

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

DECISION

FILE NUMBER: RUE2020-00099

APPELLANT: Vadim Palanchuk
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RESPONDENT: City of Sammamish
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APPLICANT: Same as Appellant

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

EXAMINER DECISION: REMAND

DATE OF DECISION: June 16, 2021

INTRODUCTION ¹

Vadim Palanchuk (“Palanchuk”) appeals from the March 1, 2021, denial by the City of Sammamish Department of Community Development (“Community Development”) of his RUE2020-00099 Reasonable Use Exception (“RUE”) application. (Exhibit 1 ²)

Palanchuk filed the subject appeal on or about March 19, 2021. ³ (Exhibit 42) The appeal was timely filed in accordance with Sammamish Municipal Code (“SMC”) 20.10.080(1).

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 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 in the 20XX block on the east side of East Lake Sammamish Parkway NE, approximately 450 feet north of the intersection with NE 18th Place. Its Assessor's Parcel Number is 7525900010 ("Lot 2"). (Exhibit 34, PDF 1, ¶ 1; 42, PDF 1)

The Sammamish Hearing Examiner ("Examiner") held an open record hearing on May 7, 2021. The hearing was conducted remotely using the "Zoom" platform 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 43)

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: Letter, Hearing Examiner to Principal Parties, March 25, 2021 (scheduling guidance)

Exhibit 9002: Appellants' Notice of Appearance, filed April 30, 2021, at 1:53 p.m.

Exhibit 9003: Declaration of Alan L. Wallace, filed May 3, 2021, at 4:23 p.m.

Exhibit 9004: Palanchuk Witness List and Expert Witness Summary of Testimony, filed May 3, 2021, at 4:23 p.m.

Exhibit 9005: E-mail exchange: Hearing Examiner to Evans, May 4, 2021, at 8:17 a.m.; Evans to Hearing Examiner, May 4, 2021, at 3:18 p.m. (re: postponement; agreement to proceed)

Exhibit 9006: *Sammamish Springs Addition*, plat recorded January 7, 1949

Pursuant to RoP 224(d), the Respondent Community Development pre-filed Exhibits 1 - 43 and provided an index listing of those exhibits. In addition, Respondent pre-filed a Prehearing brief on April 30, 2021, to which it did not assign an exhibit number. The Examiner marked it as Exhibit 44. Appellant Palanchuk did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Appellant pre-filed no exhibits.

At the close of the hearing the principal parties elected to submit written closing statements, at least in part to allow for further "dialogue" between Palanchuk and Community Development, pursuant to an agreed schedule. (Exhibit 9007, p. 4:7 – 9) The following documents are entered pursuant to that schedule:

Exhibit 9007: Vadim and Catalinas Palanchuk's Closing brief, filed June 7, 2021, at 4:23 p.m.

Exhibit 9008: City of Sammamish's Closing Brief, filed June 14, 2021, at 9:54 a.m.

The record closed with receipt of Exhibit 9008 on June 14, 2021.

³ Filing date based upon the date on the appeal memorandum: March 19, 2021. (Exhibit 42, PDF 3) One person dated his/her signature/initials (the handwriting is illegible) on the appeal form "3/13/21," another person dated his/her signature/initials on the appeal form (the handwriting is illegible) "3/17/21." The appeal form answers all questions with the statement: "Please see attached narrative." The "attached narrative" is a memorandum dated "March 19, 2021." (Exhibit 42, PDF 3 - 7) Therefore, the Examiner concludes that the appeal could not have been filed prior to March 19, 2021.

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The Hearing Examiner 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. This appeal involves Lot 2 in the 1949 *Sammamish Springs Addition* subdivision. Lot 2 is a rectangle with 100 feet of frontage on the east side of East Lake Sammamish Parkway NE and a depth of approximately 188 feet. (Exhibits 36, PDF 1; 9006) Lot 2 has a modest up-slope from west to east beginning in a modest ravine at the eastern edge of the East Lake Sammamish Parkway NE embankment. The slope increases markedly to the east and southeast. (Exhibits 13; 31, PDF 8, 27; 36, PDF 2)

Most of the northeast half of Lot 2 is covered by a Category III slope wetland (Wetland A); a smaller Category III slope wetland is located just west of the mid-point of the south property line (Wetland B); an off-site Category II wetland is located just south of the southwest corner of Lot 2 (Wetland C). "A high groundwater table provides the primary source of hydrology for these wetlands, and numerous seeps emerge that converge into numerous channelized streams." (Exhibits 31, PDF 8 – 10, quote from PDF 8; 38, PDF 4 – 6)

Three Type Np streams originate from Wetland A, fed by seeps in the steep hillside to the east, and flow downhill across Lot 2.

- A. Stream A originates near the northeast corner of Lot 2. It has been ditched diagonally across Lot 2 such that it's natural downslope flow actually begins in the southeast quarter of Lot 2. From there it meanders westerly, exiting Lot 2 near the middle of the south property line, only to cross back over the property line at the southwest corner of Lot 2. It abuts off-site Wetland C.
- B. Stream B originates just downslope of the ditched section of Stream A and flows west and northwest to exit Lot 2 near its northwest corner.
- C. Stream C originates near the center of Lot 2. It then flows west for a short distance before turning south, exiting Lot 2, and joining Stream A.

(Exhibits 31, PDF 10 – 11, 27; 38, PDF 4 – 6) Stream A, the largest of the three streams, has a bed which varies in width from about 2 – 5 feet. "Streambed substrate is composed of cobble, gravel, and fine sediments (sand, silt, clay) with no significant pool or riffle sequences. Large woody debris and overhanging vegetation were observed in areas of the stream channel." (Exhibit 31, PDF 10 & 11) Stream B's channel is about 2 feet wide. "Streambed sediments are primarily fine sediments and small gravels." (Exhibit 31, PDF 11) Stream C, the smallest of the three streams, has an average

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width of 1 – 2 feet. “Streambed sediments are primarily fine sediments and small gravels.” (Exhibit 31, PDF 11)

An area along the central part of the southern property line constitutes a landslide hazard associated with the steep eastern/southeastern slopes. (Exhibit 38, PDF 14)

2. The wetlands, streams, and landslide hazard areas are all regulated by the SMC; all have required protective buffers. The Category III wetlands require 50-foot wide buffers; the category II wetland requires a 100-foot wide buffer; the Type Np streams require 75-foot wide buffers; the landslide hazard area requires a 50-foot wide buffer. (Exhibits 30, PDF 7; 31, PDF 10, 11, & 27; 38, PDF 14) When all of the required buffers are applied, the entirety of Lot 2 is encumbered by critical areas and their required buffers. (Exhibit 38, PDF 3) Even if the required buffers were reduced the maximum allowed under SMC regulations (50% for the wetlands and streams; down to 15 feet for the landslide hazard area based upon the geotechnical engineer’s recommendation), the entirety of Lot 2 would still be encumbered by critical areas and buffers. (Exhibits 1, PDF 9; 30, PDF 7; 38, PDF 8 & 13)

The SMC requires that a 15-foot wide building setback line (“BSBL”) be maintained beyond the outer edge of critical area buffers:

Unless otherwise provided, buildings and other structures shall be set back a distance of 15 feet from the edges of a critical area buffer. The following may be allowed in the building setback area:

- (1) Landscaping;
- (2) Uncovered decks, less than 18 inches above grade;
- (3) Building overhangs if such overhangs do not extend more than 18 inches into the setback area;
- (4) Impervious ground surfaces, such as driveways and patios; provided, that such improvements may be subject to special drainage provisions adopted for the various critical areas; and
- (5) Trails.

[SMC 21A.50.210]

3. The westerly 30 feet of Lot 2 is encumbered by a water and sewer easement benefitting the Northeast Sammamish Sewer and Water District. A water main and a 15” sewer main some 14.5 feet below ground surface are located in the southern portion of that easement. (Exhibits 13; 26; 36, PDF 2)
4. The “Syringa Springs Water Company” has facilities that are at least partly within Lot 2. One of the parties who is served by the Water Company describes it this way:

Under permits granted in approximately 1958, the Water Co constructed a cistern, gravity pipelines and storage tank in order to provide water to [1707 E Lk

Sammamish Pkwy NE] as well as my neighbors. We have continuously maintained the system and use the water for domestic water use including irrigation.

As confirmed by a survey recently commissioned by [Palanchuk], the storage tank for our water system is situated at/on the SE corner of [Lot 2]. Furthermore, the survey shows that the gravity pipeline that transfers the water from the tank to our homes is situated under/within [Lot 2].

(Exhibit 21, PDF 1, Comment 1, ¶¶ 4 & 5) The cistern/storage tank is identified on the submitted topographic survey as “5’ DIA WATER TANK” straddling the south property line in the southeast corner of Lot 2. More than half of the cistern/water tank is shown to be on Lot 1, the platted lot immediately south of Lot 2. The submitted survey shows no pipes leaving the cistern. (Exhibit 13) The *Sammamish Springs Addition* plat depicts a 5-foot wide easement running from east to west across Lot 1 a short distance south of where the cistern/water tank is located. (Exhibit 9006) It would not be unreasonable to believe that the pipe(s) from the cistern are located within the easement across Lot 1, not across Lot 2. But, that is at best an educated possibility, not a fact supported by evidence in the record.

5. East Lake Sammamish Parkway NE is a designated arterial street. (Exhibit 1, PDF 4) Therefore, development on Lot 2 will require dedication of five (5) additional feet of right-of-way along Lot 2’s street frontage.⁴ (Exhibit 1, PDF 4) A residential driveway accessing onto an arterial must have a width between 20 and 24 feet. [PWS 11.2, Table 11.1, Data Row 1, Columns 4 & 5] The maximum allowed width of a residential driveway is 20 feet. [SMC 21A.40.110(5)] Therefore, any driveway serving a single-family residence on Lot 2 must be 20 feet wide. In addition, the PWS do not allow back-out driveways on arterial streets. [PWS 10.1.C]
6. Lot 2 is in an area zoned R-4. (Exhibit 2, PDF 2) “[T]he square feet of the livable space in a single-family residence will determine the setback requirements.” (Exhibit 2, PDF 2) Palanchuk’s current proposal is for 3,567 square feet (“SF”) of livable space. (Exhibit 37, PDF 1) The standard front (street) setback for a residence having between 2,500 and 4,000 SF of livable area is 20 feet, measured from the edge of the right-of-way. [SMC 21A.25.030(B)(23)(b)] However, the required minimum setback from an arterial street right-of-way is 30 feet. (Exhibits 1, PDF 4; 22, PDF 6)
7. Palanchuk purchased Lot 2 in 2019. (Exhibit 31, PDF 12) Palanchuk desires to construct a three-story, five-bedroom, single-family residence on Lot 2.
8. In 2019 Community Development received 10 or more feasibility inquiries regarding the development potential of Lot 2. One of those inquiries was on behalf of Palanchuk.⁵ (Baty testimony) That inquiry was assigned City file number FEAS2019-00311. The Department of Public

⁴ See Public Works Standards (“PWS”) 9.1.B and Table 9.1.

⁵ Community Development’s Planning and Permit Center Manager testified that staff my have interacted only with agents for Palanchuk, never directly with Palanchuk. (Baty testimony)

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Works (“Public Works”) issued its written guidance comments on June 27, 2019; Community Development issued its written guidance comments on July 1, 2019. (Exhibit 2)

A. Community Development advised Palanchuk of the following code requirements:

- i. A Pre-Application Conference would be required. (Exhibit 2, PDF 1)
- ii. The RUE process might be required because of the number and extent of critical areas on Lot 2. (Exhibit 2, PDF 1 & 4)
- iii. Tree retention within critical areas and their buffers would be subject to a 100% retention requirement. (Exhibit 2, PDF 2)
- iv. Erosion Hazards Near Sensitive Water Bodies (“EHNSWB”) regulations could affect development potential of Lot 2. (Exhibit 2, PDF 3)
- v. Landslide Hazard Area regulations could affect development potential of Lot 2. (Exhibit 2, PDF 3)
- vi. Infiltration of runoff would be required because of the site’s location within a Critical Aquifer recharge Area (“CARA”). (Exhibit 2, PDF 3)
- vii. Wetlands would have to be provided with buffers and building setbacks. (Exhibit 2, PDF 4)
- viii. Streams would have to be located and protected. (Exhibit 2, PDF 4)

B. Public Works advised Palanchuk of the following code and PWS requirements:

- i. A full drainage review would be required because of the presence of landslide hazard and critical drainage areas on Lot 2. (Exhibit 2, PDF 6 & &)
- ii. Stormwater infiltration would be required, if feasible, because of Lot 2’s location in a CARA. (Exhibit 2, PDF 7)

9. An agent for Palanchuk held a Pre-Application Conference with Community Development and Public Works on November 21, 2019. (Exhibit 3) The notes from that conference indicate that additional information was required from Palanchuk for all areas of Community Development concern. (Exhibit 3, PDF 1 – 5) Public Works essentially reiterated its comments from the Project Guidance document. (Exhibit 3, PDF 9 – 14)

10. On or around February 28, 2020, an RUE application was submitted on Palanchuk’s behalf. Included as part of that application package was a civil site plan and an architectural site plan. (Exhibits 1; 3; 7; 15; 27; 28) The civil site plan is dated January 2, 2020; the architectural site plan is dated January

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29, 2020. (Exhibits 27; 28) The plans were designed in tandem with the wetland and stream delineations. (Capron testimony)

11. On June 9, 2020, Community Development sent City staff's first review comments to Palanchuk's agent. Review comments were provided by both Community Development and Public Works. With respect to RUE approval compliance, Community Development advised that "[r]educing the footprint of the house would help maintain additional vegetation between the wetland and stream and the proposed development while still providing reasonable use." (Exhibit 22, PDF 1, RUE ¶ 2) Community Development also advised that Palanchuk "must demonstrate that alterations to the critical areas and their associated buffers are the minimum necessary to allow for reasonable use of the property." (Exhibit 22, PDF 1, RUE ¶ 3) The review comments identified numerous deficiencies with the submitted critical areas study ("CAS"). (Exhibit 22, PDF 2 – 4) The review comments advised Palanchuk that the RUE process could not be used to obtain relief from the tree retention requirements of Chapter 21A.37, SMC. (Exhibit 22, PDF 4) The comments explained the limitations and information needs associated with the EHNSWB's No Disturbance Area designation of the site. (Exhibit 22, PDF 5)

For its part, Public Works advised that a complete Technical Information Report (*i.e.* drainage report) would have to be submitted. (Exhibit 22, PDF 7)

12. Palanchuk submitted revised reports and plans in response to City staff's review comments in July and August, 2020. (Exhibits 29 – 32) The proposed building footprint and site plan were unchanged in the revised plans; the revised plans did include additional sheets providing structural and design details. (Exhibits 36; 37) (Cf. Exhibit 27 with Exhibit 36, PDF 1, and Exhibit 28 with Exhibit 37, PDF 1) The revised civil plan set is dated July 22, 2020; the revised architectural plan set is dated July 28, 2020.
13. As currently designed, the proposed residence would have a 1,243 SF footprint. The second and third stories would include cantilevers, resulting in a 1,523 SF second story and a 1,343 SF third story. The total enclosed floor area would be 4,109 SF, of which 3,567 SF would be livable space. In addition, there would be a 109 SF cantilevered terrace on the second floor, and a 920 SF roof-top deck. (Exhibit 37, PDF 1) The proposed site plan places the west façade of the structure on the edge of the water and sewer easement. Stream and wetland buffers are reduced to five (5) feet with the foundation touching the 5 foot buffer in numerous places. (No BSBL is proposed.) The cantilevered upper floors would hang over the streams' ordinary high water marks ("OHWM"). (Exhibit 37, PDF 2) The garage floor would be at elevation 77 feet; the existing grade east of the garage is at about 85 feet, which would necessitate at least an 8-foot cut within 5 feet of the stream OHWM. The first floor level at the southeast corner of the structure is also at 77 feet; the existing grade at that location is about 86 feet, which would necessitate a cut of at least 9 feet within 5 feet of the stream's OHWM. (Exhibit 36, PDF 3; 37, PDF 10 – 13)

A wall along the north side of the proposed driveway would retain a cut bank up to four feet deep; the retaining wall touches the 5-foot stream buffer. The proposed driveway would be 12 feet wide where it crosses the East Lake Sammamish Parkway NE right-of-way line. (Exhibit 36, PDF 3)

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14. During the open record hearing Community Development testified that, at a minimum, it would like to see a five-foot buffer from the critical areas plus an additional five-foot BSBL, for a total separation of at least 10 feet between the improvements and the critical areas. (Testimony; see also Exhibit 9007, p. 3:16 – 20)
15. Palanchuk has gathered lot area, lot impact area, and building footprint area for nine lots along the east side of East Lake Sammamish Parkway NE in the vicinity of Lot 2. Four of the nine lots are *Sammamish Springs Addition* Lots 3 – 5 and 7 to the north of Lot 2. Those four lots are each more than twice the size of Lot 2. (Exhibits 31, PDF 20; 9006) A fifth lot is *Sammamish Springs Addition* Lot 1, located south of Lot 2, which is slightly larger than Lot 2. The other four lots appear to be lots in a subdivision south of Lot 1 whose areas are in the same range as Lots 1 and 2. (Exhibits 31, PDF 20 & 21; 9006)

Of the nine lots, only three are encumbered in any way by wetlands, streams, or landslide hazard areas: The lots immediately north and south of Lot 2, and one of the lots in the presumed subdivision to the south. (Exhibit 31, PDF 20) The record contains no detailed information about the nature or extent of the critical areas encumbrances of those three lots.

Palanchuk's data shows that the median parcel area of the nine lots is 26,324 SF and the median building footprint is 3,000 SF. ⁶ (Exhibit 31, PDF 20)

16. The submitted plan set depicts standard inverted "T"-shaped foundation footings supported on driven piles with a standard foundation drain system surrounding the outside of the footings. (Exhibit 37, PDF 11 – 13) One of Palanchuk's agents testified during the hearing that they would use a reverse "L"-shaped footing to reduce the area impacted outside the foundation wall. (Capron testimony) That concept is shown nowhere on the plans.
17. The proposed development would require removal of five significant trees that are subject to regulation under Chapter 21A.37 SMC. ⁷ (Exhibits 1, PDF 9; 36, PDF 2) Chapter 21A.37 SMC essentially prohibits removal of significant trees from within critical area buffers. A Chapter 21A.50 SMC RUE cannot grant relief from Chapter 21A.37 SMC requirements.
18. One of the revised submittals is a proposed mitigation plan dated August 12, 2020. The major change between the initial mitigation plan and the revised mitigation plan is an increase in the area of invasive species removal. In the original plan, invasive species were to be removed from within the wetlands on only about the western two-thirds of Lot 2. In the revised plan, invasive species are proposed to be removed from all wetland areas on Lot 2. (Exhibit 39, PDF 4) Wetland enhancement plantings are still depicted as limited to about the western two-thirds of Lot 2. (Exhibit 39, PDF 6)

⁶ The "median" value is the middle number in a data set. The median is not the average. For example, in the data set 1, 3, 99, the median is 3 and the average is 34.33 $((1 + 3 + 99) \div 3 = 34.33)$.

⁷ Exhibit 1, PDF 9 states that seven regulated significant trees would have to be removed. Exhibit 36, PDF 2 shows only five significant trees within the proposed building footprint.

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However, Palanchuk's agent testified that enhancement plantings would be provided throughout the wetland areas for a total of 12,938 SF of enhancement area. (Capron testimony)

19. The City's wetland and streams peer review consultant made the following observations in its September 28, 2020, review letter:

The parcel is completely encumbered by critical areas and buffers. The buffer averaging and reduction allowed under SMC would not result in a suitable space to build a residence; therefore, denying use of the property. Additionally, all direct impacts to wetlands and streams have been avoided. Furthermore, the CAS included a Comparable Structure/Housing Study which adequately shows that the proposed residence is less impactful than the adjacent residences, and therefore the design can be considered "reasonable."

...

In our May 20, 2020 memorandum, we recommended that proposed wetland enhancement be extended further east into areas of Wetland A that are mapped with high invasive cover on Sheet W1 of the Mitigation Plan. According to the Revised CAS, 5,021 SF of additional invasive vegetation removal will occur in this area. However, no additional installation of native vegetation is proposed. ESA recommends that the supplemental planting of native trees and shrubs also occur in this area, primarily in areas that are mapped as containing extensive invasive vegetation on Mitigation Plan Sheet 1. Without the installation of native vegetation, regrowth of invasive vegetation would likely occur, which could impact the success of the adjacent buffer and wetland planting area. ESA continues to believe that enhancement within these additional areas will be necessary to achieve the functional lift described in Section 3.5 of the Revised CAS and the stated goals of the Mitigation Plan

(Exhibit 34)

20. Community Development denied the application on March 1, 2021. Community Development concluded that Palanchuk's application failed to comply with any of the four required criteria for RUE approval: SMC 21A.50.070(2)(a)(i), (ii), (iii), and (iv). (Exhibits 1; 41) This appeal followed on or about March 19, 2021. (Exhibit 42)
21. No State Environmental Policy Act ("SEPA") threshold determination has been performed for the Palanchuk proposal. Community Development declined to go through the SEPA threshold determination process when it concluded that the RUE was not approvable for reasons other than environmental impact. (Exhibit 1, PDF 13)

A threshold determination is arguably not required for an RUE based upon the following categorical exemption: "Granting of variance [*sic*] based on special circumstances, not including economic

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hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density.” [WAC 197-11-800(6)(e)] Because an RUE is akin to a variance, it may be covered by WAC 197-11-800(6)(e).

22. Palanchuk’s Closing Brief states that Palanchuk

continues to diligently work towards staff approval of home plans adhering to the ten-foot critical area buffer metric. ... [Palanchuk} believes that a further revised proposal – including construction adhering to a ten-foot critical area buffer and the planting of native species and removal of invasive species at a greater than 3:1 ratio – will merit staff approval in accordance with all concerns expressed by [Community Development] at the appeal hearing.

(Exhibit 9007, p. 4:5 – 14)

For its part, Community Development’s Closing Brief notes that Palanchuk has “declined to reduce the proposed footprint of the residence” despite staff’s urging to do so. (Exhibit 9008, p. 7:19) It further notes that “efforts [to amend the RUE application after the hearing] are not properly before the Hearing Examiner, nor have they merited the City to change its position on the RUE application.” (Exhibit 9008, p. 2, FN 2) Community Development continues to recommend that the Examiner affirm its denial of RUE2020-00099 and deny the Palanchuk appeal. (Exhibit 9008, p. 8:7 – 10)

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

LEGAL FRAMEWORK ⁸

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

⁸ 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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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:

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. Remand is the most appropriate course of action at this point in this case. Given the evidence now before the Examiner, it is clear that Lot 2 qualifies for an RUE. It is equally clear that the current proposal does not demonstrate compliance with RUE Criteria (2)(a)(iii) or (iv). Through the Closing Brief, Palanchuk has expressed a willingness to meet Community Development's "ten-foot metric," provide mitigation at a greater than 3:1 ratio, and redesign the driveway to avoid backing maneuvers onto East Lake Sammamish Parkway NE (and presumably, although not expressly stated, widen the driveway to meet the PWS 20-foot minimum width requirement). A well designed project fulfilling those three objectives could well be found to meet all RUE criteria.

It is important for Palanchuk to recognize that the "minimum necessary" concept does not mean "minimum necessary to allow a large house to be constructed on a highly encumbered lot". If Palanchuk wants a very large house, then Lot 2 is not the property on which that objective can be fulfilled. Even the "ten-foot metric" is really pushing the envelope where the standard buffer requirement is 75 feet plus a 15-foot BSBL, for a total critical area separation of 90 feet. The "ten-foot metric" is just barely 10% of the standard protection accorded to critical areas under Sammamish regulations. And it is Sammamish regulations, not those of any other jurisdiction, that apply here.

The remaining Conclusions of Law will address the plans that were before the Examiner at hearing, providing the foundation for the above Conclusion of Law.

- 2.⁹ The term "'Reasonable use' means a legal concept articulated by federal and state courts in regulatory taking cases." [21A.15.950]

⁹ This Conclusion of Law has been adapted from Conclusion of Law 1 in the undersigned Examiner's September 29, 2020, Decision in RUE2018-00394 ("Khendry I", so named because the same parties currently have another appeal in the same case pending before the Examiner).

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.

- 3.¹⁰ The Erosion Hazard Area and CARA designations are not impediments to potential development of Lot 2. 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. Palanchuk 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 Lot 2 will have to comply with their requirements.
- 4.¹¹ The Palanchuk RUE seeks relief from the Wetland, Stream, and 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 environmental regulations.¹² Sammamish's regulations hold that areas meeting specified hydrologic, soil, and vegetation characteristics are, by definition, regulated wetlands; that water courses meeting specified characteristics are, by definition, regulated streams; and 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 wetland, a stream, or a Landslide Hazard Area and their required buffers. That is a policy statement about the amount of

¹⁰ Adapted from Khendry I, Conclusion of Law 5.

¹¹ Adapted from Khendry I, Conclusion of Law 7.

¹² 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.

physical disturbance of wetlands, streams, steeply sloping areas, and the adjacent areas around them (buffers) that the City's legislative officials are generally willing to allow.

5. ¹³ Community Development incorrectly concluded that Lot 2 does not meet RUE Criterion (2)(a)(i).¹⁴ This criterion simply asks: Can you make any reasonable use of a property if you comply with the regulations in Chapter 21A.50 SMC? The entirety of Lot 2 is encumbered by a combination of wetlands, streams, and Landslide Hazard Areas and their overlapping, required buffers as defined in the SMC. If the wetland, stream, and Landslide Hazard Area restrictions within Chapter 21A.50 SMC were enforced, no reasonable use at all could be made of Lot 2.

Community Development's analysis goes into substantial detail about the Palanchuk proposal's failure to avoid, minimize, or mitigate impacts to critical areas and its failure to meet criteria for maximum buffer width reductions. (Exhibit 1, PDF 8 – 12) The Examiner does not disagree with that analysis, but it is not relevant to this particular criterion. The fact is, even if Palanchuk developed a proposal that avoided, minimized, and mitigated impacts to critical areas and qualified for maximum buffer width reductions, the entirety of Lot 2 would still be encumbered by those buffers and no reasonable development could occur within them.

6. ¹⁵ Community Development incorrectly concluded that Lot 2 fails to meet RUE Criterion (2)(a)(ii).¹⁶ Community Development holds out an arboretum, a park, or trails as alternative reasonable uses that would have lesser environmental impact.¹⁷ None of those uses have economic value to a private property owner. Lot 2 is privately owned. It is totally inappropriate to put forward public uses as reasonable for a parcel that is privately owned – unless the City is prepared to acquire Lot 2 and develop it as a public facility. This record is devoid of any evidence of City interest in acquiring Lot 2.

If one looks to the R-4 zone for potential alternative uses that might have a lesser impact on the wetlands, streams, and 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 livestock sales, farming (including livestock raising), and forest products growing and harvesting.¹⁸ [Chapter 21A.20 SMC] All of those uses would require as

¹³ Adapted from Khendry I, Conclusion of Law 8.

¹⁴ Community Development conceded this point in its Closing Brief. (Exhibit 9008, p. 4:5-6)

¹⁵ Adapted from Khendry I, Conclusion of Law 9.

¹⁶ This criterion addresses the type of use, not the size of use. Criterion (2)(a)(iv) addresses the size of a proposed use.

¹⁷ In its Closing Brief Community Development suggests that a smaller single-family residence could be a reasonable use with lesser impact. (Exhibit 9008, p. 4:14-20) The Examiner agrees. But size is an element of the fourth criterion, not the second criterion.

¹⁸ The Examiner has omitted from the list uses that clearly would produce no economic return to a private land owner such as trails.

least as big a footprint as would a single family residence. And, even an arboretum, a park, and a trail (assuming Lot 2 was either a trailhead or a self-contained trail) would require a parking area for its users. (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 and located single-family residence.

- 7.¹⁹ Community Development correctly concluded that Lot 2 fails to meet RUE Criterion (2)(a)(iii). Basing this conclusion on public health or safety might be somewhat of a stretch. Yes, the current plan would create a safety issue with vehicles backing out of the garage onto East Lake Sammamish Parkway NE, but Palanchuk's agents testified that the driveway could be expanded to allow vehicles to turn around before exiting the lot. If that were the only problem, an appropriate correction could easily be imposed on approval of an RUE.

But that is not the only problem with lack of compliance with this criterion. The "general purpose" of Chapter 21A.50 SMC is to preserve critical areas and minimize impacts to them to the greatest extent deemed feasible by the City's legislative officials. Analysis of this criterion and of criterion (2)(a)(iv) must start with the realization that Palanchuk's proposal provides at most only a 5-foot buffer from the on-site streams and wetlands. A 5-foot buffer represents only 5% of a standard 100-foot buffer, 6.7% of a standard 75-foot buffer, and 10% of a standard 50-foot buffer; if the standard buffers were reduced by the maximum allowable 50%, a 5-foot buffer would represent only 10% of a reduced 50-foot buffer, 13% of a reduced 37.5-foot buffer, and 20% of a reduced 25-foot buffer. Palanchuk is thus proposing an extraordinarily small amount of buffer in the first place. And it must be remembered that Palanchuk is proposing absolutely no BSBL.

The idea that one can build a 4-foot high wall retaining a cut bank precisely 5-feet from a stream's OHWM without intruding into that 5-foot buffer to build the wall is not credible; the idea that one can build a 6- 8-foot high foundation wall precisely 5-feet from a stream's OHWM without intruding into that 5-foot buffer to construct the foundation is not credible. A retaining wall requires some sort of footing drain behind its base. That footing drain would be within 5-feet of the OHWM. The same is true of a foundation wall. And with the foundation wall, workers need access to the outside of the foundation in order to construct and remove forms. That, too, would require excavation well into the minimal 5-foot buffer. Section 21A.50.210 SMC requires a 15-foot BSBL beyond the edge of a required buffer precisely to accommodate the reality that construction requires space around the thing being built. The 5-foot buffer may look neat on a site plan, but that neatness is not reality. The cantilevers will place the building literally above the streams. Such a design may have been fine at times past in some jurisdictions,²⁰ but it is not permissible in Sammamish in 2021.

¹⁹ Paragraph 2 adapted from Khendry I, Conclusion of Law 11.

²⁰ The Examiner is well aware of the famous "Fallingwater" residence in Pennsylvania designed in 1935 by Frank Lloyd Wright which literally straddles a stream much larger than those on Lot 2.

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The reality is that the proposed 5-foot buffers will be destroyed during construction because the proposed residence is to be built right against the edge of the buffer. It is completely unrealistic to expect that future maintenance and repair activities would not intrude into the buffers. Such a situation does not serve the public welfare, public interest, or the purposes of Chapter 21A.50 SMC.

8. Palanchuk's witnesses emphasized the fact that the City's peer review consultant ultimately agreed with them that the proposal avoided any direct impact to the on-site critical areas. As noted above, that view is based on paper theory, not reality. The notion that a contractor can build a six or more foot deep foundation wall together with footing drains precisely five feet from the edge of a stream without impacting the stream is simply not credible.
9. Community Development correctly concluded that Lot 2 fails to meet RUE Criterion (2)(a)(iv). The above analysis for RUE Criterion (2)(a)(iii) applies equally to this criterion.

The fact that data shows that Palanchuk's proposed residence has a building footprint comparable to or less than that of the median of surrounding residences, is not proof that the proposal constitutes the minimum disturbance of the wetlands, streams, Landslide Hazard Area and their required buffers on Lot 2 required to achieve a reasonable economic use of Lot 2. 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 critical areas required to achieve a reasonable economic use of Lot 2. The characteristics of the individual lots must be considered. Here, none of the "comparables" are comparable with regard to their encumbrance by critical areas. Most of the "comparable" lots are far bigger than Lot 2; most have no known critical area encumbrances. A reasonable use of a lot encumbered by critical areas and their buffers is not necessarily the same as a use on an unconstrained lot. The building footprint and associated site disturbance must be minimized to the greatest extent reasonably possible while still providing a reasonable economic use.

10. It is rather telling that Palanchuk's design and building placement never changed at any point in the review process. A plan designed when the wetlands and streams were initially delineated was never adjusted as the process went along. Community Development's review comments suggested that alternatives should be pursued. The impression one is left with is that Palanchuk had a five-bedroom house with two-car garage in mind from the outset and simply forced it onto the site.
11. It is profoundly obvious that reasonable development of Lot 2 is not possible if the requirements of Chapter 21A.50 SMC are followed to the letter. Thus, it is profoundly obvious that approval of an RUE is very appropriate. But the current proposal fails significantly to meet two of the four required criteria for RUE approval. The Examiner fully understands and appreciates Community Development's position that since Palanchuk declined to reduce or alter the proposal at any point in the review process, its denial of the RUE should simply be affirmed.

However, the Examiner believes that Palanchuk should be given one more opportunity to reduce the building's footprint, location, and/or design to provide a more beneficial and realistic buffer for the

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critical areas. Cantilevers over critical areas must be eliminated – they simply could not be maintained (let alone constructed) without repetitive impact to the critical areas.²¹

The process of returning an application for corrections is called “remand.” 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.

12. 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 RUE2020-00099 for further action consistent with this Decision.

²¹ The Examiner does not know whether relocating one or more of the on-site Np streams could meet the requirements of SMC 21A.50.340(8) and (9). If such could be achieved under the SMC, that might be a beneficial approach to working with the site’s numerous critical areas.

Decision issued June 16, 2021.

John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ²²

Alexandra Kenyon, unsworn counsel
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Avril Baty

Alan Wallace, unsworn counsel
Samuel Payne
Kenny Booth
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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: Cynthia Schaff, Hearing Examiner Clerk, City Clerk, 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

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.”

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