

**CITY OF KIRKLAND HEARING EXAMINER
FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

In the Matter of Appeal of

**OVERLOOK FINN HILL HOMEOWNERS
ASSOCIATION and IRENE GIUSTINA,**

Hearing Examiner File:

SUB-22-00036

(Finn Hill 8 Short Plat)

from a decision by the Director, City of Kirkland
Planning and Building Department.

1. FINDINGS OF FACT

1.1 Proposal. The City of Kirkland Planning and Building Department issued a short plat approval dividing one .7-acre parcel into four lots. At 8230 NE 117th Street, in Kirkland's Finn Hill neighborhood, the plat would accommodate four single family residences and four accessory dwelling units. Neighbors Overlook at Finn Hill Homeowners Association and Irene Giustina appealed the decision to the Hearing Examiner.

Applicant. Legacy Group Capital, 400 112th Ave NE, Suite 400, Bellevue WA 98004.

Property Owner. DKWozniak Design Build LLC, 10834 NE 68th Street, #B3, Kirkland, WA, 98033; Finneight LLC, 400 112th Ave NE, #400, Bellevue, WA 98004.

1.2 Hearing. An open record public hearing was held June 14 and 15, 2023. The hearing was conducted remotely. Access information was provided to the public to allow citizens to join via video link or telephone. The parties to the appeal also appeared. Ms. Croll, City Attorney's Office, represented the Department; Mr. Telegin, Telegin Law PLLC, represented the Appellants; and Mr. Gribben, Helsell Fetterman LLP, represented the applicant and property owners ("Applicants").

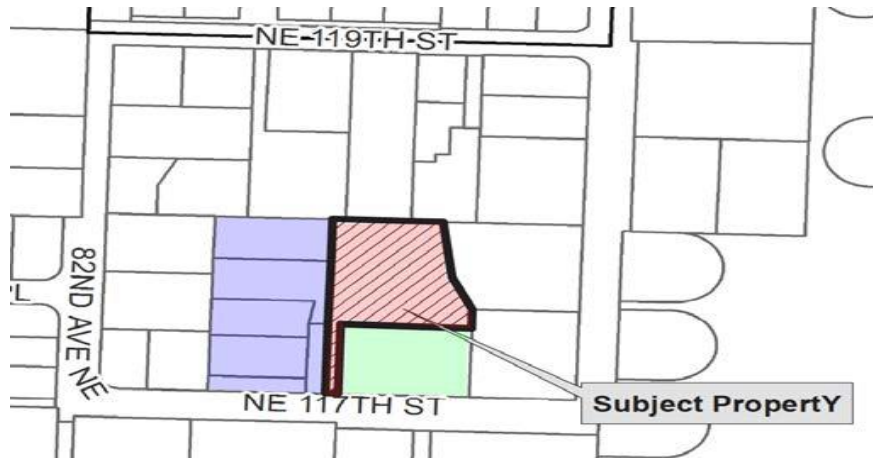
1.3 Witness Testimony. During the portion of the proceeding devoted to public input, six citizens testified. Appendix 1 identifies those citizens. Public testimony is summarized in Finding 1.7. During the portion of the proceeding devoted to the appeal, the parties called these witnesses:

- **Department:** Martha Rubardt, Department Planner; Tuan Phan, Public Works Development Engineering Supervisor; and, Nicholas Cilluffo, Department Planning Supervisor.
- **Appellants:** Irene Giustina and Mike Hurley. Ms. Giustina owns the adjacent property, including an area the Applicants intend to use for access. Mr. Hurley belongs to the Finn Hill Homeowners Association and owns one of the four homes composing it.

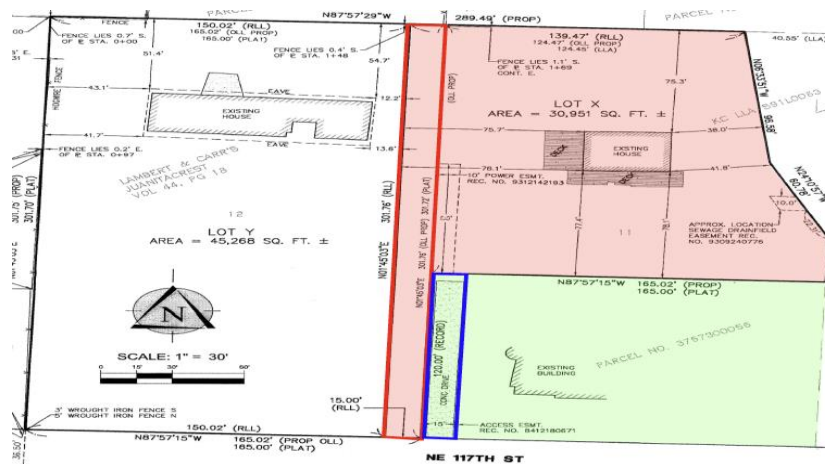
- **Applicants:** Terrance Wilson, an attorney representing Legacy Group Capital and Moira Haughian, Project Manager and Entitlement Manager Lead for Legacy Group Capital.
- **Appellants/Rebuttal:** Rob Cooper, Ms. Giustina’s husband, was called to rebut Mr. Wilson’s testimony.

1.4 Administrative Record. Appendix 2 lists the admitted exhibits.

1.5 Project Area and Access Locations. The below diagram shows where the plat is and where Appellants reside. The project site is pink, the Homeowners Association area is blue, and Ms. Giustina’s property is green.¹



The diagram below depicts Property access. The green area lined with blue is the access Ms. Giustina states is hers. The pink area lined with red is the Applicants’ and provides access.²



¹ Exhibit 3 (Appellants’ response brief, p. 3. The image is from the City’s plat decision, Att. 1, Vicinity Map, attached to the Telegin Dec.). Appellants added the color. The image was resized to fit this page.

² Exhibit 3 (Appellants’ Response to Motions to Dismiss, p. 7. The image is from the Giustina Dec., p. 9 and Ex. F). Appellants added the color. The image was resized to fit this page.

In hearing testimony and by declaration, Ms. Giustina described a 2005 deed exchange in which she conveyed a 4,500 square foot “pan handle” access to the previous property owner, Mr. Hatch. In the described deed exchange, in which the parties quit claimed their respective interests, Mr. Hatch conveyed his interest in the easement that had crossed her property. Recorded deeds document the described exchange.³ The excise tax affidavit accompanying the deed from Mr. Hatch to Ms. Giustina describes the purpose of the exchange as “to move driveway.”⁴ Mr. Hatch detailed the deal with a neighbor, Mr. Winkler, who provided a comment letter, recounting the exchange.⁵

The Appellants contend this trade eliminated Mr. Hatch’s earlier blue lined easement area but provided him with the 15-foot-wide access outlined in red. The Appellants allege that in approving the plat, the Department incorrectly relied on both the red and blue-lined areas. The Department agreed that had it known about these circumstances, it would not have made the decision it did.

Ms. Croll: If [you] received that information before you determined, before you issued your decision, would you have issued your decision, or would you have not issued the decision the way it was issued?

Ms. Rubardt: I would have not issued the decision the way it was issued.⁶

1.6 History of the Applicants’ Panhandle Property and Ms. Giustina’s Adjacent Property.⁷ The parties do not dispute the Applicants acquired property interests Mr. Hatch originally owned, which include his pink 15-foot access strip lined in red in the earlier diagram. They do dispute whether the Applicants also hold a property interest in the 15-foot access area Mr. Hatch used to use to access his home. At the hearing, Ms. Giustina provided background on why she and her late husband provided the 15-foot access strip to Mr. Hatch in exchange for his relinquishment of an easement across their property. At the time, they had young children and were often outdoors. Mr. Hatch was a bachelor then and drove at speeds across the easement which alarmed Ms. Giustina and her husband. The issue was discussed with Mr. Hatch but not resolved. Ultimately, a solution was arrived at.

In exchange for Mr. Hatch’s easement rights, Ms. Giustina testified that she and her husband proposed providing him with a 15-foot “slice” of the property they owned next door. Once this occurred, Mr. Hatch would use that 15-foot “panhandle” to access his property. He would no longer cross Ms. Giustina and her husband’s property and the safety and nuisance concerns they had would be resolved.

After the property rights exchange, the parties do not dispute the easement became blocked. Mr. Hatch and his father built a retaining wall across the old easement. Ms. Giustina had a fence and landscaping installed, which also blocked it. Mr. Hatch married, and his wife planted Douglas firs on

³ Exhibit 3 (Appellants’ Response to Motions to Dismiss, pp. 7-8; Giustina Dec., pp. 9-10, Exs. G and H).

⁴ Exhibit 3 (Giustina Declaration, Ex. D).

⁵ Exhibit 6 (Appellant’s Comment Letter, Ex. A).

⁶ Hrg. Audio, Day 1 at 3:54:12-3:54:30.

⁷ The property is held in trust, with Ms. Giustina as trustee. For ease and efficiency, the property is simply described as her property.

the Hatch side which further blocks his former access route. Both parties took measures to block the area Mr. Hatch had formerly traversed, rendering passage impossible.

Consistent with this history, 12 years ago, in 2011, when Mr. Hatch was exploring land development, he informed the City that his “panhandle” provides the only access to his property.

Hi Chris – as I mentioned in my voice mail, I did discuss the short plat potential for your property with Public Works and Fire **based on the limited 15’ wide panhandle for access**. Both Departments thought it would be feasible to use the access if there were no alternatives. As part of the review, we would work with you to see if there was **any opportunity to share access with the Chaffey subdivision or consolidate driveways with the neighbor to the east**.⁸

The current conditions, which Ms. Giustina described as resulting from the land exchange, are apparent today. One need not enter the property to discern this. The blockage is obvious from the road.⁹ After the formerly used easement area was blocked and not used for access for nearly two decades, it did not occur to Ms. Giustina that anyone would attempt to undo the earlier land exchange. So, when she reviewed the cities’ notice posted for the plat, it did not occur to her that this new development intended to use this area of her property. This is evident from her comment to the Department. “It is unclear on the map as to how the ingress and egress of 8-16+ cars will navigate the single lane private road that accesses the property.”¹⁰ The Department acknowledged this at the hearing.

Mr. Telegin: Does [Ms. Giustina’s comment letter of May 2, 2022] strike you as the comment of somebody who understood the Applicant was going to pave over part of their land and chop down their hedge?

Ms. Rubardt: No.¹¹

This is not a standard easement use matter. In hearing testimony, the Department recognized that while off-site easements have been used without issue in the past, these projects did not involve contested situations. Unfortunately, the issue was not sorted earlier in the review process for a variety of reasons. That the plat would be using Ms. Giustina’s property for access is not evident from the notice. Project boundary lines appear to encompass not her property, but the flag shaped lot.¹² Ms. Giustina did not discover this was the plan until a neighbor reviewed additional documents from the City and appraised Ms. Giustina of the project’s true scope.¹³

⁸ Exhibit 3 (Appellants’ Response to Motions to Dismiss, p. 17 and Telegin Declaration, Ex. C), emphasis added. *See Pelly v. Panasyuk*, 2 Wn. App.2d 848, 864-866 (2018) (Washington follows “context rule” in interpreting deeds, which considers the circumstances, subject matter, and objective of the transactions, the parties subsequent conduct, and statements the parties made).

⁹ Exhibit 8 (Applicants’ Google View of Property); Exhibit 3 (Giustina Dec., p. 15 and Ex. L).

¹⁰ Exhibit 5 (Staff Report, Att. 1 at p. 75, e-mail comment from Ms. Giustina to Department, April 29, 2022).

¹¹ Hrg. Audio, Day 1 at 2:11:26-2:11:39.

¹² Exhibit 8 (Department Presentation, Slides 5 and 6. The plat notice depicting the proposal states “[p]roposed Private 15’ ingress, egress, landscape & utility easement.” This is visible on Slide 6).

¹³ Testimony, Ms. Giustina.

The Department did not directly contact Ms. Giustina to confirm the Applicants held the property rights they said they did, instead relying on the title report and survey the Applicants provided.¹⁴ The Department did request that the Applicants coordinate with the property owner and further document access.¹⁵ A month later, the Applicants reported back that “coordination is ongoing with the neighbor regarding this development.”¹⁶ This statement implies Ms. Giustina knew of the Applicants’ plans and did not dispute them. However, the Applicants never reached out to her although her address is easily obtained. As the taxpayer of record, her contact information is readily available.¹⁷

The Applicants’ counsel, Mr. Wilson, testified that he spoke with Ms. Giustina’s husband, Robb Cooper, who has no ownership interest in the Giustina property and does not represent Ms. Giustina. On rebuttal, Mr. Cooper was called. He stated he had no interest in the property and did not represent Ms. Giustina, and never represented otherwise. He stated he had told Mr. Wilson that the easement was no longer valid, he believed there was a recorded document to that effect from the property owner, and that Mr. Wilson needed to “do [his] homework and check before [he went] any further.”¹⁸ The evidence presented does not show there was coordination with Ms. Giustina or her authorized representative.

A month after Mr. Wilson spoke to Mr. Cooper in January of 2023, the Applicants contacted David Winkler to inquire about purchasing a strip of land across Mr. Winkler’s property, connecting the project site to 84th Avenue NE.

I communicated with several Legacy Group Capital members – Micah Woody and Moira Haughian – about selling my property but the resulting offer was too low. I later received a phone call from a man representing the Legacy group, did not get his name, asking if we would sell only the front south side of my property below the driveway, which I was not interested in doing. I was not told why they wanted the strip of land below my driveway. This conversation occurred around the end of February 2023.¹⁹

If there were no easement right issues, there would have been no need for this inquiry. The Department and the former property owner Mr. Hatch knew of these issues in 2011. The Applicants certainly knew by January of 2023, if not earlier. Although a mere site visit would appraise one further investigation is needed,²⁰ there is no record here of additional enquiry with Ms. Giustina.

Given the lack of communication with Ms. Giustina and the erroneous representation to the Department, it is apparent there was an effort to avoid fully describing the circumstances surrounding access to the Department. Ms. Giustina has since filed a quiet title suit in Superior Court, which is

¹⁴ Exhibit 5 (Staff Report, Att. 3 (survey) and Att. 4 (title report)); Testimony, Ms. Rubardt.

¹⁵ Exhibit 3 (Haughian Declaration, Ex. G, Department’s June 27, 2022 request, at p. 3, which states: “Show that the subject property has legal access to utilize that ingress egress easement. The 8300 NE 117th St property’s driveway is located within that easement area so please coordinate with that property owner for access.)

¹⁶ Exhibit 5 (Staff Report, Att. 6, p. 214, which is the Applicants’ Comment Response).

¹⁷ Exhibit 9 (King County Property Records).

¹⁸ Hrg. Audio, Day 2 at 3:48.

¹⁹ Exhibit 6 (Appellants’ Comment Letter, Att. A).

²⁰ Exhibit 8 (Applicants’ Google View of Property); Exhibit 3 (Giustina Dec., p. 15 and Ex. L).

now pending. At the hearing, as noted above, the Department stated that had it been aware of the information Ms. Giustina had put forth, it would not have decided as it did.

1.7 Public Testimony, Summary.²¹ Public testimony focused on the family centered nature of the area and constrained road access issues. Children play and ride bicycles, and there are many walkers within the immediate area surrounding the project site. Safety is already problematic with concerns over vehicle and pedestrian conflicts due to the narrow right of way (essentially a one lane road), vehicle speeds, and limited parking available. The street is unpainted with no center line, there are hidden driveways, no sidewalks, and blind corners. It is a difficult area for vehicular movement, including backing out of driveways.

For the homes within the adjacent Overlook at Finn Hill Homeowners Association there is a private street providing access to the four homes. Traffic levels on that street in conjunction with its narrow width mean access is easily blocked by resident vehicle movement coupled with delivery and service provider trips. In the four homes alone, there are 19 people (families with children) and 13 cars. That's for just four residential units, none with car collectors or borders. Due to the limited street parking, neighbors often park there, though it is a private access drive. In evaluating the present situation and assessing the plan for eight units, commenters did not see how the project could work. Commenters even viewed four new homes as a challenge. Citizens explained that as it is now (without the project and other projects now proposed), there are days residents in the Association area come home and cannot access their homes. The public's concern is that with eight new residences and the associated 20+ additional vehicles, these issues will be exacerbated.

Another access-related concern raised was how the limited space can accommodate the additional garbage cans. With three per home, that would be 24, which there is no room for. Even based on four homes, that is 12, and citizens testified that even that number cannot be accommodated. As with access and safety concerns, added detail was provided on this issue in earlier comment submitted to the Department.

A fourth concern is the impact of 8 to 24 additional garbage/recycle bins on NE 117th Street. (between 82nd and 84th Ave NE) As of now, there can be up to 36 garbage/recycle bins along this section of NE 117th Street on garbage day. The added garbage/recycle bins will have to be placed in front of neighbor's homes since none of these houses and ADUs front a public street.²²

In their comments, the neighbors did not look to the Applicants to remedy existing conditions, or for the Department to complete SEPA or concurrency review, but for the Department to consider project impacts and how existing conditions would be exacerbated, including whether infrastructure and access is sufficient to support the project.

²¹ See the recording for the complete comments.

²² Exhibit 5 (Staff Report, Att. 1 at p. 76, e-mail comment from Ms. Giustina to the Department, April 29, 2022).

2. CONCLUSIONS OF LAW

2.1 Jurisdiction. The Hearing Examiner has jurisdiction over short plat appeals.²³ The Hearing Examiner conducts a public hearing and issues a decision. Examiner jurisdiction was addressed in the Examiner’s Order on Motions to Dismiss, which is incorporated.

2.2 Standard of Review. “The person filing the appeal has the responsibility of convincing the Hearing Examiner that the Planning and Building Director made an incorrect decision.”²⁴ In presenting its application to the Department, “[t]he applicant has the responsibility of convincing the Planning and Building Director that, under the provisions of this chapter, the applicant is entitled to the requested decision.”²⁵ If an appellant meets its burden to show an applicant did not demonstrate it was entitled to the decision, so the decision cannot be affirmed, the Department’s decision is reversed or modified.²⁶

2.3 Issues. The Appellants raised appeal issues 1-10. As addressed by previous order²⁷ and at hearing, Issues 6 (construction impacts), 7 (open space and parks), and 10(b) and (c) (signature requirements and digging up private roadway) were withdrawn. Before the Examiner are these issues:

- Issue 1 – Density;
- Issue 2 – Access;
- Issue 3 – Road Conditions;
- Issue 4 – Street Parking;
- Issue 5 – Access Width;
- Issue 8 – Criteria for Short Plat Approval;
- Issue 9 – Development Regulations; and,
- Issue 10(a) – Application on land the Applicants do not own.

2.3.1 Density (Issue 1). The decision determined that each of the four lots on the original .7-acre parcel “may contain one principal detached dwelling unit and up to two ADUs (and any detached ADUs may be independently owned or rented).”²⁸ Appellants challenged this contention.²⁹

The site is zoned RSA-6, which provides that “the maximum units per acre is six dwelling units.”³⁰ This requirement is contained within what the code calls “special regulations,” or here, KZC 15.30 Special Regulation DD-17c. While the parties do not dispute that the four single-family homes

²³ Ch. 145 KZC; KZC 145.60(4) (“Appeals from the decision of the Planning and Building Director will be heard by the Hearing Examiner.”).

²⁴ KZC 145.95.

²⁵ KZC 145.35.

²⁶ KZC 145.105.

²⁷ Order on Motions to Dismiss (May 30, 2023).

²⁸ Exhibit 3 (Telegin Dec. Att. A, Department’s Decision, pp. 3-4).

²⁹ The Department and Applicants argue the plat approves no development so this issue need not be addressed. This contention was addressed in the Order on Motions to Dismiss. The Department did address density. Under Washington land use law, absent appeal that decision is final. The Order, which is incorporated, elaborates.

³⁰ KZC 15.30, Special Regulation DD-17c.

meet density requirements, the Appellants' position is that with the added four ADU's on the .7-acres, that does exceed density requirements. Due to code language lifting certain ADU requirements, the Department did not interpret the regulations as limiting density for ADUs.

Two (2) accessory dwelling units (ADUs), including either one (1) attached ADU and one (1) detached ADU, or two (2) of either type, are permitted per single-family dwelling; provided, that an accessory dwelling unit shall not be considered a "dwelling unit" in the context of Special Regulations in Chapters 15 through 56 KZC **which limit the number of detached dwelling units on each lot to one (1).**³¹

This language provides that Special Regulations limiting detached dwelling units to one per lot do not apply to ADU's. The Department's and Applicants' interpretation is this language lifts the density restriction. The Appellants' position is that the regulations should be interpreted more narrowly to lift only the restriction on dwelling units per lot.

The Examiner appreciates the two possible interpretations. However, the code does appear to direct the density calculation to the primary residence. The code states that any single-family dwelling may be complemented with up to two ADUs and that ADU's for purposes of the Special Regulations relating to dwelling unit number restrictions, are not to be considered dwelling units.

This approach does mean that unlike other residential structures, multifamily or otherwise, even though the individual units may be considerably smaller, ADUs are exempted from density requirements. The language may have come about as originally ADUs were designed as less expensive accommodations for extended family and were proposed by individual property owners as the need arose rather than being a standard component of new plats. As the project exemplifies, that situation has changed.

Due to this shift, a local jurisdiction such as Kirkland might elect to reconsider how density is managed particularly if such a regulatory carveout is being used on a more routine basis. If there is a shift to ADUs and single-family homes as opposed to say, cottage developments,³² which undergo review to which specifically tailored criteria apply, then perhaps code revisions could be enacted to apply similar review standards to plats. Whether and how to apply such considerations to project design is a legislative question well outside Examiner purview. However, this does mean that short plats now being proposed may have impacts and considerations not present in the short plats of yesterday so may warrant additional review and attention.

2.3.2 Access Easement and Access Width Compliance (Issue 2, 5 and 9). Absent Public Works approval, which is based on safe ingress and egress, the code requires 16-feet of pavement within a 21-foot-wide easement.

Roadway Widths – For vehicular access easements or tracts, minimum standards for widths are established as follows: When no Fire Department access road is required, and the access easement or tract will service one (1) to four (4) detached

³¹ KZC 115.07, emphasis added.

³² Ch. 113 KZC.

dwelling units or one (1) to two (2) duplex structures, the minimum standard is **16 feet of unobstructed pavement in a 21-foot-wide easement or tract**. The Public Works Department may reduce the standard to 10 feet of unobstructed pavement in a 15-foot-wide easement or tract if the easement or tract and abutting driveways are located to allow for safe ingress and egress.³³

The Appellants met their burden of proof to demonstrate documentation is inadequate for the Department to determine the plat complies with code.³⁴ While the Examiner is not deciding whether the Applicants hold an easement over Ms. Giustina's property, the evidence provided is inadequate to demonstrate compliance with City access requirements so must be denied until the issue is resolved.

2.3.3 Road Conditions (Issue 3). The development must install additional right-of-way improvements (curb, gutter, and sidewalk) along the street in front of the project.³⁵ However, the Project is exempt from certain traffic analysis requirements. SEPA and concurrency analysis is not required.³⁶ This was not disputed. However, other requirements must be met, and analysis must confirm same.

A sidewalk would be constructed along Ms. Giustina's property to accommodate project pedestrian traffic. However, sidewalk location and alignment are unknown. The Applicants do not own Ms. Giustina's land so cannot dedicate it. Instead, based on evidence submitted, and contrary to plat drawings, which do not detail this, the sidewalk must jut out from Ms. Giustina's property. This then apparently entails a "jut in" on the opposite side of the street to maintain street widths. The width for vehicle passage is not identified and the Department acknowledged a straight alignment would be safer.³⁷ It is unclear what the resulting road and sidewalk alignment will be after these improvements. Engineering details will be resolved at the building permit stage, but the basic infrastructure layout must be apparent at the preliminary plat stage to ensure the project can meet code.

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 ... rights-of-way, easements, ..., including sidewalks.... (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.³⁸

³³ KZC 105.10(1)(a), emphasis added.

³⁴ There is no Public Works' approval of a lesser access width.

³⁵ KZC 110.10 and KZC 110.25.

³⁶ KMC 24.02.060, KMC 25.08.010(5), and WAC 197-11-800(6)(d).

³⁷ Testimony, Mr. Pham. Although referred to as sidewalk, the area would not be a traditional elevated sidewalk. In testimony, there seemed to be a suggestion that Ms. Giustina ought to remedy the situation by gifting her land.

³⁸ KMC 22.20.140; *see also* RCW 58.17.060(2) (cities "shall include in their short plat regulations and procedures ... provisions for considering sidewalks and other planning features that assure safe walking conditions for students who walk to and from school."); RCW 58.17.020(4) ("Preliminary plat" is a neat and approximate drawing of a proposed subdivision showing the general layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of this chapter. The preliminary plat shall be the basis for the approval or disapproval of the general layout of a subdivision.").

There was considerable public comment on public safety due to inadequate sidewalks, parking space, room for garbage cans, and traffic conditions in constrained conditions. While the Applicants are not responsible for existing conditions, they are responsible for their impacts and designing a plat lay out which avoids exacerbating these conditions. Without adequate disclosure on how the sidewalk and street will be laid out, these impacts cannot be adequately assessed.

2.3.4 Street Parking (Issue 4). The code requires two parking spaces for the single-family dwelling units and no additional parking for the ADUs.³⁹ The project provides two garage spaces and a 400-square foot parking pad outside for the single-family units, along with one parking space per ADU, so more on-site parking is provided than the code requires. This was not disputed.

The Appellants' concern is how the project will impact street parking and circulation. Street parking is only available on one side of the street. It is unknown how street parking and operations will be affected with the "jut-out" required by the irregularly aligned sidewalk (addressed above). While on-site parking code requirements are met, as Conclusions 2.3.2, 2.3.3, 2.3.5 and 2.3.6 address, insufficient information is available on street operational conditions with the project.

2.3.5 Short Plat Approval Criteria (Issue 8). The code requires not only regulatory consistency but also an assessment of public health, safety, and welfare consistency.

The Planning and Building 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 and Building 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.⁴⁰

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, transit stops, water supplies, sanitary waste, power service, parks, playgrounds and schools, including sidewalks and other planning features that assure safe walking routes to and from 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.⁴¹

³⁹ KZC 115.07(6); KZC 15.40.060.

⁴⁰ KZC 145.45.2(a) and (b).

⁴¹ KMC 22.20.140(a) and (b).

Many, if not most projects, if consistent with criterion (a), meaning the development regulations and if none apply, then the Comprehensive Plan, will also be consistent with the public health, safety, and welfare. In this situation though (putting aside the development regulation non-compliance issue), there is inadequate information on street and sidewalk alignment, and on plat access. Given the property's unique panhandle shape, potentially highly constrained access, and existing conditions, without additional information on easement rights and actual street and improvement alignment, it was error to determine the public health, safety, and welfare criterion was met.

2.3.6 Development Regulations (Issue 9). Short plats must comply with “all applicable development regulations.”⁴² This includes KZC 105.10 access requirements, which require a 16-foot-wide access drive in a 21-foot-wide easement or tract. As the “panhandle” access is only 15-feet wide, the Applicants must use the disputed easement across Ms. Giustina’s land to comply with code. The Appellants met their burden to demonstrate the evidence is inadequate to determine compliance.

2.3.7 Land Ownership and Authority (Above Issues Except Density and 10(a)). A title suit is pending in King County Superior Court. The Appellants have presented compelling evidence that the Applicants do not hold the easement rights they assert they hold. A similar situation arose in the Bellevue *Halverson* case, where an adverse possession question should have precluded plat approval.

Because the merit of an adverse possession claim cannot be determined by the city prior to adjudication, caution in approving plats in such cases is warranted. The platting statute requires the consent of owners in order to prevent future title disputes. Once the City was put on notice of Halverson's claim, approval of the plat as submitted was improper. RCW 58.17.170.2

The City and Morgan contend that the failure to obtain Halverson's signature did not justify setting aside the entire plat, since Halverson owned such a small portion of the proposed subdivision. Instead, they argue, the court should have allowed the plat to stand by excising from it the property acquired by Halverson. RCW 58.17.100 provides, in part: “Sole authority to approve final plats, and to adopt or amend platting ordinances shall reside in the legislative bodies.”

Thus, the law is clear that the Legislature has granted the authority to amend plats to the legislative bodies and not the courts. Having found that plat approval should not have been granted without Halverson's consent, the trial court had authority only to set aside the plat as invalid.⁴³

Ms. Giustina owns the land the plat proposes to use to access the property and contends her ownership includes all access rights. She is the property owner and her asserted property rights include access. While the Applicants are proposing to use a disputed easement area, rather than her

⁴² KZC 145.45.2.a. A short plat is a Process I decision the Department issues, with a right of appeal to the Hearing Examiner.

⁴³ *Halverson v. City of Bellevue*, 41 Wn. App. 457, 460–61 (1985).

property in fee simple, her rights to this disputed area are property rights. And without those property rights, the plat cannot be approved. If information is insufficient to confirm ownership, and there are valid doubts that an applicant holds the property rights asserted, and such rights are necessary to plat approval, platting cannot proceed without resolution.

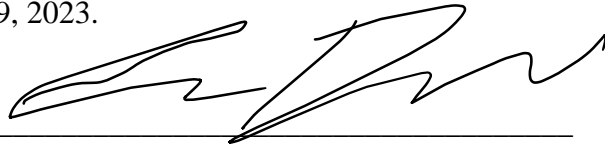
The Examiner does not with this decision determine who holds the disputed access rights and does not rule on Ms. Giustina's claims of abandonment, adverse possession, equitable estoppel, and part performance. The parties agree these issues are outside Examiner jurisdiction and require Superior Court resolution. However, the Appellants have demonstrated by a preponderance of the evidence that the Applicants did not provide sufficient evidence to warrant plat approval under Kirkland's code requirements. The Appellants met their burden to demonstrate there is insufficient evidence of uncontested ownership to the disputed easement area. The Department, as it acknowledged, erred in approving the plat.

The Department requests that the plat be affirmed conditioned upon the Applicants showing, at the time of final plat recordation, that they have adequate legal access. The Applicants request that the plat be upheld without any such conditions. Putting aside the other issues of reversal, a plat cannot be upheld if code requirements for approval have not been demonstrated as met.⁴⁴

DECISION

The short plat decision is **REVERSED**. The matter is returned to the Department for proceedings consistent with this decision and to await superior court resolution of the easement dispute. Jurisdiction is not retained.

Entered June 29, 2023.



City of Kirkland Hearing Examiner
Susan Elizabeth Drummond

Concerning Further Review

The Hearing Examiner's decision is the City of Kirkland's final decision. KMC 22.20.340. Under RCW 36.70C.040, a request for judicial review must commence within twenty-one (21) days of decision issuance. It is incumbent on the person seeking to appeal to consult code and statutory sources to determine applicable rights and responsibilities.

⁴⁴ Exhibit 12 (Department e-mail to Applicants, July 20, 2022, stating "We're just looking for confirmation that the easement can be used for this project since use of that easement is necessary for there to be enough access width to be in compliance with the code."). Despite the continuing lack of confirmation, the Applicants indicated they applied for a building permit which is now under review. Applicants' Closing Statement, p. 3:17-19.

Appendix 1
Citizens who Provided Public Testimony at the Hearing*

- Mike Connachan. 8149 NE 117th Place NE, mikey.connachan@gmail.com
- Vincent Randall Johnson. 8243 NE 119th Street, randy.johnson8@outlook.com
- Tim Brewer. 11710 84th Ave NE, tugboattimbo@hotmail.com
- Mathew Cohen. 8216 NE 117th Street, Kirkland. matt.cohen@hotmail.com
- Connie Brewer. 11710 84th Ave NE, connier14@outlook.com
- Janice Orr. 8210 NE 117th Street, janice_orr@yahoo.com

*All addresses are in Kirkland, WA 98034

**Appendix 2
Index of Record**

Ex. #	Exhibit Description
1	Appeal (March 13, 2023), attaching City's Decision (without Attachments 1-9)
2	Prehearing Order (May 8, 2023)
3	Dismissal Pleadings and Attachments <ul style="list-style-type: none"> • City's Motion to Dismiss Quiet Title Issues, attaching Access Easement • Applicants' Motion to Dismiss, with Declaration of Moira Haughian and Exhibits A-G • Appellants' Combined Response to Motions to Dismiss, with Declaration of Mike Hurley; Declaration of Irene Giustina with Exhibits A-L; and Declaration of Bryan Telegin with Attachments A-C (Attachment A is the City's Decision and includes Attachments 1-9) • City's Reply, attaching Title Report • Applicants' Reply, attaching Declaration with Short Plat Application Checklist
4	Examiner's Order on Motions to Dismiss (May 30, 2023)
5	Staff Report with Attachments 1-8 <ul style="list-style-type: none"> • Finn Hill 8 Short Plat (SUB22-00036) Planning Director's Decision and Attachments 1-9 • Appeal Letter filed by Overlook at Finn Hill Homeowners Association and Irene Giustina • Property Survey • Title Report • Existing Ingress, Egress, and Utility Easement • Applicants' Comment Response Letter dated July 25th, 2022 • Appellants' Response to Motions to Dismiss dated May 19th, 2023 • Existing Utility Easements
6	Appellants' Public/Appeal Comment for Hearing (6/13/23)
7	Public Comments for Hearing (transmitted 6/14/23). Besides Ex. #6 above, includes comment from: <ul style="list-style-type: none"> • Mike Hurley (6/13/23 and 5/2/22) • Matthew and Shelly Cohen (6/13/23 and 4/30/22) • Nadia Oujvenko (6/7/23) • Ken Williams (6/8/23) • Connie and Timothy Brewer (6/10/23 and 6/11/23) • Joseph Schlegel (6/12/23) • Vincent Johnson (6/13/23) • Mike Connachen (6/13/23) • Marcia Schlegel (6/13/23)
8	Department Hearing Slides
9	Appellants' Slides Used in Direct Examination of Ms. Giustina and King County Property Records Information from Redirect

10	Appellants' Slides Used in Direct Examination of Mr. Hurley
11	Applicants' Exhibits 1-32 (For Ex. 32, Water/Sewer Availability, use updated exhibit) and Screen Shot Google View of Property
12	E-mail from Ms. Rubardt to Applicants (7/20/22) submitted by Appellants on Cross Examination of Ms. Haughian
13	Applicants' consent to 6/28/23 and then 6/30 decision date (5/3/23 and 6/15/23)
14	Owner/applicant addresses from Applicants (6/15/23)

Appendix 3

Excerpted City Code Short Plat Requirements Access/Road Infrastructure

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 ... rights-of-way, easements, ..., including sidewalks.... (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.⁴⁵

Decisional Criteria – The Planning and Building 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 and Building 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.⁴⁶

All lots must have direct legal access as required by the Zoning Code, including KZC 115.80, Legal Building Site, and KZC 105.10, Vehicular Access Easement or Tract Standards. The city will determine whether access will be by right-of-way or vehicular-access easement or tract on a case-by-case basis.⁴⁷

[To be buildable, a lot must be] either adjacent to, or has a legally created means of access to, a street providing access to the lot or parcel.⁴⁸

Roadway Widths – For vehicular access easements or tracts, minimum standards for widths are established as follows: When no Fire Department access road is required, and the access easement or tract will service one (1) to four (4) detached dwelling units or one (1) to two (2) duplex structures, the minimum standard is 16 feet of unobstructed pavement in a 21-foot-wide easement or tract. The Public Works Department may reduce the standard to 10 feet of unobstructed pavement in a 15-foot-wide easement or tract if the easement or tract and abutting driveways are located to allow for safe ingress and egress.⁴⁹

⁴⁵ KMC 22.20.140.

⁴⁶ KZC 145.45(2).

⁴⁷ KMC 22.28.080(a). Requirements in Ch. 20.28 KMC must be met. KMC 22.20.010.

⁴⁸ KZC 115.80(1)(c).

⁴⁹ KZC 105.10(1)(a).

**BEFORE THE HEARING EXAMINER
CITY OF KIRKLAND**

CERTIFICATE OF SERVICE

The attached **DECISION** was e-mailed June 29, 2023, to the below individuals and to the individuals identified in Appendix 1:

Party	Method of Service
Appellant Bryan Telegin, Telegin Law PLLC bryan@teleginlaw.com	<input type="checkbox"/> U.S. First Class Mail <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
Applicants Scott Johnson, Helsell Fetterman LLP SJohnson@helsell.com Brandon S. Gribben, Helsell Fetterman LLP BGribben@helsell.com	<input type="checkbox"/> U.S. First Class Mail <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
Department Stephanie Croll, City Attorney's Office SCroll@kirklandwa.gov Martha Rubardt MRubardt@kirklandwa.gov Nick Cilluffo NCilluffo@kirklandwa.gov	<input type="checkbox"/> U.S. First Class Mail <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

Dated June 29, 2023

/s/ Susan Drummond
Hearing Examiner Pro Tem