

**BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH**

DECISION

FILE NUMBER: CVC2020-00161

APPELLANT: Toll Brothers, Inc.
C/o Jay P. Derr
Van Ness Feldman, LLP
1191 Second Avenue, Suite 1800
Seattle, WA 98101
jpd@vnf.com

RESPONDENT: City of Sammamish Department of Community Development
C/o Hillary Evans Graber
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
hillary@kenyondisend.com

TYPE OF CASE: Appeal from a Notice and Order charging tree retention violations

EXAMINER DECISION: VACATE Notice and Order

DATE OF DECISION: May 3, 2021

INTRODUCTION ¹

Toll Brothers, Inc. (“Toll Brothers”) appeals from a Notice and Order (“Notice”) issued by the Sammamish Department of Community Development (“Department”) on February 2, 2021. (Exhibit 19²)

Toll Brothers filed the subject appeal on February 18, 2021. (Exhibit 21) The appeal was timely filed in accordance with Sammamish Municipal Code (“SMC”) 20.10.080(1) and 23.110.010(1).

The subject property is located at 2068 246th Avenue SE. Its Assessor’s Parcel Number is 9476050280 (“Lot 28”). (Exhibit 19)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Sammamish Hearing Examiner (“Examiner”) held a remote prehearing conference with the parties on March 9, 2021. (Exhibit 9002) The prehearing conference is memorialized in Exhibit 9003.

The Examiner held an open record hearing on April 21, 2021. The hearing was conducted remotely using the “GoToMeeting” platform due to assembly restrictions attendant to the current COVID-19 pandemic. The City gave notice of the hearing as required by SMC 20.10.180(2).

Pursuant to City of Sammamish Hearing Examiner Rule of Procedure (“RoP”) 224(c), the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: Letter, Examiner to Principal Parties, February 19, 2021 (Scheduling guidance)
- Exhibit 9002: Notice of Prehearing Conference, issued February 22, 2021
- Exhibit 9003: Order Memorializing a Prehearing Conference, issued March 9, 2021

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 – 21 and provided an index listing of those exhibits. Respondent also pre-filed a Prehearing brief to which it did not assign an exhibit number. The Examiner marked that brief as Exhibit 22. Appellant did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from the Department as follows:

- Exhibit 23: SMC 21A.15.1333 Tree, significant, (definition of) adopted by Ordinance O2005-175

Pursuant to RoP 224(d), Appellant Toll Brothers pre-filed Exhibits 1001 – 1016 and rebuttal Exhibits 1017 and 1017.1 and provided an index listing of those exhibits. Respondent Department objected to entry of Exhibit 1005. After hearing brief oral argument the Examiner sustained the objection to Exhibit 1005. The Examiner entered Exhibits 1001 – 1004 and 1006 – 1017.1 into the hearing record.

The parties opted to submit written closing statements in accordance with an agreed schedule. The following documents are herewith entered in accord with that agreement:

- Exhibit 9004: Appellant Toll Bros., Inc.’s Closing Statement, filed April 26, 2021
- Exhibit 9005: City of Sammamish’s Closing brief, filed April 28, 2021

The record closed with submittal of Exhibit 9005 on April 28, 2021.

The Hearing Examiner Clerk has the record copy of all exhibit index lists and exhibits.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. This appeal is about alleged violation of the City’s tree retention/preservation regulations. Toll Brothers is charged with impermissibly cutting down three trees that were to be retained on Lot 28 of *Windsor Grove*. The Notice assessed Toll Brothers a \$93,000 civil penalty for that asserted infraction. (Exhibit 19) The deciding factor in this appeal is a “Note” on page 7 of the final plat of *Windsor Grove*.
2. Sammamish first enacted tree retention/preservation regulations in or around 2005. [Official notice: Ordinance No. O2005-175] Those regulations were contained in former SMC 21A.35.210 - .240. In 2014 the City enacted emergency, interim revisions to those code sections (the “Interim Tree Code”). The Interim Tree Code was in effect from October 14, 2014 to October 14, 2015. [Official notice: Ordinance Nos. O2014-375 and O2015-390] The Interim Tree Code was repealed and replaced by Chapter 21A.37 SMC, Development Standards – Trees, effective October 14, 2015. [Official notice: Ordinance No. O2015-395]
3. The history behind this case begins in 2015. On March 20 of that year Seattle Real Estate Holdings, LLC (“SREH”) filed an application to subdivide approximately 7.6 partly wooded acres into 30 lots for single-family residential development. SREH named its proposed preliminary subdivision *Costea Estates*. The Department deemed the application complete when filed. Thus, *Costea Estates* was vested to the Interim Tree Code. The preliminary tree retention plan submitted by SREH and approved by the Department depicted preservation of trees scattered throughout the subdivision as was allowed under the Interim Tree Code. Three of the trees to be retained were trees #598, #599, and #600 on Proposed Lot 28. *Costea Estates* was granted preliminary approval on August 30, 2016. (Exhibit 4, PDF 1) Therefore, the *Costea Estates* Decision referred to the Interim Tree Code as “former” regulations.

The conditions of preliminary subdivision approval included a number of statements to be placed on the face of the final plat. (Those in *italics* were to appear verbatim.) Among those many statements were two related to tree retention/preservation:

43. Trees retained pursuant to former SMC 21A.35.210 shall be identified on the face of the final plat for retention.
44. *Trees identified on the face of this plat have been retained pursuant to the provisions of former SMC 21A.35.210. Retained trees are subject to the tree protection standards of former SMC 21A.35.230. Removal of these trees is prohibited unless the tree is removed to prevent imminent danger or hazard to persons or property, and may be subject to a clearing and grading permit approved by the City of Sammamish. Trees removed subject to this provision shall be replaced in compliance with former SMC 21A.35.240.*

(Exhibit 4, PDF 14, italics in original)

4. In or around January, 2017, SREH applied for a Clearing and Grading permit for *Costea Estates*. (Exhibit 5) The City issued that permit on January 7, 2019. (Jasvir Singh, Assistant City Planner, testimony)
5. Toll Brothers acquired the *Costea Estates* site from SREH on January 3, 2019 (deed recorded on January 4, 2019). (Exhibit 1002) Toll Brothers thus became the plat developer.
6. A 2019 aerial photograph of Proposed Lot 28 (identified by the number 2068) and its surroundings, taken sometime during the growing season,³ shows that Proposed Lot 28 had been logged clean and completely graded: No trees were retained on Proposed Lot 28. (Exhibit 7)
7. On or about March 6, 2020, Toll Brothers filed application for final plat approval of *Costea Estates*, which Toll Brothers had renamed *Windsor Grove*.⁴ (Exhibit 9)
8. The final plat of *Windsor Grove* was recorded on July 30, 2020. (Exhibit 8, PDF 1) The final plat lists and depicts 95 trees, including trees #598, #599, and #600 on Lot 28, as retained. (Exhibit 8, PDF 7) In addition, the final plat contains a “Tree Retention Note” and a “Tree Replacement Note,” one after the other, in the lower left corner of page 7 of the plat:

Tree Retention Note

Trees identified on the face of this plat have been retained pursuant to the provisions of former SMC 21A.35.210. Retained trees are subject to the tree protection standards of former SMC 21A.35.230. Removal of these trees is prohibited unless the tree is removed to prevent imminent danger or hazard to persons or property, and may be subject to a clearing and grading permit approved by the City of Sammamish. Trees removed subject to this provision shall be replaced in compliance with former SMC 21A.35.240.

Tree Replacement Note

Prior to occupancy, Lots 1, 2, 3, 19, and 21 are each required to install (4) new trees, and Lots 4 - 18, 20, and 22 – 30 are each required to install (3) new trees meeting the requirements for replacement trees under former SMC 21A.35.240(1).

(Exhibit 8, PDF 7, all-caps format omitted) The Tree Replacement Note lists all 30 lots in the subdivision and mandates (“required to install”) a total of 95 replacement trees – the exact same number of trees listed for retention.⁵

³ The time of year can be roughly determined based on the fact that deciduous trees are leafed out.

⁴ Jeff Peterson (“Peterson”), Toll Brothers Land Entitlement Manager, testified that the final plat application was filed on October 18, 2019. However, the Toll Brothers agent who signed Exhibit 9 dated his/her signature March 6, 2020. (Exhibit 9, PDF 3) The discrepancy is irrelevant.

⁵ The Hearing Examiner has no role in the review and approval of final plats. The undersigned never saw the final plat of *Windsor Grove* before this appeal proceeding.

9. In fact, none of the trees on Lot 28 designated for retention were actually retained. All three were removed sometime in 2019. Prior to July, 2020, Toll Brothers replaced each of the three removed trees with a smaller conifer. Peterson testified that the replacement trees met City standards for replacement trees in terms of type and size. An August 14, 2020, aerial photograph of Lot 28 shows three new replacement trees in Lot 28 located approximately where trees #598, #599, and #600 had been. (Exhibit 1014)
10. On or about August 24, 2020, Toll Brothers filed a building permit application to construct a single-family residence on *Windsor Grove* Lot 28. (Exhibit 11) That application became entangled in questions and disagreements about the fate of trees #598, #599, and #600. (Exhibits 11 – 18; 1009 – 1011) The Notice which is the subject of this appeal followed. (Exhibit 19)
11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁶

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

An appeal from a Notice and Order requires an open record hearing before the Examiner. The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.10.240, 20.10.250, 20.10.260, and 23.110.010(4)]

Review Criteria

At the conclusion of the appeal hearing, the hearing examiner shall issue an order to the person responsible for the violation which includes the following information:

- (a) The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
- (b) The required corrective action;
- (c) The date by which the correction must be completed;
- (d) The civil penalties assessed based on the provisions of this title and the fee resolution; and
- (e) The date after which the City may proceed with abatement of the unlawful condition if the required correction is not completed.

[SMC 23.110.010(3)]

Standard of Review

⁶ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

The standard of review is preponderance of the evidence. The Department has the burden of presenting a *prima facie* case to prove the charged violation(s); the appellant has the burden of presenting an affirmative defense. [RoP 316(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. One need look no further than the Tree Replacement Note on the face of the recorded *Windsor Grove* plat to resolve this appeal: The Notice is without meaningful foundation. The Examiner has no idea how the Tree Replacement Note came to be placed on the face of the final plat; it most certainly was not required under the terms of the approved preliminary subdivision. But it is there and the City allowed the plat to be recorded with it.
2. It cannot simply be happenstance that the Tree Replacement Note requires 95 “replacement” trees to be planted within *Windsor Grove* when 95 trees were required to be retained. The Tree Retention Note together with the Tree Replacement Note require preservation of 95 trees but then require replacement of those same 95 trees (three or four trees on each and every one of the 30 lots in the plat) before occupancy of the residence on each lot. The notes effectively require wholesale replacement by new replacement trees of the mature trees that had been selected and designated for retention.
3. The Examiner is mindful that Toll Brothers cut down trees #598 and #599 before the final plat was recorded. (Tree #600 had blown down prior to Toll Brothers’ acquisition of the property.) The Examiner is also mindful that the only certified arborist to testify in these proceedings said that he had seen trees #598 and #599 before they were cut down and was of the opinion that they were dead, in one case, or on an irreversible “death spiral,” in the other case. (Brian Gilles testimony) Under the Interim Tree Code they could have been cut down. Whether prior approval was required is a moot question since the Tree Replacement Note on the final plat required that they be cut down eventually and replaced. It does not seem fair to this Examiner to financially penalize Toll Brothers for something that they would ultimately have had to do anyway.
4. A final observation about trees #598 and #599: They were unsightly, spindly, poorly shaped (one had been completely topped) trees with nothing but dead branches along their trunks. (Exhibit 1015.1 - .3) They would have been standing alone, not in a supportive grove. Given that tree #600 had already succumbed to windthrow, it is highly likely that they would have suffered the same fate – perhaps landing on the new house on Lot 28. The replacement conifers, which had to be 8 feet tall when planted to meet tree replacement standards, are undoubtedly far more esthetically pleasing, safer, and longer lasting. They will likely grow as specimen conifers since they will not be in a dense grove. And it is worth noting that the current tree code generally does not allow individual trees on

building lots to meet tree retention standards: Retained trees are generally required to be in clusters or groves and to be protected within tree protection tracts or easements. [21A.37.270]

5. Argument about which version of the tree regulations govern this case is irrelevant: The recorded plat controls. The recorded plat requires every tree that was designated for retention to be cut down and replaced. ⁷ Toll Brothers has removed the trees that were to be retained and planted the required three replacement trees on Lot 28. Toll Brothers can be required to do no more.
6. The Notice must be vacated.
7. Toll Brothers asked the Examiner to “instruct the City to issue the building permit” for Lot 28. (Exhibit 9004, PDF 10:7) The Examiner cannot grant the requested relief. The Examiner has before him only the appeal of a Notice and Order. That appeal does not give the Examiner authority to order that a building permit be issued.
8. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **VACATES** the Notice and Order issued on February 2, 2021, under file number CVC2020-00161.

Decision issued May 3, 2021.

ls\ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁸

Jay Derr, unsworn counsel
Alexandra Kenyon, unsworn counsel

Hillary Evans, unsworn counsel
Jasvir Singh

⁷ Neither party raised this issue during the hearing. The Examiner discovered the Tree Replacement Note when preparing a summary of the sequence of actions involving the building permit for this Decision. That discovery radically altered the course of this Decision. The Examiner believes that he may decide a case upon any theory supported by the evidence and the law.

⁸ The official Parties of Record register is maintained by the City’s Hearing Clerk.

HEARING EXAMINER DECISION
RE: CVC2020-00161 (Toll Brothers)
May 3, 2021
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Jeff Paterson
Brian Gilles

Paul Ollestad

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Cynthia Schaff, 801 228th Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

NOTICE of RIGHT of JUDICIAL REVIEW

This Decision is final and conclusive subject to the right of review in Superior Court in accordance with the procedures of Chapter 36.70C RCW, the Land Use Petition Act.. See Chapter 36.70C RCW and SMC 20.10.250 for additional information and requirements regarding judicial review.

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| <p>The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”</p> |
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