

**INDEX OF FILES TRANSMITTED BY KENYON DISEND TO CITY CLERK
FOR CITY COUNCIL REVIEW IN ABUNDANT LIFE APPEAL MATTER**

1.	Deputy Mayor Briefing Order [e-mail from Gregg Bradshaw to Parties]	12/08/2023
2.	Brief of Appellant	11/13/2023
3.	Brief of Respondent Abundant Life	01/12/2024
	Communications to Parties, including:	
4.1	<ul style="list-style-type: none"> • E-mail from Kendra Rosenberg to Brad Grasley and Jennifer Robertson, including Affidavit of Publication attachment 	01/11/2024
4.2	<ul style="list-style-type: none"> • E-mail from Kendra Rosenberg to Brad Grasley 	01/10/2024
4.3	<ul style="list-style-type: none"> • E-mail from Kendra Rosenberg to Heather Burgess and Jennifer S. Robertson 	01/08/2024
4.4	<ul style="list-style-type: none"> • E-mail from Kendra Rosenberg to Hearing Examiner 	01/02/2024
5.	Reply Brief of Appellant	[not rec'd yet]
	Hearing Examiner Decision and Record, including:	
6.1	<ul style="list-style-type: none"> • City's Staff Report and Exhibits Thereto (three .pdf files – 6.1a – 6.1c) 	09/25/2023
6.2	<ul style="list-style-type: none"> • Transmittal letter from Hearing Examiner's Office to City Clerk 	11/01/2023
6.3	<ul style="list-style-type: none"> • Hearing Examiner's Findings, Conclusions and Decision 	11/01/2023
6.4	<ul style="list-style-type: none"> • E-mail from Betty Hendricks to Kim Agfalvi [transmitting files already listed above] 	01/02/2024
6.5	<ul style="list-style-type: none"> • E-mail from Margaret Starkey to Betty Hendricks 	01/02/2024
6.6	<ul style="list-style-type: none"> • E-mail from Margaret Starkey to Betty Hendricks 	01/09/2024
6.7	<ul style="list-style-type: none"> • E-mail from Betty Hendricks to Kim Agfalvi [transmitting files already listed above – Email 1 of 3] 	01/09/2024
6.8	<ul style="list-style-type: none"> • E-mail from Betty Hendricks to Kim Agfalvi [transmitting files already listed above – Email 2 of 3] 	01/09/2024
6.9	<ul style="list-style-type: none"> • E-mail from Betty Hendricks to Kim Agfalvi [transmitting files already listed above – Email 3 of 3] 	01/09/2024

From: [Gregg Bradshaw](#)
To: jrobertson@insleebest.com; toni@froehlinglaw.com; hburgess@dfpblaw.com
Cc: [Kim Agfalvi](#); [Danielle Charchenko](#); [Kendra Rosenberg](#)
Date: Friday, December 8, 2023 2:48:28 PM

Briefing Order:

To prepare this matter for the City Council's decision on Abundant Life Church's application for a critical area variance, the City Council issues the following schedule:

Matter Event	Deadline
Hearing Examiner Decision and Record-to be submitted by Hearing Examiner	December 18, 2023
Brief of Respondent Abundant Life Church	January 12, 2023
Reply Brief of City Building and Planning Dept.	January 22, 2024
City Council Review Hearing	January 31, 2024; Time: 4-6 PM

This appeal will be processed consistent with chapters 11, 13, and 15 of the Orting Municipal Code. All written materials should be submitted to the City Clerk's Office for transmittal to Council, by e-mail to Kim or Danielle included on this e-mail, or in hard copy, and provided on or before the deadline to the other party by e-mail or by hard copy.

Deputy Mayor Gregg Bradshaw



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**BEFORE THE ORTING CITY COUNCIL
ORTING, WASHINGTON**

In the Matter of the Appeal of Approval of a
Critical Areas Variance to
Abundant Life Church, Applicant

APPEAL OF ORTING BUILDING &
PLANNING DEPARTMENT OF
HEARING EXAMINER DECISION TO
GRANT A CRITICAL AREAS
VARIANCE

APPEAL STATEMENT

1. Decision being Appealed.

The Decision¹ being appealed is the Hearing Examiner Decision dated November 1,
2023, by Hearings Officer,² Antoni H. Froehling on the Case: Abundant Life Church
Application for Critical Areas Variance. A copy of the Decision is attached to this Appeal
Statement as Exhibit "A".

///

¹ Under the code this may also be considered a recommendation as the City Council is the final decision maker for
variances to the critical areas code. (OMC 11-1-8.) For simplicity, whether it is a decision or a recommendation, it
will be referred to as a "Decision" throughout this Appeal Statement.

² Throughout the balance of the appeal, Mr. Froehling is referred to as the Hearing Examiner although he refers to
himself as the Hearings Officer. The City's Municipal Code refers to a Hearing Examiner.

APPEAL OF ORTING BUILDING & PLANNING DEPARTMENT
OF HEARING EXAMINER DECISION TO GRANT A CRITICAL
AREAS VARIANCE TO ABUNDANT LIFE CHURCH - Page 1

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2. Name and Address of Appellant.

This Appeal is filed by the City of Orting Building & Planning Department (“Department”) which is located at 104 Bridge Street S., PO Box 489, Orting WA 98360. The Department is represented by legal counsel Jennifer S. Robertson and Charlotte A. Archer of Inslee Best Doezie & Ryder, P.C., 10900 N.E. 4th Street, Suite 1500, Bellevue, WA 98004.

3. Appellant’s Standing.

The Appellant has standing as the Orting Building & Planning Department appeared before the Hearing Examiner, submitted documents to the Hearing Examiner, and provided testimony and evidence in the Abundant Life Church Application for Critical Areas Variance hearing.

4. Appellant’s Interest in the Matter.

The Appellant’s duties include interpreting and implementing the City’s code, including protection of critical areas as required by State and local law. The Decision violates the code, did not implement, analyze, or correctly address the applicable standards in the code for granting a Critical Areas Variance, misstates facts, was not based on substantial evidence, ignored applicable law and facts, and does not comply with the law. If allowed to stand, the Decision will unnecessarily harm critical areas and will create a precedent contrary to law.

5. Description of Errors in the Decision.

The Decision is wrong for the following reasons:

- a. ***Facial and Procedural Errors.*** The Decision does not list the individuals who testified by name or address, does not contain a complete list evidence or exhibits submitted to

1 the Hearing Examiner, and the hearing was not recorded. The Decision does not even list how
2 many people testified. The Decision says only, “A public hearing was held on October 24, 2023.
3 A number of people attended but there were only 2 supporting comments in favor of the
4 project.”³ There is no mention as to who those people were, if they represented the Applicant,
5 how many people spoke in opposition to the project, who they were, the names and roles of
6 people providing testimony or documents submittals for the Applicant or the Department, etc.
7 Therefore, it is impossible understand what evidence was provided to the Hearing Examiner or
8 to create a complete record for this matter and the Decision is defective on these bases.

9 **b. *Incorrect facts are included in Decision regarding the date for Project***
10 ***Commencement.*** In addition to the many errors of law set forth below, the Hearing Examiner
11 relied on incorrect facts, specifically when the development project commenced. The project did
12 not start “many years ago”,⁴ nor did the project begin⁵ prior to the current Critical Areas Code
13 wetland buffer standards. Rather, the project “started” when the first application for site plan
14 review was filed in October of 2020, not before, and certainly not prior to the 2016 change in
15 the Orting critical areas code. Furthermore, the application for the Critical Areas Variance
16 wasn’t filed under August 28, 2023. The Applicant may have conducted studies and due
17 diligence prior to 2020 and/or 2023, but that is not the “point of commencement of a project.”

18 Under Washington law, a project does not start and cannot be vested until a complete
19 building permit or other development permit which creates vesting has been submitted. Under
20 Washington law, unless a city has expanded the vesting standards (which Orting has not done),

21 ³ Decision, page 2.

22 ⁴ Decision, page 1.

23 ⁵ *Id.*

1 vested rights apply only in the context of building permit applications (RCW 19.27.095), short
2 subdivision and subdivision applications (RCW 58.17.033), and development agreements
3 (RCW 36.70B.180). The fact that the Applicant evaluated the wetlands back in 2015 was a key
4 component in the Hearing Examiner's Decision. However, that evaluation did not vest the
5 Applicant to those 2015 Critical Areas Codes, therefore, the evaluation date has no relevance to
6 the application of the Orting Critical Areas Code today. Only a permit application that creates
7 vesting under the law can vest a project to prior regulations. Applying the 2015 critical areas
8 code and using those prior codes as a basis for granting this Critical Areas Variance is both an
9 error of fact and an error of law.

10 **c. *Failure to Evaluate and Apply Applicable Law.***

11 **A. OMC 11-1-8 was not properly applied.**

12 The Decision cites to OMC 11-1-8 which allows the City Council to grant a variance to
13 the Critical Areas Code. The evaluation of the variance must be (1) in accordance with the
14 procedures set forth in Title 13 of the OMC; and (2) based on findings in OMC 11-1-8(A) and
15 (B) which provide:

- 16 A. Because of the special circumstances applicable to the subject property,
17 including size, shape, topography, location or surroundings, or the size
18 or nature of the critical area, the strict application of this title would
19 deprive the property owner of reasonable use of their property;
- 20 B. The granting of the variance is the minimum necessary to accommodate
21 the development proposal and will not be materially detrimental to the
22 public welfare or injurious to the property or improvements in the
23 vicinity and zone in which the property is situated, or contrary to the
24 goals and purposes of this title.

1 Although the Hearing Examiner Decision quotes these standards, they are not correctly applied.
2 In fact, the language of the Decision makes it clear that the Critical Areas Variance should have
3 been denied under OMC11-1-8(A)and(B). The Decision states, “**While it may be true that the**
4 **applicant could amend its plan to come into compliance with the City’s recommendation .**
5 **.”**⁶ If it is true that the Applicant can amend its plan to comply with the City’s Code, then by
6 the standards in OMC 11-1-8, the Applicant is not entitled to a variance.

7 The Code allows consideration of “special circumstances applicable to the subject
8 property, including size, shape, topography, location or surroundings, or the size or nature of the
9 critical area”. This has to do with the nature of the property, not the nature of the history of the
10 Applicant’s “efforts to construct a church”⁷. The Decision contains no evaluation of the special
11 circumstances related to the property, only as to the wetlands and the size of the buffers and the
12 Applicant’s desire to put a church on this site for at least 8 years. From the Decision, there is no
13 discussion about how much buildable land is available of the five acres or what can be built,
14 except that the Hearing Examiner acknowledges that the “applicant could amend its plan to come
15 into compliance with the City’s recommendation”⁸. No such special circumstances exist since
16 the parcel is approximately 5 acres in size, is generally rectangular and flat and is large enough
17 to allow development within the building area that remains after application of critical area
18 buffers. Furthermore, the site has access to the roadway without impacting the buffers.⁹ A
19 significant portion of the site has no buffer restrictions, and there are large additional areas of

20 _____
⁶ Decision, page 3.

21 ⁷ *Id.*

22 ⁸ *Id.*

23 ⁹ Staff Report, page 3.

1 the site within the outer portion of the buffers where mitigated impacts are allowed. Thus, while
2 this exact project may not be feasible, construction of a church would be feasible, therefore, the
3 variance should not have been granted. In short, there are no special circumstances present for
4 this property that would result in it being eligible for a Critical Areas Variance to reduce the
5 buffers by approximately 75 percent.

6 **B. The “reasonable use exception” was not properly applied and**
7 **vesting does not apply here as the first application on this site was**
8 **not until 2020.**

9 Instead, of evaluating the special circumstances and the detriment created by the
10 Decision, the Hearing Examiner summarily finds the “reasonable use” of the property requires
11 the wetland buffers to be diminished by approximately 75 percent just because the Critical Area
12 Code had smaller buffers back in 2015¹⁰. The 2015 Critical Areas Code does not apply nor is
13 the Applicant vested to that code. The current Critical Area Code has been in effect since July
14 13, 2016. The Applicant applied for its first permit on this property (site plan review) only in
15 2020, more than four years after the wetland buffers standard changed.¹¹ The Critical Areas
16 Variance application was only submitted on August 28, 2023, more than seven years after the
17 2016 Critical Areas Code update. Furthermore, in finding “reasonable use”, the Hearing
18 Examiner utterly failed to cite to, analyze, or apply the “reasonable use” standard in the critical
19 areas code. OMC 11-1-5 provides:

20 ¹⁰ Decision, page 3.

21 ¹¹ This is contrary to the first sentence of the Decision which incorrectly states that “Abundant Life Church has
22 initiated a project many years ago to develop a site to construct a 28,772 foot church in two phases.” This is
23 patently false. No permit application was ever made, nor application fee paid, until 2020. The project was not
24 “started” until an application was submitted.

1 **11-1-5: REASONABLE USE EXCEPTION:**

2 A. Allowing Exception: If the application of this chapter would deny all
3 reasonable use of the property, development may be allowed which is consistent
4 with the general purposes of this chapter and the public interest.

5 B. Application For Exception: An application for a critical areas reasonable
6 use exception shall be filed with the city and shall be heard by the planning
7 commission who shall seek legal advice from and consult with the city attorney.
8 The planning commission shall make a recommendation to the city council, and
9 the council shall issue a final decision.

10 C. Determination; Conditions: The planning commission, in recommending
11 approval of the reasonable use exception, and the city council in acting upon said
12 recommendation, must determine that:

- 13 1. Application of this title would deny all reasonable use of the property;
14 and
- 15 2. There is no other reasonable use with less impact on the critical area; and
- 16 3. The proposed development does not pose an unreasonable threat to the
17 public health, safety or welfare on or off the development proposal site; and
- 18 4. Any alterations permitted to these critical areas shall be the minimum
19 necessary to allow for reasonable use of the property.

20 D. Alterations: Any authorized alteration of a critical area under this section
21 shall be subject to conditions established by the city of Orting and shall require
22 mitigation under an approved mitigation plan.

23 Under the applicable code above, reasonable use of the property does not require unmitigated
24 development that reduces the wetland buffers by approximately 75 percent. There is no showing
in the record that “all reasonable use of the property” would be denied by applying the applicable
wetland buffers, nor that there is “no other reasonable use with less impact on the critical area”,
and no finding that the alterations permitted are the “minimum necessary to allow for reasonable
use of the property”. Finally, there were no mitigation measures required in the Decision to
offset the variance which is also contrary to Code. Reasonable use does not support this
Decision. Rather the Decision demonstrates that the Applicant does have reasonable use without
the variance given the Hearing Examiner found that the “applicant could amend its plan to come
into compliance with the City’s recommendation”. The Applicant being able to still build its

1 project with some amendments means that the Applicant has reasonable use without the
2 variance. In short, the Decision does not support a finding that “reasonable use” requires the
3 approval of this variance.

4 **C. OMC 11-1-8(B) was not properly applied.**

5 The Hearing Examiner also failed to analyze OMC 11-1-8(B) standards apart from a
6 general, conclusory statement that the variance is “the minimum necessary to accommodate the
7 development proposal . . . and will not be materially detrimental to the public welfare or injurious
8 to the property or improvements in the vicinity and zone in which the property is situated, or
9 contrary to the goals and purposes of this title.” No analysis of the goals and purposes of the
10 critical areas code was addressed in the Decision. In addition, the Applicant refused to provide
11 information on the exact buffer impacts, so a complete evaluation of this criteria was not even
12 possible.

13 The purpose of the critical areas code is set forth in OMC 11-1-1:

14 **11-1-1: PURPOSE AND INTENT:**

15 The purpose of this title is to designate and protect the functions and values of
16 ecologically sensitive and hazardous areas without violating any citizen's
17 constitutional rights. Landslide, erosion, volcanic and seismic hazards, wetlands,
18 aquifer recharge areas, fish and wildlife habitat conservation areas, and flood
19 hazard areas constitute critical areas that are of special concern to Orting. The
20 city finds that these critical areas perform a variety of valuable and beneficial
21 biological and physical functions that benefit the city and its residents; certain
22 critical areas may also pose a threat to human safety or to public and private
23 property. By limiting development and alteration of these critical areas, this
24 chapter seeks to:

A. Protect members of the public and public resources and facilities from
injury, loss of life, or property damage due to flooding, erosion, volcanic
eruptions, landslides, seismic events, or steep slope failures;

B. Protect unique, fragile and valuable elements of the environment, including
wildlife and its habitat;

1 C. Mitigate unavoidable impacts to environmentally critical areas by
2 regulating alterations in and adjacent to critical areas;

3 D. Prevent cumulative adverse environmental impacts to water quality and
4 wetlands;

5 E. Meet the requirements of the Washington growth management act with
6 regard to the protection of critical area lands;

7 F. Coordinate environmental review and permitting of proposals to avoid
8 duplication and delay.

9 There is no analysis to establish that this variance will not undercut the purposes of the Critical
10 Areas Code to protect wetlands. Wetland buffers have increased over the last 10 years because
11 the Washington State Departments of Commerce and Ecology have published best available
12 science that describe the value of protective buffers as management tools to preserve habitat and
13 water quality functions within wetlands. The increases in buffer widths were a recognition by
14 the State that previous buffer widths were inadequate to protect the functions and values of these
15 resources. The City's 2016 Critical Areas Code complies with these mandated standards. Even
16 the Decision itself acknowledges that the area includes two wetlands near the Puyallup River
17 along with habitat for threatened species (Puget Sound Chinook Salmon and Puget Sound
18 Steelhead). Yet the Decision contains no analysis as to how the Applicant can build its church
19 in a way to reduce the impacts on the wetland buffers (which can be achieved on a 5-acre parcel
20 and which is acknowledged in the Decision if the Applicant simply amended its plan).

21 Instead of engaging in this analysis or requiring the Applicant to provide the necessary
22 information, the Hearing Examiner simply held that because the wetland buffer was smaller in
23 the 2015 Critical Areas Code, it shouldn't be detrimental today to reduce the wetland buffer by
24 approximately 75 percent from current standards. That is not a standard found in the code and
is contrary to the Critical Areas Code, best available science, state standards for critical areas,

1 and vesting laws in Washington. It also has the effect of undermining any City Council’s ability
2 to amend their code ever if a Hearing Examiner can decide that the prior code is more beneficial
3 to an Applicant and simply grant a variance to apply the prior code.

4 **D. OMC 13-6-3 was not applied or analyzed.**

5 OMC 11-1-8 requires the critical areas variance to be “in accordance with the procedures
6 set forth in title 13 of this code, zoning.” The Hearing Examiner did not apply the variance
7 criteria found in Title 13 which is found at OMC 13-6-3 and provides, in pertinent part:

8 **13-6-3: VARIANCES:**

9 . . .

10 B. Granting Of Variances: The city shall have the authority to grant a
11 variance from the provisions of this title, when, in the judgment of the hearing
12 examiner, the conditions as set forth in subsection C of this section have been
13 found to exist. In such cases a variance may be granted which is in harmony
14 with the general purpose and intent of this title so that the spirit of this title shall
15 be observed, public safety and welfare secured, and substantial justice done.

16 C. Decision Criteria: Before any variance may be granted, it shall be shown:

17 1. That there are special circumstances applicable to the subject property
18 or to the intended use such as shape, topography, location, or surroundings that
19 do not apply generally to the other property or class of use in the same vicinity
20 and zone;

21 2. That such variance is necessary for the preservation and enjoyment of a
22 substantial property right or use possessed by other property in the same
23 vicinity and zone but which because of special circumstances is denied to the
24 property in question;

3 3. That the granting of such variance will not be materially detrimental to
4 the public welfare or injurious to the property or improvement in such vicinity
5 and zone in which the subject property is located;

6 4. That the granting of such variance will not adversely affect the
7 comprehensive plan.

8 5. That the granting of such variance will not preclude the use of LID
9 BMPs if LID BMPs are feasible for existing site conditions or existing site
10 characteristics.

11 D. Conditions On Variances: When granting a variance, the hearing
12 examiner **shall** determine that the circumstances do exist as required by
13 subsection C of this section, and attach specific conditions to the variance

1 which will serve to accomplish the standards, criteria, and policies established
2 by this title.

3 The Hearing Examiner didn't even address the standards contained in OMC 13-6-3 despite OMC
4 11-1-8 providing that the procedures in Title 13 apply. The application of the criteria OMC 13-
5 6-3 cannot be met by this application as the variance is not needed to develop the property, nor
6 did the Hearing Examiner apply appropriate conditions.

7 **E. The Decision does not properly apply or analyze applicable code.**

8 In short, the Decision does not apply or analyze applicable code, does not recognize the
9 applicable "reasonable use" standards, and appears to apply vesting to outdated codes because
10 the owner evaluated a development (with no application submitted) under a prior version of the
11 code. There are no facts present here that permit the Applicant to vest to the prior Critical Areas
12 Code. The 2016 Critical Areas Codes apply to and establishe the wetland buffers here, not the
13 2015 codes. The types and locations of the wetlands are not disputed, nor are the applicable
14 wetland buffer widths. The Hearing Examiner acknowledged that the project can be modified to
15 comply with the Orting Critical Area Code. This also is not disputed. Thus, the application does
16 not meet the standards for a Critical Areas Variance, and it should have been denied.

17 **6. Standard of Review.**

18 This City's code has some inconsistencies regarding procedures for Critical Areas
19 Variance applications. Under the Critical Areas Code, this variance application may **only** be
20 authorized by the City Council, therefore, the Hearing Examiner is not empowered to make the
21 final decision on the Critical Areas Variance. OMC 11-1-8 provides, in part, "Variances from
22 the standards of this title **may be authorized by the city council** in accordance with the

1 procedures set forth in title 13 of this code, zoning.” Under OMC 11-1-8, the Council holds the
2 ultimate authority to determine whether the Applicant has met the standards in the Code for
3 obtaining the Critical Areas Variance. Generally, that means that the City Council has broad
4 authority to weigh the recommendation of the recommending body and may affirm, deny,
5 modify, or remand the decision based on the record. However, the Code is unclear about the
6 process for recommendations to the Council. OMC 15-10 addresses appeals, not
7 recommendations for which the Council has the ultimate say. Under OMC 15-10-4(B)(3), the
8 appellant “shall bear the burden of proving the [hearing examiner] decision was wrong.” In
9 either case, the Decision was not based on a correct interpretation or application of the law, was
10 not based on pertinent or correct facts, was facially and procedurally defective, and the Critical
11 Areas Variance should be denied.

12 **7. Requested Outcome of Appeal.**

13 The Department encourages the Council to deny the Critical Areas Variance as the
14 Applicant has not met the standards under the Code and is not entitled to such Variance. As the
15 Hearing Examiner stated, the “applicant could amend its plan to come into compliance with the
16 City’s recommendation”. This means that the Applicant is not entitled to a variance. If the
17 variance is granted, even partially, then the Decision must be amended to reduce the impacts to
18 the wetlands by requiring larger buffer than requested and to require mitigation measures as
19 mandated by OMC 11-1-5(D).

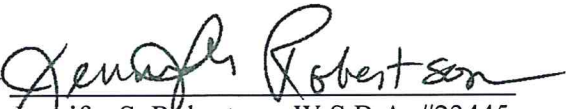
20 **8. Appeals Fees.**

21 A check for the applicable appeals fee accompanies this appeal.

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RESPECTFULLY SUBMITTED this 13th day of November, 2023.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By 

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APPEAL OF ORTING BUILDING & PLANNING DEPARTMENT
OF HEARING EXAMINER DECISION TO GRANT A CRITICAL
AREAS VARIANCE TO ABUNDANT LIFE CHURCH - Page 13

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DECLARATION OF SERVICE

I, Katia Perez, hereby declare under penalty of perjury under the laws of the State of Washington, that on the 13th day of November, 2023 before 5 PM, I caused to be served true and correct copies of the foregoing on the following parties and/or counsel of record named below in the specific manner indicated:

City Clerk:

Kim Agfalvi
City of Orting
104 Bridge St S.
Orting, WA 98360

Hand Delivery / Personal Service

Applicant Abundant Life Community Church:

Brad Grasley
Lead Pastor
Abundant Life Community Church
PO Box 826
Orting, WA 98360

E-mail: brad@alccorting.com

Chuck Sundsmo
Land Use Consulting and
Development, LLC
18820 Meridian East
Suite 171
Puyallup WA 98375

E-mail: chucksundsmo@msn.com

Thomas Deming
Wetland Biologist
Habitat Technologies, Inc.
PO Box 1088
Puyallup, WA 98371-1088

E-mail: tom@habitattechnologies.net

DATED this 13th day of November, 2023, at Bellevue, Washington.

s/ Katia Perez
Katia Perez, Legal Assistant

Exhibit "A"

OFFICE OF THE HEARING EXAMINER

CITY OF ORTING

FINDINGS, CONCLUSIONS AND DECISION

CASE: Abundant Life Church Application for Variance

APPLICANT: Mr. Brad Grasley

OWNER: Abundant Life Church

LOCATION: 1005 Orting Kapowsin Hwy East, Orting, WA 98360

DATE OF APPLICATION: July 23, 2023

SUMMARY OF REQUEST AND BACKGROUND

Abundant Life Church has initiated a project many years ago to develop a site to construct a 28,772 foot church in two phases. The first phase would essentially include the main building, parking, utilities, erosion control, an entry drive and a western expansion for the main building. The second phase, much smaller, would include an eastern expansion of the main building and more parking. A SEPA Determination of Non Significance has been issued.

The Wetland Delineation Report was dated back in October, 2015 and had revisions in June, 2019. A wetland buffer establishment and enhancement program was dated February, 2022.

Civil plans were dated in August, 2022 and a landscape plan was dated in June, 2022.

This project is close by the Puyallup River, which is a habitat to at least to threatened species: Puget Sound Chinook Salmon and Puget Sound Steelhead. This project is home to two separate wetlands, A and B that have buffers which extend into the project. Wetland A is a small swale and is not an issue. Wetland B is not on the project, but the buffer for it is. The issue here is the size of that buffer. According to current standards, it is a Category 2 Wetland, which is subject to a 150' buffer, rather than a 50' buffer, which according to the applicant, was the standard when the project was first started. The applicant essentially makes the argument that it is being forced to hit a moving target. The City's position would be that such a problem could be mitigated by averaging or offsite mitigation, which is not in the proposal. The City believes that the applicant has not taken advantage of some suggestions make that could make the project feasible without the requested variance and therefore recommends against the request, primarily by pointing out that the request reduces one buffered area by more than 75%, rather than the 25% allowed. The applicant believes it meets the requirements of OMC 11-1-8, and the City does not.

STANDARD FOR VARIANCE

OMC 11-1-8 allows for the granting of a variance if the following 2 criteria are established:

A Because of special circumstances applicable to the property, including size, shape topography, location or surroundings, or the size or nature of the critical area, the strict application of this title would deprive the property owner of reasonable use of their property, and

B The granting of the variance is the minimum necessary to accommodate the development proposal and will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated or contrary to the goals and purposes of this title.

ANALYSIS

A. This is tough. The City's position is essentially that, look, you're encroaching on a wetland buffer that has been identified on the dates mentioned above and you have large, flat areas you could use for entrance drives instead, so you don't need the variance. And besides, you haven't done what you could by way of wetland buffer on your property. And, a 75% reduction in buffer is simply not allowed.

The applicant says, wait, we have worked with the City since the beginning. We have done all that we could and all that was required and now the standards have changed, the buffer is larger than it was originally, why was 50' fine at one time and now it's not? Establishing wetlands and wetland buffers is not an exact science especially when you are not on the site examining the soils and concludes by saying that "strict application of the wetland buffer requirements would result in the inability to construct the necessary facilities.

B The City suggests that the variance is simply not the minimum necessary to accommodate the development of a large church facility. It is a big enough facility to accommodate the project without the variance.

As might be anticipated, the applicant indicates that the variance is necessary to accommodate the project and it would not be "materially detrimental to the public welfare, would not be injurious to the property or improvements within the vicinity and would not be contrary to the goals and purposes of the City of Orting municipal code.

PUBLIC HEARING

A public hearing was held on October 24, 2023. A number of people attended but there were only 2 supporting comments in favor of the project.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS:

Documentary evidence included the City of Orting Staff report, which was comprehensive and included the submissions for the variance by Abundant Life Community Church with supporting documents, including reports from Habitat Technologies originally authored in 2015 and supplemented in 2023.

In addition, supplemental emails were submitted by city staff clarifying statements made at the hearing in response to some colloquy near the end of the hearing.

Notice of the hearing was properly distributed in accordance with OMC 15-5

All parties and interested witnesses were given opportunity to present testimony or submit written materials.

That the Hearings Officer personally viewed the property and the surrounding area, which is located in an area he is quite familiar with.

That based on the information submitted and considered, the Hearings Officer finds as follows:

While it may be true that the applicant could amend its plan to come into compliance with the City's recommendation, the Hearings Officer finds that the arguments submitted by Habitat Technologies in 2015 and supplemented in 2023 to be persuasive.

That given the time that this project has been in the planning stages, with the applicant working to be in compliance with city requirements, constructing this church projects in the two planned phases does constitute the "reasonable use" of the applicant's property.

That taking into account the history of this particular piece of property, it's location relative to the Puyallup River, the history of the applicant's efforts to construct a church on the property and the history of the applicant's efforts to be compliant with what have been changing standards insofar as wetland buffer setback, there are special circumstances applicable to the property, in particular the size of the critical area, such that the strict application of this title would deprive the property owner of reasonable use of their property.

That the granting of the requested variance will be the minimum necessary to accommodate the development proposal. This finding is consistent with the review and recommendations found in the reports of Habitat Technologies from 2015 and 2023 and will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is situated or contrary to the goals and purposes of this title.

That viewing the property confirms that the plan to construct a church and related facilities at this location not only is not detrimental to the public welfare or property in the area, but should serve as a noticeable improvement and enhancement to the goals and purposes of the City. In other words, it fits the area. The designated area for the setback appears not be detrimental to the public. It is difficult for the Hearings Officer to comprehend how a setback that was fine a few years ago, would suddenly be detrimental, and nothing in the City's recommendation to deny the variance request addresses that issue. The City's position is conclusory and says that because the project does not meet its requirements, it will negatively impact nearby aquatic resources (wetlands). While I appreciate the advocacy for the environment, I find that the analysis provided by the applicant to be more persuasive. I want to

emphasize that I am not being critical of the City, just that I find the applicant's analysis to be more persuasive.

CONCLUSIONS:

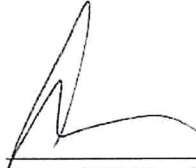
The Hearings Officer has authority to conduct this hearing pursuant to OMC 11-1-8, 15-3-5, 15-4-1, RCW 35A. 63.170

The proposed application for a critical area variance meets the requirements of OMC 11-1-8 because of special circumstances applicable to the property, and that granting of the variance is the minimum necessary to accommodate the planned development proposal and will not be materially detrimental to the property in the vicinity, or contrary to the goals and purposes of Title 11 of the Orting Municipal Code.

DECISION:

The request for a critical area variance by the applicant is granted.

Dated this 1st of November, 2023



Antoni H. Froehling
Hearings Officer for the City of Orting.

Date: January 12, 2024

Re: Brief of Respondent regarding the City of Orting's Appeal to Variance Approval

Members of the Council,

Thank you for your service to the city of Orting and for taking the time to consider my statements to you today. My name is Brad Grasley and I am the Pastor at Abundant Life Community Church. We have been serving the community since 1999. In 2007, we purchased property with the intent to build a community center for the citizens of city the of Orting. In fact, if you drive by our property, you will actually see a sign stating "Orting Community Center." I give you that context, because the genesis, scope and scale of this project is rooted in our commitment to the Orting community.

Brief History of Project

When we purchased the property, feasibility studies were conducted including wetland studies. At that time, we were required to have a 50-foot buffer from any neighboring, off-site, wetlands. We applied for and received a conditional use permit specifically for the construction of a Church and community center. At that time, to vest the project, we inquired about a binding site plan (which is in essence, a developer's agreement), but the city did not have a process in place for that. When the city's wetland codes were updated in 2016, we made many creative attempts to make this project work within the confines of the new code. We found, however, that we were not able to apply the new buffer without compromising the integrity of the entire project. Thus, we inquired about a variance process and followed the steps outlined to us by the city. That variance was granted by the City of Orting Hearing Examiner and is now being appealed by Scott Larson, City Administrator.

Issue at Hand

The issue at hand is a variance for a wetland buffer. It is worth noting that the wetland in question is off-site. The previous owner of the property brought in fill and raised the property for another project that he decided not to pursue. We can assume that a clear and grade permit was issued for that fill, making the city culpable in filling the same wetland buffer area in question. At present, the proposed buffer area is covered in blackberries, alders, and other weeds. Our proposal will drastically improve the buffer area and provide an adequate level of protection for the potential off-site wetland.

The attorneys representing Mr. Larson and the City of Orting have based the appeal on several errors they believe were made as well as procedural issues during the hearing, as noted in their statement dated November 13th, 2023. In this briefing, I will address each of their arguments to bring clarity to the issues at hand.

Item 5a – Facial and Procedural Errors in the Decision

The appellant states the decision does not list the identity of the individuals who spoke in favor of project and suggests that there may have been people there who spoke in opposition to the project. They also state that the hearing was not recorded.

There were two citizens that spoke in favor of the project. No dissenting comments were made by the public about the project. Such a statement in the appeal document is leading the council to wonder if there were people who were opposed at the time of the hearing. Recording the hearing was completely outside of my control as the applicant. I was given instructions by the city to appear at the hearing and make arguments. I did so with my team of consultants. The burden of procedure falls on the city. Neither the city clerk, city attorney, nor the city administrator were present at the hearing. We appeared at the hearing in good faith, believing the procedure was the responsibility of the local municipality. In fact, before the hearing began, a city employee stated that recording the hearing was not required, so public comment would not be documented in this case.

Item 5a – Incorrect facts are included in the decision regarding the date for Project Commencement

The appellant states that we asked to be vested based on a commenced development project

Not true. We did not claim to have a permit in hand. What we said is that we have been clear with the city for over 10 years regarding this project. We have submitted site plans and conceptual drawings. We had several meetings with the former administrator, Mark Bethune and engineer, Jacy Burnett. We simply stated that the purpose, scope, and feasibility of the project has been in the works for over 10 years and the city has been active in processing our application with conversations surrounding it. Some examples include but are not limited to: 1) A presentation of our project at the January 5th, 2012 Planning Commission Meeting. 2) An approved permit for a modular unit on the property in 2012. This permit included our site plan for the entire project, including the future building site, parking, wetland buffer, and setbacks. 3) A pre-application meeting with City Planner, Roger Wagoner in May 2015, who directed us to apply for a clearing and grading permit, which was reviewed (including the buffer establishment plan) and recommended for approval by Parametrix, the city’s engineer. It was also approved by then Treasurer Scott Larson. However, due to staffing changes in city administration, city engineer and multiple city planners, the permit was never issued.

These examples are given to show the good faith efforts we have made to work with the city to move the project forward in compliance with city codes. We have always pursued the project at the direction and instruction of the ever-changing city staff, their many consultants and administrators. We now understand that vesting does not apply, since a permit, although approved, was never given to us. This is why we applied for a variance. If we were vested, we would not have needed to apply for a variance.

Item 5c – Failure to Evaluate and Apply Applicable Law

A. The appellant state OMC-11-1-8 was not properly applied. In this section, they are arguing that the conditions of “special circumstances” and “minimum necessary” are not met.

The first point of contention I have with this argument is the misleading and false statement the appellant makes regarding the Hearing Examiner's decision. They quote the Hearing Examiner stating, "While it may be true that the applicant could amend its plan..." This was taken out of context and only partially quoted. This sentence was in response to a disagreement between both parties as to whether or not we could amend the plan to meet city code. Therefore, in context, we can interpret his comments to mean "even if the applicant could amend its plan." The appellant wants us to downsize our project, which effectively kills the purpose of this project to build a community center and church facilities. We have spent tens of thousands of dollars to work through the recent wetland code to make the project viable. We believe, with the work of biologists and land use consultants, that we have done as much as we can to mitigate the impacts to the off-site wetlands. To that end, we believe this is a special circumstance.

Second, the appellant believes there is plenty of available land remaining in which we can apply buffer average to come into compliance. This is not true. If you look at our plans, you will see that we have used the entire property to its fullest extent. The only remaining land that is not building, parking, or wetland buffers, is the stormwater pond and expanded compensatory stormwater storage. In our variance request submission, our biologist noted that approximately 1.92 acres or 40% of the property would be taken by wetland buffers if we were to meet the current code. This would certainly deprive us of reasonable use.

Third, the appellant states that we are asking for a 75% reduction in buffers. This is also not true. We used buffer averaging to increase buffers as much as possible while still maintaining (and even exceeding) a 50-foot buffer as in the previous code. The current code states that buffers should be 150 feet in contrast to the pre-2016 code of 50 feet. A 75% reduction would place a buffer at the 37.5 feet. We are nowhere near that mark, but rather far above it. We took our original plans that had 50-foot buffers and expanded the buffers, not only adjacent to the offsite wetland but in other areas as well. We planned for denser landscape plantings to protect the offsite wetland areas. We placed as much buffer as we could to meet the city's code.

B. The "reasonable use exception" was not properly applied and vesting does not apply here as the first application on this site was not until 2020.

They incorrectly stated that our first permit on this property was in 2020. We had a permit approved for a modular, submitted with full site plan in 2012. In addition, we had a clear and grade permit reviewed and approved in 2019. The arguments in this section lead us to believe the appellant wants us to abandon our community center project and instead build a small chapel for only our congregants, or build nothing at all.

C. OMC 11-1-8(B) was not properly applied.

The Hearing Examiner stated in his report, "While I appreciate the advocacy for the environment, I find that the analysis provided by the applicant to be more persuasive." He also stated, "the plan to

construct a church and related facilities at this location not only is not detrimental to the public welfare or property in the area, but should serve as a noticeable improvement and enhancement to the goals and purposes of the City.” The Examiner visited the property on his way to the hearing and stated he was familiar with the land due to having lived in the area for many years. On the other hand, the city’s biologist did not visit the site to make any assessments regarding the nature of the buffer area and its impact on the environment. In fact, no comprehensive wetland evaluation has ever been done on the off-site wetland due to the property owner not allowing anyone on his property. The wetland boundary has never been scientifically established or surveyed. The off-site wetland’s actual location is a guesstimate by observation only. In fact, the wetlands in question do not even show up on Public GIS maps.

D. OMC 13-6-3 was not applied or analyzed

If we are going to talk about OMC 13, then we can’t ignore OMC 13-6-2. This section is in regards to Conditional Use Permits. The requirements for a Conditional Use Permit are similar in nature to that of a variance stated in OMC 13-6-3. As previously stated, we fulfilled those requirements when we purchased the property and were granted a conditional use permit at that time. These factors were taken into consideration at the Hearing. The Hearing Examiner did not write down every municipal code in his decision, but it is implied throughout the decision that these were addressed. The requirements the city had for the variance were presented in full by the city’s representative at the hearing.

E. The decision does not properly apply or analyze applicable code

This is an inaccurate claim. In this section the appellant changes the wording in the Hearing Examiner’s report. The Hearing Examiner did not acknowledge that the project can be modified. Furthermore, he did not vest the project to prior code. Rather he granted a variance from the current code.

6. Standard of Review

In this section, the appellant tries to make the case that the Hearing Examiner didn’t even have authority to make the decision in the first place.

The city code does state that wetland variances are heard by the city council. However, there are conflicting codes to OMC 11-1-8. After the city investigated the codes, they told us that it was the decision of the hearing examiner. As the applicant, I acted in good faith. I applied for and paid for the hearing as I was instructed to by the city. I feel like this argument a last-ditch effort by the appellant to get the variance thrown out on a technicality.

If we look closer at Orting Municipal Code, we find that the Hearing Examiner does have the authority to consider a variance application. In this case, the Orting City Council has delegated that authority to the Hearing Examiner. OMC 15-3-5(C)(1)(b) expressly provides the Hearing Examiner with authority to review and decide on variances. OMC 2-6-3 states that decisions by the Hearing


Examiner “have the same effect as decision of the legislative body.” Furthermore, we don’t believe the city should be able to take a position inconsistent with what was previously communicated to the applicant nor should they be challenging a Hearing Examiner they empowered to act on their behalf. This calls into question the governance standards of the City of Orting.

Conclusion

I am asking you to uphold the decision of the Hearing Examiner granting a variance approval for this project. An appeal should provide enough conclusive evidence to overturn an already established decision. I believe the Hearing Examiner’s findings, conclusion, and decision are consistent with what was presented during that hearing. The city has already argued its case and may not present new arguments since this is a closed record appeal. After listening to the arguments and the documents provided at the time of the hearing, the Hearing Examiner felt that granting the variance was warranted in this case.

The appellant’s legal representation would like you to believe that upholding this previously made decision will undermine the City Council’s ability to govern in the future. That is nonsense. You have the right to accept the outcome of a hearing process that we, the applicant, attended and complied with in good faith. As City Council members you have full authority to govern as you see fit. To that end, I want to thank you for doing just that and for serving our city well.

Sincerely,



Brad Grasley
Lead Pastor

From: [Kendra Rosenberg](#)
To: [Brad Grasley](#); [Jennifer S. Robertson](#)
Cc: [Charlotte A. Archer](#); tgunther@cityofortng.org; chucksundsmo@msn.com; [Kim Agfalvi](#); [Danielle Charchenko](#)
Subject: Abundant Life Church Appeal
Date: Thursday, January 11, 2024 2:04:00 PM
Attachments: [Hearing Examiner Appeal Hearing Affidavit-507441.pdf](#)

All,

At the direction of the Deputy Mayor, I am providing you with a copy of the Affidavit of Publication - Hearing Examiner Appeal Hearing 1.31.2024. In addition, on behalf of the Deputy Mayor, I am requesting that the City Clerk provide the three e-mails with attachments from Betty Hendricks, on behalf of Toni Froehling, the Hearing Examiner, dated January 9, 2024 to the City. The City Clerk may need to provide those e-mails and attachments via Dropbox or something of the like, I defer to her. I believe based on the e-mail communications that all parties have previously received all attachments that were provided by the Hearing Examiner, however, these are the documents that will be provided to the City Council and therefore, to ensure completeness, all parties will receive the documents that the Council will receive.

This is a closed record appeal. The hearing examiner record constitutes the record for the purposes of the City Council's decision. State law prohibits the City Council from considering any new information outside of the record and therefore, no new information should be provided to the City Council in briefing or in argument.

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Issaquah, Washington 98027-3820

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AFFIDAVIT OF PUBLICATION

Account #	Order Number	Identification	Order PO	Amount	Cols	Depth
19366	507441	Print Legal Ad-IPL01545560 - IPL0154556	Applicant Abundant Life	\$256.90	1	40 L

Attention: Emily Adams

CITY OF ORTING
 PO BOX 489
 ORTING, WA 983600489

fbingham@cityoforting.org

NOTICE OF PUBLIC HEARING

Notice is hereby given that the Orting City Council will be conducting a closed record public hearing on January 31, 2024, at 4:00 p.m., or as soon thereafter as possible to consider the following:

Appeal of the Hearing Examiner's November 1, 2023, Decision on Applicant Abundant Life Church's Application for a Variance

All members of the public may join the meeting via Zoom:

Zoom link:
<https://us06web.zoom.us/j/81290362056?pwd=hbBkHME5j7ulhgo7QrXxybh5KRcMbt.1>

Meeting ID: 812 9036 2056
Passcode: 664421

This is a closed record appeal hearing pursuant to Chapter 36.70B RCW and applicable City Code and while the public is invited to attend, there will be no public comment allowed. The parties to the appeal will be invited to make presentations to the Council which must be based solely on the closed record.

The parties' time will be limited to 15 minutes each.

Posted: January 10th, 2024.
 Published: January 10th, 2024.
 IPL0154556
 Jan 10 2024

Stefani Beard, being duly sworn, deposes and says: That he/she is the Principal Clerk of the publication; The News Tribune, printed and published in Tacoma, Pierce County, State of Washington, and having a general circulation therein, and which said newspaper(s) have been continuously and uninterruptedly published in said County during a period of six months prior to the first publication of the notice, a copy of which is attached hereto: that said notice was published in The News Tribune, as amended, for:

1 insertion(s) published on:
 01/10/24

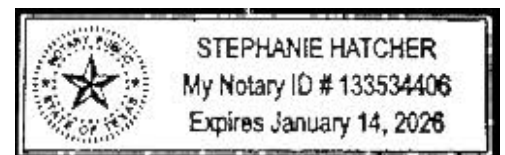
Stefani Beard

Principal Clerk

Sworn to and subscribed before me this 10th day of January in the year of 2024 before me, a Notary Public, personally appeared before me Stefani Beard known or identified to me to be the person whose name subscribed to the within instrument, and being by first duly sworn, declared that the statements therein are true, and acknowledged to me that he/she executed the same.

Stephanie Hatcher

Notary Public in and for the state of Texas, residing in Dallas County



Extra charge for lost or duplicate affidavits.
 Legal document please do not destroy!

From: [Kendra Rosenberg](#)
To: [Brad Grasley](#)
Cc: jrobertson@insleebest.com; "[Kim Agfalvi](#)"; "[Danielle Charchenko](#)"; tgunther@cityoforting.org
Subject: RE: Appeal Hearing
Date: Wednesday, January 10, 2024 4:26:00 PM
Attachments: [Untitled.msg](#)

Thank you, Brad. I am including Deputy Mayor Gunther in this communication as he is now serving in the Deputy Mayor role. I've also attached the Council's Briefing Order to this e-mail for your convenience.

Kendra S. Rosenberg
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, Washington 98027-3820

Tel: (425) 392-7090, Ext. 2205
Fax: (425) 392-7071
Kendra@KenyonDisend.com
www.kenyondisend.com

From: Brad Grasley <brad@alccorting.com>
Sent: Wednesday, January 10, 2024 12:40 PM
To: GBradshaw@cityoforting.org
Cc: jrobertson@insleebest.com; Kendra Rosenberg <Kendra@kenyondisend.com>; 'Kim Agfalvi' <KAgfalvi@cityoforting.org>; 'Danielle Charchenko' <DCharchenko@cityoforting.org>
Subject: Appeal Hearing

Deputy Mayor Bradshaw,

Due to my extensive history and knowledge with this project, I will be the one preparing the Brief of Respondent. We will retain our legal representation for consulting purposes. That said, you should be receiving a statement of withdrawal from our attorney for the purpose of allowing me be the point of contact and voice in this matter going forward. I have CC'd the city's attorneys and clerks for correspondence purposes.

Brad Grasley

Lead Pastor

Abundant Life Community Church
www.alccorting.com

From: [Kendra Rosenberg](#)
To: [Heather Burgess](#); [Jennifer S. Robertson](#)
Cc: [Kim Agfalvi](#); [Charlotte A. Archer](#); [Margaret Starkey](#)
Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing
Date: Monday, January 8, 2024 4:56:00 PM
Attachments: [image001.png](#)

Thank you, Jennifer and Heather. This e-mail confirms that I will reach out to the Hearing Examiner to ask that his office provides the large document described below to the City Clerk. It will then be transmitted to the City Council.

Kendra S. Rosenberg
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, Washington 98027-3820

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Kendra@KenyonDisend.com
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From: Heather Burgess <hburgess@dfpblaw.com>
Sent: Monday, January 8, 2024 12:50 PM
To: Jennifer S. Robertson <jrobertson@insleebest.com>; Kendra Rosenberg <Kendra@kenyondisend.com>
Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Charlotte A. Archer <CArcher@insleebest.com>
Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Jennifer,

I have confirmed with my client that the below list is accurate.

Best,

Heather

HEATHER BURGESS | PARTNER

DICKSON FROHLICH PHILLIPS BURGESS PLLC

Scheduling Contact: dgonzalez@dfpblaw.com

Scheduling Link: <https://calendly.com/hburgess-twu/30min>

From: Jennifer S. Robertson <jrobertson@insleebest.com>

Sent: Friday, January 5, 2024 4:31 PM

To: Kendra Rosenberg <Kendra@kenyondisend.com>; Heather Burgess <hburgess@dfpblaw.com>

Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Charlotte A. Archer <CArcher@insleebest.com>

Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Dear Kenda and Heather,

I have a large document that I received from the Planning Director (AHBL) as having been submitted to the Hearing Examiner. It is 66 MB so I can't email it. I can set up a transfer portal if needed, or you can ask AHBL (or Mr. Froehling) for it. My understanding is that Ms. Burgess also has this same document/set of documents.

It consists of the following:

1. Staff report (4 pages)
2. Letter dated 7.28.2023 from Habitat Technologies (1 page)
3. Letter dated 7.27.2023 from Habitat Technologies (3 pages)
4. 2015 Wetland Delineation Report by Habitat Technologies with attachments (69 pages)
5. Wetland Buffer Establishment and Enhancement Program dated Feb. 22, 2022 (with attached plans) (50 pages)
6. List of parties who received mailed notice (2 pages)

I don't know if there is anything else. Can you please have Mr. Froehling confirm that this is every document that is in the record and also whether he has any record of the people who testified or the contents of their testimony? Thanks.

Sincerely,
Jennifer



Jennifer S. Robertson | Attorney

Skyline Tower, Suite 1500 | 10900 NE 4th Street | Bellevue, WA 98004

P: 425.450.4204 | F: 425.635.7720

[vCard](#) | [website](#) | jrobertson@insleebest.com

This electronic mail transmission is privileged and confidential and is intended only for the review of the party to whom it is addressed. If you have received this transmission in error, please immediately return it to the sender. Unintended transmission shall not constitute waiver of the attorney-client or any other privilege.

From: Kendra Rosenberg <Kendra@kenyondisend.com>

Sent: Friday, January 5, 2024 2:00 PM

To: Heather Burgess <hburgess@dfpblaw.com>; Jennifer S. Robertson <jrobertson@insleebest.com>

Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Charlotte A. Archer <CArcher@insleebest.com>

Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Thank you, Heather and Jennifer. Can I ask you two to confirm the record (if it consists of anything more than the plans and wetland reports) and to provide final copies of any such documents that are part of the record by e-mail to Kim, included on this e-mail? She will then

provide those documents to the Council in advance of January 31.

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From: Heather Burgess <hburgess@dfpblaw.com>
Sent: Friday, January 5, 2024 1:57 PM
To: Jennifer S. Robertson <jrobertson@insleebest.com>; Kendra Rosenberg <Kendra@kenyondisend.com>
Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Charlotte A. Archer <CArcher@insleebest.com>
Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Jennifer,

My client has confirmed that the materials identified in #1 below are part of the record, and consents to entry for posting of the notice.

Best,

Heather

HEATHER BURGESS | PARTNER
DICKSON FROHLICH PHILLIPS BURGESS PLLC
Scheduling Contact: dgonzalez@dfpblaw.com
Scheduling Link: <https://calendly.com/hburgess-twu/30min>

From: Jennifer S. Robertson <jrobertson@insleebest.com>
Sent: Friday, January 5, 2024 12:37 PM
To: Heather Burgess <hburgess@dfpblaw.com>; Kendra Rosenberg <Kendra@kenyondisend.com>
Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Charlotte A. Archer <CArcher@insleebest.com>
Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Dear Kendra and Heather,

There are a couple of issues I wanted to raise.

1. The Hearing Examiner references the staff report and applicant's information attached thereto (i.e., plans, wetland reports, etc.) in his decision but did not include those copies in his transmittal. Can you please confirm that these are part of the record?

2. The City needs to post the property to notice the hearing in front of the Council.
Heather, can you please confirm that the City can enter the property to post the notice?

Thank you for your responses.

Sincerely,
Jennifer



Jennifer S. Robertson | Attorney

Skyline Tower, Suite 1500 | 10900 NE 4th Street | Bellevue, WA 98004

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From: Kim Agfalvi <KAgfalvi@cityoforting.org>

Sent: Friday, January 5, 2024 9:03 AM

To: Charlotte A. Archer <CArcher@insleebest.com>; Jennifer S. Robertson <jrobertson@insleebest.com>; 'hburgess@dfpblaw.com' <hburgess@dfpblaw.com>

Subject: FW: City of Orting - Appeal - Abundant Life Church Hearing

Please see the attached and below.

Kim Agfalvi, CMC

City Clerk

City of Orting

t: 360-893-9008 | c: 253-294-6663 | www.cityoforting.org
kagfalvi@cityoforting.org | 104 Bridge St S. Orting, WA 98360

Orting logo



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From: Betty Hendricks <betty@froehlinglaw.com>

Sent: Tuesday, January 2, 2024 12:21 PM

To: Kim Agfalvi <KAgfalvi@cityoforting.org>

Cc: 'Kendra Rosenberg' <Kendra@kenyondisend.com>; 'Margaret Starkey' <Margaret@kenyondisend.com>; 'Antoni H. Froehling' <toni@froehlinglaw.com>

Subject: RE: City of Orting - Appeal - Abundant Life Church Hearing

Hi Kim,

I received a call and email from Kendra Rosenberg's office requesting that Mr. Froehling forward certain documents to you.

I have attached a copy of the signed decision as well as the transmittal letter to the City. Mr. Froehling advises that this is our whole file. He viewed the site. He didn't take any pictures or notes.

Should you require any additional information, please let me know.

Betty Hendricks

Paralegal

Froehling Hendricks PLLC

510 East Main, Suite F

Puyallup, WA 98372

253-770-0116 Phone

253-770-0144 Fax

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From: [Kendra Rosenberg](#)
To: toni@froehlinglaw.com
Cc: [Kim Agfalvi](#); [Danielle Charchenko](#); hburgess@dfpblaw.com; tgunther@cityoforting.org; jrobertson@insleebest.com; [Charlotte A. Archer](#)
Subject: RE:
Date: Tuesday, January 2, 2024 12:54:00 PM
Importance: High

Good morning,

I am following up to confirm that you have provided your decision and record to the Orting City Clerk. Please reply all to confirm. Thank you.

Kendra S. Rosenberg
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, Washington 98027-3820

Tel: (425) 392-7090, Ext. 2205
Fax: (425) 392-7071
Kendra@KenyonDisend.com
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From: Kendra Rosenberg
Sent: Thursday, December 21, 2023 10:14 AM
To: toni@froehlinglaw.com
Cc: [Kim Agfalvi <KAgfalvi@cityoforting.org>](mailto:KimAgfalvi@cityoforting.org); [Danielle Charchenko <DCharchenko@cityoforting.org>](mailto:DCharchenko@cityoforting.org); hburgess@dfpblaw.com; [Gregg Bradshaw <GBradshaw@cityoforting.org>](mailto:GreggBradshaw@cityoforting.org); jrobertson@insleebest.com
Subject: RE:
Importance: High

Good morning, Hearing Examiner,

Please see the Order below and provide your decision and record to the Orting City Clerk.

Kendra S. Rosenberg
Kenyon Disend, PLLC
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11 Front Street South
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From: [Gregg Bradshaw <GBradshaw@cityoforting.org>](mailto:GreggBradshaw@cityoforting.org)
Sent: Friday, December 8, 2023 11:48 AM
To: jrobertson@insleebest.com; toni@froehlinglaw.com; hburgess@dfpblaw.com

Cc: Kim Agfalvi <KAgfalvi@cityoforting.org>; Danielle Charchenko <DCharchenko@cityoforting.org>; Kendra Rosenberg <Kendra@kenyondisend.com>

Subject:

Briefing Order:

To prepare this matter for the City Council’s decision on Abundant Life Church’s application for a critical area variance, the City Council issues the following schedule:

Matter Event	Deadline
Hearing Examiner Decision and Record-to be submitted by Hearing Examiner	December 18, 2023
Brief of Respondent Abundant Life Church	January 12, 2023
Reply Brief of City Building and Planning Dept.	January 22, 2024
City Council Review Hearing	January 31, 2024; Time: 4-6 PM

This appeal will be processed consistent with chapters 11, 13, and 15 of the Orting Municipal Code. All written materials should be submitted to the City Clerk’s Office for transmittal to Council, by e-mail to Kim or Danielle included on this e-mail, or in hard copy, and provided on or before the deadline to the other party by e-mail or by hard copy.

Deputy Mayor Gregg Bradshaw

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**BEFORE THE ORTING CITY COUNCIL
ORTING, WASHINGTON**

In the Matter of the Appeal of Approval of a
Critical Areas Variance to
Abundant Life Church, Applicant

ORTING BUILDING & PLANNING
DEPARTMENT’S REPLY IN SUPPORT
OF ITS APPEAL OF HEARING
EXAMINER DECISION TO GRANT A
CRITICAL AREAS VARIANCE

I. INTRODUCTION

The Appellant, the City of Orting Department of Building and Planning¹ (“Department”), is duty-bound to appeal the Hearing Examiner’s decision to the City Council so that the Council can apply the correct rules and regulations to this application. The Hearing Examiner committed legal error by rejecting the City Council’s 2016 legislation that increased wetland buffer requirements because he could not “comprehend how a setback that was fine a few years ago[] would suddenly be detrimental” to the environment and community. The

¹ The Applicant incorrectly claims that Scott Larson, City Administrator, is the named Appellant. This is not correct. The Appellant is the Building and Planning Department, with approval for filing the appeal authorized by the Mayor, as the Administrative head of the City.

1 Hearing Examiner is not empowered to reject the laws enacted by the City Council, and the
2 Department is required to take action to ensure the Council’s directives are met.

3 Importantly, this appeal is not about the applicant, Abundant Life Church (“Applicant”),
4 or the value that they bring to the community. The City Administration recognizes the value the
5 Applicant brings to the community and the good work they do. The Department assigns no error
6 to any action on the part of the Applicant in the history of their work with the City or in this
7 variance appeal.

8 Rather, this appeal is about the regulations enacted by the City Council, and the errors
9 in law made by the City’s Hearing Examiner in ignoring those regulations. After lengthy public
10 outreach and a statutory adoption process that spanned many years, the Orting City Council
11 adopted critical areas variance standards in 2016.² By operation—and direction of the City
12 Council—these regulations apply to all projects that are constructed after 2016 (the adoption
13 date). All projects approved since adoption of the critical areas ordinance have complied with
14 these regulations. The Orting City Council established these standards by ordinance, the
15 Applicant even acknowledged the 2016 standards applied to their application, and yet the
16 Hearing Examiner committed legal error by disregarding them. First, he allowed an
17 approximately 66% buffer reduction which he justified on the rationale that the wetland buffer
18 was smaller under the pre-2016 standards and he did not agree with the increased buffer. Second,
19 the Hearing Examiner did not correctly apply the variance standards codified under 11-1-8
20 OMC. He failed to apply the correct standards for “reasonable use” and failed to require specific

21 ² OMC 11-1-8.

1 mitigation, both of which are required by the Orting Municipal Code adopted by the City
2 Council.

3 The Department, adhering to the substantive and procedural rules adopted by the City
4 Council, is duty-bound to appeal that erroneous decision to the City Council. The Department
5 agrees that the various proposals to develop the relevant parcel have had a lengthy history, with
6 many different proposals considered by the Applicant and its consulting experts. However, this
7 history has no legal significance to the current appeal and cannot be considered under the legal
8 standard for this appeal. The Hearing Examiner made many legal errors, primary among those
9 errors a failure to apply the current Orting Municipal Code to the application. Regardless of how
10 long an applicant has been working to develop a proposal—an effort that, for some developers
11 and property owners can take many years of strategizing and identifying the exact design—the
12 relevant regulations to apply are those in existence at the time of relevant application.

13 The City Council gave itself authority to hear this appeal by adopting regulations that
14 provide multiple levels of due process for this type of permit application. Under those
15 regulations the Hearing Examiner is not authorized to deviate from the code adopted by this
16 Council. Therefore, the Council should correct the Hearing Examiner’s errors and apply the
17 OMC to the relevant, undisputed facts.

18 **II. UNDISPUTED KEY FACTS**

19 Both the Applicant and the Department agree on many of the facts. The following facts
20 are both relevant to the critical area variance application and are undisputed:

21 1. In July 2016, the City Council adopted Ordinance 2016-985, to amend and update
22 Orting Municipal Code (OMC) Chapters 11-1, 11-2, 11-, and 11-4, collectively referred to as

23 REPLY STATEMENT IN SUPPORT OF BUILDING & PLANNING
24 DEPARTMENT APPEAL OF HEARING EXAMINER DECISION
TO GRANT A CRITICAL AREAS VARIANCE TO ABUNDANT
LIFE CHURCH - Page 3

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1 the City’s critical areas regulations. As stated in Ordinance 2016-985, the purpose of the update
2 to existing critical area regulations was (which had not been updated since 2005) “to protect the
3 functions and values of critical areas and to give special consideration to conservation and
4 protection measures necessary to preserve or enhance critical areas.” Important to this appeal,
5 the City Council –through Ordinance 2016-985 – increased the requisite buffers for the wetlands
6 at issue in this case.

7 2. The Applicant submitted its application for site plan review in October 2020,
8 more than four years after the adoption of Ordinance 2016-985.

9 3. The Applicant submitted an application for Critical Areas Variance on August
10 28, 2023. Both the Applicant and the Department agree that the critical areas code that currently
11 applies to the Applicant’s project is the code adopted in 2016 and that the Applicant has never
12 vested to the 2015 critical areas code.

13 4. The Department concurs with the Applicant’s wetland biologist, and the report
14 submitted with the application, that there are two wetlands impacting the Property (Wetland A
15 and Wetland B), and that Wetland A is categorized as a Type 3 wetland and Wetland B is
16 categorized as a Type 2 wetland. The Department concurs with the report as to where Wetland
17 A and Wetland B are located, as well as the size and location of the buffer lines. (Note: this
18 called “wetland delineation”). The wetland boundary and the classification in the Applicant’s
19 Wetland Report are not in dispute.

20 5. Both the Applicant and the Department agree that the Ordinance 2016-985
21 requires a 50-foot buffer from Wetland A and a 150-foot buffer from Wetland B for this
22 application.

23 REPLY STATEMENT IN SUPPORT OF BUILDING & PLANNING
24 DEPARTMENT APPEAL OF HEARING EXAMINER DECISION
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1 6. Crucially, the Applicant and the Department agree that the Property is 4.92 acres
2 in total size and that applying the current required wetland buffers without any reduction leaves
3 approximately 2.92 acres of usable and developable land on the Property.

4 **III. LEGAL QUESTIONS PRESENTED**

- 5 A. Given that the Applicant has 2.92 acres of usable land for development, is it a legal
6 error by the Hearing Examiner to grant a critical areas variance to reduce the wetland
7 buffer for Wetland B from 150' to an average of 50'? **YES.**
- 8 B. If the Applicant has 2.92 acres of usable land for development as a result of the
9 application of the critical areas code, was it an error to hold that the Applicant did
10 not have reasonable use of its property without the critical areas variance? **YES.**
- 11 C. If the Applicant already has reasonable use of its property, was the Hearing Examiner
12 wrong to grant the critical areas variance? **YES.**

13 **IV. ANALYSIS**

14 **A. By filing this appeal, the Department is obeying the City Council's adopted
15 process to enforce the City Council's adopted regulations.**

16 The Department has filed this appeal in strict adherence to the direction of the City
17 Council. An appeal to enforce the City Council's adopted laws is compulsory for staff. The City
18 of Orting staff is solely vested with the power and authorities established for it by the City
19 Council through its laws, regulations, and policies, adopted via Ordinances, Resolutions, and
20 motions. The Department acts within its authority to enforce the Council's substantive and
21 procedural direction when reviewing all permit applications. Stated differently, if staff utilized
22 its discretion to not appeal the erroneous decision, and chose to not follow the processes adopted
23 by the Council to enforce Council's laws, staff could be seen as acting *ultra vires* – or acting
24 beyond their legal authority.

1 In this case, the Department’s appeal is necessary to adhere to two concurrent directives
2 from the City Council. First, substantively, the City Council adopted critical areas regulations
3 that the Department is required to enforce. An error by the Hearing Examiner – in ignoring
4 applicable regulations adopted by the City Council – should be challenged by staff to ensure the
5 City Council’s regulations are enforced. In this case, in 2016 the Council updated its wetland
6 buffer standards (which had not been touched since 2005). The 2016 Ordinance was adopted
7 following multiple public hearings and stakeholder outreach, and extensive staff and consultant
8 work to incorporate updated state law into the specific and unique Orting environment. The
9 Hearing Examiner rejected the 2016 law and this was legal error. The Department was required
10 to pursue an appeal to enforce the Council’s will.

11 Second, procedurally, the City Council adopted a process by which a development
12 application will be evaluated, and a final decision made. In Orting, the City Council specifically
13 vested itself with the final decision-making authority for Type 3, general variance applications.
14 This is clear in two different sections of the OMC enacted by the Council: (1) OMC 15-10-3
15 vests the City Council with appellate authority to hear all appeals of decisions of the hearing
16 examiner, including on variances; and (2) OMC 15-4-1 and OMC 15-4-2, a variance is a Type
17 3 permit and the City Council requires a final decision by the hearing examiner, followed by a
18 closed record appeal to the Council. In Washington and in Orting, the Hearing Examiner is an
19 independent officer of a municipality. In some cases, such as the current matter, this sometimes
20 results in a city appealing the decision of its own hearing examiner because of legal error. The
21 appeal then must follow the process adopted by the City Council. In Orting and in a few other

1 cities, the appeal is heard by the City Council. In other Washington cities, an appeal of a Hearing
2 Examiner’s decision takes the form of a judicial appeal to Superior Court, bypassing the Council.

3 Here, the Department has worked collaboratively with the Applicant to enable the
4 Applicant to develop its property for many years. Upon submission of the site plan application
5 in 2020 and the subsequent variance application in 2023, the Department followed the
6 proscribed process for review and submission of the variance request to the City’s Hearing
7 Examiner. As set out in the Department’s Staff Report, because the application called for an
8 unprecedented reduction in the applicable wetland buffers to build a structure and associated
9 parking of the size desired, the Department recommended the denial of the variance application.³
10 The Hearing Examiner’s error in failing to apply the OMC activated⁴ the Department to appeal
11 under the process dictated by the City Council. The Department urges the Council to uphold the
12 appeal and rectify the Hearing Examiner’s errors.

13 **B. The Hearing Examiner’s consideration and application of repealed City code
14 was a legal error.**

15 Orting is a city between two rivers with important natural and critical areas within its
16 borders. In 2016 the City Council updated the Orting critical areas code consistent with State
17 law. This was a legislative decision by the City Council. The Council is the legislative body of
18 Orting. Only the Council can adopt code. The Hearing Examiner, by contrast, is obligated to
19 apply the code that the City Council adopted to the applications he is reviewing. The Hearing

20 ³ While the Department recommended denial of the critical areas variance, the Department remains committed to
21 continue to work with the Applicant to develop the property consistent with code requirements.
22 ⁴ An appeal to enforce the City Council’s adopted laws is compulsory for staff. Stated differently, if staff utilized
23 its discretion to not appeal and not follow the processes adopted by the Council to enforce Council’s laws, staff
24 would be seen as acting *ultra vires*, without authority.

1 Examiner does not have the authority to decide whether he agrees with the code adopted by the
2 City Council or not. Nor does the Hearing Examiner have the authority to apply repealed code
3 to an application because he thinks it is better or doesn't agree with the code that the Council
4 did adopt.

5 The Hearing Examiner committed legal err by rejecting the 2016 critical areas legislation
6 that increased wetland buffers. The Hearing Examiner applied the buffer standards that pre-date
7 the City Council's 2016 legislative action and concluded: "[i]t is difficult for the Hearings
8 Officer to comprehend how a setback that was fine a few years ago, would suddenly be
9 detrimental, and nothing in the City's recommendations to deny the variance request addresses
10 this issue." The City Council is empowered to enact new rules and regulations, and staff and the
11 Hearing Examiner are required to enforce them. Had anyone, including the Hearing Examiner,
12 disagreed with the 2016 Ordinance, they were required to challenge it at the time through an
13 appeal of the Ordinance. There was no such challenge and the City Council's 2016 Ordinance
14 remains good law which is binding on all development since that time.

15 The Hearing Examiner found that the *Department* had not adequately justified the
16 Council's 2016 legislation, and thus he was justified in rejecting it. This is legal error. Hearing
17 Examiners have no authority to reject legislation, and the Department was duty-bound to appeal
18 the Hearing Examiner's decision to the City Council so that the Council can apply the adopted,
19 current rules and regulations.

20 **C. The Hearing Examiner's failure to apply the critical areas variance criteria in**
21 **OMC 11-1-8 to this application was an error.**

1 The purpose of the critical areas variance criteria found at OMC 11-1-8 is to only allow
2 a variance if, as a result of the critical areas code and special circumstances applicable to the
3 Property, there is no “reasonable use” of the Property. OMC 11-1-8(a). Only if there is no
4 “reasonable use of the property,” a variance may be granted, but it must be limited to:

5 . . . the minimum necessary to accommodate the development proposal and will
6 not be materially detrimental to the public welfare or injurious to the property or
7 improvements in the vicinity and zone in which the property is situated, or
8 contrary to the goals and purposes of [the Critical Areas and Shoreline
9 Management] title [of the Orting Municipal Code].

10 OMC 11-1-8(b). To break it down further, the criteria in OMC 11-1-8 require that the critical
11 areas variance application meet all of the following:

- 12 1. There are special circumstances applicable to the property;
- 13 2. Such special circumstances deprive the owner of reasonable use of the property;
- 14 3. Such variance is the minimum necessary to accommodate the development (which
15 is limited to reasonable use); and
- 16 4. The variance will not be materially detrimental to public welfare or injurious to the
17 property or improvements in the vicinity and zone in which the property is situated,
18 or contrary to the goals and purposes of the critical areas code.

19 If the application fails on any of these criteria, it should be denied under the code. For the
20 following reasons Criteria 2, 3 and 4 above were not met and thus the Hearing Examiner should
21 have denied this critical areas variance.

- 22 **1. *The Applicant has reasonable use of the Property even with the application of the
23 wetland buffers under the Code and thus it was error to grant the variance.***

1 Applying current critical areas codes and limiting their project to the 2.92 acres outside
2 of the buffers in no way deprives the Applicant of reasonable use of the Property. What is
3 undisputed is the following:

- 4 1. The Hearing Examiner acknowledges that the applicant could scale down their
5 project to comply with the existing wetland buffers;⁵
- 6 2. The Hearing Examiner failed to perform a “reasonable use” analysis applying the
7 reasonable use standards set forth in OMC 11-1-5;
- 8 3. This proposal does not meet the reasonable use standards in OMC 11-1-5; and
- 9 4. On this large, flat piece of property, there are 2.92 usable acres available for
10 development.

11 OMC 11-1-5 provides that reasonable use exceptions are appropriate when the applicable critical
12 areas costs would “deny all reasonable use of the property” and that there is “no other reasonable
13 use with less impact on the critical area.” There are no facts in the record to support a finding of
14 no reasonable use existing to justify the critical areas variance. Furthermore, the Hearing
15 Examiner failed to find that limiting the Property to 2.92 acres of development area would deny
16 all reasonable use of the property (nor would such finding pass the commonsense test).

17 Washington courts have examined whether a regulation would deny all reasonable use
18 of property. When a regulation denies all reasonable use of property, the property owner can sue
19 for “takings” under the U.S. and Washington Constitution. The 2016 decision of *Kinderace v.*

20 ⁵ The Applicant claims that the Department misquoted or misrepresented the Hearing Examiner Decision on this
21 point. The Department disagrees as the quote was directly from the Decision. The Decision speaks for itself and is
22 in the Record.

1 *City of Sammamish* examined whether a parcel of property could be developed under the
2 reasonable use rules when a wetland buffer interfered with the development of a parcel. In that
3 case, the Court used the legal analysis which is applied to regulatory takings cases and
4 established the following standard, “In a regulatory takings claim, one threshold issue is whether
5 a city’s decision denies a landowner a fundamental attribute of property ownership, such as the
6 right to possess, exclude others, dispose of, or make some economically viable use of the
7 property.”⁶ Absent these factors, there would be reasonable use and thus no takings.

8 The *Presbytery of Seattle v. King County*⁷ case contains facts very similar to the matter
9 now before the City Council. In that case, Presbytery of Seattle purchased 4.5 acres of property
10 in 1978 for the purpose of constructing a church.⁸ A large portion of the property contained a
11 wetland or wetland buffer.⁹ Presbytery didn’t have the funding to develop the church
12 immediately. In 1986, King County adopted a sensitive areas ordinance which regulated the
13 wetland on the Presbytery property and created a buffer zone around the wetland.¹⁰ Presbytery
14 never applied for a permit but instead sued King County asking the Court to declare that the
15 wetland regulations from 1986 were a “taking” of their property because it prohibited
16 development of a substantial portion of the property.¹¹ The Washington Supreme Court
17 dismissed Presbytery’s case holding that:

18 A land use regulation which prohibits development of one portion of an
19 undivided parcel of property does not necessarily constitute a “taking” of the
20 portion which must remain undeveloped. Mere regulation on the use of land has

19 ⁶ *Kinderace LLC v. City of Sammamish*, 194 Wn.App. 835, 843 (2016).

20 ⁷ 114 Wn.2d 320 (1990), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682 (2019).

21 ⁸ *Id.* at 323-4.

22 ⁹ *Id.* at 324.

23 ¹⁰ *Id.* at 325.

24 ¹¹ *Id.*

1 never constituted a “taking” or a violation of due process under federal or state
2 law.

3 The Court held that one must look at the entirety of the property in determining whether a
4 regulation results in a “taking”, “In deciding whether a particular governmental action has
5 effected a taking, this Court focuses rather both on the character of the action and on the nature
6 of the interference with rights *in the parcel as a whole* . . .” King County argued that Presbytery
7 “may be permitted to build a church on its land under existing regulations”.¹² The Court held
8 that until Presbytery has gone through permitting to determine whether they can obtain a permit
9 for a “possible use” (like a church), that their takings claim was premature and their claims were
10 dismissed. This case is applicable here.

11 Examining the Applicant’s Property “as a whole”, they have 2.92 usable acres after the
12 wetland buffers are applied. These 2.92 acres can be developed as a church or any other
13 allowable use. Thus, the Applicant still has the fundamental attributes of property ownership,
14 including the right to possess the property, the right to exclude others from the property, the
15 right to dispose of the property, and the right to make some economically viable use of the
16 property. This analysis doesn’t require that the Applicant have the right to *all* possible
17 economically viable uses, just that there is *some* economically viable use. It is undisputed here
18 that the Applicant can develop on the 2.92 acres of flat open land. As a result, the application of
19 the critical areas buffers for the wetlands does not deprive the Applicant of “reasonable use” of
20 the Property and therefore, the Hearing Examiner committed legal error in finding that it did in
21 granting the variance. The analysis of whether the variance should be granted could end here. If

21 ¹² *Id.* at 339.

1 granting the variance is not required for reasonable use of the property, then, under the
2 requirements of the Orting Municipal Code, the variance should be denied. In addition, the
3 application also did not meet other criteria under OMC 11-1-8 which are additional reasons to
4 deny the variance. These will be discussed briefly below.

5 ***2. The variance goes well beyond the minimum necessary to accommodate the
6 development (which is limited to reasonable use).***

7 In this application for a variance, the Applicant does not propose a less intensive use that
8 could be developed in the 2.92 acres of land that are *not* impacted by the wetland buffers. The
9 Record does not support any finding that a smaller development would not be allowed. Rather,
10 the Record supports the opposite as the Hearing Examiner held that that the Applicant “could
11 amend its plan to come into compliance with the City’s recommendation”.¹³ Instead, the Hearing
12 Examiner incorrectly based the evaluation on the *desires* of the Applicant to build a larger
13 project and did not base his evaluation on the criteria in the Code.¹⁴ This was an erroneous
14 finding. Since the variance criteria establishes that the variance shall be the “minimum
15 necessary”, the granting of the variance was legal error and the Hearing Examiner decision
16 should be reversed.

17 ***3. The variance will be materially detrimental to public welfare and is
18 contrary to the goals and purposes of the critical areas code.***

19 Again, the Department does not dispute that the Applicant’s use of the property will
20 benefit the public and the Orting community. But that value is not undermined by the

21 ¹³ Decision, page 3. The City’s recommendation was to deny the variance since the Applicant could still develop
the property in compliance with the critical areas ordinance.

22 ¹⁴ OMC 11-1-8.

1 enforcement of the City’s critical areas code, which—as applied, without the errors committed
2 by the Hearing Examiner—allows the Applicant to build a large public facility with a more
3 reasonable buffer reduction.¹⁵

4 The Property is located near wetlands and the Puyallup River. According to the
5 Applicant’s submittals, the Puyallup River contains three species of fish that are “threatened
6 species”.¹⁶ The Property itself was found to contain State Priority Species, including game
7 species, state monitored species, and state candidate species.¹⁷ Protecting “the functions and
8 values of ecologically sensitive and hazardous areas without violating any citizen’s
9 constitutional rights” is a primary purpose of the Orting Critical Areas Code.¹⁸

10 This specifically includes protecting wetlands. The purpose of the Orting Critical Areas
11 Code that was established by the City Council includes the goal of limiting development or
12 alteration of critical areas in order to:

- 13 A. Protect members of the public and public resources and facilities
14 from injury, loss of life, or property damage due to flooding, erosion,
15 volcanic eruptions, landslides, seismic events, or steep slope failures;
- 16 B. Protect unique, fragile and valuable elements of the environment,
17 including wildlife and its habitat;
- 18 C. Mitigate unavoidable impacts to environmentally critical areas by
19 regulating alterations in and adjacent to critical areas;
- 20 D. Prevent cumulative adverse environmental impacts to water quality
21 and wetlands;
- 22 E. Meet the requirements of the Washington growth management act
23 with regard to the protection of critical area lands;
- 24 F. Coordinate environmental review and permitting of proposals to
avoid duplication and delay.¹⁹

15 The OMC allows a 25% reduction with “buffer averaging” under certain criteria and conditions. *See* OMC 11-4-1(C)(3).

16 Wetland Delineation Report dated October 27, 2015, page 8.

17 *Id.*

18 OMC 11-1-1.

19 OMC 11-1-1(A-F).

1 Granting a variance to the critical areas code requires an analysis of whether the variance will
2 frustrate the purpose of the code. The Hearing Examiner committed legal error by failing to
3 evaluate this criteria.

4 The property has 2.92 acres of flat, usable property that is *not encumbered* by the critical
5 area buffers. A reasonable use is not the same as the applicant’s ideal use. Reasonable use is
6 granted if the critical areas regulations would “deny all reasonable use of the property.” Having
7 2.92 acres of usable area means there *already is* reasonable use of the property under existing
8 codes. Thus, a variance to the Orting critical area requirements is not appropriate and would
9 frustrate the purposes of the Critical Areas Code as set forth in OMC 11-1-1.

10 Furthermore, under the reasonable use rules, if any alteration of a critical area is allowed,
11 such impacts must be the “minimum necessary to allow for reasonable use of the property” and
12 mitigation is required.²⁰ If the variance is granted, even partially, then the Decision must be
13 amended to reduce the impacts to the wetlands by requiring larger buffer than requested and to
14 require mitigation measures as mandated by OMC 11-1-5(D). For these and for the many other
15 reasons set forth in the Department’s appeal statement, the Council should correct the Hearing
16 Examiner’s legal mistakes, apply the correct code, and deny this application for a critical areas
17 variance.

18 V. CONCLUSION

19 The Department is duty-bound to appeal the Hearing Examiner’s erroneous decision to
20 the City Council and has done so by adhering to the substantive and procedural rules adopted

21 ²⁰ OMC 11-1-5.D.

1 by the City Council. The critical areas' variance should be denied based on the significant legal
2 errors committed by the Hearing Examiner. The variance application does not meet the criteria
3 set forth in OMC 11-1-8, which only allows a variance absent a reasonable alternative. The
4 purpose of the variance provisions and the reasonable use exceptions under the Critical Areas
5 Code is to allow *some* use of property if it is excessively encumbered by the existence of critical
6 areas and development would otherwise be prohibited. Similarly, it was legal error to reject the
7 2016 Ordinance simply because he did not agree with it. For all of these reasons, the Department
8 recommends the Council grant the appeal and deny the variance application. Alternatively, the
9 Council may grant the application with conditions that enforce the Council's critical areas
10 regulations, including limited buffer reductions.

11 **VI. MOTION TO STRIKE AND MOTION IN LIMINE**

12 This matter is being heard as a closed record appeal. That means that factual information
13 outside the record may not be considered by the City Council nor introduced by the parties. In
14 filing its response to the Building and Planning Department's appeal, Abundant Life Church has
15 included multiple references to and the Applicant's perspective on conversations with former
16 members of City staff which are the closed record or are irrelevant to the issue of whether the
17 critical areas variance should be granted.

18 The Department requests that the statements of fact which are not relevant and/or are not
19 part of the Record be stricken and redacted from the Applicant's response prior to transmitting
20 it to the Council and the Department requests that Applicant be restrained from making oral
21 argument about these topics.

1 1. **History of Proposal.** The Applicant discusses their perspective of the history of
2 development, including a Conditional Use Permit. This information is outside the
3 Record, and is wholly irrelevant and prejudicial to whether the current application for a
4 critical areas variance should be granted. Only a building permit or a subdivision
5 application which is granted and implemented will result in old or repealed codes being
6 effective for a project into future years. Since that is not present in this case, what
7 happened before this variance application was filed has no bearing on this application.
8 What does have bearing, is the current code and the criteria for approval as applied to
9 the undisputed facts of this application.

10 2. **Prior discussions with former City Staff, or alleged instructions from previous**
11 **employees.** In their response, the Applicant provides their perspective on purported
12 conversations with Orting staff that took place prior to application for the critical areas
13 variance. Not only is this information outside the Record, but such information is also
14 wholly irrelevant to whether the current application for a critical areas variance should
15 be granted.

16 3. **Listing of Statements in the Applicant’s Response that are outside the Record.** The
17 following sentences in the Appellant’s Response are outside the record and should be
18 stricken and redacted:

- 19 • Second, third, fourth, and fifth sentences in the first paragraph under the heading
20 of “Brief History of the Project”.
- 21 • First, second, third, fourth, fifth and sixth sentences in the second paragraph.

- Third sentence in the third paragraph.
- Second, fifth, eighth and tenth sentences in the sixth paragraph.
- All sentences in the first full paragraph under “Item 5a” and the first two sentences of the second paragraph under “Item 5a”.
- The second sentence in the paragraph under subsection “B” under “Item 5c”.
- The fourth and eighth sentences in the paragraph under subsection “C” under “Item 5c”.
- The fourth, fifth and sixth sentences in the paragraph under subsection “D” under “Item 5c”.

Since the information contained subsections 1 to 3 above is not found within the Record, these statements should be stricken from the Applicant’s submission and not considered. In addition, the Applicant should be restrained from making arguments based on these statements which are outside the closed record.

RESPECTFULLY SUBMITTED this 22nd day of January, 2024.

INSLEE, BEST, DOEZIE & RYDER, P.S.

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REPLY STATEMENT IN SUPPORT OF BUILDING & PLANNING
DEPARTMENT APPEAL OF HEARING EXAMINER DECISION
TO GRANT A CRITICAL AREAS VARIANCE TO ABUNDANT
LIFE CHURCH - Page 18

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1 **DECLARATION OF SERVICE**

2 I, Katia Perez, hereby declare under penalty of perjury under the laws of the State of
3 Washington, that on the 22nd day of January, 2024 before 5 PM, I caused to be served true and
4 correct copies of the foregoing on the following parties and/or counsel of record named below
5 in the specific manner indicated:

6 **City Clerk:**

7 Kim Agfalvi
8 City of Orting
9 104 Bridge St S.
10 Orting, WA 98360

Email: KAgfalvi@cityoforting.org

11 **Applicant Abundant Life Community Church:**

12 Brad Grasley
13 Lead Pastor
14 Abundant Life Community Church
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17 Chuck Sundsmo
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22 **Attorney for Orting City Council**

23 Kendra Rosenberg
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DATED this 22nd day of January, 2024, at Bellevue, Washington.

s/ Katia Perez

Katia Perez, Legal Assistant