

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

APPLICANT Nathan and Debra Weinberger

FILE NO. ZON05-00018

APPLICATION:

1. Site Location: 10530 NE 108th Street
2. Request: To modify a Type I wetland buffer pursuant to KZC 90.60 to allow enclosure of an existing porch, construction of a patio, and continuation of rockery walls, and to reduce the existing 100' buffer by the maximum 1/3 allowed, to 67'.
3. Review Process: Process IIA, Hearing Examiner conducts the public hearing and makes final decision
4. Major Issues: (1) Whether a five- or a two-year maintenance and monitoring plan should be required as a condition of approval; (2) Whether the wetland buffer width reduction should be approved without conditions on future use of areas located within the "former" buffer area.

SUMMARY OF RECOMMENDATION AND DECISION:

Department of Planning and Community Development Recommendation: Approve with conditions

Hearing Examiner Decision: Approve with conditions

PUBLIC HEARING:

The public hearing on this matter was held on February 2, 2006, commencing at 9:04 a.m. in Council Chambers, City Hall, 123 Fifth Avenue, Kirkland, Washington. The hearing adjourned at 11:07 a.m. A verbatim recording of the hearing is available at the City's Clerk's office. The minutes of the hearing are available from the Planning Department. The record was held open through February 17, 2006, to receive post-hearing submittals by the parties, and the record was closed after receipt of those submittals.

PUBLIC COMMENTS:

Comments offered at the hearing are summarized in the minutes of the hearing. The following persons appeared and commented at the hearing:

From the City:

Susan Greene, Project Planner
Oskar E. Rey, Assistant City Attorney
Jeremy McMahan, Planning Supervisor

From the Applicants:

G. Michael Zeno, Jr. Attorney for applicants
Nathan Weinberger, Applicant
Celeste Botha, Wetlands Consultant
Denise Pirolo, Kirkland Public Works Department (called as a witness by the applicant)

From the Community:

No member of the public testified.

CORRESPONDENCE:

Four letters were submitted to the Department during the public comment period, which are contained in Exhibit A, Attachment 9. No written correspondence from the general public was submitted to the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION:

Having considered the entire record on this matter, the Hearing Examiner now makes and enters the following:

FINDINGS OF FACT

1. The site is approximately 11,770 square feet in size, and is addressed as 10530 NE 108th Street. The site is located within the South Juanita Neighborhood, and is zoned RS 8.5, a single family zone requiring 8,500 square feet per dwelling unit. The site slopes steeply from the north to the south, and a portion of the site is designated moderate landslide hazard area.
2. The zoning to the north, east and west is also RS 8.5, and development in the area includes other single family residences. South of the site is a right-of-way, NE 108th Street, which contains a gravel walking trail. South of the gravel trail is Juanita Bay Park, which has a large Type I wetland in a primary basin. The paved right-of-way ends at the east side of the subject property and the applicant's driveway extends up the steep hillside to the garage.
3. The Type I wetland to the south requires a 100-foot buffer from the wetland edge, and a 10-foot building setback from the buffer edge.

4. Original construction of the single-family home occurred in 1992, and at the time, a Natural Growth Protection Easement (NGPE) was required and was recorded across the southwestern portion of the lot over the wetland buffer that extended onto the property.

5. The applicants purchased the property in 1994. At that time, the Zoning Code required a 50-foot wetland buffer.

6. In 1999, the City's Zoning Code was changed to require a 100-foot wetland buffer and a 10-foot building setback for a Type I wetland. As a result of this change, about half of the existing residence was within the 100-foot buffer and building setback line. The existing structure thus became legally nonconforming as to the new buffer and setback areas.

7. The applicants applied for a building permit, BLD04-00347, on April 12, 2004, to build an addition to the east side of their home.

8. The City's wetland consultant delineated the boundaries of the wetland. The owner had the property surveyed using the flags (Attachment 2c, Exhibit A).

9. On August 26, 2004, the applicants submitted a substantial revision to their building permit that pulled the entire new addition out of the required 100-foot buffer and 10-foot building setback. A small, wedge-shaped portion of the driveway, approximately 270 square feet, and located within the wetland buffer area, was proposed to permit access to a new garage.

10. A Determination of Nonsignificance (DNS) was issued on September 30, 2004. The building permit for the addition was approved on October 18, 2004. A new NGPE area was required along the east side of the new driveway as part of the SEPA review for the building permit.

11. In December, 2004, the applicants submitted plans for the relocation of the front door of the house from the western end of the house to a more central location, and to enclose the old front landing. The footprint of the landing would not be changed.

12. As part of their remodeling of the house, the applicants had removed pavers from a patio located behind the house. A portion of the patio area is located within the wetland buffer. The applicants had intended to build a deck or install different pavers in the patio area. The applicants also installed some rockery walls, a portion of which extended into the wetland buffer area.

13. The Department and the applicants had discussions during the first half of 2005 regarding the remodeling work. The Department advised the applicants that the enclosure of the front landing and the replacement of the patio in the buffer area, could not be approved except through a buffer modification under Process IIA. The

Department also advised them that the rockery wall in the buffer area constituted a violation of the Code, which could be corrected if a buffer modification were obtained.

14. A stop work order was issued and posted on site on June 16, 2005 (MIS05-00020) to prohibit exterior work on the building permit. This order was posted as a result of violations observed by a Planning staff member during a site visit on June 13, 2005. The violations observed were: storage of construction materials within the wetland buffer, addition of rockery within the wetland buffer to the north and west side of the house, fill material deposited within the NGPE and within the buffer on the southwestern slope of the subject property, improperly installed silt fencing to protect the wetland and buffer from construction activities, additional rockery walls placed within the area which was required to be NGPE for the building permit (within the 100 foot buffer), the groundcover within this area was stripped down to dirt except for trees, and new stairs were added leading to the addition.

15. On June 16, 2005, the applicants submitted an application for modification of the buffer. The applicants did not submit a buffer enhancement plan, and maintained that the proposal had no impact on the wetland, so that an enhancement plan was unnecessary. The application identified "three main issues": (1) to enclose the existing porch; (2) to allow the portion of the rockeries and the patio areas within the buffer area to remain; and (3) to reduce the existing 100' wetland buffer to 67'. The application noted that the request to reduce the buffer was "not meant to be tied to the first request to enclose the porch or to allow the existence of the portion of the rockery and patio within the buffer."

16. The City's wetland consultant (the Watershed Company) analyzed the applicants' impact analysis (Exhibit A, Attachments 2h and 5). The consultant determined that an enhancement plan was required, recommended that the plan include certain features, and that the plan be incorporated with any restoration that would be required as part of the building permit violations.

17. The public comment period on the application ran from July 14 to July 26, 2005. Four letters were received by the Department as public comment (Exhibit A, Attachments 9-12). Most of the letters commented on the recent building permit for the large addition which was constructed outside of the wetland buffer. A letter submitted by Corey Petersen stated that he was not opposed to the enclosure of the porch entry, the rockery walls, and the addition of the deck area, but that he opposed reducing the wetland buffer width from 100 to 67 feet. He also stated that Process IIA was expensive and excessive for changes to single family residences such as the proposed porch enclosure.

18. One other letter by Grace Weaver mentioned the recently constructed rockeries and asked if they were stable; this matter was referred to the Kirkland Building Department. No evidence of unstable rockeries was found on site by the Planning Department or the Building Department.

19. In a letter dated August 19, 2005, the Department advised the applicants that their request to “permanently move” the buffer could not be granted because:

this would require the actual wetland to be filled in order to change the buffer line and filling the wetland is not an option in this case. Since the line may not be permanently moved, this means that your buffer modification request is a one time allowance much like a variance. If you wish to modify the house or buffer area in the future, you will need to apply for another buffer modification.

20. At some time during 2005, the City’s Public Works Department proposed to create a new sewer connection to serve properties in the area. The proposed sewer line was located in part on the applicants’ property. The applicants and the Public Works Department entered into an agreement whereby Public Works agreed to pay the applicants \$20,000 for a sewer easement, and to pay \$5,000 towards the compensatory mitigation for the wetland buffer, and to maintain the buffer enhancement area for two years. The Public Works Department is not willing to monitor and maintain the area for longer than two years.

21. The applicants’ wetland consultant submitted a wetland buffer enhancement plan on November 8, 2005. The plan included a proposed enhancement area, some of which was to be located on the unimproved right-of-way next to the gravel trail, as well as on the subject property. The plan called for a two-year monitoring plan for the enhanced buffer.

22. The Public Works Department granted approval to the applicants for use of the unopened right-of-way area for the enhancement area, in a letter dated February 1, 2006 (Exhibit G).

23. The City’s wetlands consultant reviewed the applicants’ plan and submitted recommendations to the Department on December 12, 2005. The consultant identified four problems with the plan, including its proposed two-year monitoring and maintenance plan. The consultant noted that a five-year plan was required.

24. The applicants submitted a revised enhancement plan on December 29, 2005. The plan proposed a two-year monitoring and maintenance plan, stating that the “city code does not specify the length of the monitoring period for buffer enhancement.” (Exhibit A, Attachment 8, page 4).

25. The stop work order was lifted on December 9, 2005. Some of the violations were remedied, such as the stockpiling of construction materials and improper silt fencing. Other violations such as the rockeries, and soil denuding were deemed by the Department to be addressed by the Buffer Modification application as part of this proposal.

26. In December, 2005, the Department advised the applicants that it had determined that wetland buffers could be reduced in size “provided the applicable criteria are met,” and that the City’s approval of a modification was normally limited “to the proposed improvements.” (Exhibit H, Attachment 1).

27. The Department issued a recommendation on January 25, 2006, that the buffer modification be approved with conditions described in the Advisory Report, Exhibit A (section I.B). The Department concluded that the request to “permanently move the buffer line will meet the criteria in KZC section 90.60.2 if no additional structures or permanent improvements are installed in the former buffer area and the use of the former buffer area is limited to landscaping and garden uses. Approval of this request does not necessarily result in a permanently fixed buffer line.”

28. At hearing, the Department presented amended recommendations regarding conditions I.B.2,c, I.B.3.c, and I.B.5 (Exhibit C). The amendments call for the installation of plantings along the southern edge of the buffer (instead of a fence) and allows the applicants to design signage. The amended recommendations acknowledge the existing 1994 NGPE and call for a new NGPE for the south east portion of the property. In its post-hearing submittal, the Department noted that it was requesting maintenance security for the buffer modification to cover the five-year period and that it would request a performance security in the event of an appeal of the modification decision, if the appeal prevents installation of the buffer enhancement by April 1, 2006.

29. At hearing, the Department noted that it did not object to specifying that in the event the structure were destroyed (e.g., by fire or other disaster) the residence and the approved improvements in the wetland buffer would have “legally conforming status” and could be re-constructed.

30. The applicants agree with some of the recommendations in the Department’s Advisory Report as amended at hearing. However, the applicants oppose two of the proposed conditions as being inappropriate. The applicants oppose the condition limiting their activities to gardening and landscaping within the 937-square-foot area that lies within 100 feet of the wetland. As noted above, the applicants desire that the 100-foot buffer be reduced to 67 feet, and that the area located outside of the 67-foot buffer area is no longer subject to being regulated as a buffer area. The applicants also oppose the condition that they maintain and monitor the plantings within the buffer enhancement area for five years, and propose a two-year period instead.

31. The applicants submitted several City decisions issued by the Department and/or the Hearing Examiner (Exhibit D). The applicants contend that these decisions show that the City has in the past allowed wetland buffer lines to be redrawn without placing limits on the use of the “former” buffer areas.

32. The applicants have incurred certain costs in their dealings with the City, which they describe in Exhibit D.

CONCLUSIONS

1. KZC 90.60.2.b provides that a proposal to modify a wetland buffer is decided under Process IIA, set forth in Chapter 150 KZC. Under KZC 150.50, the applicant bears the responsibility of convincing the Hearing Examiner that the applicant is entitled to the requested decision.
2. Under KZC 150.65.3, the Hearing Examiner shall use the criteria listed in “the provision of this code describing the requested decision” in deciding upon the application. In this case, the relevant criteria are found in Chapter 90 of the KZC, which contains the City’s wetland regulations. In addition, the Hearing Examiner may approve the application only if it is consistent with all applicable development regulations (or if there are no applicable regulations, the Comprehensive Plan) and if the application is consistent with the public health, safety and welfare.
3. The lot’s zoning and size are not constraining factors in this application, nor are the neighborhood development and zoning constraining factors. In addition, the public comment requirements have been met.
4. The issues to be resolved in this application concern two conditions recommended by the Department: (1) the condition limiting the activities that may take place within the former buffer area; and (2) the condition requiring a five-year, rather than a two-year, monitoring and maintenance plan for the buffer enhancements. As discussed below, the Department’s recommendations as to both of these conditions are supported by the Code and the facts in the record, and will be adopted.
5. In its post-hearing submittal, the applicants also stated the decision should clarify that a Certificate of Occupancy shall issue immediately, based on statements in the Department’s post-hearing submittal. However, the determination of whether or not a Certificate of Occupancy may issue is not within the scope of this decision and will not be addressed.

Conditions

6. The applicants object to the Department’s recommended condition I.B.6 (Exhibit A, page 2). This condition restricts the use of the area within the former wetland buffer area (as measured by the 100-foot buffer line) to landscaping and gardening. The applicants contend that their proposed enhancement of the wetland buffer satisfies the criteria for reduction of the buffer width under KZC 90.60.2.a.2, so the use of the area outside the former buffer must be treated as any other upland, non-buffer area.
7. As a preliminary matter, it does appear that KZC 90.60 identifies two types of buffer modification. KZC 90.60.2 not only refers to the placement of improvements and surface modifications within buffers, but also states that buffer widths may be decreased.

Other references in KZC 90.60 also refer to the reduction or decrease of a buffer width. However, the fact that buffer widths can be changed, does not answer the questions of what criteria are to be used to evaluate a request for that change, and whether the approval of the change can be conditioned as has been recommended in this case.

8. In considering these questions, it is notable that KZC 90.60.2 requires approval of virtually any activity that occurs within a wetland buffer. This section states that *“No land surface modification may occur and no improvement may be located in a wetland buffer, except as provided for in this subsection. Buffer widths may be decreased if an applicant receives a modification request approval.”*¹

9. KZC 90.60.2.a provides that buffers may be decreased through buffer enhancement, but the applicant must demonstrate that the *“reduced buffer will function at a higher level than the existing standard buffer.”* KZC 90.60.2.b describes the review process and decisional criteria for *“modification requests for averaging or reduction/enhancement”* of wetland buffers, and so is applicable to this request to reduce the wetland buffer. At the end of the section is a statement that *“As part of a modification request”* the applicant is to submit a report assessing the functions of the buffer and the effects of *“the proposed modification on those functions; and address the nine criteria listed in this subsection (2)(b) of this section.”*

10. Thus, regardless of whether a proposal is characterized as a buffer width reduction or the placement of a structure within a buffer, the effects of the proposed buffer modification on the buffer function are to be considered, as well as the nine criteria listed in this section.

11. This language, as well as the chapter language as a whole, support the conclusion that a decision to grant a buffer reduction must consider the proposed improvements (in this case, the proposed use of the “former” buffer area) in conjunction with the modification. Without knowing what improvements could occur in the future, it would not be possible for the City to evaluate the effects of the proposed modification on the buffer functions, or to consider the nine criteria referenced in KZC 90.60.2.b. In order to

¹ The terms “improvement” and “land surface modification” are defined in Chapter 5 of the Code, the definitions apply throughout the zoning code unless otherwise indicated (KZC 5.10):

.390 Improvement – Any structure or manmade feature.

.455 Land Surface Modification – The clearing or removal of trees, shrubs, groundcover and other vegetation, and all grading, excavation and filling of materials. The removal of overhanging vegetation and fire hazards as specified in Chapter 9.12 KMC shall not be deemed to be land surface modifications.

.910 Structure – Anything which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

ensure that proposed improvements or developments are identified, it is reasonable for the City to impose conditions, as recommended by the Department, limiting the future use of an area as part of the approval of the buffer reduction.

12. If the Code were construed as urged by the applicants, the City could also find it difficult to approve an enhanced buffer under KZC 90.60.2.a. That section requires an applicant to demonstrate that the enhanced buffer will function at a higher level than the existing standard buffer. But this may be difficult to show without identifying the activities or development that would occur on the property adjacent to the reduced buffer. For example, if the primary function of a buffer were “to deter harmful intrusion into wetlands” (see KZC 90.10), the level of function could not be evaluated without considering the potential for “harmful intrusion” that might occur from adjacent activities or development.

13. The applicants assert that the City has approved other buffer width reductions without imposing limitations on future actions in the “former” buffer areas (Exhibit D). The Steptoe decision is not relevant to this issue. However, it is true that in the other cited decisions there are no explicit conditions limiting the use of the former buffer area. But the North Rose Hill, Clark and Robinson decisions involved applications for specific developments, and thus the City had before it information as to the expected improvements that could occur. The short plat decisions (Quail’s Run, Berk), including the depictions of a “new” buffer line on the plans, do not indicate that the approvals were made without regard for future development on the lots. And in any case, the decisions do not show that the City would be without authority on a site-specific basis to impose conditions on future activities or improvements in former buffer areas.

14. The Code allows the City to limit activities or development in the former buffer area as a condition of approval of the applicants’ buffer modification request. In this case, the proposed buffer modification, as conditioned by the Department’s proposed conditions, would meet the criteria of KZC 90.60, including the approval criteria of KZC 90.60.2.a and b. The conditional approval would allow the applicants to enclose the existing porch, retain the identified portions of the rockery walls and patio as legally conforming, and would allow the applicants to use the former buffer area for landscaping and garden purposes.

Duration of Monitoring Plan

15. The applicants have requested a two-year monitoring and maintenance period, rather than the five-year period recommended by the Department. The applicants argue that KCZ 90.55, which contains the five-year requirement, applies to mitigation for wetlands modification, not buffer modification. The applicants also note that the City’s Public Works Department was unwilling to maintain the buffer enhancement area for more than two years, and that it would be unreasonable to require the applicants to observe a five-year monitoring plan when the City is unwilling to do so.

16. Although the title of KZC 90.55 refers to modification of wetlands, the text states that “*Applicants proposing to alter wetlands or their buffers shall submit a mitigation plan prepared by a qualified professional.*” (Empahsis added.) This Code section goes on to state that at a minimum the mitigation plan shall include plans for a five-year monitoring and maintenance program.

17. Thus, the specific language of KZC 90.55 controls here and requires a five year plan. No Code sections have been identified that would allow relief from this standard on the basis of applicants’ cost to comply, or their agreement with the Public Works Department. It is also clear from the record that the Department has consistently interpreted this section to require a five-year plan for buffer enhancement plans. It is understandable that the applicants are frustrated by the process of rmaking improvements to their single family home, but a five-year plan is required.

18. With the adoption of the conditions recommended by the Department (contained in Exhibits A and C) the proposal would meet the applicable criteria of KZC 90.60.2 for modification of a wetland buffer.

19. As conditioned, the proposal would meet the criteria in Chapter 90 of the Kirkland Zoning Code, would be consistent with the City’s Comprehensive Plan, and would be consistent with the public health, safety and welfare.

20. The recommended conditions in the Advisory Report (including attachment 3, Development Standards List) and Exhibit C shall be required as conditions of this decision. If installation of the buffer enhancment plantings by April 1, 2006, is prevented because of an appeal of this decision, a performance security will be required by that date.

DECISION

Based on the foregoing findings and conclusions, the application for wetland buffer modification is approved, subject to the conditions set forth in the Department’s Advisory Report Section I.B., including Attachment 3, as amended by Exhibit C. If installation of the buffer enhancement plantings by April 1, 2006, is prevented because of an appeal of this decision, a performance security as determined by the Department is required by that date.

EXHIBITS

The following exhibits were admitted into the record:

- Exhibit A: Department’s Advisory Report with Attachments 1-14 and site plan
- Exhibit B: Department’s Revised pages 8 and 9 of Advisory Report
- Exhibit C: Department’s Advisory Report Addendum to Recommendations
- Exhibit D: Applicant’s proposed Findings, Conclusions and Decision, and supporting exhibits

Exhibit E: Applicant's Supplement to Process IIA Application
Exhibit F: Applicant's photographs of the site (seven sheets)
Exhibit G: February 1, 2006 letter from John Burkhalter, Public Works, to Applicants
Exhibit H: February 10, 2006, Supplement to City Staff's Advisory Report with Attachments
Exhibit I: February 17, 2006, Applicant's Reply to City's Post-Hearing report

PARTIES OF RECORD:

Applicant: Nathan and Debra Weinberger, 10530 NE 108th St., Kirkland WA 98033
Michael Zeno, Jr., Zeno, Drake and Hively, PS 4020 Lake Washington Blvd., Suite 100, Kirkland, WA 98033

Grace Weaver, no physical address given

Richard Rethke, 11010 108th Ave NE, Kirkland, WA 98033

Steven Arnold, 10807 106th Ave NE, Kirkland, WA 98033

Corey Petersen, 10616 NE 109th Street, Kirkland, WA 98033

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

Entered this 28th day of February, 2006, per authority granted by granted by Section 150.65, Kirkland Zoning Code.

Anne Watanabe
Hearing Examiner

APPEALS 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 Planning Department for further procedural information.

Appeal to City Council:

Under Section 150.80 of the Zoning Code, the Hearing Examiner's decision may be appealed by the applicant and any person who submitted written or oral testimony or comments to the Hearing Examiner. A party who signed a petition may not appeal unless such party also submitted independent written comments or information. The appeal must be in writing and must be delivered, along with any fees set by ordinance, to the Planning Department by 5 p.m. _____, fourteen (14) calendar days following the postmarked date of distribution of the Hearing Examiner's decision on the application.

Judicial Review:

Section 150.130 of the Zoning Code allows the action of the City in granting or denying this zoning permit to be reviewed in King County Superior Court. The petition for review must be filed within twenty-one (21) calendar days of the issuance of the final land use decision by the City.

LAPSE OF APPROVAL

Under Section 150.135 of the Zoning Code, the applicant must submit to the City a complete building permit application approved under Chapter 150, within four (4) years after the final approval on the matter, or the decision becomes void; provided, however, that in the event judicial review is initiated per Section 150.130, the running of the four years is tolled for any period of time during which a court order in said judicial review proceeding prohibits the required development activity, use of land, or other actions. Furthermore, the applicant must substantially complete construction approved under Chapter 150 and complete the applicable conditions listed on the Notice of Approval within six (6) years after the final approval on the matter, or the decision becomes void.