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# CITY OF EDMONDS

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DEVELOPMENT SERVICES DEPARTMENT • PLANNING DIVISION

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## BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

RE: Kent Dietz  Critical Area Reasonable Use  PLN20150052	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</b>
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### INTRODUCTION

The applicant requests a reasonable use variance in order to construct a single-family home with a 336 square footprint within the 100-foot critical area buffer of Shell Creek. The reasonable use request is approved subject to conditions.

### ORAL TESTIMONY

*Note: This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary to the decision issued by the Hearing Examiner. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner.*

Kernen Lien, Edmonds Senior Planner, summarized the proposal. In response to examiner questions, Mr. Lien noted that City regulations and recommended conditions don't require that the conditions of approval be recorded against the property.

Kent Dietz, applicant, noted that the reason the buffer enhancement areas aren't larger is because the rest of the property wouldn't benefit from any improvements. The remaining area is already native growth.

1 Lynnette Callahan, neighboring property owner, noted that the site is not an attractive  
2 nuisance as alleged in the exhibits. She has never seen the property serve as an  
3 attractive nuisance. Neighboring property owners were not sent letters about the  
4 proposal, only adjacent property owners. She saw approval as a slippery slope where  
it could lead to other variance requests. There have been multiple owners of the  
property who have all had to accept that development of the property is restricted.  
Removal of the trees will cause stormwater problems.

5 Vi Walls, neighbor, asked questions about the proposal. She noted that she lives on  
6 top of a hill and she used to dump her yard waste over her fence and was told she could  
not do so, apparently because of the presence of critical areas.

7 Scott Blomenkamp, citizen, testified that the review process was in violation of WAC  
8 197-11-340(2)(a), which prohibits an agency from acting on a proposal within 14 days  
9 of the issuance of the SEPA determination. The city set a hearing and prepared a staff  
10 report within that 14-day period. He also stated that an appearance of fairness  
presentation should have been made at the beginning of the hearing. Mr. Blomenkamp  
believed that the City tends to overly rush development projects.

11 In rebuttal, Mr. Lien stated that Ms. Callahan was referring to a letter submitted by the  
12 applicant on the issues regarding letters sent to adjoining property owners and the  
13 property serving as an attractive nuisance.

14 Kent Dietz stated in rebuttal that the amount of trees being removed is minimized. He  
15 noted that his comments about the property being an attractive nuisance were based  
16 upon information given to him from neighboring property owners and also that every  
time he goes to the property he has to close the gate. Neighbors have told him that the  
property is often frequented by young people.

## 17 EXHIBITS

18 Exhibit 1 Staff report dated March 17, 2016 with 39 attachments.

19 Exhibit 2 Staff power point.

20 Exhibit 3 Email from Lynnette Callahan dated March 23, 2016

21 Exhibit 4 Schenk reasonable use decision -- PLN 20130044; 20140008.

22 Staff sent an email to the examiner dated March 24, 2016 stating that a letter had been  
23 submitted to the City's planning counter at 3:50 pm on March 24, 2016. Since the  
24 hearing was already closed at that time and hearing participants did not have an  
opportunity to respond to the letter, the letter was not admitted into the record.  
Although the letter was emailed by staff to the examiner, the examiner did not read the  
letter and has no knowledge of its contents.

## FINDINGS OF FACT

### Procedural:

1. Applicant. The applicant is Kent Dietz.
2. Hearing. A hearing was held at 3:00 pm on March 24, 2016 at the Edmonds City Council meeting chambers.

### Substantive:

3. Site/Proposal Description. The applicant requests a reasonable use variance in order to construct a single-family home with a 336 square footprint within the 100-foot critical area buffer of Shell Creek. The property is located at 742 Daley Street and has steep slopes along the west side of the property and Shell Creek runs across the northeast corner of the property. Shell Creek is identified as an anadromous fish bearing stream which has 100 foot stream buffers pursuant to Edmonds Community Development Code (ECDC) 23.90.040.D. Given the entire property is encompassed by the stream buffer, the applicant is pursuing a critical area reasonable use variance to develop the site.
4. Characteristics of the Area. The subject site is located within a single-family residential neighborhood in Edmonds. The site is one of the few undeveloped parcels in the area and is completely surrounded by parcels that are currently developed with single-family residences. The site and surrounding properties are located within the RS-6 (Single-Family Residential) zone. North of the neighborhood is the Holy Rosary Church and School site, which is zoned RS-12. West of the neighborhood across 7<sup>th</sup> Avenue North is property zoned RM-1.5 (Multi-Family) that is developed with a mix of multi-family and single family residences.
5. Adverse Impacts. As mitigated, impacts to Shell Creek will be minimized and stream functions and values will be maintained. No other significant adverse impacts are anticipated.

The two primary impacts of concern are to Shell Creek and a landslide hazard located on the property. As noted in the critical areas report, Ex. 1, att. 5, the proposal will result in unavoidable stream buffer impacts. As noted in the report and evident from its references to credible scientific studies, the report is based upon best available science. Since the entire property is encumbered by Shell Creek or its 100 foot buffer, there is no way to build a home on the property without encroaching into the buffer. To compensate for these impacts, the critical areas report recommends 1,617 square feet of stream buffer enhancement with native trees and shrubs. The critical areas report also recommends a five-year monitoring plan. The home is also located as far as possible from the stream itself and the size of the residence's building footprint is far smaller than that of neighboring properties or sizes usually associated with single-family homes. A split rail fence will also be installed close to the home to ensure that no clearing or other development activity occurs outside of the footprint area. In

1 addition to adopting all of the critical area report recommendations, this decision will  
2 also require that the buffer restrictions be recorded to provide notice to subsequent  
3 property owners and to facilitate enforcement. As designed and mitigated, the critical  
4 areas report concludes that the functions and values of the Shell Creek will be  
maintained. There being no evidence to the contrary and given the expertise of the  
report and minimized design impact, it is determined that the proposal will maintain  
Shell Creek functions and values.

5 As previously noted, the southwest corner of the property has steep slopes. These  
6 slopes meet or exceed 40% grade and therefore qualify as landslide hazard areas  
7 pursuant to ECDC 23.80. The applicant had a geotechnical report prepared for the  
8 proposal, which determined that the proposal would have no adverse impacts to slope  
9 stability and would improve slope stability due to the proposed reinforced concrete  
10 foundation and drainage controls. The proposed site work also includes slope  
11 stabilization measures composed of gabion walls, which the geotechnical report  
describes as a wire basket of rocks. There being no evidence to the contrary and given  
the expertise of the geotechnical report, it is determined that the proposal will not  
adversely affect slope stability.

12 The proposal is fully compatible with surrounding homes. As noted in the critical areas  
13 report, Ex. 1, att. 5, the proposed home is significantly smaller than surrounding homes  
14 and the applicant is proposing a single-family home in an area zoned and developed  
15 with single-family use. As noted in the staff report, the residence is not likely to  
16 adversely affect the views of existing homes since the home will be located on the  
17 downhill side of a steep slope.

18 There was some concern about the removal of trees, but there is no evidence to suggest  
19 that this removal will create any significant adverse impacts. The amount of trees that  
20 will be removed is not identified with any specificity in the record, except for a  
21 comment in the environmental checklist that a large maple tree will be removed. The  
area to be cleared is only about 800 square feet and the required mitigation involves  
enhancing 1,689 square feet, which includes the installation of 15 native trees. Given  
the determination in the critical areas report that the functions and values of the stream  
will be maintained, the minimal amount of clearing proposed and the absence of any  
evidence to the contrary, it is determined that removal of the trees will not create any  
significant adverse impacts.

22 6. Minimum Reasonable Use. Finding of Fact No. 6 of the Schenk decision contains  
23 a detailed analysis of how to determine minimum reasonable use for the subject  
24 property. Although in this case the purchase price for the subject property was \$20,000  
25 instead of the \$95,000 to be paid by Mr. Schenk, the analysis is otherwise the same. As  
was the case for the \$95,000 purchase price, Mr. Dietz will certainly have no trouble  
realizing a reasonable economic return on his property if he is allowed to build a single-  
family home of minimum dimensions on the subject property. As determined in the  
Schenk decision, specifically footnote 3 of that decision, a home with a first floor limited  
to a two car garage would constitute minimum reasonable use with a building footprint

1 of 626 square feet. Although the Schenk application proposed a 626 square footprint,  
2 it was denied because it had an extensive second floor overhang that would adversely  
3 affect the stream buffer. In this application the applicant proposes a 336 square foot  
4 building footprint, but instead of in a garage he proposes to place the parking spaces on  
5 the proposed 460 square foot driveway. The administrative record does not contain any  
6 information on the dimensions of the size of the driveway proposed in the Schenk  
7 application, however from the minimal size of the driveway proposed for this  
8 application it does not appear likely that Mr. Schenk's driveway would have been  
9 significantly less in area. From all of these considerations it is determined that the  
10 proposal constitutes a minimum reasonable use of the property.

## 7 CONCLUSIONS OF LAW

### 8 **Procedural:**

9 1. Authority of Hearing Examiner. ECDC 20.85.020 provides the Hearing  
10 Examiner with the authority to review and act upon variance applications as Type III-  
11 A.

### 12 **Substantive:**

13 2. Zoning Designations. The area is zoned Single-Family Residential (RS-6).

14 3. Review Criteria and Application. Reasonable use exceptions to critical area  
15 stream buffers are governed by ECDC 23.40.210(A)(2) and 23.40.210(B). Applicable  
16 criteria are quoted in italics below and applied through corresponding conclusions of  
17 law.

18 **ECDC 23.40.210(A)(2)(a):** *The application of this title would deny all reasonable  
19 economic use of a property or subject parcel;*

20 **“Reasonable economic use(s)”** is defined pursuant to ECDC 23.40.320 as follows: *“The  
21 minimum use to which a property owner is entitled under applicable state and federal  
22 constitutional provisions in order to avoid a taking and/or violation of substantive due  
23 process. “Reasonable economic use” shall be liberally construed to protect the  
24 constitutional property rights of the applicant. For example, the minimum reasonable use  
25 of a residential lot which meets or exceeds minimum bulk requirements is use for one  
single-family residential structure. Determination of “reasonable economic use” shall not  
include consideration of factors personal to the owner such as a desire to make a more  
profitable use of the site.”*

10. Under the definition above, there is no question that the stream buffer denies the  
applicant all reasonable use of the subject property. The subject lot meets minimum bulk  
and dimensional standards in the RS-6 zoning district. Consequently, a single family home  
qualifies as a minimum reasonable use under the definition. The property is completely  
encumbered by the stream or stream buffer and City regulations prohibit the construction

1 of a home within a critical areas buffer. Consequently, the City's critical area regulations  
2 are depriving the applicant of all reasonable use of the property.

3 **ECDC 23.40.210(A)(2)(b):** *No other reasonable economic use of the property consistent  
4 with the underlying zoning and the city comprehensive plan has less impact on the critical  
5 area;*

6 11. The criterion is met. As concluded in Conclusion of Law No. 10, a single-  
7 family home is defined as a minimum reasonable use for the subject property. As a  
8 minimum reasonable use, no other type of reasonable use could be required for the property  
9 unless it allowed for a greater economic return on the property. As outlined in ECDC  
10 16.20.010, more intense uses allowed for the subject property include uses such as churches  
11 and schools and none of those uses could be accommodated on the applicant's relatively  
12 small lot. None of these types of uses could be construed as creating less impact to critical  
13 areas. If the "other reasonable use" referenced in the criterion above encompasses different  
14 project design as opposed to different types of uses, then as determined in Finding of Fact  
15 No. 6 the applicant has established compliance with the criterion since the project design  
16 encompasses the least area and impact that could be reasonably required for a single-family  
17 home.

18 **ECDC 23.40.210(A)(2)(c):** *The proposed impact to the critical area is the minimum  
19 necessary to allow for reasonable economic use of the property;*

20 12. The criterion is met. Conclusion of Law No. 12 of the Schenk decision contains a  
21 detailed legal analysis of what constitute minimum reasonable economic use, which  
22 involves a balancing of the public interest in enforcement of the City's critical area  
23 regulations verses the economic impact on the property owner. As determined in Finding  
24 of Fact No. 6, a balancing of these factors conclusively demonstrates that the proposal does  
25 in fact constitute the minimum necessary for reasonable use of the property. The criterion  
is met.

**ECDC 23.40.210(A)(2)(d):** *The inability of the applicant to derive reasonable economic  
use of the property is not the result of actions by the applicant after the effective date of the  
ordinance codified in this title or its predecessor;*

13. The criterion is met. The inability to derive reasonable use is wholly  
attributable to the critical areas ordinance, which encumbers the entirety of the subject lot  
with a stream buffer.

**ECDC 23.40.210(A)(2)(e):** *The proposal does not pose an unreasonable threat to the  
public health, safety, or welfare on or off the development proposal site;*

14. The criterion is met. As determined in Finding of Fact No. 5, there are no  
significant adverse impacts associated with the proposal. This conclusion could not be  
reached in the Schenk decision because the critical areas study prepared for the Schenk  
application was based upon an inaccurate critical areas classification of Shell Creek.

**ECDC 23.40.210(A)(2)(f):** *The proposal minimizes net loss of critical area functions and  
values consistent with the best available science; and*

15. The criterion is met. As determined in Findings of Fact No. 5 and 6, the proposal minimizes impacts to critical areas and the critical areas analysis upon which these conclusions were drawn was based upon best available science. See Ex. 1, att. 5.

**ECDC 23.40.210(A)(2)(g):** *The proposal is consistent with other applicable regulations and standards.*

16. As noted in the staff report, staff has determined compliance with all applicable development standards and there is no evidence to the contrary.

**ECDC 23.40.210(B)(1):** *Special conditions and circumstances exist that are peculiar to the land, the lot, or something inherent in the land, and that are not applicable to other lands in the same district;*

17. The property is completely encumbered with critical area buffers, which qualifies as a special condition and circumstance. Most lots in the vicinity and district are not fully encumbered by critical area buffers.

**ECDC 23.40.210(B)(2):** *The special conditions and circumstances do not result from the actions of the applicant;*

18. The criterion is met. See COL No. 13.

**ECDC 23.40.210(B)(3):** *A literal interpretation of the provisions of this title would deprive the applicant of all reasonable economic uses and privileges permitted to other properties in the vicinity and zone of the subject property under the terms of this title, and the variance requested is the minimum necessary to provide the applicant with such rights;*

19. The criterion is met. See COL No. 10.

**ECDC 23.40.210(B)(4):** *Granting the variance requested will not confer on the applicant any special privilege that is denied by this title to other lands, structures, or buildings under similar circumstances;*

20. The criterion is met. Authorizing the variance would enable the applicant to build a single-family home in a single-family neighborhood that is developed and zoned for single-family use.

**ECDC 23.40.210(B)(5):** *The granting of the variance is consistent with the general purpose and intent of this title, and will not further degrade the functions or values of the associated critical areas or otherwise be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity of the subject property; and*

21. The criterion is met. As determined in Finding of Fact No. 5, the applicant has demonstrated that the proposal will maintain the functions and values of Shell Creek and will not adversely affect slope stability of on-site steep slopes. The proposal will not be materially detrimental to the public because as determined in Finding of Fact No. 5 it will not create any significant adverse impacts.

1 **ECDC 23.40.210(B)(6):** *The decision to grant the variance is based upon the best*  
2 *available science and gives special consideration to conservation or protection measures*  
3 *necessary to preserve or enhance anadromous fish habitat.*

4 22. The criterion is met. As determined in Findings of Fact No. 5 and 6, the  
5 proposal minimizes impacts to critical areas and the critical areas analysis upon which these  
6 conclusions were drawn was based upon best available science. See Ex. 1, att. 5.

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Miscellaneous Issues

23. Appearance of Fairness “Script”. One of the hearing participants expressed some confusion about the absence of an appearance of fairness “script” in the hearing that is typically used in City Council and Planning Commission hearings. These scripts are usually comprised of the presiding officer asking if any members of the decision making body have engaged in any ex parte communications or have any association with the application that could make them appear to be biased. These scripts are recommended for multimember bodies but are not mandated by state law. The scripts are recommended because if a potential appearance of fairness violation is disclosed and no objection is made from the audience, the city or county has immunized itself from challenge. If an objection is not timely made, it is considered waived and cannot be raised on appeal. *See Lakeside Industries v. Thurston County*, 119 Wn. App. 886 (2004); *King County v. Central Puget Sound Growth Management Hearings Board*, 91 Wn. App. 1 (1998), partially reversed on other grounds, 138 Wn.2d 161 (1999); RCW 42.36.080. Of course, there is no point in a hearing examiner going through a script and asking himself questions about whether he has engaged in ex parte contacts or has any associations with a project if the examiner has not made any such contacts and has no association with the application. In this case the examiner had no ex parte contacts or associations with the project beyond reviewing the prior Schenk application, which would likely not be considered an appearance of fairness issue (although the examiner did disclose and enter the Schenk decision in any event). Consequently, there was no duty to go through any script or go through disclosures.

24. SEPA Review. It was also argued during the hearing that the City violated WAC 197-11-340(2)(a) by scheduling the application hearing and issuing a staff report within 14 days of issuance of the DNS. WAC 197-11-340(2)(a) provides that a municipality may not “act” on an application within 14 days of the issuance of a DNS. This issue cannot be resolved by the hearing examiner because the examiner has no jurisdiction to address SEPA compliance issues absent an appeal of the issuance of the DNS.

### DECISION

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The reasonable use variance is approved, subject to the following conditions:

1. The applicant is responsible for seeking and obtaining all other required local, state and federal permits.
2. The mitigation measures detailed in the Critical Areas Study and Mitigation Plan prepared by Wetland Resources, Inc. revised on January 7, 2016 contained in Attachment 20 of this staff report must be implemented prior to issuance of Certificate of Occupation for the residence constructed consistent with this approval.
3. Signs shall be installed on the fence delineating the setback area from the critical area buffer. The signs shall be consistent with the requirements of ECDC 23.90.030.F.2.a.
4. At time of building permit application, the applicant shall provide an updated estimate for the cost of plant materials, labor, monitoring, and maintenance. This shall be used as the basis for a maintenance bond which will be 15% of the estimate. The maintenance bond must be secured prior to issuance of Certificate of Occupation.
5. A monitoring report must be submitted to the City of Edmonds for each of the five year monitoring periods. The monitoring report shall document milestones, success, problems, and contingency actions required to ensure success of the mitigation.
6. Compliance with Engineering codes and construction standards will be reviewed with the building permit application for development of the site. The applicant is encouraged, wherever feasible, to incorporate pervious pavements, rain gardens and/or other low impact development techniques into the project design.
7. The City of Edmonds has two easements that encumber the subject property. One is for the construction, maintenance and repair of said stream channel and the other is a utility easement for installation, operation and maintenance of a fish ladder and diversion structure. Please refer to recording documents #8207160100 and #9003150306, respectively. Easement areas shall also be shown on any future building permit applications.
8. The conditions of approval shall be recorded upon the property with express reference to the restriction that no development activity or other disturbance of the area outside the rail fence is allowed except as authorized by the City's critical area regulations. The recording document shall be approved by planning staff and recorded prior to occupancy.

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Dated this 7th day of April, 2016.



Phil A. Olbrechts

Edmonds Hearing Examiner

**Appeal Right and Valuation Notices**

This land use decision is final and subject to closed record appeal to the City Council as authorized by ECDC 20.01.003. Appeals must be filed within 14 days of the issuance of this decision as required by ECDC 20.07.004(B). Reconsideration may be requested within 10 calendar days of issuance of this decision as required by ECDC 20.06.010.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.