

1
2



CITY OF EDMONDS

121 5th Avenue North, Edmonds WA 98020
Phone: 425.771.0220 • Fax: 425.771.0221 • Web: www.edmondswa.gov
DEVELOPMENT SERVICES DEPARTMENT • PLANNING DIVISION

7
8

BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

11
12
13
14
15
16

<p>RE: Scott Blomenkamp</p> <p>ECDC 20.100.040 Review of Approved Permit</p> <p>(PLN20150030)</p>	<p>DECISION UPON RECONSIDERATION</p>
-------------------------------------------------------------------------------------------------------	-------------------------------------------------

17
18
19
20
21
22
23
24
25

Mr. Blomenkamp filed a request for reconsideration of the Final Decision of the above-captioned matter on October 5, 2015. His reconsideration request is granted in part. The conditions of approval of the Final Decision will be modified to require three replacement trees instead of one per damaged tree, to provide for more time for remediation work, and to integrate the restoration standards of ECDC 18.45.075. No fines will be imposed. Fines could be imposed for clearing violations on Mr. Blomenkamp’s property, but Mr. Blomenkamp’s ECDC 20.100.040 application did not allege illegal clearing on his property, only that the ADB findings of compliance on the Kautz Route LLC (“Kautz”) property were in error. Fines cannot be imposed against Kautz unless Kautz was advised of the specific actions that constituted its code violation (i.e. clearing trees on adjoining property) and applicable code provisions prior to the hearing on the charges against them. It is unclear if Mr. Blomenkamp believes he would be entitled to any fines that were levied, but as fines they would remain the property of the City in any event. Beyond the fines, Mr. Blomenkamp will be entitled to all the restoration requirements for Chapter 18.45 violations, since ECDC 18.45.075 provides an objective legislative standard as to what would be appropriate restoration for nuisances determined to have occurred under ECDC 20.100.040.

1 The conditions imposed by the Final Decision are replaced by the revised conditions
2 imposed by this Decision Upon Reconsideration. Beyond the conditions, the
3 findings, conclusions and legal analysis of the Final Decision remain unchanged.
4 This Decision Upon Reconsideration should be considered as a supplement to the
analysis of the Final Decision. The Decision Upon Reconsideration shall supersede
any conflicting provisions of the Final Decision.

5 **Background**

6 Mr. Blomenkamp filed his request for reconsideration on October 5, 2015. A city
7 response was filed on October 28, 2015. Mr. Blomenkamp's reply was filed on
8 November 2, 2015. The request, response and reply are all admitted as Exhibits R-1,
9 R-2 and R-3 respectively. No other documents beyond those in the administrative
record of the Final Decision in this matter were considered.

10 **Procedural Issues**

11 In his reconsideration request Mr. Blomenkamp asserts that portions of his opening
12 brief, Ex. 2, were unfairly excluded during the October 27, 2015 hearing in violation
13 of his due process rights. Only portions of his brief addressing the nuisance claims of
14 his application were admitted to the record. Mr. Blomenkamp asserts he did not have
15 sufficient advance notice to argue against the exclusion of argument on the other
16 claims of his ECDC 20.100.040 application. There was no unfair surprise. Page 2 of
17 the August 19, 2015 staff report, provided to Mr. Blomenkamp prior to the hearing,
18 noted that only Mr. Blomenkamp's nuisance claims had been forwarded to the
19 examiner for review. Mr. Blomenkamp was given a full opportunity with no time
20 limit to address this position at the beginning of the August 27, 2015 hearing. At no
21 time prior to the examiner's ruling on the City's motion to exclude did Mr.
22 Blomenkamp request an opportunity for additional time to brief or research the issue.
23 If Mr. Blomenkamp believes he did not have an adequate opportunity to argue against
24 the City's motion to exclude portions of his brief, it was his responsibility to raise that
25 issue before the examiner ruled on the motion. Under these circumstances, Mr.
Blomenkamp's due process and appearance of fairness rights were fully protected. It
may very well be that the exclusion issue might have come up during a prehearing
conference and it also would have been preferable if the City presented a motion to
dismiss the excluded claims prior to the commencement of the hearing, but
prehearing motions and conferences are not mandated by City code, court opinions or
procedural due process and are not typically conducted in most local land use
hearings. It must also be further recognized that ultimately Mr. Blomenkamp was
given an opportunity to brief the exclusion issues through this reconsideration process
as well.

In his reconsideration reply, Mr. Blomenkamp asserts that the City's response to his
reconsideration request should be stricken because it was untimely and because it was
not signed. No City code provision requires written argument in land use hearings to

1 be signed. Written public comment is routinely accepted without a written signature.
2 Although it is arguably appropriate to exclude anonymous written submissions, there
3 was no question as to the authorship of the City's response. The basis of Mr.
4 Blomenkamp's passing reference to the City's response as being untimely is unclear.
The Order for Reconsideration required the City to file its response by October 28,
2015. The City's response was timely filed on that date by email to the examiner,
Mr. Blomenkamp and Mr. Price by 2:53 pm.

5 State Law

6 A significant issue in this case is whether the City can under state law reconsider
7 issues addressed in a prior permit decision in a second hearing under the ECDC
8 20.100.040 review process. The requirements of state law assist in the interpretation
9 of ambiguous ECDC 20.100.040 provisions. Case law is clear that cities cannot
10 collaterally revisit permitting decisions in subsequent permit applications. *See*
11 *Nykreim Chelan County v. Nykreim*, 146 Wn.2d 904 (2002); *Habitat Watch v. Skagit*
12 *County*, 155 Wn.2d 397 (2005). State statutes are equally clear that development
13 projects cannot be subject to more than one open record hearing. RCW
14 36.70B.050(2). Mr. Blomenkamp does not contest the validity of these legal
15 requirements and it would be very difficult for him to do so. As determined in the
16 Final Decision, the interpretation of RCW ECDC 20.100.040 must be harmonized
17 with the finality requirements of *Nykreim* and *Habitat Watch* and the one hearing rule
18 of RCW 36.70B.050(2) to the extent that rules of construction permit.

19 In his reconsideration briefing Mr. Blomenkamp makes the valid point that finality
20 and the one hearing rule do not preclude the consideration of issues that were beyond
21 the scope of approval in a prior permitting proceeding. Mr. Blomenkamp asserts that
22 ECDC 20.100.040 essentially provides for a citizen initiated code enforcement
23 process and that code enforcement cannot be precluded for issues that were not
24 authorized in a prior permitting decision. As correctly noted by Mr. Blomenkamp in
25 his reconsideration reply, the City was able to institute a code enforcement action
against the Birlenbachs because they cut more trees than authorized by a prior tree
removal permit. In its briefing the City never contested this point. The pertinent
questions on this issue are (1) whether Kautz engaged in any development activity
beyond the scope of what was authorized by ADB approval and (2) whether any such
unauthorized activity violated City Code. It is uncontested that Kautz cleared within
the areas authorized by the ADB in its approval. Consequently, any code compliance
issues pertaining to clearing on the Kautz project site cannot be reconsidered under
Nykreim and *Habitat Watch*. All of Mr. Blomenkamp's arguments that on-site
clearing violated provisions of Chapter 18.45 ECDC are precluded by principles of
finality on that basis, because Kautz limited its clearing activities to the areas
authorized by the ADB, including those areas that involved severance of Mr.
Blomenkamp's tree roots.

Mr. Blomenkamp raises the valid point, however, that the ADB did not authorize the
removal and/or destruction of trees on his property. This is arguably correct for

1 purposes of finality. The preceding is qualified by “arguably” because the ADB did
2 authorize the clearing that was the sole action by Kautz that lead to the destruction of
3 Mr. Blomenkamp’s trees. But taking Mr. Blomenkamp’s position as correct, there is
4 still no avenue for further relief upon reconsideration for two reasons. The first
5 reason is that it’s somewhat questionable whether the unintentional destruction of
6 trees by Kautz would constitute a code violation. The only code issue identified by
7 Mr. Blomenkamp that could apply is ECDC 18.45.020, which provides that no
8 clearing may be undertaken without a land clearing permit. As noted by Mr.
9 Blomenkamp, ECDC 18.45.040(D) defines “clearing” as the act of “*cutting and/or
removing vegetation*” and ECDC 18.45.040(O) defines “removal” as “*actual
destruction or causing the effective destruction through damaging, poisoning or other
direct or indirect actions resulting in the death of a tree or ground cover.*” It was
determined in the Final Decision that Kautz has likely destroyed some of Mr.
Blomenkamp’s trees by cutting their roots, which falls within the definition of
removal.

10 Although the actions of Kautz may fall under the “removal” definition, there is some
11 question as to whether a permit would have been required for this type of accidental
12 removal. ECDC 18.45.020, which requires land clearing permits, is silent as to
13 whether the clearing must be intentional. This is arguably an ambiguity. Under Mr.
14 Blomenkamp’s interpretation, a car accident that results in the destruction of a tree or
15 a house fire that involves the destruction of a tree would require a land clearing
16 permit under ECDC 18.45.020. None of the purposes of Chapter 18.45 ECDC are
17 served by clearing actions caused by car accidents and house fires, since of course no
18 one has the foresight in a car accident or house fire situation to apply for a land
19 clearing permit and the penalties are not going to lessen the chances that something
20 like that will happen. Penalties assessed against developers for destroying
21 neighboring trees could serve the purposes of Chapter 18.45 since that could make
22 developers more sensitive to that issue. Indeed, it has been the practice of the City to
23 impose penalties against homeowners for the tree removal actions of their contractors
24 on that basis even when the homeowners allegedly were unaware of the illegal
25 activity, so there is some merit to that position.

The second and much more determinative reason there is no avenue for further relief
is that Mr. Blomenkamp’s ECDC 20.100.040 application doesn’t identify illegal
clearing on his property (as opposed to the Kautz property) as one of his claims.
Nowhere in his June 29, 2015 does Mr. Blomenkamp allege that Kautz had cleared
trees on his property without acquiring a land clearing permit as required by ECDC
18.45.020. Instead, the primary focus of that application is clearing beyond the drip
line as regulated by ECDC 18.45.050(H) and other 18.45 violations on the Kautz
property, which as discussed previously cannot be reconsidered because those issues
were within the scope of the ADB approval. The failure to include that claim is not a
minor procedural technicality. The monetary penalties for failing to comply with
Chapter 18.45 ECDC are significant, as demonstrated in prior cases involving fines
amounting to tens of thousands of dollars for the removal of handfuls of trees. If
Kautz was to be subjected to those penalties, it had a constitutional right to know the

1 code basis of the violation and how it violated the code in its charging document (in
2 this case Mr. Blomenkamp's ECDC 20.100.040 application). *See e.g. U.S. v.*
3 *Castro*, 78 F.3d 453 (9th Cir. 1996). Had the City initiated a code enforcement case
4 without identifying ECDC 18.45.020 for Kautz's actions, any claims related to that
5 provision would have been summarily dismissed.

6 Ultimately, the inability to impose monetary penalties for an ECDC 18.45.020
7 violation doesn't adversely affect Mr. Blomenkamp. Mr. Blomenkamp would not be
8 entitled to any fines imposed by Chapter 18.45 ECDC. Characterized as "fines",
9 those "fines" are punitive, not remedial. They're not designed to compensate a
10 property owner for damages, but rather to provide some financial incentive for
11 compliance. ECDC 18.45.075 also requires restoration of the damaged area for any
12 illegal clearing. The Final Decision already provides for that restoration and this
13 decision integrates more of those restoration standards for Mr. Blomenkamp's
14 successful nuisance claim.

15 **Constitutional Law**

16 Mr. Blomenkamp argues in his reply brief that depriving him of an opportunity to
17 argue code violations violates his due process constitutional rights, asserting that the
18 purchase and sale agreement he used to purchase his property gave him a
19 constitutionally protected property interest that extended to protecting the roots of his
20 trees located on adjoining properties. Mr. Blomenkamp doesn't identify any case
21 law that specifically considers a purchase and sale agreement to confer these types of
22 constitutional rights nor is it readily apparent why any court would come to that
23 conclusion. Mr. Blomenkamp already has a remedy against Kautz via a nuisance
24 action filed in superior court. The only reason Mr. Blomenkamp seeks redress in a
25 City administrative process is because the City has ordinances that prohibit the
destruction of trees without a permit. If those ordinances don't specifically give Mr.
Blomenkamp a right of enforcement, it's unclear why Mr. Blomenkamp would have a
constitutionally protected property interest at stake where similarly situated
individuals in cities without ordinance prohibiting tree destruction would not have
any such protected interest to be recognized in local administrative review.

Beyond the property interest factor, it is also unclear how Mr. Blomenkamp can claim
he hasn't had an opportunity to be heard as required by due process. Although he's
precluded from arguing issues that were subject to ADB review, he still had the
opportunity to address the damage to his property in his nuisance claim and he's
being conferred all of the remedies to which he would be entitled had he prevailed in
a review of City code violations. No civil fines are being imposed, but he would not
be the recipient of those fines if they were imposed. Given that Mr. Blomenkamp has
been conferred all the remedies he could have acquired had all his claims been
considered, there is no basis for claiming that his property interest has been
compromised in this review process.

1 **Legislative History**

2 In his Request for Reconsideration Mr. Blomenkamp also cites to some legislative
3 history regarding a substantial 2009 re-write of the City’s land use hearing
4 procedures. The re-write did not affect ECDC 20.100.040, which had last been
5 amended in 1996. In his argument, Mr. Blomenkamp makes the point that the 2009
6 re-write was done despite the previous *Nykreim* and *Habitat Watch* court opinions.
7 Mr. Blomenkamp doesn’t identify how this relates to ECDC 20.100.040. There is
8 nothing in the 2009 legislative history that suggests that the City Council had chosen
9 to adopt regulations contrary to the holding of *Nykreim* and *Habitat Watch*. Nothing
10 in that legislative history suggests that the City Council has any intent to have its
11 ordinances construed in any manner contrary to state law. The 2009 legislative
12 history does not undermine the position that ECDC 20.100.040 should be interpreted
13 in a manner consistent with state law.

14 **Interpretation of ECDC 20.100.040**

15 As the parties fully appreciate, ECDC 20.100.040 is ambiguous as to who decides
16 what is to be reviewed by the examiner as well as what can be reviewed by the
17 examiner. From background principles regarding finality and the one hearing rule as
18 addressed *supra*, it is clear that ECDC 20.100.040 should not be interpreted to
19 authorize the reconsideration of issues that were addressed in the ADB approval. To
20 this end, as determined in the Final Decision, any request to reconsider an issue
21 resolved in a prior permitting decision does not constitute a “*reasonable ways to*
22 *correct the deficiencies*” under ECDC 20.100.040(3) and, therefore, cannot be
23 referred to the examiner for resolution. As noted in the Final Decision, a way that is
24 invalid under state law is not a “*reasonable ways*” to correct a deficiency. For similar
25 reasons, a deficiency cannot be “*reasonably corrected*” under ECDC 20.100.040(5) if
the only way to do so is by imposing an invalid condition. There is nothing gained by
referring illegal requests to the examiner and ECDC 20.100.040 can be reasonably
interpreted to avoid these types of requests.

The interpretation in the preceding paragraph is sufficient to resolve this case.
However, in reconsideration argument Mr. Blomenkamp and the City were still
debating whether or not City staff can assume a “gatekeeper” role in determining
what is to be reviewed by the examiner in ECDC 20.100.040 applications. Given the
continuing interest of the parties in this issue and the fact that some guidance is
necessary since this is the first time ECDC 20.100.040 has been applied, the issue
will be addressed. It is concluded that City staff do have the authority to decide what
is to be reviewed by the examiner under ECDC 20.100.040. The difference between
“deficiencies” and “alleged deficiencies” is determinative as argued by the City.
Under Mr. Blomenkamp’s interpretation, every time three citizens get together to
allege a deficiency, the City must demand that the applicant correct the deficiency no
matter how ill-founded or arbitrary the allegations may be. Further, under Mr.
Blomenkamp’s interpretation, the City must conduct a hearing on an alleged

1 deficiency even though the hearing and subsequent decision would clearly violate
2 court mandated principles of finality and the Regulatory Reform one hearing rule.
3 Such an interpretation could put City taxpayers in the position of having to pay
4 substantial damages claims from developers alleging violations of RCW 64.40.010 as
5 well as federal civil rights statutes, not to mention requiring the expenditure of
6 substantial amounts of public funds on invalid land use review. Mr. Blomenkamp's
7 interpretation leads to absurd consequences as argued by the City. Under ECDC
8 20.100.040, the Director of Community Services has the authority to determine what
9 qualifies as an actual as opposed to alleged deficiency and also to determine what
10 deficiencies are to be forwarded to the hearing examiner for review.

11 **Adequacy of Conditions**

12 At page 22 of his Request for Reconsideration Mr. Blomenkamp asserts that the
13 conditions imposed by the Final Decision are not based upon sufficient evidence.
14 The imposed conditions are based upon the recommendations of the City's arborist,
15 who is fully qualified to make such recommendations and was the most impartial
16 expert involved in this proceeding. Mr. Blomenkamp does not identify any evidence
17 in the record that suggests that the recommendations of the City's arborist are in
18 error. However, Mr. Blomenkamp makes a compelling point that restoration should
19 be based upon the restoration standards of Chapter 18.45 ECDC. Although
20 restoration in this case is based upon the nuisance claims of ECDC 20.100.040 and
21 not any violation of Chapter 18.45 ECDC, ECDC 20.100.040 doesn't provide any
22 objective standards for restoration while Chapter 18.45 ECDC does. One
23 clarification to the 18.45 standards is the requirement for ten foot replacement trees.
24 ECDC 18.45.075(A)(2) requires replacement with trees "*of sufficient caliber to*
25 *adequately replace the lost tree(s)*". What constitutes an "adequate" replacement is
not identified. The fact that ECDC 18.45.075(A)(2) requires up to three replacement
trees per lost trees is a recognition of the fact that it's not feasible or even probably
possible to replace 100 foot trees with trees of a similar height. In past enforcement
actions of Chapter 18.45 ECDC the City has never required replacement of this
nature. The replacement trees are limited to ten feet in height based upon the
maximum tree height required by the City's landscaping standards as referenced in
the Final Decision.

21 **Decision**

22 The conditions imposed by this Final Decision in this matter are replaced by the
23 following:

24 1. Kautz Route LLC shall pay for the removal of Tree No. 1, 3 and 5 as identified in
25 the City's arborist report, Ex. 1, att. 5, and shall also pay for the replacement of those
trees by up to three trees of the same species ten feet in height in the immediate
vicinity of the tree(s) which were removed so long as adequate growing space is

1 provided for such species. Payment is only required for trees actually removed by the
2 property owner.

3 2. Kautz Route LLC shall pay for the monitoring of Tree 4 as identified in the City's
4 arborist report, Ex. 1, att. 5, for three years and shall also pay for its replacement with
5 up to three ten foot trees (as space permits) of the same species should that be found
6 necessary through the monitoring program. The replacement trees shall be placed in
7 the immediate vicinity of the tree(s) which were removed so long as adequate
8 growing space is provided for such species. Payment is only required if the tree is
9 actually removed by the property owner.

10 3. Kautz Route LLC shall pay for the repair of Tree No. 2 as identified in the City's
11 arborist report, Ex. 1, att. 5. Payment is only required for actual repairs.

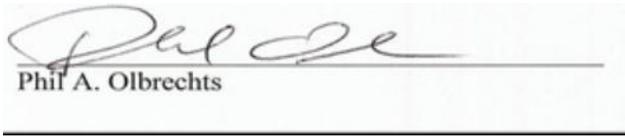
12 4. Payment amounts shall be based upon estimates provided by qualified contractors
13 submitted by the property owner and approved by the City as within reasonable
14 market prices and shall include all recommended maintenance to support the trees
15 taking root . Estimates shall be provided to City planning staff within two months of
16 this decision for replacement of Trees 1, 3 and 5 and two months from the time it is
17 determined Tree 4 needs to be replaced for Tree 4. Kautz Route LLC shall pay the
18 amount of each estimate to the City within 15 days of City demand. The City shall
19 reimburse the property owner with the funds upon proof of tree removal or repair (or
20 upon submission of an executed contract for the monitoring including the full amount
21 for replacement if needed in escrow). Any payments given to the City shall be
22 reimbursed to Kautz Route LLC if the services covered by the estimate are not
23 completed within the installation time recommended by the selected contractor
24 (excepting the monitoring program, in which a contract must be executed within two
25 months). City shall only be responsible for reimbursing property owner with funds
received from Kautz Route LLC (i.e. property owner should wait until funds are
received by City from Kautz before having services performed).

5. Kautz Route LLC shall also post security in an amount and form determined by
staff as necessary to cover a one year rooting period as identified in ECDC
18.45.075(B). The purpose of the security will be to replace any trees that fail to
"establish themselves" as contemplated by ECDC 18.45.075(B) within the one year
rooting period. The security shall be posted within 60 days of the date of this
decision.

6. Restoration shall also include installation and maintenance of interim and
emergency erosion control measures as determined necessary by staff until such time
as the restored trees reach sufficient maturation to function in compliance via
performance standards identified in ECDC 18.45.050.

Dated this 18th day of November 2015.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



Phil A. Olbrechts

City of Edmonds Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final as specified in ECDC 20.100.040(C)(5) and subject to appeal to superior court under the Land Use Petition Act (“LUPA”), Chapter 36.70C RCW. Potential appellants should review the appeal requirements of LUPA immediately, as appeal deadlines are short and appeal requirements complex.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.