

City and Borough of Sitka

PROVIDING FOR TODAY...PREPARING FOR TOMORROW

Coast Guard City, USA

MEMORANDUM

To: Mayor Eisenbeisz and Assembly Members

From: Melissa Haley, Finance Director
Brian E. Hanson, Municipal Attorney

Thru: John Leach, Municipal Administrator

Date: January 20, 2021

Subject: Appeal of Denial of Refund of Sales Tax Paid on Home Construction
by Andrew and Becky Friske of 420 Kramer Avenue

Background

On June 3, 2015, Andrew and Becky Friske were issued a building permit (copy attached) by the CBS Building Official for construction of a home at 420 Kramer Avenue. On August 17, 2015, the catastrophic and deadly "Kramer Avenue Landslide" (the "Landslide") destroyed a portion of that home and halted construction by direction of CBS.

In response to the Landslide, CBS retained geotechnical and environmental consultants, Shannon & Wilson, Inc., to ascertain and report on landslide risks in the Landslide area. On February 2, 2016, Shannon & Wilson submitted their written report which designated land in the vicinity of the Landslide as either high, medium, or low risk for landslide debris flow.

Also, in response to the Landslide, on June 27, 2017, the CBS Assembly enacted SGC, Chapter 20.01, entitled "Landslide Area Management," which has as its purpose to balance public safety and the ability of citizens to develop homes and livelihoods. This Chapter requires geotechnical evaluation and mitigation in the permitting process for land development for "Restricted Land Area[s]" as defined in the code. It also provides for a waiver of those requirements if the land owner submits a "Land-Use Covenant."

As a result of the Landslide, the Friske's land was deemed a "Restricted Land Area," which in order to develop requires geotechnical evaluation/mitigation or a waiver of the same. On June 18, 2018, the Friskes submitted, and CBS accepted and approved, a "Land-Use Covenant" (copy attached), after which the Friskes were approved to resume construction. The Friskes resumed construction in "early 2019." On May 8, 2020, by direction of the CBS Building Official, the Friskes were permitted to temporarily occupy their home pending a final inspection and issuance of a Certificate of Occupancy, which to date has not occurred.

On September 19, 2020, by email to the prior Finance Director Jay Sweeney, the Friskes requested refund of sales tax they paid on the construction of their home. In that email, the Friskes indicated they started inquiring about the refund with the Finance Department in June 2020. The Friskes have been told by the Finance Department and Legal Department that their application was untimely under SGC 4.09.110(B) because, technically, it wasn't brought within two years of issuance of the underlying building permit. After notification of their appeal right under SGC 4.09.110(E), the Friskes have given notice of appeal.

Note, the Friskes have supported their application with a summary of invoices and corresponding copies of the listed invoices which appear to verify the sales tax paid for construction of their home between February 2019 thru October 2020

Analysis

The Friske's appeal is governed by SGC 4.09.110, entitled "Residence construction tax refund" (copy attached). Subsection (B) provides in pertinent part: "At the time of refund application, no more than two years shall have passed since issuance of . . . [a] building permit" (emphasis added)." Here, the building permit was issued on June 3, 2015. The time of refund application was, at the earliest by the Friskes own statement, in June 2020. Clearly, on its face, the Friske's refund application was untimely since it was made five years after issuance of the building permit.

However, the Friskes are expected to argue that equitable circumstances exist such that the two-year deadline should not be strictly applied. The Friskes are expected to argue the following points, among others: (1) the Landslide occurred only two months after the building permit was issued, putting in motion certain equitable circumstances, (2) all construction of their home was halted for over three years until construction was restarted in early 2019, and (3) the sales tax refund application was initiated in June 2020, at the earliest, which was within two years of restarting construction. Essentially, the Friskes are expected to argue that the time period between issuance of the building permit and restarting of construction should not be counted in calculating the two-year deadline because of the extraordinary circumstances occasioned by the Landslide.

SGC 4.09.110(E) provides ". . . Appeals may be made to the assembly." No standards or guidance are provided as to appeals. Consequently, the Assembly should review the totality of the circumstances and determine if equitable circumstances and reasons exist which warrant a determination that the Friske's application for a sales tax refund is timely.

Fiscal Note

The building permit issued in 2015 cost \$3,192.09. The Friskes are seeking a refund of \$11,734.27 in sales tax paid to vendors for materials and services for construction of their home on Kramer Avenue, and remitted to CBS, between February 2019 thru October 2020.

Recommendation

As discussed above, the Assembly must determine whether the Friske's application for a sales tax refund is timely. A motion should be made to grant the appeal. If the appeal is granted, the refund application would be deemed timely. If the appeal is not granted, the refund application would be deemed untimely. The amount requested is not on appeal.

CITY AND BOROUGH OF SITKA (CBS) BUILDING PERMIT

(PERMIT NOT VALID UNTIL STAMPED "APPROVED" BELOW)

PLEASE VISIT WWW.CITYOFSITKA.COM FOR MORE INFORMATION.

PERMIT NO. 15132

APPLICATION INFORMATION: PLEASE FILL OUT ALL THAT APPLY.

OWNER Andrew + Becky Friske PHONE NUMBER 738-3141
PROJECT ADDRESS 420 Kramer MAILING ADDRESS 3004 Barker St
CONTRACTORS: GENERAL Titan Construction PLUMBING _____ ELECTRICAL _____
PROJECT TO INCLUDE: ☒ BUILDING ☐ ELECTRICAL ☐ PLUMBING ☐ DEMOLITION ☐ GRADING
TOTAL SQUARE FOOTAGE 3544 living 483 753 garage PROJECT VALUE \$ 600,000 \$574,745 CD

WHEN APPLICABLE, OWNER/APPLICANT IS RESPONSIBLE FOR THE FOLLOWING ITEMS:

- ☐ CBS UTILITIES CONNECTION / DRIVEWAY CULVERT PERMIT
- ☐ AS BUILT SURVEY PRIOR TO FRAMING
- ☐ CORPS OF ENGINEERS PERMIT FOR ALL CONSTRUCTION ON TIDELANDS OR WETLANDS
- ☐ STATE OF ALASKA DEC SANITARY WASTE DISPOSAL PERMIT
- ☐ STATE OF ALASKA DOT HIGHWAY DRIVEWAY PERMIT
- ☐ 2 SETS OF PLANS SUBMITTED WITH BUILDING PERMIT APPLICATION (ONE SET WILL BE RETURNED WITH PERMIT, ONE SET WILL BE KEPT AT CBS FOR DURATION OF PROJECT)

RECEIVED
MAY 06 2015
CBS BLDG DEPT

IMPORTANT: ALL WORK MUST BE INSPECTED PRIOR TO CONCEALMENT. THE BUILDING CODE REQUIRES A MINIMUM OF ONE WORKING DAY'S NOTICE PRIOR TO ALL INSPECTIONS.

PROJECT DESCRIPTION:

Duplex w/ attached garage

I HEREBY ACKNOWLEDGE THAT I HAVE READ THIS APPLICATION, STATE THE ABOVE IS CORRECT, AND AGREE TO COMPLY WITH ALL STATE LAWS, AND CODES AND ORDINANCES OF THE CITY AND BOROUGH OF SITKA.

Andrew Friske
APPLICANT'S NAME (PRINTED)

[Signature]
APPLICANT'S SIGNATURE

4/5/14
DATE

FOR OFFICE USE ONLY			
ZONING <u>R-1(PUD)</u>	OCCUPANCY <u>R-3</u>	FLOOD ZONE <u>N/A</u>	PROPERTY TAX ID NO. _____
PLANNING <u>MB</u>	PUBLIC WORKS (W/WW) _____	ELECTRIC _____	ADMINISTRATOR _____
COMMENTS:	<input type="checkbox"/> AS BUILT TO ASSESSING <input type="checkbox"/> UTILITIES PERMIT APPLICATION SUBMITTED		
<u>Please call for inspections before covering any work.</u>			
<div>APPROVED FOR CONSTRUCTION <u>[Signature]</u> 6/3/15 BUILDING OFFICIAL</div>			

BUILDING DEPARTMENT FEES
Building/Plan Review/Service Connection

NAME: Andrew Friske
ADDRESS: 420 Kramer Ave
PHONE: 738-3141

BY: _____

DATE: 5/32

BUILDING OFFICIAL: _____

DESCRIPTION	ACCOUNT NO.	AMOUNT
Building Permit Fee	100-300-320-3201-001 MG	\$ 2332 ⁴⁰
Plan Review Fee	100-300-320-3201-001 MG	\$ 769 ⁶⁹
Water Service Connection Charge	210-300-350-3501-001	\$
Sewer Service Connection Charge	220-300-350-3501-001	\$
Comments:		3102 ⁰⁹
Sales Tax @ / Exempt #		\$
TOTAL AMOUNT DUE:		\$

DATE PAID: _____ RECEIVED BY: _____ PAYMENT TYPE: _____

RECORDED ELECTRONICALLY
ID 2018-000634-0
Date 6-18-18 Time 11:10 A.M.
Alaska Escrow & Title 907-225-9077

Return to:

City & Borough of Sitka
100 Lincoln St
Sitka, AK 99835

THIS COVER SHEET HAS BEEN ADDED TO THIS DOCUMENT TO PROVIDE SPACE FOR RECORDING DATA. THIS COVER SHEET APPEARS AS THE FIRST PAGE OF THE DOCUMENT IN THE OFFICIAL PUBLIC RECORD.

(Title)

Sitka Recording District

DO NOT DETACH

**LAND-USE COVENANT FOR
DEVELOPMENT OF RESTRICTED LANDSLIDE AREA**

Grantors: Andrew Friske and Rebecca Friske, a married couple.

Grantee: City and Borough of Sitka, Alaska, a home rule municipal corporation.

Short Legal Description: Lot 2, Plat 2014-2
420 Kramer Avenue
City and Borough of Sitka, Alaska
(Complete Legal Description below)

City Assessor's Tax Parcel Identification Number: 2-4909-136

Reference Numbers of Documents Released or Assigned: N/A

This Land-Use Covenant for Development of Restricted Landslide Area (this "Covenant") is made by and between the City and Borough of Sitka, Alaska, a home rule municipal corporation of the State of Alaska ("City") and Andrew Friske and Rebecca Friske, a married couple ("Owners").

Recitals

A. The Owners own real property in the City (the "Real Property"). The Real Property is located at 420 Kramer Avenue and more particularly described as follows:

Lot 4, NORTH WOODBURY SUBDIVISION, according to Plat 2014-2,
records of the Sitka Recording District, First Judicial District, State of Alaska.

B. The Real Property contains a "Restricted Landslide Area," which means:

- (1) Any portion of any lot which has been identified as a moderate or high risk zone in any city geotechnical risk mapping commissioned and received by the City.
- (2) For areas not mapped, properties damaged by previous landslides or within one hundred fifty feet of locations damaged by previous landslides. SGC 20.01.020.

C. A geotechnical report (Exhibit 1 attached) relevant to the Real Property was prepared by Shannon & Wilson Inc. Geotechnical and Environmental Consultants, dated February 2, 2016, entitled "South Kramer Avenue Landslide: Jacobs Circle to Emmons Street, Sitka, Alaska." A landslide occurred on August 18, 2015, which impacted this Real Property. The Real Property has been identified as a medium and high risk in the aforementioned report.

D. The Owners seek a waiver of the City's special requirements and limitations for development within a Restricted Landslide Area.

E. The owners have proposed repairing the damage caused by the August 2015 landslide as well as finishing the 420 Kramer Avenue house as previously approved by the City. An engineer's report (Exhibit 2 attached) assessing the damage was prepared by Design Southeast, dated September 25, 2015, entitled "420 Kramer Avenue Structural Conditions Assessment".

F. The City requires no protective improvements, mitigation measures, or other conditions for development.

G. In view of the risks inherent in construction of buildings or structures in a Restricted Landslide Area, the City requires the owners of real property on which development is proposed to execute a Land-Use Covenant prior to the commencement of any construction or site alteration activities. SGC 20.01.040.

H. In light of the commitments set forth in this Covenant and the information that has been provided to the City, the City has concluded that the Proposed Activity may proceed without creating an unreasonable risk to public safety.

Covenant

The parties agree as follows:

1. **Assumption of Risk.** The Owners understand and assume the landslide risks associated with the Proposed Development.
2. **Compliance with Requirements.** The Owners agree to conduct the Proposed Development, including protective improvements, mitigation measures, and other required conditions of development, in accordance with permit conditions and City requirements.
3. **Maintenance.** The Owners agree to maintain the Real Property in such condition and such manner as will prevent harm to the public, to residents of the property, to nearby property, and to streets, alleys and drainage facilities.
4. **Inform Future Owners, Lessees, Renters and Other Consensual Residents.** The Owners agree to inform future purchasers of the Real Property, and other successors and

assignees, of the risks and of the advisability of obtaining insurance in addition to standard homeowner's insurance to specifically cover the risks posed by development in a Restricted Landslide Area, including risk of damage from loss of use, personal injury and death resulting from soil and water movement. The Owners also agree to inform future lessees, renters, and other persons consensually residing on the Real Property of the risks posed by residing on the Real Property which is located in a Restricted Landslide Area, including risk of damage from loss of use, personal injury, and death resulting from soil and water movement.

5. Release. The Owners release and discharge the City and its officers, employees, agents, successors, assigns and consultants from all known and unknown losses, liabilities, claims, damages or causes of action that the Owners have or may have relating to, arising out of, or resulting from, directly or indirectly, the issuance of the permit or approval by the City for the Proposed Development, or arising out of any inspection, statement, assurance, delay, act or omission by or on behalf of the City related to the permit or approval or the work done thereunder, including but not limited to soil movement or the construction of buildings, structures and improvements on the Real Property, or unintended results from maintenance, modification, or aging of drainage facilities.

6. Indemnification and Hold Harmless. The Owners agree to indemnify and hold harmless the City and its officers, employees, agents, successors, assigns and consultants from and against any losses, liabilities, claims, damages, or causes of action (including attorney's fees incurred in defense thereof), for deaths or injuries to persons or loss of or damage to property, occurring either on or off the Real Property, sustained by the City or its officers, employees, agents, successors, assigns and consultants, or any other person or entity, relating to, arising out of, or resulting from, directly or indirectly, the issuance of the permit or approval by the City for the Proposed Development, or arising out of any inspection, statement, assurance, delay, act or omission by or on behalf of the City related to the permit or approval or the work done thereunder, including but not limited to soil movement or the construction of buildings, structures and improvements on the Real Property or unintended results from maintenance, modification, or aging of drainage facilities. This obligation shall not include losses, liabilities, claims, demands, or causes of action caused solely by the negligence or willful misconduct of the City, or its officers, employees, agents, successors, assigns or consultants. In the event any loss, liability, claim, demand or cause of action is caused by the joint negligence of the Owners and the City, the Owners' indemnification of the City shall be enforceable to the extent of the Owners' negligence. The Owners shall give the City prompt notice in the event of claims potentially covered by this Covenant.

7. Waiver of Geotechnical Evaluation. Based on the foregoing, the City agrees to waive the requirement for a Geotechnical Evaluation, as defined in SGC 20.01.020.D, for the Proposed Development.

8. Binding Nature. The provisions of this Covenant shall inure to the benefit of and be binding on the parties and their respective heirs, representatives, successors and assigns. The provisions of this Covenant shall constitute covenants running with the Real Property.

9. Recording. This Covenant shall be recorded by the City at the State of Alaska's Recorder's Office within the Department of Natural Resources for the Sitka Recording District, at the expense of the Owners and become part of the State of Alaska's real property records.

10. Attorney's Fees. In the event of any dispute relating to or arising out of this Covenant, including mediation, arbitration or litigation, then the prevailing party shall be awarded full costs and expenses, including reasonable attorney's fees, incurred in connection with the dispute.

11. Severability.

A. If a court of competent jurisdiction holds any part, term or provision of this Covenant to be illegal or invalid, in whole or in part, the validity of the remaining provisions shall not be affected, and the parties' rights and obligations shall be construed and enforced as if the Covenant did not contain the particular provision held to be invalid

B. If any provision of this Covenant is in direct conflict with any statutory provision of the State of Alaska or code provision of the City, that provision which may conflict shall be deemed inoperative and null and void insofar as it may conflict, and shall be deemed modified to conform to such statutory or code provision.

12. Governing Law. This Covenant shall be governed by and construed in accordance with the laws of the State of Alaska.

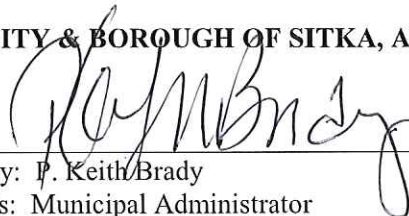
13. Venue. The venue for any action to enforce or interpret this Covenant shall lie in the State of Alaska, First Judicial District at Sitka.

Date

6/8/18

CITY & BOROUGH OF SITKA, ALASKA

By: P. Keith Brady
Its: Municipal Administrator



Date

6-6-18

Andrew Friske
Owner



Date

6-6-18

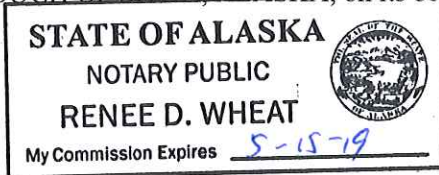
Rebecca Friske
Owner



STATE OF ALASKA)
)
FIRST JUDICIAL DISTRICT)

ss:

The foregoing instrument was acknowledged before me this 8th day of June, 2018, by P. Keith Brady, the Municipal Administrator of the CITY AND BOROUGH OF SITKA, ALASKA, on its behalf.

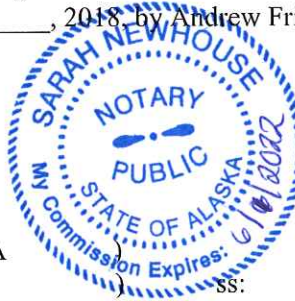


Renee D. Wheat
Notary Public in and for the State of Alaska
My commission expires: 5-15-19

STATE OF ALASKA)
)
FIRST JUDICIAL DISTRICT)

ss:

The foregoing instrument was acknowledged before me this 6 day of June, 2018, by Andrew Friske.



Sarah Newhouse
Notary Public in and for the State of Alaska
My commission expires: 06/01/2022

STATE OF ALASKA)
)
FIRST JUDICIAL DISTRICT)

ss:

The foregoing instrument was acknowledged before me this 6th day of June, 2018, by Rebecca Friske.



Sandy Baird
Notary Public in and for the State of Alaska
My commission expires: 5/14/2020

AFTER RECORDING RETURN TO:

Municipal Clerk
City and Borough of Sitka, Alaska
100 Lincoln Street
Sitka, Alaska 99835

LAND-USE COVENANT – RESTRICTED LANDSLIDE AREA - 5 of 5

ALASKA ESCROW & TITLE INSURANCE AGENCY, INC. IS RECORDING THIS DOCUMENT AS AN **ACCOMMODATION ONLY**. IT HAS NOT BEEN EXAMINED AS TO ITS EFFECT, IF ANY, ON THE TITLE OF THE ESTATE HEREIN NOR HAS AN EXAMINATION BEEN MADE AS TO STATUS OF PROPERTY DESCRIBED HEREIN. DOCUMENT CONTENT IS BEING RECORDED AS PRESENTED AND NOT ALTERED IN ANY WAY.

4.09.110 Residence construction tax refund. Revised 4/14

Upon proper application the city and borough will refund sales tax paid on the construction of an owner-occupied single-family dwelling or duplex.

- A. The dwelling must be a new dwelling unit, not merely an extension of an existing unit.
- B. At the time of refund application, no more than two years shall have passed since the issuance of either a grading permit, foundation permit, or building permit. The applicant may choose which permit issuance date begins the two-year period. No refund shall be made for items purchased prior to the issuance of the permit selected by the applicant. No sales tax paid to businesses outside of the city and borough shall be refunded.
- C. The refund shall be the amount of sales tax actually paid for materials and services used in the construction of the dwelling. This shall include lumber, building materials, electrical and plumbing supplies or services, furnace and other heating apparatus and permanent carpeting and major appliances, such as kitchen stove, refrigerator, washer, dryer and freezer. Items not included are throw rugs, televisions, furniture, drapery, pictures and minor appliances, not built into the building. Also not included are tools and machinery purchased to use in the construction of the dwelling, nor shall it include spare material(s) not used.
- D. Upon application for a refund the applicant shall certify, under penalty of perjury:
 - 1. The sales tax requested to be refunded has actually already been paid to the supplier;
 - 2. That all items for which a refund is requested were consumed in the construction of the dwelling or have actually been installed in the dwelling.
 - 3. That all services were used to prepare the lot for construction, construct the dwelling, or install materials in the dwelling.
- E. Applications for refund shall be made to the finance director and shall be supported by detailed invoices. Such invoices must be presented in an orderly fashion with the total amount of refund being applied for totaled. The finance director will disallow unsupported application or portions thereof. Appeals may be made to the assembly.
- F. Only one refund will be issued in conjunction with the same building permit. If a builder chooses to apply for a refund prior to completion of construction during the two-year period commencing with the issuance of the building permit and subsequently incurs additional construction costs after the issuance of a refund, sales taxes paid on those additional costs will not be refunded, even if incurred within two years after the issuance of the building permit.
- G. If a noncontractor home builder completes and sells a home prior to the end of the two-year time period for refunds, the amount of applicable sales tax will be deducted from the amount of the refund. This is the amount of sales tax applicable to the sale of the home in effect at that time.

(Ord. 14-08 § 4, 2014; Ord. 12-46A § 4 (part), 2013; Ord. 03-1758 § 4(B), 2004.)