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BEFORE the HEARING EXAMINER for the  
CITY of SAMMAMISH

CITY OF SAMMAMISH

DECISION

FILE NUMBER: RUE2018-00594

APPELLANT: Rupesh Khendry  
446 211<sup>th</sup> Avenue NE  
Sammamish, WA 98075

RESPONDENT: City of Sammamish  
C/o Hillary Evans Graber  
Kenyon Disend, PLLC  
11 Front Street South  
Issaquah, WA 98027-3820

APPLICANT: Lingering Pine Investments, LLC  
ATTN: Jerry Walker  
4205 148<sup>th</sup> Avenue NE, Suite 200  
Bellevue, WA 98007-7114

TYPE OF CASE: Appeal from approval of a Reasonable Use Exception

EXAMINER DECISION: REMAND

DATE OF DECISION: September 29, 2020

INTRODUCTION <sup>1</sup>

Rupesh Khendry (“Khendry”) appeals from the approval by the City of Sammamish Department of Community Development (“Department”) of the Lingering Pine Investments, LLC (“LPI”<sup>2</sup>) Reasonable Use Exception (“RUE”) application. (Exhibit 12<sup>3</sup>)

Khendry filed the subject appeal on June 18, 2020. (Exhibit 9001) The appeal was timely filed in accordance with Sammamish Municipal Code (“SMC”) 20.10.080(1).

<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.  
<sup>2</sup> LPI is referred to in many record documents as “Walker,” the last name of LPI’s agent, Jerry Walker. (Exhibit 3.1)  
<sup>3</sup> Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

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The subject property is located at 4XX 211<sup>th</sup> Avenue NE, immediately east of 446 211<sup>th</sup> Avenue NE. Its Assessor's Parcel Number is 856290-1480-01 ("Parcel 1480"). (Exhibit 3.1, PDF p. 2)

Applicant LPI filed a Motion to Dismiss (the "Motion") on July 8, 2020. (Exhibit 9004) The Motion sought dismissal of appeal Issue 1, a challenge to LPI's right to use an easement across Khendry's property to access Parcel 1480. After considering the Motion and responses thereto (Exhibits 9006; 9007), the Examiner issued an Interlocutory Order on July 21, 2020, granting the Motion. (Exhibit 9008) The Interlocutory Order is incorporated herein by reference as if set forth in full.

The Examiner convened a remote open record hearing on August 12, 2020. The hearing was conducted remotely using the "GoToMeeting" program due to assembly restrictions attendant to the current COVID-19 pandemic. The City gave notice of the hearing as required by SMC 20.10.180(2). (Exhibit 17) At the prior request of Appellant Khendry, who found that he would be unable to attend that hearing, the hearing was continued to September 9, 2020, prior to submittal of any evidence or receipt of any testimony. (Exhibit 9009) The Examiner reconvened, took testimony and evidence, and concluded the remote hearing on September 9, 2020.<sup>4</sup>

Pursuant to City of Sammamish Hearing Examiner Rule of Procedure (RoP) 224(c), the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: Appeal, filed on or about June 18, 2020
- Exhibit 9002: Letter, Examiner to Principal Parties, July 1, 2020 (Scheduling guidance)
- Exhibit 9003: E-mail, Examiner to Principal Parties, July 7, 2020 (Setting hearing date)
- Exhibit 9004: [LPI]'s Motion to Dismiss, filed July 8, 2020<sup>5</sup>
- Exhibit 9004.1: King County Superior Court Order Granting Plaintiff's Motion for Summary Judgment, Case No. 18-2-08059-2 SEA, August 17, 2018
- Exhibit 9004.2: LPI v. Khendry, Unpublished Court of Appeals Opinion, No. 78962-7-1, November 12, 2019
- Exhibit 9004.3: Supreme Court of Washington, Order denying a petition for review, No. 97966-9, April 1, 2020
- Exhibit 9005: E-mail, Examiner to Principal Parties, July 8, 2020 (Setting period for responses to Motion)
- Exhibit 9006: City of Sammamish's Response to Applicant's Motion to Dismiss, filed July 20, 2020
- Exhibit 9007: Appellant's Response to Motion for Partial Dismissal, filed July 20, 2020
- Exhibit 9007.1: LPI v. Khendry, Unpublished Court of Appeals Opinion, No. 78962-7-1, November 12, 2019
- Exhibit 9007.2: Copies of five (5) recorded documents affecting the Khendry property

<sup>4</sup> Written notice of the hearing continuance was not required since the continuance was announced during the initial hearing and was to a date, time and manner certain.

<sup>5</sup> LPI incorrectly titled the Motion as "Respondent's" Motion. The Department, not LPI, is the Respondent. LPI is the Applicant for the underlying RUE.

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- Exhibit 9008: Interlocutory Order of Partial Summary Dismissal, July 21, 2020
- Exhibit 9009: E-mails, August 4 – 6, 2020 (procedure for continuing the originally scheduled hearing)
- Exhibit 9010: Public comment from Mary Wictor, filed September 9, 2020

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 - 17 and provided an index listing of those exhibits. In addition, Respondent Department pre-filed a Pre-Hearing Brief marked by the Examiner as Exhibit 18. There was no objection to entry of Exhibits 1 - 18. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted an additional exhibit during the hearing from the Department as follows:

Exhibit 19: Excerpt from a City Erosion and Landslide Hazard Area delineation map

Pursuant to RoP 224(e), Appellant Khendry pre-filed Exhibits 1001 - 1005 and provided an index listing of those exhibits. There was no objection to entry of Exhibits 1001 - 1005. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted an additional exhibit during the hearing from Appellant Khendry as follows:

Exhibit 1006: "Comparables" map and data table

Applicant LPI did not pre-file any exhibits nor did it enter any exhibits during the hearing.

The principal parties (Appellant, Respondent, and Applicant) agreed to use a post-hearing written closing statement process and agreed to a schedule for that process. Applicant LPI did not file a closing statement. The other parties' closing statements are entered as follows:

Exhibit 20: City of Sammamish's Closing Brief, submitted September 21, 2020

Exhibit 1007: Khendry Closing Brief, submitted September 25, 2020

The record closed with receipt of Exhibit 1007 on September 25, 2020.

The City Clerk has the record copy of all exhibit index lists and exhibits.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

## FINDINGS OF FACT

1. On September 25, 2018, LPI filed an RUE application seeking relief from landslide hazard area regulations in Chapter 21A.50 SMC to allow construction of a single-family residence on Parcel

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1480. (Exhibits 3.1; 3.3) On May 15, 2020, after reviewing studies and materials submitted by LPI and considering review comments from the public, the Department approved the requested RUE subject to 11 conditions. (Exhibit 12) Khendry, the owner of the property immediately west of Parcel 1480 (the “Khendry Lot” or “Lot 17”), filed a timely appeal. (Exhibit 9001)

2. The Khendry appeal raised five issues:

- 1) No evidence that [LPI] has access rights for easement over [Khendry] property
- 2) Criterion compliance (1) – Waiver of setback to under 15 ft [*sic*] in critical area
- 3) Evidence of soil erosion near boundary line recently poses great risk
- 4) Incorrect assumption in criterion compliance that there is no other reasonable use
- 5) Incorrect assumption that devt [*sic*] does not pose unreasonable threat to safety

(Exhibit 9001, PDF p. 1) As noted in the Introduction, above, the Examiner dismissed Issue 1. (Exhibit 9008)

3. Parcel 1480 was created in its present configuration in 2006 through a Boundary Line Adjustment (“BLA”). The BLA depicted an “easement for ingress, egress, & utilities” over the south 20 feet of Lot 17, connecting Parcel 1480 to 211<sup>th</sup> Avenue NE to the west. Construction of a residence on Lot 17 began in 2007. Khendry purchased Lot 17 in 2013. Litigation ensued over LPI’s right to access Parcel 1480 via the easement over Lot 17 in which Khendry argued that LPI had no right to cross Lot 17 for access to Parcel 1480. The Superior Court and the Court of Appeals ruled against Khendry; the Supreme Court denied a petition for review. (Exhibits 9004.2; 9004.3)
4. Parcel 1480 is an undeveloped, 17,979 square foot (“SF”), wooded lot zoned R-4, exhibiting steep down-slopes toward the northeast over most of the lot. The elevation change across Parcel 1480 from the high point at its southwest corner to the low point at its northern tip is about 118 feet. (Exhibits 3.1; 3.3; 5)
5. “Areas with a slope of 40 percent or steeper and with a vertical relief of 10 or more feet except areas composed of consolidated rock” are included in the definition of Landslide Hazard Areas. [SMC 21A.15.680(4)] The City’s critical areas regulations bar virtually all development within a Landslide Hazard Area and a required buffer (typically 50 feet wide at the top and toe of the steep slope). The only activities allowed within such areas are certain surface water conveyances, public and private trails, utility corridors, limited trimming/pruning of vegetation, slope stabilization in certain limited circumstances, and reconstruction/repair of existing structures. [SMC 21A.50.680(4)]

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6. The record contains excerpts from general City maps indicating that all but a small area in the southwest corner of Parcel 1480 exhibits slopes of 40% or more and is, thus, considered a Landslide Hazard Area.<sup>6</sup> (Exhibits 12, PDF p. 4; 19) Exhibit 3.3, prepared by a licensed land surveyor, depicts the topography of Parcel 1480 at 2-foot contour intervals, but it does not indicate the top or toe of the 40% or greater slope area.<sup>7</sup>

Using Exhibit 5, the Examiner has determined that most of Parcel 1480 contains slopes in excess of 40%, that the toe of the 40% or greater slope area lies off-site to the northeast, and that the top of the 40% or greater slope is roughly coterminous with the 436 – 440 elevation contours in the southwest corner of Parcel 1480.<sup>8</sup> The portion of Parcel 1480 which does not exhibit slopes of 40% or more consists of an irregular area in the southwest corner of the lot that is roughly 50 feet by 20 feet. A standard 50-foot top of slope buffer would encumber the remainder of the property outside the 40% slope area. (Exhibit 5)

7. LPI retained The Riley Group, Inc. (“Riley”), a geotechnical engineering company, to study the site’s geology. No site plan was available in May, 2018 when Riley prepared its report. Riley reported that Parcel 1480’s geological structure consists of three to four feet of weathered glacial till overlying dense, consolidated, unweathered glacial till.<sup>9</sup> The site is not underlain by consolidated rock. The potential for liquefaction of the site’s soils is minimal. Riley found some evidence of shallow, surficial soil creep in the weathered till on the steep slope, but no evidence of any recent, large-scale slope movement. Riley concluded that given the glacial till composition of the site, the slope is stable against deep-seated failures. (Exhibit 1)

The City hired Robinson Noble, Inc. (“Robinson Noble”), a consulting engineering firm, to peer review Riley’s work. Robinson Noble reviewed Riley’s report and conducted its own field inspection. Robinson Noble generally concurred with Riley. Robinson Noble raised some concerns about foundation construction and stormwater control, but concluded that the proposed residence could be safely constructed on Parcel 1480 if its concerns were adequately addressed. Robinson Noble did not consider placement of any fill in its analysis. (Exhibit 8; and testimony)

8. The soils on Parcel 1480 are classified as Alderwood and Kitsap, very steep. “These soils are characterized by rapid to very rapid runoff, a severe to very severe erosion hazard, and severe slippage potential.” (Exhibit 1, PDF p. 9, § 4.6.1) Alderwood and Kitsap soils are among the eight soil classifications which are considered Erosion Hazard Areas when they occur on slopes of 15% or greater. [SMC 21A.15.415] The entirety of Parcel 1480 is classified as an Erosion Hazard Area except for a triangular area in the southwest corner encompassing about 300 SF. (Exhibit 5, PDF p. 2)

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<sup>6</sup> The regional context in which Parcel 1480’s steep slopes exist is clearly depicted in Exhibit 7 at page 41.

<sup>7</sup> The required critical area study should have included a delineation of the landslide hazard area and its required buffer. [SMC 21A.50.130]

<sup>8</sup> The Examiner has a Master’s degree in Geography and has worked as a professional cartographer.

<sup>9</sup> Unweathered glacial till is often called “hard pan” by laypersons. [Official notice]

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9. Unlike Landslide Hazard Areas, Erosion Hazard Areas are not subject to use prohibitions. Rather, the SMC sets out a series of regulations applicable to construction within such areas that are designed to eliminate or minimize the erosive potential of the area's soils. [SMC 21A.50.220] LPI is not seeking relief from any Erosion Hazard Area requirements.
10. All of Parcel 1480 except a band along the western half of the south property line tapering from about 25 feet wide to zero feet wide is within a Class 3 Critical Aquifer Recharge Area ("CARA"). (Exhibits 1, PDF p. 10; 5, PDF p. 2) CARAs are those parts of the City which recharge water tables providing potable drinking water. [SMC 21A.15.253] Land development activities within a designated CARA are required to infiltrate stormwater runoff whenever possible and protect ground water quality during and after construction. Certain named hazardous uses are prohibited in Class 3 CARAs. Single-family residences are not among the prohibited uses. [SMC 21A.50.280] LPI is not seeking relief from any CARA requirements.
11. LPI proposes to construct a two-story plus daylight basement, single-family residence with attached garage on the western portion of Parcel 1480. The structure's footprint would cover 1,684 SF; the square footage of the daylight basement and second story are not listed. An elevated deck off the east side of the main floor would cover 192 SF. 2,934 SF, which may include the 10-foot wide driveway crossing Lot 17, would be devoted to vehicular uses. Much of that area would be paved with permeable pavement. The proposal would create 1,876 SF of impervious surface on Parcel 1480. (Exhibit 5, PDF p. 1)

The proffered development plan depicts a basement floor that would vary from 7 feet below existing grade at the south west corner of the structure to 11 feet above existing grade at the northeast corner of the structure. The garage floor would vary from 6 feet above existing grade at the southeast corner of the garage to 19 feet above existing grade at the northwest corner of the garage. (Exhibit 5, PDF p. 1)

A wall retaining fill would span the distance between the south wall of the residence and the south property line. That wall would vary from 10 feet above existing grade at the structure's foundation to 7 feet above existing grade at the south property line. The wall would extend westerly along the south property line for about 15 feet, tapering to grade level at its western end. A similar wall would extend from the west side of the garage westerly towards the west property line. That wall would be 12 feet above existing grade at the garage and 8 feet above grade at its western end. That wall would then turn south for about an 8-foot run, reducing in height to 2 feet. There would thus be substantial fill between the residence and the southwest corner of Parcel 1480. (Exhibit 5, PDF p. 1)

12. The Khendry Lot would appear to have been substantially graded at some time in the past, most likely when the house on the lot was being constructed in the mid-2000s. Most of the easement area along the south edge of the lot slopes gently upwards toward the east (toward Parcel 1480). The Khendry Lot was flattened in the north-south direction by cutting into a moderate slope descending

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from the south. A block retaining wall was placed on or very near the south line of the Khendry Lot along the resulting cut bank. The blocks appear to be standard retaining wall blocks which are typically about 8” high. Assuming that to be true, the retaining wall appears to be between 3 to 4 feet high. (Exhibit 1003) In addition, it would appear that the natural slope along at least a portion of the eastern edge of the Khendry Lot was at least partially filled to increase the “level” area of the lot, creating an over-steepened bank along the east edge of Lot 17 just north of the 20-foot wide access easement. (Exhibits 3.3<sup>10</sup>; 3.8)

13. A fence was erected more or less along the top edge of the over-steepened slope within Lot 17.<sup>11</sup> Khendry submitted three photographs of shallow surface slippage, apparently taken in the area of the over-steepened slope near the fence. (Exhibit 13, PDF pp. 3 – 5; and testimony)
14. The abutting property to the south of both the Khendry Lot and Parcel 1480 is owned by Lovely. (Exhibit 7, PDF p. 17) The Lovely residence is roughly five feet south of and parallel with the south line of Lot 17 and located just southwest of the southwest corner of Parcel 1480. (Exhibits 3.3; 1003) The steep slopes that encumber most of Parcel 1480 also encumber some of the eastern part of the Lovely property. (Exhibit 7, PDF p. 41)

When Lovely was seeking permits to expand her house, she was required to have a geotechnical report prepared. “Because of the potential for shallow surface failures within the lower strength near-surface soil horizon, [Lovely’s consultant, Associated Earth Sciences, Inc. (“AES”)] recommend[ed] a minimum foundation setback of 30 feet from the top of the steep slope assuming the foundation for the addition is placed on undisturbed Vashon lodgement till sediments.” (Exhibits 7, PDF pp. 16 – 18, quote from PDF p. 18; 1002; and testimony)

15. LPI proposes to collect stormwater runoff from impervious surfaces, convey it to a detention pipe beneath the vehicular use area in the southwest corner of Parcel 1480, and then pipe it to a stormwater pipe to be located within easements on property to the north which would convey the runoff in a pipe down the steep slope to an existing drainage system at the base of the slope.<sup>12</sup> No stormwater runoff is proposed to be discharged onto the face of the steep slope. (Exhibits 3.6; 3.10; 3.11; 3.13)

The City has adopted stormwater regulations with which any development in the City must comply. Those regulations are contained in Title 13 SMC, not in Chapter 21A.50 SMC. LPI is not seeking any relief from those regulations.

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<sup>10</sup> The exceedingly steep slope extending northwesterly from the east line of the Khendry Lot in a straight line is evidence of a manmade fill: It is far steeper than any portion of the undisturbed slope on Parcel 1480, its “straightness” is not natural, and its orientation is inconsistent with the natural slope in the area. (Exhibit 3.3)

<sup>11</sup> The fence is visible in Exhibit 1003 and is mapped on Exhibit 3.3.

<sup>12</sup> That pipe may not yet have been constructed. (Exhibit 34.15, PDF p. 5) The City has advised LPI that all stormwater runoff must be tightlined to the base of the steep slope. (Exhibit 2, PDF p. 8)

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16. Khendry believes, without any professionally produced evidence to support his belief, that the small areas of surficial erosion that he sees on his property are an indication of significant instability of the entire steep slope. Khendry further argues that the proposed residence is not the minimum necessary to avoid a “takings” claim by LPI. (Exhibit 9001; and testimony)

Khendry also objects to the proximity of the proposed driveway to his residence. The residence is about 4 feet north of the north line of the easement. The proposed driveway is depicted as 10-foot wide and, according to Exhibit 5, would be between approximately 2 – 3 feet south of the easement edge. Thus, it would be approximately 6 - 7 feet south of the Khendry residence. (Exhibits 5; 9001; and testimony)

17. Several neighboring property owners submitted comments to the Department during its review of the LPI RUE application. Many of those comments raised issues not within the scope of this appeal. Others echoed Khendry’s concern about the stability of the steep slope. (Exhibits 7; 9010)
18. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

### LEGAL FRAMEWORK <sup>13</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

#### Authority

A Reasonable Use Exception is a Type 2 land use application. [SMC 20.05.020, Exhibit A] An appeal from the Department’s action on a Type 2 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.05.020, 20.10.240, 20.10.250, and 20.10.260]

The Examiner’s decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the Examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.

[SMC 20.10.070(2)]

#### Review Criteria

Section 20.10.200 SMC sets forth requirements applicable to all Examiner Decisions:

<sup>13</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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When the examiner renders a decision . . . , he or she shall make and enter findings of fact and conclusions from the record that support the decision, said findings and conclusions shall set forth and demonstrate the manner in which the decision . . . is consistent with, carries out, and helps implement applicable state laws and regulations and the regulations, policies, objectives, and goals of the interim comprehensive plan, the development code, and other official laws, policies, and objectives of the City of Sammamish, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public.

The review criteria for an RUE application are set forth at SMC 21A.50.070(2):

(2) Reasonable Use Exception. If the application of this chapter would deny all reasonable use of the property, the applicant may apply for an exception pursuant to this subsection:

(a) The director may approve alterations to critical areas, critical area buffers and setbacks to allow a reasonable use not otherwise allowed by this chapter when the following criteria are met:

(i) The application of this chapter would deny all reasonable use of the property;  
(ii) There is no other reasonable use with less impact on the critical area;  
(iii) The proposed development does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site and is consistent with the general purposes of this chapter and the public interest; and

(iv) Any alterations permitted to the critical area or buffer shall be the minimum necessary to allow for reasonable use of the property; and any authorized alteration of a critical area under this subsection shall be subject to conditions established by the department including, but not limited to, mitigation under an approved mitigation plan.

Vested Rights

Sammamish has enacted a vested rights provision.

Applications for Type 1, 2, 3 and 4 land use decisions, except those that seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[SMC 20.05.070(1)] An RUE application, by definition, seeks exception to adopted land use regulations. Therefore, the RUE application involved in this appeal has no vested rights.

Standard of Review

The standard of review is preponderance of the evidence. The appellant has the burden of proof. [RoP 316(a)]

### Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

## CONCLUSIONS OF LAW

1. The term “Reasonable use” means a legal concept articulated by federal and state courts in regulatory taking cases.” [21A.15.950]

Both the federal and Washington State constitutions provide that the government may not take private property unless it is for a public use and just compensation is paid. Just compensation is considered to be the fair market value of the property at the time of the taking. A government may "take" property in two basic ways:

1. By physically appropriating the property, such as for a right-of-way.
2. By regulating or limiting the use of property under the government's police power authority in such a way as to destroy one or more of the fundamental attributes of ownership (the right to possess, exclude others, and to dispose of property), deny all reasonable economic use of the property, or require the property owner to provide a public benefit rather than addressing some public impact caused by a proposed use.

[Municipal Research Service Center, “Regulatory Takings,” at <http://mrsc.org/Home/Explore-Topics/Legal/Planning/Regulatory-Takings.aspx>, last viewed September 21, 2020, emphasis added] The RUE process is included in municipal regulations to ensure that a “regulatory taking” of private property does not result from enforcement of local regulations. Essentially, the RUE process provides a means to relax a regulation to the extent necessary to allow a reasonable economic use of a parcel that would otherwise be unbuildable because of the regulations, thus avoiding a regulatory taking. It is the very nature of an RUE that the standard regulations will be relaxed to the extent necessary to allow a reasonable economic use of a parcel.

2. Khendry succinctly summarizes in his Closing Brief his view of the Department’s approach to the processing of LPI’s RUE application:

The [Department] ... largely bypassed the latter three [RUE] criteria .... Instead, it argues that the issues raised in these criteria may be deferred until a building permit application is filed. ... Under the [Department’s] approach, once the first criterion is met (i.e., application of the critical areas requirements “would deny all reasonable use of the property”), the other three criteria are immaterial because the issues they raise

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can be dealt with in connection with the building permit. But if that were the case, the City Council would have had no need to adopt the three latter criteria. They would be without meaning.

(Exhibit 1007, unnumbered p. 1) The Examiner agrees in part and disagrees in part with that assessment.

3. In its Closing Brief the City argues that “the RUE process is only designed to reduce the buffers and setbacks to critical areas, not to approve a specific site design.” (Exhibit 20, p. 6, ll.15 &16; see also p. 8, ll. 7 & 8) The Examiner disagrees. RUE Criteria (2)(a)(i) and (2)(a)(ii) are independent of specific design. They address the extent of critical area restrictions affecting a particular site and the type of use proposed. A specific site plan is not required to analyze compliance with those two criteria.

However, it is impossible to determine if a use will be injurious to surrounding properties without having a specifically designed use to consider (Criterion (2)(a)(iii)); it is equally impossible to determine if alteration of the critical area will be the minimum necessary to afford a reasonable use without having a specifically sized use to consider (Criterion (2)(a)(iv)). The Department may not defer consideration of RUE Criteria (2)(a)(iii) and (iv) to the building permit stage of review.

4. LPI did not request a dimensional reduction of the required buffer or a specific amount of allowance for intrusion onto the steep slope. In fact, it could not do that since virtually the entire site is encumbered by steep slopes. Rather, LPI asked for permission to build a residence in a specific location with a specific footprint and specific associated retaining walls and fill. The submitted plan is all we have to evaluate. By approving the RUE as submitted, the Department effectively approved the submitted site plan.

But that plan does not demonstrate that it is “the minimum [slope disturbance] necessary to allow for reasonable use of the property”. The proffered plan depicts substantial fill and leaves unanswered how a basement floor and a garage floor can be between 12 and 19 feet above existing grade: Either more fill than that behind the retaining walls will be required or piles will be required to support the structure. The stability of the site cannot be adequately assessed without at least knowing which construction technique is contemplated.

5. The Erosion Hazard Area and CARA designations are not impediments to potential development of Parcel 1480 and/or the easement across Lot 17. Those two designations impose development requirements. Other than prohibiting certain named hazardous uses in Class 3 CARAs, they do not prohibit development – they regulate development. LPI is not seeking relief from any critical areas requirements associated with those designations. Therefore, they need not and will not be addressed further because whatever is developed on Parcel 1480 and/or the easement across Lot 17 will have to comply with their requirements.

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6. Khendry's concern about drainage associated with the proposed driveway in the easement across his property is a concern about compliance with stormwater runoff regulations. Those regulations are not contained within Chapter 21A.50 SMC. The RUE provisions in Chapter 21A.50 SMC have no bearing on stormwater control regulations. All development on Parcel 1480 and/or the easement across Lot 17 must comply with adopted stormwater regulations. Therefore, Khendry's concern about runoff within the easement need not and will not be addressed further because whatever is developed on Parcel 1480 and/or the easement across Lot 17 will have to comply with stormwater control requirements.
7. The LPI RUE seeks relief from the Landslide Hazard Area requirements of the SMC. Before undertaking that analysis it is worth noting that there is often a difference between what can be safely undertaken on a site from a geotechnical perspective and what is allowed under local regulations.<sup>14</sup> Sammamish's regulations hold that any slope, not composed of consolidated rock, that exhibits 40% or greater slope over a vertical relief of at least 10 feet is, by definition, a Landslide Hazard Area. Sammamish's regulations then provide that virtually nothing of consequence may occur within a Landslide Hazard Area and its required buffer. That is a policy statement about the amount of physical disturbance of steeply sloping areas that the City is generally willing to allow. That policy statement does not mean that every slope of 40% or greater having a vertical relief of at least 10 feet is actually prone to landslides.
8. The Department correctly concluded that Parcel 1480 meets RUE Criterion (2)(a)(i). The entire site is encumbered by a Landslide Hazard Area or its required buffer as defined in the SMC: The site is not underlain by consolidated rock and its slope exceeds 40% with a vertical relief far in excess of 10 feet. If the Landslide Hazard Area restrictions within Chapter 21A.50 SMC were enforced, no reasonable use at all could be made of Parcel 1480. (See Finding of Fact 5, above, for the list of uses permitted within Landslide Hazard Areas.)
9. The Department correctly concluded that Parcel 1480 meets RUE Criterion (2)(a)(ii).<sup>15</sup> There are very few uses allowed within a Landslide Hazard Area, regardless of the underlying zoning. The uses allowed in a Landslide Hazard Area have been summarized in Finding of Fact 5, above. None of those uses have economic value to a private property owner.

If one looks to the R-4 zone for potential alternative uses that might have a lesser impact on the steep slopes than would a single-family residence and which could be allowed under an RUE, one doesn't find anything with a potentially lesser impact that would be a reasonable economic use to a private land owner. Other permitted uses in the R-4 zone include duplexes, townhomes, apartments, bed & breakfast guesthouses, golf facilities, libraries, museums, conference centers, cemeteries, day care facilities, churches, social service facilities, artist studios, health clinics, K-12 schools, school district support facilities, public buildings (offices, yards, etc.), farmers' markets, agricultural product and

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<sup>14</sup> The Examiner has frequently heard it said that an engineer can show you how to safely build almost anything almost anywhere if you are willing to spend enough money.

<sup>15</sup> This criterion addresses the type of use, not the size of use. Criterion (2)(a)(iv) addresses the size of the proposed use.

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livestock sales, farming (including livestock raising), and forest products growing and harvesting.<sup>16</sup> [Chapter 21A.20 SMC] All of those uses would require as least as big a footprint as would a single family residence. And, as the City points out in its Closing Brief, most would require a larger parking area. (Exhibit 20, p. 4)

As a practical matter, there is no permitted use in the R-4 zone that could reasonably be expected to have a lesser impact on the steep slopes than an appropriately sized single-family residence.

10. The Department prematurely concluded that Parcel 1480 meets RUE Criterion (2)(a)(iii). Khendry's assertion that the steep slope is inherently dangerous and landslide prone is not supported by any evidence in the record. Khendry produced no evidence from a professional geologist to support his assertion. All three geologists whose work is included in the record<sup>17</sup> agree that the slope is subject to surficial sloughing, but not subject to deep-seated failures. The material that is sloughing is the top 3 – 4 feet of weathered till overlying the very dense glacial till. On the other hand, Robinson Noble stated that the site's "soils are characterized by rapid to very rapid runoff, a severe to very severe erosion hazard, and severe slippage potential." (Exhibit 1, PDF p. 9, § 4.6.1)

While there simply is no credible evidence that the dense glacial till is unstable<sup>18</sup>, there is also no indication of the true amount of slope disturbance that would be associated with the proposed building footprint. The depicted proposal envisions a basement floor (not an upper floor, but a basement floor) which would be as much as 12 feet above existing grade on the down-slope side; it proposes a garage floor (not roof) which would be as much as 19 feet above existing grade; it relies on retaining walls holding back up to 12 feet of fill south and west of the building. (Exhibit 5) Will the basement and garage floors be elevated slabs founded on drilled piles or massive fills retained by tall concrete walls? How will the structure affect the slippage potential of the slope? Questions such as those are critical to a favorable conclusion on RUE Criterion (2)(a)(iii). Evaluation of a specific concept must occur before any conclusion regarding the effect of the proposal on neighboring properties can be reached. That evaluation is required before an RUE decision is issued. That evaluation is not present in this record.<sup>19</sup>

11. The Department incorrectly concluded that Parcel 1480 meets RUE Criterion (2)(a)(iv). Compliance with this criterion requires that the disturbance of the steep slope be the minimum required to provide a reasonable economic use. LPI's proposal (Exhibit 5) has a large footprint that would seem

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<sup>16</sup> The Examiner has omitted from the list uses that clearly would produce no economic return to a private land owner such as trails.

<sup>17</sup> Riley (LPIs geologist), Robinson Noble (the City's peer review geologist), and AES (the geologist who studied Lovely's property).

<sup>18</sup> The three pictures presented by Khendry show shallow sloughing of loose material within the top foot or so of the surface. Further, it appears that those pictures were taken on the over-steepened fill slope created by the developer of the Khendry Lot when the lot was "leveled" preparatory to building what is now the Khendry residence.

<sup>19</sup> This does not mean that detailed, structural plans must be prepared at this stage of project review. But it does mean that structural concepts must be evaluated sufficiently to allow a well founded response to the criteria for RUE approval.

to require significant alteration within the building area. That does not necessarily represent a minimum impact to the steep slope.

LPI presented data purporting to show that its proposed residence would be of comparable size to other residences in the surrounding area. (Exhibit 3.10) But there is a fundamental flaw with LPI's data: It reports "AGLA," an acronym used by the King County Assessor for "Above Ground Living Area." King County defines AGLA as "The living area in a house not including the basement." [<https://blue.kingcounty.com/Assessor/eRealProperty/ResidentialGlossary.aspx?Parcel=8562901-590&AreaReport=http://www.KingCounty.gov/depts/Assessor/Reports/areareports/2020/residentialnorth-east/035.aspx>, last visited September 25, 2020] AGLA includes the living area of all floors except the basement, but does not include the area of an attached garage.<sup>20</sup> The only situation in which AGLA would equal the building footprint area would be a one-story residence without attached garage. But LPI is proposing a multi-story residence with attached garage (and since LPI has provided only a ground coverage site plan, one cannot know how large the upper floor would be). The AGLA figures for neighboring properties provided by LPI cannot be compared with the building footprint data on Exhibit 5 as the latter shows only building footprint, not AGLA.<sup>21</sup> This is a classic case of comparing apples with oranges.

Even if AGLA data were available for LPI's proposal, and if that data showed that LPI's proposed residence had an AGLA comparable to that of surrounding residences, that would not be proof that the proposal constituted the minimum disturbance of the steep slope area required to achieve a reasonable economic use of Parcel 1480. Just because a house of  $x$  SF has been built on one lot in the neighborhood does not mean that a house of  $x$  SF would constitute the minimum disturbance of the steep slope area required to achieve a reasonable economic use of Parcel 1480. The characteristics of the individual lots must be considered. The building footprint and associated site disturbance must be minimized to the greatest extent reasonably possible while still providing a reasonable economic use. And mitigation for slope disturbance is expected.

12. Lovely and Khendry question why Lovely had to maintain a 30-foot setback from the top of the steep slope when she expanded her house on the adjoining lot but LPI does not have to on its abutting lot. The answer to that question is clearly depicted in the excerpt from the State Department of Commerce's "Critical Areas Handbook" contained in Wictor's September 9, 2020, submittal. (Exhibit 9010, PDF p. 2) Lovely's lot is like the lots on the left and right in the diagram on that page (labeled in the text as A and D) – it is only partly encumbered by steep slopes and there is non-slope-encumbered building area available. LPI's lot is like the next-to-the-right lot (labeled in the text as C) – it is completely encumbered by steep slopes. Lovely had a large enough area free of steep slopes that she could provide a slope setback while making a reasonable use of her lot. LPI has no area outside of the steep slope and its buffer. What is allowed in LPI's case, as stated in the excerpt,

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<sup>20</sup> The on-line definition does not indicate whether the living area in a daylight basement is included in AGLA.

<sup>21</sup> Khendry submitted his own version of comparative residence size data. His data, too, reports AGLA, not building footprint.

is a “minimal development” accompanied by “mitigation methods.” (Exhibit 9010, PDF p. 2) Unfortunately, that is not what has been proposed.

13. The Department’s approval of LPI’s requested RUE cannot be sustained because the approved plan may not comply with RUE Criterion (2)(a)(iii) and does not comply with RUE Criterion (2)(a)(iv). But reversal of the Department’s decision (which would amount to denial of LPI’s RUE application) is not appropriate either: There is every reason to believe that the proposal can be reduced in scope and design such that it would constitute the minimum necessary to afford a reasonable economic use without jeopardizing the safety of surrounding properties.

The SMC says that the Examiner may approve, approve with conditions, or deny an application or appeal. The concept of remanding an application for correction falls on the continuum of those options. Remand is the appropriate action given the facts in evidence.

14. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

### DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **REMANDS** application RUE2018-00594 for further action consistent with this Decision. Further analysis/action regarding appeal Issue 1 is neither required nor allowed, that issue having been summarily dismissed.

Decision issued September 29, 2020.

  
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John E. Galt  
Hearing Examiner

### HEARING PARTICIPANTS <sup>22</sup>

Rupesh Khendry  
Andrew Johnson  
Mary Wictor  
Jerry Walker, unsworn counsel and witness

Jeff Wale  
Dawn Lovely  
Mike Gillett, unsworn counsel  
Hillary Evans Graber, unsworn counsel

<sup>22</sup> The official Parties of Record register is maintained by the City’s Hearing Clerk.

**NOTICE of RIGHT of RECONSIDERATION**

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, City Clerk, 801 228<sup>th</sup> Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

**NOTICE of RIGHT of JUDICIAL REVIEW**

This Decision is final and conclusive subject to the right of review in Superior Court in accordance with the procedures of Chapter 36.70C RCW, the Land Use Petition Act.. See Chapter 36.70C RCW and SMC 20.10.250 for additional information and requirements regarding judicial review.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."