

**BEFORE THE HEARING EXAMINER
CITY OF KIRKLAND**

In the Matter of the Appeal of

**SAM ELDER and
LAUREN ELDER, his daughter**

from a decision issued by the Director
of the Planning and Community
Development Department

File Nos.: SUB14-01032 &
SUB14-01033

**ORDER ON MOTION
FOR PARTIAL
DISMISSAL**

The Director of the Planning and Community Development Department ("Department") approved two contiguous two-lot short subdivisions, Avalon East and Avalon West. Prior to applying for the short subdivisions, the Applicant, Merit Homes, Inc., ("Applicant") removed two trees on each lot in violation of Chapter 95 of the Kirkland Zoning Code ("KZC"). The resulting code enforcement case, file number COM14-00460, remains open, following the payment of penalties, for remediation for loss of the trees, which will occur following installation of the short plat improvements.

Sam Elder and Lauren Elder ("Appellants") appealed the Department's decision on each of the short subdivisions, listing 24 appeal issues. The Department filed a motion to dismiss some of the issues, and the Appellants filed a response to the motion. The Hearing Examiner has reviewed the motion documents and the Department's decisions on the short subdivisions.

The Department seeks dismissal of appeal issues 2, 5, 7, 9, and 13 as beyond the scope of the applicable decision criteria for short subdivisions and therefore, outside the jurisdiction of the Examiner. In reviewing a decision on a short subdivision, the Examiner looks to the same decisional criteria that govern the Department's decision, Kirkland Municipal Code ("KMC") Section 22.20.140 and KZC 145.45.2. KMC 22.20.140 reads as follows:

In addition to the decisional criteria identified in KZC 145.45(2), the planning director may approve the short subdivision only if:

- (a) There are adequate provisions for open spaces, drainageways, rights-of-way, easements, water supplies, sanitary waste, power service, parks, playgrounds and schools; and
- (b) It will serve the public use and interest and is consistent with the public health, safety and welfare. The planning director shall be guided by the policy and standards and may exercise the powers and authority set forth in Chapter 58.17 RCW.

KMC 145.45.2 lists the criteria for a "Process I" decision:

Decisional Criteria – The Planning Director shall use the criteria listed in the provision of this code describing the requested decision in deciding upon the application. In addition, the Planning Director may approve the application only if:

- a. It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and
- b. It is consistent with the public health, safety and welfare.

And under KZC 145.70, the scope of the appeal is limited to "*the specific elements of the Planning Director's decision*" that are disputed in the letter of appeal. Emphasis added.

Appeal issue 2 notes the Applicant's tree violation and states that the Department should have required the Applicant to take necessary steps to remediate the violation before approving the short subdivision, and that the short subdivision should "reflect" the newly planted trees. As noted, the code enforcement action under Chapter 1.12 KMC against the Applicant, including the required remediation process, is ongoing. Although the Appellants would like the two actions to be linked, they have cited nothing in the Code that would prohibit the processing and approval of a short subdivision application on property that is the subject of an ongoing code enforcement case. Appeal issue 2 is beyond the scope of the applicable criteria for reviewing a short subdivision and, therefore, is not within the Examiner's jurisdiction. Appeal issue 7 duplicates appeal issue 2, and both issues are DISMISSED.

Appeal issue 5 states that the Department should have taken enforcement action concerning the Applicant's improper removal of trees on other properties, and that the short subdivisions should not have been approved in light of such code violations. Again, the short subdivision criteria do not include an applicant's tree removal practices on other property or the existence of a code enforcement action related to the property being divided. Appeal issue 5 is outside the scope of the Examiner's jurisdiction and is DISMISSED.

Appeal issue 9 states that the Applicant should not receive short subdivision approval "in a way that would allow them to cut down additional trees," and addresses retention of specific trees on the property. However, as explained in Section III of the Department's decisions on the short subdivisions, tree removal is not addressed at the time property is divided. *See also* Department Decisions on Avalon West and Avalon East Short Plats, Attachments 3 at p. 2 of 5 (*Phased Review Retention Guidelines*). Further, tree removal/retention is not within the scope of the criteria for reviewing a short subdivision and is therefore beyond the Examiner's jurisdiction. Appeal issue 9 is DISMISSED.

Appeal issue 13 again states that in light of the Applicant's tree cutting violation and history, the Department should have addressed tree protection and retention in the

decision on the short subdivision. This claim has already been addressed above. Appeal issue 13 is DISMISSED.

Appeal issue 4 questions the sufficiency of the arborist report issued on March 3, 2014. The Department's motion seeks dismissal of this issue because the Department "deemed the first report to be insufficient and required [the Applicant] to submit a new report, which was submitted on November 20, 2014." The Department asks that appeal issue 4 be limited to the sufficiency of the November 20, 2014 arborist report. Motion to Dismiss Portions of Appeal at 2. The electronic copies of the Department's two short subdivision decisions that the Examiner reviewed included only the arborist report dated March 3, 2014. Therefore, the motion to dismiss appeal issue 4 is DENIED.

Appeal issue 14 states that the Department "provided inadequate tree retention standards and tree planting standards, especially in light to Merit Homes' unremediated code violations for improperly removing trees." The Department asks that the issue be limited to the adequacy of tree planting and retention standards. Because the final phrase in appeal issue 14, "especially in light to Merit Homes' unremediated code violations for improperly removing trees," concerns a matter outside the scope of the applicable short subdivision criteria, it is not within the Examiner's jurisdiction and is therefore STRICKEN. The remainder of appeal issue 14 will go forward to hearing.

The Department asks that the first sentence of appeal issue 21 be dismissed because it duplicates appeal issue 14. The sentence states that the "subplat contains inadequate tree protection measures and techniques." It is sufficiently vague that it could conceivably concern "measures and techniques" in addition to the "tree retention standards and tree planting standards" addressed in appeal issue 14. Therefore, the motion is DENIED as to the first sentence of appeal issue 21.

The Department also asks that the second sentence of appeal issue 21 be dismissed because it duplicates appeal issues 1 and 11. That sentence reads, "The grove and high and moderate retention value trees should have been retained and adequate provisions for maintenance to ensure survival should have been included in the subplat conditions." Appeal issues 1 and 11 address very similar topics with slightly different wording but, again, it is conceivable that there are some differences in the topics raised. The motion is DENIED as to the second sentence of appeal issue 21.

The Department seeks dismissal of appeal issue 6, which states that the Department has improperly collected two appeal fees in light of the fact the Examiner consolidated the Appellants' two appeals for hearing for purposes of efficiency. The Appellants have cited no authority that would allow the Examiner to review the issue of appeal fees, which is not an element of the Planning Director's decision on the short subdivisions, and the Examiner has found none. Appeal issue 6 is DISMISSED.

The Department seeks dismissal of appeal issue 8, which states that the notice of decision provided to the Appellants was inadequate because the original notice was provided by mail, but a corrected notice of decision was sent by email and the appeal period was not

extended. The Department also seeks to dismiss appeal issue 24, which states that the "notice provided to me as person who submitted public comments was legally inadequate." The Department points out that nothing in KMC 145.45.5 requires mailed notice, and that the Appellants do not claim that they did not receive the emailed notice.

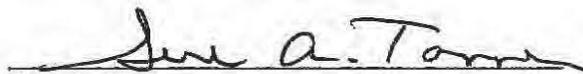
More fundamentally, neither the Department nor the Appellants have cited anything in Chapter 145 KMC, or elsewhere in the Code, that would authorize the Examiner to review the issue of the Department's compliance with notice requirements, which are not an element of the Planning Director's decision on the short subdivisions. See KMC 145.70. The Hearing Examiner is an administrative tribunal created by the City Council and has only the authority granted by the Kirkland Municipal Code. The Examiner lacks inherent or common law powers. See *Human Rights Comm'n. v. Cheney School Dist.*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982) (citations omitted); *Chaussee v. Snohomish Cy. Council*, 38 Wn.App. 630, 636, 689 P.2d 1084 (1984); *State v. Pierce*, 11 Wn.App. 577, 581, 523 P.2d 1201 (1974). The Examiner has found no authority under the Code to review the Department's compliance with notice requirements. Accordingly, appeal issues 8 and 24 are DISMISSED. Appeal issue 3, which also concerns compliance with notice requirements, is also DISMISSED.

The Department seeks dismissal of appeal issue 22, which states that the "sub plat should have required bonds sufficient to ensure adequate compliance, especially in light of the existing code violation which has not been remedied." From the second clause in the appeal issue, one can infer that the Appellants' concern with "bonds sufficient to ensure compliance" means compliance with tree regulations. The Department asserts that there is no Code provision that authorizes the Department to require a bond for tree protection or retention. In their response, the Appellants cited no legal authority to refute this statement. Appeal issue 22 is therefore DISMISSED.

The Department seeks dismissal of appeal issue 23, which reads as follows: "I wrote several comments to the City of Kirkland *complaining about the subplat being sought and code violations that occurred*. I incorporate those complaints and comments by reference." Emphasis added. The Appellants' comments on the short subdivision applications and code violations are attached to the Department's decisions as public comments, and the decisions respond to the comments. However, the comments pre-date the Department's decisions and thus, by definition, are not a "statement of the specific elements of the Planning Director's decision" on the short subdivisions. Consequently, they do not meet the requirements of KZC 145.60 or KZC 145.70. Appeal issue 23 is therefore DISMISSED.

The following appeal issues remain for hearing: 1, 4, 10 through 12, first phrase in 14, and 15 through 21.

Entered this 24th day of April, 2015.



Sue A. Tanner
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**BEFORE THE HEARING EXAMINER
CITY OF KIRKLAND**

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I sent true and correct copies of the attached Order on Motion for Partial Dismissal to each person listed below, or on the attached mailing list, in the matter of Sam Elder and Lauren Elder, Hearing Examiner files: SUB14-01032 & SUB14-01033 in the manner indicated.

Party	Method of Service
Sam Elder Law Office of Sam Elder PLLC 12716 NE 106 th Lane Kirkland, WA 98033 sam@samelderlaw.com	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Susan Lauinger Dept. of Planning and Community Development 123 Fifth Avenue Kirkland, WA 98033 slauinger@kirklandwa.gov Jeremy McMahan jmc_mahan@kirklandwa.gov Caryn Saban csaban@kirklandwa.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger
Oskar Rey Assistant City Attorney 123 Fifth Avenue Kirkland, WA 98033 orey@kirklandwa.gov	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger

<p>Greg Griffis Merit Homes 805 Kirkland Avenue, Suite 100 Kirkland, WA 98033 greg@merithomesinc.com</p>	<p><input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Inter-office Mail <input checked="" type="checkbox"/> E-mail <input type="checkbox"/> Fax <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger</p>
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Dated: April 24, 2015



Tiffany Ku
Legal Assistant

RE

JAN 29 2015

LETTER OF APPEAL PURSUANT TO KZC 154.60

PERSONS APPEALING: Sam Elder, Lauren Elder (age 5)

MATTER BEING APPEALED: Avalon East – Case No. SUB14-01032 and Avalon West – Case No. SUB14-01033. I am appealing Eric Shields January 9, 2015 decision regarding the subplat. Mr. Shield's decision was "Approval with Conditions."

SPECIFIC ELEMENTS AND SCOPE OF APPEAL:

I should note at the outset that I have conducted no discovery. I have not entered onto the premises to investigate, measure trees, etc. I have not talked with or deposed Josh Lysen, Greg Grffis, or the current or prior property owners. I have not had the opportunity to send an independent arborist onto the property in question. I think it is unreasonable to expect me to make full meaningful comments on the basis of this appeal until after I have had an opportunity to inform myself further.

I have had an opportunity to submit comments, look over the fence at the property, speak with City staff, and review documents sent to me by the City. Elements of this appeal letter are constrained by my limited access to information.

I should also note that the City of Kirkland tied together two different subplat approvals: SUB14-01032 and SUB14-01033. SUB14-01032 specifically references the Avalon West subplat #SUB14-01033 and vice versa. I submitted comments on both applications. I think it is unreasonable for the City to expect me to pay two appeal fees for what the City has combined into one by its choice to cross-reference these two approvals. I am paying two appeal fees so I do not lose any rights, but I do so under protest and I believe one appeal fee should be refunded to me. Once the City decided to combine the sub plat approvals and cross-reference both approvals, I believe that I should only have to pay one appeal fee. Making me pay two appeal fees is overcharging. I could not take the risk of appealing just one and having this issue decided against me, so I am paying two fees under protest.

I am specifically appealing:

1. The City should have required a grove easement to protect trees located on the south property line near my property (12716 NE 106th Lane, Kirkland, Washington). The City should have required that certain viable trees be retained as a condition of the subplat approval. I believe these trees are identified as numbers 10-13 on the City of Kirkland report (attachment 3) and Merit Homes' arborist reports. These trees should not be removed and the City should have required this as part of the subplat.
2. Merit Homes is in violation of Kirkland City Code for improperly removing trees from this lot. Merit Homes has not remedied the code violation. Merit Homes should have replanted trees to comply with the City Code and should have been required to create a plan for retention and survival of the newly planted trees – obligations that would run with the property. Instead, Merit Homes has done nothing to remedy the code violation. The City should not approve the subplat until the violation is remedied. Any subplat approval should reflect the newly planted trees and should ensure that the newly planted trees remain viable for 5 years.
3. Merit Homes posted whiteboard as required by the City of Kirkland. These whiteboards did not accurately reflect the condition of the property and the trees that existed on the property. Further,

Merit Homes altered the condition of the properties by illegally cutting down some trees. Merit Homes was found to be in code violation. The fact that Merit Homes gave improper information on the white boards and provided inadequate public notice and potentially deprived the city of meaningful comments means that the shortplat should be denied. Merit Homes should re-do the white board and get new public comments based on accurate depiction of the property.

4. Merit Homes hired an arborist to submit an arborist report. The arborist report was issued on March 3, 2014. Merit Homes instructed Tree Solutions, Inc. to ignore and not include in its report numerous, healthy viable trees that were standing on March 3, 2014. On June 7 2014, Merit Homes had a tree cutter remove numerous healthy trees from these two lots. Merit Homes was found in code violation for these illegal cuttings. The arborist report was prepared improperly and ignored trees that should have been counted. These trees should have been included in assessing tree density and tree credits. Merit Homes and Tree Solutions, Inc. actively worked to deceive the City into believing that there were less trees on the property than their actually were. The subplat should be denied because a subplat requires accurate arborist reports and the arborist report that was submitted to support the subplat were inadequate.

5. Merit Homes cut down trees in violation of KZC Chapter 95. Although Merit Homes was found in code violation on this lot, they actually cut down additional trees for which no code violation has been levied at this time. I believe that the City of Kirkland erred in not finding additional code violations. The City of Kirkland also erred in not requiring additional penalties because Merit Homes has repeated violated the City code by cutting down trees improperly on other projects. Merit Homes also improperly removed trees on (1) 10040 Slater Ave. NE, (2) 11616 NE 112th Street, (3) 12426 NE 75th Street, (4) 12618 NE 105th Place, (5) 8027 128th Ave. NE, (6) 8035 124th Ave. NE, (7) 8041 NE 124th Ave. NE, (8) 10633 128th Ave NE, and (9) 10633 128th Ave NE. There are probably more instances, but those are the ones that I have found so far. Merit Homes improperly removes trees under the City code provision for "tree removal not associated with development" when they are in fact developing the properties. They should have been using the City code provision for "tree retention associated with development." This subplat should not be approved when Merit Homes has never remediated for its code violations and has additional code violations that may still be levied.

6. The City has improperly combined the subplat approvals of SUB 14-01032 and 14-01033. The City has improperly attempted to charge double appeal fees for the two lots.

7. The City has at various times tried to claim that (1) the code enforcement and subplat approvals are completely separate and unrelated and (2) the code enforcement will not occur until after the subplat is approved and construction is completed. The code violation occurred before any subplat approval was granted and before any building permits were even applied for. The City should require Merit Homes to remediate for its code violation immediately. It should not grant the subplat approval or grant additional permits as long as Merit Homes is out of compliance. If the subplat is approved, Merit Homes has up to six years to record it. Thus, it appears that the City is willing to give Merit Homes approvals of permits and wait up to six year or perhaps longer to remediate their code violations.

8. The notice provided to me as a person who can appeal the decision was inadequate. An initial notice was provided by mail. Subsequent to this, the City amended the Approval with Conditions; however, the City neither mailed a copy of the amendments nor extended the period of time for the appeal after this amendment took place. A "corrected" decision was emailed only on January 22, 2015.

Under applicable law, an email is insufficient notice. The notice should have been mailed and the appeal period should have been expanded.

9. Merit Homes should not be granted approval of the shortplat in a way that would allow them to cut down additional trees. Merit Homes should not be granted building permits that would allow them to cut down significant trees with high or moderate retention value. If the short plat is approved, it should contain conditions that require retention of trees – particularly trees 10-13. Merit Homes is already in violation of City code. It should not be given approval to further remove trees before it remediates its existing violation.

10. Merit Homes is not the homeowner and was not the legal owner of the property at the time that it submitted its subplat application. Merit Homes was not the owner at the time that it directed that certain trees be cut down in violation of City Code. Merit Homes lacked appropriate standing to take such actions at the time that actions were taken and lacked appropriate approvals and authorizations for such actions. The subplat should be denied on this basis.

11. Moving the road access to the north is an improvement over what had been initially proposed; however, additional considerations should have been made to make sure that moving the road to the north maximized the retained trees. In particular, the City should have required that trees with high and moderate retention value be preserved as part of the approval. Further, the specifics of the road (width, impervious nature, location relative to root systems, etc.) should have been addressed differently by the City.

12. The City should have required a tree retention plan that would have kept the lots from falling below desired tree densities. Trees that were illegally removed by Merit Homes should have been counted in calculation the loss of tree density. They were not. The subplat should be denied as a result.

13. The City uses phased review, however in light of the tree cutting violation and history of improper tree cutting, the City should have required the tree retention to occur at this stage of approval. The City should have required protection and retention of trees with high or moderate retention value. This is the only opportunity for the public to comment on such issues, and in light of Merit Homes repeated violations, the subplat decision should have denied or conditioned upon proper tree retention.

14. The City provided inadequate tree retention standards and tree planting standards, especially in light to Merit Homes' unremediated code violation for improperly removing trees.

15. The subplat contains inadequate provisions for parking and parking pads.

16. The subplat contains inadequate provisions for water and sanitation systems.

17. The subplat contains inadequate provisions for fences.

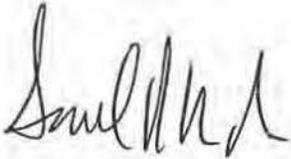
18. The subplat contains inadequate provisions for street trees.

19. The subplat contains inadequate provisions for protection of neighbors in terms of work hours allowed.

20. The subplat contains inadequate provisions for setbacks and set back yards, which should have been coordinated with tree retention.

21. The subplat contains inadequate tree protection measures and techniques. The grove and high and moderate retention value trees should have been retained and adequate provisions for maintenance to ensure survival should have been included in the subplat conditions.
22. The sub plat should have required bonds sufficient to ensure adequate compliance, especially in light of the existing code violation which has not been remedied.
23. I wrote several comments to the City of Kirkland complaining about the subplat being sought and code violations that occurred. I incorporate those complaints and comments by reference.
24. The notice provided to me as a person who submitted public comments was legally inadequate.

Signed:



Samuel J. Elder, Jr.

12716 NE 106th Lane

Kirkland, WA 98033

425-999-8170

City Council Meeting

October 21, 2014

ISSUE 1: KCC 95.23 and KCC 95.30

I want to discuss Kirkland City Code Chapter 95 – Tree Management and Required Landscaping. This chapter has two provisions for tree removal: (1) KCC 95.23 is Tree Removal – Not Associated with Development Activity and (2) KCC 95.30 is Tree Retention Associated with Development Activity.

KCC 95.23(5)(a) allows removal of 2 significant trees within a 12 month period provided that there is no active application for development activity on the site and as long as there as at least 2 other significant trees that remain.

KCC 95.30 uses a minimum tree density approach towards making sure that as many viable trees as possible are retained with development. It requires a tree retention plan prepared by an arborist and has a lot of technical requirements.

So KCC 95.23 (non-development) allows homeowners to remove significant trees as long as there are other viable trees; whereas KCC 95.30 has considers tree removal in light of development activities.

The problem is the developers are using KCC 95.23 (tree removal not associated with development) to remove the most significant healthy, and then they ignore these trees when submitting development applications under KCC 95.30.

I can illustrate the abuse with this example of Merit Homes.

On February 24, 2014, Merit Homes submitted a City of Kirkland Tree Removal Notification for two lots (Case # TRE14-001201 and Case # TRE14-01202). This form is only for tree removal not associated with development, and they are signing under penalty of perjury that the information is true and correct.

On February 27, 2014, Merit Homes submitted applications for building permits for demolition of the house located on the same lot that they just submitted an application for tree removal not associated with development (Case # DEM14-01073).

On March 7, 2014, the City of Kirkland erroneously approved the tree removal not associated with development. This should have been denied because there were "active application for development activity" which violated KCC 95.23(5)(a)(1). I don't blame the City – the developer should not have represented under penalty of perjury that they were removing trees unassociated with development when they clearly were.

On June 6, 2014, Merit Homes applied to Short Plat both lots in question. Merit Homes submitted a consulting arborist report that is dated March 3, 2014 and revised on May 27, 2014. It purports to list all of the trees on the two lots and contain information regarding their species, size, and viability as part of a tree retention plan. This report does not even mention the four trees that Merit Homes submitted the City of Kirkland Tree Removal Notification back in February. It does not count them when calculating minimum tree density of identify them in any way.

Amazingly, the four trees that Merit Homes attempted to remove "not associated with development activity" were not actually cut down until June 7, 2014. So Merit Homes submitted an application to

short plat the property and included an arborist report to support that sub-plat that totally ignored standing trees that had not yet been cut down.

This summarizes the problem: developers are removing trees under KCC 95.23 (not associated with development) and then ignoring the trees that were removed under KCC 95.23 when attempting to comply with KCC 95.30.

In meeting with representatives of the planning department, I was informed that this happens routinely. We caught Merit Homes this time, and they have been found in code violation. They have been fined, and we are asking that the sub plat be denied.

The solution is simple. First, the City should deny applications to remove trees under KCC 95.23 when the developer is in fact developing the property. Second, when a developer attempts to remove trees under KCC 95.30, it must identify not only all the trees standing, but should be required to show any trees that have been recently removed under KCC 95.23.

I have submitted public records requests to try to determine whether Merit Homes is engaged in a pattern of deception against the City. When I met with the planning department representative, I was informed that developers do this all the time. I ask that the City place a temporary moratorium on the approval of tree removal under KCC 95.23 and KCC 95.30 while the City investigates the scope of this abuse. I also ask that the City Code be modified to make it clear that (1) developers should not be removing trees under KCC 95.23 and (2) in submitting tree retention plans under KCC 95.30 any trees recently removed (probably within the last couple of years) be identified in arborist reports.

ISSUE 2: Enforceability of KCC 95.05

KCC 95.05 contains the policies and purpose behind KCC Chapter 95 on Tree Management and Required Landscaping. In meeting with City staff regarding this tree issue, I was informed that KCC 95.05 is not enforced by the City. Specifically I was told, "The City cannot enforce intent." I asked for clarification, "Are you saying that KCC 95.05 has a bunch of flowery language that is unenforceable, whereas the remaining provisions of KCC Chapter 95 have technical requirements that are enforceable?" I was told yes, and that is how the City staff is instructed.

KCC 95.05 is just as enforceable as any other part of KCC Chapter 95. When a statute contains policies and purposes those provisions should be used to interpret the entire Chapter, resolve any ambiguities, and fill in any gaps. Attempts to circumvent to pursues of the Chapter, such as the behavior outlined above, should be disallowed by the City. City staff should be instructed that in approving or denying permit requests KCC 95.05 is just as applicable and enforceable as any other part of the Chapter.

Thank you for your consideration.

Sam Elder
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 Kirkland, WA 98033
 425-999-8170
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Sam Elder <sam@samelderlaw.com>

Permit # SUB14-01032 and # SUB14-01033

23 messages

Sam Elder <sam@samelderlaw.com>
To: slauinger@kirklandwa.gov

Mon, Aug 11, 2014 at 3:23 PM

I am writing regarding requests for Process I Permit, permits number SUB14-01032 and SUB14-01033. I oppose this project and request that permits not be issued by the City of Kirkland.

My primary concern is that a number of Significant Trees as defined in Kirkland City Code 95.10 (hereinafter "KCC") will be removed if this permit is issued which would violate various portions of KCC Chapter 95. The proposed permits contemplate a 15' wide access from 128th Ave NE, which would run right through at least 4 Significant Trees. This will both have a significant effect on the neighborhood as a whole and on my specific property which adjoins the lots for which the permits are sought. The trees in question are located right next to the property line and extend about 20-25 feet onto my property, 12716 NE 106th Lane, Kirkland, WA 98033. The Critical Root Zone as defined in KCC 95.10, is approximately 40% on my parcel. All of the trees in question qualify as Specimen Trees as defined by KCC 95.10.

The City of Kirkland has recognized the policy of protecting old growth trees and incorporated those policies legislatively into the Kirkland City Code. KCC 95.05 recognizes that:

1. Trees and other vegetation are important elements of the physical environment. They are integral to Kirkland's community character and protect public health, safety and general welfare. Protecting, enhancing, and maintaining healthy trees and vegetation are key community values. Comprehensive Plan Policy NE-3.1 describes working towards achieving a City-wide tree canopy coverage of 40 percent. The many benefits of healthy trees and vegetation contribute to Kirkland's quality of life by:
 - a. Minimizing the adverse impacts of land disturbing activities and impervious surfaces such as runoff, soil erosion, land instability, sedimentation and pollution of waterways, thus reducing the public and private costs for storm water control/treatment and utility maintenance;
 - b. Improving the air quality by absorbing air pollutants, mitigating the urban heat island effect, assimilating carbon dioxide and generating oxygen, and decreasing the impacts of climate change;
 - c. Reducing the effects of excessive noise pollution;
 - d. Providing cost-effective protection from severe weather conditions with cooling effects in the summer months and insulating effects in winter;
 - e. Providing visual relief and screening buffers;

- f. Providing recreational benefits;
 - g. Providing habitat, cover, food supply and corridors for a diversity of fish and wildlife; and
 - h. Providing economic benefit by enhancing local property values and contributing to the region's natural beauty, aesthetic character, and livability of the community.
2. Tree and vegetation removal in urban areas has resulted in the loss to the public of these beneficial functions. The purpose of this chapter is to establish a process and standards to provide for the protection, preservation, replacement, proper maintenance, and use of significant trees, associated vegetation, and woodlands located in the City of Kirkland. The intent of this chapter is to:
- a. Maintain and enhance canopy coverage provided by trees for their functions as identified in KZC 95.05(1);
 - b. Preserve and enhance the City of Kirkland's environmental, economic, and community character with mature landscapes;
 - c. Promote site planning, building, and development practices that work to avoid removal or destruction of trees and vegetation, that avoid unnecessary disturbance to the City's natural vegetation, and that provide landscaping to buffer the effects of built and paved areas;
 - d. Mitigate the consequences of required tree removal in land development through on- and off-site tree replacement with the goals of halting net loss and enhancing Kirkland's tree canopy to achieve an overall healthy tree canopy cover of 40 percent City-wide over time;
 - e. Encourage tree retention efforts by providing flexibility with respect to certain other development requirements;
 - f. Implement the goals and objectives of the City's Comprehensive Plan;
 - g. Implement the goals and objectives of the State Environmental Policy Act (SEPA); and
 - h. Manage trees and other vegetation in a manner consistent with the City's Natural Resource Management Plan.
 - i. Preserve and protect street trees, trees in public parks and trees on other City property.

The City Counsel has adopted these rules with a clear intent and goal of maintaining existing trees. The following sections that set forth rules for tree removal should all be interpreted with these underlying policies in mind. KCC 95.25 specifies that the policies set forth in KCC 95.05 apply to Sustainable Site Development and constitute minimum standards for development.

KCC 95.30 sets forth specific rules for development of properties. It should be noted that Merit Homes specifically coordinated tree removal with the prior property owner as pre-condition of Merit Home's purchase of the subject property. On or about June 7, 2014, the prior owner cut down four Significant Trees as defined by KCC 95.10. These trees ranged upward of 24 inches DBH. This was done without any warning or notice. I specifically confronted the prior owner about the tree removal, and he told me that Merit Homes made the decision not him. He informed me that I should

contact Merit Homes if I had any issues that that it was a requirement that the tree removal occur as part of the purchase of the property. Washington law recognizes privity of contract. When a developer coordinates development activities with a land owner as a condition of the purchase and sale agreement, these activities are imputed to the developer who is in privity with that owner. Any attempt to circumvent development rules – including tree removal – is ineffective under these circumstances. When assessing the reasonableness of the development plan and the reasonableness of issuing permits, the actions imputed to Merit Homes as part of its pre-purchase development activity must be considered.

Merit Homes has thus already removed four significant trees. This tree removal did not comply with KCC 95.23 and no notice was provided to the City or neighbors. These trees extended about 20-25 feet onto my property and had approximately 40% of the Critical Root Zone on my property. The removal of these trees without permits or notice and in violation of Kirkland City Code both (1) endangers my property because the significant root systems located on my property is going to decay without any mitigation and (2) creates a track record of Merit Homes disregarding appropriate procedures before engaging in Tree Removal of Significant Trees as defined in KCC 95.10.

KCC 95.30 reiterates the City's policy in favor of "to retain as many viable trees as possible on a developing site." Locating the access road right through these Significant Trees violates KCC 95.30. The clear solution is to allow development of the property and allow an access road, but require Merit Homes to locate the access road on the north side of the Significant Trees.

KCC 95.30 requires approval of a tree retention plan because there would be disturbance of Significant Trees. No exemption pursuant to KCC 95.20 applies. KCC 95.30 specifically authorizes amendment of development plans to retain as many viable trees as possible. This is exactly what should happen – the development plans should be amended to put the access road on the north side of the trees. If the trees are removed, then minimum tree density standards will not be maintained. These standards must be met for both permit SUB 14-01032 and SUB 14-01033 because both developments contemplate single-family residences. As stated in KCC 95.30:

The importance of effective protection of retained trees during construction is emphasized with specific protection standards in the last part of this section. These standards must be adhered to and included on demolition, grading and building plans as necessary.

This policy would be violated with the proposed location of the access road off 128th Ave. NE.

Merit Homes has not submitted a tree retention plan that complies with KCC 95.30. The proposed development calls for more than one tree retention plan component, thus KCC 95.30 requires that the more stringent tree retention plan requirements apply.

KCC 95.30(3) requires that the Tree Retention Plan be submitted and approved as part of the Process I Permit for the property. Failure to comply with all of the Tree Retention Plan requirements justify denial of the Process I Permit. Each tree must be given a retention value of low, medium, or high. The trees must be tagged, which they are not. Because Merit Homes is in privity with the prior owner and coordinated development pre-purchase, the trees removed in June 2014 must be included as part of the Tree Retention Plan. The DBH for each tree must be noted and considered. The trees must be inventoried and identified in terms of their health. Merit Homes has failed to comply with these standards.

The proposed development by Merit Homes would cause these lots to fall below the 30 tree credit per acre threshold required by KCC 95.33. Merit Homes has failed to submit a Tree Retention Plan that addresses the tree credit issue.

Any permits issued to Merit Homes should ensure compliance with KCC 95.34 regarding protection of existing trees during development. Merit Homes has already showed disregard for the Critical Root Zone of the trees that it had removed already. Much of that Critical Root Zone exists on my property and Merit Homes has taken no steps to mitigate the decay effects within the Critical Root Zone.

Another concern is that the impervious road surface proposed by Merit Homes would run directly adjacent to my property and cause run off of the water to flow onto my property. KCC 95.45 sets forth requirement for landscape buffering areas adjacent to driving surfaces. However, Merit Homes has failed to accommodate the requirements of KCC 95.45 and address water run off from impervious driving areas onto my property. The obvious solution is to move the access road onto the north side of the Significant Trees and use the area of the trees as the buffer contemplated by KCC 95.45.

I should also note that I have seen pileated woodpeckers in the trees that Merit Homes proposes to remove. Pileated woodpeckers are designated as a species of concern by the Washington State Department of Fish and Wildlife. I am concerned the removal of these trees which are some of the best habitats for pileated woodpeckers around with further endanger the species. I have only seen pileated woodpeckers in the trees that are directly adjacent and over my property.

For all of the reasons outlined above, I ask that the permit be denied. Permits should not be issued until Merit Homes complies with all aspects of KCC Section 95 and permits should be conditioned on retaining trees and moving the access road so that there is appropriate drainage from impervious surfaces and so required tree density is maintained. This will ensure that Kirkland's stated policies favoring tree preservation is effectuated. Thank you.

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033

425-999-8170 phone
425-999-8172 fax
sam@samelderlaw.com

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Wed, Aug 13, 2014 at 3:27 PM

Hi Sam,

Thanks for the comment concerning tree retention. I will address your comments formally in my staff report.

In the meantime, let me know if you have any questions.

Sincerely,

Susan Lauinger
Planning
425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, August 11, 2014 3:24 PM
To: Susan Lauinger
Subject: Permit # SUB14-01032 and # SUB14-01033

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Thu, Aug 14, 2014 at 1:05 PM

I love how removing all of the significant trees is called the "tree retention" plan -- quite an Orwellian euphemism.

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>, Sandi Elder <elder.sandi@gmail.com>

Mon, Sep 8, 2014 at 11:45 AM

Hi Sam and Sandi,

I would like to follow up with you on this before I write my staff report, which I am in process of doing right now. Attached is a response letter from Greg Griffis of Merit Homes and the arborist report that came with the short plat application. Your comments will go in to the report and Greg's letter will be a response. Additionally, I will respond to both.

I do have one quick question. Do you know the exact date that the trees in question were cut and removed. I have conflicting information on this and would like to know if you do know the date. I'm guessing that you do.

Thanks for your help.

Also, if you have any questions regarding the arborist report, please feel free to contact me in the most convenient way for you.

Sincerely,

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Thursday, August 14, 2014 1:06 PM
To: Susan Lauinger
Subject: Re: Permit # SUB14-01032 and # SUB14-01033

[Quoted text hidden]

2 attachments

 **SP comment letter response.pdf**
17K

 **Arborist Report Avalon(2).pdf**
1259K

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Sep 8, 2014 at 12:36 PM

I will have my wife get the exact date that the trees were cut down and let you know. I remember the event very clearly, because we went out of town for the weekend and when we came back the trees were on the ground. It was rather shocking because we specifically contacted Josh and Greg months before about trying to save the trees. They just ignored them and had them cut down. Both my wife and I talked to the current resident of the property (I think he is the son of the prior owner who died) and he told both of us that the decision to cut down

the trees had nothing to do with him -- it was Merit Homes' decision. I noticed that in Mr. Griffis' responsive letter # 3, he just says "patently false" with regard to Merit Homes coordinating removal of the trees. The current resident told both my wife and me that he had nothing to do with the tree removal and it was 100% Merit Homes, so I think that Mr. Griffis is not being honest and forthcoming on this point. It makes perfect sense. Why would the prior owner spontaneously and independently decide to remove the trees? It certainly was not for wood -- the tree is still laying on the ground. The only reason for removing those trees is to try to avoid the development rules.

I note that Merit Homes is also developing the lots just to the north of these lots. They stripped those lots of trees as well. Even though this is an application for only two lots, they are trying to strip 4 lots of trees. The effect to this block and neighborhood is significant and goes against everything in Kirkland City Code about preserving trees.

I think the argument about the trees being diseased is misleading. Merit Homes coordinated with the prior owner to remove the biggest and healthiest trees before applying for permits. Thus, several of the healthy and viable trees don't even appear on the arborist's report -- which is disturbing considering that the trees trunks are still laying there on the ground. They did not identify and tag all the trees -- just the trees left standing after they already cut down some of the biggest and healthiest trees.

I dispute their calculation of tree density and tree credits. By developing these four lots all of which touch, and by planning on removing nearly all the viable trees, Merit Homes is totally undermining the purposes of KCC 95.05. They stripped out the trees from those other two lots as well, so the City really should be looking at all four lots in assessing compliance. Merit Homes is engaged in the process of coordinating pre-application tree removal to try to game the system. Again, if you research privity law in Washington, they are in privity with the prior owner and cannot avoid application of city code provisions by simply having the prior owner cut down a number of trees.

The Critical Root Zone of a number of these trees is on my property. This is true of all of the trees that they propose to remove along my property line. The arborist does not address this in his report at all. One of the trees that they already cut down has significant roots on my property that are now rotting away and undermining the soil in my back yard. Removal of additional trees is only going to magnify the problem. Merit Homes took no mitigation efforts to address this. Mr. Griffis makes the comment, "...I do know that when we developed the adjacent plan and built the Elders home the CRZ were not of issue with the Elders at that time." First, this statement is false. Mr. Griffis used the existing trees on the back property line as a selling point for us to buy our home. We specifically noted that much of the trees and roots (probably 40% of the tree that they already cut down) was on our property. We specifically selected to move the home 5' forward compared to Merit Homes' initial proposal to address the tree canopies and the critical root zone of those trees (in other words, we moved the home forward to give them more room). Second, if Mr. Griffis was trying to imply that they cut down a lot of trees to develop our home, and we did not seem to care then, he is wrong again. When we first viewed the lot that we eventually purchased, all trees had already been removed -- so we had no idea what critical root zones may have existed beforehand and no opportunity to try to protect any, other than the decision we made to move the home forward to avoid the existing trees on the property line.

Mr. Griffis is under the mistaken impression that the "adopted storm water design guidelines" allow them to place an impervious surface near the property boundary. KCC 95.45 does not allow Merit Homes to place an impervious surface so close to the boundary line. This storm water system that Merit Homes is using is to address ground water on the existing property; however, the boundary guidelines regarding impervious surfaces is still in effect to make sure that surface water is not diverted to other properties. This is important because if the setbacks and buffers are observed, then there is no need to remove some of the trees along the property line.

Finally, and most importantly, I encourage the City of Kirkland to look both at the number of trees removed by Merit Homes prior to submitting applications and the ones actually on the applications. Merit Homes is developing 4 contiguous lots, and there are stripping all 4 lots of trees that cause the collective parcels to fall well below the tree density and tree credit requirements. Merit Homes is coordinating removal of trees before they submit applications -- and I encourage the City to not rest on Mr. Griffis' "patently false" claim. Merit Homes

removed numerous trees from these two lots, and I suspect the other two adjacent lots, that never appeared on the application or arborist reports. Merit Homes should not be allowed to take out big healthy trees, then submit applications to remove the remaining trees. This strategy flies in the face of all the policies outlined in KCC 95.05.

Sam Elder
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425-999-8170 phone
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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Mon, Sep 8, 2014 at 12:49 PM

Sam,

Thank you for your insight into this matter. I'm sure you understand that I must remain neutral on this issue, but I will say that you are correct on one point—the intent of Chapter 95 clearly does not want healthy significant trees removed and I have already relayed that to Greg, and of course he disagrees and there is the problem with intent. We cannot regulate on intent of the code, and the rules must be stated in the code. I too see this as a loophole, but it is a legal loophole unless they cut the trees after they submitted the development application. The application was submitted on June 6th and I'm having trouble figuring out the timelines since developers do not have to tell us when they are going to cut when they have an approved tree removal request. I am attaching the two tree removal requests that Greg submitted prior to submitting his short plat.

This is all terribly complicated to do over email. I am really happy to meet with both you and your wife and can do so when I go out to do my site visit to the Avalon property.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, September 08, 2014 12:36 PM

[Quoted text hidden]

[Quoted text hidden]

2 attachments **Tree Removal Request West lot.pdf**
133K **Tree removal vacant lot.pdf**
140K

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Sep 8, 2014 at 1:25 PM

I attached some photos to help illustrate the tree removal by Merit Homes. The attached file has 4 views: (1) Bing Maps Bird's Eye View, (2) Bing Maps aerial view, (3) Google Maps, and (4) King County Parcel Viewer 2012 overlay. Merit Homes had already removed one of the biggest trees on the map -- it is still laying in the middle of the lots.

Tree # 13 is listed as a Japanese Maple at 6.4 DSH. There is really a huge Douglas fir there. There are some tiny trees under it -- but the Douglas Fir is not even listed. You can see that the gap between #13 and #19 -- that is where they already cut down two big trees. Attached is a photo showing the downed tree and stump. Why are these not listed in the arborist report?

This is not a question of "intent" as much as a question of privity. A homeowner cannot remove a bunch of trees (directly or indirectly) and then apply for permits to remove trees as if it did not just cut down a bunch already. This is not a loop hole at all. It has nothing to do with intent. It has everything to do with actually removing a bunch of trees and then getting an arborist report that pretends they were never there. It makes me question what kind of arborist they used. I would like to hire my own arborist to go out and do an actual inventory of tree (both standing and already on the ground). Can I do so? I don't want to get in trouble with Merit Homes or anyone else for trespassing. I can look over the fence, but it is difficult for me to give a more detailed analysis and rebuttal of all the mistakes on the arborist report without going over there.

I saw your attachments. How can he say that there was no coordination of efforts to remove trees with the prior homeowners. Isn't that Gospin? One application lists the owner as Gospin but the email as Merit Homes. The other lists the owner as Gospin/Merit Homes. I think that is a pretty strong indication that they were coordinating tree removal with the prior owner. I think Sandra Gospin was deceased at the time the application was submitted. I doubt that she was using greg@merithomes.com as an email address.

I encourage you to look at the other two adjacent lots. Did Merit Homes do the exact same thing where they removed some trees as part of the purchase before they submitted an application to remove additional trees? I remember that there there a giant, beautiful, healthy tree in front of the really old home (it was built in the early 1900s if I remember, before it was demolished), and suddenly one day it was on the ground. I wondered why, because I don't think there were any application permit signs up. Then they cut down another big tree in the back yard. I think later they submitted applications to the City for tree removal. My best guess is that Merit does this routinely. And again, it is not a question of "intent." Under Kirkland City Code, can a person cut down a bunch of trees, then apply to cut down more trees while pretending that they did not just cut down a bunch of big healthy trees? I see nothing in the KCC that allows this.

I hope you appreciate that it is difficult to comment exactly on some of these details when I cannot actually go over and measure the trees and distances, etc. I am willing to pay to have my own arborist look at this if the arborist can get permission to go over there. I believe that the existing arborist report is extremely misleading, leaves out a bunch of trees that Merit already cut down, and misidentifies some of the trees.

I would be happy to meet with you and discuss this in more detail.

Sam Elder
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12716 NE 106th Lane
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425-999-8170 phone
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[Quoted text hidden]

2 attachments

 **Downed trees.pdf**
1746K

 **Overview of lots.pdf**
259K

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Sep 8, 2014 at 1:53 PM

Okay, my wife and I have compared notes and have identified exactly when the trees were removed. We left town on afternoon of Friday, 6/6/2014. We returned in the afternoon of Sunday, 6/8/2014. We noticed that the trees were gone when we got back. I would suspect the trees were actually cut down on Saturday, 6/7/2014. On the evening of Sunday, 6/7/2014, my wife screamed at the neighbor about removing the trees without letting us know. The neighbor (son of the prior owner) said that he had nothing to do with it. He actually had no idea that the trees were being removed at that time and was trying to figure out how get an old bus and old boat out from the back part of his property. Whoever cut down the trees did not leave him any space to remove these. In follow-up conversations with this neighbor, he indicated that the had nothing to do with the tree removal -- it was all Merit Homes. This appears to be confirmed by the documents that you forwarded.

Part of what makes this very confusing for my wife and me to figure out is that we don't know: (1) the name of the prior owner, although the parcel viewer says it is Marilyn Hall, so that is probably right (not Sandra Gasapin, who applied for the permits), (2) the name of the neighbor, and (3) when the property was sold to Merit Homes (the parcel viewer still lists the property as being owned by Marilyn Hall). I note that the two adjacent lots, # 674370-0375 and # 674370-0374 are both listed as being owned by Merit Homes. Do you know when it was sold to Merit Homes?

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425-999-8172 fax

[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Mon, Sep 8, 2014 at 4:24 PM

Hi Sam,

You are right about the ownership. I checked that title and it says Marilyn Hall. However, I think that there may have been a death in the family at some point and the property changed to a relative. I'll look in to

that.

Thanks for the timeline. That is very helpful and is corroborated by the current resident of the property.

I'll keep you posted.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Monday, September 08, 2014 1:54 PM

[Quoted text hidden]

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>

Tue, Sep 9, 2014 at 1:11 PM

To: Susan Lauinger <SLauinger@kirklandwa.gov>

FYI, if you want to meet, my wife and I will be available until 9/19, then we are out of town until 10/10. Hopefully there are no deadlines or appeal period that will run while we are out of town. If you want to meet before 9/19, let us know.

Sam Elder

Law Office of Sam Elder PLLC

12716 NE 106th Lane

Kirkland, WA 98033

425-999-8170 phone

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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>

Tue, Sep 9, 2014 at 3:45 PM

To: Sam Elder <sam@samelderlaw.com>

We don't have to meet, I am only offering if you want to. I will be going to the property on Thursday for my usual short plat site visit and thought I could drop by if you want me to. It is not necessary though.

As far as timing of the short plat and the appeal period, I will do everything in my power to make sure you have plenty of time to appeal the decision. That is your right and I do not plan to try and take it away from you--on the contrary in fact.

However, I also can't hold up the appeal period timing for vacations and such. But I feel confident that we can work something out that satisfies you and Merit Homes. Too, you may decide not to appeal. I just want to make sure it is an available option to you.

That said, as I look at my calendar and try to figure out when the decision will be coming, it is highly likely that it will be within the time you will be gone.

Now that I know these dates however, I am going to try my best to get this done before you leave and give you options for appealing from afar if it comes to that.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Tuesday, September 09, 2014 1:11 PM

[Quoted text hidden]

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>

Fri, Sep 12, 2014 at 10:38 AM

To: Susan Lauinger <SLauinger@kirklandwa.gov>, Sandi Elder <elder.sandi@gmail.com>

I am sorry. Did you mean yesterday or next Thursday for the site visit? My wife and I would like to meet with you if possible.

Sam Elder
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Kirkland, WA 98033
425-999-8170 phone
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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>

Fri, Sep 12, 2014 at 2:22 PM

To: Sam Elder <sam@samelderlaw.com>

Hi Sam,

I actually did mean yesterday except I did not end up going out to the site. I had to send a colleague because of my recent knee surgery. I had thought that I would be well enough, but I was and am still not able to walk on uneven ground.

However, let's meet at City Hall. I have several times available next week. What days/times would work best for you? I have quite a few openings but I am not available Tuesday or Friday. And in general, I leave by 4 every day to pick up my son.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Friday, September 12, 2014 10:38 AM
To: Susan Lauinger; Sandi Elder

[Quoted text hidden]

[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Sep 15, 2014 at 10:50 AM

To: Sam Elder <sam@samelderlaw.com>, Sandi Elder <elder.sandi@gmail.com>

In case you guys were planning to come in today or tomorrow, you should know that I may not be in office. I am experiencing some setbacks and difficulties with my recent knee surgery. Because of this lack of time this week, I will make myself available Wednesday morning too, which is normally our staff meeting time.

So Wednesday anytime until 3:30, Thursday from 10-3:30, or if none of that works, let me know what will. I can stay an evening, but then have to plan for it since traffic gets so bad that I would have to stay past 7, or sit in two hours of traffic (I only live in Issaquah, which is kind of sad to know it takes two hours).

Anyway, also, attached is a site plan our Urban Forester prepared to show which trees were cut as part of the Tree Removal Request. Let me know what you think.

Best,

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Friday, September 12, 2014 10:38 AM
To: Susan Lauinger; Sandi Elder

[Quoted text hidden]

[Quoted text hidden]

 removed trees from Avalon sites.pdf
1915K

Sandi Elder <elder.sandi@gmail.com>
To: Sam Elder <sam@samelderlaw.com>

Mon, Sep 15, 2014 at 10:56 AM

I'm not sure what "none of these three removed trees show up on the plans provided by blue line group" means. Are they saying that they removed 3 trees here? I know they removed at least one, but I can't see what else

may have been removed because of the mess. If they took out 3 trees here then they violated their original permission of removing 2 per lot, they would have removed 6 total trees. Who is blue line?

[Quoted text hidden]

Sandi Elder <elder.sandi@gmail.com>
To: Sam Elder <sam@samelderlaw.com>

Mon, Sep 15, 2014 at 10:58 AM

As for the meeting. I could come on Wed morning while she is in preschool. Or I could come on Thurs 11 or later and bring her.

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>
Cc: Sandi Elder <elder.sandi@gmail.com>

Mon, Sep 15, 2014 at 2:18 PM

Sandi and I would like to come in Thursday at 11:00 am. Where do we meet you?

Sam Elder
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12716 NE 106th Lane
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425-999-8170 phone
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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Mon, Sep 15, 2014 at 2:20 PM

Just come to City Hall (123 5th Ave), top floor. As you walk in, you will see information, then planning on the left.

Ask the receptionist to call me up from my desk.

I'll see you at 11 on Thursday.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, September 15, 2014 2:18 PM
To: Susan Lauinger
Cc: Sandi Elder

[Quoted text hidden]

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Sandi Elder <elder.sandi@gmail.com>

Mon, Sep 15, 2014 at 2:22 PM

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
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425-999-8170 phone
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[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Sandi Elder <elder.sandi@gmail.com>

Thu, Sep 18, 2014 at 2:59 PM

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

----- Forwarded message -----
From: Susan Lauinger <SLauinger@kirklandwa.gov>
[Quoted text hidden]

2 attachments

 Tree Removal Request West lot.pdf
133K

 Tree removal vacant lot.pdf
140K

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Fri, Oct 10, 2014 at 8:34 AM

Dear Ms. Lauinger:

I received my public records request from the City of Kirkland. Based on the timing of the demolition permit which was submitted on 2/27/2014, Merit Homes should not have been given any approval under KCC 95.23. They had to get approval under KCC 95.30. Actually, what were they doing submitting an application under penalty of perjury for tree removal not associated with development when they submitted a demolition application? The trees that were cut down under KCC 95.23 should not have been cut down. Also, the arborist report submitted for the sub plat is invalid since it ignored trees that were currently standing and that could not be cut down under KCC 95.23. The sub plat application should be denied for being out of compliance with Chapter 95.

Also, I would like to submit a public records request for all "City of Kirkland Tree Removal Notifications" (Under KCC 95.23) submitted by Merit Homes between 1/1/2010 and today. I am curious if this is a repeated practice of Merit Homes trying to avoid the law by submitting applications to remove trees under KCC 95.23 when in fact

they are developing the properties.

Sam Elder
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425-999-8170 phone
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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Fri, Oct 10, 2014 at 9:49 AM

Hi Sam,

I will forward your public records request to the appropriate staff.

As to the tree removal, this matter has been referred to our code enforcement staff. Merit Homes was served a Notice of Tree Fines with corrective restoration required. Would you like to include a copy of that notice with your other requests for public disclosure?

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Friday, October 10, 2014 8:35 AM

[Quoted text hidden]

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Fri, Oct 10, 2014 at 10:26 AM

Yes, could you send us that notice of tree fines.

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

[Quoted text hidden]



Sam Elder <sam@samelderlaw.com>

Meeting

2 messages

Sam Elder <sam@samelderlaw.com>
To: orey@kirklandwa.gov

Mon, Nov 17, 2014 at 2:48 PM

Dear Mr. Rey:

I have been communicating with the staff of the planning department regarding a development project near my home. In the course of discussions, I am frequently told about the staff's "interpretation" of the city code. Occasionally, I am told that the city attorney office is telling the staff to interpret things in certain ways. I have found some of these discussions confusing or troublesome.

For example, KZC 95.23 is supposed to be used only when there is no active permit for development on the property. If there is development activity, then tree removal must comply with KCZ 95.30. I pointed out that Merit Homes had submitted Land Use Application # 186200 before submitting a notice of tree removal under KZC 95.23. City staff informed me that they don't consider Land Use Application #186200 to be development activity. I believe this interpretation is wrong. Is that coming from the city attorney's office?

Another example involves code enforcement. Merit Homes was found to be in violation of KZC 95.23 and/or 95/30 with respect to one of the two lots. I was told that the code enforcement would be handled completely separate from the sub plat approval. I was told that once the code enforcement was completed, then the sub plat would have to be approved, because there was no basis for denial. Then when I looked at the actual remedial plan proposed by Merit Homes, it involves Merit Homes not planting the trees until after they construct the homes (proposed as part of the sub plat). It seems to me that the city is letting the developer have their cake and eat it too. The City should be requiring Merit Homes to replant necessary trees and ensure their survival (as required by KMC 1.12.100(d) before any sub plat approval.

Another example involves how Merit Homes deals with the code violation. The City found a violation on only one lot (erroneously because the sub plat application was submitted on 6/6/2014, but the tree was not cut down until 6/7/2014), but the City appears to be entertaining a restoration plan that involves BOTH lots. If the violation is only on one lot, then the restoration should be on that same lot. It also appears that the City is considering letting Merit Homes pay into a tree fund instead of restoring the site. The tree fund is supposed to be allowed only if site restoration is impossible. It is not impossible as the lot is currently configured. It appears that the City is buying Merit Homes' argument that once the sub plat is allowed, then site restoration or replanting on only one lot is impossible or impractical. But that assumes that the sub plat has already been approved -- which it has not. Merit Homes can totally restore the single lot as it currently exists. This may create impossible problems for the sub plat -- but it does not create any impossibilities for site restoration. As I understand it, the code enforcement must take place first, so Merit Homes should have to replant and restore and ensure survival of the new trees pursuant to KZC 1.12.100(d). Then the sub plat should be reviewed given the existence of the new trees. Again, the interpretations appear to drift and change depending on the questions that I ask.

Also, Merit Homes' Notice of Proposed Land Use boards (I think they might be called white boards) contain clear inaccuracies. They were based on the arborist report which is so inaccurate that the City required the report to be redone. The problem is that the public was erroneously informed and the public comments may have been influenced by posting false information regarding the trees on the property. I have asked that the white board be re-posted with accurate information and that the public be given a new comment period based on the accurate information.

Overall, my belief is that the sub plat should be denied based on the observed violation of the Kirkland Tree Code and the repeated practice of Merit Homes violating the law on many of its projects by using KZC 95.23

(tree removal not associated with development) on projects that they are actually developing. I was told my city staff that sub plat applications are never denied.

Anyway, I was thinking that it might make sense to sit down to meet and discuss these and other items about how the Kirkland Zoning and Municipal Codes work. Is such a meeting possible?

Sam Elder
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425-999-8172 fax

Oskar Rey <ORey@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>
Cc: Susan Lauinger <SLauinger@kirklandwa.gov>

Tue, Nov 18, 2014 at 9:30 AM

Dear Mr. Elder:

My role is to advise City staff and my involvement with this matter has been fairly limited. To the extent I have advised City staff, those communications are subject to the attorney-client privilege.

With respect to short plats, to the extent an applicant or an interested party disagrees with a City land use determination, there is an appeal option available under KMC Chapter 22.20 (which provides that Process I of the Kirkland Zoning Code applies, which allows for an administrative appeal to the Kirkland Hearing Examiner). That is typically how someone would obtain review of a City short plat decision.

Since the City is my client, It is not really my role to meet with project applicants or opponents for the purpose of getting City staff to change its interpretation of City codes. If it turns out that you disagree with a short plat decision issued by the City, your remedy is to file an appeal in accordance with the applicable processes.

Oskar Rey
Assistant City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
(425) 587-3034
orey@kirklandwa.gov

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Monday, November 17, 2014 2:48 PM

To: Oskar Rey

Subject: Meeting

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Sam Elder <sam@samelderlaw.com>

Sub Plat for Merit Homes

7 messages

Sam Elder <sam@samelderlaw.com>

Mon, Dec 1, 2014 at 12:08 PM

To: Susan Lauinger <slauinger@kirklandwa.gov>

What is the status of the sub plat application and the code enforcement action?

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Dec 1, 2014 at 12:38 PM

To: Sam Elder <sam@samelderlaw.com>

I am finishing up with final details of the staff reports and they will go to the management team and City Attorney for review and editing. After they are finalized, they will be sent to the Planning Director for his decision. I expect a decision this week although probably later in the week.

As to code enforcement, the ball is in the City's court as Merit Homes has agreed to voluntarily comply and we have agreed to extend the time for compliance. Why? Because it makes more sense for the health of the trees to be planted. I will tackle the specifics of the restoration plan once I know which trees will be retained that are currently existing on the properties. It would not be a healthy tree outcome to require replanting before we know where the house footprints and utilities will be placed. From what I can tell, an extension is not prohibited by KMC Chapter 1.12, which is the chapter that governs code enforcement for tree violations.

As to your public disclosure request--I just sent the emails you requested to our Public Disclosure Request team. You should be receiving them soon.

Sincerely,

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Monday, December 01, 2014 12:08 PM

To: Susan Lauinger

Subject: Sub Plat for Merit Homes

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Mon, Dec 1, 2014 at 3:36 PM

If I am understanding you, Merit Homes is going to get sub plat approval even though they are in violation of the tree code, were found to be in violation, and have not remediated the problem. Merit Homes will then build the houses before attempting to remediate the code violation. Then after the homes have been built, they will remediate for the code violation. Is that right? Is it typically that someone who violates the City code would be allowed to delay code compliance for so long? When are the homes going to be built so the remediation can occur? Is there a time frame in mind, or is it completely open ended?

I see the world a little differently. I think Merit Homes should be remediating for the code violation first. This may or may not have some implications of with regard to their future development plans, but that is beside the point. This is why people should not violate city code -- they may have to remediate the problem. If someone can violate the city code and then perform the remediation whenever they want, doesn't this take some of the teeth out of the law? The City Code requires the person who violated the tree code to ensure the long term viability of the newly planted trees. We both know that Merit Homes is going to pre-sell those lots, and so as soon as the trees are planted, Merit Homes loses all control of those trees. What would stop the new home owners from cutting down every newly planted tree? The City's plan of allowing Merit Homes to build first and comply with code second frustrates the purpose of KMC 1.12.100(d)(2)(D) which states, "The restoration plan shall include a maintenance plan and an agreement or security to ensure survival and maintenance of restoration trees for a three-year period unless the violation was on a site with an approved tree plan, in which case the maintenance period is five years." Is the City making the home buyers sign off that they will ensure the survival of the trees for 3-5 years? Merit Homes surely won't have control of the properties for 3-5 years?

Frankly, I think the City's plan of "let them build, then fix code problems later" is completely flawed. I hope you/the City will reconsider its position. If the City intends to proceed with this approach, I need to figure out what legal options I have for blocking this plan. Can I appeal such a decision to allow "deferred" code compliance?

Thank you, Susan.

Sam Elder
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12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

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Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Mon, Dec 1, 2014 at 3:59 PM

Hi Sam,

I understand your concerns. However, I disagree with your premise that Merit Homes will not end up having to remediate. They will and they have already agreed to do so. Timing is what is in question.

Greg's plan for restoration if you look at it was to plant several arborvitae trees around the property. These are those hedge trees that don't grow very tall, don't provide any environmental benefits and certainly cannot replace Hemlocks, Doug Firs, or Flowering Dogwoods. So I denied that plan.

The City's interest in waiting is to make sure that the replanting is not done in a haphazard way. The trees that do get planted need to have the proper space to grow (per code). This does not include hedges. We do not regulate hedges or allow hedges to satisfy tree planting requirements.

The main problem in allowing him to replant right now is that we do not know yet what will be saved as far as existing trees on the sites. This can't be decided until we know where the homes and utility impacts will be. It would make very little sense to make him plant 23 trees now, then possibly have him rip them back out because they won't fit.

I need to remind you that the remediation is IN ADDITION to the already required tree density that must be planted as part of the short plat. Our tree density requirements are already designed to be the maximum number of trees that any given lot can handle. Let's say that all the trees on site would need to be removed. Per short plat regulations, he would have to plant somewhere in the neighborhood of 18 new trees (for both short plats) JUST TO SATISFY THE SHORT PLAT.

If you take one lot, let's say Lot 2, which is about 5,000 SF, that would require 4 new trees to be planted (if they save no others). How many more trees can fit and grow to their maximum potential on a lot that size? We are only talking about a few thousand square feet once the house and driveway are installed. Additional trees would not fit on a small lot like that. The point is not to create a forest, the point is to have trees growing in the proper places for their maximum health and maximum benefit to the community and property owner. A few healthy trees are better than a hundred dead ones, especially in an Urban environment.

I reject the notion that houses cannot be built because the tree code was not followed. I don't think that is a logical conclusion if that is the one you are trying to make.

Merit Homes will restore per the code violation. They will either plant 23 additional trees on this site, but if they won't fit, they can plant them somewhere else if approved by our Department, or they can pay in to the tree fund that will be used to plant trees within the City where they are needed most. Any trees that are planted must come with the maintenance agreement--which runs with the property. Future homeowners would not be able to cut them for 5 years.

Hope that explains it. If not, we may need to have a conversation, or agree to disagree. I will ask that any trees that are planted, be planted as near to the place that they were taken from if it makes sense for the maximum potential of that tree.

Again, what is driving this decision is the health of the future trees. We need to give them space to grow to their full potential.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Monday, December 01, 2014 3:36 PM

To: Susan Lauinger

Subject: Re: Sub Plat for Merit Homes

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>

Mon, Dec 1, 2014 at 4:11 PM

To: Susan Lauinger <SLauinger@kirklandwa.gov>

So:

1. What is the time frame for the remediation to occur? Or is this open-ended -- basically whenever they get finished with the homes and decide to replant?
2. That seems good that the obligations to not cut the trees will run with the land. Can you provide me with a sample of the form or format of such an agreement? I assume that it gets recorded on the property, right?
3. Is there a mechanism for me to appeal this type of decision?

Also, I had a number of other questions that never really received a response, such as:

4. What about the whiteboards containing false information regarding the trees on the property? The white boards were based on the old arborist reports, which had omissions. Are new white boards going to be posted? If not, why not?
5. What about that tree fund? You mentioned it again. My reading of the code is that this is supposed to be for when replanting by the violator is impossible. Examples would be (1) where I cut down trees on my neighbor's property -- I cannot be required to plant trees on a property that is not mine or at least I could not replant and come up with a maintenance plan without permission or (2) perhaps a steep slope, changes in hydrology, or other such reasons means that planting trees is impossible. There is nothing impossible about planting trees on the property as it currently exists. There may or may not be some problems with building on the lot after the trees are planted, but I don't see why code compliance is worried about future development plans that have not even been approved yet. I see no justification for Merit paying into a fund when tree planting is viable.

Thank you.

Sam Elder
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425-999-8170 phone
425-999-8172 fax

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Susan Lauinger <SLauinger@kirklandwa.gov>

Tue, Dec 2, 2014 at 4:02 PM

To: Sam Elder <sam@samelderlaw.com>

Cc: Oskar Rey <ORey@kirklandwa.gov>

Answers:

1. There is no exact time frame at this time. It is also not open ended. It may not take until the homes are finished. Once I get an idea of where they want to put the homes and utilities, I will move forward.
2. Attached
3. No. Code Enforcement policies are not appealable.
4. White boards—we will not be asking Merit to re-notice the short plats. If you look at the site plans, they are the surveys. The surveys are correct. It is the arborist report that had problems, which have been corrected. We do not post arborist reports on the white boards.
5. Yes, the tree fund is for those sites that cannot take additional trees beyond the required density. This site may fall in to that category. We are not going to ask Merit to plant 23 extra trees then rip them out when they build homes. Planting too many trees on a site where that site cannot support them makes no sense at all. It creates hazard trees in the future and is not a sound environmental practice. That said, we

have not made any decisions yet and it may be the case that he can spread these trees out throughout the entire site.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Monday, December 01, 2014 4:12 PM

[Quoted text hidden]

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36K

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Tue, Dec 2, 2014 at 4:48 PM

Got it. Thanks.

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
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425-999-8170 phone
425-999-8172 fax

[Quoted text hidden]



Sam Elder <sam@samelderlaw.com>

FW: tree restoration plan

12 messages

Susan Lauinger <SLauinger@kirklandwa.gov>

Thu, Nov 13, 2014 at 10:35 AM

To: Sam Elder <sam@samelderlaw.com>

Here is the tree restoration plan, which I have already rejected. The emails that are associated with this will follow, probably sometime today. I have to make sure I have them all first.

Susan Lauinger

Planning

425-587-3252

From: Greg Griffis [mailto:Greg@merithomesinc.com]

Sent: Wednesday, November 05, 2014 5:03 PM

To: Susan Lauinger

Cc: Penelope Skovold

Subject: tree restoration plan

Please review and get back to me asap

Appreciate your time

greg

Greg Griffis

MERIT HOMES



Principal / President

O - 425-605-0597 ext. 104 | M - 425-444-0309 | F - 206-600-4914

Greg@MeritHomesInc.com | www.MeritHomesInc.com | Facebook

805 Kirkland Ave, Suite 100, Kirkland, WA 98033

 2014-11-05 (1).pdf
62K

Sam Elder <sam@samelderlaw.com>

Thu, Nov 13, 2014 at 12:41 PM

To: Susan Lauinger <SLauinger@kirklandwa.gov>, orey@kirklandwa.gov, enf-planning@kirklandwa.gov

Thank you, Susan. Have you read Kirkland Municipal Code 1.12.100? KMC 1.12.100(d)(1) states in relevant part, "In cases where the violator intentionally or knowingly violated this chapter or has committed previous violations of this chapter, restoration costs may be based on the city-appraised tree value of the subject trees in which the violation occurred, utilizing the industry standard trunk formula method in the current edition of the "Guide for Plant Appraisals." Was this provision used by Code Enforcement? The public records requests that I have currently made will expose the repeated violations by Merit Homes. Merit Homes used the Tree Removal Not Associated with Development forms when they were clearly in the process of development and had submitted development permit applications already before they cut down the tree. This is strong objective evidence of intent. Code enforcement should be using this provision.

Further, I see that KMC 1.12.100(d)(2)(B) requires "The minimum size for a tree planted for restoration is twelve-foot-tall conifer and three-inch caliper deciduous or broadleaf evergreen tree." Do the trees proposed by Merit meet this standard?

Am I correct in believing that these trees must be actually planted for Merit Homes to be in compliance? I do not believe that having a plan approved is compliant. The clear language requires PLANTING of the trees to be in code compliance. This has strong implications for approval of the subplat. Once those trees are planted for code compliance, Merit would then have to update the arborist report for purposes of the subplat application and include the recently planted trees. Am I right there?

KMC 1.12.100(d)(1) also states, "The restoration plan shall provide for repair of any environmental and property damage and restoration of the site. The goal of the restoration plan shall be a site condition that, to the greatest extent practical, equals the site condition that would have existed in the absence of the violation" I think this is a strong basis for insisting that Merit replant trees back in the same location as they removed trees. This is the best way to the "site condition that would have existed in the absence of a violation."

There is a provision for what happens if the site cannot be restored -- KMC 1.12.100(d)(2)(C). This provision is ONLY available if the site cannot be restored. This site can be stored. KMC 1.12.100(d)(2)(C) does not allow payment of a fine simply because the restoration would mess up some future building plan or it is inconvenient for the owner. KMC 1.12.100(d)(2)(C) can ONLY be used when restoration is impossible at the site. There is no indication that restoration is impossible at this site. I hope no such option was presented to Merit Homes because this would be improper use of KMC 1.12.100(d)(2)(C).

Has Merit Homes come up with a plan for the maintenance of the trees and an agreement or security to ensure the survival of the trees? They need to do this to comply with KMC 1.12.100(d)(2)(D). It seems to me that the construction of the homes that are proposed is inconsistent with the health of the trees that Merit Homes must plant in order to come into compliance.

My best guess is that Merit Homes intends to get approval of a tree remediation plan, then get all permits and develop the property, then plant the trees afterwards. The City should not allow this. The City must require the trees to be planted first. Then make Merit Homes submit a revised arborist report before approving the subplat, which recognizes the existence of the newly planted trees, then if the subplat is approved it should require that Merit Homes does not disturb the recently planted trees and kill them. Frankly, given the proximity of the trees

that Merit Homes is proposing to replant to come into code compliance to the homes that they are trying to build, I cannot conceive that they can do so safely. If they cannot ensure the safety of the trees that they plant for code compliance, Merit Homes cannot comply with KMC 1.12.100(d)(2)(D), and thus the sub plat should not be approved.

Am I right that the City will require Merit Homes to solve its code compliance issue before it issues sub plat approval? In looking through the sub plat application, this appears to be a requirement. I have copied Oskar Rey on this email. It makes no sense to me that a developer could cut down trees illegally, be found in code violation, not remedy the situation, but still get their sub plat and development permits approved. If I am right that they must come into code compliance first, then Merit Homes is going to have to (1) remediate the site by planting the trees and (2) come up with plan to ensure the newly planted trees survive for a three year period. No sub plat approval should be issued until this is complete. Then Merit Homes would have to get a new arborist report that reflects the new trees for the sub plat due to changed conditions. Then Merit Homes would have to get approval of the sub plat considering both the newly planted trees and the plan to ensure survival. Is all of this right?

I note that KMC 1.12.100 is a non-exclusive list of enforcement procedures (according to KMC 1.12.090) and the replanting is in addition to other remedies.

In all fairness, shouldn't Merit Homes have to post new whiteboards associated with the subplat. The whiteboards that were posted do not accurately identify all the trees -- specifically they ignore the large trees that Merit Homes illegally cut down and for which the code enforcement was made. Shouldn't Merit Homes have to post new white boards that contain the actual conditions on the property, including the remediation efforts that Merit Homes is going to have to make. In fairness, all of this came to light AFTER the public comment period had ended. In fairness, the public should get new white boards with a new public comment period because it might elicit additional or new public comments based on the changed conditions. Also, the existing white board did not have the updated arborist information -- it posts incorrect information regarding the trees. We ask that they process for public comments period should start over.

Thank you again for your help.

Sam Elder
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425-999-8170 phone
425-999-8172 fax
[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Thu, Nov 13, 2014 at 10:53 PM

Another thought about the tree restoration plan: It appears that the tree restoration is occurring on BOTH lots. The violation and code enforcement is only for one of the two lots. KMC 1.12.100(d)(1) states, "The restoration plan shall provide for repair of any environmental and property damage and restoration of the site. The goal of the restoration plan shall be a site condition that, to the greatest extent practical, equals the site condition that would have existed in the absence of the violation." The "site" in question is only one lot. Shouldn't the 23 trees all be on one lot?

Sam Elder
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12716 NE 106th Lane

Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

On Thu, Nov 13, 2014 at 10:35 AM, Susan Lauinger <SLauinger@kirklandwa.gov> wrote:
[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Fri, Nov 14, 2014 at 8:14 AM

Hi Sam,

It would not be conducive to true tree restoration to put 23 of any species of tree in an area so small. The goal of restoration is to replace what was destroyed. Since you can't replant a huge Hemlock tree like the one that was cut near your house, we use a tree density approach. Using the diameter of each tree that was cut, we require one tree credit per diameter lost. 23 smaller trees will simply not fit on one of the lots, and maybe not even both. The replacement trees are in addition to the tree requirements for the short plat. Since we do not yet know which trees will stay or go, it becomes problematic to say all of the restoration will fit. They may end up having to pay in to the tree fund for some of the restoration.

I got your other email and will respond to that next week.

Sincerely,

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Thursday, November 13, 2014 10:54 PM
To: Susan Lauinger
Subject: Re: FW: tree restoration plan

[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Fri, Nov 14, 2014 at 4:03 PM

I don't think that the lot on which the violation occurred is too small. It only seems small based on the post-construction status of that lot assuming that it gets short platted and has multiple houses on it. As it currently exists, there is lots of room in the current front and back yards to have lots of trees.

My understanding from our discussion yesterday is that the short plat and development are handled separately from the code enforcement. Code enforcement should enforce based on the current, non-re-developed layout. It looks like Merit Homes is putting the cart before the horse and assuming that they develop both lots, then simply do landscaping around the homes. This isn't code enforcement -- it is not really a penalty or fine at all.

You mentioned paying into a tree fund. Am I missing something? That tree fund is supposed to be only for

when restoration is impossible. There is nothing impossible about restoration -- especially if the city lets them do the restoration over two different lots. Now there may be some issues with putting a bunch of homes after the restoration -- but again the development plans really should not be part of the code enforcement. Merit Homes can easily plant 23 trees on the existing wide open spaces on these lots.

I looked at the white boards again. The public notice reflects a totally inaccurate diagram that does not reflect some of the trees that were existing at the time. It appears to be based on the old arborist report which was inaccurate and omitted key information. I encourage the city to make Merit Homes post new accurate information and allow another public comment period. Can the City say that the public comments would have been exactly the same whether Merit Homes posted accurate or inaccurate information on those white boards? If a developer is allowed to post false information on the white boards, which might influence whether the public comments or not, and then is able to proceed with approval anyway, then where is the incentive to post accurate information? It seems the like public comments must be based on accurate depiction of the conditions of the property. I took photos of the whiteboards. I can send photos of the inaccurate diagrams if that helps convince the city to require reposting.

Sam Elder
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[Quoted text hidden]

Sam Elder <sam@samelderlaw.com>

Mon, Nov 17, 2014 at 9:06 AM

To: Susan Lauinger <SLauinger@kirklandwa.gov>, orey@kirklandwa.gov, enf-planning@kirklandwa.gov

I found examples of where Merit Homes has repeatedly violated KCC 95.23, which is a factor for code enforcement and tree remediation plans under KMC 1.12.100(d)(1):

+++

Merit Homes submitted development permits on 11616 NE 112th Street on 5/20/2014. Afterwards, it submitted a notification to remove trees not associated with development (Kirkland City Code 95.23) on 6/24/2014. Merit Homes signed off under penalty of perjury that it was properly removing trees not associated with development on 6/24/2014. This was improper because submitting a development permit then requires compliance with Kirkland City Code 95.30). Merit Homes improperly obtained approval and improperly cut down tress under KCC 95.23.

According to Kirkland's Code Enforcement, KMC 1.12.100(d)(1), repeated violations of KCC 95.23 is the basis for imposition of stiffer fines. Merit Homes also violated KCC 95.23 on its developments of 10633 128th Ave NE and 8027 128th Ave NE.

+++

Merit Homes submitted development permits on 8027 128th Ave NE on 6/25/2014. Afterwards, it submitted a notification to remove trees not associated with development (Kirkland City Code 95.23) on 8/4/2014. Merit Homes signed off under penalty of perjury that it was properly removing trees not associated with development on 8/4/2014. This was improper because submitting a development permit then requires compliance with Kirkland City Code 95.30). Merit Homes improperly obtained approval and improperly cut down tress under KCC 95.23.

According to Kirkland's Code Enforcement, KMC 1.12.100(d)(1), repeated violations of KCC 95.23 is the basis for imposition of stiffer fines. Merit Homes also violated KCC 95.23 on its developments of 10633 128th Ave NE and 11616 NE 112th St.

+++

Merit Homes submitted development permits on 12618 NE 105th PI on 6/5/2014. Afterwards, it submitted a

notification to remove trees not associated with development (Kirkland City Code 95.23) on 6/25/2014. Merit Homes signed off under penalty of perjury that it was properly removing trees not associated with development on 6/25/2014. This was improper because submitting a development permit then requires compliance with Kirkland City Code 95.30). Merit Homes improperly obtained approval and improperly cut down trees under KCC 95.23.

According to Kirkland's Code Enforcement, KMC 1.12.100(d)(1), repeated violations of KCC 95.23 is the basis for imposition of stiffer fines. Merit Homes also violated KCC 95.23 on its developments of 10633 128th Ave NE and 11616 NE 112th St and 8027 128th Ave NE.

+++

Additional examples where Merit Homes removed trees under KCC 95.23 for properties that they were developing include:

- (1) 10040 Slater Ave NE (TRE14-0119 and SUB14-00457)
- (2) 12426 NE 75th St (TRE14-01200 and SUB14-01478)
- (3) 8041 124th Ave NE (TRE14-03697 and PRE14-00317)

If the City finds that the development permit applications were submitted AFTER approval of the tree removal not associated with development, I encourage the city to follow up to see when the trees were ACTUALLY REMOVED. Using the example of Merit Homes's 10633 128th Ave NE development, it submitted the tree removal notification on 2/24/2014, but it did not cut down the trees until 6/7/2014. Merit Homes had submitted some development permits prior to 2/24/2014 (clear violation) but it also submitted additional permits before cutting down the trees (subplat applications on both lots were submitted 6/6/2014).

I am concerned and curious as to why Merit Homes was found to be in code violation on only one of the two lots associated with the 10633 128th Ave NE development. Can someone explain that? They submitted PRE14-00281 on 2/19/2014 and that covers both lots. It states, "Pre-submittal meeting request for 2 adjacent short plats which includes doing an LLA." So, they clearly violated the law on BOTH lots but code enforcement is only enforcing for one lot. Why? Also, it appears that the City is entertaining a remediation plan that covers BOTH lots for violations on only one lot. I do not understand why. It seems like the City should be enforcing on both lots, which each lot getting its own remediation. And Merit Homes should not be paying into a tree fund, because remediation is possible on both lots -- there is plenty of room.

I have submitted code violations using the online complaint form. It is clear that a pattern and practice of violation is occurring. I encourage the city to both follow-up on code enforcement on the other projects and to make use of the increased penalties set forth in KMC 1.12.100(d)(1) for repeated and intentional violations.

Sam Elder
Law Office of Sam Elder PLLC
12716 NE 106th Lane
Kirkland, WA 98033
425-999-8170 phone
425-999-8172 fax

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Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Mon, Nov 17, 2014 at 10:39 AM

Hi Sam,

We will look in to this of course. But I should also tell you that a PRE SUBMITTAL meeting is not a development action. So hopefully you are not finding pre-submittal meetings as the case for development action. The pre-sub as we call it is a preliminary assessment of what a person can do when developing. It is

not a permit nor does it vest an applicant in the information we give them. The only development actions would be actual permits like a demolition permit, building permit, grading (LSM) permit or the like. Anything with PRE at the front would not constitute a development action.

Just an FYI for your research.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, November 17, 2014 9:06 AM
To: Susan Lauinger; Oskar Rey; Nancy Cox
Subject: Re: FW: tree restoration plan

I found examples of where Merit Homes has repeatedly violated KCC 95.23, which is a factor for code enforcement and tree remediation plans under KMC 1.12.100(d)(1):

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Sam Elder <sam@samelderlaw.com>

Mon, Nov 17, 2014 at 2:28 PM

To: Susan Lauinger <SLauinger@kirklandwa.gov>, orey@kirklandwa.gov

I must disagree with your interpretation of "development activity." The Pre Submittal meeting is definitely development activity as defined by the code. KZC 95.23(5)(a)(1) contains the relevant language. KZC 95.23(5) can only be used when "There is no active application for development activity for the site." The pre-development meeting is part of the MyBuildingPermit.Com application process with the City. It is an active application for development activity. I attached the form. Look at it. It states that it is an application. It calls the person filling it out "the applicant." It states, "I further certify that I have full power and authority to file this application..." It specifically calls it an "Integrated Development Plan." There is no basis for suggesting that Land Use Application #186200 is not an application for development. Take a look at the attachment. Who is suggesting that Land Use Application #186200 is not an application for development?

Sam Elder
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12716 NE 106th Lane
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425-999-8170 phone
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 **PRE14-00281.pdf**
1265K

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Tue, Nov 18, 2014 at 8:28 AM

Hey Sam,

I just wanted to let you know that I need to get a whole bunch of work done for my other permits. All of your concerns have been forwarded to the Code Enforcement team and they and myself are working on them. We may not have an immediate answer for you since you have a lot of concerns for us to address.

I just didn't want you to think we are ignoring you.

This week is super full for me, so I'm expecting to get to this matter next week but also have to coordinate with enforcement and the city attorney.

Later,

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, November 17, 2014 9:06 AM
To: Susan Lauinger; Oskar Rey; Nancy Cox
Subject: Re: FW: tree restoration plan

I found examples of where Merit Homes has repeatedly violated KCC 95.23, which is a factor for code enforcement and tree remediation plans under KMC 1.12.100(d)(1):

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Sam Elder <sam@samelderlaw.com>
To: Susan Lauinger <SLauinger@kirklandwa.gov>

Tue, Nov 18, 2014 at 8:59 AM

No problem. I know that I gave you guys a lot to think about.

[Quoted text hidden]

Oskar Rey <ORey@kirklandwa.gov>

Tue, Nov 18, 2014 at 9:42 AM

To: Sam Elder <sam@samelderlaw.com>
Cc: Susan Lauinger <SLauinger@kirklandwa.gov>

Dear Mr. Elder:

"Development activity" is a defined term under the Kirkland Zoning Code Section 5.10.210:

"Any work, condition or activity which requires a permit or approval under this code or KMC Title 21, Buildings and Construction."

A pre-application conference happens prior to an applicant filing a permit application. As Susan points out, a pre-application submittal does not authorize any "work, condition or activity." It therefore does not amount to "development activity."

Oskar Rey
Assistant City Attorney
City of Kirkland
123 Fifth Avenue
Kirkland, WA 98033
(425) 587-3034
orey@kirklandwa.gov

From: Sam Elder [mailto:sam@samelderlaw.com]
Sent: Monday, November 17, 2014 2:28 PM
To: Susan Lauinger; Oskar Rey

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[Quoted text hidden]

Susan Lauinger <SLauinger@kirklandwa.gov>
To: Sam Elder <sam@samelderlaw.com>

Thu, Nov 20, 2014 at 3:38 PM

Hi Sam,

I'm working through your concerns and investigating the "inaccurate site plans" and need to re-notice the short plat.

Since you offered, I will take you up on the offer of showing me a picture of the white boards' site plans. It saves me a trip. Unfortunately, I did not save an electronic copy of the plans that I laminated.

Thanks for your help.

Susan Lauinger

Planning

425-587-3252

From: Sam Elder [mailto:sam@samelderlaw.com]

Sent: Friday, November 14, 2014 4:04 PM

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RECEIVED
JAN 29 2015
AWI
PLANNING DEPARTMENT PM
BY _____