

**CITY OF KIRKLAND**  
**HEARING EXAMINER RESPONSE TO REMAND**

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**APPLICANT:** Charles Rosinski.

**FILE NO:** ZONO5-00016

**APPLICATION:**

1. **Site Location:** 95xx Slater Avenue NE

2. **Request:** The Applicant requests a reasonable use exception to allow construction of a single-family residence within a wetland buffer.

3. **Procedural History:**

- August 25, 2005 - Planning staff recommended denial of the application.
- October 19, 2005 - The Hearing Examiner conducted a hearing under Process IIB and issued a recommendation that the application be denied.
- October 28, 2005 - The Applicant challenged the Hearing Examiner's recommendation.
- December 13, 2005 - The City Council considered the application and the Hearing Examiner's recommendation, and remanded it to the Examiner with five questions seeking further information on the basis for the recommendation.
- December 28, 2005 - The Hearing Examiner responded to the Council's remand, answering all five questions in the negative, amending his report to the Council, and changing his recommendation to one of approval, subject to certain conditions.
- February 7, 2006 - The City Council considered the application again and remanded it to the Examiner a second time, with directions to reopen the hearing, take additional evidence, and consider the following questions:

1. Referring to KZC 90.140(2), is there an on-site alternative to the proposal that is feasible and reasonable considering possible changes in site layout, reductions in density and similar factors? By way of example and not limitation, is there an alternative structure or location for any structure on the site that would be feasible and reasonable?

2. Determine the least-sized structure, in terms of square footage and impervious surface area, necessary to meet reasonable use requirements under current law.

## **PUBLIC HEARING:**

After reviewing the file, the Hearing Examiner conducted a public hearing on the issues remanded by the Council. The hearing was held at 9:00 a.m. on March 16, 2006, in the Council Chamber, City Hall, 123 Fifth Avenue, Kirkland, Washington. A verbatim recording of the hearing is available in the City Clerk's office. The minutes of the hearing and the exhibits are available for public inspection in the Department of Planning and Community Development. The record was left open for the Examiner's site visit, which occurred later in the day on March 16, 2006.

## **PUBLIC COMMENT:**

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

## **RESPONSE TO REMAND**

### **1. Legal Context**

As stated by the City Attorney in the March 9, 2006 staff memorandum to the Hearing Examiner, (Exhibit C), there is no statutory or case law that defines the least sized structure and impermeable surface necessary to provide a reasonable use of property. Federal and state case law provides only the following general guidance for making such decisions on a case by case basis:

A. Takings. A regulation can result in a taking of property in violation of the state and federal constitutions.

1) If a regulation destroys the right make any economically viable use of property, the regulation will be found to be a total taking of the property.<sup>1</sup>

2) If a regulation: 1) does not prevent all economic use of the property; and 2) substantially advances a legitimate governmental interest; but 3) goes beyond preventing public harm directly caused by the prohibited use of the property, and instead, requires the regulated landowner to provide an affirmative public benefit, or "infringes on a fundamental attribute of ownership", then a balancing test is required in order to determine whether the governmental interest behind the regulation is outweighed by the adverse economic impact on the landowner. The factors considered include the regulation's economic impact on the property, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.<sup>2</sup>

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<sup>1</sup> *Lucas v. South Carolina Coastal Coun.*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992); *Guimont v. Clarke*, 121 Wn.2d 586, 600-01,854 P.2d 1 (1993).

<sup>2</sup> *Guimont v. Clarke*, *supra* at 603-04.

B. Substantive Due Process. Even if a regulation does not effect a taking, it may violate the substantive due process rights of the landowner under the state constitution. A regulation that is aimed at achieving a legitimate public purpose, and uses means that are reasonably necessary to achieve that purpose, may be found to violate substantive due process rights if is “unduly oppressive” on a landowner.<sup>3</sup> The “unduly oppressive” analysis balances the public’s interest with the burden being placed on the landowner. The factors considered on the public’s side include the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions. The factors considered on the landowner’s side include the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated the regulation, and how feasible it is for the owner to alter present or currently planned uses.<sup>4</sup>

## 2. Alternative Proposal

At the Staff’s request, the Applicant developed an alternative proposal for the single-family residence that would reduce the impact on the wetland buffer. The alternative shows the residence re-oriented on the lot to pull it back further from the wetland edge. As noted in Exhibit C, the differences between the two proposals are as follows:

	Original Proposal	Alternative Proposal
Gross Floor Area	3,045 sq.ft.*	2,391 sq.ft.*
Total Size	Unknown	3,270 sq.ft.
Total Lot Coverage	2,666 sq.ft.	1,943 sq.ft.
Amount of Wetland Buffer Impacted	4,060 sq.ft.	3,558 sq.ft.
Distance from Wetland Edge	20 feet	36 feet
Zoning Setbacks	Meets all	Proposed reduction to front setback from 20 to 11 ½ ft.
Paving Material	Impervious concrete	Pervious concrete

\*Excludes daylight basements under KZC

The City’s wetlands consultant reviewed the alternative and determined that the alternative is preferred over the prior submittal, incorporates a beneficial innovative design through use of pervious concrete, and reduces the loss of buffer function; the proposed enhancement is advantageous to the wetland; and the consultant’s recommended changes and additions to the proposed mitigation plan remain unchanged. (Exhibit C, Attachment 6)

<sup>3</sup> *Id.* at 609, quoting *Presbytery v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907, cert. denied, 498 U.S. 911, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990).

<sup>4</sup> *Guimont v. Clarke*, *supra* at 610, quoting *Presbytery v. King Cy.*, 114 Wn.2d at 331.

### **3. Development in the Area**

Staff prepared a chart from King County Assessor records showing the size of homes built in the last 10 years within 1000 feet of the subject property. (Exhibit C, Attachment 7) The chart, which does not differentiate between residences that are located within wetland buffers and those that are not, indicates that the average size of the residences is 3,102 square feet.

The Examiner observed that development in the immediate vicinity of the property includes large, multi-family structures near Forbes Lake, smaller, older residences and multi-family structures, and newer homes, most of which are of larger size than the older ones. The area is urban in character, and there is impervious surface in, (part of Slater Avenue NE), and near the Lake's wetlands.

The Applicant provided samples of decisions on reasonable use exception applications from several jurisdictions that the Applicant characterized as comparable to the City of Kirkland in size, and in the economic segments and types of housing found within the City. (Attachments to Exhibit C, Attachment 5) One of these decisions involves a much smaller encroachment into a wetland buffer than is at issue here. Most of the decisions concern exceptions to steep slope regulations, which involve different considerations than exceptions to wetland buffer requirements, even though both may be analyzed under the same set of reasonable use criteria. There are two administrative decisions from one jurisdiction that do involve more extensive wetland encroachments. However, without more information about the policy and regulatory background for that city's decisions, as well as more specific factual information on the sites addressed in the decisions, the Examiner does not consider the decisions reliable guides in this case.

### **4. Purpose of Wetland Regulations**

As stated in the introduction to Chapter 90 KZC, "Drainage Basins", wetlands "help maintain water quality; store and convey storm and flood water; recharge ground water; provide fish and wildlife habitat". Wetland buffers "moderate runoff volume and flow rates; reduce sediment loads; remove waterborne contaminants such as excess nutrients, synthetic organic chemicals (e.g., pesticides, oils, and greases), and metals; provide shade for surface water temperature moderation; provide wildlife habitat; and deter harmful intrusion into wetlands." The City's wetland regulations are "to achieve a goal of no net loss in wetland function, value, and acreage within each drainage basin, which, where possible, includes enhancing and restoring wetlands."

### **5. Analysis**

It seems to this Examiner that the analysis for a reasonable use exception to critical area regulations does not start with the maximum amount of development that would be allowed if the regulations did not exist, and then work down to something that has just slightly less impact on the wetland and wetland buffer. Instead, the analysis should start with the fact that the regulations totally prohibit the use on this property, and then work

up to determine something more than a total prohibition that would constitute a reasonable use of the property.

There are on-site alternatives to the original proposal that are feasible and reasonable. The on-site alternative proposed by the Applicant is certainly feasible, and it has some advantages over the original proposal. But there is no evidence that the proposed alternative is the smallest structure, in terms of gross floor area and impervious surface area, that could be built on the property and still constitute a reasonable use of it. After reviewing the limited amount of information available to this Examiner in light of the takings and substantive due process tests gleaned from state case law, the Examiner sees no clear constitutional impediment to the City's requiring something smaller on this property. However, a full assessment and final determination of that issue is properly left to the City Council and City Attorney.

**TESTIMONY:**

The following persons testified at the public hearing:

**From the City:**

Tony Leavitt, Project Planner

**From the Applicant:**

Charles Rosinski, Applicant

Duana T. Kolousková, attorney-at-law

**From the Public:**

Maxine Keesling

**EXHIBITS:**

The following exhibits were offered and entered into the record at the public hearing:

- A. Rosinski Site Plan Statistical Comparison, from Applicant
- B. March 16, 2006 memo from Maxine Keesling

**PARTIES OF RECORD:**

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City Attorney

Department of Planning and Community Development

Department of Public Works

Department of Building and Fire Services

Dated this 20th day of March, 2006

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Sue A. Tanner  
Hearing Examiner