

**BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH**

DECISION

FILE NUMBER: SVAR2015-00209 and ZONV2015-00208

APPLICANTS: Daniel and Marisa Ogren
23047 NE 19th Drive
Sammamish, WA 98074

TYPE OF CASE: Consolidated: 1) Shoreline Management Act Variance to reduce shoreline setback from 50 feet minimum to not less than 20 feet and to reduce tree replacement standards; and 2) Zoning variance to reduce street setback from 10 feet minimum to not less than one (1) foot

STAFF RECOMMENDATION: Approve both applications subject to conditions

EXAMINER DECISION: GRANT both applications subject to conditions

DATE OF DECISION: March 13, 2017

INTRODUCTION ¹

Daniel and Marisa Ogren (“Ogren” ²) seek approval of a Shoreline Management Act Variance (“Shoreline Variance”) to reduce shoreline setback from 50 feet minimum to not less than 20 feet and to reduce tree replacement standards, and a zoning code variance to reduce street setback from 10 feet minimum to not less than one (1) foot.

Ogren filed a Land Use Application for both requests on August 20, 2015. (Exhibits 2; 4 ³) The Sammamish Department of Community Development (the “Department”) deemed the application to be complete when filed. (Exhibit 3)

The subject property is located along the Lake Sammamish shoreline in approximately the 3200 block of East Lake Sammamish Parkway NE (“Parkway”).

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² For simplicity, the applicants will be referred to in the singular: “Ogren”. No disrespect to either applicant is intended.
³ 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. 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 Sammamish Hearing Examiner ("Examiner") viewed the subject property on March 2, 2017.

The Examiner held an open record hearing on March 2, 2017. The Department gave notice of the hearing as required by the Sammamish Municipal Code ("SMC"). (Exhibit 17)

Subsection 20.05.100(1) SMC requires that decisions on most land use applications, including those in this case, be issued within 120 net review days after the application is found to be complete. Because of issues associated with staff turnover during the processing of the Ogren application, the Department cannot say for sure how many net review days had passed before the open record hearing was held. (Testimony) The SMC provides two potential remedies for an untimely decision: A time extension mutually agreed upon by the City and the applicant [SMC 20.05.100(2)] or written notice from the Department explaining why the deadline was not met [SMC 20.05.100(4)]. Ogren chose to extend the deadline. (Testimony)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 17: As enumerated in Exhibit 1, the Departmental Staff Report
- Exhibit 18: E-mail string, Purcell – Pyle, January 26 – February 22, 2017, submitted March 2, 2017
- Exhibit 19: Letter, King County Division of Parks and Recreation, February 27, 2017, submitted March 2, 2017
- Exhibit 20: 27 photographs taken by Ryan Harriman on February 9, 2017 (Exhibits 20.1 – 20.27), submitted March 2, 2017
- Exhibit 21.1: Hearing statement, Vincent Mendillo, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.2: Notice of Application, Paul Shoreline and Zoning Variances, October 31, 2016; Real estate advertisement for Paul property, undated; Notice of Public Hearing, Baerwald Shoreline and Zoning Variances, January 20, 2017; Notice of Application, Chan Shoreline and Zoning Variances, January 12, 2017; all submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.3: King County Assessor parcel printouts for Parcels 202506-9073, 202506-9042, and 202506-9030, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.4: Excerpts (Figure 3-2c and pp. 3-30, 4-3, 4-5, and 4-6) from Revised Critical Areas Study, East Lake Sammamish Master Plan Trail – North Sammamish Segment, King County, July 2013, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.5: Pre-application Conference application, Parcels 2025069071 and 2025069085, Applicant: Nelson/Bergsma, undated, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.6: Pre-Application Conference Notes, Parcel 2025069071, Applicant: Nelson/Bergsma, dated December 5, 2014, submitted by Mendillo/Purcell on March 2, 2017

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- Exhibit 21.7: Pre-Application Conference application and supporting materials, Parcel 202506-9085, Applicant: Nelson/Anwar, dated 3-13-14, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.8: One page of annotated photographs, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.9: Project Details, PRA2014-00257, as of 11/9/2015, Parcels 2025069071 and 2025069085, Applicant Nelson/Bergsma, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.10: Project Details, PRA2014-00058, as of 4/14/2016, Parcel 2025069071, Applicant: Nelson/Anwar, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.11: Pre-Application Conference Notes, Parcel 2025069085, Applicant: Nelson/Anwar, March 31, 2014, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.12: Duplicate of Exhibit 21.6, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.13: Duplicate of Exhibit 21.9, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.14: Pre-Application Conference Notes – PRA2008-00019, Applicant: Fischietto-Senigor, Parcel 2025069071, February 6, 2008, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.15: Letter, Garwood to Booth, re: SVAR2015-00209 and ZONV2015-00208, October 7, 2015 (includes seven pages of attachments), submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.16: Three pages of annotated photographs and a map, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 21.17: Pre-application Conference packet; ⁴ Applicant: Nelson/Hughes Estate, Parcels 2025069038, 2025069085, 2025069071; undated ⁵; submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 22: ⁶ King County GIS Center map showing parcel numbers and street addresses in the vicinity of the Ogren parcel, submitted by Mendillo/Purcell on March 2, 2017
- Exhibit 23: Environmentally Sensitive Areas: Geologic hazards, Figure 3.1-9, data plotted date 02/03 (a City of Sammamish map), submitted by Mendillo/Purcell on March 2, 2017

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.

⁴ The packet contains eight pages including handwritten notes (author unknown), an aerial photograph of the area, a photograph apparently showing water flowing through the parcel to the north of the Ogren parcel, a figure from the East Lake Sammamish Trail Draft, and a three-page e-mail string between April 8, 2011 and June 26, 2012.

⁵ Presumptively prior to 2007 – 2008 because the address of City Hall on the form is the old address before the City moved to its current offices in 2007 – 2008.

⁶ Exhibits 22 and 23 were submitted by Mendillo/Purcell during their testimony. Unfortunately they were "lost in the shuffle" when the Examiner entered all the other Mendillo/Purcell documents at the end of their testimony. They were intended to be entered. The Examiner apologizes for the procedural lapse which is herein corrected.

FINDINGS OF FACT

1. Ogren wants to build a single-family residence on King County Assessor's Parcel 202506-9085 ("Parcel 9085"⁷). Parcel 9085 backs up to the east shore of Lake Sammamish and fronts on the west side of King County's East Lake Sammamish Trail ("ELST") right-of-way, which in turn abuts the west side of the Parkway right-of-way. Because Ogren's proposed site plan does not comply with the setback from Lake Sammamish or the tree replacement ratio required under the City's adopted Shoreline Master Program ("SMP") regulations nor with the street setback required under the City zoning regulations, Ogren has made application for a variance from each. (Exhibits 2; 5 – 12; 22)
2. Lake Sammamish is a designated Shoreline of Statewide Significance under the SMP. [SMC 25.05.030] The SMP assigns one of two "Environment" designations to all SMP-regulated shorelines within the City: Either Urban Conservancy ("UC") or Shoreline Residential ("SR"). [SMC 25.05.020(1)] Approximately 86% of the City's Lake Sammamish shoreline is designated SR; the remaining 14% is designated UC. The UC designation occurs in three pockets near the north end of the lake. About 40% of the UC-designated shoreline is owned by the City. (Testimony)

The purpose of the urban conservancy environment is to protect and restore relatively undeveloped or unaltered shorelines to maintain open space, floodplains, or habitat, while allowing a variety of compatible uses. This designation shall apply to shorelines that retain important ecological functions, even if partially altered. These shorelines are suitable for low intensity development, uses that are a combination of water-related or water-enjoyment uses, including single-family residential use, or uses that allow substantial numbers of people to enjoy the shoreline.

[SMC 25.05.020(1)(b), emphasis added]

Parcel 9085/Ogren is within a string of 14 contiguous UC-designated parcels along the Lake Sammamish shoreline. Of those 14 parcels, eight are located north of Parcel 9085 and the remaining five are located south of Parcel 9085. The three parcels immediately south of Parcel 9085 each contain a single family residence; the other 11, including Parcel 9085, contain no buildings. Four or five of the parcels to the north are developed as recreational parcels jointly owned by groups of residents whose homes are on the east side of the Parkway. (Exhibit 9, pp. 6 and 7)

Single-family residences are a permitted use in the UC designation. [SMC 25.07.010, Table 25.07.010-1] The single-family residential height limit, side setback requirement, shoreline setback requirement, and vegetation enhancement area ("VEA") requirement are the same for both UC and

⁷ All of the parcels referenced within this Decision have a ten-digit parcel number, the first six digits of which are the same: "202506." In some record documents the first six digits are separated from the last four with a "-" (e.g.: Exhibit 21.3); in other documents there is no separation (e.g.: Exhibit 22). For simplicity, the Examiner will hereinafter refer to individual parcels using only their last four digits and, where appropriate to the context, the name of the owner.

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SR designated areas: 35 feet maximum height, 15% of lot width with minimum side setback of 5 feet, minimum 50 foot shoreline setback, and 15 foot VEA. [SMC 25.06.020(9); 25.07.010, Table 25.07.010-2] The 50 foot shoreline setback may be reduced to 20 feet under certain circumstances for all uses in the SR designation, but only for public uses in the UC designation. [SMC 25.06.020(11)]

“Single-family residential use is a preferred shoreline use and shall be permitted when consistent with this program and the Act, including the goal to ensure no net loss of shoreline ecological functions.” [SMC 25.07.080(1)] The pervious surface requirement for parcels designated UC is essentially 60% of the lot area above the ordinary high water mark (“OHWM”). [SMC 25.07.080(2)(d) ⁸]

Whenever a reduced shoreline setback is allowed along Lake Sammamish, significant trees that must be removed to utilize the reduced setback must be replaced on site at a 2:1 ratio. [SMC 25.06.020(11), Table 25.06.020]

3. Parcel 9085/Ogren is zoned R-4. (Exhibit 1, p. 3, § II.A) Single-family residences are a permitted use in the R-4 zone. [SMC 21A.20.0030] The required “street” setback in the R-4 zone is 10 feet. [SMC 21A.25.030(A)]

All properties between the Parkway and Lake Sammamish from the northern City limit to the southern City limit are zoned R-4, as are most of the upland properties on the east side of the Parkway, including all properties in the vicinity of Parcel 9085/Ogren. [Official notice, Official City zoning map, viewed at <https://www.sammamish.us/attachments/pagecontent/36868/17013.pdf>, last visited March 10, 2017]

4. The lots in the vicinity of Parcel 9085/Ogren which lie between Lake Sammamish and the ELST are, generally speaking, shallow (east to west) and served by private roads which cross the ELST at various points and then extend north – south within the ELST right-of-way to reach the individual lots. (Exhibits 1, p. 4, § II.D; 22)

Such is the case with Parcel 9085/Ogren. An ELST crossing is located immediately east of Parcel 9085 which becomes a gravel road which breaks to the north and south immediately after crossing the trail. That road extends south to serve Parcel 9042/Glover, immediately south of Parcel 9085, and north to serve Parcel 9085, Parcel 9071/Baerwald, immediately north of Parcel 9085, and Parcel 9135/Eagle Shores, immediately north of Parcel 9071. (Exhibits 1, p. 4, § II.D and p. 9, Figure 7; 5; 6, p. 2, Fig. 1 and Appendix A, Fig. 6; 20.2; 22)

⁸ This section of the SMC was amended by the City in 2016 (Ordinance O2016-410). Ordinances which amend the SMP do not become effective until 14 days after approval by the state Department of Ecology (“Ecology”). Ordinance O2016-410 became effective on March 1, 2017. Under the City’s vesting regulations (See Legal Framework, Vested Rights, below.), the amended provisions are applicable in the review of this application because vested rights protections do not extend to variance applications.

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5. Parcel 9085/Ogren is approximately 100 feet wide (measured along the edge of the ELST right-of-way. Its depth from the east property line to the Lake Sammamish OHWM varies from about 43 to about 75 feet. Its upland area is approximately 5,760 square feet ("SF"). Only about 216 SF in the southeast corner of the parcel lies outside the SMP-required 50 foot shoreline setback and 5-foot side setback. Application of the 10-foot zoning setback from the ELST right-of-way would reduce that usable area to about 143 SF, virtually all of which is currently encumbered by the driveway serving Parcel 9042/Glover. (Exhibits 5; 9, p. 4)

Parcel 9085/Ogren is presently undeveloped except for a dilapidated shelter (which intrudes into Parcel 9071/Baerwald along the north edge of the property) and a small fire pit near the shoreline in the southwest corner of the property. The parcel drops about 6 – 8 feet from east to west, with most of the elevation change occurring near the east edge of the parcel. The majority of the parcel lies below the base flood level ("100-year" flood level) of Lake Sammamish. Overstory vegetation consists of a total of 15 trees: fir, madrona, and cottonwood. Two firs and a maple lie immediately east of Parcel 9085 along the edge of the ELST right-of-way. Understory upland vegetation consists of Nootka rose, Himalayan blackberry, thimbleberry, beaked hazelnut, English holly, and English ivy. Vegetation below the OHWM is characterized by willow, hardstem bulrush, and garden loosestrife. (Exhibits 5; 6, pp. 3, 5, and 6)

6. There are no wetlands on Parcel 9085/Ogren. There is a wetland between the east edge of the ELST and the west edge of the Parkway (Wetland 32A). Wetland 32A was delineated and rated as a Category III wetland during the planning for the ELST. Wetland 32A is fed by water flowing from development on the east side of the Parkway which is collected in roadside ditches, passes beneath the Parkway in a culvert, passes northerly through the wetland in a ditch alongside the ELST, flows westerly through a culvert beneath the ELST, and flows westerly across the gravel road in a shallow ditch to enter Parcel 9071/Baerwald near its northeast corner. The water then apparently meanders westerly as unconstrained surface flow across Parcels 9071 and 9135/Eagle Shores before entering Lake Sammamish.⁹ (Exhibits 6, Appendix A; 20; 21.8; 21.16)

⁹ Mendillo/Purcell (See Finding of Fact 10, below.) submitted Exhibit 21.4 for the purpose of proving that the flow from Wetland 32A is a stream. That exhibit consists of Figure 3-2c and four text pages from a 2013 King County Revised Critical Areas Study for the ELST. On Figure 3-2c, Parcel 9085/Ogren is located approximately between ELST Stations 531+50 and 532+50. Table 3-3 on page 3-30 indicates that stream "Unnamed 4" flows within the ELST project area between Stations 535+50 and 542+00, crossing the trail at approximately Station 539+00. That stream is flowing through Wetlands 32B and 32C (not Wetland 32A), both of which are at least 300 feet north of the north edge of Parcel 9085. The trail crossing at Station 539+00 is approximately 650 feet north of Parcel 9085. Figure 3-2c depicts the outlet from the north end of Wetland 32A crossing the ELST at approximate Station 534+00, but Table 3-3 lists no stream at that location. Parcel 9085 is located approximately 150 feet south of the Wetland 32A outlet crossing and about 250 feet south of the nearest segment of Unnamed 4. The nearest stream to the south of Parcel 9085 is 0143F which crosses the ELST at about Station 528+00 – some 250 feet south of Parcel 9085. The excerpts in Exhibit 21.4 do not even mention the outlet of Wetland 32A. Exhibit 21.4 does not prove the existence of a stream anywhere near Parcel 9085/Ogren.

The standard buffer width for a Category III wetland depends upon the wetland's habitat score under Ecology's 2014 wetland rating system: 75 feet for a habitat score of 8 – 9; 50 feet otherwise. [SMC 21A.50.290(2)] "Where a legally established and constructed street transects a wetland buffer," the buffer may be truncated at the near edge of the street. [SMC 21A.50.290(2)(a)] A "street" is "a public or recorded private thoroughfare providing pedestrian and vehicular access through neighborhoods and communities and to abutting property." [SMC 21A.15.1245] The ELST is not a street for purposes of SMC 21A.50.290(2)(a): The words "or the East Lake Sammamish Trail" were removed from that code provision in the 2016 amendments. Removal of an express provision means that the remaining text excludes that which was removed. But the access road within the ELST right-of-way is a legally established private road providing vehicular and pedestrian access to Parcels 9042/Glover, 9085/Ogren, 9071/Baerwald, and 9135/Eagle Shores. Therefore, the west edge of the Wetland 32A regulatory buffer ends at the east edge of the access road.

7. Ogren proposes to construct a two-story house with a 1,844 SF footprint: 1,360 SF for the residence and 484 SF for the attached garage. The house will most likely be founded on piles and will be elevated above the base flood elevation. The east, front face of the structure will maintain a 5-foot setback from the edge of the ELST right-of-way except for the attached garage which will have only a 1-foot setback from the right-of-way. The house will maintain a 6-foot setback from the south, Parcel 9042/Glover, property line in order to preserve Glover's driveway.¹⁰ The residence with attached garage will preserve a shoreline setback that will vary from 20 to about 44 feet. The proposed deck will preserve a shoreline setback varying between 20 and about 35 feet. All but two of the significant trees described in Finding of Fact 5, above, will have to be removed; the other two will be "snagged". Extensive shoreline enhancement/mitigation, described later, is proposed for the area between the structure and the shoreline.¹¹ Ogren has committed to not use herbicides or pesticides on the property. (Exhibit 5; and testimony)

The site plan depicts, only schematically, a dock extending into Lake Sammamish. Ogren expects to seek approval to construct a dock, but the dock is not a part of the present application. The dock is presumed for the purpose of the enhancement and mitigations plans. (Exhibits 5; 7, p. 2)

8. The Ogren application is categorically exempt from the threshold determination requirements of the State Environmental Policy Act. (Exhibit 1, p. 1)
9. The three UC-designated parcels immediately south of Parcel 9085/Ogren are each developed with a single-family residence and individual dock. (Exhibit 1, p. 4, § II.D, Figure 1)
 - A. Parcel 9042/Glover. The Glover residence was built in 1977 and remodeled in 2013. The Glover residence has a 2,730 SF building footprint (1,860 SF house plus 870 SF attached

¹⁰ Ogren and Glover have apparently decided to accept the driveway intrusion as it exists rather than seek a judicial resolution through the courts.

¹¹ The current proposal reflects consultation and coordination between Ogren, Ogren's consultants, King County, Ecology, and the Department which began in 2014. (Testimony)

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garage). It is a two-story residence with 3,720 SF of living area. The Glover parcel was at one time owned by one Mary Beth Nelson ("Nelson"). It has a 240 SF open porch. The Glover residence has a minimum shoreline setback of 17 feet and a total impact area of 5,140 SF. The current tax value of Parcel 9042 is \$2.7 million of which the land value is \$1.7 million. (Exhibits 9, p. 6; 21.3, unnumbered pp. 4 – 6)

- B. Parcel 9030/Azelby. The Azelby residence was built at some time prior to 1982, demolished in 2007, and reconstructed in 2008. The Azelby residence has a 2,930 SF building footprint (2,190 SF house plus 740 SF attached garage). It is a two-story residence with 5,010 SF of living area. It has a 250 SF deck and a 300 SF open porch. The Azelby residence has a minimum shoreline setback of 18 feet and a total impact area of 4,879 SF. The current tax value of Parcel 9030 is \$3.8 million of which the land value is \$1.9 million. (Exhibits 9, p. 6; 21.3, unnumbered pp. 7 – 9)
- C. Parcel 9073/Selitrennikoff. The Selitrennikoff residence was built at some time prior to 1982, demolished in 2000, and reconstructed in 2001. The Selitrennikoff residence has a 1,720 SF building footprint (1,070 SF house plus 650 SF attached garage). It is a two-story residence with 3,770 SF of living area. It has a 380 SF deck. The Selitrennikoff residence has a minimum shoreline setback of 12 feet and a total impact area of 5,009 SF. The current tax value of Parcel 9073 is \$2.3 million of which the land value is \$1.9 million. (Exhibits 9, p. 6; 21.3, unnumbered pp. 1 – 3)

- 10. Vincent Mendillo and Aurora Purcell ("Mendillo/Purcell") are the only party opposing Ogren's proposal: They oppose any single-family residential development on Parcel 9085/Ogren.¹² Mendillo/Purcell live at 19720 NE 32nd Place on the east side of the Parkway opposite Parcel 9135/Eagle Shores. They are one of four lot owners in a short subdivision served by NE 32nd Place. The developer of the short subdivision also owned Parcel 9135, but apparently made it a community beach tract for the four lot owners in or around 2001 when he was unsuccessful in getting permits to build a fifth residence on it.¹³ Mendillo/Purcell contend that: The City has failed to consider seismic

¹² Glover initially opposed the proposal, but withdrew opposition and testified in support after Ogren moved the house one foot to the north so as to not impede access to the Glover garage. (Exhibits 16.1; 16.2; and testimony) King County Division of Parks and Recreation initially opposed the proposal, but withdrew opposition and currently supports the proposal after Ogren changed the minimum east setback from zero to one foot. (Exhibits 16.4; 19) The Muckleshoot Indian Tribe raised questions, but did not oppose the proposal. The Muckleshoots' concern relate to mitigation of impacts and will be addressed in the discussion of the permit approval criteria.

¹³ The adverb "apparently" is used because King County property records indicate that Parcel 9135 is owed by a Robert Hamilton, one of the four lot owners in the short subdivision, as opposed to ownership in common by the four owners of the short subdivision lots. [King County Parcel Viewer 2 website (gismaps.kingcounty.gov/parcelviewer2), last visited on March 9, 2017] Mendillo testified that he is one of the owners of Parcel 9135. Whether Parcel 9135/Eagle Shores is owned by one lot owner or held in common ownership by more than one lot owner is completely irrelevant to the outcome of this case.

Also irrelevant to the outcome of this case is whether the developer of that short subdivision was prevented from building a house on Parcel 9135. If Parcel 9135 was originally part of the parcel which was subdivided, it may be that using the

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factors; drainage exiting Wetland 32A is somehow related to Ogren's proposal and must be corrected (*i.e.*, re-routed so that it doesn't flow onto Parcel 9135/Eagle Shores); statements made by former City staff during pre-application meetings with prior potential applicants investigating the development potential of the Ogren property should be binding on the current application; the City has failed to consider the cumulative impact of approving other similar requests within the UC-designated shoreline area, three of which Mendillo/Purcell are aware of; and the site is already being cleared. (Exhibits 18; 21.1 – 21.17; and testimony) Mendillo/Purcell's contentions are addressed throughout this Decision.

11. The three similar, pending applications of which Mendillo/Purcell are aware are:
 - A. Parcel 9071/Baerwald. Baerwald seeks a Shoreline Variance, Shoreline Substantial Development Permit ("SSD"), and zoning variance to construct a single-family residence and a dock. The proposal is for a residence with a 2,215 SF footprint, 20-foot minimum shoreline setback, 2-foot ELST property line setback, and a 424 SF dock.¹⁴ (Exhibit 21.2 unnumbered pp. 5 and 6¹⁵)
 - B. Parcel 9151/Paul. Parcel 9151 is immediately south of Parcel 9073/Selitrennikoff. Paul seeks a Shoreline Variance and a zoning variance to construct a single-family residence.¹⁶ (Exhibits 21.2, unnumbered pp. 1 – 3¹⁷; 22)
 - C. Parcel 9041/Chan. Parcel 9041 is immediately south of Parcel 9151/Paul. Chan seeks a Shoreline Variance and a zoning variance to construct a single-family residence.¹⁸ (Exhibits 21.2, unnumbered pp. 7 and 8; 22)
12. Ogren submitted extensive written documentation addressing the proposal's compliance with the criteria for approval of the Shoreline Variance and the zoning variance. (Exhibits 5 – 12) The Department has also submitted a detailed analysis of compliance with the criteria for approval of the Shoreline Variance and the zoning variance. (Exhibit 1) The discussion of criteria compliance which follows will draw heavily from those materials.

residual on the west side of the Parkway for anything other than a community recreation tract was considered a violation of subdivision regulations at the time the short subdivision was being pursued: Until in or around 2010, a short subdivision could not create more than four lots. [SMC 19A.04.310]

¹⁴ The SSD is required because of the proposed dock.

¹⁵ The cited exhibit is a Notice that a hearing on the Baerwald application was to occur on March 2, 2017. That hearing was canceled by the Department. The hearing is currently scheduled for March 27, 2017. [Official notice]

¹⁶ The included graphic (Exhibit 21.2, unnumbered p. 2) is not sufficiently legible to enable detailed description of Paul's proposal.

¹⁷ Unnumbered p. 4 is the blank, reverse side of unnumbered p. 3.

¹⁸ The included graphic (Exhibit 21.2, unnumbered p. 7) is not sufficiently legible to enable detailed description of Chan's proposal.

13. The review criteria for a Shoreline Variance depend upon where the proposal is located. Ogren's proposal is located landward of the OHWM and any associated wetland. For a proposal located landward of the OHWM and landward of any associated wetland, the criteria are contained in WAC 173-27-170(1), (2), (4), and (5) "Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect." [WAC 173-27-170(1)] The criteria in WAC 173-27-170(2), (4), and (5) and the facts relating to each are as follows:

- A. "That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;" [WAC 173-27-170(2)(a)]

Facts: The site is encumbered with the standard 50-foot shoreline setback from Lake Sammamish. Within the UC environment, the setback cannot be reduced without a shoreline variance. The standard setback encumbers the entire parcel, with the exception of a small, triangular area, totaling 463 SF, in the southeast corner of the parcel. Compliance with a five-foot side yard setback (and assuming a reduced five-foot street setback) would reduce the triangular, buildable area to 216 SF. This area is not large enough to accommodate a single-family residence. In addition, this area currently consists of a portion of the driveway utilized by Glover for access. Therefore, the required 50-foot shoreline setback for the subject parcel significantly interferes with reasonable use of the property. (Exhibits 1; 5; 9; and testimony)

With regard to tree replacement, the subject parcel cannot accommodate both a reasonably-sized residence and provide adequate room for replacement trees at a 2:1 ratio. This number of replacement trees is not practical due to space constraints. The mitigation area is generally located between the future residence and the Lake Sammamish shoreline. Planting 32 - 34 trees in an area approximately 2,300 SF in size would not meet general best practices for tree spacing within mitigation areas. This is supported by the City's VEA standards, which require one tree for every 500 SF of mitigation plantings. This equates to five trees for the subject site. Therefore, a shoreline variance is necessary to deviate from the tree replacement standards. (Exhibits 1; 5; 9; and testimony)

- B. "That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;" [WAC 173-27-170(2)(b)]

Facts: Neither Ogren nor any prior owner of Parcel 9085 did anything to create the hardship. The hardship is entirely due to the requirements of the SMP. The subject parcel is small, with 5,760 SF of upland area. The parcel is oddly shaped, being approximately 43 feet deep along its northern boundary and approximately 75 feet deep along its southern boundary. The

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contour of the shoreline results in an irregular shaped parcel that gradually widens as it extends from north to south. Because of this, the standard 50-foot shoreline setback encumbers nearly the entire parcel, with only 216 SF in the southeast corner of the parcel located outside of the shoreline setback, side yard setback, and reduced street setback. However, this area currently consists of a portion of the driveway utilized by Glover for access. The parcel, and adjoining portion of King County's ELST right-of-way, also includes a total of 17 significant trees within the shoreline setback. It is the unique size and shape of the property, combined with the required 50-foot shoreline setback and tree replacement regulations, which causes the hardship. (Exhibits 1; 5; 9)

- C. "That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;" [WAC 173-27-170(2)(c)]

Facts: The proposed residential footprint (including attached garage) is 1,844 SF, 1,666 SF of which will occur within the standard shoreline setback. An additional 593 SF of impact to the setback will result from construction of a small deck and the driveway (including portions of driveway off-site). The total development footprint for the parcel only (within and outside of the standard setback) is 2,271 SF. This includes the home, driveway, pathways, and deck. A total of 17 significant trees within the standard shoreline setback will be removed or snagged. (Exhibits 1; 5; 7)

The proposal will have a smaller footprint than the three existing residences in the immediate vicinity. (Exhibit 5; 21.3) The increased south side setback (from 5 to 6 feet) will ensure access to Parcel 9042/Glover's garage. (Exhibit 16.1; 16.2; and testimony)

The area's R-4 zoning matches the adopted Comprehensive Plan's goal for this area: Single-family residences. The SMP's UC designation of Parcel 9085/Ogren (and the adjoining parcels along this stretch of the lake shoreline) specifically allows single-family residential use. Ogren is not asking for any relief from use provisions of either the zoning code or the SMP. (Exhibit 1)

Ogren's proposal includes significant mitigation. The immediate shoreline area of the parcel will be restored to ensure no net loss of shoreline ecological functions. The mitigation plan proposes 2,277 SF of shoreline enhancement. The dilapidated shelter, fire pit, and all invasive species will be removed. Native species will be planted throughout the area between the residence and the shoreline; there will be no usable lawn. Preliminary plans indicate that 12 trees, 144 shrubs, and 539 groundcover plants will be planted. As stated previously, Ogren has committed to not use herbicides or pesticides on the property. Boulders and woody debris will be placed along the shoreline to enhance habitat opportunities. The end result will be a better shoreline habitat than presently exists. (Exhibits 5; 6; 9; and testimony)

In addition, the development will be a low intensity use of the site, utilizing several low impact development techniques, including pervious pavers, no significant lawn, and natural infiltration of stormwater runoff with amended soils and native plantings. In fact, the usage of the site could be considered an equivalent, or perhaps lower intensity, than nearby recreational parcels. That is, many of the recreational parcels are community beach parcels that are shared by numerous upland homeowners. The parcels are heavily utilized in the summer months with little to no area preserved on-site for meaningful protection or restoration.¹⁹ While continued use of those parcels for recreational purposes would prevent construction of residences, it would not necessarily result in fewer impacts, as it would not generally allow for meaningful restoration or enhancement to occur adjacent to the shoreline. (Exhibits 1; 5 – 7; 9; and testimony)

- D. “That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;” [WAC 173-27-170(2)(d)]

Facts: This area of UC-designated parcels is approximately one-third of a mile long and includes 14 separate parcels, three of which are developed with single-family residences. Parcel depths range from 11 feet to 97 feet. The three developed parcels maintain an average setback of 15.6 feet, far less than the required standard setback of 50 feet and also less than proposed by Ogren. Therefore, all of the adjacent developed properties located within the same environment designation include non-conforming structures. In addition, of the other 10 potentially developable parcels within the subject UC environment, the average parcel depth is 60 feet. Therefore, it is unlikely that any of the other parcels can be developed without a Shoreline Variance, as there would not be enough area outside of the standard 50-foot shoreline setback to place reasonably sized residences. (Exhibits 1; 9; and testimony)

- E. “That the variance requested is the minimum necessary to afford relief;” [WAC 173-27-170(2)(e)]

Facts: The “minimum relief necessary” criterion most assuredly requires a subjective judgment call. The proposed residence has been pushed as far from the lake shoreline as practical. The house is narrow (only one room wide for the most part) and linear to conform with the linear shape of the property. The design does not fully utilize the reduced 20-foot setback: The 20-foot minimum is used for only part of the structure with the rest maintaining a substantially greater lake setback. (Exhibit 5)

- F. “That the public interest will suffer no substantial detrimental effect.” [WAC 173-27-170(2)(f)]

¹⁹ For example, Parcel 9135/Eagle Shores contains significant mown, grassy areas both adjacent to the lake shoreline and within the abutting ELST right-of-way. (Exhibits 6, Appendix A, second Figure 6; 20.4)

Facts: The existing shoreline is degraded; restoration of the shoreline environment is a high public priority, which would be addressed by this project. Shoreline restoration activities, such as the proposed plan includes, are specifically identified in the Final Lake Washington/Cedar/ Sammamish Watershed (WRIA 8) Chinook Salmon Conservation Plan (July 2005). (Exhibits 1; 9)

Because the site is already served with sewer, water, electricity, and private street access, there will be no additional burden to the public from construction of a single-family residence. Leaving the parcel in its existing degraded condition would not further the interests of the public because the existing dilapidated structure would remain and restoration of the shoreline would not be accomplished. In addition, the proposed development will fit in with surrounding developed land uses within the immediate vicinity. Therefore, no substantial detrimental effect to the public interest will result from the proposed project. (Exhibits 1; 9; and testimony)

- G. “In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment.” [WAC 173-27-170(4)]

Facts: Ogren’s proposal will impact 2,271 SF of the site, or about 36%. It is reasonable to expect that five of the remaining undeveloped UC-designated parcels along this stretch of the lake shoreline may be developed in the future. If that occurred, total impacts would be about 18,715 SF. In each case one must assume that mitigation similar in type and scope to that proposed by Ogren would be required. One must also presume that a similar shoreline setback would be observed. (It is worth noting that a 20-foot setback can be realized in the SR environment designated areas as a matter of right with appropriate mitigation.) No significant overstory vegetation exists in immediate proximity to the shoreline; removal of the existing overstory vegetation will not significantly decrease shoreline shading. (Exhibits 1; 9)

A Shoreline Restoration Plan was developed as part of the City’s recent update of its SMP. The plan calls for restoration along portions of the Lake Sammamish shoreline, both voluntarily and as mitigation for development impacts. A concurrent Cumulative Impacts Analysis was prepared that concluded that although additional development would occur along the Lake Sammamish shoreline, the net effect of development combined with the standards prescribed by the SMP, other regulations, and mitigation efforts would prevent a net loss in shoreline ecological functions. (Exhibit 1)

- H. “Variances from the use regulations of the master program are prohibited.” [WAC 173-27-170(5)]

Facts: No relief from the SMP's use regulations has been requested.

14. The review criteria for zoning variances are contained in SMC 21A.110.030. "A variance shall be granted by the City, only if the applicant demonstrates" compliance with each of 12 criteria. [SMC 21A.110.030] The criteria and the facts relating to each are as follows:

- A. "The strict enforcement of the provisions of this title creates an unnecessary hardship to the property owner;" [SMC 21A.110.030(1)]

Facts: Ogren has worked with multiple iterations of the site plan and conducted extensive correspondence with King County. The result of this work is a request for a 1-foot setback at the location of the first-floor garage. The remainder of the residence, including the second floor above the garage, will be set back at least 5 feet. Even assuming approval of the full shoreline setback relief requested, the garage could only be 13 feet deep and the house would range in depth from about 13 to about 20 feet if no zoning setback relief were granted. These are not practical dimensions for a modern residence, especially not in this area. Without the ability to reduce the setback, it would not be possible to situate a reasonably sized home on the parcel. (Exhibits 1; 5; 10)

- B. "The variance is necessary because of the unique size, shape, topography, or location of the subject property;" [SMC 21A.110.030(2)]

Facts: Parcel 9085/Ogren is located directly adjacent to the Lake Sammamish shoreline and is nearly entirely encumbered with the standard 50-foot shoreline setback. A separate Shoreline Variance is required to reduce the shoreline setback from 50-feet to 20-feet. However, even with the reduction of the shoreline setback, there is not adequate room for a reasonably sized residence when complying with the 10-foot street setback. (Exhibits 1; 5; 10)

- C. "The subject property is deprived, by provisions of this title, of rights and privileges enjoyed by other properties in the vicinity and under an identical zone;" [SMC 21A.110.030(3)]

Facts: The R-4 zone applies to the entire surrounding area, both lots sandwiched between the lake shoreline and the ELST and those located east of the Parkway. This criterion requires comparison of Parcel 9085/Ogren with all of those similarly zoned lots, not just with those between the lake and the ELST. Once that code requirement is considered in its proper context, it is evident that Parcel 9085 is deprived of the right to have a reasonably sized house because of the extreme shallowness of the lot. The requirement for a large shoreline setback only exacerbates the problem. (Exhibits 1; 10)

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- D. “The variance does not create health and safety hazards, is not materially detrimental to the public welfare or is not unduly injurious to property or improvements in the vicinity;” [SMC 21A.110.030(4)]

Facts: The garage is positioned at the north end of the structure so as to not conflict with access to Parcel 9042/Glover. The setback will allow for a 25-foot long driveway between the garage and the edge of the private access road within the ELST right-of-way, thus allowing cars to park in the driveway without impeding traffic flow on the private road or on the ELST. The actual trail will be some 45 feet from the nearest face of the garage, and even further from the rest of the east face of the residence. (Exhibit 5)

- E. “The variance does not relieve an applicant from any of the procedural provisions of this title;” [SMC 21A.110.030(5)]

Facts: Ogren has not requested any relief from the procedural requirements of Title 21A SMC. (Exhibits 1; 10)

- F. “The variance does not relieve an applicant from any standard or provision that specifically states that no variance from such standard or provision is permitted;” [SMC 21A.110.030(6)]

Facts: Street setback variances are not prohibited by Title 21A.

- G. “The variance does not relieve an applicant from conditions established during prior permit review or from provisions enacted pursuant to SMC 21A.50.225, Erosion hazards near sensitive water bodies – Special district overlay, SMC 21A.50.322, Wetland management area – Special district overlay, or SMC 21A.50.355, Lake management areas – Special district overlay;” [SMC 21A.110.030(7)]

Facts: The record does not disclose any “conditions established during prior permit review.” The record discloses that a number of persons over the past 10 ± years held pre-application conferences with Department staff to discuss the development potential of Parcel 9085 (See Finding of Fact 15, below.), but there is absolutely no evidence that any of those pre-application meetings ever went beyond that step to become an actual permit application. Further, there is absolutely no evidence that any conditions were ever imposed on development of Parcel 9085 during any prior permit approval. Statements made by Department staff during a pre-application meeting do not constitute “conditions established during prior permit review.”

Ogren will have to comply with any and all applicable provisions of the listed regulations; the setback variance does not seek relief from any of those provisions.

- H. “The variance does not allow establishment of a use that is not otherwise permitted in the zone in which the proposal is located;” [SMC 21A.110.030(8)]

Facts: This is not a use variance. Parcel 9085/Ogren is zoned R-4. Single-family residences are a permitted use in the R-4 zone.

- I. “The variance does not allow the creation of lots or densities that exceed the base residential density for the zone by more than 10 percent;” [SMC 21A.110.030(9)]

Facts: The proposed variance is not creating or altering any lot.

- J. “The variance is the minimum necessary to grant relief to the applicant;” [SMC 21A.110.030(10)]

Facts: A lesser street setback zoning variance would require a larger Shoreline variance in order to accommodate a reasonably sized residence given the shallow depth of Parcel 9085/Ogren. Given the sensitivity of the lake and the substantial distance (45± feet) between the east face of the proposed residence and the actual ELST, the requested zoning setback variance is the minimum necessary for reasonable relief. (Exhibits 1; 5; 10)

- K. “The variance from setback or height requirements does not infringe upon or interfere with easement or covenant rights or responsibilities; and” [SMC 21A.110.030(11)]

Facts: The record contains no evidence of any easements or covenants affecting Parcel 9085/Ogren. The driveway to Parcel 9042/Glover appears to encroach across the southeast corner of Parcel 9085. There is no indication that that encroachment is pursuant to an easement. However, Ogren and Glover have agreed that if the proposed residence is kept 6 feet from the south property line, access to Parcel 9042 would not be restricted. (Exhibits 16.1; 16.2; and testimony)

- L. “The variance does not relieve an applicant from any provisions of Chapter 21A.50 SMC, Environmentally Critical Areas, except for the required building setbacks set forth in Chapter 21A.50 SMC.”

Facts: The requested setback variance does not seek any relief from the requirements of Chapter 21A.50 SMC.

15. Several persons have held discussions with the Department regarding development of lots along the Lake Shoreline in this area, none of which have made it as far as an actual application, hearing, or decision.²⁰ Mendillo/Purcell submitted materials seeking to prove that Department staff have held different opinions in the past regarding the development potential of the lots along the Lake

²⁰ If any did, Mendillo/Purcell provided no evidence of that fact.

shoreline. Mendillo/Purcell believe that those prior positions should be adhered to in the Ogren application:

- A. On March 14, 2006,²¹ Nelson and the Trustee of the William F. Hughes Estate (“Nelson/Hughes”) had a pre-application conference regarding potential development of Parcels 9038, 9085, and 9071. (File PRA2006-00032) The Department’s representation in that process cannot be determined from the submitted documents. Parcel 9038 is an acreage parcel on the east side of the Parkway, opposite the private road which serves Parcels 9042/Glover, 9085/Ogren, 9071/Baerwald, and 9135/Eagle Shores. The submitted materials indicate that Nelson/Hughes wanted to know what the properties were zoned, whether the properties could be short subdivided, what would be required to build on Parcel 9085, how lot lines could be adjusted, and how long it would take to complete all of the above. The submitted materials provide no information about the outcome of that pre-application process. The record contains no evidence that any permit application(s) followed. (Exhibits 21.17; 22)
- B. On February 6, 2008, Dana Fischietto-Seneger (“Fischietto-Seneger”) had a pre-application conference regarding potential development of Parcels 9038 and 9071. (File PRA2008-00019) The Department was represented at that conference by Mona Davis and Kathy Curry (“Curry”), both of whom have since left City employment. Fischietto-Seneger was advised that Parcel 9038 appeared to be crossed by a Type Np (Perennial, non-fish-bearing) stream which would have to be protected during any development. Fischietto-Seneger was told that under then-applicable SMC 21A.50.351 (This code section was repealed in 2013.) a 50-foot setback from the Lake would be required, but that it could be reduced to as little as 15 feet. Fischietto-Seneger was told that Parcel 9038 exhibited steep slopes which would affect development of that parcel. Fischietto-Seneger was told that Parcel 9071 was subject to Class 3 Critical Aquifer Recharge Area (CARA) requirements which would generally require infiltration of 75% of on-site stormwater runoff. Fischietto-Seneger was told that the parcels were zoned R-4. (Exhibit 21.14) The record contains no evidence that any permit application(s) followed.
- C. On or about March 31, 2014, Nelson and Tameem Anwar (“Nelson/Anwar”) had a pre-application conference regarding potential development of Parcels 9085 and 9071. (Files PRA2014-00057/00058) The Department was represented at that conference by Rob Garwood (“Garwood”) and Curry; Garwood has since retired. Nelson/Anwar wanted to know what restrictions, other than zoning, would apply to development of the two parcels. (Exhibit 21.7) Nelson/Anwar were advised that the parcels were in the UC designation and that current SMP regulations did not allow reduction of the 50-foot lake setback using the “incentivized reductions in Table 1 following 25.06.020 in the SMP.” (Exhibit 21.11, p. 1, § 2) But Garwood told them that a setback reduction could be requested through a shoreline

²¹ The date of this pre-application conference is contained in the records of another pre-application conference. (Exhibit 21.14, p. 6, Note 5, ¶ 1)

variance application and that minimum relief could be expected to allow for 700 – 900 SF of impervious coverage. They were told that Ecology has “limited the size of residential structures that can be constructed under a Shoreline Variance in the required setback”. (Exhibit 21.11, p. 2, ¶ 1) They were told about the Class 3 CARA requirement. They were told that Parcel 9071 had a stream crossing its northern end. (Exhibit 21.11) A refund of the application fee was requested on April 1, 2014. (Exhibit 21.10) The record contains no evidence that any permit application(s) followed.

- D. On December 5, 2014, Nelson and Lilian Bergsma (“Nelson/Bergsma”) had a pre-application conference regarding potential development of Parcels 9085 and 9071. (File PRA2014-00257) Nelson/Bergsma wanted information about constructing a single-family residence with dock on each parcel. (Exhibit 21.5) The Department was represented at that conference by Garwood and Curry. Nelson/Bergsma were told that Wetland 32A and Stream 0143F were “mapped to be located on or immediately north and/or east of the subject parcels.” (Exhibit 21.6, p. 1, Curry § 1, ¶ 2) Like Nelson/Anwar, they were told that the UC designation did not allow reduction of the 50-foot lake setback except through a Shoreline Variance application. They were also told about the Class 3 CARA requirement. This time, Garwood told Nelson/Bergsma that a shoreline variance application could be expected to allow for 700 – 1,000 SF of impervious coverage. Garwood also said that a zoning variance would be required to reduce the east setback to zero. Garwood again said that a stream crossed the northern end of Parcel 9071. (Exhibits 21.6; 21.9) The record contains no evidence that any permit application(s) followed.

16. On October 7, 2015, Garwood wrote a “Letter of Inconsistency” to Ogren’s consultant regarding the current application. In that letter, Garwood noted that at that time King County was opposing the variance application; he suggested contacting King County to determine what steps would be needed to obtain County acceptance of the proposal. Garwood reported that Curry said a 50-foot buffer for Wetland 32A would have to be shown on the site plan and that the “proposed home footprint does not reflect adequate impact avoidance and minimization for a site that has an Urban Conservancy shoreline designation and is as environmentally constrained as this property is.” (Exhibit 21.15, unnumbered p. 1, Curry ¶ 3) Curry mentioned the Class 3 CARA requirement. For the first time, Curry noted that the property was “located within a mapped seismic hazard area” which would require compliance with SMC 21A.50.270. (Exhibit 21.15, unnumbered p. 2, Curry ¶ 6)
17. A “seismic hazard area” is defined by the SMC as “those areas mapped as moderate to high and high liquefaction susceptibility and peat deposits on the Liquefaction Susceptibility Map of King County, Washington, Washington Division of Geology and Earth Sciences, OFR 2004-20, Palmer et al., September, 2004, as revised.” [SMC 21A.15.1045] Given the small scale of the version of that map available on the City’s web site, it is hard to say definitively whether Parcel 9085 is mapped as Very Low or Moderate to High liquefaction potential: Much, but not all of the land between the Lake shoreline and the Parkway is mapped as Moderate to High liquefaction potential. [<https://www.sammamish.us/attachments/pagecontent/37642/8729.pdf>, last visited March 9, 2017]

18. Section 21A.50.270 SMC requires development within seismic hazard areas to comply with all building code requirements and either to provide a study demonstrating that the site is not located in a seismic hazard area or to provide mitigation to minimize hazards to life and limb from liquefaction or settlement.
19. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ²²

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

Authority

A Shoreline Variance is a Type 4 procedure. A Type 4 land use application requires an open record hearing before the Examiner. According to the SMC, the Examiner makes a final decision on Type IV applications which is subject to the right of reconsideration and appeal to the State Shorelines Hearings Board. [SMC 20.05.020, 20.10.240, 20.10.260, and 25.35.080(1)] However, state law requires that the local action on a Shoreline Variance (and Shoreline Conditional Use Permit) is technically subject to approval by Ecology, whose decision may be appealed to the Shorelines Hearings Board, a state quasi-judicial review board. [RCW 90.58.140(10)]

A zoning variance is normally a Type 2 procedure in which the Department acts administratively. [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]

When applications are consolidated for processing, they follow the highest numbered process type; in this case, Type 4. [SMC 20.05.020(2)] However, neither Ecology nor the Shorelines Hearings Board have any jurisdiction over zoning variances. Therefore, the Examiner's Decision on the zoning variance portion of this consolidated application is final subject to the right of reconsideration and appeal to Superior Court.

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.

²² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

[SMC 20.10.070(2)]

Review Criteria

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

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.

Subsection 25.08.050(1) SMC adopts the WAC 173-27-170 Shoreline Variance review criteria. The review criteria for a Shoreline Variance depend upon whether the proposal is located landward or waterward of the OHWM. [WAC 173-27-170] The applicable criteria have been set forth in Finding of Fact 13, above.

The review criteria for zoning variances are set forth in SMC 21A.110.030. The applicable criteria have been set forth in Finding of Fact 14, above.

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)] Therefore, this application has no vested rights.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [SMC 25.08.050(4) and City of Sammamish Hearing Examiner Rule of Procedure 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. Mendillo/Purcell's objections (Exhibits 18; 21.1; and testimony) provide no basis to deny or restrict the Ogren application.

Despite all of their pictures and testimony, they have not presented any evidence of the existence of a current or previous stream crossing Parcel 9085/Ogren. As has been noted, Stream 0143F crosses the ELST well more than 150 feet south of Parcel 9085 and the water course which flows through Wetland 32A crosses the private road over 150 feet north of Parcel 9085. Whether that latter water course is a stream or simply a drainage ditch (The Department and Ogren's consultant believe it is the latter.) is immaterial: It doesn't flow through or near the Ogren parcel. If that water course were the highest order stream in the City's regulatory system (a Type S stream), the required buffer width would be 150 feet. [SMC 21A.50.330(1)] That water course is more than 150 feet from the north edge of Parcel 9085/Ogren. The buffer would have no effect on the Ogren proposal. If, as Mendillo/Purcell seem to suggest, King County re-routed that water course during the development of the ELST, that is a matter to take up with King County. There is no evidence that Ogren (or Ogren's predecessors in interest) had any involvement with any alleged rerouting. (The evidence submitted by Mendillo/Purcell, especially Exhibit 21.4, does not support the contention that any water course was rerouted.)

Mendillo/Purcell's concern regarding prior permit conditions is totally misplaced. There is no evidence of any permit ever having been issued for Parcel 9085. There were several pre-application conferences held with various persons over the past 10+ years, none of which ever resulted in actual applications for or issuance of any permits. A statement made by a Department staffer during a pre-application conference is not a condition established during permit review. Further, in the case of a Shoreline Variance, the Department has no authority to establish permit conditions in the first place; only the Hearing Examiner has that authority at the local level. The Department may make a recommendation, but a recommendation is not establishment of a permit condition unless that recommendation is implemented by the Examiner.

Variance decisions do not establish legal precedent for any other variance. One of the principles of variance jurisprudence is that every variance is decided on its own merits giving consideration to the criteria for approval and the facts presented during the hearing process. Even if this Shoreline Variance established a precedent, it would be a good precedent. The shoreline conditions and habitat that will result from the proposed Ogren development will easily exceed those which presently exist. Given that single-family residences are a permitted use in the UC environment designation, a single-family project which enhances shoreline quality and does not reduce shoreline setback below that allowed in the SR environment is a good thing.

Mendillo/Purcell assert that trees have been cut and land cleared on Parcel 9085/Ogren. They presented little to no evidence that even shows conditions on Parcel 9085. Most of their pictures focused on the water course which flows across the north end of Parcel 9071/Baerwald and, at least partly, across Parcel 9135/Eagle Shores. None of the pictures submitted by the Department, especially Exhibits 20.6 – 20.8, taken on February 9, 2017, depict any tree cutting or land clearing on Parcel 9085/Ogren.

Purcell testified that she thought the subject property used to be zoned R-1. She offered no authority for that assertion. The City was incorporated in or around 1999. It is the Examiner's understanding that upon incorporation the City essentially adopted the zoning that King County had in place. To the best of the Examiner's knowledge, this area has not been rezoned in the years since incorporation. Even if it had, the previous zoning would be completely immaterial.

Purcell testified, again without support for the assertion, that development of Parcel 9085/Ogren as proposed would harm the CARA and, thereby, harm endangered salmon species that inhabit Lake Sammamish. CARA regulations are found in SMC 21A.50.280. Those regulations basically require infiltration of at least 75% of on-site stormwater that would otherwise leave the site as runoff and assurances that "the proposed activity will not result in a significant increased risk of contamination of drinking water supplies". [SMC 21A.50.280(2)(a)] The focus of the CARA regulations is protection of aquifers which provide domestic drinking water supplies. Nothing in the CARA regulations would prevent the proposed development. As far as endangering salmonid species in Lake Sammamish, Ogren has voluntarily offered to prohibit herbicide and pesticide use on the property; unlike Parcel 9135/Eagle Shores, there will be no lawn adjacent to the shoreline.

Finally, Purcell quoted two sections from the King County Code ("KCC") in Exhibit 18: KCC 21A.04.070 and 21A.04.080. Provisions of the KCC have no relevance within the City of Sammamish. In addition, the zones which are described in the quoted KCC sections (Urban Reserve and Urban Residential) do not even exist in the City's zoning scheme. The discussion of those zones in Exhibit 18 is without any merit in the context of these applications.

2. The Muckleshoot Tribe's comments were submitted in October, 2015, and raised five questions. (Exhibit 16.3) The proposed site and mitigation plans have been revised twice since. (Exhibit 5) The Examiner has no idea what the site and mitigation plans looked like which were available to the Muckleshoot staff in 2015. The current plans depict trees and shrubs planted between the residence and the shoreline. The dock is not part of the current application. The Department has recommended a condition permanently blocking construction of any bulkhead. Cumulative impacts have been addressed. The Muckleshoot Tribe's comments have made a positive impact on the proposal.
3. No basis in law exists for Garwood's opinion that 900 to 1,000 SF should be the maximum reasonable building footprint for Parcel 9085/Ogren under a variance analysis. Nothing in the SMC sets any upper building footprint limit or ratio of building footprint to upland lot area. The two sets of variance criteria are couched in the context of providing comparability to other uses in the same

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vicinity and zone/environment designation. Given the character and value of the other residences within the subject area, zone, and environment designation, a 700 SF building footprint limit would be entirely unreasonable and unfair. The requested 1,360 SF residence footprint (plus 484 SF garage footprint) is entirely reasonable and in character with the other residences in the same zone and environment designation. In fact, the proposed residence footprint is smaller than two of the three nearby residences and the proposed garage footprint is smaller than any of the three nearby attached garages in the same zone and environment designation.

4. The Examiner's records indicate that he has previously approved three Shoreline Variances in the City for properties on Lake Sammamish:

	SVAR2013-00240	SVAR2014-00139	SVAR2014-00170
Zone	R-4	R-4	R-4
Environment Designation	SR	SR	SR
Lot area		6,029 SF	5,782 SF
Lot depth	28' – 34'	66' – 94'	64' – 71'
Building footprint	1,230 SF	1,611 SF	995 SF
Number of stories	3	2	3
Lake setback (minimum)	11'	35'	30'
Other factors	Type F stream adjacent to north lot line	Category IV wetland upland of OHWM	Type Np stream along south edge; Category IV wetland in southeast corner

If nothing else, those three cases demonstrate that each case is judged on its own merits. Each was a very different property; each was judged by the property's characteristics. The Ogren application is not out of line with the three previously approved Shoreline variances.

5. The preponderance of the evidence, summarized in Finding of Fact 13, above, demonstrates compliance with all criteria for approval of a Shoreline Variance. (The reader is referred to Exhibits 1 and 9 for more in-depth analyses of criteria compliance than presented in Finding of Fact 13.)

A word or two about the "cumulative impact" criterion (See Finding of Fact 13.G, above.) is warranted here. The Department's Deputy Director testified that the Department insists that shoreline permit applicants demonstrate "no net loss" of shoreline habitat and functions, and encourages applicants to achieve a net gain of shoreline habitat and functions. The evidence in this case clearly demonstrates a net gain of shoreline habitat and functions from the proposed enhancement/mitigation. If every development along the shoreline met that objective, then the cumulative impact would be beneficial, not detrimental. Given that the UC environment designation specifically allows single-family residences, it is neither logical nor legally defensible to argue that single-family residences should not be allowed on UC-designated parcels.

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6. The recommended conditions of approval for the Shoreline Variance as set forth in Exhibit 1 at pages 35 - 37 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Recommended Condition 1. The Examiner believes that all variance approvals should verbally state the limits of the approval. This condition will be revised to do so.
 - B. Recommended Condition 2. The Examiner agrees with the Department which testified that this condition does not pertain to the Shoreline Variance; it should be a condition of the zoning variance instead.
 - C. Recommended Condition 3. The Examiner does not like to use the word "applicant" in permit conditions. "Applicant" may be read by some to refer only to the party which initially applied for the variance. Land use permits run with the land; that is, the permit remains valid even if title to the property changes hands. In order to avoid any future misunderstanding, the Examiner prefers to use words such as "owner," "developer," etc. depending upon context. In this case the Examiner will substitute "owner/developer" for "applicant."
 - D. Recommended Condition 5. The second paragraph in this condition is merely explanatory text, it is not a condition. The Examiner will delete it.

Ogren's commitment to not use herbicides or pesticides on the property constitutes a voluntary offer. Voluntary offers should be reflected in the conditions of approval to ensure that they are not forgotten. This condition would be a good place to locate that commitment.
 - E. Recommended Condition 7. The Examiner agrees with the Department which testified that this condition does not pertain to the Shoreline Variance and should be deleted.
 - F. Recommended Condition 9. This indemnification condition is something new. The Department testified that it had not consulted with the City Attorney prior to deciding to recommend imposition of this condition on all variance applications. The Department's justification is in part a concern that lot owners may seek financial redress from the City in the event climate change causes problems with the property in the future. The Examiner concludes that imposition of a legally complex and important indemnification condition on a whole class of permits should be preceded by review by the City Attorney and, possibly, the City Council. The Examiner declines to set a precedent by imposing the condition on this permit.
 - G. Section 173-27-190 WAC contains certain content and format requirements for any Shoreline Variance which is issued:

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(1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).

(2) Permits for substantial development, conditional use, or variance may be in any form prescribed and used by local government including a combined permit application form. Such forms will be supplied by local government.

(3) A permit data sheet shall be submitted to the department with each shoreline permit. The permit data sheet form shall be as provided in Appendix A of this regulation.

Subsection (2) allows this Decision to serve as the Shoreline Variance. Subsection (1) requires that an additional condition be added. The data sheet required by Subsection (3) will be prepared by the Department when it transmits the Shoreline Variance and supporting exhibits to the state as required by Chapter 90.58 RCW.

7. The preponderance of the evidence, summarized in Finding of Fact 14, above, demonstrates compliance with all criteria for approval of a zoning variance. (The reader is referred to Exhibits 1 and 10 for more in-depth analyses of criteria compliance than presented in Finding of Fact 14.)
8. The recommended conditions of approval for the zoning variance as set forth in Exhibit 1 at pages 18 and 19 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Recommended Condition 1. The Examiner believes that all variance approvals should verbally state the limits of the approval. This condition will be revised to do so.
 - B. Recommended Condition 2. The Examiner does not like to use the word “applicant” in permit conditions. “Applicant” may be read by some to refer only to the party which initially applied for the variance. Land use permits run with the land; that is, the permit remains valid even if title to the property changes hands. In order to avoid any future misunderstanding, the Examiner prefers to use words such as “owner,” “developer,” etc. depending upon context. In this case the Examiner will substitute “owner/developer” for “applicant.”
 - C. Recommended Condition 9. This indemnification condition is something new. The Department testified that it had not consulted with the City Attorney prior to deciding to recommend imposition of this condition on all variance applications. The Department’s justification is in part a concern that lot owners may seek financial redress from the City in

the event climate change causes problems with the property in the future. The Examiner concludes that imposition of a legally complex and important indemnification condition on a whole class of permits should be preceded by review by the City Attorney and, possibly, the City Council. The Examiner declines to set a precedent by imposing the condition on this permit.


9. 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:

- A. **GRANTS** the requested zoning variance under file number ZONV2015-00208 from SMC 21A.25.030(A) to relax the street setback **SUBJECT TO THE ATTACHED CONDITIONS.**
- B. **GRANTS** City approval of the requested Shoreline Variances under file number SVAR2015-00209 from SMC 25.06.020(9) and 25.07.010, Table 25.07.010-2 to relax the shoreline setback and from SMC 25.06.020(11), Table 25.06.020 to relax the tree replacement ratio **SUBJECT TO CONDITIONS SET FORTH WITHIN THE ATTACHED PERMIT.**

Decision issued March 13, 2017.


John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ²³

Ryan Harriman
Daniel Ogren
Aurora Purcell
David Pyle

Kenny Booth
Vincent Mendillo
Michael Glover

²³ 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, 801 228th 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 ZONING VARIANCE

The zoning variance portion of 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.

NOTICE of RIGHT of APPEAL SHORELINE VARIANCE

The ultimate decision by the Washington State Department of Ecology on the Shoreline Management Variance portion of this Decision is final subject to the right of appeal to the State Shorelines Hearings Board. Please see RCW 90.58.180 and Chapter 173-27 WAC for guidance regarding Hearings Board appeal procedures.

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."

CONDITIONS OF APPROVAL
ZONV2015-00208
DANIEL and MARISA OGREN

This Zoning Variance is subject to compliance with all applicable provisions, requirements, and standards of the Sammamish Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. The zoning variance granted herein is limited solely to that requested, to wit: Reduction of the SMC 21A.25.030(A) street setback from 10 feet to not less than 1 foot for the structure depicted on Exhibit 5. No other variance is either expressed or implied.
2. The owner/developer shall comply with all federal, state, or local statutes, ordinances, rules, or regulations applicable to this project, including obtaining any additional required permits.
3. A notice on title shall be recorded for this property that reflects the zoning variance and designated setback.
4. The applicant shall comply with the payment of street impact fees, impact fees for park and recreational facilities, and school impact fees in accordance to SMC Chapters 14A.15, 14A.20, and 21A.105, respectively.
5. Cultural resources help define human history, remind us of our interdependence with the land, and show how cultures change over time. Structures, artifacts, objects and other cultural resources are found throughout Washington in locations where people have lived and thrived. These resources are evidence of how people lived, where important events occurred, and where traditional, religious and ceremonial activities took place. Cultural resources are varied in their nature and may include any number of materials, objects or sites that are considered to have significant cultural or historic value to the people. It is not uncommon for cultural resources to have private, ceremonial, sacred and/or spiritual qualities that might require confidentiality for their protection. If cultural resources are unearthed during the development process, immediately cease and desist ALL operations and contact the City of Sammamish, the Washington State Department of Archeology and Historic Preservation (DAHP) Historic Preservation Officer, regional Native American Tribes, and King County concerning the appropriate treatment of archaeological and historic resources. Do not resume work until appropriate approvals are received and the City of Sammamish has authorized development to resume.

CITY of SAMMAMISH

**SHORELINE MANAGEMENT ACT
VARIANCE**

File No.: SVAR2015-00209

Applicant: Dan and Marisa Ogren
23047 NE 19th Drive
Sammamish, WA 98074

A Shoreline Management Variance is granted pursuant to the Shoreline Management Act of 1971 [Chapter 90.58 RCW] from SMC 25.06.020(9) and 25.07.010, Table 25.07.010-2 to relax the shoreline setback and from SMC 25.06.020(11), Table 25.06.020 to relax the tree replacement ratio, both as reflected in Hearing Exhibit 5.

This variance applies to the property legally described in Exhibit 13 which is generally located in the 3200 block of East Lake Sammamish Parkway NE between the East Lake Sammamish Trail and the shoreline of Lake Sammamish in Section 20, Township 25 N, Range 6 E, W.M.

This variance is subject to all applicable regulations of the Sammamish Shoreline Master Program. In addition, this permit is subject to the following **SPECIAL CONDITIONS**:

1. The Shoreline Variances granted herein are limited solely to those requested, to wit: Reduction of the SMC 25.06.020(9) and 25.07.010, Table 25.07.010-2 shoreline setback from 50 feet to not less than 20 feet and relief from the SMC 25.06.020(11), Table 25.06.020 tree replacement ratio, both as depicted on Exhibit 5. No other variance is either expressed or implied. The mitigation/enhancement depicted by Exhibit 5 is an integral element of this approval.
2. The owner/developer shall comply with all federal, state, or local statutes, ordinances, rules, or regulations applicable to this project; including obtaining any additional required permits.
3. A notice on title shall be recorded for this property that reflects the reduced shoreline setback, as well as reflects information about the mitigation project required for development of this property.
4. A notice on title shall be recorded for this property that prohibits the shoreline stabilization through the use of hard structural stabilization or a bulkhead. The owner may use bio-engineering shoreline stabilization techniques only. The notice shall also prohibit use of herbicides or pesticides on the property. Final language shall be submitted to the City of Sammamish for review and approval prior to recording.

HEARING EXAMINER DECISION

RE: SVAR2015-00209 and ZONV2015-00208 (Ogren)

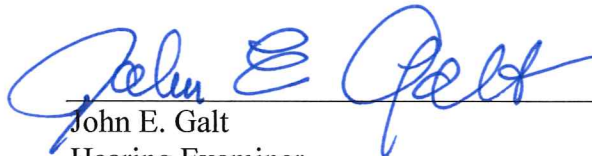
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5. A bond quantity worksheet must be supplied for city review. A performance bond must be posted to ensure completion of mitigation work. After mitigation installation, the project biologist must document installed mitigation in an as-built report and plan that is supplied for City review. After the City accepts the as-built condition, the performance bond will be released and the mitigation project will shift into the required 5-year mitigation monitoring period after a maintenance and defect bond is posted to replace the performance bond.
6. Cultural resources help define human history, remind us of our interdependence with the land, and show how cultures change over time. Structures, artifacts, objects and other cultural resources are found throughout Washington in locations where people have lived and thrived. These resources are evidence of how people lived, where important events occurred, and where traditional, religious and ceremonial activities took place. Cultural resources are varied in their nature and may include any number of materials, objects or sites that are considered to have significant cultural or historic value to the people. It is not uncommon for cultural resources to have private, ceremonial, sacred and/or spiritual qualities that might require confidentiality for their protection. If cultural resources are unearthed during the development process, immediately cease and desist ALL operations and contact the City of Sammamish, the Washington State Department of Archeology and Historic Preservation (DAHP) Historic Preservation Officer, regional Native American Tribes, and King County concerning the appropriate treatment of archaeological and historic resources. Do not resume work until appropriate approvals are received and the City of Sammamish has authorized development to resume.

EXCEPT AS PROVIDED IN RCW 90.58.140(5)(a) AND (b), CONSTRUCTION PURSUANT TO THIS PERMIT SHALL NOT BEGIN AND IS NOT AUTHORIZED UNTIL TWENTY-ONE DAYS FROM THE DATE THIS PERMIT IS FILED WITH THE WASHINGTON STATE DEPARTMENT OF ECOLOGY AND ATTORNEY GENERAL AS REQUIRED BY RCW 90.58.140(6) AND WAC 173-27-130, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN TWENTY-ONE DAYS FROM THE DATE OF SUCH FILING HAVE BEEN TERMINATED.

VARIANCE issued March 13, 2017.



John E. Galt
Hearing Examiner

DEPARTMENT OF ECOLOGY REVIEW

The above variance is **APPROVED** _____ / **APPROVED WITH ADDITIONAL CONDITIONS**
_____ **DENIED** _____ pursuant to WAC 173-27-200.

COMMENTS/ADDITIONAL CONDITIONS: _____

(Name)

(Title)

(Date)