



CITY OF KIRKLAND
Planning and Community Development Department
123 Fifth Avenue, Kirkland, WA 98033
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**ADVISORY REPORT
FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS**

To: Kirkland Hearing Examiner

From:  **Eric Shields, Planning Director**
Susan Lauinger Susan Lauinger, Associate Planner

Date: **October 5th, 2015**

Subject: APPEAL OF HEDEEN SHORT PLAT; 7921 NE 112TH ST
FILE: SUB14-02156 (See Exhibit A)

SEPA Appeal: Note: this is a dual SEPA/Short Plat appeal see
Separate report for SEPA appeal; file #: SEP14-02240

Hearing Date and Place: **Thursday October 15th, 9:00 a.m.**
City Hall Council Chambers
123 Fifth Avenue, Kirkland

I. INTRODUCTION

- A. Appellants: George and Sarah Finkenstaedt residing at 11158 79th PI NE, Kirkland WA. Joe and Winnie Kates residing at 11136 79th PI NE, Kirkland WA (see Exhibit B).
- B. Actions Being Appealed: The Planning Director decision to approve, with conditions, a short plat application for 6 lots known as the "Hedeen Short Plat" (SUB14-02156) (See Exhibit A)
- C. Issues Raised in Appeal letter (summarized): The appellants dispute several aspects of the short plat approval; the key issues are tree retention in relation to the short plat and Holmes Point Overlay; protection for Bald Eagles; administering regulations for geologically sensitive areas; compliance with the short plat criteria; and, previous practices of King County prior to the City's annexation of the area in 2011.

Note that the appeal letter also includes aspects of the Substantial Development Permit (SDP), which is a shoreline land use permit. The SDP appeal is heard by the Shorelines Hearings Board, and the Hearing Examiner has no jurisdiction to hear the appeal of these issues and Shoreline issues will not be analyzed in this appeal report. See Exhibit C for the letter of appeal.

II. RULES FOR THE APPEAL HEARING AND DECISION

Conduct the appeal hearing on October 15th, 2015. Take oral testimony and argument from parties entitled to participate in the appeal as defined in Kirkland Zoning Code (KZC) Section 145.70. Based on the findings and conclusions of the Hearing Examiner, the Hearing Examiner shall either:

- A. Affirm the decision being appealed;
- B. Reverse the decision being appealed; or
- C. Modify the decision being appealed.

The decision by the Hearing Examiner is the final decision of the City.

III. HEARING SCOPE AND CONSIDERATIONS

The appeal will be an open record appeal hearing. The scope of the appeal is limited to the specific elements of the Planning Director's decision disputed in the letter of appeal, and the Hearing Examiner may only consider comments, testimony and arguments on these specific elements. Per KZC 145.95, the person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision.

IV. PRE-HEARING CONFERENCE

- A. A pre-hearing conference was held by the Hearing Examiner on September 2nd, 2015 to discuss the case schedule for pre-hearing motions, witnesses and exhibits for the applicant, appellants and the City. Per that order, the City offers this report with Exhibits (see list at the end).
- B. Additionally, the City would like to reserve the right to offer a PowerPoint presentation at the hearing, presented by the project planner.
- C. The witness list on behalf of the City is as follows: John Burkhalter, Development Engineering Supervisor and Stacey Rush, Senior Surface Water Engineer.

V. BACKGROUND & SITE DESCRIPTION

- A. Site Location: 7821 NE 112th St.
- B. Planning Director Decision: The Planning Director issued his decision on July 23rd, 2015 as "Approval with Conditions" (See Exhibit A).
- C. Appeal submitted: Per Kirkland Zoning Code Chapter 145.60.2, appeals must be received within 14 days of the date of distribution (date of distribution: July 23rd, 2015). The appellants submitted a timely appeal on August 6th, 2015, within 14 days of the distribution of the decision (see Exhibit C, letter of appeal).
- D. Zoning and Land Use: The subject property is zoned RSA 8, a low density residential zoning designation and contains 56,769 square feet.
- E. Proposal: Divide the parcel into 6 lots.

VI. STAFF ANALYSIS OF ISSUES RAISED IN THE APPEAL

- A. The appeal letter can be found as Exhibit C, and has 5 numbered items of appeal. Each item contains long paragraphs, most of which are comments rather than specific appeal items. Staff has summarized each item of appeal and addressed the general concerns in relation to the criteria for approval of a short plat.

B. Standard of Review for Short Plats in the City of Kirkland:

1. The City's short plat criteria for approval are set forth in Kirkland Municipal Code (KMC) section 22.20.140:

22.20.140 Planning director's decision—Criteria

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, drainage-ways, 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.

2. The KMC section below references decisional criteria that must be met for short plats in the Kirkland Zoning Code (KZC), Chapter 145.45 (2):

145.45 Planning Director's Decision

a. 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:

b. It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and

c. It is consistent with the public health, safety and welfare.

- C. The following is a staff analysis of the Zoning Code and Municipal Code requirements related to the issues raised in the appeal. Staff analysis of the appeal issues are based on the decisional criteria as listed in the KMC and KZC as shown in the previous section. The appeal issues are listed in numerical order as they appear in the letter by the appellants. Note that the appellant's contentions are paraphrased from the appeal letter.

1. Appeal item: Protected Natural Areas (PNA's) and tree retention: The appellants make several comments concerning tree retention and lot size in relation to how many trees might be removed for development of the Hedeen Short Plat. They call out several lot sizes and make assumptions about how many trees should be on each subdivided lot. They ask the question of who will be monitoring the tree requirements. Additionally, there is a comment about a neighboring development approved by King County, and a comment about loss of view.
 - a. Staff Response: This appeal item is unclear in relation to City development standards and criteria for approval of a short plat. The comments about tree retention, the neighboring development called "Dijulio" (which was developed under King County prior to annexation) and view are not specific appeal items, nor is it clear what is being appealed. Appeal item 1 consists of comments and questions.
 - b. Tree Retention Requirements: In Exhibit A, Attachment 3, entitled Development Standards, tree retention requirements are shown as "phased review" for the Hedeen Short Plat as allowed by KZC 95.30.6(a). In phased review, all of the improvements such as houses and utilities are not yet known. Tree retention decisions are made when all impacts to trees are considered. Trees cannot be removed with only a short plat approval; an approved building permit is required to remove trees under "phased review" and the building permit must show all impacts to trees on the site.

2. Appeal item: Tree Canopy Coverage of 40%: The appellants contend that the City should require larger lots for the Hedeen short plat in order to maintain a 40% tree canopy coverage. Additionally, the appellants contend that the Protected Natural Areas (PNA's) which are specific to Holmes Point Overlay are required to have "only 25% understory plants and tree density" and that this is "paltry".
 - a. Staff Response: KZC 95.05 makes the following reference to the Comprehensive Plan: "Comprehensive Plan Policy NE-3.1 describes working towards achieving a City-wide tree canopy coverage of 40 percent". This section of the KZC is an intent section of the code and does not contain specific regulations on the retention of individual trees on individual parcels. The specific regulations for tree retention and supplemental tree planting requirements are found in KZC Chapter 95.30 and are based on tree density credits relative to lot size, not the policy to maintain a city-wide tree canopy coverage of 40%. The Hedeen short plat approval was approved with a phased tree retention plan review as allowed by the Kirkland Zoning Code (Chapter 95.30.6.a).
 - b. The PNA requirements include setting aside 25% of each lot area toward preserving or planting both native trees and understory plants as well as native ground cover. The required minimum tree density within the PNA is 150 tree credits/acre. The remaining portion of the lot is required to meet a minimum 30 tree credits/acre. It is unclear why this is "paltry" or what the appeal issue is in relation to the short plat criteria for approval.
3. Appeal item: Geologically Hazardous Areas: The appellants contend that the City's requirement for the applicant to record a "hold harmless agreement" is the "solution" that the City proposes for the Hedeen property's landslide hazard area. They further contend that this is not consistent with the short plat criteria to "protect the public health, safety, and welfare."

Staff Response:

- a. Facts: Exhibit A contains the Staff Report and approval with conditions for the Hedeen Short Plat. Section VI.B.3 of that report requires that with any building permit proposed for Lot 1, which is where the landslide hazard area lies, another geotechnical evaluation must be prepared by a Geotechnical Engineer. A "Condition of Approval" for this short plat found as item I.B of Exhibit A is shown here:

"Prior to submitting a building permit for proposed Lot 1, the applicant shall obtain an updated geotechnical evaluation for proposed Lot 1 (See Conclusion VI.B.3)"

Section VI.B of Exhibit A has a full explanation of the geotechnical conditions on the site, and was evaluated using the geotechnical report included as Attachment 4 of the staff report (see Exhibit A). The geotechnical report indicates that there are no geologically hazardous conditions. However, the report did not include the area near and below the existing home. Thus, staff conditioned the short plat to be sure that this area will be fully evaluated prior to any building or construction.

- b. Conclusion: On the topic of geologically hazardous areas, public health, safety, and welfare is being protected by the condition of approval found as I.B of Exhibit A, which requires an updated geotechnical report prior to building permit submittal on Lot 1. Geological conditions have been evaluated for the site by a licensed Geotechnical Engineer, and the shortcoming in the report was identified and addressed. The Hold Harmless agreement, which is required for all properties in a geologically hazardous area, is a standard agreement that protects the City from liability. It is also conducive to protecting the public welfare because it alerts current and future homeowners that they have a geologically sensitive area on their site and should thus take the precautions necessary for building in these areas.
4. Appeal item: Shoreline Policies: This appeal item references Section IX of the short plat approval report, which relates to the Shoreline Policies of the city and the Shoreline Substantial Development Permit (SDP). The Kirkland Hearing Examiner has no jurisdiction over appeals of Shoreline permits. Appeals of an SDP are heard by the Shoreline Hearings Board.
Staff Response: The applicant filed an appeal to the Shoreline Hearings Board. Staff referred the appellant to the Department of Ecology, the governing body responsible for guiding appellants of a Substantial Development Permit.
5. Appeal item: General Zoning Criteria: The appellants have specifically referenced the short plat criteria for approval found within the Kirkland Zoning Code, Chapter 145.45 which states:

"the Planning Director may approve a short subdivision only if: It is consistent with all applicable development regulations and, to the extent there is no applicable development regulation, the Comprehensive Plan; and It is consistent with the public health, safety, and welfare."

The appellants contend: "the Hedeem Project is most certainly NOT consistent with the City's development regulations or the Comprehensive Plan, nor is it consistent with public health, safety, and welfare." (Note that the proof offered in the appeal is to reference the entire appeal letter and state that the only thing the Hedeem short plat will do is provide housing). Additionally, the appellants contend that it is "blatantly false" that the Hedeem approval is consistent with all applicable City codes and laws, or with federal regulations and laws.

Staff Response:

- a. Facts: The appellants offer no specific indications that the City's decision is in error. Instead, appellants make a general reference to the entire appeal letter and observe that the short plat will provide additional housing.
- b. The appellants offer no explanation of how the City's decision is inconsistent with City codes and laws or with federal regulations or laws.
- c. Conclusions: The City's decision is based on the criteria for approval of a short plat and the evidence that the criteria have been followed is found in Exhibit A. Attachment 3 of this exhibit provides a list of conditions that must be followed with the development of the Hedeem Short plat. These

conditions, combined with the "Conditions of Approval" were required to ensure that development of the Hedeem property will be consistent with all development codes, the Comprehensive Plan, and public health, safety and welfare.

6. Continued from item 5--Appeal item (last paragraph): In the last paragraph of the appeal letter, the intent of Chapter 95.23 is mentioned in relation to "preserving vegetation in and near streams, and wetlands and in geologically hazardous areas." Again, the shoreline policies are referenced, the landslide hazard area, and the Holmes Point Overlay as well as the "poor execution of previous tree retention plans by developers in the area". The appellants reiterate that the Hedeem short plat approval be "rejected on appeal".

Staff Response: The last paragraph of the appellant's appeal letter appears to be a conclusion of their entire appeal letter with the exception of adding Chapter 95.23 language which references vegetation near streams and wetlands. There are no streams or wetlands on the Hedeem property. Poor execution by developers prior to the City annexing this area is not a pertinent appeal issue in relation to the City's approval of the Hedeem Short Plat.

STAFF RECOMMENDATION:

Per KZC 145.95, the person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision. The appellants have submitted a list of comments, most of which are not specific; nor do they contain any evidence that the Planning Director made an incorrect decision. Staff recommends that the Hearing Examiner uphold the Planning Director's decisions for approval with conditions for the Hedeem Short Plat.

EXHIBITS

- | | |
|-----------|---|
| Exhibit A | Hedeem Short Plat approval with all attachments. Note: not included in this packet due to file size, but was sent to the Hearing Examiner, appellants, and the applicant. |
| Exhibit B | Vicinity Map |
| Exhibit C | Letter of appeal by George and Sarah Finkenstaedt and Joe and Winnie Kates dated and received August 6 th 2015. |

EXHIBIT A –SUB14-02156 NOTICE OF APPROVAL AND STAFF ANALYSIS

The notice of approval, and staff analysis report with all attachments were sent to all parties to the appeal prior to the hearing with the understanding that they would not be included in this packet of materials due to overwhelming file sizes.

All parties confirmed receipt including: The Hearing Examiner, the applicant, and the appellants.

In addition to the Notice of Approval and Staff Report the following attachments were included in that mailing:

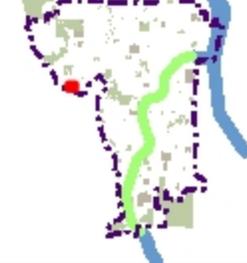
APPENDICES

Attachments 1 through 10

1. Plans
2. Development Standards
3. Geotechnical Report
4. Arborist Report
5. Public Comment Letters (combined)
6. Applicant response to public comment and citizen rebuttal
7. SEPA documents
8. Applicant's proposed Protected Natural Area (PNA)
9. Save Harmless Agreement Geologically Hazardous Areas



APPEAL EXHIBIT B
HEDEEN SUB14-02156



Legend

- Address
- - - City Limits
- Grid
- QQ Grid
- Cross Kirkland Corridor
- Regional Rail Corridor
- Streets
- Parcels
- Place Names
- Buildings
- Lakes
- Parks
- Schools

1: 1,566



Notes

0.0 0 0.02 0.0 Miles

NAD_1983_StatePlane_Washington_North_FIPS_4601_Feet

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RECEIVED
AUG 06 2015

August 6, 2015

To: Eric Shields and Susan Lauinger, City of Kirkland Planning Department
BY _____
AUG 06 2015 PM

From: Sarah and George Finkenstaedt, Winnie and Joe Kates

Subject: **Appeal of Decision Permit Number SUB14-02156 & SHR14-02157**

Thank you for allowing us to appeal the decision to approve the permit to divide the narrow property at 7821 NE 112th Street into 6 lots within the Shoreline jurisdiction and within the Holmes Point Overlay (Hedeem Short Plat).

1. With respect to the Staff Response on p. 7 regarding "Wildlife," it is stated that outside of the "Protected Natural Areas" (PNAs), "[a] 5,000 square foot lot would generally require at least 8 trees . . ." Because four of the six Hedeem lots are between 5,150 and 5,305 square feet, a bare minimum of eight trees should be saved on each (outside of what is required within the PNA); one lot is nearly 6,000 square feet (5,856), and should have at least nine trees saved on it (again, outside the PNA); and the remaining lot of 18,180 square feet should be required to have at least 28 trees saved (outside the PNA). Who will be monitoring these minimal requirements and what are the penalties for failure to comply? At the Dijulio "clear-cut" development nearby, we understand from a neighbor that fines for overcutting were paid for by the proceeds from the timber sale with profits left over. What happened to the Holmes Point Site Disturbance P-suffix Conditions (NS-P23) which are supposed to give additional protections? "All significant trees must be retained." By the way, the staff comment on page 8, near the top, regarding loss of view, refers to loss of view from the lake and from across the lake, not the view from the property.

2. In as much as the City seeks (is committed?) to maintaining a tree canopy coverage of 40% throughout the City – including all the commercial areas – it is incomprehensible why the Planning Department would ignore that goal on a parcel that has 101 existing "significant" trees. The Planning Department admits that "[d]evelopment of smaller lots does make it more difficult to retain existing trees . . ." (p. 8), but the obvious solution of requiring the developer to divide the property into larger lots does not seem to have occurred to the Department as a way to reduce the number of mature "significant" trees that will be removed. Moreover, why has the Planning Department settled for a PNA on each lot that is required only to have a combination of a paltry 25% understory plants and tree density? Again, who will be monitoring these requirements?

3. Section IV.B. regarding "Geologically Hazardous Areas" describes a huge problem. The Planning Department acknowledges that "the property that is proposed to be divided into 6 parcels has a steep slope and is listed on the City's Environmentally Sensitive Map as a possible high landslide hazard area." See p. 11. The proposal to take care of this issue is for the permit applicant to "record a

Hold Harmless Agreement as shown in Attachment 10." However, such agreement would only protect the City in the event of damage to or losses/injuries that occur as a result of "soil disturbance on the 'property' in connection with the construction of improvements." Under this arrangement, only the City is protected, not the land or trees. Or the property owners. This solution hardly seems consistent with the requirement that the City must "protect the public health, safety, and welfare."

4. Section IX. regarding "Shoreline Policies" is similarly deficient in fulfilling the City's required management of new subdivisions of land to "[e]nsure no net loss of ecological functions resulting from the division of land or build-outs of the lots . . ." See p. 13. The Staff Response is silent with respect to this mandate. The facts are that the Hedeem Project will do irreparable damage to the ecological functions currently associated with the property, and there will unquestionably be a huge net loss of such functions if six houses are built on this steep and narrow strip of land. It appears the Staff's only answer to the objections that the Hedeem permit would harm the wildlife species that rely on tree retention and would be detrimental to the protection of Lake Washington and its shorelands, is to state that "Bald Eagles are not specifically protected under the City's codes." See p. 7.

This is a false and ridiculous statement (both in its conclusion and weak analysis). For example, bald eagles are a "Sensitive Species" in Washington—which is defined as follows:

"Sensitive" means any wildlife species native to the state of Washington that is vulnerable or declining and is likely to become endangered or threatened in a significant portion of its range within the state without cooperative management or removal of threats. [WAC 232-12-297, Section 2.6](#)

It is astonishing that the Planning Dept. would assert merely that "Bald Eagles are not specifically protected under the City's codes. Citizens interested in Bald Eagle preservation should contact the Federal Fish and Wildlife office to understand how this species is protected." Not only is this lazy, this position is inconsistent with state law. Bald eagles are specifically protected in Washington—not as an endangered species but as a species that is to be protected by "cooperative management and/or the removal of threats." Allowing the removal of most of the mature trees these birds rely on for survival flies in the face of protecting a Sensitive Species.

Also to ignore completely the status of osprey as a "State Monitor Species" disregards the State of Washington's decision that such species "are monitored for status and distribution. They are managed by the Department, as needed, to prevent them from becoming endangered, threatened, or sensitive. The Wildlife Diversity Division maintains a State Monitor Species list that includes animal species for which we monitor for status and distribution. Little is known about many of these species, but biologists are concerned about their well being." The Planning Dept. failed to even acknowledge the State's concern over osprey and its habitat.

The Department's position that, "The City annexed this area from King County in 2011 and retained the basic zoning that was in place prior to annexation, including the 8 unit/acre density and the Holmes Point Overlay regulations. The proposed Hedeen short plat meets or exceeds established all zoning rules as to maximum density and minimum lot size." This makes no sense: the City annexes property and then is powerless (chooses not) to alter the zoning of the newly acquired land in order to make such land consistent with current neighborhood standards? Kirkland added land in order to degrade property already under its control?

5. Section VI.C. concerning "General Zoning Criteria" demonstrates that the Planning Department is recommending that the City violate the most basic of its obligations to its citizens. The Staff acknowledges that the City may approve an 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." See pp. 11-12. As demonstrated above, the Hedeen Project is most certainly NOT consistent with the City's development regulations or the Comprehensive Plan, nor is it consistent with public health, safety, and welfare. The only thing approving the application does is provide additional housing. However, the Staff's Conclusion that "the proposed development provides additional housing consistent with all applicable City codes and laws," is blatantly false. Nor is the proposed development consistent with federal regulations and laws.

As mentioned in section 95.23, the intent of preserving vegetation in and near streams and wetlands and in geologically hazardous areas is to support the functions of healthy sensitive areas and sensitive area buffers and / or avoid disturbance of geologically hazardous areas. The approval of this permit will violate all principals identified in the Kirkland Zoning Code (KZC 95.05) on what is now a significantly wooded site. The combination of preserving views from the Lake and across the lake, the landslide hazard area, the shoreline jurisdiction, the Holmes Point Overlay and the poor execution of previous tree retention plans by developers in the area demand the permit (as it now stands) be rejected on appeal.

Respectfully submitted,

Sarah and George Finkenstaedt
Winnie and Joe Kates
Residents
Kirkland, WA 98034

cc: Amy Walen, Mayor
Penny Sweet, Deputy Mayor
Jay Arnold, Council Member
Shelley Kloba, Council Member
Toby Nixon, Council Member
Dave Asher, Council Member
Doreen Marchione, Council Member
Eric Shields, Director, Kirkland Planning & Community Development

Here are two mature bald eagles in the Holmes Point Overlay, approximately 200 yards from the shoreline directly on or immediately adjacent to the Hedeem property. They perch, roost and nest in tall trees between Juanita and Kenmore along the northeastern shore of Lake Washington. They will not perch, roost or nest in the replacement trees suggested by the Kirkland planning staff.





Here is an example of the recent clear-cut development (Dijulio property outlined in blue) two lots to the west of the Hedeen property (red). No mature trees were retained, but “replacement” trees were planted. Before the clear-cut, the area looked much like the area outlined in red, which is the Hedeen Short Plat.

These 5 houses (below) now occupy the clear-cut area (Dilulio) seen above. Very little habitat in the form of trees, shrubs, or ground cover exists, though they have planted some small trees to replace the large trees that were removed. This appears inconsistent with the outcomes envisioned by the City of Kirkland 2013 Urban Forestry Strategic Management Plan. We fear a similar outcome with the approval of the Hedeen Short Plat and Substantial Development as currently submitted.



