Chan Pongkhamsing
CWA 404 Enforcement Coordinator
Aquatic Resources Unit
Ecosystems, Tribal, and Public Affairs Office
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900, ETPA-083
Seattle, Washington 98101

November 14, 2014

Dear Chan Pongkhamsing

With this document are two sections dealing with the Bainter development project. First, is a selection of aerial photos and maps that have been prepared by Mr. Bainter and submitted to Planning Department Officials at the City of Yakima. Second, I discuss some issues dealing with environmental investigations at the State, Local and Federal Levels.

These items will likely help you with your initial review of the Clean Water Act 404C violations by Bainter Group LLC and Mr. Greg Bainter. Within your email of November 13, 2014 you indicated that you wished to see aerial photos of the site. The materials I have are in hard-copy format. So I will copy the materials and send them to you with this letter. Additional information and annotations have been added by me to these photos and maps.

A list of the subject matter on the aerial photos and maps is as follows:

1. A location map for the so-called Bainter Habitat Improvement Project. While Mr. Bainter presented project materials to perform "habitat improvement", no such habitat improvement occurred. Also, the map for the project location describes an illegal access to the project site since Zoning Ordinance 14-2004

prohibits the use of S. 90th Ave. until such time as the roadway is paved. South 90th Avenue is just an ill defined patch of dirt and there are no improvements of the roadway such as utilities and paving. So, according to the zoning ordinance, no access to the site is allowed by using S. 90th Ave. Access to the site is to be through the legally allowed driveway from S. 92nd Avenue.

2. Labelled "Attachment 1" by Mr. Bainter. This document shows the correct location of Shaw Creek. This location is defined by the mature Willow trees that line the watercourse. Also, a survey of 2011 defined the watercourse of Shaw Creek. At about the same time, formal mapping of Shaw Creek, the Shaw Creek Floodway, and the Shaw Creek FEMA 100-year Floodplain was performed by FEMA. The true location of Shaw Creek has been clearly defined.

3. Labelled "Attachment 3". With this aerial photo (submitted by Mr. Bainter), he shows the true location of Shaw Creek. Mr. Bainter shows, in red, a dry overflow channel that he proposed to excavate in order to prevent flooding in homes downstream from the project site. When Mr. Bainter obtained the Critical Area Permit in 2012, it described the required steps to plant a large 14,000 Sq Ft Riparian Planting Zone; this Bainter Riparian Habitat Improvement Project is defined by the large yellow area on the map. Using the Critical Area Permit, Mr. Bainter brought heavy equipment to the site. Mr. Bainter excavated the overflow channel and then diverted all flows of Shaw Creek into this so-called "dry overflow channel" (aka Illegal-Bainter-Ditch).

Then Mr. Bainter illegally filled the historic watercourse (blue line on the map) and filled critical areas along Shaw Creek. Mr. Bainter did not plant native vegetation within the so-call Bainter Riparian Habitat Improvement Zone. Rather, Mr. Bainter has repeatedly mowed all vegetation up to the high water mark of the watercourse.

4. Labelled "Attachment 2". Mr. Bainter presented this aerial view as a reason or purpose for excavating the "dry flood channel". Mr. Bainter indicated that water overflowed from Shaw Creek and then flowed in a path to the homes along the red line on the map. This red line is labeled "Flow Path". This so-called "Flow Path" begins with water flowing downhill, but then the water flow would be going up a slope towards homes that are located up and above the level of the stream. These homes are located above the Shaw Creek FEMA 100-year Floodplain. So, according to Mr. Bainter, water flowed uphill in March of 2011 in defiance of the laws of gravity. The annotated aerial photograph (Attachment 2) is false. Water does not flow uphill as indicated by Mr. Bainter. Mr. Bainter presented false and misleading information to reviewers so that he would receive a Critical Area Permit. Then Mr. Bainter used the Critical Area Permit to bring heavy equipment to the site so that he could perform preemptive habitat destruction in advance of commercial development.

5. Labelled Preliminary FEMA Flood Map 9/30/10. In this aerial photo, the true course of Shaw Creek and the Shaw Creek Floodway is indicated in red. The Shaw Creek FEMA 100-year Floodplain is indicated in yellow. Note that

there is an elevated area on the lower right portion of the aerial photo. This portion of land is located up and above the Shaw Creek FEMA 100-year Floodplain. Water that may overflow the banks of Shaw Creek flows within the floodway and the floodplain, but flood waters do not gain elevation and flow into homes located above the floodplain. The image shows the roofs of homes in the lower right portion of the photo; these homes are located above the floodplain and do not receive overflow floodwaters. However, these are the specific homes that Mr. Bainter falsely asserted would be threatened by floodwaters escaping from Shaw Creek. Mr. Bainter falsified the information that he reported on page 4 (Attachment 2).

6. Labelled Adjoining Property Map. Mr. Bainter presented this map to show some adjoining residential parcels. On this map Mr. Bainter falsely indicates that S. 90th Ave. is an improved cul-de-sac. In truth, S. 90th Ave. is just an ill-defined area of dirt with no paving and no other improvements. The legal access to the project location is by way of S. 92nd Avement. A group of homes downstream from the illegal Bainter diversion have been experiencing significant crawl space flooding. The illegal diversion of Shaw Creek removed natural flood abatement features such as woody material and wetlands; the Bainter environmental destruction is likely to have resulted in the flooding of downstream homes.

7. Labelled Site Plan. This site plan was submitted by Mr. Bainter. However, the site plan has very little to do with the real project performed by Mr. Bainter. The location of Shaw Creek is indicated on the map. Following the

completion of the project, Mr. Bainter had relocated Shaw Creek without legal permits. There is an area labeled "project area" where Mr. Bainter said he would plant a large are of native vegetation to benefit fish swimming within Shaw Creek. Mr. Bainter has indicated that there are trout, speckled dace and there is also evidence that the stream contains habitat for endangered Steelhead. When the project was complete, Mr. Bainter had planted nothing within the "project area". No native vegetation was planted. Rather, Mr. Bainter repeatedly mowed all vegetation up to the high water mark of the watercourse. Furthermore, after Mr. Bainter relocated Shaw Creek to the so-called "dry flood control ditch", he has indicated that the R-1/B-2 boundary line has moved to the south. So Mr. Bainter indicates that the illegal movement of Shaw Creek into a ditch has allowed for the expansion of his B-2 commercial zoning district without going through the legally required land use and zoning hearings.

8. Site Plan for 2014 – The Bainter Site Plan is a modification of a land survey of 2013. Mr. Bainter has indicated that the Illegal-Bainter-Ditch now is the new boundary line between R-1 and B-2 commercial land; so Bainter is asserting that the illegal diversion of Shaw Creek gifted him with new, valuable commercial property. The Site Plan includes no indication of the legal position of Shaw Creek. The utility roadways are shown right up to the high water mark of the watercourse. Former wetlands are destroyed and not indicated on the site plan; only a small remnant area of wetland remains to the east side of the property. The legal access driveway is not shown. While there

appear to be lengthy sewer line extensions, in truth, Bainter proposes only to place a stub of pipe that is 100 feet long.

The following paragraphs address matters related to local, state and federal investigation of the illegal diversion of Shaw Creek and the illegal filling of critical areas. During the summer of 2014, I was gathering source documents dealing with the diversion of Shaw Creek and filling of critical areas. As these documents were reviewed, I have faced difficulties getting a fair investigation and review of the materials due to involvement of at least two government officials who have facilitated the preemptive habitat destruction along Shaw Creek. One individual is Mr. Jeff Peters at the City of Yakima Planning Department. Another individual is Mr. Eric Bartrand at the Washington Department of Fish and Wildlife. There is a possibility that other officials are involved. I have not ruled out some level of complicity and approval by officials from the State of Washington Department of Ecology.

When I determined that Mr. Eric Bartrand at WDFW assisted Mr. Bainter by issuing a Hydraulic Project Approval without a written application, I learned that this State of Washington Official had violated the State Growth Management Act by failing to include any level of public review with respect to the diversion of Shaw Creek and filling of critical areas. With no project application, there was no review by commenting agencies and no ability to review the permit by members of the public.

After learning that at least one State of Washington Official was involved with facilitating Mr. Bainter's destruction of habitat, I did not feel it would be appropriate for me to notify the Department of Ecology and the State of Washington Attorney General for an investigation at the local or state level. This is the reason that the materials were sent to the EPA; and that is how you received notice.

At the local level, the City of Yakima has been closely aligned with Mr. Bainter through the efforts of Mr. Jeff Peters. Mr. Peters is a Planning Supervisor. Mr. Peters also has a senior role with Code Enforcement. And Mr. Peters is the Official heading a Shaw Creek Flood Control Project where Shaw Creek is to be relocated to a new channel in the future. To be fair, Shaw Creek might stay right where it is; one of the project options is to leave the stream in the current alignment.

Mr. Jeff Peters has reviewed all Bainter project applications and received a copy of the HPA from Mr. Bartrand in 2012; this HPA was delivered prior to any illegal activity by Mr. Bainter. So Mr. Jeff Peters was fully informed that Mr. Bainter had plans to illegally divert Shaw Creek and fill critical areas. Mr. Peters did not take any action to stop the destruction of Shaw Creek and the associated critical areas. Despite receiving numerous photos and written documents dealing with the "Unlawful Alteration of Critical Areas" by Mr. Bainter, there has been no meaningful action taken to stop ongoing critical area destruction. On August 7, 2014, Mr. Bainter (and Bainter Group LLC) was issued permission by Mr. Peters to destroy all vegetation within the Shaw Creek FEMA 100-year Floodplain, destroy vegetation within wetland buffer zones, and destroy vegetation up to the high water mark of the watercourse. Mr. Peters has made decisions that

authorize and facilitate critical area destruction. Mr. Peters is also engaging in preemptive habitat destruction that facilitates development on his Shaw Creek NEPA Flood Control Project. Mr. Peters authorizes self-serving habitat destruction. The study of Shaw Creek by Fish Biologists, Wetland Experts and the USACE is greatly simplified when there are no critical areas and no wetlands along the stream. Mr. Peters proposes to locate Shaw Creek in a straight line swale, devoid of trees, devoid of pools, and devoid of the features that are required by law along a perennial stream.

It is anticipated that an investigation at the local level will go nowhere. Up to now, there has been no meaningful action to stop Shaw Creek critical area destruction and to restore damage done to critical areas. Last week I prepared a comprehensive Notice of Complaint and sent the materials to the City of Yakima Manager. I will send you a copy of the Notice of Complaint since much of the material is relevant to your investigation. Ordinarily, the City of Yakima Code Enforcement Department would be expected to immediately bring in the Department of Ecology to assist with an investigation of Mr. Bainter. This kind of investigation occurred recently on Manastash Creek in Kittitas County. However, the City of Yakima has done nothing.

With the WDFW involvement (through Mr. Bartrand), there may be conflicts of interest with an investigation by the Department of Ecology and the State of Washington Attorney General. You should also know that I invited the Department of Ecology to take over as Lead Agent with Bainter Planning Decisions as he attempts to excavate sewer trenches and roadway near and within the so-called "dry ditch" that he used for the illegal diversion of Shaw Creek. The Department of Ecology declined to become involved with

the Bainter project. So, I have some gnawing concerns that the Department of Ecology may wish to steer clear of all matters related to Shaw Creek.

Overall, Mr. Bainter performed preemptive habitat destruction in advance of commercial development. Mr. Bainter destroyed the Shaw Creek watercourse, diverted the waters into a ditch, destroyed critical areas, and filled wetlands. With the current sewer and roadway excavations, Mr. Bainter now indicates that there are no critical area features that he will impact. The full truth is well documented within maps and photographs that Mr. Bainter has submitted. His own photographs show that he destroyed Shaw Creek and destroyed critical areas; he did not obtain the legally required permits to divert Shaw Creek and to fill wetlands and other critical areas. After diverting Shaw Creek and destroying critical areas, now Mr. Bainter has presented another round of development plans where he will excavate a stub of sewer pipe and construct long utility access roadways. This new sewer and roadway project will, according to Mr. Bainter, not be impacting critical areas since the critical areas were preemptively destroyed by him in 2012.

Sincerely,

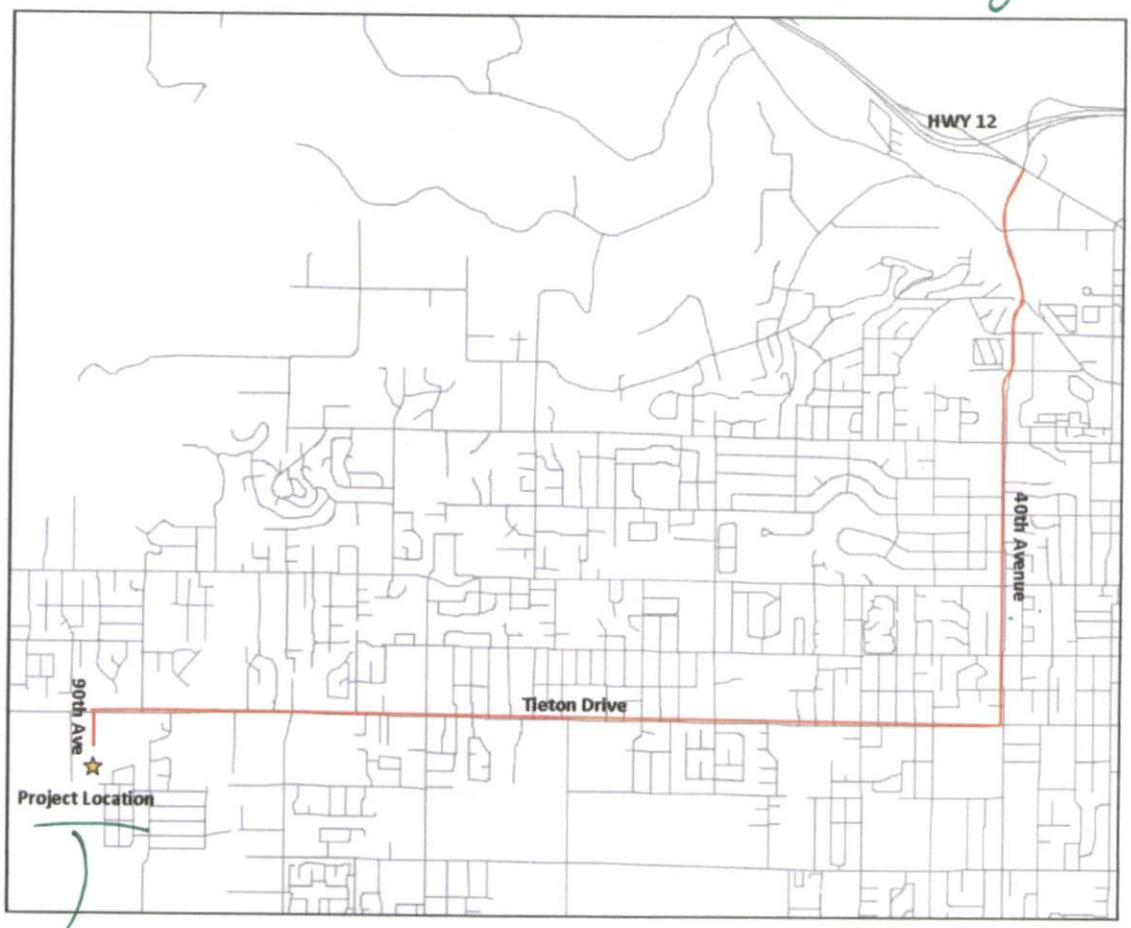
Matthew Seaman

8902 Tieton Dr., Yakima, WA 98908

90th Avenue Shaw Creek Habitat Improvement

Location Map

Habitat Improvement was not performed



Project location is 608 S. 90th Ave

Zoning ordinance 14-2004 prohibits use of S. 90th Ave for access since the road is just an ill-defined patch of dirt. No access until paved (per 2014-2004)

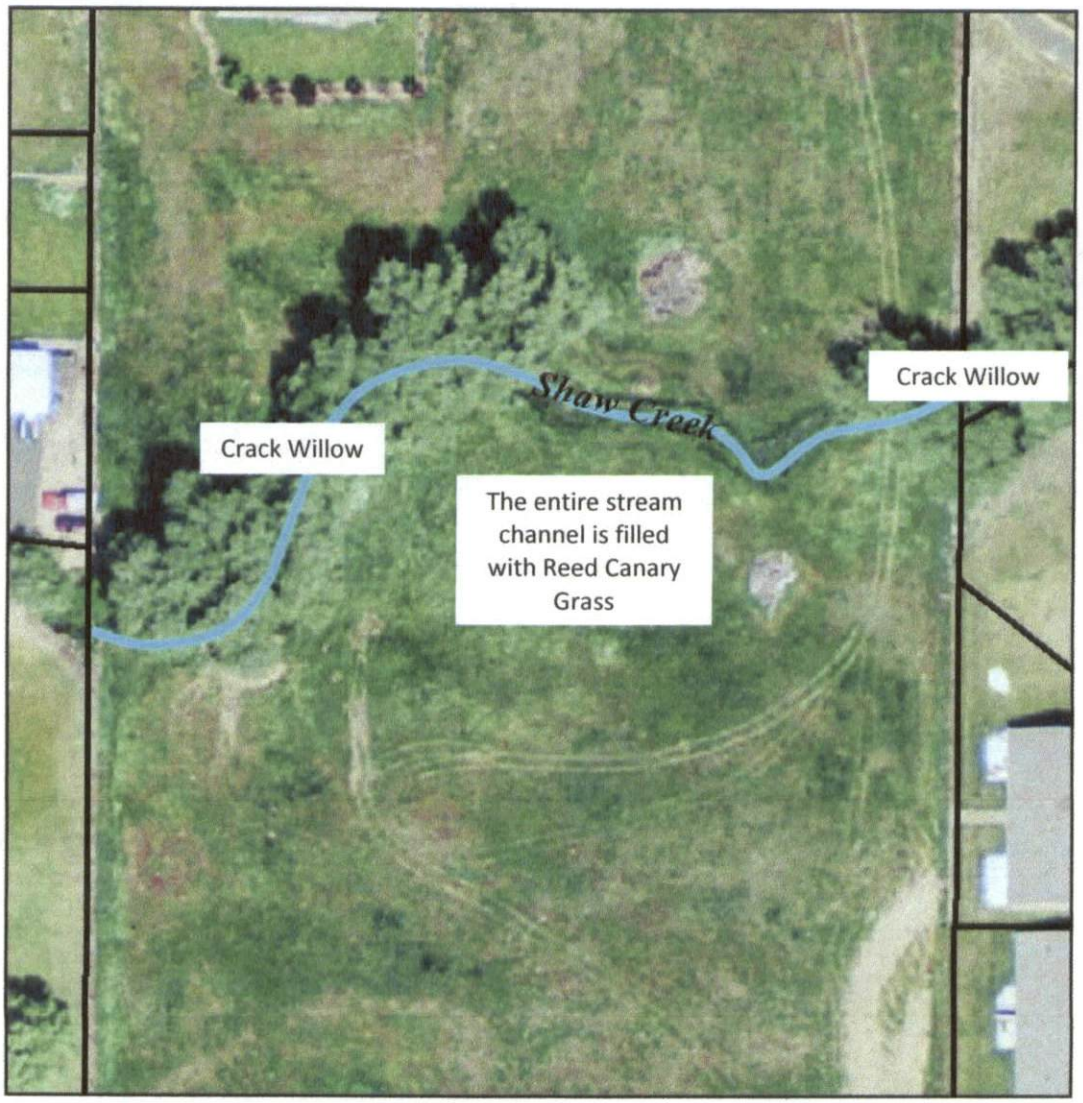
Bauter lives at 9004 Tieton DR

Attachment 1

90th Avenue Shaw Creek Habitat Improvement

Existing Vegetation

? Not done

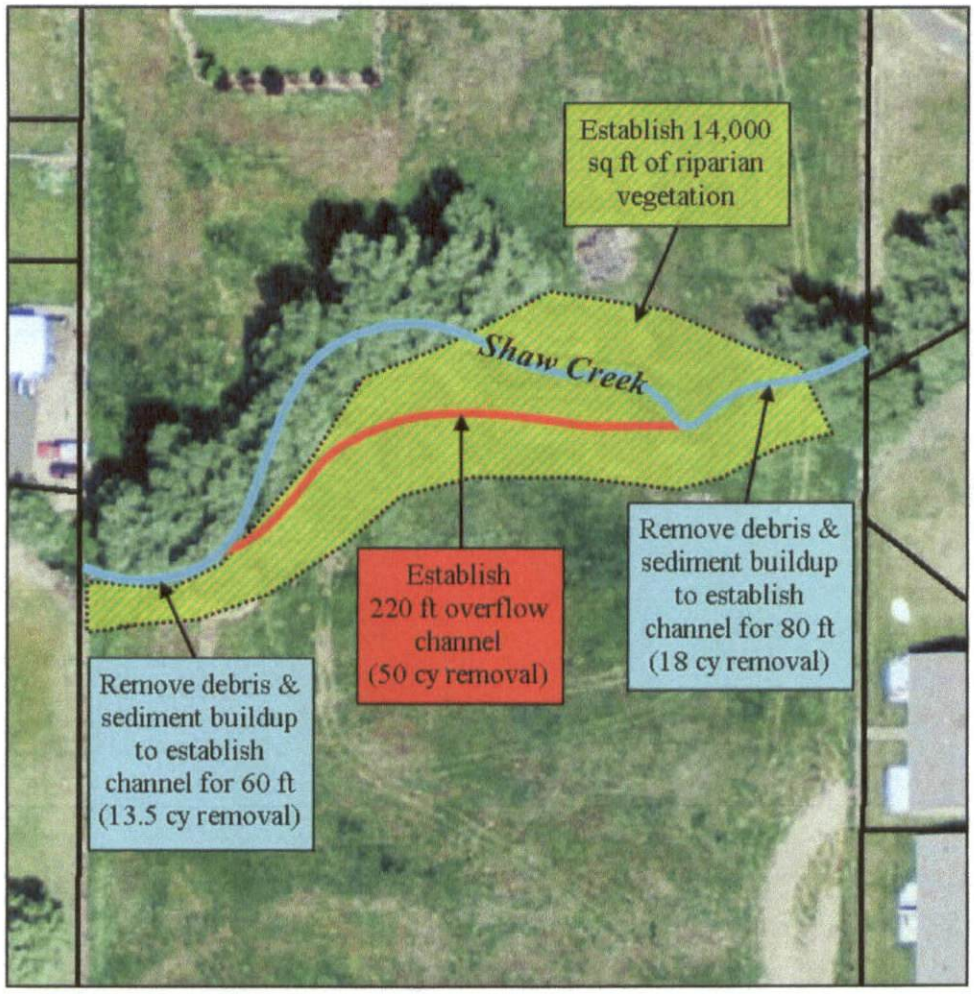


MR Baenter & MR Durant show here the correct, legal position of Shaw Creek

Attachment 3

90th Avenue Shaw Creek Habitat Improvement

Project Plan



When the 220 ft overflow channel was excavated, Bainter diverted all flows into the channel (see Red line). He then filled Shaw Creek (blue line) & critical areas. Nothing was planted in the 14000 sq ft of "riparian vegetation" (yellow)

Attachment 2

90th Avenue Shaw Creek Habitat Improvement

March 2011 flow path

False

Not done

A true flow path is in green.

The Red Flow path per Bacinter & Durant has water flowing uphill into homes located up and above the FEMA floodplain

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W ← → E

S

Not Done

Attachment 2

90th Avenue Shaw Creek Habitat Improvement

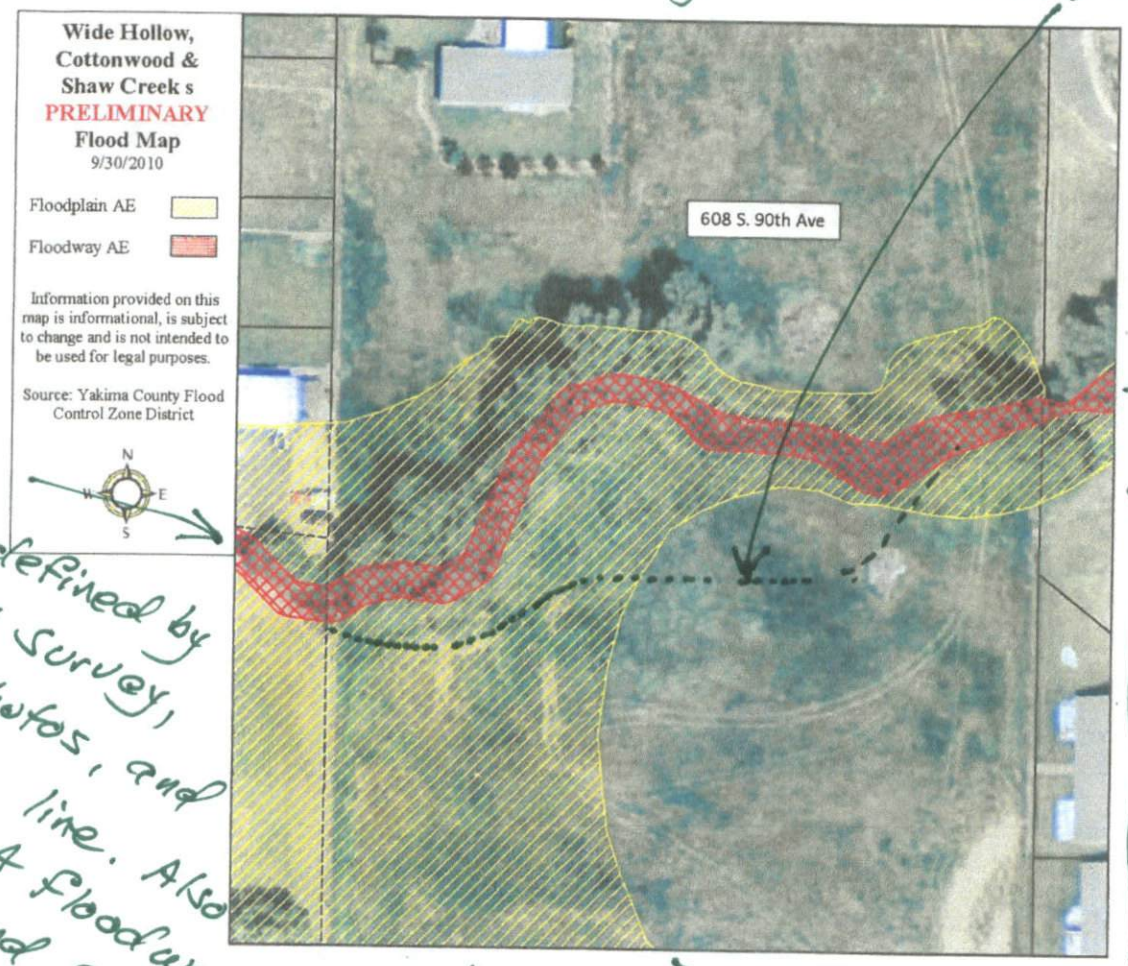
RECEIVED

JAN 2 6 2012

CITY OF YAKIMA
PLANNING DIV.

Preliminary FEMA Flood Map 9/30/10

Bainter Illegally diverted Shaw Creek here

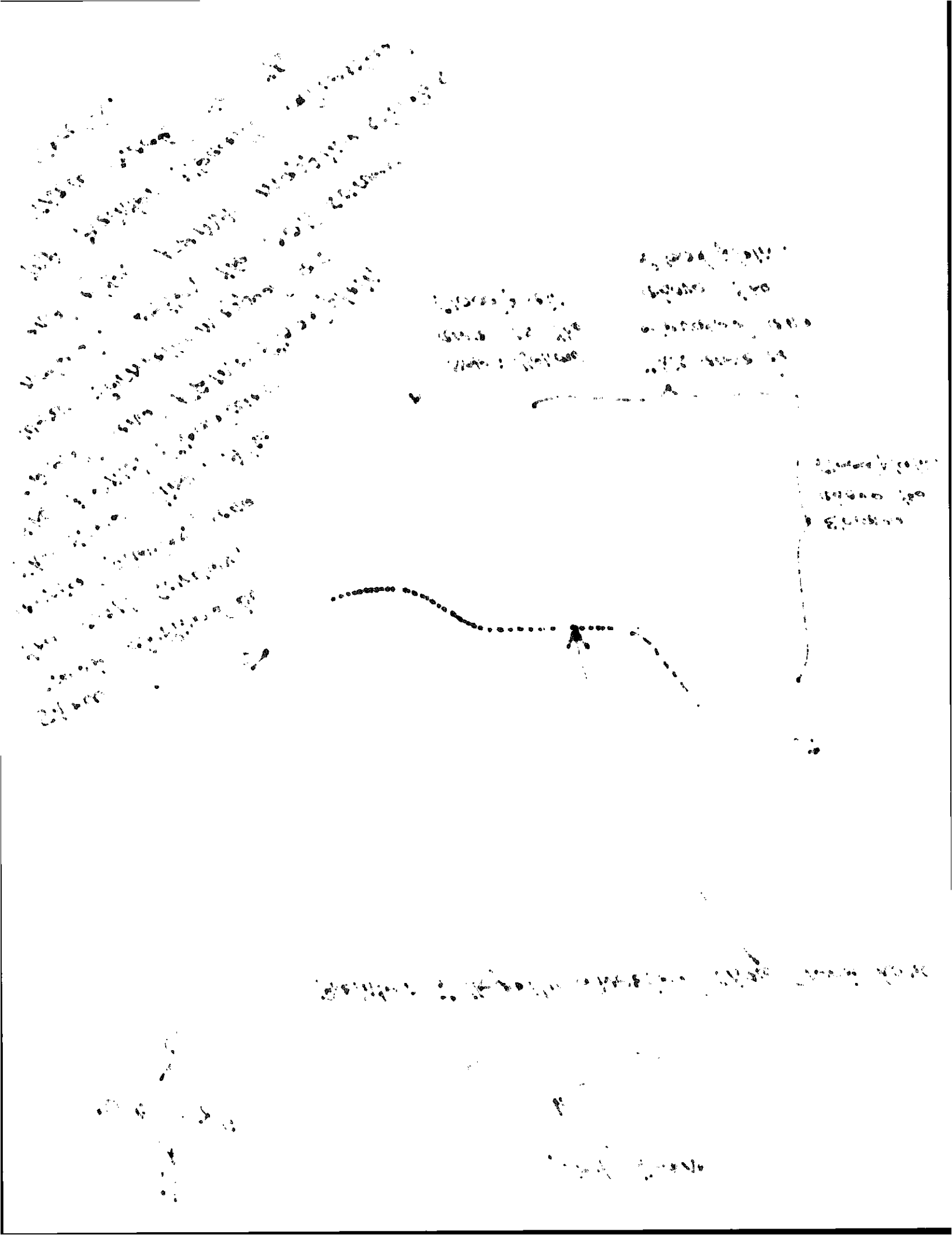


Shaw Creek defined by the 2011 survey, aerial photos, and the tree line. Also the FEMA floodway (Red) and FEMA floodplain were formally mapped as noted. After the 2011 survey and after FEMA mapping studies MR Bainter illegally diverted Shaw Creek to the South.

Elevated above the floodplain.

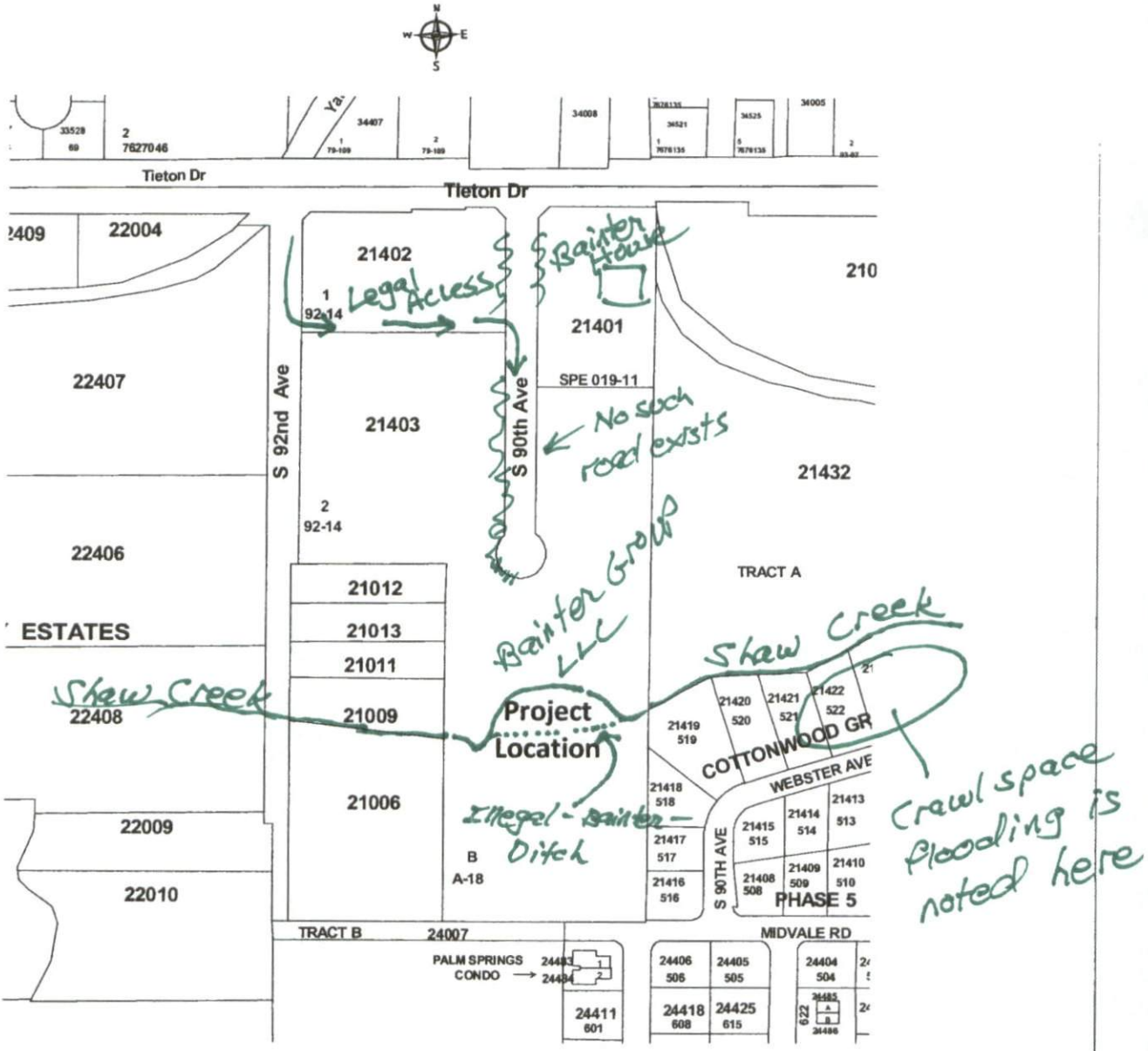
Note: Yellow area is the floodplain

This area is elevated and above the floodplain.



90th Avenue Shaw Creek Habitat Improvement

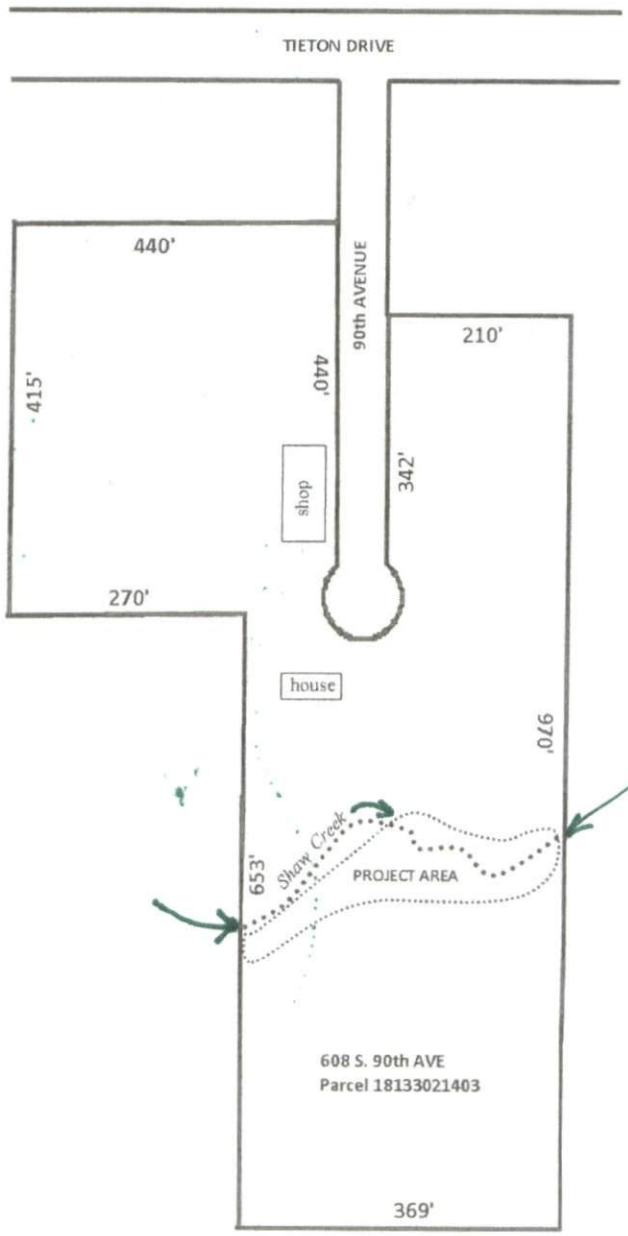
Adjoining Property Map



Attachment 3

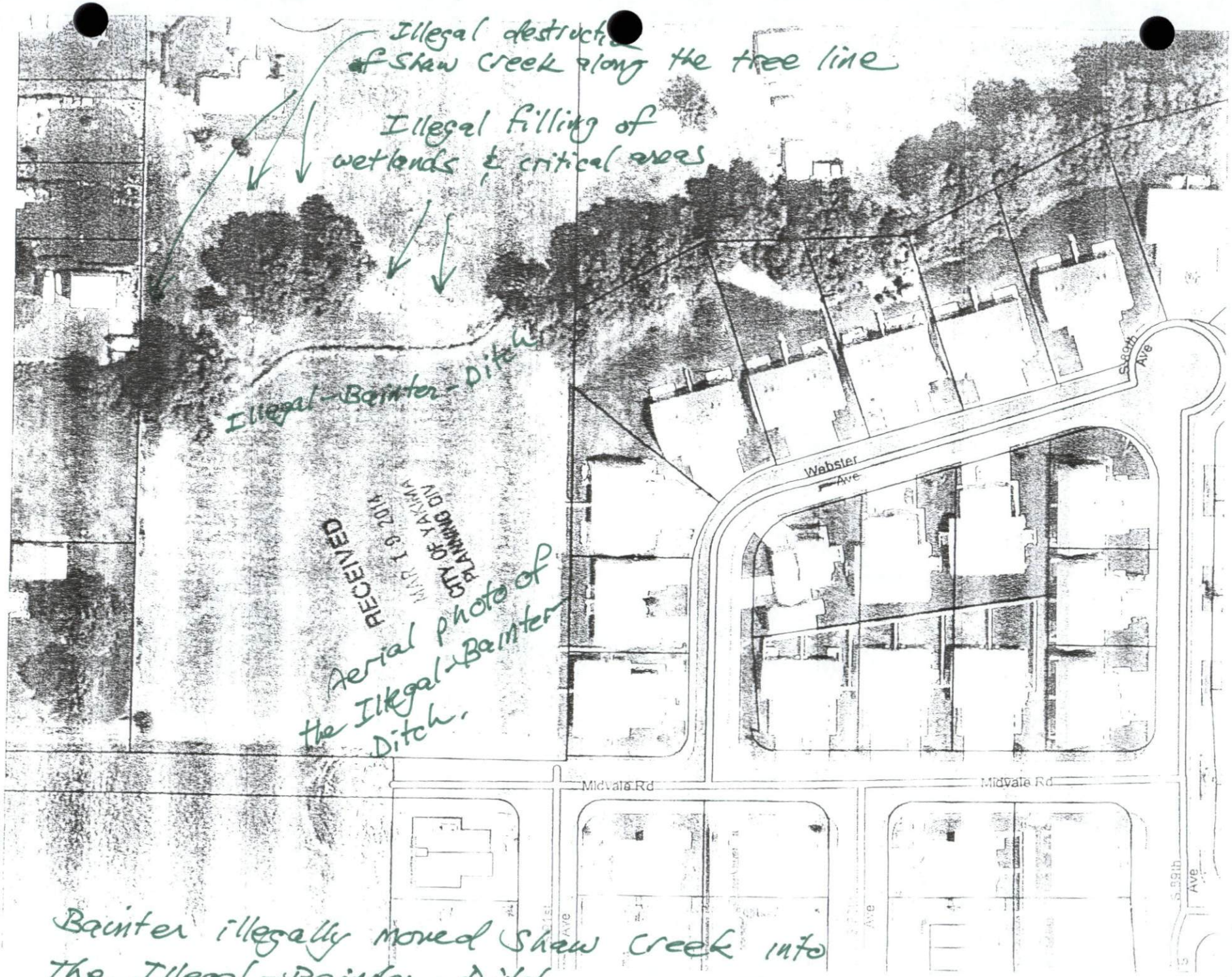
90th Avenue Shaw Creek Habitat Improvement

Site Plan



This is the location of Shaw Creek defined by the survey of 2011

While MR Bainter proposed to plant 14,000 sq Ft of native vegetation in the "Project Area", he planted nothing. Bainter used the Critical Area Permit (for planting vegetation) to illegally divert Shaw Creek into a ditch.



Bainter illegally moved Shaw Creek into The Illegal-Bainter-Ditch