

**BEFORE THE HEARING EXAMINER
FOR CITY OF KENNEWICK**

In the Matter of the Appeal of)	
Gilbert Pitkoff and Veronica Hanson Pitkoff)	FILE NO: APPEAL 18-01/
Of City of Kennewick approval of)	PLN-2018-03440
Preliminary Short Plat)	
File Number SP 18-13/PLN-2018-02922) ¹)	FINDINGS CONCLUSIONS
)	and DECISION
<u>Applicant Scott Ridgeway</u>)	

SUMMARY OF DECISION

The appeal of the Kennewick Planning Department’s October 17th, 2018 approval of SP 18-13/PLN-2018-02922 is denied and the October 17th, 2018 decision is upheld.

SUMMARY OF RECORD

Request

Scott Ridgeway (Applicant) submitted a request to the City of Kennewick (City) for approval of a short-subdivision of three lots at 5500 W. 10th Ave., Kennewick, Washington² (property). Pursuant to review of applicable laws and regulations, on October 17th, 2018, the City’s Community Planning Department issued approval of the request subject to eleven conditions.

On October 26th, 2018, Gilbert and Veronika Pitkoff (Appellants) and others filed a letter of appeal of the City’s approval.³ The appeal included request to locate a utility easement and storm water easement on the plat map; that a turnaround for emergency vehicles be included in a surveyor’s report of the plat; a request that a correction of a 10-inch discrepancy of proposed lot 2 be included in the surveyor’s report; and arguments that the proposed plat is in violation of restrictions and protective covenants.

Hearing Date:

The Hearing Examiner of the City of Kennewick held an open record hearing on the application on January 14, 2019.

Testimony:

At the open record hearing the following individuals presented testimony under oath:

- Mr. Steve Donovan-City of Kennewick
- Mr. Scott Ridgeway-Applicant
- Mr. Gilbert Pitkoff-Appellant
- Mr. Joe Axtell-Appellant’s representative
- Mr. William Keatts
- Mr. Eric Beswick
- Ms. Nancy McLean

¹ The PLN reference is the City of Kennewick Planning Department file number.

² The East half of lot 1, Block 1, Unit 2, Ranchette Estates, According to the Plat thereof recorded in Volume 8 of Plats, Page 90, Records of Benton County Washington

³ The letter of appeal is dated October 24, 2018. It was received by the City on October 26, 2018.

Ms. Pam Potter
Mr. Doug Buckwalter
Ms. Elizabeth Wise

Exhibits admitted for the public record:

At the open record hearing the following exhibits were admitted:

1. Staff Report
2. Appeal Application and Appeal Letter
3. Letter from Gilbert Pitkoff, dated November 15, 2018
4. Preliminary Short Plat Approval Letter SP 18-13/PLN-2018-02922⁴
5. Hearing Notice, mailing list and mailing affidavit for parties of record
6. Letter from Scott Ridgeway, dated 1/03/19
7. Comments from Appellants regarding Staff Report (exhibit 1) and Appellant's letter to City Planner (Exhibit 6)
8. Letter and photograph submitted by Mr. Hewitt
9. Post Hearing correspondence allowed by Hearing Examiner at hearing.

Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following Findings and Conclusions:

FINDINGS OF FACT

1. The Applicant requested approval from the City of a short subdivision for three lots at 5500 W. 10th Ave., Kennewick, Washington. Pursuant to a review of applicable laws and regulations, the City's Community Planning Department issued approval of the request subject to eleven conditions on October 17th, 2018. The short-plat approval allows a one-acre parcel to be developed into three single family lots. The approved design of the short-plat is depicted in the Short Plat Map which was included as part of the City's approval letter of October 17th, 2018. *Exhibit 4- Pgs. 1-4 (Short Plat Map found on Pg. 4).*
2. The property is zoned Residential Subdivision (RS) and has a Comprehensive Plan designation of Low Density Residential. The application for the short-plat was reviewed by the City who determined that the proposal satisfied all developmental and zoning standards and requirements. *Testimony of Mr. Donovan; Exhibit 4, Pgs. 1-4*
3. On October 26th, 2018 the City received a "formal" letter of appeal from the Appellant and others of the City's approval of the short-plat. *Exhibit 4.* A summary of the issues of appeal presented in the letter include:
 - a) The submitted plat map does not include a utility easement and a stormwater easement as required by the City Public Works Department in a September 25, 2018 memo.

⁴ Exhibit 4 also contains comments from City Departments and many letters of opposition to the City's approval. The opposition letters are identified and summarized in Finding No.3.

- b) In a memo from the City Deputy Fire Marshal, it was noted that access roads that exceed 150 feet require a turnaround for emergency vehicles. This type of access with a turnaround is missing from the “surveyor’s report”.
- c) The surveyor’s report includes a 10 inch “discrepancy” for the width of Lot 2.
- d) The approved short plat is in violation of restrictions and covenants of a previous subdivision of property (Ranchette Estates) that includes the property of the proposed short-plat. The allowance of the proposal is contrary to City’s conclusion that the short-plat will be in the public use and interest.

Exhibit 2, Pg.1

4. In addition to the formal letter of appeal, other comments were received by the City that addressed short-plat approval. These individuals, and a summary of their comments, include:
- a) Joe Axtell (October 9, 2018)—a previously approved subdivision included the subject property and the perceived failure to consider the recorded restrictive and protective covenants of the Ranchette Estates approved plat. *Exhibit 4*
 - b) Mark and Mary Cain (October 7, 2018)—failure to consider the recorded restrictive and protective covenants. These covenants were accepted by the City when the land of the subdivision was annexed into the City. *Exhibit 4*
 - c) Jeff DeLine (October 10, 2018)-failure to consider the recorded restrictive and protective covenants. Mr. DeLine submitted that he understood that the City does not enforce covenants, but the City cannot violate them and force land owners into civil disputes. He also questioned whether the residents of Ranchette Estates waived the restrictions and covenants at the time of annexation into the City of Kennewick. *Exhibit 4*
 - d) Genie Gilmore (October 3, 2018) --failure to consider the recorded restrictive and protective covenants. Ms. Gilmore submitted opposition to the proposed short-plat being developed in her neighborhood. *Exhibit 4*
 - e) William Keatts (October 3, 2018) --failure to consider the recorded restrictive and protective covenants. *Exhibit 4*
 - f) Jessie Rowett (October 3, 2018 and October 9, 2018)—opposition based on the development of three lots in the short-plat will take away the semi-country feel of the area. In addition, the writer submitted that the design of the short-plat did not consider the recorded restrictive and protective covenants. *Exhibit 4*
 - g) Al and Cheryl Schauble (October 4, 2018)—in the letter received by the City the failure to consider the recorded restrictive and protective covenants was identified. *Exhibit 4*
 - h) Steve and Wanda Westermeyer (October 4, 2018)-opposition based on the fact that traffic that has increased during the 37 years they have lived on their property. They oppose that Ranchette Estates could be subdivided into another subdivision. The parties also submitted a failure to consider the recorded restrictive and protective covenants. *Exhibit 4*
 - i) Ron and Pam Potter (October 4, 2018)—Parties listed the failure to consider the recorded restrictive and protective covenants. They do not want increased density on the site. *Exhibit 4*

- j) Betty Wise—Ms. Wise listed the failure to consider the recorded restrictive and protective covenants. *Exhibit 4*
5. None of the Appellants, nor the people who submitted correspondence in opposition, contested the approval of the short-plat based on violation of any subdivision developmental standards and regulations or RS zoning standards and requirements.
6. Pursuant to Kennewick Municipal Code (KMC) Chapter-17.13, the administrative Short Plat approval is the first step of the process for review of the overall lot layout and compliance with land use regulations. If the review warrants it, a preliminary plat approval is granted.
7. After approval of the short plat an appeal of the preliminary approval can be filed. If no appeals are filed, the final phase of the process requires final plat approval, at which time the exact dimensions and features of the lots are established. In addition, the final approval must include the final lot designs, the utility services, the access roads and traffic circulation and all other requirements and limitations imposed by the City. Final plat approval is based on compliance of the conditions of approval of n the Preliminary Plat. A civil permit with a detailed review of street, utility and stormwater construction standards, and street and utility construction or bonding for incomplete work is required prior the Final Plat approval. The Final Plat must be recorded prior to the construction on the new lots. *Testimony of Mr. Donovan; KMC chapter 17.13*
8. Pursuant to conditions 2 through 7 of the preliminary short plat approval, the Applicant must adhere to the requirements imposed as part of the approval of the short-plat. Failure to do so will result in the final plat denial. In the instant case the short plat approval requires compliance conditions imposed by:⁵
- a. The City's Departments of Public Works. *Exhibit 4 dated September 25, 2018;*
 - b. The requirements imposed upon the development of the short-plat by the City's Departments of Traffic Engineering, *Exhibit 4 dated September 28 2018;*
 - c. The requirements imposed upon the development of the short-plat by the City's Fire Department. *Exhibit 4 dated September 25, 2018;*
 - d. The requirements imposed upon the development of the short-plat by the City on behalf of the Kennewick Irrigation District. *Exhibit 4 dated September 26, 2018*
 - e. The requirements imposed upon the development of the short-plat by the City on behalf of Benton PUD. *Exhibit 4 dated October 2, 2018*
 - f. The developer will be required to construct the required turnaround and show it on the face of the plat prior to Final Short Plat Approval.

⁵ Other conditions were imposed in addition to the ones listed in this Finding.

List of Legal Authority

Jurisdiction:

The Kennewick Hearing Examiner is granted jurisdiction to hear and decide preliminary plat applications pursuant to KMC 4.02.080 (1)(b) ii.

KMC 4.02.020:-Creation of the Hearing Examiner. The office of the Hearing Examiner, hereinafter referred to as "Examiner," is hereby created. The Examiner shall interpret, review, and implement land use regulations *as provided in this Title* and other ordinances, issues and matters as assigned, delegated and/or referred to the Examiner. (Emphasis added).

KMC 4.02.080:-Duties of the Examiner—Applications and Decisions.⁶

The Hearing Examiner shall have the following duties with respect to applications of matters submitted before him or her.

Decisions of the Hearing Examiner. The Hearing Examiner shall receive and examine available information, conduct open record appeal hearings or open record public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon these facts, which conclusions shall represent the final action on the application, unless appealed further to Superior Court, as specified in this Section for the following:

- Open record appeal hearings on the following applications and/or administrative decisions:
- Lot Line Adjustment;
- Accessory Apartment;
- Parcel Combination;
- Home Occupation;
- Additional Animals;
- Comparable Use;
- Manufactured Housing In-fill;
- Conditional Use Permit;
- Site Plan Approval;
- *Short Plat;*
- Appeals of SEPA determinations;
- Business license denials, revocations;
- Appeals from sign permit decisions; and
- *Appeals from administrative land use interpretation decisions.*
- Open record public hearings on the following applications:
- Variance; applications for variances from the terms of the zoning code and subdivision code;
- Preliminary Plats;
- Shoreline Permits; and
- Planned Development Permits.
- Such other matters as may be designated by the Council.

⁶ The applicable duties for the instant appeal are italicized for emphasis for this matter.

- Open record appeal hearing of a department director's administrative decision when provided in the Kennewick Municipal Code.

(Emphasis added)

KMC 17.13.075:-Procedure-Appeal.

Any person aggrieved by the decision of the Administrator to conditionally approve, or disapprove a proposed preliminary short plat may appeal the decision to the Hearing Examiner within ten days following issuance of the decision. The Hearing Examiner will hold an open record appeal hearing and may affirm or reverse the Administrator's decision or may remand the application to the Administrator with instructions to approve the same upon compliance with conditions imposed by the Hearing Examiner. Any person aggrieved by a decision of the Hearing Examiner may appeal to the Superior Court of Benton County for such relief as he may be entitled within 21 days of the decision.

KMC 17.13.060:-Administrative Review.

Upon the receipt of a completed preliminary short plat application, copies of the information will be distributed to any involved parties and agencies as necessary for review. The City, with the assistance of other reviewing agencies, will grant Preliminary Short Plat approval when the following findings are made:

- The proposed lots conform to the Kennewick Municipal Code;
- The proposed short subdivision meets the criteria of Section 17.10.080(1);
- Applicable irrigation assessments will be paid and adequate utility easements will be provided; and
- The public use and interest will be served by permitting the proposed division of property.

RCW 35A.63.170 Hearing examiner system—Adoption authorized—Alternative—Functions—Procedures.

- (1) As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and report on any proposal to amend a zoning ordinance, the legislative body of a city may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and decide applications for amending the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner,

RCW 58.17.033

Proposed division of land—Consideration of application for preliminary plat or short plat approval—Requirements defined by local ordinance.

- (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use

control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

(2) The requirements for a fully completed application shall be defined by local Ordinance;

(3) The limitations imposed by this section shall not restrict conditions imposed under Chapter 43.21C RCW.

These ordinances and statute are the legal basis for the following decision

DECISION

I.

The appeal is of the City of Kennewick's approval of a short-plat of three lots at 5500 W. 10th Ave., Kennewick, Washington. This area, which appears to have been mostly developed when the property was outside of the City and subject to Benton County jurisdiction, is located in a long-established neighborhood. The property was included in the original plat of Ranchette Estates. The approval of the Ranchette Estates plat included various covenants that limit further subdivision of the land in its boundaries. It is the contention of the Appellants that the covenants control over the zoning laws of the City and that the short-plat of the property located in Ranchette Estates should be denied.

In addition to the covenant issue, the Appellants argue that some of the information of the development is not included in the short-plat material submitted to the City. The City does not deny these contentions of the Appellants, but submitted that all of the correct and accurate information of the short-plat will be included as part of the final plat information. Prior to final plat approval the City will verify the correctness of the design and the standards and requirements that must be adhered to as part of the development. Only when this information is filed can there be a final plat approval.

II.

KMC 4.02.080 establishes the duties of the Hearing Examiner. In this ordinance the Examiner must:

...receive and examine available information, conduct open record appeal hearings or open record public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon these facts...

These duties have been adhered to in this matter. Because no party objected to the City's review of the facts and details relating to the requirements and regulations for a short-plat in an RS zone, the materials presented by the Planning Department in its Staff Report and in the testimony of Mr. Donovan are uncontradicted and are accepted as accurate. Thus, the only issues presented to be addressed are the contentions that the preliminary plat map does not contain certain information relating to design and that the covenants of the Ranchette Estates of the previously approved subdivision control the approval of the instant short-plat.

III.

Three of the issues of appeal listed in the Appellant's letter of appeal do not support the reversal of the short-plat approval.

The first issue, the failure to submit-plat map that includes a utility easement and a stormwater easement, is not reason to overturn the approval. The requirement of such an easement is set forth by the City Public Works Department in a September 25th, 2018 memo. The memo, which is part of Exhibit 4, specifically requires the information (and other information) to be submitted prior to final approval. Not only is it required per the memo, it has been made a condition of approval (condition number 2) of the short-plat preliminary approval. The information will be included in the Final Plat approval. *Finding No.7*

The second issue alleges the failure to include information on access roads that exceed 150 feet provide for a turnaround for emergency vehicles. This information is required by the City Fire Department and is memorialized in a September 25th, 2018 memo. The memo, which is part of Exhibit 4, specifically requires this information and has been made a condition of approval (condition number 5) of the short-plat preliminary approval. The information will be included in the final plat approval. *Finding No.7*

The third issue of the appeal is the alleged 10-inch "discrepancy" for the width of Lot 2. In uncontradicted testimony Mr. Donovan described the process for plat approval in Kennewick. The final plat is the document that must contain the exact information, including lot dimensions. Any discrepancies must be corrected before the final plat is approved. If such a discrepancy exists, it must be corrected prior to final plat approval. *Finding No. 6*

All three of these issues raised by the Appellant will be resolved with the final plat approval. This type of process is accepted in the state of Washington. In a Washington Supreme Court decision, *Friends of the Law vs. King County* 123 Wn.2d 518, 522, 869 P.2d 1056 (1994); the Court held that the final plat approval controls for exactness:

A preliminary plat application is meant to give local governments and the public an *approximate* picture of how the final subdivision will look. RCW 58.17.020(4). *It is to be expected that modifications will be made during the give and take of the approval process.* Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application, RCW 58.17.033, they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479. Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission. If the applicant can show that its plat, with the proper conditions and modifications, will comply with those laws, it will be approved. If not, it will be rejected and the process may begin again. RCW 58.17.140. The applicant bears the burden of complying fully with applicable land use requirements. *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 169-70, 759 P.2d 447 (1988).

Hence, we hold that Anstalt's [Applicant] application did vest upon submission. *The Council did not abuse its discretion in approving Anstalt's preliminary plat application*

subject to modifications which will bring it into compliance with all applicable zoning requirements. The judgment of the Superior Court is affirmed. (Emphasis added)

IV.

The last issue of the appeal is whether the City, through the Planning Department or the Hearing Examiner, can interpret or apply the restrictive covenants of the Ranchette Estates plat. The answer to this issue is neither the Department nor the Examiner has the authority to apply the restrictive covenants. Only the authority of the Hearing Examiner will be addressed in this decision.

A.

RCW 35A.63.170 sets forth the authority of a City Council to establish a Hearing Examiner system:

- As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and report on any proposal to amend a zoning ordinance, the legislative body of a city may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and decide applications for amending the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner

With the creation of the Hearing Examiner, the office becomes an administrative agency of the City. A Washington Court of Appeals case, *Chaussee vs. Snohomish County*, 38 Wash. App. 630 (1984) 689 P.2d 1084, held that "...[a]dministrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication (citing authority).

Subsequent to the enactment of RCW 35A.63.170 and the *Chaussee* decision, the City of Kennewick created a Hearing Examiner system with the passage of KMC 4.02.020: Included in the ordinance are the powers of the Examiner:

The Examiner shall interpret, review, and implement land use regulations as provided in this Title and other ordinances, issues and matters as assigned, delegated and/or referred to the Examiner.

The duties of the Hearing Examiner of Kennewick are set forth in KMC 4.02.080: - Duties of the Examiner. These powers are the only authority that the Hearing Examiner has to hear issues in the City. They are limited and cannot be exceeded. Not included in these powers is the authority to interpret, enforce, nullify or amend restrictive covenants.

A covenant is an agreement between parties and is contractual. *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014). The jurisdiction to interpret the covenant and whether the short-plat violates the agreement lies with the superior Court of Washington. The Wilkinson Court stated:

The primary responsibility of a *court* when faced with a dispute about the meaning of restrictive covenants is to determine the intent of the parties who established the covenants. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). The *court* examines the language used as indicating the parties' intent, with the language given its ordinary and common meaning. *Id.*; *Metzner v. Wojdyla*, 125 Wn.2d 445, 450, 886 P.2d 154 (1994); *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993).¹
(Emphasis added)

Applying these ordinances, statute and the Wilkinson decision it is apparent that The Kennewick Hearing Examiner and the Kennewick Planning Department have no authority to interpret and enforce covenant agreements or to apply relief from the terms of the covenant.

V.

While it is understandable that some of the residents do not want to have additional housing developed in the area, this in of itself is not grounds for denial of the short-plat. It is long established in the state of Washington by the Supreme Court and various Court of Appeals that a local jurisdiction may not deny land use permits based solely on evidence of general neighborhood opposition: *Sunderland vs. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986; *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990); *Kenart & Assocs. V. Skagit County*, 37 Wn. App. 295, 680 P.2d 439, *review denied*, 101 Wn.2d 1021 (1984).

SUMMARY

The appeal of the Kennewick Planning Department's October 17th, 2018 approval of SP 18-13/PLN-2018-02922 is denied and the October 17th, 2018 decision is upheld.

The appeal fails because the issues of appeal relating to insufficient information in the preliminary short plat can be remedied in the final approved final plat. Further, the appeal fails because the interpretation and enforcement of the restrictive covenant is not part of the jurisdictional authority of the Kennewick Hearing Examiner or the Kennewick Planning Department.

Dated this 11th day of February, 2019.

James M. Driscoll
Kennewick Hearing Examiner