IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

SUPREME COURT NO. 97713-5

COURT OF APPEALS NO. 78292-4-I

SCOTT BLOMENKAMP, Petitioner,

v.

CITY OF EDMONDS, a municipal corporation;

LEIF BJORBACK, Edmonds City Building Official;

and

KAUTZ ROUTE LLC, Respondents.

PETITION FOR REVIEW

Scott Blomenkamp, PRO SE

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Cases

I. IDENTITY OF THE PETITIONER

Scott Blomenkamp, appellant below, hereby petition for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Appellant seeks review of an unpublished Court of Appeals decision captioned *SCOTT BLOMENKAMP, Appellant v. CITY OF EDMONDS, a municipal corporation; LEIF BJORBACK, Edmonds City Building Official; KAUTZ ROUTE LLC, Respondents* (July 22, 2019) (App. A hereto). The Court of Appeals denied appellants' motion for reconsideration on August 27, 2019 (App. A hereto).

III. ISSUES PRESENTED FOR REVIEW

1. Are occupancy permits, which state on their face "...certifying that...was in compliance with the applicable...codes and ordinances..." *CP 461* issued by a local municipality, final decisions under LUPA? YES! Does a LUPA review constitute an impermissible collateral attack on the original development permits when the original permits explicitly state "...shall not be deemed to modify, waive, or reduce any requirements of any City ordinance nor limit in any way the City's ability to enforce any ordinance provision" *CP 408*? NO!

2. Under Local Project Review, RCW 36.70B.160(3), each local government is required to "adopt procedures to monitor and enforce

permit decisions and conditions." Is a LUPA petition for review of occupancy permits, which are the final decision in the enforcement of a development project, a belated collateral attack on a permit in the guise of a failure-to-enforce claim? NO!

3. Does the common law remedy of self help in trimming tree roots or branches of a neighbor's tree extend to allowing for destruction of the tree? NO! Is common law subordinate to statutory law of the local municipality and of the State. YES!

4. May the Appellant Court ignore independent testimony when deciding if facts are in dispute when determining the threshold question in a summary judgement? NO!

IV. STATEMENT OF THE CASE

This case arises from the City of Edmonds failing to follow its development permit process and intentionally refusing its responsibility to enforce its development codes and subsequently the Superior Court and Court of Appeals not correctly interpreting and applying the law.

A. The Facts Giving Rise to the Dispute

The project property is located at 23220 Edmonds Way. Mr. Blomenkamp owns property adjoining the approved project. The project began in 2013 with two pre-application meetings in early 2013 and formally with an application for design review under permit number

PLN20130066. *CP 165.* The development staff was required to determine consistency in accordance with RCW 36.70B.040 and ECDC 20.04. *CP 74-91.* There is no evidence in the record that the requirements of ECDC 18.45 (Land Clearing and Tree cutting Code) were discussed nor was the required decision pertaining to ADB approved projects issued. *CP 948-953.* The Architectural Design Board (ADB) reviewed the proposed development at a public hearing on February 5, 2014, and approved the development with conditions following the public hearing. The key condition being #12 The plans must comply with the current conditions and regulations. *CP 953.*

Following ADB approval, the applicant submitted five separate building permits for development of the site which were approved on December 29, 2014. They included language that required the permits be compliant with all regulations. *CP 408.* However, the required Land Clearing and Tree Cutting permit was not issued.

Mr. Blomenkamp bought his property May 12, 2015, nearly six months after permit approval and before any initiation of clearing and grading. There was not any notice of pending action on the Kautz Route property. Development of the site began in May 2015. While grading the site, the grading machinery encroached on to Mr. Blomenkamps property and cut the supporting roots that extended into the development site from

some trees located on Mr. Blomenkamp's property. This grading extended nearly five feet below the grade of the adjoining property. *CP 484-486.* (The photos unfortunately in the record are poor reproductions of the original documents. They do show the excavation starting at Mr. Blomenkamp's chainlink fence which is approximately a foot on his property.)

Mr. Blomenkamp contacted City staff about the damage and requested code enforcement on June 4th, 2015. City staff inspected the property and spoke with the developer, Respondent Kautz Route LLC, about the problem. Appellant Blomenkamp met with the Edmonds Mayor and the Director of Development Services on June 12th, 2017 to express his concern the development code was not being followed and enforced. Kautz Route LLC (hereinafter "Kautz" or "Kautz Route") voluntarily agreed to not continue work temporarily in the immediate vicinity of the property line while the issue was being investigated. A official stop work order was not issues, part of the plan not to provide a appealable decision. Subsequently, Kautz Route and the City of Edmonds commissioned arborist reports to assess the damage to the trees. Both arborist reports noted some of the trees have been impacted to a degree that the arborists determined them to be hazardous trees. *CP 460-503.*

On June 24th, 2015 the Director of Development Services sent a

letter summarizing the City's "investigation", one that did not even interview the complainant Mr. Blomenkamp, and concluded that the development was found to be operating within the conditions of the permit. *CP 1947*. This determination however did not memorialize that the development was compliant with ECDC 18.45. Nor did it memorialize any decision to change the landscape requirements requiring two rows of 10 foot trees separating the multi-family zone from single family zone. It also did not indicate any appeal process. Therefore it could not be considered a final determination.

B. The Review of Approved Permit Subject of LUPA 1

On June 29, 2015, Scott Blomenkamp, Marj Penderaft and Andrew Baxter jointly filed a request for review of the ADB approval of the duplex project under ECDC 20.100.040. The request asserted that the duplex project was not compliant with ECDC 18.45, specifically section 18.45.050(H), also that the property had created a hazardous situation and nuisance by causing four of Mr. Blomenkamp's trees to become severe hazards. *CP 151-165.* The hazard and nuisance portions of the Petitioner's ECDC 20.100.040 review were bifurcated from the code violation allegations and forwarded to the Hearing Examiner for review. The Development Services Director summarily dismissed the remaining deficiencies of Petitioner's application for review of an approved permit.

The Hearing Examiner determined he did not have authority to review the alleged code violations. He did rule that the project did cause a hazardous situation and nuisance. *CP 159,186-188.*

C. LUPA Petition to Superior Court

On December 9, 2015, Mr. Blomenkamp filed this LUPA petition seeking judicial review of the Hearing Examiners decision limiting the scope of the hearing and his decision that the statutory required redress was ambiguous in Snohomish County Superior Court, Cause No. 15-2-07634-3, pursuant to LUPA Chapter 36.70C RCW. *CP 194-203.*
On July 9, 2016, the Superior Court issued its Decision on LUPA and Order. *CP 271-281.*

On August 9th, 2016 the Superior Court issued its Order Granting/Denying Motion for Reconsideration. *CP 327-328.*

D. Appellant Court

On July 24th, 2017, the Court of Appeals ruled that the appellant had not exhausted his administrative remedies and therefore was barred from pursuing enforcement. In deciding this the Court made the unusual choice to utilize RAP 12.1(b) and decide the case based a "failure to exhaust administrative remedies" that was not briefed. Nor did it request additional briefing to allow the Petitioner an opportunity to address the issue. The court did not base its decision on the one provision in LUPA

that expressly discusses the exhaustion requirement (RCW 36.70C.060). That provision, titled "Standing", requires exhaustion only of "his or her administrative remedies to the extent required by law." The court ignored the clear unrebutted evidence that the appellant did not own the damaged property until May of 2015 and therefore the administrative remedies of appealing the ADB decision or appealing the grading permit were not available to him. This Court denied review. *CP 370-383.*

E. City of Edmonds Avoids Issuing a Reviewable Final Decision

Through all of Mr. Blomenkamp's attempts, the City of Edmonds would not issue any "final decision by the highest authority" on the compliance of the project with development regulations. Mr. Blomenkamp warned the City that under Chumbley issuing occupancy permits would be a final determination that they were not pursuing enforcement of their development regulations regarding the project and he would be filing under LUPA.

F. LUPA 2

On April 26, 2017 Mr. Blomenkamp filed his second LUPA challenging the issuing of certificates of occupancy for the project contrary to the plain face of the certificates that the project complies with all regulations. *CP 440-463.* Along with his LUPA, he filed tort claims for

the damage caused to his property. Before discovery could be done, after briefing on the Petitioner's standing, the LUPA was dismissed by summary judgement that the Certificates were not reviewable final decisions. No argument, nor decision was given that it was a collateral attack on the permit. The tort claims could continue. *CP 533-638.*

On January 18, 2018 the Superior Court ignored the evidence presented of the independent arborist reports as to the damage to Mr. Blomenkamp's property showing that facts were in dispute and dismissed by summary judgement the remaining tort claims for damages. *CP 735-736.*

G. Court of Appeals

Mr. Blomenkamp filed his appeal to the Court of Appeals claiming that the Certificates of Occupancy were final decisions appealable under LUPA along with appealing the dismissal of his tort claims as not being ripe for a summary judgement as the threshold question of relevant facts being in dispute. Even though Mr. Blomenkamp was opposed by six learned lawyers from two of the largest firms in Washington State the Court again chose to use the unusual choice to employ RAP 12.1(b) and rule that the Appellants challenge to the issuance of occupancy permits was an impermissible collateral attack when it was not briefed. Again,

there was no additional briefing allowing for the Appellant to address the issue. Further, the Court ignored the multiple arborist reports, photo evidence of the damage, and disputed facts dismissing the case based on the common law that "a property owner may cut back to the property line any tree roots that intrude onto his or her property." ignoring the statutory laws of the City of Edmonds and the State of Washington.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may grant review and consider a Court of Appeals opinion if the decision conflicts with other decisions of this Court, if the decision conflicts with a published decision of the Court of Appeals, if it involves a significant question of law under the Constitutions of the State of Washington or the United States, or if it involves an issue of substantial public interest. RAP 13.4(b)(1)-(4). This petition has multiple issues of first impression.

A. The Confirmation of the Superior Court Summary Judgement to Dismiss the Appellants LUPA Conflicts with both a Decision by the Court of Appeals and Multiple Decisions of this Court and is of Substantial Public Interest.

The Division 1 Court of Appeal's decision to confirm the Superior Court's dismissal of the Appellants LUPA was not based on the briefings,

or the plain statutory requirement of RCW 36.70C. Instead, it went against its own decision in *Chumbley v. Snohomish County,* 386 P. 3d 306 - Wash: Court of Appeals, 1st Div. 2016. While the Court is correct that the key decision was that the determination that "no permit will be required" was the triggering final decision, they ignore their extensive discussion of the relationship of how Occupancy Permits relate to Building Permits that require the permit be in accordance with development regulations thereby not being a final decision on the potential enforcements of regulations at a later date. Further, the Court went on to say

"¶ 59 County Planning closed its enforcement file on September 9, 2015, with the decision that "no permit will be required." County Planning **certified the building for occupancy** on September 22, 2015. **These** were County Planning's **final determinations** that the county was finished with **enforcement** of land disturbing activity and critical area ordinances on lots 60 and 61. **Until these** decisions were made, it was open to further dispute whether County Planning would require Begis to apply for a permit and submit to a rigorous geotechnical review such as County Planning conducted for lot 36." (emphasis added)

While the Court decided the case on the "no permit will be required." determination since it was still a timely challenge it certainly could have decided it on the issuance of occupancy permits. The key part

of the decision that it spent nearly ten paragraphs explaining was that building permits did not "leave nothing open to further dispute" and that a challenge to enforcement decisions, of which a occupancy permit is one, does not constitute an "implied challenge to or a belated collateral attack on the building permit."

However, the Court ignored its own prior precedent and rule it was an impermissible collateral attack on the permit, further stating "The City's issuance of the April 6, 2017 certificates of occupancy was not a final enforcement decision." Again, the Appellant will state the issues under LUPA on appeal are the City's final decision by issuing Occupancy Permits that it would not enforce its Land Clearing and Tree Cutting Code, ECDC 18.45 *CP 675-682*, and its Landscaping Requirements, ECDC 20.13 *CP 684-689*, which have to do with actions initiated after the development permitting process specifically in accordance with the damage to the Appellants trees and the failure of the project to install the required dual rows of 10' trees separating two different development zones.

The Court of Appeals decision is also in conflict with other Appeals Court decisions in *Heller Bldg., LLC v. City of Bellevue*, 194 P. 3d 264 - Wash: Court of Appeals, 1st Div. 2008, and multiple decisions by this Court in *Taylor v. Stevens County*, 759 P. 2d 447 - Wash: Supreme

Court 1988, *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005), *Chelan County v. Nykreim*, 52 P. 3d 1 - Wash: Supreme Court 2002 and *Lauer v. Pierce County*, 267 P. 3d 988 - Wash: Supreme Court 2011. The Appellant expounded on these in depth in his Motion for Reconsideration of the Court of Appeals decision. *Pg 4-8.*

B. The Court of Appeals Decision to Affirm Dismissal of the Appellants Various Trespass Claims Conflicts with Multiple Decisions by this Court.

The Court partially cites this Court's decision that "A property owner may cut back to the property line any tree roots that intrude onto his or her property." *Gostina v. Ryland*, 116 Wash. 228, 233, 199 P. 298 (1921); Boyle v. Leech, 7 Wn. App. 2d 535, 436 P.3d 393 (2019). However, it ignores the critical part in the decision "...but he may not cut down the tree." While Kautz Route did not cut down Mr. Blomenkamp's trees, the act of ripping the supporting roots out and disturbing the soil on Mr. Blomenkamp's property caused the trees to be considered hazardous and required removal according to two arborist reports and the Edmonds Hearing Examiner's decision the subject of Mr. Blomenkamps first LUPA. Further, the letter from Kautz insurance company states that they knew full well that their work would destroy Mr. Blomenkamp's trees. *CP 1015.*

The Court further ignores this Court's opinion in *Jongeward v. BNSF R. CO.*, 278 P.3d 157 (2012)174 Wn.2d 586 where the Court held that the term trespass in RCW 64.12.030 refers to a "trespass to the tree" not requiring a trespass onto the property the tree is situated on. The major parts of a tree are leaves, flowers and fruit, trunk and branches, and roots. See www.sactree.com/assets/files/greenprint/toolkit/c/huntsvilleTreeGuide.pdf The consensus is that roots are not separate and distinct from a tree, one does not live without the other. Although Washington Courts have not had a case of such, imagine a neighbor poisoning another neighbors tree by simply poisoning the tree by applying heavy doses of poison on the roots extending underneath his/her property. While not controlling, Oregon has had such a case in *Brown v. Johnston*, 482 P. 2d 712 - Or: Supreme Court, Department 2 1971 where the court decided such action was a trespass to the tree.

The issue in the present case is that statutory law which is codified, is controlling over common law. Common law being based on case law by it's very definition must bow to statutory law. The City of Edmonds established a comprehensive tree removal code that specifically provides for protecting trees during development. *ECDC 18.45.* It specifically defines the act of removal as ""Removal" is 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." *ECDC 18.45.040.* Further, it provides for tree protective measures that the City in its permitting did not recognize. *ECDC 18.45.050.* The fact that these measures were not included in the original permit does remove the responsibility of Kautz to follow them as the language on the face of the permit makes clear.

C. The Court of Appeals Decision that Occupancy Permits do not Constitute Challengeable Final Decisions not to Enforce and that a Development May Indiscriminately Destroy a Neighbors Trees by Destroying Roots of the Tree are of Substantial Public Interest and a violation of Mr. Blomenkamps Constitutional Rights.

This Court must recognize the fundamental fallacy in the Court of Appeals decision that "In short, Blomenkamp cannot, under the guise of a LUPA failure-to-enforce challenge, use a certificate of occupancy issued at the end of a project to collaterally attack a final land use decision made near the beginning of the project." The Court confuses the functions of project permitting in which the municipality is limited by time limits imposed by RCW 36.70B and articulated in *Lauer v. Pierce County at 36*, with enforcement of activity after the permit approval. By the Court's

absurd logic, a municipality would be barred from enforcing its development regulations if it did not timely challenge its own permit decision just as their decision bars Mr. Blomenkamp from challenging their refusal to enforce their regulations. The substantial public interest is that as in Mr. Blomenkamp's case, the City of Edmonds avoided providing Mr. Blomenkamp a challengeable final determination by simply ignoring his claims of code violations. Without a final determination, he could not challenge the City in court, violating his 1st Amendment U.S. Constitutional "Right of Redress" as well as 4th Amendment "Due Process". As LUPA is the exclusive remedy, not having a final decision precludes a challenge. By not allowing Occupancy Permits to be final determinations that the municipality will not enforce it's regulations, the Court opens the door for corrupt officials too avoid being held accountable. These officials have significant motive when one looks at the revenue new development brings to their coffers.

The public has substantial interest in the preservation of trees to combat Climate Change. Surely this court is not oblivious to the daily news reports and the obvious knowledge that trees are consumers of CO2. The conflict between increasingly dense development and their neighbors result in indiscriminate tree removal.

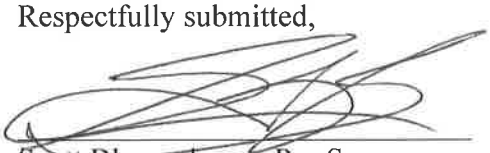
VI. CONCLUSION

For the reasons above, Appellant Scott Blomenkamp respectfully requests that this Court grant review under RAP 13.4(b)(1)-(4) of the court of appeals affirmation of the superior court decision. Mr. Blomenkamp simply seeks from this court an order reversing the Superior Court's dismissal of his LUPA and tort claims, allowing for discovery and a decision of the case on its merits. To this date the City of Edmonds has been able to avoid judicial review of its failure to enforce its development regulations to the mental, emotional and financial detriment of Mr. Blomenkamp.

I, Scott Blomenkamp hereby declare under penalty of Washington perjury laws that the foregoing is true and correct.

Dated this 26th day of September, 2019.

Respectfully submitted,



Scott Blomenkamp, Pro Se

APPENDIX

FILED
7/22/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT BLOMENKAMP, Appellant, v. CITY OF EDMONDS, a municipal corporation; LEIF BJORBACK, Edmonds City Building Official; KAUTZ ROUTE, LLC, Respondents.	)	No. 78292-4-I UNPUBLISHED OPINION FILED: July 22, 2019

VERELLEN, J. — Scott Blomenkamp appeals from the superior court's order dismissing his Land Use Petition Act (LUPA)[1] petition for lack of standing. He also appeals the dismissal of his tort claims against Kautz Route LLC (Kautz) and the City of Edmonds (City). Because the superior court properly dismissed Blomenkamp's LUPA and tort claims, we affirm.

FACTS

After unsuccessfully appealing the denial of his first LUPA appeal,[2] Blomenkamp filed this appeal of his unsuccessful second LUPA petition.

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[1] Ch. 36.70C RCW.

[2] Blomenkamp v. City of Edmonds, No.75737-7-1-I, slip op. at 2-4 (Wash. Ct. App. July 24, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/757377.pdf.

In October 2013, Kautz began developing a five-duplex project in Edmonds, Washington. On February 5, 2014, the architectural design board (ADB) for the City reviewed and approved Kautz's project with conditions. No one appealed the ADB decision. On December 29, 2014, Kautz obtained a site and utility improvements permit that contemplated clearing. No one appealed that permit.[3]

In May 2015, while grading the site, Kautz severed tree roots extending into the development site from some trees located on adjoining property purchased by Blomenkamp on May 12, 2015.[4] In June 2015, Blomenkamp and two other residents filed a request for review of the ADB approval of Kautz's project pursuant to Edmonds Community Development Code (ECDC) 20.100.040.[5]

The City's Development Services Director (Director) concluded that the approved permits for Kautz's project "complie[d] with City code" and that the project was "operating within the conditions of the approved permits."[6] The City's Hearing Examiner (Examiner) rejected Blomenkamp's claims to revoke the permits and to award damages.[7]

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[3] Id. at 2.

[4] CP at 162.

[5] CP at 151-52. As relief for these alleged violations, Blomenkamp sought revocation of the ADB approval and $50,000 in compensation for the damage caused to his trees. CP at 167.

[6] CP at 159.

[7] Blomenkamp, slip op. at 3-4. The examiner concluded: (1) "compliance with Chapter 18.45 ECDC was subject to the exclusive jurisdiction of the ADB during the design review process[,]" (2) "the ADB would have had a fairly accurate understanding of precisely how much grade and fill was involved in the project[,]" (3) "[r]evocation of the permit will not prevent any further tree damage or remedy the hazards that

In December 2015, Blomenkamp appealed the Examiner's decision to Snohomish County Superior Court under LUPA but the superior court dismissed the petition.[8] Blomenkamp appealed that order of dismissal to this court.[9] We rejected Blomenkamp's argument that the City failed to enforce the codes and ordinances governing the permits it issued Kautz in 2014 as a prohibited collateral attack.[10]

On April 26, 2017, while review of his first LUPA petition was still pending in this court, Blomenkamp filed a second LUPA petition and Complaint for Damages in Snohomish County Superior Court.[11]

In the LUPA portion of his second petition, Blomenkamp identified the land use decision being appealed as the City Building Official's April 6, 2017 issuance of certificates of occupancy to Kautz for the same five properties that were the subject of his first petition.[12] In the damages portion, he asserted numerous tort claims against Kautz, including timber trespass, damage to land, trespass,

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currently exist[,]" and (4) if Blomenkamp "believes he is entitled to a cash award, he needs to file his claim in superior court, who with . . . tort jurisdiction is the proper forum to adjudicate damages claims." CP at 176-77.

[8] CP at 194, 281, 327; Blomenkamp, slip op. at 4.

[9] CP at 331.

[10] Blomenkamp, slip op. at 1-2. We also rejected all of Blomenkamp's remaining claims and his motion for reconsideration. Id. at 10-13; CP at 433. The Washington Supreme Court denied his petition for review. Blomenkamp v. City of Edmonds, 190 Wn.2d 1003, 413 P.3d 14 (2018).

[11] CP at 440.

[12] CP at 441, 458-62.

negligence, gross negligence, and nuisance.[13] He asserted a single claim of "Local Municiple [sic] Tortious Conduct" against the City.[14]

Based on a series of motions, the superior court dismissed Blomenkamp's second LUPA petition for lack of standing, dismissed all of his tort claims against Kautz, and dismissed his tortious conduct claim against the City.[15] Blomenkamp appeals.[16]

ANALYSIS

I. Second LUPA Petition

Blomenkamp contends the superior court erred in dismissing his second LUPA petition for lack of jurisdiction and standing.[17] Blomenkamp mistakenly refers to jurisdiction. The superior court dismissed the LUPA petition based only upon lack of standing.[18]

Additionally, although "jurisdiction" is often used imprecisely, a court has subject matter jurisdiction if it has authority to adjudicate the type of controversy involved in the action.[19] The "type of controversy" refers to the nature of the case

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[13] CP at 451-54.

[14] CP at 454.

[15] CP at 640-42, 667-68, 2000-04.

[16] CP at 1992-94.

[17] Appellant's Br. at 3-4, 13-22.

[18] Report of Proceedings (RP) (July 12, 2017) at 36 (ruling "there is no standing.").

[19] In re Marriage of McDermott, 175 Wn. App. 467, 480-81, 307 P.3d 717 (2013) (quoting Shoop v. Kittitas County, 108 Wn. App. 388, 393, 30 P.3d 529 (2001)); see also Cole v. Harveyland, LLC, 163 Wn. App. 199, 209, 258 P.3d 70 ("The critical

or the relief sought.[20] A superior court has subject matter jurisdiction to hear a LUPA petition challenging a land use decision.[21]

"To have standing to file a land use petition, a petitioner must first 'exhaust [ ] his or her administrative remedies to the extent required by law.'"[22] We review LUPA standing de novo.[23]

In his first LUPA petition, Blomenkamp challenged the City's decisions to permit and approve Kautz's project on the theory the City failed to enforce its codes and ordinances. On appeal, we rejected his claim as an impermissible belated collateral attack.[24] Now, Blomenkamp contends that the City's issuance of certificates of occupancy to Kautz was "a final decision that it would not enforce its

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concept in determining whether a court has subject matter jurisdiction is the type of controversy.").

[20] Dougherty v. Dep't of Labor & Indus., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003); Magee v. Rite Aid, 167 Wn. App. 60, 73, 277 P.3d 1 (2012).

[21] Durland v. San Juan County, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

[22] Id. at 66 (quoting RCW 36.70C.060(2)(d)). LUPA petitions must be brought within 21 days of the land use decision. RCW 36.70C.040(3). Failure to timely pursue a right to appeal a land use decision precludes a collateral attack of that decision via a challenge to subsequent land use decision. Blomenkamp, slip op. at 6; Durland v. San Juan County, 174 Wn. App. 1, 13, 298 P.3d 757 (2012) ("[A] party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision.").

[23] Knight v. City of Yelm, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

[24] There, we explained that a LUPA petition "does not allow a belated collateral attacked on a permit in the guise of a failure-to-enforce claim." Blomenkamp, slip op. at 9 (holding that Blomenkamp was precluded from raising substantive tree protection standards in his LUPA petition challenging the February 2014 ADB approval and December 2014 permit).

development regulations."[25] Critically, however, this is the same "failure-to-enforce" argument we rejected on review of his first appeal. For similar reasons, we conclude that Blomenkamp lacked standing to bring the collateral attacks contained in his second LUPA petition.[26]

Blomenkamp again cites Chumbley v. Snohomish County,[27] and now cites Biermann v. City of Spokane[28] to argue that a City's issuance of occupancy certificates supports standing under LUPA to challenge its final enforcement decisions.[29] His reliance on those cases is misplaced.

In Chumbley, the county's decision to issue a certificate of occupancy was not the key decision. There, the county's September 9, 2015 determination that "no permit will be required" was the final enforcement decision triggering commencement of the 21-day deadline to file a LUPA petition; the county's

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[25] Appellant's Br. at 18; Appellant's Reply Br. at 14. He again claims that Kautz's project "did not have a clearing permit and the clearing and development has caused damage to his trees in violation of ECDC." Appellant's Br. at 20. The City's "lack of enforcement" is at the core of his second LUPA petition. Appellant's Reply Br. at 1.

[26] Blomenkamp, at slip op. 8-9; Stientjes Family Tr. v. Thurston County, 152 Wn. App. 616, 624 n.8, 217 P.3d 379 (2009) (challenges brought "after LUPA's 21-day time period for filing an appeal constitute impermissible collateral attacks"); Habit Watch v. Skagit County, 155 Wn.2d 397, 407, 120 P.3d 56 (2005) (even illegal land use decisions will be allowed to stand if not timely challenged under LUPA).

[27] 197 Wn. App. 346, 386 P.3d 306 (2016). Blomenkamp unavailingly cited Chumbley on his first appeal to this court. See Blomenkamp, slip op. at 9 n.23.

[28] 90 Wn. App. 816, 960 P.2d 434 (1998).

[29] Appellant's Br. at 17-19; Appellant's Reply Br. at 2.

September 22, 2015 issuance of the certificates of occupancy was not.[30] We reversed in Chumbley because the petitioners timely filed their LUPA petition on September 30, 2015 (within the 21-day deadline).[31] Here, the City made its final land use decisions on the scope of permits issued to Kautz in February and December 2014, but Blomenkamp did not begin to challenge those permits until June 2015. The City's issuance of the April 6, 2017 certificates of occupancy was not a final enforcement decision.

Biermann is also factually distinguishable. In Biermann, a divided Division III panel concluded that an adjacent property owner had standing under LUPA to challenge the City of Spokane's approval of a "certificate of compliance" for a non-conforming garage.[32] Biermann did not involve "certificates of occupancy." Most significantly, the focus of Biermann was on whether inspections extended the duration of a building permit, and there is no indication the property owner's LUPA petition was an untimely collateral attack.[33]

In short, Blomenkamp cannot, under the guise of a LUPA failure-to-enforce challenge, use a certificate of occupancy issued at the end of a project to

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[30] Chumbley, 197 Wn. App. at 358-59, 365.

[31] Id. at 365.

[32] Biermann, 90 Wn. App. at 818-20 (There, the developers' building permit expired before they began construction, they constructed a two-story garage when only a one-story had been approved, and Spokane "issued three stop-work orders and threatened the [developers] with criminal action." Despite this, Spokane's hearing examiner granted the developer's request for a certificate of compliance.).

[33] Id. at 819.

collaterally attack a final land use decision made near the beginning of the project. The superior court did not err in dismissing Blomenkamp's second LUPA petition for lack of standing.[34]

II. Tort Claims

Blomenkamp also contends the trial court erred in dismissing his tort claims against Kautz and the City.[35]

Our case law "recognizes[ ] claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails."[36] In Mercer Island, the court explained that because all of the petitioner's claims challenged the validity of the land use decision at issue "and were therefore subject to LUPA, the [petitioner's] failure to assert them within LUPA's time limitations requires dismissal of all the claims, including those for damages. Thus, the trial court did not err by dismissing the

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[34] See Durland, 175 Wn. App. at 325 (noting that even granting the petitioner's requested relief from the administrative exhaustion requirement in establishing LUPA standing, such relief "could not, however, expand the authority of the court to act"). Given our conclusion, we do not need to address the parties' arguments on whether the City's issuance of occupancy certificates qualifies as a final land use decision.

[35] Appellant's Br. at 4-7, 29-35.

[36] Mercer Island Citizens for Fair Process v. Tent City 4, 156 Wn. App. 393, 405, 232 P.3d 1163 (2010) (citing Shaw v. City of Des Moines, 109 Wn. App. 896, 901-02, 37 P.3d 1255 (2002) "(where LUPA petition challenging conditions imposed on building permit application included a claim for damages, court acknowledged: 'If the petitioner loses the LUPA appeal, the damages case is moot and the matter is over.')"; Asche v. Bloomquist, 132 Wn. App. 784, 800, 133 P.3d 475 (2006) "(LUPA precluded nuisance claim for damages because it depended entirely upon a finding that the challenged permit was invalid).").

claims."[37] Blomenkamp even acknowledges "LUPA is controlling . . .when the damages are derived directly from the decision being reviewed under LUPA."[38]

A decision how ordinances or regulations should be enforced is a "determination" that qualifies as a land use decision subject to LUPA and does not constitute a separate tortious act committed during the land use process.[39]

Here, the record reveals from the initiation of his first LUPA petition until now, Blomenkamp's tort claims are based on the City's "determination" of how its codes and ordinances should be enforced as to Kautz's project. Beginning with the August 2015 hearing before the Examiner where he requested revocation of Kautz's permits and $50,000 in damages to his trees, Blomenkamp argued that Kautz "should have followed the tree-cutting code. . . . The code needs to be enforced. This is not a land use issue, but it is a code enforcement issue."[40]

Then, in his motion for reconsideration following this court's decision on his first appeal, Blomenkamp argued (among other things) that his LUPA petition was not an impermissible collateral attack on a permit, but "an appeal of an enforcement action."[41] Blomenkamp also incorporated "all of the facts" set forth in

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[37] Id. at 405.

[38] Appellant's Reply Br. at 20.

[39] See Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 426-28, 423 P.3d 223 (2018) (distinguishing tort claims from a "determination" subject to LUPA).

[40] CP at 171 (emphasis added).

[41] CP at 386.

his second LUPA petition as the factual support that he contends entitles him to monetary damages for his tort claims.[42]

Moreover, his current briefing continues to allege the City's failure to enforce, and Kautz's failure to comply with, clearing codes and ordinances. For instance, he claims that Kautz violated ECDC 18.45 and cleared "outside a permitted area" and caused damage to his tree, his nuisance claim is "partially based on the lack of a dense visual barrier that [Kautz is] required to have with the required type 1 landscape," and the "City was negligent in its permitting the development without the required Type 1 landscaping and failed to enforce such requirements."[43]

The record makes clear that Blomenkamp's tort claim against the City is based on the City's determination on how to enforce its ordinances—land use decisions the City finalized in 2014. Because Blomenkamp's second LUPA petition inherently focused on his failure to enforce theory, his tort claim against the City based on that same theory necessarily fails because he lacks standing to pursue his second LUPA petition. The superior court properly dismissed Blomenkamp's tort claim against the City.[44]

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[42] CP at 452.

[43] Appellant's Br. at 31, 34, 37.

[44] Blomenkamp relies on Post v. City of Tacoma, 167 Wn.2d 300, 217 P.3d 1179 (2009) for the proposition that if money damages or compensation is the relief requested from a land use decision, then such a claim is not subject to LUPA's procedures and deadlines pursuant to RCW 36.70C.030(1)(c). See Appellant's Reply Br. at 19. Post is distinguishable. First, unlike the case at bar, the Post court concluded that the City of Tacoma's enforcement of ordinance violations was not a

As to his tort claims against Kautz, the alleged torts are grounded in the premise that when grading, Kautz crossed over the property line damaging tree roots on Blomenkamp's side of the property line.[45]

We review a summary judgment order de novo and engage in the same inquiry as the trial court.[46] Summary judgment is proper if there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law.[47] A party opposing summary judgment may not rely solely on allegations made in its pleadings but "'must set forth specific facts showing that there is a genuine issue for trial.'"[48] We view the facts and all reasonable inferences in the light most favorable to the nonmoving party.[49] We may affirm the superior court's summary judgment decision on any ground supported by the record.[50]

"land use decision" subject to LUPA under RCW 36.70C.020(1)(c). Id. at 308-12. Second, the Post court did not address the merits of the plaintiff's damages claims because "[t]hose claims were either dismissed by the trial court or abandoned by Post prior to appeal." Id. at 307 n.2.

[45] Appellant's Br. at 29-33.

[46] Beaupre v. Pierce County, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

[47] CR 56(c); Lowman v. Wilbur, 178 Wn.2d 165, 168-69, 309 P.3d 387 (2013). A material fact is one that affects the outcome of the litigation. Janaszak v. State, 173 Wn. App. 703, 711, 297 P.3d 273 (2013).

[48] Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting CR 56(e)).

[49] Fulton v. Dep't of Soc. & Health Servs., 169 Wn. App. 137, 147, 279 P.3d 500 (2012).

[50] LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

In his opposition to Kautz's motion for summary judgment on the various trespass claims, Blomenkamp did not present any proper declarations or affidavits establishing a genuine issue of material fact that the damage to the tree roots occurred on Blomenkamp's side of the property line.[51] A property owner may cut back to the property line any tree roots that intrude onto his or her property.[52] Blomenkamp did not establish on summary judgment that Kautz owed him any legal duties supporting his negligence and nuisance claims.[53] Nor has he cited to any authority stating that Kautz owed such duties or even discussing the elements required for his various tort theories.[54] Accordingly, Blomenkamp fails to establish a genuine issue of material fact precluding summary judgment rejecting his tort claims against Kautz.

We affirm.

WE CONCUR:

[51] CP at 1032, 1055.

[52] Gostina v. Ryland, 116 Wash. 228, 233, 199 P. 298 (1921); Boyle v. Leech, 7 Wn. App. 2d 535, 436 P.3d 393 (2019).

[53] CP at 1054-55.

[54] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate courts do not consider arguments that are not supported by authority).

RICHARD D. JOHNSON,

The Court of Appeals
of the
State of Washington

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CASE #: 78292-4-I

Scott Blomenkamp, Appellant v. City of Edmonds, et al., Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion For Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson

Court Administrator/Clerk

LAM

Enclosure

c: Reporter of Decisions

FILED
8/27/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SCOTT BLOMENKAMP, Appellant, v. CITY OF EDMONDS, a municipal corporation; LEIF BJORBACK, Edmonds City Building Official; KAUTZ ROUTE, LLC, Respondents.	No. 78292-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed July 22, 2019. Following consideration of the motion, the panel has determined it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:

1. Blank building walls should be softened by landscaping.

2. Landscaping should include trees and shrubs – mostly evergreen.

3. Trees should be planted an average of 20 feet on center either formally or in clusters.

B. Foundation Planting.

1. Trees and shrubs should soften the building elevation and soften the transition between the pavement and the building.

2. Plantings may be in informal or formal arrangements (see ECDC 20.13.020(A) and (B)).

3. Landscaping should be planted in all areas except service areas.

4. Planting areas should be at least four feet wide. [Ord. 3636 § 4, 2007].

20.13.030 Landscape types.

A. Type I Landscaping. Type I landscaping is intended to provide a very dense sight barrier to significantly separate uses and land use districts.

1. Two rows of evergreen trees, a minimum of 10 feet in height and planted at intervals of no greater than 20 feet on center. The trees must be backed by a sight-obscuring fence a minimum of five feet high or the required width of the planting area must be increased by 10 feet; and

2. Shrubs a minimum of three and one-half feet in height planted in an area at least five feet in width, and other plant materials, planted so that the ground will be covered within three years;

3. Alternatively, the trees and shrubs may be planted on an earthen berm at least 15 feet in width and an average of five feet high along its midline.

B. Type II Landscaping. Type II landscaping is intended to create a visual separation between similar uses.

1. Evergreen and deciduous trees, with no more than 30 percent being deciduous, a minimum of six feet in height, and planted at intervals no greater than 20 feet on center; and

2. Shrubs, a minimum of three and one-half feet in height and other plant materials, planted so that the ground will be covered within three years.

C. Type III Landscaping. Type III landscaping is intended to provide visual separation of uses from streets, and visual separation of compatible uses so as to soften the appearance of streets, parking areas and building elevations.

1. Evergreen and deciduous trees, with no more than 50 percent being deciduous, a minimum of six feet in height, and planted at intervals no greater than 30 feet on center; and

2. If planted to buffer a building elevation, shrubs, a minimum of three and one-half feet in height, and living ground cover planted so that the ground will be covered within three years; or

3. If planted to buffer a parking area, access, or site development other than a building, any of the following alternatives may be used unless otherwise noted:

a. Shrubs, a minimum of three and one-half feet in height, and living ground cover must be planted so that the ground will be covered within three years.

Chapter 18.45
LAND CLEARING AND TREE CUTTING CODE

Sections:

18.45.000 Purposes.

This chapter provides regulations for the clearing of and the protection and preservation of trees and associated significant vegetation for the following purposes:

A. To promote the public health, safety, and general welfare of the citizens of Edmonds by preserving the physical and aesthetic character of the city through the prevention of indiscriminate removal or destruction of trees and ground cover on improved or partially improved property;

B. To implement the policies of the State Environmental Policy Act of 1971 as revised in 1984;

C. To implement and further the goals and policies of the city's comprehensive plan in regard to the environment, open space, wildlife habitat, vegetation, resources, surface drainage, watershed, and economics;

D. To ensure prompt development, restoration and replanting and effective erosion control of property during and after land clearing;

E. To promote land development practices that result in a minimal adverse disturbance to existing vegetation and soils within the city;

F. To minimize surface water and ground water runoff and diversion;

G. To aid in the stabilization of soil, and to minimize erosion and sedimentation;

H. To minimize the need for additional storm drainage facilities caused by the destabilization of soils;

I. To retain clusters of trees for the abatement of noise and for wind protection;

J. To acknowledge that trees and ground cover reduce air pollution by producing pure oxygen from carbon dioxide;

K. To preserve and enhance wildlife and habitat including streams, riparian corridors, wetlands and groves of trees;

L. To promote building and site planning practices that are consistent with the city's natural topographic and vegetation features while recognizing that certain factors such as condition (e.g., disease, danger of falling, etc.), proximity to existing and proposed structures and improvements, interference with utility services, and the realization of a reasonable enjoyment of property may require the removal of certain trees and ground cover;

M. To promote the reasonable improvement and development of land in the city of Edmonds. [Ord. 3646 § 1, 2007].

18.45.010 Administering authority.

The city's planning division manager or his/her duly authorized representative is hereby authorized and directed to enforce all the provisions of this chapter. [Ord. 3646 § 1, 2007].

18.45.020 Permits.

No person shall engage in or cause any land to be cleared without first obtaining a land clearing permit from the planning division manager or his/her designee. [Ord. 3646 § 1, 2007].

18.45.030 Exemptions.

The following shall be exempt from the provisions of this chapter:

A. Clearing on an improved single-family lot or clearing on a partially improved single-family lot, which is capable of being divided into one additional lot, except for:

1. That portion of the lot that is located in a designated environmentally sensitive area;

2. That portion of the lot that is located within 25 feet of any stream or wetland;

3. That portion of the lot that has slopes exceeding 25 percent;

B. Unimproved lots which are not capable of being further subdivided, except for:

1. That portion of the lot that is located in a designated environmentally sensitive area;

2. That portion of the lot that is located within 25 feet of any stream or wetland;

3. That portion of the lot that has slopes exceeding 25 percent;

C. Routine landscape maintenance and gardening;

D. Removal of trees and/or ground cover by the public works department, parks department, fire department and/or public or private utility in situations involving danger to life or property, substantial fire hazards, or interruption of services provided by a utility;

E. Installation and maintenance of public utilities, after approval of the route by the planning division manager or his or her designee, except in parks or environmentally sensitive areas;

F. Emergency situations on private property involving danger to life or property or substantial fire hazards. [Ord. 3646 § 1, 2007; Ord. 3507 § 1, 2004].

18.45.035 Procedural exemption.

Projects requiring the approval of the Edmonds architectural design board ("ADB") under the provisions of Chapter 20.10 ECDC shall be exempt from the application and procedural requirements of this chapter; provided, however, that:

A. Clearing on such projects shall take place only after ADB approval and shall be in accordance with such approval. Violations shall be subject to the remedies prescribed by this chapter. See ECDC 18.45.070.

B. ADB review of clearing proposals shall be consistent with and apply to the standards established by this chapter. [Ord. 3646 § 1, 2007; Ord. 3507 § 2, 2004].

18.45.040 Definitions.

A. "Caliper" shall mean the diameter of any tree trunk as measured at a height of four feet above the ground on the upslope side of the tree.

B. "Creek" means those areas where surface waters flow sufficiently to produce a defined channel or bed. A defined channel or bed is indicated by hydraulically sorted sediments or the removal of vegetative litter or loosely rooted vegetation by the action of moving water. The channel or bed need not contain water year-round. This definition is not meant to include storm water runoff devices or other entirely artificial watercourses unless they are used to store and/or convey pass-through stream flows naturally occurring prior to construction.

C. "Clearing" means the act of cutting and/or removing vegetation. This definition shall include grubbing vegetation.

D. "Clearing permit" means the written approval of the city of Edmonds planning division manager or his or her designee to proceed with the act of clearing property within the city limits of Edmonds.

E. "Improved lot" shall mean a lot or parcel of land upon which a structure(s) is located, which cannot be more intensively developed or improved pursuant to the city zoning code, and which cannot be further subdivided pursuant to city subdivision regulations.

F. "Drip line" of a tree shall be described by a line projected to the ground delineating the outermost extent of foliage in all directions.

G. "Grubbing" means the act of removing vegetation by the roots.

H. "Ground cover" shall mean a dense covering of small plants such as salal, ivy, ferns, mosses, grasses, or other types of vegetation which normally cover the ground.

I. "Land development permit" means a preliminary or final plat for a single-family residential development; a building permit; site plan; preliminary or final planned unit development plan.

J. "Lakes" are natural or artificial bodies of water of two or more acres and/or where the deepest part of the basin at low water exceeds two meters (6.6 feet). Artificial bodies of water with a recirculation system approved by the public works department are not included in this definition.

K. "Mechanical equipment" shall include all motorized equipment used for earth moving, trenching, excavation, gardening, landscaping, and general property maintenance exceeding 12 horsepower in size.

L. "Native growth protection easement" is a restrictive area where all native, predevelopment vegetation shall not be disturbed or removed except for removal pursuant to an enhancement program approved pursuant to this chapter or to remove dead or diseased vegetation. The purpose of an easement is to protect steep slopes, slopes with erosion potential, landslide and seismic hazards, creeks, wetlands and/or riparian corridors, wildlife, and areas shown on the environmentally sensitive areas map. This easement shall be defined during the development review process and shown on the recorded plat or short plat or approved site plan.

M. "Partially improved lot" shall mean a lot or parcel of land upon which a structure (refer to ECDC 21.90.150) is located and which is of sufficient area so as to be capable of accommodating additional development or

improvement pursuant to the Edmonds zoning code; or which may be subdivided in accordance with the city of Edmonds subdivision chapter.

N. "Person" shall mean any person, individual, public or private corporation, firm, association, joint venture, partnership, owner, lessee, tenant, or any other entity whatsoever or any combination of such, jointly or severally.

O. "Removal" is 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.

P. "Routine landscape maintenance" shall mean tree trimming and ground cover management which is undertaken by a person in connection with the normal maintenance and repair of property.

Q. "Tree" shall mean any living woody plant characterized by one main stem or trunk and many branches and having a caliper of six inches or greater, or a multi-stemmed trunk system with a definitely formed crown.

R. "Unimproved lot" shall mean a platted lot or parcel of land upon which no structure (refer to ECDC 21.90.150) exists.

S. "Wetlands" are those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted to life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. [Ord. 3646 § 1, 2007].

18.45.045 Application requirements.

A. An application for a land clearing permit shall be submitted on a form provided by the city, together with a plot plan and other information as described hereafter:

1. Name, address and telephone number of the applicant;

2. Legal status of applicant with respect to the land;

3. Written consent of owner(s) of the land, if the applicant is not the sole owner;

4. Name of person preparing the map, drawing or diagram submitted with the application, along with credentials if applicable;

5. Location of the property, including street number and addresses, together with the names and addresses of all the adjacent property owners within 80 feet of the subject property as listed in the records of the Snohomish County assessor;

6. A plot plan, drawn to scale, of the property depicting the following items (scale 1" = 30' or as approved by the planning division manager):

a. Topographic information,

b. Location of all existing and/or proposed structures, driveways, and utilities,

c. Areas proposed for clearing and the proposed use for such area,

d. Designation of all diseased or damaged trees,

e. Any proposed grade changes that might adversely affect or endanger trees on the property and specifications to maintain them,

f. Designation of trees to be removed and trees to be maintained,

g. Designation of all wetlands, streams and environmentally sensitive areas;

7. A statement outlining the purpose of the tree removal (e.g., building construction, street or roadway, driveway, recreation area, patio, or parking lot), together with a proposed timetable for when the work will occur;

8. The manner in which the cleared areas on the property will be reclaimed with vegetation and the timetable for replanting;

9. Any other information deemed necessary by the city to allow adequate review and implementation in conformance with the purposes of this chapter.

B. Upon receipt of the application for a clearing permit, the staff shall inspect the site and contiguous properties. If the staff determines that the plan is in compliance with the provisions of this section and will result in the removal of no more trees or vegetation than is necessary to achieve the proposed development or improvement, the permit shall be approved as a Type II decision (see Chapter 20.01 ECDC).

The city may require a modification of the clearing plan or the associated land development permit to ensure the retention of the maximum number of trees.

If the staff determines that the plan will result in the destruction of more trees and vegetation than is reasonably necessary to achieve the proposed development, the permit shall be denied.

C. Any permit granted under the provisions of this section shall expire one year from the date of issuance. No work may commence on the permit until the appeal time limit has expired. Upon receipt of a written request, a permit may be extended for six months.

D. Approved plans shall not be amended without written authorization from the city. The permit may be revoked or suspended by the city upon discovery that incorrect information was supplied or upon any violation of the provisions of this chapter.

E. Applications for land clearing shall be referred to other city departments or agencies for review and approval as deemed necessary by the planning division manager. Applications for clearing in parks shall always be referred to the Edmonds planning board for review and approval. [Ord. 3736 § 26, 2009; Ord. 3646 § 1, 2007].

18.45.050 Performance standards for land development permits.

A. There shall be no clearing on a site for the sake of preparing that site for sale or future development. Trees may only be removed pursuant to a clearing permit which has been approved by the city.

B. Trees shall be retained to the maximum extent feasible.

1. Clearing should not occur outside of the areas designated on the clearing plan.

2. No tree(s) or ground cover shall be removed from a native growth protection easement or environmentally sensitive site unless that plot plan and other submitted materials can demonstrate that the removal will enhance the easement area. An exception for the installation of roads and utilities may be approved if it can be demonstrated that alternative access is not practical or would be more damaging and is developed pursuant to an approved development plan.

Enhancement may include nonmechanical removal of noxious or intrusive species or dead or diseased plants and replanting of appropriate native species.

C. The city may restrict the timing of the land clearing and tree cutting activities to specific dates, times, and/or seasons when such restrictions are necessary for the public health, safety and welfare, or for the protection of the environment.

D. Native growth protection easements may be established through the subdivision process in the following areas:

1. A 25-foot buffer area from the annual high water mark of creeks, streams, lakes and other shoreline areas or from top of the bank of same, whichever provides good resource protection;

2. Areas in which the average slope is greater than 25 percent;

3. Wetlands;

4. Any other area which is determined through the environmental review process to include significant vegetation, wildlife or other similar resources which should be protected.

E. No ground cover or trees which are within 25 feet of the annual high water mark of creeks, streams, lakes, and other shoreline areas or within 15 feet of the top of the bank of same should be removed, nor should any mechanical equipment operate in such areas except for the development of public parks and trail systems; provided, that conditions deemed by the city to constitute a public nuisance shall be removed; and provided, that a property owner shall not be prohibited from making landscaping improvements where such improvements are consistent with the aims of this chapter.

F. The city may require and/or allow the applicant to relocate or replace trees, provide interim erosion control, hydroseed exposed slopes, or use other similar methods which would comply with the intent of this chapter.

G. No land clearing and tree cutting shall be conducted in a wetland, except for the installation of roads and utilities where no feasible alternative exists and the work is done pursuant to an approved development plan.

H. When tree cutting or land clearing will occur pursuant to a building, permit protection measures should apply for all trees which are to be retained in areas immediately subject to construction. The requirements listed may be modified individually or severally by the city if the developer demonstrates them to be inapplicable to the specific on-site conditions or if the intent of the regulations will be implemented by another means with the same result.

Where the drip line of a tree overlaps a construction line, this shall be indicated on the survey and the following tree protection measures shall be employed:

1. The applicant may not fill, excavate, stack or store any equipment, or compact the earth in any way within the area defined by the drip line of any tree to be retained.

2. The applicant shall erect and maintain rope barriers on the drip line or place bales of hay to protect roots. In addition, the applicant shall provide supervision whenever equipment or trucks are moving near trees.

3. If the grade level adjoining a retaining tree is to be raised or lowered, the applicant shall construct a dry rock wall or rock well around the tree. The diameter of this wall or well must be equal to the tree's drip line.

4. The applicant may not install ground level impervious surface material within the area defined by the drip line of any tree to be retained.

5. The grade level around any tree to be retained may not be lowered within the greater of the following areas: (a) the area defined by the drip line of the tree, or (b) an area around the tree equal to one foot in diameter for each one inch of tree caliper.

6. The applicant may prune branches and roots, fertilize and water as horticulturally appropriate for any trees and ground cover which are to be retained.

The planning division manager or his/her designee may approve the use of alternative tree protection techniques if those techniques provide an equal or greater degree of protection than the techniques listed above. [Ord. 3646 § 1, 2007].

18.45.055 Notice.

Notice to surrounding property owners shall be provided pursuant to ECDC 20.03.002, informing them of the application for a clearing permit. [Ord. 3817 § 8, 2010; Ord. 3736 § 27, 2009; Ord. 3646 § 1, 2007].

18.45.060 Appeals.

Any person aggrieved by the decision of the staff regarding a clearing permit may appeal such decision to the hearing examiner within 10 working days of the date of the decision. The appeal shall comply with the provisions of Chapter 20.06 ECDC. [Ord. 3736 § 28, 2009; Ord. 3646 § 1, 2007].

18.45.065 Bonding.

The applicant shall post a performance bond in the amount covering the installation of temporary erosion control measures and the clearing work to be done on the property and the cost of any proposed revegetation. [Ord. 3646 § 1, 2007].

18.45.070 Violations and penalties.

A. A violation of any of the provisions of this chapter shall constitute a misdemeanor and shall be punishable as provided in Chapter 5.50 ECC. Each and every day or portion thereof during which any violation of any of the provisions of this chapter is committed or permitted to continue shall constitute a separate offense.

B. Any person found to be in violation of the provisions of this chapter shall be subject to a civil penalty in an amount not to exceed $1,000 penalty for a tree of up to three inches and $3,000 for a tree three inches or more. This civil penalty may be in addition to any criminal, civil, or injunctive remedy available to the city. The planning division manager shall utilize the procedures outlined in Chapter 20.110 ECDC in order to notify an individual of violation; provided, however, that the same shall commence with a notice of civil violation as provided in ECDC 20.110.040(B) and be subject to an appeal as provided in ECDC 20.110.040(C).

C. The fines established in subsection (B) of this section shall be tripled for clearing which occurs within any critical area or critical area buffer, in any earth subsidence or landslide hazard area, any native growth protection easement, in any area which is designated for transfer or dedication to public use upon final approval of a subdivision, planned residential development or other development permit or for clearing which occurs on any portion of public property or within any portion of the public right-of-way. [Ord. 3828 § 1, 2010; Ord. 3788 § 8, 2010; Ord. 3646 § 1, 2007; Ord. 3507 § 3, 2004].

18.45.075 Public and private redress.

A. Any person who violates any provision of this chapter or of a permit issued pursuant hereto shall be liable for all damages to public or private property arising from such violation, including the cost of restoring the affected area to its original condition prior to such violation and the payment of any levied fine.

1. Restoration shall include the replacement of all ground cover with a species similar to those which were removed or other approved species such that the biological and habitat values will be substantially replaced; and

2. For each tree removed, replacement planting of up to three trees of the same species in the immediate vicinity of the tree(s) which was removed so long as adequate growing space is provided for such species. The replacement trees shall be of sufficient caliper to adequately replace the lost tree(s). Replacement trees shall be a minimum of three inches in caliper and shall be replaced at the direction of the planning division manager.

B. In order that replanted species shall have an opportunity to adequately root and establish themselves prior to disturbance by any future development, no permit shall be issued nor final approval given to any project until such time as all planting required to mitigate illegal activity has been fully implemented in accordance with an approved landscaping plan, and an adequate rooting period has expired. The plan shall meet the performance standards established in ECDC 18.45.050. The phrase "adequate rooting period" is defined for the purposes of this section as a period of one calendar year from the date of planting; provided, however, that a developer or other impacted party may apply to the architectural design board for the establishment of a different rooting period. The architectural design board shall establish such period which may be longer or shorter than one calendar year based upon the species of the plants involved, the particular point in the growing cycle at which the application is reviewed, and the planting schedule. The architectural design board shall establish a rooting period based upon the best scientific and biological evidence available as necessary to reasonably ensure the establishment of the plantings. In no event shall a rooting period be established as a penalty.

C. Restoration shall also include installation and maintenance of interim and emergency erosion control measures until such time as the restored ground cover and trees reach sufficient maturation to function in compliance via performance standards identified in ECDC 18.45.050. [Ord. 3646 § 1, 2007; Ord. 2804 § 1, 1990].

18.45.080 Additional remedies authorized.

Violation of ECDC 18.45.035(A) or of any condition of ADB approval regarding tree clearing, the protection of native growth or landscaping installation and maintenance shall, in addition to another remedy imposed by this code, be a violation of the provisions of this chapter and subject to the bonding, violation and penalty and public and private redress provisions of ECDC 18.45.065, et seq. [Ord. 3646 § 1, 2007; Ord. 3507 § 4, 2004].

SCOTT BLOMENKAMP - FILING PRO SE

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Filing Petition for Review

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