

**FINDINGS AND DECISION OF THE HEARING EXAMINER
FOR THE CITY OF KIRKLAND**

In the Matter of the Appeal of

File No. SAR14-01808

**ROMAN EREMENKO and
INNA BORISKINA**

from a decision by the Department of
Planning and Community Development
on a minor improvement application

Introduction

The Department of Planning and Community Development issued a decision denying an application to install a minor improvement within a wetland buffer. The Applicants, Roman Eremenko and Inna Boriskina (Applicants) filed a timely appeal of the decision pursuant to KZC 90.160.

The appeal hearing was held on December 4, 2014, before the Hearing Examiner (Examiner). The Applicants were represented by Roman Eremenko and Alexi Eremenko, and the Department was represented by Desiree Goble, Planner. The Examiner viewed the site in advance of the hearing.

After considering the evidence in the record and viewing the site, the Examiner enters the following findings of fact, conclusions, and decision on the appeal.

Findings of Fact

1. The subject property is addressed as 9237 124th Avenue NE in Kirkland. It is located between 124th Avenue NE and Forbes Lake, which is approximately 400 feet west of the west property line. The area between the lake and the subject property is vegetated with trees and shrubs. No wetlands are located on the property.
2. Property to the south of the subject property was developed at a time when the required wetland buffer width was 50 feet and could be reduced by 50 percent. It is developed with a Planned Unit Development that included a wetland buffer modification. Property to the north is owned by the City.
3. The short subdivision that created the subject property was approved with conditions on February 13, 2007. Olga and Victor Razumovich were the applicants. Much of the property within the short subdivision was covered by the Type 1 wetland that surrounds Forbes Lake, which is in a primary basin. The recorded short plat includes a graphic depiction of a Natural Greenbelt Protective Easement (NPGE) that covers lot 2, as well as 3,370 square feet of the 7,100 square feet that make up the subject property, lot

3 of the short plat. *See* Exhibit A, Enclosure 2, Attachment 4. The area covered by the NPGE has been dedicated to the public under the easement dedication language shown on the face of the short plat. *Id.*

4. A building permit was issued to Olga and Victor Razumovich on July 28, 2009, for construction of a new single-family residence on the subject property. In accordance with a condition of the short subdivision, a sewer line had been constructed across the property within the wetland buffer. A condition of the building permit for the subject property required that a restoration plan be submitted to the City “to restore that area of the wetland buffer disturbed during construction.” The plan was to incorporate only “native plants and other habitat features and shall be implemented prior to final inspection.” Exhibit A, Enclosure 2, Attachment 5, Condition 26.

5. In February of 2012, the Department conducted a final inspection for the building permit but could not sign off on it. The Applicants had installed a lawn, patio, lanterns, and other improvements within the wetland buffer without City approval and had not submitted the restoration plan. A correction letter dated February 28, 2012 listed four items concerning the wetland buffer that required correction on or before April 1, 2012, and a requirement that the applicants submit the name of a qualified professional to prepare the wetland restoration plan and a timeline for its implementation. Exhibit A, Enclosure 1, Attachment 1.

6. The Applicants met with the Department on March 12, 2012, and agreed to provide the credentials for a wetland specialist before attending to the other corrections listed in the February 28, 2012 letter. Kim Peterson, a wetland specialist with Blue Heron Services submitted her credentials to the Department via email on March 15, 2012. Exhibit A, Enclosure 1, Attachment 2. The Applicants’ representatives state that numerous attempts were made following the email to contact the Department but met with no response for a period of two years.

7. On February 3, 2014, the Department sent a letter to the Applicants stating that “[i]t was brought to my attention that your building permit for construction of a new single-family residence at 9237 124th Ave NE still hasn’t received an approved final inspection.” Exhibit A, Enclosure 1, Attachment 3. The letter enclosed a copy of the February 28, 2012 correction letter and established new deadlines for the required corrections.

8. On February 14, 2014, the Department sent a letter to the Applicants summarizing a February 11, 2014 meeting between the Applicants and the Department and stating the Department’s expectations for required corrections to the subject property. The letter established a March 31, 2014 deadline for modification of the deck and stairs located on the west side of the house, installation of a split rail fence along the edge of the unmodified wetland buffer, and “removal of all pavers/bricks, fence post, pots, lanterns and other miscellaneous items from the wetland buffer,” and covering of the disturbed areas. The patio has been removed. It is not clear from the record whether all other

required corrections have been completed, but they are not relevant to the decision at issue in this appeal.

9. The February 14, 2014 Department letter also included the following:

The attendees propose installing minor improvements (walkways, pedestrian bridges, benches, and similar features as determined by the Planning Official) in the outer half of the unmodified 100 foot wetland buffer. To accomplish this task they will need to complete the following steps:

a. Have a qualified professional prepare a plan, complying with Kirkland Zoning Code (KZC) Section 90.45(5). We approve the use of Kim Peterson at Blue Heron Services, Inc. The City will require peer review for compliance with the established approval criteria by the City's wetland consultant at the applicants' expense.¹

b. *The plan should also include restoration of all disturbed areas of the wetland buffer. The restoration plan must only incorporate native plants and other habitat features and must be implemented prior to final inspection.*

c. **Propose a timeline for submitting a wetland restoration plan by February 27, 2014. A complete restoration plan must be submitted no later than April 14, 2014.**

Exhibit A, Enclosure 1, Attachment 4 (underline and bold emphasis original, italic emphasis added).

10. On April 8, 2014, Blue Heron Services submitted on behalf of the Applicants an "Application and Request for Minor Improvement". Exhibit A, Enclosure 1, Attachment 5. The Applicants characterize the document as a "restoration plan with minor improvements". Exhibit A, Enclosure 1. The minor improvements were proposed for the outer 40 feet of the required 100 foot wetland buffer and included the following:

- Four cubic yards of Cedar Grove compost
- 144 square feet of pervious concrete paver patio
- 146 square feet of pervious concrete paver pathway
- Approximately 679 square feet of grass lawn²
- Nine sword ferns planted 3 feet on center
- 12 inch wide area covered with bark to a minimum depth of 6 inches adjacent to the sword ferns

Exhibit A, Enclosure 2.

¹ The Appellants represent that the Department has withdrawn the requirement for peer review.

² The Department's decision on the application misstated the area as 780 square feet, but the appeal, and the Department's memo of November 26, 2014 responding to it, corrected the area to approximately 679 square feet.

11. The Department determined that the proposal failed to meet four of the five decisional criteria established in the Code for such minor improvements and denied the application. Exhibit A, Enclosure 2.

12. “Minor improvements” are “[w]alkways, pedestrian bridges, benches, and similar features, as determined by the Planning Official”

13. KZC 90.45.5 provides that minor improvements may be located within the outer half of a wetland buffer if all of the following criteria are met:

- a. It will not adversely affect water quality;
- b. It will not adversely affect fish, wildlife, or their habitat;
- c. It will not adversely affect drainage or storm water detention capabilities;
- d. It will not lead to unstable earth conditions or create erosion hazards or contribute to scouring actions; and
- e. It will not be materially detrimental to any other property in the area of the subject property or to the City as a whole, including the loss of significant open space or scenic vistas.

14. “Open space” is defined in KZC 5.10.610 as “[v]egetated and pervious land not covered by buildings, roadways, sidewalks, driveways, parking areas, plazas, terraces, swimming pools, patios, decks, or other similar impervious or semi-impervious surfaces.”

Conclusions

1. KZC 90.45.5 provides that the Department’s decision on an application for a minor improvement application may be appealed pursuant to KZC 90.160 which, in turn, specifies that appeals shall be handled pursuant to Chapter 145 KZC, the Code provisions that set forth the procedures for “Process I” applications and appeals. Under KZC 145.95, the Applicants have the “responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision.”

2. The Applicants argue correctly that the short subdivision of the property has been approved and, therefore, the conditions placed on the short subdivision are not at issue. However, the building permit has not received final approval, and the record shows that the application to install minor improvements was to include a plan “showing restoration of all disturbed areas within the wetland buffer,” as required by Condition 26 to the building permit. Exhibit A, Enclosure 1, Attachment 4, para. 1.

3. Concerning the first criterion for a minor improvement in the buffer, the Department’s decision notes that “water quality is typically maintained through the uptake of nutrients by plant roots,” and that a “wetland buffer planted with native vegetation” will best maintain water quality. Exhibit A, Enclosure 2 at 3. The Department also observes that grass lawns, such as that proposed by the Applicants, “typically include” mowing, fertilizer application, irrigation, and the application of

chemicals. The Department concluded that the installation of nine sword ferns in the total affected area would be “insufficient to provide the intended water quality benefits of a wetland buffer planted with native plants,” which would also regulate stormwater runoff into the wetland. *Id.* The Applicants offered no contrary, objective, scientific evidence and noted only that their application indicates that “fertilizer should not be necessary,” citing Exhibit A, Enclosure 1, Attachment 5 at p.4. That is not sufficient to demonstrate that the Department’s decision on the first criterion is incorrect.

4. The second criterion requires that the minor improvement not adversely affect fish, wildlife, or their habitat. The decision notes that native vegetation provides wildlife with a food source, and that plantings of multiple vegetation layers in a variety of sizes would maximize benefits by providing nesting areas for wildlife, whereas planting nine sword ferns provides no food source or significant wildlife habitat. Exhibit A, Enclosure 2 at 4. The Applicants did not dispute this and in their opening statement, offered to add more plantings to their application. They have not shown that the Department’s decision on the second criterion is incorrect.

5. Criterion three requires that the minor improvement not adversely affect the drainage or storm water detention capabilities of the wetland buffer. The decision states that a patio and a lawn, which has very shallow roots, “will do little to improve the soil’s ability to absorb water,” and that “the lack of vegetation layers provided by trees and shrubs greatly reduces the ability of the stormwater detention by plant roots.” Exhibit A, Enclosure 2 at 4. The Applicants assert that the decision did not consider the proposed sword ferns, and an email message from their wetland specialist stated that once established, sword fern “provides a very impenetrable barrier to flows along the surface”. However, there is no evidence that nine sword ferns, which are considered a ground cover, could equal the water retention capabilities of native trees and shrubs. The Applicants have not shown that the Department’s decision on the third criterion is incorrect.

6. The Department’s decision states that the minor improvement meets criterion four, in that it will not lead to unstable earth conditions or create erosion hazards or contribute to scouring actions.

7. Criterion five requires that the minor improvement not be “materially detrimental to any other property or to the City as a whole, including the loss of significant open space or scenic vistas.” The Director’s decision states that the proposal would reduce the wetland buffer area on the subject property by 46%, from 3,370 square feet to 1,850 square feet. The decision notes that this reduction is greater than the reduction that would be allowed had the Applicants applied for a buffer reduction under KZC 90.60 but includes none of the mitigation that would be required under that Code section. The decision therefore concludes that the proposal would be detrimental to other properties and to the City as a whole. Exhibit A, Enclosure 2 at 5. The Applicants do not dispute the Department’s conclusion but misinterpret the decision as applying the standards of KZC 90.60 to the proposal, which it does not do. The Applicants have not shown that the Department’s decision on the fifth criterion is incorrect.

8. The Applicants also ask the Examiner to reverse the decision because the “project planner has negligently drawn out this case” for nearly three years, and cite the planner’s failure to respond in a timely manner, requiring only thorny plants within the buffer, and allegedly misleading the Applicants in emails concerning appeal and hearing dates. These are procedural matters that are not part of the Department’s *decision* in this case, and thus, are not within the Examiner’s jurisdiction under KZC 145.95.

9. The Department’s decision was not shown to be incorrect, and it should therefore be affirmed.

Decision

The Department’s decision denying the minor improvement application is affirmed.

Entered this 18th day of December, 2014.

Sue A. Tanner
Hearing Examiner

Exhibits

The following exhibits were entered into the record:

Exhibit A	Department’s Memorandum with 2 enclosures, including the appeal
Exhibit B	Department’s PowerPoint presentation
Exhibit C	Applicants’ Opening Statement
Exhibit D	Applicants’ photographs of the site
Exhibit E	Statement by Appellants’ wetland specialist re scope of proposal and attached confirming email
Exhibit F	Print-out from “MyBuildingPermit.com” on status of SPL06-00038
Exhibit G	Email message dated 11/17/14 from Desiree Goble to Applicants re date of appeal hearing, and email message dated 11/26/14 re “Hearing Examiner Packet for Boriskina Appeal”
Exhibit H	Letter dated November 20, 2014 from Desiree Goble to Appellants re date of hearing on appeal, and Notice of Appeal Hearing

PARTIES OF RECORD:

Appellants Roman Eremenko and Inna Boriskina
Department of Planning and Community Development

Concerning Further Review

KMC 145.110 reads as follows: “The action of the City in granting or denying an application under this chapter may be reviewed pursuant to the standards set forth in RCW 36.70C.130 in the King County Superior Court. The land use petition must be filed within 21 calendar days of the issuance of the final land use decision by the City. For more information on the judicial review process for land use decisions, see Chapter 36.70C RCW.”