 that 112th is not adequate because it isn't wide enough for two-way traffic.
7 However, as noted in the transportation engineer response, this is a condition
8 common to urban areas. See P. 147 pdf. Further, the engineer noted that the
9 road has low traffic volumes with no congestion and the increase in traffic
10 created by the project would have "negligible traffic impact." Id.

11 As noted in the staff closing argument, Ex. 4, the traffic engineer's opinion on
12 what qualifies as a negligible increase in traffic is consistent with City practices
13 and policies. Based on past developments, additional assessment is unlikely to
14 be required unless a project results in an increase of at least 150 daily peak hour
15 vehicle trips. As identified in Ex. 4, the average single-family residence is
16 generally considered to generate 10 additional daily trips total (i.e., an estimated
17 80 total daily trips added with the construction of eight average single-family
18 homes). As further noted in the rebuttal, proposals involving less than 30
19 single-family homes are exempt from environmental review under the State
20 Environmental Policy Act, which empowers Cities to impose mitigation on
21 impacts such as traffic if they are found to be significant.

22 The Appellants also assert concern over road access when cars are parked below
23 steep slopes during snow events, including impacts to emergency vehicle access.
24 The City's transportation engineer addressed this issue in his appeal response,
25 noting that cars parked for snow events would still leave room for other vehicle
26 circulation including for emergency vehicles. P. 424 pdf.

27 The Appellants have not identified any adopted road design standards that
28 would be violated by the level of traffic generated by the proposal or provided
29 any expert testimony to counter the City's traffic engineer that the traffic levels
30 created by the proposal would be unusually high or that the road design is
unusually poor in relation to levels typically seen in neighborhood roads. Given
the expertise of City staff in road design and road safety, as well as the traffic
history of the project site, there is no basis to conclude that the roads are
inadequate to handle the added traffic generated by the proposal.

9. Trees Adequately Retained. The proposal provides for adequate protection of trees since it conforms to the City's vested tree standards.

1 Appellants are concerned that 25 of 38 on-site trees will be removed from the
2 proposal and that neighboring trees may be adversely affected from root
3 damage.

4 At the outset, it's unclear whether only 25 trees will be removed from the
5 project site. The Applicant's tree retention plan is approved by the Section
6 IIE5a6 of the Process I decision, P. 24 pdf. That tree retention plan, P. 76 and
7 402 pdf, only proposes retention of one tree, not thirteen as identified in the
8 appeal staff report, p. 5. The tree retention plan presented by staff as part of its
9 power point presentation also only showed one tree as retained.

10 There doesn't appear to be any exhibit in the record that identifies where the
11 approval of the Applicant's tree retention plan in the Process I decision was
12 overridden to require retention of thirteen trees instead of one. Yet curiously,
13 the Appeal, written before the appeal staff report, also presumes that thirteen
14 trees will be retained. It appears that perhaps the Appellants were privy to some
15 documentation or staff communication that clarified that thirteen instead of one
16 tree would be retained. See Ex. 2, slide 11.

17 As best as can be ascertained from the exhibits in the record, the thirteen trees
18 that the City and Appellants appear to understand as subject to retention are
19 those identified as "*high retention value*" in what appears⁴ to be att. 3 to the
20 Process I decision. See P. 76 pdf⁵. Section IIE5b4 requires that the Applicant's
21 tree retention plan to follow the additional tree retention standards of att. 3.
22 However, att. 3 doesn't require retention of the "*high retention value*" trees. As
23 discussed in Conclusion of Law No. 2 below, high retention value trees only
24 have to be retained to the "*maximum extent possible*." The Applicant would be
25 reasonable in believing that its tree retention plan and associated removal of all
26 but one tree has met the "*maximum extent possible*" standard since its tree
27 retention plan was approved by the Process I decision.

28 To further confuse matters, although Section IIE5a6 of the Process I expressly
29 approves the Applicant's "*tree retention plan*," Section IIE5b1 requires that
30 Applicant to submit a "*tree retention plan (Major) as consistent with att. 18* [the
already approved tree retention plan]" during grading permit or building permit
review.

⁴ All of the attachments to the Process I decision as submitted into the record are stamped as "Attachment 1" in the upper right hand corner. Consequently, the correct attachment numbers are not always clear.

⁵ There are actually 15 trees identified as "high retention value," but two of those have apparently been removed via an approved tree removal permit.

1 Att.18 in point of fact does not specifically identify why it is not possible to
2 retain the “high retention value” trees to the maximum extent possible as
3 required by KZC 95.30.5. Given this lack of justification and the apparent
4 understanding of at least the City and Appellants that these trees will be
5 retained, the Process I decision is modified to provide that the “high retention
6 value” trees in att. 3 will be shown as retained in the retention plan required by
7 Section IIE5b1 unless the Applicant demonstrates that removal meets the
8 “*maximum extent possible*” retention standard. Given that the Applicant’s att.18
9 tree retention plan generally identifies that the high value retention trees cannot
be retained due to surrounding grading and construction activities, it is
anticipated that some or all of the trees will still be subject to removal under the
“maximum extent possible” standard.

10 Even with the understanding that 13 of the 38 trees will be retained, the
11 Appellants still find that level of retention to be insufficient. The measure of
12 adequate tree protection is the City’s applicable tree standards. With the
13 modification previously discussed, the project site is found to conform to the
14 City’s tree retention standards as discussed below. Consequently, it must be
concluded that the proposal adequately addresses tree retention.

15 The tree protection standards applicable⁶ to the project do not require much
16 specific tree protection. As outlined in Conclusion of Law No. 2, trees located
17 within required yards and setbacks must be protected to the “maximum extent
18 possible.” For all other trees the City and Applicant are essentially just
19 encouraged to work cooperatively in retaining trees but the Applicant cannot
otherwise be required to retain those trees.

20 Using the code parameter above, the City has provided prima facie justification
21 for supporting the retention of only one tree. The required stormwater
22 infrastructure and grade changes proposed with the new cottages makes it
23 difficult to retain many trees. The stormwater infrastructure had to be placed on
24 the west side of the property and the soils on the site influenced the sizing of the
25 detention vault. Another important consideration for this site was windthrow.
26 Often trees that are growing closely together would no longer be windfirm if
27 adjacent trees are removed. Given that this site was densely wooded, trees that
28 might have had sufficient room for root protection could not be retained due to
windthrow concerns. This is a difficult site for tree retention but the City was
able to protect some trees on site. At multiple stages of the review, the applicant
was asked to move structures to accommodate protection of neighboring trees.

29 ⁶ Chapter 95 was recently amended to be more stringent as of March 15, 2022. Under KZC 10.10, the
30 Process I application vested to the Chapter 95 version in place prior to March 15, 2022.

1 The Applicant was also required to consider alternative stormwater
2 infrastructure designs that might result in additional on-site and neighboring
3 trees being retained. As previously discussed, high value retention trees (by
4 definition located in required yards and landscape areas) will have to
5 demonstrate conformance to the “maximum extent possible” standard during
6 building permit or grading permit review, when the impacts to tree roots can be
7 assessed more accurately.

8 To protect the interests of neighboring tree owners, the City is requiring an
9 arborist to be on-site for excavation near tree roots. A Tree Risk Assessment of
10 the neighboring trees will be provided to the affected homeowners after
11 excavation near neighboring trees. The issue of offsite trees being affected by
12 construction activity on an adjacent parcel is ultimately a civil matter between
13 neighbors.

14 Although the City’s tree justification was fairly generalized, the Appellants had
15 the burden of proof to show that some of the tree removal was in violation of
16 Chapter 95 KZC. No such evidence was presented and none is readily apparent
17 from the record. For these reasons, the City’s justification for authorizing
18 removal of 25 of the 38 trees in the Process I decision is found to be
19 determinative.

20 One important point raised by the Appellants regards a condition of approval
21 requiring permission to remove trees located on the common property line. As
22 identified in the staff report, the trees are owned jointly by the neighboring
23 property owner and the Applicant doesn’t have the authority to remove the tree
24 without permission from the neighboring owner. The Appellants have raised the
25 valid question of what happens if permission is not obtained. Ultimately, in that
26 situation the Applicant may have to revise its proposal to accommodate the root
27 system of the common line tree. Those revisions may necessitate an amendment
28 to the approved Process I application, which under the City’s procedural rules
29 could trigger additional public comment via application for a Process I
30 amendment.

Finally, in terms of the aesthetic and environmental impacts caused by the
elimination of trees, that is covered by Chapter 95 KZC as well. That chapter
specifies the number of trees found adequate to mitigate for the loss of trees. If
37 of the 38 trees are removed for the project, adequate mitigation under
Chapter 95 KZC is 24 trees as specified in the Applicant’s tree retention
plan/arborist report at P. 422 pdf. If more trees are retained pursuant to the
revisions required by this decision, the amount of tree mitigation will be less
pursuant to the formulas of Chapter 95 KZC.

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10. Design Standards Met. Cottage development design standards have been met for this proposal.

Appellant assertions of design standard violations are as follows:

- Orientation – Units adjacent to common open space do not include the required primary/secondary entrance and/or covered porch as required by KZC 113.35.1a.
- Open Space – Too steep to be usable with grades exceeding 40% in some areas, failing to provide usable open space as required by KZC 113.35.1c2.
- Low Impact Development (LID) – The proposal fails to meet Kirkland Surface Water Standards as required by KZC 113.35.1e.
- Variation – Structures don't exhibit variation in size, building and site design as required by KZC 113.35.1f.
- Pedestrian Connections – No pathways are included as required by KZC 113.35.1h and the driveways are too steep for walking.

The standards cited above are found to be met for the following reasons:

Units 2,3,6 and 7 abut common open space, and all have covered porches directly adjacent to the open space (see Attachment 2, p. 36-75 and Attachment 9, P. 285-86 pdf). The Appellants' written closing, Ex. 6, p. 15, still asserts that that the porches depicted in the Applicant's project drawings don't qualify as covered porches. It's not clear why the Appellants still take this position. The KZC does not define porches. Merriam Webster defines a porch as "*a covered area adjoining an entrance to a building and usually having a separate roof.*" The cottages abutting the open space clearly meet this definition – they have areas covered by a separate roof facing the open space areas.

Open space is usable. The finished grade does not include slopes exceeding 40%. The elevation transition from 394' to 380' includes retaining walls and a flatter area to ensure the common open space is centrally located and usable.

KZC 113.35.1e. only requires LID practices where feasible. Public works staff have determined that stormwater low impact development practices would be implemented where feasible based on the criteria of the King County Surface Water Design Manual. The steep slopes on the property reduce the feasibility of low impact development best management practices. The retention of natural hydrology and topography is infeasible due to the grading necessary to make the driveway and open space (and the site generally) usable. Vegetated swales and filter strips are mainly used along roadways and provide some infiltration and

1 water quality treatment, but Public Works does not recommend infiltration on
2 the site. Open channels with the steep driveway would cause erosion problems.

3 There is an adequate amount of variation on units (see Attachment 6, P. 36-75
4 pdf). For example, cottages 4 and 5 are directly adjacent and completely
5 different styles of home (i.e., different roof form, unit size, finishing's, etc.).
6 Units 3 and 6 are the same style but have a flipped floor plan and different
7 paneling on the front façade. Additionally, two units are smaller than the other
8 six.

9 A 4' pedestrian path is combined with the access driveway (see page 1 of
10 Attachment 2 in Enclosure 1). The pedestrian pathway is at the same grade as
11 the driveway (to allow passing by vehicles) but is differentiated by the paving
12 material. The pedestrian path is only located along one side of the driveway; this
13 minimizes the amount of impervious surface on site while still allowing for safe
14 pedestrian access from the right-of-way to all units and common open space. As
15 previously noted, public works staff have not found the grades of the walkways
16 to be unsafe or inappropriate and the Appellants have presented no evidence to
17 the contrary.

18 11. Waste Management. The proposal will not result in an over-abundance of trash
19 cans placed on right of way for solid waste collection. Section II8f of the
20 Appeal asserts there will not be enough room on City streets to accommodate
21 trash cans for collect day. However, Waste Management has agreed to do all
22 waste pickup on the subject property (see Attachment 8 in Enclosure 1, P. 284
23 pdf). The placement of trash cans on the access road developed for the project
24 will have no impacts on the surrounding neighborhood.

25 12. Grades Code Compliant. Section II5 of the Appeal asserts that the 15% grades
26 for roads and walkways are too steep. As noted in the appeal staff report, KZC
27 105.12 authorizes 15% grades for private access easements. The plan set, P. 29
28 pdf, shows the access road in question to be a private access easement. There is
29 no minimum grade for walkways, but public works staff do not have concern
30 with 15% walking grades. As testified by the Applicant's civil engineer, Mr.
Pudists, 15% "is a commonly accepted road grade." Appellants have not met
their burden to show such a grade would be unsafe.

Mr. Sheets also testified that he didn't believe that the grade across the open
space would make it useable as required by the City's cottage design standards.
However, as testified by Mr. Pudists, the grade difference across the open space
tract is only about two feet, which likely does not create any use problems.

1 Section II5 of the Appeal also asserts that the slopes of the project site are too
2 steep, but as previously discussed steep slopes were addressed in the
3 geotechnical reports of the project and found suitable for development provided
4 the recommendations of the reports are followed. Those recommendations have
5 been made a condition of the Process I approval. See Process I Decision,
6 Section IIE3b1.

6 13. Affordable housing. The Applicant has no obligation to provide for affordable
7 housing. KZC 113.40 only requires affordable housing to be provided for
8 projects involving ten units or more. The Applicant believes that affordable
9 housing should be provided for this project because of the increase in density
10 authorized for cottage housing projects. KZC 113.40 is the City's legislative
11 determination of a developer's responsibility for providing affordable housing.
12 Since that determination does not require or authorize the City to impose
13 affordable housing requirements upon projects with less than ten dwelling units,
14 the City has no legal authority to require affordable housing units of the project
15 under appeal.

14 14. Compatibility. Section II8g of the Appeal asserts that the project site is not
15 compatible with the neighborhood due to the impacts addressed in the findings
16 above. As outlined in the findings above, all impacts identified by the
17 Appellants have been adequately addressed. As to compatibility of density, the
18 doubling of density authorized by the City's cottage regulations is a legislative
19 determination that when all cottage housing standards are met, the increase in
20 density is compatible with surrounding development to an acceptable degree.

19 **Conclusions of Law**

20
21 1. Authority of Hearing Examiner. KZC 145.60(4) provides that appeals of Process
22 I decisions shall be made to the hearing examiner. KZC 145.105 provides that the
23 decision of the hearing examiner is the final decision of the City.

24 2. No Authority for Density Reduction to Preserve Trees. Reducing density is not an
25 option for tree retention under the City's tree retention standards.

26 Chapter 95 KZC regulates tree preservation for the City. It doesn't impose any specific
27 tree retention standards, but rather provides that trees located in required yards and
28 landscape areas be protected to the "*maximum extent possible*." See KZC 95.30.5. KZC
29 95.10 defines a high-retention tree as a tree located "*within required yards and/or*
30 *required landscape areas*." Under these terms, a tree doesn't qualify as "high
retention" until it's located in a required yard or landscape area. Those yards and
landscape areas do not exist unless and until a developer has defined the lot lines of

1 his/her proposal, which in turn sets the density. Consequently, under Chapter 95 KZC,
2 the high retention “*maximum extent*” standard doesn’t apply until after density is set by
3 the developer.

4 Chapter 95 KZC also contains an aspirational standard, specifically that the objective of
5 the chapter is “*to retain as many viable trees as possible on a developing site while still*
6 *allowing the development proposal to move forward in a timely manner,*” KZC 95.30.
7 KZC 95.30 also requires the City and applicants to work in good faith to find solutions
8 to retaining trees pursuant to the tree retention principles of Chapter 95 KZC. These
9 provisions encourage tree retention and help clarify ambiguous tree retention

10 At best, even if those provisions on their own could be used to compel an unwilling
11 applicant to revise a proposal, they would likely be too vague to be enforceable for
12 something as significant as a reduction in density. Under principles of constitutional
13 due process, ambiguous standards can essentially only be enforced in circumstances
14 where there is no reasonable disagreement as to their applicability. The seminal case on
15 this issue is *Anderson v. Issaquah*, 70 Wn. App. 64, 75 (1993). The *Anderson* decision
16 involved a city design standards ordinance that required project design to be
17 “*harmonious*” and “*compatible*” with surrounding development and that the design be
18 “*interesting*.” The *Anderson* court ruled that, as applied to the permit applicant of that
19 case, those terms “*do not give effective or meaningful guidance*” to local decision
20 makers and as such the standards were unconstitutionally vague. As referenced by the
21 *Anderson* court, “*a statute which either forbids or requires the doing of an act in terms*
22 *so vague that men [and women] of common intelligence must necessarily guess at its*
23 *meaning and differ as to its application, violates the first essential of due process of*
24 *law.*” 70 Wn. App. At 76.

25 For this project, reasonable minds could certainly disagree as to how many lots must be
26 lost before the City has met its objective of retaining as many viable trees as possible.
27 Taking the provision literally, this would mean prohibiting development altogether.
28 That would violate the property rights of the developer. Consequently, a vague concept
29 of reasonableness must be used to ascertain at what point the developer’s rights to
30 develop are superseded by the City’s objective to retain trees. Reasonable minds could
certainly differ as to where that point is reached.

Even if reasonable minds could agree that the point is reached when the Applicant’s
property rights are breached, the record doesn’t support any finding of where that point
would be in this particular case. It is important to recognize that when the City seeks to
restrict portions of land from development (i.e. prohibiting development at tree sites), it
has the burden of proof to show that the condition is reasonably necessary as a direct

1 result of the proposed development. *See Citizens' Alliance v. Sims*, 145 Wn. App. 649
2 (2008); *Koontz v. St. Johns River Water Management District*, 570 US 595 (2013). To
3 establish reasonableness in a 5th Amendment takings without compensation analysis,
4 factors such as investment backed expectations (involving purchase price and likely
5 investment return) are significant factors in assessing at what point development
6 restrictions create a taking of private property. *See Penn Central Transp. Co. v. New
York City*, 438 U.S. 104, 124 (1978)⁷. No such evidence has been presented in this case
to justify a reduction in density.

7 As outlined above, there are several reasons the City was justified in not considering a
8 reduction in density to protect the trees. The code itself, only requiring protection of
9 trees in required yards and landscape areas, is reason enough to avoid that practice. The
10 ambiguities and constitutional limitations of venturing further than that are likely the
11 reason why the code was limited in this fashion. Absent more specifically applicable
12 tree retention requirements, the tree retention ordinance vested to the Process I
13 ordinance does not authorize the City to require any more tree retention than that
14 proposed.

15 3. No Authority to Require Protection of Neighboring Trees. The City has no
16 authority to prohibit damage to on-site roots of neighboring trees. Those roots have the
17 legal status of a nuisance.

18 The City's hands are tied on damage to tree roots to neighboring trees because the
19 courts find those roots to be a nuisance for which the neighboring property owner is
20 responsible. *See Gostina v. Ryland*, 116 Wash. 228, 232, 199 P. 298 (1921). In
21 *Gostina*, the WA State Supreme Court determined that overhanging tree branches or
22 encroaching roots onto a neighboring property constitute nuisances. *Gostina*, 116
23 Wash. at 231. Furthermore, a property owner who permits his or her tree to extend
24 onto a neighboring property commits "*an unequivocal act of negligence.*" *Gostina*, 116
25 Wash. at 232, 199 P. 298. Accordingly, the case holds a party may cut back to the
26 property line any tree branches or roots that intrude onto his or her property. *Gostina*,
27 116 Wash. at 233, 199 P. 298.

28 ⁷ The constitutional references are a fairly gross simplification of applicable constitutional property rights
29 law. Technically, this conclusion of law conflates a general *Penn Central* takings analysis with the more
30 specific takings standards applicable to development exactions under cases such as *Koontz*. The *Citizen's
Alliance* case also focuses on RCW 82.02.020, which mirrors the constitutional principles of cases such
as *Koontz* but is statutorily based. Further, the conclusion conflates the general regulatory takings
holding of *Penn Central* with the more focused exaction takings holding of *Koontz*. However, whenever
issues of reasonableness are addressed in property entitlement issues, investment backed expectations are
usually factored into the equation. *See, e.g., See Buechel v. Department of Ecology*, 125 Wn.2d 196
(1994).

1 In *Mustoe v. Xiaoye Ma*, 193 Wash. App. 161 (2016), Division One of the Court of
2 Appeals relied on *Gostina* to hold that the appellant could not maintain an action for
3 timber trespass based on the defendant's lawful conduct in trimming branches and roots
4 that encroached on the defendant's property. *Mustoe*, 193 Wash.App. at 164-65, 170.
5 In so holding, the *Mustoe* court rejected the appellant's contention that, when trimming
6 encroaching vegetation, landowners owe a duty of care to prevent damage to their
7 neighbor's tree. 193 Wash.App. at 165.

8 As previously noted, the City only has authority to mitigate impacts directly caused by
9 development. To impose conditions that restrict development, Washington courts
10 require that the City establish that a development creates a problem that necessitates
11 the condition. See *Burton v. Clark County*, 91 Wn. App. 505 (1998). As previously
12 outlined, a project applicant who removes tree roots encroaching into its property is
13 exercising its right to remove a nuisance from its property. Given these parameters,
14 it's very unlikely that a court would find the resulting damage a "problem" created by
15 the developer that can justify a mitigation requirement from the City. Under these
16 circumstances the most that the City can likely do is require the developer to provide
17 notice to the neighboring property owner that its tree is in jeopardy from the tree
18 cutting. That is precisely what the City has required for this project.

19 4. No Duty to Include/Respond Public Comments. The failure of the Process I staff
20 report to include and/or respond to public comments does not affect its validity. There
21 is no local or state law requirement to identify all public comments received in a
22 permit application or to respond to those comments. The pertinent factors in
23 assessing the validity of a land use decision is whether it meets permitting criteria and
24 whether the public received required notice of the permit review. There are no permit
25 criteria or notice requirements that compel City staff to acknowledge the receipt of
26 public comments or an obligation to respond to them. City of Kirkland staff
27 voluntarily respond to public comments in an effort to be responsive to the concerns
28 of City residents. City staff have acknowledged that they failed to identify and
29 respond to a comment letter submitted during Process I review. The failure to include
30 or respond to that letter does not affect the Process I approval.

5. Special Regulations Inapplicable. Section II3 of the Appeal asserts that the City
should adopt special policies addressing the unique topographical constraints of the
project vicinity as it has for the Goat Hill area, which has the same type of
topographical constraints. Ultimately, the policies adopted for some other part of the
City are irrelevant to this permit review. KZC 145.45.2 sets the criteria for approval
of the Process I cottages application under appeal. Those criteria do not include the
policies adopted for the Goat Hill project area.

1 6. No Authority for New Development Standards. The Appeal proposes numerous
2 new policies and standards that Appellants wish to apply to the proposal. As
3 previously noted in Footnote 6, KZC 10.10 vests (grandfathers) the proposal to the
4 development standards in effect when a complete Process I application was filed with
5 the City. The City is legally barred by this provision from applying development
6 standards adopted after the filing of a complete application. Even if the City could
7 adopt new standards, City staff and the hearing examiner do not have the authority to
8 adopt such standards. Development standards can only be adopted by the City
9 Council by ordinances. *See* RCW 35A.63.100, or in limited circumstances by City
10 staff via administrative policies that implement and/or clarify the ordinances adopted
11 by the City Council.

12 7. Process I Review Standards Met/Process I Decision Sustained. With the two
13 revisions required in the Decision section below, the Process I decision meets
14 applicable Process I review criteria. For this reason, the Process I decision is
15 sustained.

16 The review criteria for a Process I decision are governed by KZC 145.45.2, which
17 requires that a Process I application be consistent with all applicable development
18 regulations and the comprehensive plan. KZC 145.45.2 also requires that the
19 proposed development be consistent with public health, safety and welfare . One of
20 the more specifically applicable development standards to the project is KZC
21 113.45.4, which requires compatibility of cottage developments with surrounding
22 development.

23 KZC 145.95 provides that the Appellants have the burden of proof in establishing that
24 the proposal fails to meet the standards of KZC 145.45.2. For the reasons identified
25 in the Conclusions of Law and Findings of Fact above, the Appellants have not been
26 able to meet that burden. As revised by this Decision, the Appellants have not
27 established that any specific development regulation was violated by the proposal.

28 As to whether the proposal meets the broader standard of being consistent with public
29 health, safety and welfare, the more specific standards adopted by the City generally
30 set the acceptable level of impacts. Consistency with specific development standards
for a given impact generally establish that the impact has been sufficiently mitigated
to be consistent with public health, safety and welfare. The Appellants have not
demonstrated that the conditions of the project area are so unusual that the City's
development standards were not designed to address them. As to impacts not
addressed by specific City development standards, such as the grade of pedestrian
walkways, the Appellants have not presented any compelling evidence that the
impacts are so adverse or dangerous that no reasonable minds would disagree that the
impacts should be mitigated.

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Decision

The City’s Process I decision is sustained for the reasons identified in the Findings of Fact and Conclusions of Law above, subject to the following two revisions:

1. Prior to building permit approval for any cottages or approval of any grading activity, the Applicant’s geotechnical report shall be revised to include the conclusion that “*the project can be undertaken safely as long as the measures/recommendations of the geotechnical report are incorporated into the project plans*” as required by KZC 85.15.3m. The geotechnical report shall be further supplemented with any analysis and/or recommendations necessary to reach this conclusion.

2. The tree retention plan approved by Section IIE5a6 of the Process I decision is understood to propose retaining the trees identified as “*high retention value trees*” in Att. 3 to the Process I appeal staff report. The Applicant may remove any of those trees if it can establish in the retention plan required by Section IIE5b1 of the Process I decision that removal would be consistent with applicable tree retention standards.

ORDERED this 29th day of August 2022.

Phil Olbrechts

 City of Kirkland Hearing Examiner

Appeal and Valuation Notices

KMC 145.105(4) provides that hearing examiner decisions on building code appeals shall be the final decision of the City. Final land use decisions of the City are appealable to superior court within 21 days of issuance as regulated by the Land Use Petition Act, Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.