

**CITY OF LYNDEN
HEARING EXAMINER**

re: The application of **Cedarbrook Partners, LLC** for a Shoreline Substantial Development Permit in regard to a Short Plat Subdivision proposal

SSD #21-02

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant requests approval for a short plat subdivision where the applicant would subdivide a three acre parcel into four single family lots where the parcel is adjacent to a shoreline in the form of Fishtrap Creek.

Decision: The requested Shoreline Substantial Development Permit is granted, subject to conditions.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing, in which opportunity was afforded to interested parties to object, comment, or bring information forward.

FINDINGS OF FACT

I. PRELIMINARY INFORMATION

Applicant: Cedarbrook Partners, LLC

Property Owner: Shane Bajema, Cedarbrook Partners, LLC
131 E Cedar Drive
Lynden, WA 98264

Property Location: 131 E Cedar Drive
Parcel Number: 4003174461160000
Legal Description: LOT 1 VAN DYKEN SHORT PLAT AS REC AF 2000201901
Adjacent Water Body: Fishtrap Creek
Shoreline Designation: Shoreline Residential
Statewide Significance: No
Notice Information: Application Submitted: May 17, 2021
Notice of Application: June 16 and July 21, 2021
Notice of SEPA determination: June 16, 2021
Notice of Hearing: August 11, 2021
Comment Period Ending: August 25, 2021
SEPA Review: Lynden SEPA #21-05. Mitigated Determination of Non-Significance (MDNS) issued June 14, 2021

Authorizing Codes, Policies, Plans, and Programs:

- RCW 36.70B Local Project Review
- RCW 43.21C State Environmental Policy Act (SEPA)
- RCW 90.58 Shoreline Management Act (SMA)
- WAC 173-27 Shoreline Management Permit and Enforcement Procedures
- WAC 197-11 State Environmental Policy Act Rules
- LMC 2.09 Hearing Examiner
- LMC 16.08 Shoreline Management Program (SMP), City of Lynden SMP, approved by Dept of Ecology September 10, 2019
 - SMP 1.03 Shoreline Jurisdiction
 - SMP 3.01 SMP Goals
 - SMP 4.03 Shoreline Residential Environment
 - SMP 4.06 Development Standards
 - SMP 6.09 Residential Development
 - SMP 8.00 Administration
- LMC 16.16 Critical Areas Ordinance
- LMC Chapter 17 Land Development
- LMC Chapter 18 Subdivisions
- City of Lynden Manual for Engineering Design and Development Standards

Parties of Record

Bob Libolt, Managing Member

Cedarbrook Partners, LLC
125 Rosemary Way, Lynden

Dave Timmer, City Planner
City of Lynden - Planning & Community Development
300 4th St.
Lynden, WA 98264

Mark Sandal, Programs Manager
City of Lynden – Public Works
300 4th St.
Lynden, WA 98264

Mel Fullner
325 Kwanzan Drive
Lynden, WA

Admitted Exhibits:

1. Staff Report, *dated* 8/20/21
2. SSD Permit Application, 4/30/21
3. SSD Project Plan Map, *dated* 5/10/21
4. Critical Areas Report Mitigation Addendum, *dated* 6/14/21
5. SEPA Mitigated Determination of Non-Significance, *dated* 6/14/21
6. Cedar Drive Neighbors / Traxler Public Comment Letter, *dated* 6/30/21

II.

The Applicant is requesting proposing to subdivide a 3-acre parcel at the terminus of the dead-end of East Cedar Drive into 4 single family residential lots. The parcel currently contains a centrally located single family home and detached accessory structure accessed by an approximately 300 ft asphalt driveway. The parcel is characterized by maintained lawn/pasture, scattered large trees, and approximately 450 foot of Fishtrap Creek which forms the eastern boundary of the parcel. Furthermore, a portion of the existing Jim Kaemingk Sr. public trail (including a pedestrian bridge over Fishtrap Creek) crosses the NE portion of the property. The 200 foot zone of shoreline jurisdiction partially extends into the parcels on the northern portion and fully encompasses the southern portion. Similarly, the 150 foot Critical Area Buffer from Fishtrap Creek encompasses the existing home, touches the southern portion of the access easement, and partially extends into the new vacant proposed lots.

III.

Hearing Examiner Rules §27(B) allows the Hearing Examiner to issue subpoenas and compel attendance of witnesses— but in this case no party requested the Hearing Examiner to compel a witness or any public comment provider to appear in person and be cross examined. There was no public comment at the Hearing. Public comments were received, reviewed, and discussed at the hearing.

IV.

Hearing Examiner Rules §33 grants parties the right to object to evidence and for the Hearing Examiner to rule on such objections. In the case at hand, with full knowledge of the evidence being admitted, no objection was made by any party to any of the exhibits that were admitted into the record.

Admitted Exhibit 1-6 are deemed to be relevant in regard to the facts represented therein.

V.

Public comment was given from a neighbor referencing Exhibit 6 indicating that the concerns in the letter had been largely met and satisfied despite concerns about future enforcement of the conditions. The City also addressed how the concerns raised were addressed in the conditions recommended.

VI.

The City of Lynden’s Technical Review Committee (“TRC”) made a written specific recommendation to approve the Shoreline Substantial Development Permit in Exhibit 1 and did also review and reference the applicable facts and laws with proposed necessary conditions, in a report entitled “Development Project Report,” dated August 20, 2021 (herein “Staff Report”).

The Applicant has indicated that the Staff Report is factually correct and agreed with all the recommended conditions put forward by the TRC.

Any factual findings set forth in the Staff Report, a copy of which is attached hereto, are hereby adopted as findings of fact by the Hearing Examiner and incorporated herein by this reference.

VII.

Any Conclusion of Law made below which is deemed a Finding of Fact is hereby

adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

The proposed Application for a Substantial Development Permit to subdivide the parcel adjacent to Fishtrap Creek should be approved if it is consistent with the SMP criteria.

SMP §8.03.01 specifies that unless a project is exempt, no development, use or activity shall be undertaken within the jurisdiction of the SMA without a Shoreline Substantial Development Permit. This project is not exempt under SMP §8.03.02-04, and thus requires a permit.

SMP §8.03.01 specifies that the criteria for granting a Shoreline Substantial Development Permit is that all proposed uses and developments must be consistent with the policies and provisions of the SMP and the SMA, unless an exemption applies. The eight policy goals are outlined in SMP §3.

The proposed permit does in fact allow for a proposed use and development that is consistent with the policies and provisions of the SMA and the SMP.

Subject to the Conditions of Approval attached hereto, the proposed use complies with the SMP criteria, and a Shoreline Substantial Development Permit should be granted with those conditions.

II.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

A Shoreline Substantial Development Permit is hereby granted to Cedarbrook Partners, LLC to, as described in their application: subdivide a 3-acre parcel at the terminus of the dead-end of East Cedar Drive into 4 single family residential lots, on Assessor's Parcel No. 400317 446116 0000, addressed as 131 E Cedar

Drive in the City of Lynden, WA. The permit is granted subject to the following conditions:

CONDITIONS ASSOCIATED WITH PERMIT

1) Planning and Development

- a) The proposed shoreline developments shall be consistent with the scope and site plan approved by this SSD permit. Any changes to the proposal may require additional review and approval by City staff and/or the Lynden Hearing Examiner.
- b) Issuance of this SSD permit does not release the applicant from any other Local, State, or Federal statutes or regulations applicable to the proposed development.
- c) *Joint Review:* The Shoreline Substantial Development Application for the Cedarbrook Short Plat is subject to joint review with other land use applications. These include a Short Plat Application, a Development Standards Variance request, and SEPA environmental review. Be advised, comments generated in association with other applications will not necessarily be repeated in this staff report but remain applicable to the project.
- d) *Proposal Maps:* The submitted maps associated with this proposal shall be updated to remove the “112.5 foot Critical Area Buffer” reduction line from all project maps (Short Plat map, Mitigation Map, SSD Map, and any others) as there is no buffer reduction being proposed with this short plat.
- e) *Critical Area Review:* The “1,181 sq ft Buffer Enhancement Area” as shown in the June 14, 2021 Mitigation Addendum (Mitigation Map) will be moved subject to the final determined location of the Trail Easement (see the Parks Dept comment below). There is sufficient adequate space on the parcel for mitigation plantings.
- f) *Floodplain:* A portion of the Cedarbrook parcel is within the FEMA mapped floodplain for Fishtrap Creek. No work is being proposed within the mapped floodplain. Note that any future proposed development within the floodplain is regulated by LMC 16.12 Floodplain Management.

2) Public Works

- a) *Drainage Plan Required:* A stormwater management plan prepared by a professional engineer and meeting the requirements of the Department of

Ecology's Best Management Practices (including all known and reliable technologies) and the standards approved in the Manual for Engineering Design and Development Standards will be required for this development.

- b) *Erosion Control Required:* An erosion control plan must be included in the drainage plan and construction plans as necessary. This must be designed and constructed in compliance with the Department of Ecology's Best Management Practices (including all known and reliable technologies) and the standards approved in the Manual for Engineering Design and Development Standards.
- c) *Agency Review and Permitting:* The applicant will be responsible for obtaining all required permits from the Department of Ecology and the Department of Fish and Wildlife for all stormwater and construction activity. This may include a Department of Ecology NPDES discharge permit.

3) Fire Safety

- a) A hydrant is required, as proposed, within the plat.
- b) A fire apparatus turnaround is required to be delineated within the existing driveway of the existing single-family house.

4) Parks

- a) Dedication of the public trail easement along the existing portion of trail which crosses the northeastern corner of the property is required as a condition of short plat approval. Furthermore, due to erosion concerns along the existing trail, the easement shall be extended westward away from the creek to allow for future realignment of the trail away from the eroding stream edge. The precise location of the easement extension shall be located below the top of bank and will be determined in the recorded easement document and indicated on the recorded plat.

5) Environmental Impacts

- a) Mitigation measures shall be installed according to the June 14, 2021 Mitigation Addendum (Performance Standards, Plant list, Invasive Plant Removal, Maintenance and Monitoring, and a 5 year surety to be released after Performance Standards are met).
- b) The "Buffer Enhancement Area" as noted in the above Technical Review Committee comments will be moved to accommodate the trail easement location.

- c) Any unanticipated impacts to the environment that occur as part of this proposal will necessitate additional Critical Area Review and revisions to the mitigation plan determined by the project biologist. These changes will require approval by the Planning Department.
- 6) Should archaeological resources (e.g. shell midden, faunal remains, stone tools) be observed during project activities, all work in the immediate vicinity should stop and the area be secured. An Inadvertent Discovery Plan (IDP) has been produced by the applicant. It identifies protocol for contacting the appropriate authorities and protecting archaeological resources if they are inadvertently found during any future construction activity. Project managers and contractors shall be familiar with this IDP prior to any construction occurring.
- 7) If ground disturbing activities encounter human skeletal remains during the course of any construction activity, then all activity will cease that may cause further disturbance to those remains. The area of the find will be secured and protected from further disturbance. The finding of human skeletal remains will be reported to the county medical examiner/coroner and local law enforcement in the most expeditious manner possible. The remains will not be touched, moved, or further disturbed. The county medical examiner/coroner will assume jurisdiction over the human skeletal remains and make a determination of whether those remains are forensic or non-forensic, then they will report that finding to the Department of Archaeology and Historic Preservation (DAHP) who will then take jurisdiction over the remains. The DAHP will notify any appropriate cemeteries and all affected tribes of the find. The State Physical Anthropologist will make a determination of whether the remains are Indian or Non-Indian and report that finding to any appropriate cemeteries and the affected tribes. The DAHP will then handle all consultation with the affected parties as to the preservation, excavation, and disposition of the remains.
- 8) Variance Contingency
 - a) The Shoreline Substantial Development Permit may be modified in terms of the lot configuration approved by City of Lynden Planning and Community Development without additional hearing *if* the Development Standards Variance if it is not supported by Council. This modification could increase the size of Lot 1 and reduce the depth of Lots 2, 3, and 4 so that the depth does not exceed three times the proposed width. Lots would remain subject to minimum size requirements and all other subdivision standards described in LMC 18.14. The modification will not be allowed if the change includes additional impacts associated with the access drive or utilities.
- 9) Any change or modification in this project in design or scope shall be immediately routed to City of Lynden Planning and Community Development staff for review. Any change in this project will likely require more information and critical areas assessment submittals pursuant to SMP 8.04 REVISION OF PERMITS.

NOTICE OF POTENTIAL REVOCATION AND PENALTIES

This Approval is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation.

Complaints regarding a violation of the conditions of this permit should be filed with City of Lynden Planning and Community Development staff. The Hearing Examiner may not take any action to revoke this approval without further public hearing. Violations of this title shall constitute misdemeanors pursuant to LMC 16.16.140 under the municipal code.

FURTHER, in addition to incurring civil liability under the Shoreline Master Program's sections 8.08.03 and 8.09, and RCW 90.58.210, pursuant to RCW 90.58.220 any person found to have willfully engaged in activities on shorelines of the state in violation of the provisions of the act or the Shoreline Master Program or other regulations adopted pursuant thereto shall be guilty of a gross misdemeanor and shall be punished by a fine of not less than \$25 or more than \$1,000 or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment; provided that the fine for the third and all subsequent violations in any five year period shall not be less than \$500 nor more than \$10,000.

Any person who willfully violates any court order, regulatory order or injunction issued pursuant to the Shoreline Master Program shall be subject to a fine of not more than \$5,000, imprisonment in the county jail for not more than 90 days, or both. This approval does not release the applicant from any regulations and procedures required of any other public agency, or any City requirements other than the requirement to obtain a Shoreline Substantial Development Permit. This permit may be rescinded pursuant to SMP 8.08 or RCW 90.58.140(8) in the event the permittee fails to comply with the terms or conditions thereof. Pursuant to RCW 90.58.143 this permit shall expire within two years of the date of its approval and a new permit will be required if the permittee fails to make substantial progress toward completion of the project for which it was approved, unless the permittee has requested a review, and upon good cause

shown, been granted an extension of the permit pursuant to RCW 90.58.143(2).

THIS PERMIT IS NOT VALID (AND NO CONSTRUCTION NOR OPERATION AUTHORIZED BY THIS PERMIT SHALL BEGIN) UNTIL TWENTY-ONE (21) DAYS AFTER THE DATE OF FILING AS DEFINED BY RCW 90.58.180 AND WAC 173-27-100, OR UNTIL ALL REVIEW PROCEEDINGS INITIATED WITHIN TWENTY-ONE DAYS FROM THE DATE OF SUCH FILING HAVE TERMINATED; EXCEPT AS PROVIDED IN RCW 90.58.140(5).

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE LYNDEN HEARING EXAMINER

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Lynden City Council or other body as within 14 days as specified by LMC 2.09.040(G); or for shoreline permit applications and revisions which are subject to appeal to the State Shoreline Hearings Board within 21 days pursuant to SMP 8.05.02, RCW 90.58.180, and WAC 461-08.

Dated this 2nd day of September 2021



Rajeev Majumdar, Hearing Examiner