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THE HEARING EXAMINER OF THE CITY OF KIRKLAND

<p>IN RE:</p> <p>Aesthete Studio, LLC</p> <p>Hearing on Notice of Violation</p>	<p>Case No. COM21-00190</p> <p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.</p>
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Overview

Kristen Shuma, on behalf of Aesthete Studio, LLC, was issued a Notice of Civil Violation (“NOCV”) asserting several code violations associated with construction of a single-family home at 9050 NE 117th Pl, Kirkland. Specifically, the NOCV asserts that Ms. Shuma¹ failed to implement required erosion control measures, failed to protect a tree from construction, failed to have a vertical cut slope adequately stabilized and removed a protected tree without authorization.

The erosion control, tree protection and vertical cut counts are sustained. Ms. Shuma will have to take corrective action for the vertical cut by July 15, 2021 and on the erosion control and tree protection measures July 21, 2021. The corrective actions that need to be taken are outlined in more detail at the end of this decision.

¹ References to Ms. Shuma in this Decision should be construed as including Aesthete Studio, LLC.

1 The tree removal allegation is dismissed because as outlined in Finding of Fact No. 4
2 below, the City has not met its burden of proof that Ms. Shuma removed a tree on her
3 property.

4 **Exhibits**

5 The April 13, 2021 staff report with its 24 attachments was admitted as Ex. No. 1
6 during the hearing. The staff PowerPoint was admitted as Ex. 2.

7 **Findings of Fact**

8
9 1. Notice of Civil Violation. Aesthete Studio LLC and Ms. Shuma were cited
10 with the NOCV under review on April 13, 2021. The NOCV cited Ms. Shuma with
11 violating KMC 21.06.260 (suspension or revocation); KZC 115.35 (erosion and
12 sedimentation); KMC 1.12.100 (tree regulation enforcement) and IBC Chapter 33
13 (safeguards during construction). As outlined in the Conclusions of Law herein, these
14 code provisions have little to do with the actions subject to the NOV, which are failure
15 to implement required erosion control measures; failure to adequately protect a cut into
16 a steep slope; failure to protect a tree from construction; and unauthorized removal of a
17 protected tree.

18 2. Subject property/Ownership. The subject property is located at 9050 NE 117th
19 Pl, Kirkland and is owned by Aesthete Studio LLC, Registered Agent Kristen Shuma.
20 The property is under development for what appears to be a three story single-family
21 home.

22 3. Unprotected Slopes. Ms. Shuma has failed to have a vertical slope cut
23 evaluated and stabilized by a geotechnical engineer as required by City regulations and
24 permit terms and conditions. The cut was made in a moderate to high landslide hazard
25 area as identified in the City of Kirkland Landslide Susceptibility Map and page 3 of the
26 Applicant's geotechnical report, att. 7. The geotechnical report concludes that
27 "*provided the recommendations within this report and subsequent geotechnical*
28 *recommendations are incorporated into the design and construction of the project, the*
29 *proposed project will not decrease the stability of the site and surrounding properties.*"
30 The report makes several recommendations, including that any temporary excavation
plans would have to be further reviewed by the geotechnical engineer. See p. 6, att. 7.
Staff assert that Ms. Shum has not complied with the recommendations of the Geotech
report or commissioned a separate report to evaluate the vertical cut. Ms. Shuma does
not dispute this assertion.

4. Unauthorized Tree Removal/Absence of Tree Fencing. Ms. Shuma has failed to
protect one of the trees at the project site, labelled Tree No. 8, with fencing as required

1 by City regulations. Ms. Lunde had conducted a site visit on the day of hearing and
2 found that fencing for the tree was still missing. Tr. 5. As evidenced by email
3 communications between Ms. Shuma and City staff, Ms. Shuma was advised of the
4 need for tree fencing on at least two separate occasions. See att. 10, 3/30/21 email; att.
5 22, 6/7/21 email. Ms. Shuma does not deny that she hasn't yet placed fencing around
6 the tree. One of the project drawings at p. 12 of the Agenda Packet, att. 4, identifies
7 where tree protection fencing is required.

8 The NOCV also asserts that Ms. Shuma removed a tree, labelled Tree No. 23, without
9 authorization in violation of the City's tree retention standards. Ms. Shuma denies the
10 removal, stating that the tree came down as the result of a storm. As evidence she
11 submitted pictures of a tree trunk that appears to have been split by natural forces at its
12 trunk. See att. 23. Given that the City has the burden of proof per KMC 1.12.050(c)
13 and that Ms. Shuma has been forthright about all other NOCV violations, it is
14 determined that Ms. Shuma did not remove Tree No. 23.

15 One of the corrective measures requested in the NOCV and staff report is
16 "supplemental planting prior to final inspection." The staff report an NOCV do not
17 identify why planting, is necessary, what replanting is necessary and what code
18 provision requires the planting. As best as can be ascertained, the planting would be
19 required if the Applicant had removed Tree No. 23. Since the tree has not been
20 removed by Ms. Shuma and there is no clear explanation as to why planting is required,
21 no planting will be required as part of this code enforcement decision.

22 5. Erosion Hazards. Ms. Shuma has failed to comply with the erosion control
23 measures identified on her approved building permit plans, att. 5&6, and in her
24 geotechnical report. Ms. Lunde, one of the City's code enforcement officers, testified at
25 hearing that some erosion control measures are in place, but they are inadequate and
26 displaced and the site has yet to pass an erosion control inspection. Tr. 4. Ms. Lunde's
27 last inspection of the project site was on the day of hearing, when erosion control
28 measures were still missing. Tr. 5. Ms. Shuma does not deny that she has failed to
29 install required erosion control measures.

30 6. Hearing. A virtual hearing on the NOCV was held on 9:30 am, June 17, 2021
by the Zoom meeting application.

Conclusions of Law

1. Jurisdiction. KMC 1.12.050 provides that the hearing examiner shall conduct a
hearing and issue a final decision on the validity of Notices of Violation.

1 2. Alleged Code Violations. The code sections of the NOV identified in Finding of
2 Fact No. 1 are quoted below in italics and applied via corresponding conclusions of law.

3 **KZC 115.35:** *It is a violation of this code for the owner of the subject property to*
4 *create, allow or perpetuate conditions on the subject property which cause the erosion*
5 *or undermining of adjacent property. It is also a violation of this code for the owner of*
6 *the subject property to create, allow or perpetuate a condition which causes the*
7 *deposition of sediments or the movement of other geologic materials onto adjacent*
8 *property.*

8 3. No Violation: Ms. Shuma has not violated KZC 115.35. There is no evidence that
9 Ms. Shuma has caused damage to adjoining properties as contemplated in KZC 115.35.

10 KZC 115.35 prohibits conditions that “cause” the erosion or undermining of adjoining
11 property or the deposition of geologic materials onto adjacent property. There is no
12 evidence in the record that any such erosion, undermining or deposition has occurred on
13 adjoining properties. KZC 115.35 does not prohibit conditions that “can cause” damage
14 to adjoining property, but is rather worded to require that the property owner “causes”
15 such damage. There are presumably numerous City development standards that
16 specifically require implementation of erosion control measures. Those are the types of
17 regulations that should have been cited in the NOCV for what the City had intended to
18 assert.

17 **KMC 1.12.100c1:** *It is unlawful to remove or damage trees in violation of the tree*
18 *regulations in Chapter 95 KZC. Tree removal shall include the removal of a tree,*
19 *through either direct or indirect actions, including but not limited to: (A) clearing,*
20 *damaging, girdling, or poisoning, in each case, resulting in an unhealthy or dead tree;*
21 *(B) topping that results in removal of more than twenty-five percent of the live crown;*
22 *or (C) damage to roots or trunk that is likely to destroy the tree’s structural integrity.*

22 4. No Violation. The NOCV only generally references that Ms. Shuma has violated
23 KMC 1.12.100. It’s unclear what specific sections the City had in mind. Presumably
24 KMC 1.12.100c1 was one of the provisions, as it prohibits the unauthorized removal of
25 trees as alleged in the NOCV. As determined in Finding of Fact No. 4, the record does
26 not support a finding that Ms. Shuma removed a protected tree without authorization.

26 The NOCV also asserts that Ms. Shuma failed to protect a tree from construction with
27 fencing. There is no specific referencing to fencing standards in KMC 1.12.100. The
28 fencing standard that the City has in mind appears to be KZC 95.34(2)(a), which if
29 correct should have been cited in the NOCV.
30

1 **IBC 3304.1.1:** *Slopes for permanent fill shall be not steeper than one unit vertical in*
2 *two units horizontal (50-percent slope). Cut slopes for permanent excavations shall be*
3 *not steeper than one unit vertical in two units horizontal (50-percent slope). Deviation*
4 *from the foregoing limitations for cut slopes shall be permitted only upon the*
presentation of a soil investigation report acceptable to the building official.

5 5. Questionable Violation: The 2015² International Building Code does not apply to
6 detached single-family homes less than three stories above grade plane in height with a
7 separate means of egress. IBC 101.2. Given that the home at issue appears to be three
8 stories, it's not clear why the IBC as opposed to the IRC is applied to the proposal in the
9 NOCV. Some of the building plans identify that the home is subject to the IRC while
10 others identify it as subject to the IBC. See e.g. Agenda Packet, p. 27 (identifying the
11 IBC as the "governing code"); Agenda Packet p. 12 (identifying the IRC as the
12 "applicable code"). It's possible that IBC 3304.1.1 is cross-referenced into the IRC or
13 something of that nature. Regardless, the issue need not be resolved since geotechnical
14 review and stabilization of the cut slope is otherwise required by Ms. Shuma's
15 geotechnical report as outlined in Conclusion of Law No. 6 below. It is also noted that
16 since the cut was made into a landslide hazard area protected by the City's critical area
17 regulations, the NOCV could have also referenced the violation as a violation of critical
18 area regulations.

19 **KMC 1.12.040a:**

20 (a) *Issuance.*

21 (1) *When the applicable department director determines that a violation has occurred*
22 *or is occurring, and is unable to secure voluntary correction pursuant to Section*
23 *1.12.030, the applicable department director may issue a notice of civil violation to the*
24 *person responsible for the violation.*

25 (2) *The applicable department director may issue a notice of civil violation without*
26 *having attempted to secure voluntary correction as provided in Section 1.12.030 under*
27 *the following circumstances:*

28 ...

29 (D) *When the person knows or reasonably should have known that the action is*
30 *in violation of a city regulation.*

² The building plans admitted into the record suggest that the project is vested to the 2015 building codes, although the City has since adopted the 2018 building codes.

1 6. Ms. Shuma Has Failed to Conform to Permit Conditions. Ms. Shuma has failed to
2 comply with conditions on her building permit that require conformance to steep slope,
3 tree protection and erosion control measures.

4 As outlined in KMC 1.12.040a, quoted above, the City is authorized to issue an NOCV
5 for code violations. KMC 1.12.020(o) defines “violation” to be an act or omission
6 contrary to a development regulation. KMC 1.12.020(k) defines a regulation to include
7 the terms and conditions of any permit or approval issued by the City. Ms. Shuma’s
8 compliance with the requirements and recommendations of her geotechnical report,
9 erosion control plan and building permit site plans are construed as part of the “terms”
10 of her building permit approval. As determined in Finding of Fact No. 3, 4 and 5, Ms.
11 Shuma has not complied with those terms. Consequently, the NOCV properly alleges
12 that Ms. Shuma has violated City regulations by failing to implement required erosion
13 control and tree protection measures and failing to have her cut slope evaluated and
14 stabilized by a geotechnical engineer.

15 **KMC 1.12.040 (e)(1):**

16 (A) *The penalty for first-time violations is one hundred dollars per day for each
17 violation; ...*

18 7. Daily Fines Authorized. KMC 1.12.040 (e)(1) authorizes daily fines of \$100 per
19 day for each violation. The City has requested imposition of daily fines if Ms. Shuma
20 fails to meet the compliance deadlines set by this Decision. Since daily fines
21 authorized, the request is granted.

22 **KMC 1.12.060(d):** *Recovery of Costs and Expenses. The costs, including incidental
23 expenses, of correcting the violation shall be billed to the person responsible for the
24 violation and/or the owner, lessor, tenant or other person entitled to control, use and/or
25 occupy the property and shall become due and payable to the city at the permit center
26 within ten calendar days. The term “incidental expenses” includes but shall not be
27 limited to personnel costs, both direct and indirect, including attorney’s fees; costs
28 incurred in documenting the violation; hauling, storage and disposal expenses; and
29 actual expenses and costs of the city in preparing notices, specifications and contracts,
30 and in accomplishing and/or contracting and inspecting the work; and the costs of any
required printing and mailing.*

8. Cost Recovery Authorized. KMC 1.12.060(d) authorizes the City to recover the
costs for this code enforcement action. The City has requested this cost recovery if Ms.

1 Shuma failed to meet the compliance deadlines set by this Decision. Since cost
2 recovery is authorized, the request is granted.

3 **Decision**

4 1. The erosion control and vertical cut allegations of the NOCV are sustained. The
5 tree allegations are dismissed.

6 2. Ms. Shuma is subject to the following correction deadlines:
7

8 A. Abatement of the erosion control violations by July 21, 2021.

9 *Install TESC and cover exposed soils per best management practices as*
10 *identified on the approved plans and in the approved geotechnical report*
11 *for permit BSF19-03158 (see Attachments 5 & 7). Schedule and pass*
12 *inspection by July 21, 2021.*

13 B. Abatement of vertical cut violation by July 15, 2021.

14 *Have a geotechnical engineer review and evaluate slope stability at area*
15 *of cut and provide guidance for shoring if necessary. If report cannot be*
16 *completed by July 15, 2021 deadline, provide documentation of a signed*
17 *contract to have the work completed. Once the report has been*
18 *completed, complete all recommended mitigation measures within 14*
19 *days. In lieu of a geotechnical report, City staff may authorize to have*
20 *the wall shored by July 15, 2021 if that can be safely done without*
21 *geotechnical review.*

22 C. Abatement of tree protection violation by July 21, 2021


23 *Install and maintain tree protection for Tree No. 8 using T-posts and tall*
24 *construction webbed fencing by July 21, 2021.*

25 3. Failure to meet the three correction deadlines shall be subject to a fine of \$100
26 per day per each of the three continuing violations.

27 4. The City is authorized to recover costs and incidental expenses for this
28 enforcement action pursuant to KMC 1.12.060 if all correction deadlines are not
29 met.

30 ORDERED this 2nd day of July 2021.

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Phil A. Olbrechts

City of Kirkland Hearing Examiner

Appeal

An appeal of this Decision must be filed with superior court within twenty-one calendar days from issuance as required by the Land Use Petition Act, Chapter 36.70C RCW.