



Date: June 7, 2013  
To: Mayor Earling and Edmonds City Council  
From: Jeff Taraday and Beth Ford, Lighthouse Law Group PLLC  
Re: Appeal of Hillman critical areas variance

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### **Introduction**

The city council is acting in its quasi-judicial capacity as it considers the closed record appeal of the Hearing Examiner's findings of fact, conclusions of law and decision with regard to the granting of a variance for the Hillman property. This memo aims to set forth the legal framework for the city council's review by discussing the standard of review and highlighting a couple key points in the hearing examiner's decision. We also discuss some of the case law that addresses reasonable use exceptions to provide the city council with additional legal context for its decision. We also seek to outline some optional courses of action.

### **Appeal Procedures**

The closed record appeal procedures are set forth in ECDC 20.07.005. Of particular import is subsection H because it sets forth the city council's options for action:



H. The city council shall determine ***whether the decision by the hearing body/officer is clearly erroneous given the evidence in the record***. The city council shall affirm, modify or reverse the decision of the hearing body/officer accordingly. Upon written agreement by the applicant to waive the requirement for a decision within the time periods set forth in RCW 36.70B.080, as allowed by RCW 36.70B.080(3), the city council may remand the decision with instructions to the hearing body for additional information.

ECDC 20.07.005.H (emphasis added).

**Standard of Review: what deference is owed to the hearing examiner?**

As noted above, the city council is sitting in an appellate capacity. Not only is the council expected to act like judges, it is, in particular, supposed to act like a court of appeals. While the hearing examiner's factual findings are subject to the clearly erroneous standard mentioned in the above-referenced code section, the hearing examiner's conclusions of law are reviewable *de novo*. See *Knight v. City of Yelm*, 173 Wn.2d 325, 336 (2011). *Citizens to Pres. Pioneer Park LLC v. City of Mercer Island*, has some procedural similarities in that the city council there was also sitting in an appellate capacity on a variance application for a cellular monopole antennae. The city council modified the planning commission's decision by granting a variance of 133 feet instead of only 70 feet like the planning commission. During the LUPA appeal that followed, appellants challenged the city council's decision for having improperly substituted its judgment for that of the hearing examiner.

It is true that when an appellate administrative body is governed by provisions directing it not to substitute its discretion for that of the original tribunal, findings of fact made by the original tribunal are not to

be disturbed if they are sustained by substantial evidence. *Messer*, 19 Wash.App. at 787, 578 P.2d 50. But the critical determinations by the planning commission that the residents want to have reinstated cannot properly be characterized as findings of fact. ***The major areas in which the city council differed from the planning commission revolved around the meaning and application of the variance criteria. Such disputes, as contrasted to disagreement about “raw facts”, present either questions of law, or mixed questions of fact and law.*** See *Leschi Improvement Council v. Washington State Highway Commission*, 84 Wash.2d 271, 283, 525 P.2d 774 (1974) (a finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect). An example of a mixed question of fact and law is whether the visual impact of a monopole is so great as to constitute a material detriment to the public welfare. The city council could properly conclude, based on its own review of the pictures, maps and testimony in the record, as summarized by the planning commission’s findings as to underlying facts, that in view of the entire record, there was insufficient evidence that the visibility of the pole constituted a detriment to public welfare. In so deciding, the city council did not step outside the appellate role prescribed for it by the Mercer Island City Code.

*Citizens to Pres. Pioneer Park LLC v. City of Mercer Island*, 106 Wash. App. 461, 473, 24 P.3d 1079, 1086 (2001). Like *Citizens to Pres. Pioneer Park*, this city council will be presented with the hearing examiner’s findings of fact (which should not be disturbed if they are supported by substantial evidence in the record) and conclusions of law (which can more easily be disturbed if the city council concludes that the hearing examiner misinterpreted city code).

Ultimately, the council must decide whether or not to overturn the Hearing Examiner decision to approve the variance with conditions. The clearly erroneous standard of review of the decision requires that the city council ask this question: “whether we are left with a definite and firm conviction that a mistake has been committed.” *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 37,

252 P.3d 382, 392 (2011), as corrected (May 10, 2011).

### **Reasonable Economic Use Definition**

The Council should look to the definitions cited in the ECDC as it reviews the hearing examiner's decision on the variance. One point of contention is whether the imposition of the city's critical area regulations would deny the Hillmans the reasonable economic use of their property. This is one of several factors that the Hillmans must prove in order to receive a variance.

The ECDC provides the following definition for "reasonable economic use:"

#### **23.40.320 Definitions pertaining to critical areas.**

"Reasonable economic use(s)" means the *minimum* use to which a property owner is entitled under applicable state and federal constitutional provisions in order to avoid a taking and/or violation of substantive due process. "Reasonable economic use" shall be liberally construed to protect the constitutional property rights of the applicant. ***For example, the minimum reasonable use 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.

ECDC 23.40.320 (emphasis added). The example provided in the definition, above (see emphasized text), has caused staff to interpret this definition to mean that a property owner should be able to construct a single-family residence on a conforming<sup>1</sup> single-family lot in order to make reasonable economic use of that single-family lot. The real question, from staff's perspective, and apparently from the hearing examiner's perspective, concerns the footprint and size of that single-family residence. Here, the

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<sup>1</sup> A lot that meets the minimum dimensional standards (e.g., width, area) for the zoning in which it is located.

code does not provide much guidance.

### **Critical Area Variance Criteria**

The ECDC provides several factors that must be satisfied in order to obtain a critical areas variance. While the staff report to the hearing examiner addressed all of these factors, this memo will focus on two that appear to have been of significance to the hearing examiner.

#### **23.40.210 Variances.**

A. Variances from the standards of this title may be authorized through the process of hearing examiner review in accordance with the procedures set forth in Chapter 20.85 ECDC only if an applicant demonstrates that one or more of the following two conditions exist:

1. ... [not applicable here]
2. The application of this title would deny all reasonable economic use (see the definition of “reasonable economic use(s)” in ECDC 23.40.320) of the subject property. ***A reasonable use exception may be authorized as a variance only if an applicant demonstrates that:***
  - a. The application of this title would deny all reasonable economic use of a property or subject parcel;
  - b. No other reasonable economic use of the property consistent with the underlying zoning and the city comprehensive plan has less impact on the critical area;
  - c. The ***proposed impact*** to the critical area ***is the minimum necessary to allow for reasonable economic use*** of the property;
  - 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;
  - e. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
  - f. The proposal minimizes net loss of critical area functions and values consistent with the best available science; and
  - g. The proposal is consistent with other applicable regulations and standards.

ECDC 23.40.210.A. (emphasis added). The council must determine whether the hearing examiner erred in concluding that the seven requirements of ECDC 23.40.210(A)(2) have been met.<sup>2</sup> We limit our discussion here to the primary focus of the appeal and to staff's primary concern over the hearing examiner's decision: whether the applicant demonstrated that the proposed impact to the critical areas was the "*minimum necessary* to allow for reasonable economic use" as required by ECDC 23.40.210.A.2.c. "Necessary" is not defined in ECDC 23.40.320. Nor is "necessary" defined in Title 21. The Washington Supreme Court, in a case that turned on whether a helistop was "reasonably necessary," provided this analysis:

"Necessary" is not defined in the ordinance. However, it is defined in the dictionary as something "that cannot be done without : that must be done or had : absolutely required : ESSENTIAL, INDISPENSABLE...."  
Webster's Third New International Dictionary 1511 (3d ed.1986).

*Development Services of America v. City of Seattle*, 138 Wn.2d 107, 118 (1999). The *Development Services* court held as follows:

[W]e hold that in order to fulfill the "necessary element" criterion, something more than business "convenience," "efficiency," or "reasonable" necessity is required. Under the ordinance, an applicant must show the requested helistop is actually "necessary" to its business services. While we agree with SGA that the helicopter itself is a useful business tool, SGA has failed to show why landing on the roof of its west Seattle headquarters is a "necessary" or "essential" element of its business.

*Dev. Servs. of Am., Inc. v. City of Seattle*, 138 Wn.2d 107, 119, 979 P.2d 387, 393 (1999).

### **Hearing Examiner's Key Factual Findings**

The city council should pay particular attention to hearing examiner finding

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<sup>2</sup> There are additional factors required by ECDC 23.40.210.B, which were addressed by the staff report.

number 6, which reads as follows:

6. Minimum Variance. The most challenging issue for this proposal is whether the request constitutes the minimum necessary to grant relief from the City's critical area regulations. ***It appears that encroachments into the wetland could be almost entirely avoided by limiting the building footprint to 1,600 square feet, inclusive of garage space.*** The need to encroach into 1,790 square feet of Class III wetland is based upon the applicants' desire to have vaulted ceilings and a driveway that could be larger than necessary to serve the property. ***Almost of the living space and the garage could be located within the footprint proposed outside of the wetland if the applicant fully built out the second story of the proposed home in lieu of vaulted ceilings.***

As noted in the staff report, the proposed living area of 2,623 square feet appears to be average, if not smaller than those of existing residences within the vicinity, as demonstrated by the sizes of other homes in the area tabulated by the applicant in Table 3 of Ex. 8. As identified by comments from Todd and Candy Brown, Ex. 23, one outlier not identified in Table 3 is the Mallot home, located across the street with living space of 2,063 square feet.

If only a buffer encroachment were proposed, as opposed to encroachment into the wetland itself, the size of the proposed home would clearly be considered a minimum variance request given the larger sizes of surrounding homes. However, a significant complicating factor in this application is that ***it appears that the encroachment into the wetland itself could be avoided entirely if the home is redesigned*** to replace the vaulted ceiling space with additional living space. The only reasons for not fully using second floor living space presented by the applicant were that they have a preference for first floor living space as they grow older and they want to avoid a boxy appearance for their home. The author of the wetland report, Andrea Bachman, was not able to provide any reason why the home couldn't be redesigned to avoid encroachment into the wetland. These are not sufficient reasons to justify an encroachment into wetlands.

Record, at 0013-0014 (emphasis added). The emphasized phrases above are findings of fact in the purest sense. In other words, these phrases do not involve any interpretation of law or any application of law to facts. They represent the examiner's summary of the

facts of this case. While the hearing examiner also stated in Finding of Fact 6 that “[t]hese are not sufficient reasons to justify an encroachment into wetlands,” (Record, at 0014) this statement is arguably more of a conclusion of law than a finding of fact because the examiner can only make this statement through some application of law to the facts. The examiner here is essentially stating that the applicant has not met its burden of proof with respect to this prong of the analysis.

**Hearing Examiner’s Conclusions of Law regarding ECDC 23.40.210.A.2.c**

The hearing examiner appears to have struggled in his application of ECDC 23.40.210.A.2.c. That subsection, which is one of the tests that must be proven by the applicant, requires as follows: “[t]he proposed impact to the critical area is the minimum necessary to allow for reasonable economic use of the property.” Here is the hearing examiner’s conclusion of law (Conclusion 12) with respect to this prong of the test:

12. As discussed in Finding of Fact No. 6 and Conclusion of Law No. 11, ***there is an open question as to whether the home has been designed to minimize impacts to the on-site wetland. The conditions of approval require further staff investigation and redesign of the project to the extent necessary to mitigate project impacts.*** According to the testimony of Mr. Brown, the applicants only had to pay \$75,000 for their lot whereas other lots in the vicinity average approximately \$500,000. Although Mr. Brown did not provide any hard data to substantiate his cost estimates, his assertions were undisputed by the applicants and it is fair to conclude that the purchase price of the applicants’ property was substantially reduced as a result of the wetland and stream. As discussed in the Order on Reconsideration, investment backed expectations are one of the factors involved in assessing reasonable use. If the living space and garage is limited to the footprint identified in Condition No. 1 of this decision, the applicants would still have 2,600 square feet of living space. This would be 1,200 square feet less than the average living space available to other

homes that the applicants identified in the vicinity, but given the significantly reduced land value this would still qualify as reasonable use if there was an appreciable environmental benefit to not building within the wetland.

Record, at 0017-0018 (emphasis added). By stating that there is an “open question” regarding a mandatory prong of the critical areas variance test, and by conditioning the project on the possibility of a redesign, the hearing examiner has effectively reiterated what he said in Finding of Fact 6: that the applicant has not met its burden with respect to this prong of the analysis for the project that is currently proposed.

#### **Hearing Examiner’s Condition No. 1**

While the examiner clearly was not convinced that the applicant had met its burden with respect to ECDC 23.40.210.A.2.c, he still approved the critical areas variance by conditioning it on the grounds that city staff would confirm compliance with ECDC 23.40.210.A.2.c at a later date:

#### **DECISION**

The street, side yard and critical area reasonable use variance stream and wetland requests are approved, subject to the following conditions and modifications:

**1. As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist**, who can be Andrea Bachman, to determine whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions. ***If there is any appreciable environmental benefit to avoiding the proposed wetland encroachment, the building footprint for the home, inclusive of the garage, will be limited to the squared building space*** (including the west bay window) depicted in Ex. 4, Sheet 2, excluding the garage area and the room appended to the north of the garage to the extent it encroaches into the wetland. The southeast wetland encroachment of this living space is authorized. The driveway shall be located outside the wetland. Retaining walls may be built into the wetland

to the extent necessary to support the home and driveway. If the driveway cannot be built to City standards without encroaching more than a foot into the wetland, the applicants may build the home as proposed with the 1,790 square foot encroachment.

Record, at 0020 (emphasis added). The hearing examiner does have the authority to approve a variance with conditions. But, having found that the applicant did not meet the burden on at least one prong of the test, we doubt the examiner has the authority to condition a variance approval in such a manner as to essentially delegate to staff the authority to determine whether (after the hearing) the applicant has now satisfied that initially-failed prong of the test, either through a redesigned project or through additional documentation from a wetland biologist. The ECDC delegates this decision to the hearing examiner and the hearing examiner, not staff, should make the determination as to whether the tests in the code have been satisfied.

Furthermore, it is unclear how any level of environmental documentation would help the applicant satisfy the “minimum necessary” impact prong of the test. While environmental factors are certainly relevant in analyzing other prongs of the test (ECDC 23.40.210.A.2.e and f, for example), the analysis of the “minimum necessary” impact prong should more appropriately focus on architectural, and perhaps economic, considerations that are intended to prevent a regulatory taking. While the code makes it fairly clear that, for reasonable use purposes, one should be able to build a single-family home on a conforming single-family lot, it is silent as to how one should determine whether the “minimum necessary” impact prong has been satisfied. For example, there is no minimum or maximum square footage in the code to help staff or the hearing

examiner determine when a footprint is small enough to be considered the “minimum necessary.”

Finally, there are procedural concerns with the hearing examiner’s condition. It would allow one party (the applicant) to provide additional “evidence” after the hearing is over to demonstrate satisfaction with condition 1 without allowing the opposing party to question or respond to the evidence. And, the appeal possibilities from such a staff decision (for either applicant or neighbor) would be compromised, because there is no administrative appeal from the decision on a building permit.

### **Case law regarding takings**

Appellants cited several cases that provide a background to the issue of takings. These cases have only marginal relevance to the case pending before the city council because the ECDC appears to state that reasonable use amounts to the ability to construct a single-family home on a conforming single-family lot assuming that it is the “minimum necessary” single-family home. The city council may still be interested in the cases cited by the Appellants to provide a fuller understanding of the broader legal context for these determinations. Therefore, we provide the following summary of the facts and main holdings of these cases.

### **Federal cases (mentioned in Appellants’ Argument):**

*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982): A New York City landlord sued a cable television company claiming

that the defendant's installation of its facilities on the plaintiff's property pursuant to New York law requiring a landlord to permit installation of such facilities on rental property constituted a constitutionally compensable taking. The Court held that the physical occupation of the rental property constituted a taking, notwithstanding that the statute might be within the state's police power as having important educational community aspects. Permanent physical occupation authorized by the government is a "taking" without regard to the public interest it may serve.

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992): Owner of beachfront property brought an action alleging that application of the South Carolina Beachfront Management Act to his property (which barred Lucas from erecting permanent habitable structures on his parcels) constituted a taking without just compensation. The Court held that there are two categories of regulatory deprivations that are compensable under Fifth Amendment without case-specific inquiry into public interest advanced in support of restraint; the first encompasses regulations that compel property owner to suffer physical invasion of his property (as in *Loretto*). The second concerns the situation in which a regulation denies all economically beneficial or productive use of land (as in this case). This case also identifies that governments need not pay compensation when the State's action "makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon ownership."

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). This case further expanded the instances in which a court may find a takings (in addition to a physical taking in *Loretto* and a regulatory taking that denies all economic and productive use in *Lucas*). In this case, following the refusal of the New York City Landmarks Preservation Commission to approve plans for construction of 50-story office building over Grand Central Terminal, which had been designated a “landmark,” the terminal owner filed suit charging that application of landmarks preservation law constituted a “taking” of the property without just compensation and arbitrarily deprived owners of their property without due process. The regulations did not deny all economically beneficial or productive use in the land (as in *Lucas*), but did diminish the value of the property to some extent. The court found that whether such action constituted a taking depends largely on the particular circumstances, and held that the relevant considerations in determining whether economic injuries caused by public action is required to be compensated by the government are (1) the economic impact of the regulation, (2) the extent to which the regulation has interfered with distinct investment backed expectations, and (3) the character of the governmental action (such as if the action can be characterized as an acquisition of resources to permit or facilitate uniquely public functions, for example when a government water project results in private land flooding).

*Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001): A landowner brought an inverse condemnation action against the Rhode Island Coastal Resources

Management Council (CRMC), alleging that the CRMC's denial of his application to fill 18 acres of coastal wetlands and construct beach club constituted a taking for which he was entitled to compensation. A corporation owned by petitioner and his associates purchased the property (at that time a salt marsh) in 1959, and shortly afterwards the petitioner bought out his associates and became the sole shareholder. Applications to develop the property were rejected. In 1971, the State created CRMC to protect the State's coastal properties. CRMC's regulations designated salt marshes like the one at issue as protected coastal wetlands. In 1978 the corporate charter was revoked and title passed to the petitioner as the corporation's sole shareholder. In 1983 petitioner applied for permission to construct a wooden bulkhead and fill his entire marshland area, which was rejected by CRMC. A subsequent application was denied as well. The inverse condemnation action followed.

The Rhode Island supreme court ruled in part that because petitioner received title to the property after the wetlands regulations were enacted, he did not have a right to challenge the regulations. The court rejected both claims that the CRMC's actions (1) deprived him of all economic beneficial use of the property (under *Lucas*) and (2) deprived him of some economic value (under *Penn Central*). With regard to the *Penn Central* test, the court also ruled that because the regulation at issue predated his acquisition of title, he could have no reasonable investment-backed expectation to develop the property, and therefore could not recover compensation.

The US Supreme Court rejected the Rhode Island court's "sweeping" rule that acquiring title after the regulations' effective date barred a takings claim. Court held that

such a ruling “would absolve the state of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.” It remanded the case back to state court, telling the lower court to address the merits of the petitioner’s claim under *Penn Central*, which is not barred by the fact that he acquired title after the effective date of the regulation.

The question of whether timing of acquisition may be a factor for consideration was left unclear by this decision. However, Justice O’Connor wrote a concurring opinion stating that the timing of the purchase may be a factor in the reasonable “investment-backed expectations” analysis mentioned in *Penn Central*. She stated that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.” This must be balanced with the other factors in the *Penn Central* test. O’Connor’s opinion can be read in tandem with the majority opinion, because she says: “As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry.”

Appellants cite to Robert Meltz, TAKINGS LAW TODAY: A PRIMER FOR THE PERPLEXED, 34 Ecology L.Q. 307 (2007), for the proposition that cases have followed O’Connor’s analysis.

### **Washington cases (mentioned in Appeal):**

*Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 787 P.2d 907 (1990): The

Presbytery of Seattle challenged the 1986 Wetland Ordinance that prohibits new construction in wetland boundaries under the theory of inverse condemnation. This ordinance prevented the Presbytery from constructing a church on the property it purchased in 1978 that was located in a wetland. The Court held: “Mere regulation on the use of land has never constituted a ‘taking’ or a violation of due process under federal or state law. The problem in any given case is to determine when such a regulation exceeds constitutional bounds.” The Court then laid out the tests for takings and substantive due process, in addition to discussing an issue of exhaustion of administrative remedies.

The test for takings is as follows: “The ‘taking’ analysis requires that the court first ask whether the regulation substantially advances legitimate state interests. If it does not, then it constitutes a ‘taking’. If it does substantially advance a legitimate state interest, then it becomes necessary to look further and see if the challenge to the regulation is a facial challenge or one involving application of the regulation to specific property.” ... “If the challenge involves an application of the regulation to specific property, then the court should consider: (1) the economic impact of the regulation on the property; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the government action” (the same test as used in *Penn Central*).

*State v. Lake Lawrence Pub. Lands Prot. Ass'n*, 92 Wn.2d 656, 601 P.2d 494 (1979):

Lake Lawrence, Inc. appealed the denial of its application for preliminary plat and

shoreline substantial development permit by the County Board of Commissioners. After Lake Lawrence applied for these permits, the County Planning Commissioners gathered evidence and testimony regarding the proposal. A draft EIS was prepared, and it became clear during investigation that bald eagles used the site for perching and feeding. The County Board of Commissioners denied the application for preliminary plat and shoreline development permit based on the eagles' status as endangered birds, the county's comprehensive plan calling for preservation of wildlife and a recommendation by the Department of Game for a 200 foot buffer strip to protect bald eagle habitat. Review was sought before the Shoreline Hearing Board, which reversed the denial. The Court held that the Commissioners were not bound by the Shorelines Hearing Board finding, and found that they had independent authority under SEPA to consider the environmental issue and deny the plat for environmental reasons.

The Court also held that denial of the plat in this case does not violate respondents' rights to due process, or constitute a taking of private property for public use without compensation. The determination of whether a regulation is an unconstitutional taking requires a balancing of the nature of the infringement of private property interests against the public interest in imposing the regulation in question. "The strong public policy interest being advanced by this regulation of respondent's use of the leasehold is the preservation of a valuable environmental resource which is identified as such in the County's Master Program. Where, as here, the Commissioners' decision does not deny to respondent all reasonably profitable uses, but only requires that the use be adapted to protect an important environmental resource, we find no

taking in violation of the state and federal constitutions.”

### **Possible Decisions by the City Council on Appeal**

“The city council shall affirm, modify or reverse the decision of the hearing body/officer accordingly. Upon written agreement by the applicant to waive the requirement for a decision within the time periods set forth in RCW 36.70B.080, as allowed by RCW 36.70B.080(3), the city council may remand the decision with instructions to the hearing body for additional information.” ECDC 20.07.005.H. The optional actions below are not intended to be exhaustive.

**AFFIRM:** a decision to affirm would essentially amount to the city council agreeing with the hearing examiner that staff can determine whether variance criteria have been satisfied post-hearing. While staff initially recommended approval of the variance based on staff’s application of the “minimum necessary” impact standard, the hearing examiner was not convinced and he is the original decision-maker. Because the hearing examiner has now determined that the “minimum necessary” impact has not been satisfied, staff can no longer recommend approval as proposed.

**MODIFY:** the city council could modify the hearing examiner’s decision by approving the variance subject to the following conditions:

1. that there be no encroachment into or variance to use the wetland itself (as distinct from the wetland buffer); and
2. that the footprint of the structure inclusive of garage not exceed 1600 square feet (see Record, at 0014 where the examiner appears to suggest this size).

**REVERSE:** the city council could reverse the hearing examiner’s decision and based upon finding of fact 6, deny the requested critical area variance for failure to satisfy ECDC 23.40.210.A.2.c.

**REMAND:** the city council could remand the matter to the hearing examiner, clarifying that Condition 1 is an unacceptable delegation of his authority and that the variance must either be denied or conditioned in such a manner that the examiner can

determine for himself that the decision criteria have been satisfied. Note that this option would likely require a waiver from the applicant.