

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

In the Matter of the Appeal of

MARK GUCKER

From a Short Plat decision by the Director,
Planning and Community Development Department

Appeal Number:
APL06-00003

File No.:
05-000050

Introduction

The Director issued a decision conditionally approving the Merrily Short Plat (File No. SPL05-00050), and the appellant timely filed an appeal.

The appeal was heard by the undersigned Hearing Examiner Pro Tem on May 11, 2006 in City Council Chambers, City Hall, 123 Fifth Avenue, Kirkland, Washington. Parties represented at the proceeding were: the appellant, Mark Gucker, by Charles E. Watts, attorney at law; the Director, by Ron Hanson, Project Planner, and the applicant, Paul Duren, Duren Homes, Inc., by Andree Gagnon, attorney at law. A verbatim recording of the hearing is available in the City Clerk's office, and minutes of the hearing are available from the Department of Planning and Community Development.

Exhibits

The following exhibits were entered into the record of this appeal:

1. Department's Memorandum, April 24, 2006
Attachments to Exhibit 1:
 - A. Mark Gucker Letter of Appeal
 - B. KZC 145.60-145.105
 - C. Vicinity Map
 - D. Proposal Drawings
 - E. Merrily Short Plat Staff Report (SPL-05-00050) with attachments 1-10
 - F. Juanita Sensitive Areas Map
 - G. North/South Juanita Neighborhood Natural Element Sensitive Area Map
2. Appellant's PowerPoint Presentation
3. Appeal letter
4. March 10, 2006 Dept. letter to Paul Duren
5. Notice of application
6. Aerial photo captioned "Before Duren SP"
7. Aerial photo captioned "After Duren"

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8. Site plan
9. Hallmark Estates plat map
10. Aerial photo, Hallmark Estates
11. KZC 22.28
12. May 8, 2006, letter from Robert Rodgers, with attachments
13. North/South Juanita Neighborhood Plan excerpt
14. February 15, 1979 Planning Commission minutes
15. Excerpt from staff report for Hallmark Estates 2/15/79
16. Notice of Approval, Hallmark Estates Subdivision
17. Tree retention plan, Duren Short plat
18. Photo captioned "My backyard today."
19. Photo captioned "If this..."

Parties of Record

Mark Gucker, 10712 NE 114th Pl, Kirkland, WA 98083
Paul Duren, Duren Homes, Inc., 1529 17th Avenue E., Seattle, WA 98112
Donald and Merrily Dicks, 10635 NE 116th Street, Kirkland, WA 98033
Robert and Stacy Rogers, 10716 NE 114th Pl., Kirkland, WA 98033
Department of Planning and Community Development
Department of Public Works
Department of Building and Fire Services

For purposes of this decision, all section numbers refer to the Kirkland Municipal Code (Code) unless otherwise indicated. After due consideration of all information and material within the scope of the appeal submitted by persons entitled to participate in the appeal, the Hearing Examiner makes the following findings of fact, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

1. The subject property is located at the south side of NE 116th Street, between 106th Avenue NE and 108th Avenue NE. The site is approximately 33,045 square feet and is zoned RS 8.5, single family residential with a minimum lot size of 8500 square feet. The site is rectangular in shape, with a north-south dimension of approximately 424 feet, and an east-west dimension of approximately 78 feet.
2. The site slopes gently downward from the north property line adjacent to NE 116th Street (elevation approximately 240 feet) to an elevation of approximately 224 feet along the south property line. The average grade change across the site is less than five percent.

3. The site is located in an area designated as a “Significant Woodland” in the North/South Juanita element of the City’s Comprehensive Plan. At page XV.I-2, the Plan discusses the retention of trees and the protection of streams and wetlands.

4. There are 35 significant trees on the site. The site also contains trees of less than significant size, and other native vegetation.

5. The “Juanita Sensitive Areas” map contained in the Comprehensive Plan depicts a minor stream located west of the site. However, no stream or surface water feature is shown to be on or near the site according to the City’s current sensitive area maps or Surface Water maps. These maps show a stream or drainage channel approximately 800 feet away from the subject site.

6. The site is approximately 320 feet away from Lot 4 of the existing Duran Short Plat. A map (identified as a “Tree retention exhibit”) depicts a wetland that is located partially on and to the west of the northern part of Lot 4 of the Duran Short Plat.

7. The zoning of property to the south, east and west is RS 8.5, and is developed with single family homes. The applicant in this case previously received approval for a six-lot short plat, the above-referenced Duren Short Plat. That plat is located west of the site and borders the southern portion of the site. To the north is NE 116th Street and an area zoned RSX 7.2, which is developed with single family homes. Northeast is an area zoned P, developed with McAuliffe Park.

8. The 11-lot Hallmark Estates subdivision was approved by the Kirkland City Council on March 5, 1979. The plat map designated a 20-foot-wide “Green Belt” to be located along the north, south and west property lines of the plat. The plat was approved subject to a condition that trees 18” or larger in caliper within the Green Belt could not be removed from the Green Belt area without the City’s approval. In addition, no construction was to be permitted within the Green Belt area on Lots 7, 8 and 9 of the subdivision. The plat map also shows a “Tract A” in the central part of the subdivision, within which no trees of 18” caliper or larger may be removed without the City’s approval.

9. The proposal is to subdivide the site into three single-family lots. The proposed Lot 1 would be 16,856 square feet, while proposed Lots 2 and 3 would be 8,090 square feet each.

10. Because Lots 2 and 3 would be less than the minimum lot size for the zone (8,500 square feet), the application was reviewed under the lot size averaging provisions of KZC 22.28.040. That section provides that up to 75 percent of the number of lots in a short plat may contain an area less than the prescribed minimum for the zoning district, if the lots created contain an area no more than five percent less than prescribed. Smaller lots are to be located so as to have the least impact on surrounding properties and public rights-of-way.

11. The average lot size in the proposed short plat is 11,015 square feet. Five percent of 8500 square feet would be 42.5 feet. Thus, under KMC 22.28.040, no lot may contain less than 8,075 square feet. Proposed Lots 2 and 3 would be located internal to the plat, and do not abut a public right of way.

12. The application for the proposed short plat was submitted prior to the effective date of Ordinance 4010, which contains the City's tree preservation requirements. The short plat is therefore vested to the tree preservation requirements in effect prior to Ordinance 4010. However, the required building permits for construction on the individual lots will be subject to the applicable requirements of Ordinance 4010. The Director's Advisory Report (Section II.E, and Development Standards List) describes the tree requirements that the Department has applied to the short plat and that would be applied to future development on the lots.

13. The Director issued the decision granting the short plat on March 6, 2006. A number of conditions with respect to trees were imposed, including: At least 25 percent of healthy significant trees must be retained; no significant trees may be removed except as required for installation of plat improvements; no trees may be removed unless approved as part of the land surface modification or building permits; and that an arborist's report may be required to establish limits of disturbance and on-site measures to reduce impacts to the trees to be retained.

14. The appellant's home is located in the Hallmark Estates subdivision. At the time he purchased his house, he was advised of the "green buffer" of 20 feet in the subdivision and he believed that it made good sense. He currently enjoys a view of trees and vegetation facing his deck, which he believes will be replaced with a view of another home's siding, as a result of the proposed short plat.

15. At hearing, the appellant presented aerial photos from 2000 and 2006, on which can be seen Hallmark Estates, the proposed short plat site, and the Duran Short Plat site. The photographs indicate that many if not most of the trees that were on the Duran Short Plat site in 2000, were no longer there in 2006.

16. Tree removal and construction activities by this applicant at the Duran Short Plat site have been of concern to the appellant and some of the neighbors. The neighbors believe that the applicant failed to protect significant trees from damage during the construction activities on the Duran Short Plat site. Some of the trees designated for retention at that site were subsequently removed, and the Department required the applicant to replant four trees.

Conclusions

1. Pursuant to KZC 145.60, the Hearing Examiner has jurisdiction over this appeal. Under KZC 145.75, the scope of the appeal is limited to those elements of the decision

that are disputed in the appeal letter. Under KZC 145.95, the person filing an appeal has the responsibility of convincing the Hearing Examiner that the Planning Director made an incorrect decision.

2. The appellant's appeal raised the following issues: (1) that the proposed short plat should be conditioned with a requirement for a Natural (or Native) Growth Protection Easement, i.e., a 20-foot-wide NGPE along the east property line of the site; and (2) that the proposal should be re-evaluated in light of the City's Comprehensive Plan for the North/South Juanita Area, because the proposed short plat is inside a "Significant Woodland" and because there is a stream located west of the property.

3. The appellant has requested that the applicant be required to establish an NGPE on the site to preserve trees. The appellant cites the conditions imposed on the Hallmark Estates subdivision in 1979, and argues that since the 20-foot buffer has worked well on his side of the property line, the same condition should be imposed on the proposed short plat.

4. The appellant has cited no Code provision or other requirement applicable to this short plat that would require or even authorize the creation of an NGPE on the site. The Director's decision relies on the tree requirements to which the application is vested, and imposes additional requirements based on Chapter 22.28, including the retention of all significant healthy trees on the site unless removal is required for plat improvements, and only then as permitted by the City. In addition, the current tree ordinance will apply to development on the individual lots. On this record, the decision cannot be considered incorrect for failure to require creation of an NGPE.

5. The appellant has also requested that the application be re-evaluated based on the site's location within a "Significant Woodland" as designated in the North/South Juanita Neighborhood Plan, and because of the presence of a stream or drainage channel off-site. The Juanita Plan is part of the Comprehensive Plan, which under the Growth Management Act is "a generalized coordinated land use policy statement of the governing body of a county or city;" RCW 36.70A.040(4). The Plan is implemented through the development regulations, including the Code provisions that regulate short plats and the zoning Code; the Plan statements cannot be used to directly regulate this short plat proposal. It has not been shown that the Plan was adopted into the zoning or other regulatory codes that apply directly to this proposal, and therefore the designation as Significant Woodland does not directly regulate this proposal. No re-analysis of the proposal was required on account of this designation in the Plan.

6. The stream or drainage channel, and the wetland depicted on the Duran Short Plat tree retention map, are located several hundred feet away from the subject site. No evidence was presented to establish that re-analysis of the proposal was required or would be authorized on account of the presence of the stream/channel or wetland.

7. That the appellant is frustrated with the loss of trees in the area over the past few years, and desires certainty about future tree preservation, is understandable. But the appellant did not meet his burden to show that the Planning Director's decision was incorrect as to any of the claims raised in the appeal letter, and the appeal must therefore be denied.

Decision

The decision of the Planning Director to approve with conditions the Merrily Short Plat, File No. SPL05-00050, is hereby **AFFIRMED**.

Entered this 19th day of May, 2006.

Anne Watanabe
Hearing Examiner Pro Tem

Concerning Further Review

The decision by the Hearing Examiner is the final decision of the City. KZC 145.110 states: "The action of the City in granting or denying an application under this chapter may be reviewed pursuant to the standards set forth in RCW 36.70C.130 in the King County Superior Court. The land use petition must be filed within 21 calendar days of the issuance of the final land use decision by the City. For more information on the judicial review process for a land use decision, see Chapter 36.70C RCW."