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## CITY OF EDMONDS

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DEVELOPMENT SERVICES DEPARTMENT • PLANNING DIVISION

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### BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

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<p>RE: Scott Blomenkamp</p> <p>ECDC 20.100.040 Review of Approved Permit</p> <p>(PLN20150030)</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION.</b></p>
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### SUMMARY

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Scott Blomenkamp, along with two others, has requested a second review of the approval of a design review by the Edmonds Architectural Design Board (“ADB”) for a five duplex project, PLN20130066. Mr. Blomenkamp owns property adjoining the approved project. Trees on Mr. Blomenkamp’s property were damaged when roots from his trees located on the project site were damaged during project grading. Mr. Blomenkamp asserts that the roots were damaged in violation of City standards and that the project did not meet ADB standards. On that basis, under ECDC 20.100.040, Mr. Blomenkamp seeks revocation of the ADB approval and \$50,000 in compensation for the damages caused to his trees. Relief is limited in this case to the following: (1) replacement of three hazardous trees with three ten foot replacement trees; (2) three year monitoring of one potentially hazardous tree with a requirement to have it replaced if it is found to be hazardous; and (3) some pruning of another tree to make it more stable.

## ORAL TESTIMONY

1  
2 *[Note: This “Oral Testimony” section of this decision is provided for the*  
3 *convenience of the reader only and does not include any Findings of Fact or*  
4 *Conclusions or Law and does not represent any indication of what the examiner*  
5 *found significant during the hearing. No assurance as to accuracy is made.]*

6 Kernan Lien stated that the Edmonds City Code provision regarding the review of  
7 permits does not necessarily require permit review by the Hearing Examiner. If the  
8 Development Services Director’s review of the application finds that the alleged  
9 deficiencies are not deficiencies or can be handled without conditions, the matter can  
10 be handled without review by the Hearing Examiner. In the current matter, there  
11 were four alleged deficiencies in the application. The city only referred one of these  
12 issues to the Hearing Examiner. Simply because a review is requested does not mean  
13 an issue will automatically go to the Hearing Examiner.

14 Scott Blomenkamp testified that he disagrees with the City’s interpretation. The code  
15 provides for issues to go before a, neutral, third party. It does not make sense for the  
16 city to allow the Development Director to conduct these reviews when there are two  
17 other options: Hearing Examiner review or City Council review. The Planning  
18 Department is incorrectly interpreting the code. The internalization of the review is  
19 inappropriate in this case. The code references “alleged deficiencies” not deficiencies  
20 judged by the Planning Department. He does not believe the deficiencies have been  
21 proven as deficiencies yet, but believes the Hearing Examiner should be reviewing all  
22 four of them. He reviewed the 2007 City Council minutes from when the code  
23 provision was passed that said the exemption does not exempt an ADB-reviewed  
24 entity from the substance provisions. The removal of trees is not allowed by the  
25 permit. 18.45.50 does not allow the removal of trees under a permit without prior  
approval/conditioning, thus a review of the permit by a neutral, third-party is  
necessary.

18 Gordon Smith, applicant, stated that the City has been examining the project since  
19 2013 and has done extensive reviews. He agrees with the City’s staff report and  
20 scope of the hearing determination.

21 Jeff Taraday, City Attorney, noted that ECDC20.100.040c provides two requirements  
22 for Hearing Examiner review of a permit. The first requirement is an actual  
23 deficiency. Hearings do not occur for bogus deficiencies. The second requirement is  
24 that the only ways to address the deficiency must be for the permit to be rescinded or  
25 the City to impose conditions upon the applicant. The Development Director gets to  
make the decision in regard to whether these requirements have been met.

25 Scott Blomenkamp stated that he is not asking for the permit to be revoked. The  
activity that is occurring on the subject property is outside the scope of the permit.  
Furthermore, the activity is illegal under Washington Code.

Proponents Testimony

1  
2 Scott Blomenkamp stated that he bought his home on May 12, 2015. After searching  
3 for two years, he chose the home because of its location in a community with similar  
4 values and the home's features. The home has a large backyard for his family to  
5 enjoy. The backyard features a line of trees separating the property from the  
6 adjoining lot which provide privacy, sound, and dust protection. On June 2, 2015,  
7 Gordon Smith of Kautz Route LLC visited Mr. Blomenkamp's home to describe the  
8 duplex he would be building on the adjacent lot. According to Mr. Blomenkamp, Mr.  
9 Smith described the duplex as well-designed and helping to reduce the sound from  
10 Edmonds Way. Mr. Smith showed Mr. Blomenkamp damage that had occurred to  
11 Mr. Blomenkamp's chain link fence and a large gouge on a root of a 160' tall, 42"  
diameter Douglas Fir. Mr. Smith offered to have the tree, and three others removed  
stating that the trees were already rotten and that bushes would provide Mr.  
Blomenkamp with privacy. The following day, Mr. Blomenkamp visited the damage  
site and saw the contractor for Kautz Route LLC had excavated 3' deeper and ripped  
the buttress roots of the already gouged tree. Additionally, the contractor damaged  
another tree and compacted the soil around it. The damage was done while extending  
over the property line and trespassing on Mr. Blomenkamp's property.

12 According to Mr. Blomenkamp, when he informed the City about the damage to his  
13 trees, he was first told that Kautz Route LLC had a clearing permit. Mr.  
14 Blomenkamp is not disputing that there is a permit, but that the damage of trees on  
15 his property is cause for review and additional conditioning. The City next claimed it  
16 was an exempted development. There are a limited number of exempted  
17 developments, and the Kautz Route duplex project is not one of them, according to  
18 Mr. Blomenkamp. Instead, Kautz Route only has a limited procedural exemption.  
19 Finally, the City claimed that the code only applies to trees on the Kautz Route LLC  
20 property. Kautz Route LLC knew that the trees being damaged were on Mr.  
21 Blomenkamp's property. An arborist determined that the trees were all healthy and  
22 not in deteriorated health prior to the damage. Because of the damage, the trees now  
23 pose a severe hazard. His trees were appraised as valuing 50,000 dollars and there is  
24 a 12,000 dollar bill to remove the trees. An entity that is breaking the law should not  
25 gain enrichment from those acts. A settlement offer by Kautz Route LLC was offered  
in bad faith as it was not based on law or estimation of damages. The City is aware of  
the value of trees as it was recently involved in a suit where a developer damaged a  
tree and the damaged tree was valued at 12,000. Katz Route knew or should have  
known there would be significant damage to Mr. Blomenkamp's trees by excavating  
at the property line to the depth the contractor did. Katz Route chose to excavate  
lower in order to avoid applying for a height variance. At a 2014 ADB hearing, Mr.  
Price of Katz Route testified that the LLC was contemplating applying for a height  
variance, but in the end chose not to do so. Katz Route has no easement or contract  
with Mr. Blomenkamp or the previous property owners to conduct the excavations.  
Katz Route's destruction of three of Mr. Blomenkamp's trees is a nuisance. Mr.  
Blomenkamp now has to remove the hazardous trees and no longer gets their

1 enjoyment. He does not want the permit to be overturned, but he wants the code  
2 properly interpreted.

### 3 City Testimony

4 Kernen Lien testified that the development permit is for a 5-duplex development. Mr.  
5 Blomenkamp's property is to the west of the development. The development  
6 received design approval under PLN20130066 and has received 5 building permits  
7 since this approval. The landscape plan was approved by the Architectural Design  
8 Board. Prior to development, there was 14 trees on the subject site. Thirteen of the  
9 trees were going to be removed as part of the development project. While grading the  
10 site in accordance with a building permit, roots of trees on Mr. Blomenkamp's  
11 property were damaged. The developer, Kautz Route LLC, and the City of Edmonds  
12 both hired arborists to assess damages to the trees. The City of Edmonds' arborist  
13 found two trees to be hazardous (Tree 1 and Tree 3) and recommended removal, and  
14 one tree (Tree 4) in need of monitoring. The developer's arborist found one tree  
15 hazardous and needing removal (Tree 1), and one tree (Tree 4) possibly needing  
16 removal due to moderate risk. The developer's arborist report did not find Tree 3 as  
17 being hazardous. The developer has offered to pay for removal of any hazardous  
18 trees and pay 200 dollars for each tree removed in order to replace the trees.

19 Mr. Lien stated that the Hearing Examiner needs to determine if a new condition  
20 should be added with regards to removal of hazard trees. ECDC 20.100.040c4 says  
21 the Hearing Examiner conducts the review using the criteria required by the original  
22 permit. If the Hearing Examiner finds that deficiencies exist and that they can be  
23 reasonably corrected by imposing conditions on the permit, the permit conditions can  
24 be changed. The Hearing Examiner may also revoke the permit if he finds the only  
25 way to correct the deficiencies is to cease all permitted activities. The City does not  
believe the Hearing Examiner should revoke the permit. There is no evidence that  
revoking the permit would restore the trees that have been identified as hazards. The  
backfilling and retaining wall associated with the development will help protect trees  
that currently have only minimal damage and are not considered hazardous. In regard  
to adding conditions, the affected trees are on Mr. Blomenkamp's property and the  
decision whether or not to remove them should be Mr. Blomenkamp's. Therefore,  
adding a condition on the permit would not be appropriate because the decisions  
regarding the trees should be Mr. Blomenkamp's.

### 22 Applicant Testimony

23 Steve Price, Kautz Route LLC, noted that Kautz Route made a good faith offer to Mr.  
24 Blomenkamp in June, 2015 of 5,000 dollars and to pay for an arborist report, but Mr.  
25 Blomenkamp rejected that offer. He submitted a review of the two arborist reports by  
a consulting arborist, Mr. Gilles. The report looked at Trees 3 and 4 and found no  
roots visible in the excavated portions of the property. The lack of visible roots is  
likely due to the permeable soil and the trees having deep roots. According to Mr.  
Gilles review, there is not enough evidence to conclude that Trees 3 and 4 are

1 hazardous. The permitting process for the development began in October, 2013. The  
2 ADB hearing occurred in February, 2014 and building permits were issued in late  
3 2014. The contractor for the excavation project called the previous property owner in  
4 regard to Tree 1 three times, but did not hear back from that owner. After not hearing  
5 from the previous owner, Mr. Smith went in person to the home in early June and met  
6 Mr. Blomenkamp. Kautz Route made a good faith effort to communicate with its  
7 neighbors and keep the community informed about the project developments.

#### 8 Public Testimony

9 Mr. Alvin Rutledge testified that homeowner's insurance may cover the tree removal  
10 cost and replacement. He said that the applicant and proponent should come to an  
11 agreement for replacing the trees.

#### 12 Proponent Rebuttal

13 Mr. Blomenkamp stated that the damage of trees is a nuisance to a new landowner. It  
14 is not his responsibility to discuss with a previous landowner the adjoining  
15 development. He did not buy the property until 2 years after the initial permitting  
16 process. Kautz Route LLC should have followed the tree-cutting code. Edmond's  
17 Comprehensive Plan is very conscious of protecting trees. 5,000 dollars was a bad  
18 faith offer as arborists have estimated the trees are worth at least 30,000 dollars. .  
19 His initial application for review was rushed so he did not realize there was a code  
20 option to amend the permit. He is amenable to the permit being revised rather than  
21 revoked. The code needs to be enforced. This is not a land use issue, but it is a code  
22 enforcement issue. He wants a good faith offer for what has occurred. He believes  
23 the applicant planned to remove these trees from the beginning. He suggested putting  
24 a condition in the permit regarding private redress.

### 25 EXHIBITS

Exhibit 1: August 9, 2015 Staff Report w/ 12 attachment

Exhibit 2: Scott Blomenkamp Brief (first 3 pages)

Exhibit 3: Gilles Arborist Report dated 8/27/15.

Exhibit 4: Aerial photographs and emails between Katz Route and Mr. Blomenkamp.

Exhibit 5: Letter addressed to Mr. Blomenkamp from contractor's insurance company.

1 Exhibit 6: Section 1 of 9/3/15 City of Edmonds Objection to Blomenkamp  
2 9/2/15 Brief Submittal in addition to two Olbrechts email  
3 attachments.

4 Mr. Blomenkamp's post hearing briefing was not admitted into the record. As noted  
5 in the City's objection to his briefing, Ex. 6, Mr. Blomenkamp was advised on four  
6 separate occasions by the examiner that his briefing was limited to providing excerpts  
7 of the opening brief he presented during the hearing and that he was not to rewrite  
8 any portions of the brief. As noted by the examiner in an email to Mr. Blomenkamp  
9 on this subject, Ex. 6, Mr. Blomenkamp would still get a chance to address the issues  
10 that he wanted to re-argue by requesting reconsideration of the final decision, i.e. this  
11 decision. As noted at the end of this decision, reconsideration is governed by ECDC  
12 20.06.010<sup>1</sup>.

### 13 FINDINGS OF FACT

#### 14 Procedural:

15 1. Applicant. The ECDC 20.100.040 applicants are Scott Blomenkamp,  
16 Marj Penderaft and Andrew Baxter. The applicant for the project subject to re-review  
17 under ECDC 20.100.040 is Kautz Route LLC.

18 2. Hearing. A hearing was held on the application on August 27, 2015. The  
19 record was left open through September 7, 2015 in order to give the Mr. Blomenkamp  
20 an opportunity to submit the portions of his opening brief that he believed were  
21 relevant to the nuisance/hazard claims of his application.

#### 22 Substantive:

23 3. Description of Re-Review Request. Scott Blomenkamp along with two  
24 others, has requested a second review of the approval of a design review by the  
25 Edmonds Architectural Design Board Review for a five duplex project,  
26 PLN20130066. Mr. Blomenkamp owns property adjoining the approved project.  
27 Trees on Mr. Blomenkamp's property were damaged when roots from the trees  
28 located on the project site were damaged during project grading. Mr. Blomenkamp  
29 asserts that the roots were damaged in violation of City construction standards. On  
30 that basis, under ECDC 20.100.040, Mr. Blomenkamp seeks revocation of the permit  
31 and compensation for the damages caused to his trees.

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<sup>1</sup> If it is determined upon reconsideration that evidence was improperly excluded (i.e. that Mr. Blomenkamp should have had a chance to argue code violations), that evidence may probably be considered on rehearing even though the hearing has been closed. Considering evidence that was improperly excluded is one of the exceptions that courts use to consider new evidence, and would likely be a reasonable grounds for the admission in a hearing examiner proceeding as well. Cf. RCW 36.70C.120(2)(b).

1 The project property is located at 23220 Edmonds Way. Review of this development  
2 began in 2013 with two pre-application meetings in early 2013 and formally with an  
3 application for design review under permit number PLN20130066. The ADB  
4 reviewed the proposed development at a public hearing on February 5, 2014, and  
5 approved the development with conditions following the public hearing.

6 Following ADB approval, the applicant submitted five separate building permits for  
7 development of the site. Permit number BLD20140299 was issued on December 29,  
8 2014 for the site and utility improvements pertaining to the entire site where the five  
9 duplexes are to be constructed. They were consistent with the plan approved by the  
10 ADB. Building permits BLD20140240 – BLD20140244 for each of the duplex units  
11 were also issued on December 29, 2014. Development of the site began in May 2015.  
12 While grading the site in accordance with plans approved under BLD20140299, roots  
13 extending into the development site from some trees located at 23227 – 92nd Avenue  
14 West were damaged. The owner of the aforementioned property, Scott Blomenkamp,  
15 contacted City staff about the damage. City staff inspected the property and spoke  
16 with the developer, Kautz Route LLC, about the problem. Kautz Route LLC  
17 voluntarily agreed to not continue work temporarily in the immediate vicinity of the  
18 property line while the issue was being investigated. Subsequently, Kautz Route LLC  
19 and the City of Edmonds commissioned arborist reports to assess the damage to the  
20 trees, Ex. 1, att. 4 and 5. Both arborist reports noted some of the trees have been  
21 impacted to a degree that the arborists determined them to be hazardous trees.

22 Due to the tree damage, Scott Blomenkamp, Marj Penderaft and Andrew Baxter  
23 jointly filed a request for review of the ADB approval of the duplex project under  
24 ECDC 20.100.040 on June 29, 2015. The request asserted that the duplex project was  
25 not compliant with ECDC 18.45.050(H) and also that the property had created a  
nuisance by causing four of Mr. Blomenkamp's trees to become severe hazards. The  
request also asserted various violations of ADB design regulations and that staff had  
provided inaccurate information to the ADB for its review.

Section IV of the staff report, Ex. 1, noted that the ECDC 20.100.040 review was  
only sent forward to the examiner for review of Mr. Blomenkamp's nuisance claim.  
Mr. Blomenkamp's assertions of noncompliance with city code were expressly not  
forwarded to the examiner for review by the community development director. At the  
hearing Mr. Blomenkamp argued that the community development director did not  
have the authority to prevent his entire request for review from being considered by  
the examiner. The examiner ruled at the hearing that he only had authority to review  
issues forwarded to him by the community development director.

4. Tree Hazards. An arborist report assessing tree hazard was prepared by both a  
City consultant and a consultant for the applicant. See Ex. 1, att. 4 and 5. An  
additional report was submitted by the applicant during the hearing. Ex. 3. All  
reports were credible and well documented, with the identification of the most  
hazardous trees being fairly consistent between the first arborist report from the  
applicant and the City's report, but with the City's report taking a moderately more

1 conservative position on level of risk. Given the severity of damage that could occur  
2 if the trees do in fact fall and the greater objectivity of the City's report (due to the  
3 source of funding, not due to any bias evident in the first report), the more  
4 conservative level of risk assessment taken in the City's report is found to be the  
5 more compelling. The Gilles report raises some good points about the absence of  
6 direct damage to the roots of some of the trees found to be hazardous or potentially  
7 hazardous by the City's arborist, but the excavation for those trees was within their  
8 drip lines and the City arborist's impartial conclusions regarding excavation near a  
9 tree must take precedence in the absence of more detailed and site specific evidence  
10 that the proximate construction work did not cause damage. It is determined that the  
11 conclusions made in the City's report, Ex. 1, att. 5, is accurate as to the level of risk  
12 associated with each of the five trees assessed in that report.

13 The City's arborist report also concludes that the grading done for the subject project  
14 was responsible for the hazardous conditions of the trees. Given the absence of any  
15 compelling evidence that some other factor is responsible for the hazardous condition  
16 of the trees and the conclusions of the City's arborist, it is determined that the grading  
17 of the subject project is responsible for creating the hazardous conditions identified in  
18 the City's report.

## 19 CONCLUSIONS OF LAW

### 20 Procedural:

21 1. Authority of Hearing Examiner. The hearing examiner only has authority  
22 to consider the assertion in Mr. Blomenkamp's request for ECDC 20.100.040 review  
23 that the project duplex project creates a nuisance. The hearing examiner has no  
24 authority to consider Mr. Blomenkamp's assertions that the duplex project violates  
25 City law.

ECDC 20.100.040(A) sets the scope of ECDC 20.100.040(A) review as follows:

*Scope. Any permit approved by the city under the community development code may be reviewed under this section if the conditions of the permit are not being met, the requirements of the city code of Edmonds are not being met, or the permitted activity is causing a nuisance or hazardous condition. A permit includes any city approval under the community development code.*

ECDC 20.100.040(B)(3) provides that review requested by private citizens must be made by three residents living within 300 feet of the project in question. ECDC 20.100.040(C)(3) authorizes the community development director to submit an ECDC 20.100.040 review request to the examiner for review via a public hearing "[i]f the only reasonable ways to correct the deficiencies are for the permittee to

1 *cease the permitted activity, or for the city to impose new or changed conditions on*  
2 *the permit, ...”*

3 In interpreting the ordinance provisions above, it must be recognized that the extent  
4 of the examiner’s jurisdiction is significantly affected by state law. At the outset it is  
5 recognized that the examiner has no authority to ignore or invalidate City ordinances  
6 because he believes them to be inconsistent with state law. However, state law  
7 requirements can be used to interpret city ordinances, since it is fair to presume that  
8 when the City Council adopts ordinances, it intends them to be consistent with state  
9 law.

10 There are two state statutes that provide guidance in this case on the scope of the  
11 examiner’s authority. The first is the Regulatory Reform Act, Chapter 36.70B RCW.  
12 RCW 36.70B.050(2) provides that city and county land use permit review procedures  
13 can only authorize one open record hearing per project permit application or  
14 consolidated project permit application. The purpose of this requirement is to provide  
15 for a more efficient permitting system by preventing decision makers from holding  
16 one new hearing after another ad finitum as new factual issues occur and also to  
17 prevent public confusion about when to participate in an on-going series of public  
18 hearings. *See* RCW 36.70B.010. ECDC 20.100.040 would clearly be noncompliant  
19 with the Regulatory Reform Act one hearing rule if it were construed as authorizing  
20 an additional hearing on a permit application every time three residents alleged  
21 noncompliance with city code. Indeed, ECDC 20.100.040 could easily be abused by  
22 project opponents as a means of subjecting a project to endless public hearings with  
23 one issue of asserted noncompliance after another.

24 The other state statute at issue is the Land Use Petition Act (“LUPA”), Chapter  
25 36.70C RCW. A significant concept that runs through many appeals under LUPA is  
“finality”, the concept that once a final land use permit has been approved and no  
appeal has been timely filed, the land use permit can no longer be judicially appealed  
even if it did not comply with permitting criteria when approved. *See Nykreim*  
*Chelan County v. Nykreim*, 146 Wn.2d 904 (2002); *Habitat Watch v. Skagit County*,  
155 Wn.2d 397 (2005). In *Habitat Watch*, the state supreme court further elaborated  
that when a local land use permit has not been timely challenged, it cannot be  
collaterally attacked through another administrative permit review process.  
Specifically, in *Habitat Watch* project opponents failed to timely appeal a special use  
permit, so they attempted to defeat the project by challenging a grading permit on the  
basis that the special use permit was incorrectly issued. The *Habitat Watch* court  
concluded that “[b]ecause appeal of the special use permit and its extensions are time  
barred under LUPA, *Habitat Watch* cannot collaterally attack them through its  
challenge to the grading permit.” 155 Wn.2d at 411. In this case, Mr. Blomenkamp  
seeks to challenge the validity of the ADB approval through the ECDC 20.100.040  
review process. Under the *Nykreim* line of cases, this likely would qualify as a  
prohibited collateral attack on the ADB decision.

1 At the hearing the examiner noted that in order to comply with the requirements of  
2 LUPA and the one hearing rule, ECDC 20.100.040(C)(3) had to be construed as  
3 granting the community development director the authority to determine what goes to  
4 the examiner for review and that the determination of the director in this regard is not  
5 subject to examiner review. Since the community developer did not forward any  
6 issues of code compliance to the examiner, the examiner determined he could not  
7 consider those issues. This conclusion was drawn from ECDC 20.100.040(C)(3),  
8 which provides as follows:

9 *If the only reasonable ways to correct the deficiencies are for the permittee to*  
10 *cease the permitted activity, or for the city to impose new or changed conditions*  
11 *on the permit, the director of community services shall refer the matter to the*  
12 *hearing examiner for review.*

13 Upon further reflection, there is a more direct way of integrating Regulatory Reform  
14 and LUPA requirements into ECDC 20.100.040(C)(3). ECDC 20.100.040(C)(3) only  
15 authorizes examiner review if that review provides the only “reasonable ways” to  
16 correct noncompliance. This “reasonable ways” language presumes that examiner  
17 review can correct the alleged noncompliance. Any examiner remedies imposed to  
18 correct a noncompliance issue that was subject to another permit review would be  
19 quickly invalidated by any reviewing court under the *Nykreim* cases and the  
20 Regulatory Reform Act. An invalid remedy is not a “reasonable way” to correct a  
21 permit violation. Since Mr. Blomenkamp’s allegations of design review  
22 noncompliance should have been addressed in an appeal of the ADB approval, they  
23 cannot be considered in ECDC 20.100.040(C)(3).

24 In his request for review Mr. Blomenkamp included the assertion that ADB approval  
25 was secured by material misrepresentation. Although the issue has not yet been  
addressed by the courts, it is reasonably possible that the courts would be willing to  
allow a permit to be reviewed a second time if it was secured by material  
misrepresentation. Mr. Blomenkamp asserts that staff misrepresented the amount of  
grading involved due to a sentence in the staff report that noted that “*minimal grading*  
*is anticipated.*” It is determined as a finding of fact that there was no material  
misrepresentation of fact. As noted in p. 5 of the community development director’s  
report, Ex. 1, att. 3, the ADB was given a significant amount of information that  
provided information on the grades and amounts of fills to be employed at the project  
site. Upon review of these materials the ADB would have had a fairly accurate  
understanding of precisely how much grade and fill was involved in the project.

At the hearing, Mr. Blomenkamp suggested that compliance with ECDC  
18.45.050(H), one of the code compliance issues raised in his appeal, was not  
something that would have been addressed by the ADB but rather should have been  
addressed out on the field during construction. ECDC 18.45.050(H) is the most  
pertinent code compliance issue raised by Mr. Blomenkamp, because it arguably  
prohibited any grading that could have adversely affected his tree roots. However,  
ECDC 18.45.035 expressly provides that projects subject to ADB review are exempt

1 from Chapter 18.45 ECDC (i.e. no separate clearing permit is required), and instead  
2 the ADB must review the project for compliance with Chapter 18.45 ECDC in its  
3 design review. In short, compliance with Chapter 18.45 ECDC was subject to the  
4 exclusive jurisdiction of the ADB during the design review process. For the reasons  
5 previously discussed, the examiner has no jurisdiction to review matters already  
6 decided upon by the ADB.

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**Substantive:**

2. Nuisance and Hazardous Condition. ECDC 20.100.040(C)(5) authorizes the hearing examiner to modify the conditions of development approval to “*correct the deficiencies*”, which include permitted activities causing a nuisance or hazardous condition, see ECDC 20.100.040(A).

Mr. Blomenkamp seeks \$50,000 in damages, see Ex. 1, att. 2, as well as revocation of the permit, see Ex. 1, att. 1. The deficiency that needs correcting in this case is the hazard and nuisance created by the trees that were damaged by the developers grading activities. That hazard can be removed by removing the trees. Revocation of the permit will not prevent any further tree damage or remedy the hazards that currently exist.

Mr. Blomenkamp appears to believe that within the authority to correct the tree hazard lies the authority to award him a \$50,000 damages claim to make him whole. Adjudicating nuisance claims is not within the jurisdiction of a city land use hearing. ECDC 20.100.040(C)(5) authorizes the examiner to modify permit conditions to correct deficiencies, not to award damages claims. Development permit conditions do not include awards of damages claims; instead, they only include measures to prevent impacts to the environment and neighboring property owners as necessary to ensure compliance with land use permitting criteria. ECDC 20.100.040(C)(4) requires the examiner to assess requests for relief under ECDC 20.100.040 “*using criteria used for the original permit.*” If Mr. Blomenkamp believes he is entitled to a cash award, he needs to file his claim in superior court, who with its juries, technical rules of evidence, and statutes granting it tort jurisdiction is the proper forum to adjudicate damages claims.

The relief granted by this decision will be that necessary to remove the hazardous trees as well as to replace the buffering provided by those trees. The City’s arborist report, Ex. 1, att. 5, concludes that Tree No. 1, 3 and 5 in that report are considered high risk and should be removed expeditiously. The report further concludes that Tree No. 4 is moderate to high risk and should be monitored for potential removal. Tree No. 2 can be retained if specified actions are taken. As determined in Finding of Fact No. 4, the conclusions of the City’s arborist report are taken as verities for purposes of this decision. Consequently, a condition of approval will be added to the ADB approval that requires the replacement of the hazardous trees with ten foot replacement trees. The ten foot height is taken from the City’s landscaping standards,

1 which generally require trees used for buffering to start at six feet or ten feet. See  
2 ECDC 20.13.030.

### 3 **DECISION**

4 Additional conditions are added to PLN20130066 to provide as follows:

- 5 1. Kautz Route LLC shall pay for the removal of Tree No. 1, 3 and 5<sup>2</sup> as identified  
6 in the City's arborist report, Ex. 1, att. 5, and shall also pay for the replacement of  
7 those trees by trees of the same species ten feet in height. Payment is only  
8 required for trees actually removed by the property owner.
- 9 2. Kautz Route LLC shall pay for the monitoring of Tree 4 as identified in the City's  
10 arborist report, Ex. 1, att. 5, for three years and shall also pay for its replacement  
11 with a ten foot tree of the same species should that be found necessary through the  
12 monitoring program. Payment is only required if the tree is actually removed by  
13 the property owner.
- 14 3. Kautz Route LLC shall pay for the repair of Tree No. 2 as identified in the City's  
15 arborist report, Ex. 1, att. 5. Payment is only required for actual repairs.
- 16 4. Payment amounts shall be based upon estimates provided by qualified contractors  
17 submitted by the property owner and approved by the City as within reasonable  
18 market prices. Estimates shall be provided to City planning staff within two  
19 months of this decision. Kautz Route LLC shall pay the amount of each estimate  
20 to the City within 15 days of City demand. The City shall reimburse the property  
21 owner with the funds upon proof of tree removal or repair (or upon submission of  
22 an executed contract for the monitoring). Any payments given to the City shall be  
23 reimbursed to Kautz Route LLC if the services covered by the estimate are not  
24 completed within one month of payment by Kautz Route LLC (excepting the  
25 monitoring program, in which a contract must be executed within a month). 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).

21 Dated this 22<sup>nd</sup> day of September 2015.

22  
23  
24 <sup>2</sup> The City's arborist report notes that Tree No. 5 is a "neighboring" tree. From this language, it  
25 appears that the tree may not be on Mr. Blomenkamp's property. If that is the case, it is unclear if the  
tree is on the property of one of the other two petitioners who joined in Mr. Blomenkamp's ECDC  
20.100.040 request for relief. Given the severe hazard damage the hazard trees could potentially  
impose, this decision errs on the side of caution and operates with the understanding that Tree No. 5 is  
owned by Mr. Blomenkamp or one of his petitioners and that no one has waived a request to have the  
hazard remedied. The parties are free to request reconsideration if this is incorrect.

  
Phil A. Olbrechts

City of Edmonds Hearing Examiner

## Appeal Right and Valuation Notices

This land use decision is final and subject to closed record appeal to the City Council as authorized by ECDC 20.01.003. Appeals must be filed within 14 days of the issuance of this decision as required by ECDC 20.07.004(B). Reconsideration may be requested within 10 calendar days of issuance of this decision as required by ECDC 20.06.010.

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

### Reconsideration

A request for reconsideration may be filed within ten days of this decision as specified in ECDC 20.06.010.