Ex 83

## Lindsey Ozbolt

**From:** Kathy Koback <kkoback@romeropark.com>
**Sent:** Thursday, November 2, 2017 5:10 PM
**To:** Lindsey Ozbolt
**Subject:** RE: East Lake Sammamish Trail Segment 2B
**Attachments:** 2017-11-02_Response to Hearing Examiner.ltr.pdf

Good afternoon again,

Attached please find the Response in Opposition from additional clients of ours.

Thank you!

Kathy

**From:** Kathy Koback
**Sent:** Thursday, November 2, 2017 4:57 PM
**To:** 'Lindsey Ozbolt' <LOzbolt@sammamish.us>
**Subject:** RE: East Lake Sammamish Trail Segment 2B

Good afternoon Ms. Ozbolt,

Attached please find our clients' Response in Opposition to the Comments re: the ELST for presentation to and consideration by the Hearing Examiner.

Thank you for your assistance in this matter.

Thank you!

Kathy

**From:** Lindsey Ozbolt [mailto:LOzbolt@sammamish.us]
**Sent:** Friday, October 20, 2017 3:21 PM
**To:** Kathy Koback <kkoback@romeropark.com>
**Subject:** RE: East Lake Sammamish Trail Segment 2B

Good afternoon Ms. Koback.

If you have documentation you would like submitted to the Hearing Examiner for the public hearing, it can either be submitted at the hearing during your testimony or it can be provided to the City c/o of myself. This can be provided via email at lozbolt@sammamish.us or mailed to the City at 801 228th Ave. SE, Sammamish WA 98075. Any documents received by the City will be provided to the Hearing Examiner at the start of the hearing. Please make sure any submitted documentation clearly identifies the name of the project and the project number if possible.

Best regards,

Lindsey Ozbolt
Associate Planner | Department of Community Development | 425.295.0527

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*Via Electronic Mail*
November 2, 2017

John Gault
Hearing Examiner
City of Sammamish
801 228th Avenue SE
Sammamish, WA 98075
Email: lozbolt@sammamish.us

**RE: Comments for Hearing Examiner re: Issuance of SSDP2016-00415 Permit Application**
Our Reference: SASH 501

Dear Hearing Examiner:

*Property Owners in Opposition*

This office represents the following affected Sammamish property owners: A) Jennifer and Scott Baisch, the owners of the property located at 2317 East Lake Sammamish Place SE ("Baisch Property"); Patricia Harrell, the owner of the property located at 2221 East Lake Sammamish Place SE ("Harrell Property"); Nate and Alison Thompson, the owners of the property located at 2325 East Lake Sammamish Place SE ("Thompson Property"); Mike and Diane Parrott, the owners of the property located at 2311 East Lake Sammamish Place SE ("Parrott Property"); Mike and Gina Abernathy, the owners of the property located at 2331 East Lake Sammamish Place SE ("Abernathy Property"); and Howard and Meg Crow, the owners of the property located at 2127 East Lake Sammamish Place SE ("Crow Property")(collectively referred to as the "Property Owners").

*Requested Relief*

The Property Owners respectfully request that the Hearing Examiner ("Examiner") denies King County's application for a Shoreline Substantial Development Permit, as disclosed in the December 28, 2016 Notice of Application for Shoreline Substantial Development Permit; East Lake Sammamish Trail Segment 2B – SSDP2016-00415 (the "Permit Application") for the reasons set forth below, notably the County's continued inability to provide a title report/insurance for the property over which it seeks to improve the interim trail. Alternatively, and at the minimum, the Property Owners respectfully request that the Examiner approve the Permit Application only if and when the County first strictly complies will all conditions set forth in the Director's Recommendation dated October 4, 2017, such that land and property bisected by this "improved" trail is not adversely affected.

*Procedural Grounds for Requested Relief*

**1. The Permit Application should be denied because the County has not complied with SMC 20.05.040.**

The County has not complied with SMC 20.05.040, which requires denial of the Permit Application. SMC 20.05.040 provides in part:

(1) The department shall not commence review of any application set forth in this chapter until the applicant has submitted the materials and fees specified for complete applications. Applications for land use permits requiring Type 1, 2, 3, or 4 decisions shall be considered complete as of the date of submittal upon determination by the department that the materials submitted meet the requirements of this section. Except as provided in subsection (2) of this section, all land use permit applications described in SMC 20.05.020, shall include the following:

...

(r) Verification that the property affected by the application is in the **exclusive** ownership of the applicant, or that the applicant has a right to develop the site and that the application has been submitted with the **consent of all owners** of the affected property; provided, that compliance with subsection (2)(d) of this section shall satisfy the requirements of this subsection (1)(r); and

...

(2) Additional complete application requirements apply for the following land use permits:

...

(d) For all applications for land use permits requiring Type 2, 3, or 4 decisions, **a title report** from a reputable title company indicating that the applicant has either **sole marketable title** to the development site or has **a publicly recorded right to develop the site** (such as an easement); if the title report does not clearly indicate that the applicant has such rights, then the applicant shall include the written consent of the record holder(s) of the development site.

(emphasis added).

There can be no dispute that the following statements about the County's application are correct:

1. It did not provide verification of exclusive ownership to *all* of the Property in question (in fact, it concedes it does not own the subject property in fee simple, rather it acknowledges that it acquired the **railroad easement** through the Rails to Trails Act, which means that it does not possess all of the bundle of rights of the subject property).

2. It did not provide consent of the affected property owners (in fact, this letter continues to demonstrate that many of the affected property owners are opposed to the proposed shoreline development).

3. It did not provide a copy of a title report showing the County has "sole marketable title" or has a "publicly recorded right to develop the site."

Given the County's failure to provide these requisite deliverables, the Permit Application should be denied as incomplete, despite the Director's Recommendation.

**2. Not insisting on title insurance only serves to put the City at risk unnecessarily because the County has admitted for years that title to much of the trail Corridor is clouded.**

While the Director may waive submittal requirements if they are determined as "unnecessary," requiring title insurance in this instance is necessary. SMC 20.05.040(3). In fact, SMC 20.05.040(2)(d) should never be determined by the Director as "unnecessary," especially under the circumstances of this permit application, and the Examiner has the responsibility and the opportunity to protect the City and its citizens by denying the Permit Application until SMC 20.05.040(3) is satisfied.

The Property Owners continue to vehemently deny that the County owns a 200-foot easement for the trail that would allow them to wipe out portions of many permitted improvements that are bisected by the proposed Corridor. Specifically, the shorelands that fall within the claimed Corridor Parcel were granted to the Property Owners by the State of Washington and were never used or occupied by the Railroad. Even if the County did have a 200-foot easement it still is limited by the Rails to Trails Act to only be allowed to build a trail in the Corridor – it is not allowed under any circumstances to remove anything that is outside the actual 20' trail, since doing so would be going outside its authorized use of the subject alleged easement.

Further, as it relates to the proposed trail improvements themselves, the Property Owners do not believe the County should be allowed to construct a trail that will eliminate some of the Property Owners' access stairs, utilities, waterfront access and landscaping, in a manner that will decrease safety, privacy and significantly prevent the full enjoyment and use of their private property. The Hearing Examiner should take note that the County has changed its position, and especially its representation to the Property Owners and other citizens of Sammamish who live on Lake Sammamish that it will not ever disturb their use of their docks and waterfront access. Specifically, in 2004, Joe Wilson, former Program Manager for the County, informed the City and the citizenry at a City Council meeting:

> There are about 27 properties in Section 7 and the county has settled with about 9 of them or they have been settled prior to the county gaining ownership to the Corridor. Section 7 is an area where there is clouded title. That means that you can't go to records and find titles that says whether [the Right of Way] belongs to the railroad or it belongs to someone else so its adverse or can happen either way. So, the County says rather than getting into legal battle about it, let's settle with these people. And let's take what we need for the trail and then they can have what they need for their properties. So, 9 properties out of 27 that have been happened and settled and I have asked the Prosecuting Attorney that it will make my job a lot easier to pursue all the rest of the properties now addressing this so that we get them settled so that when we start building the trail there won't be these questions.

*See* Transcription of 2004 Sammamish City Council Meeting attended by the Property Owners and many others in the community.

In summary, the County's ownership of the Corridor is challenged on at least the following grounds:

1. The County only has an easement, not fee ownership;
2. The County does have the use of 200 feet for a trail;
3. Even if the County has the right to build a trail over the entire alleged 200-foot Corridor it does not follow that it has the right to remove docks and other structures and/or deny property owners access rights to Lake Sammamish that they have enjoyed for decades; and
4. The County acknowledged in 2004 that it did not have clear title to construct the trail in the Corridor, and it should now be estopped from asserting that its ownership rights are clear.

Because of these "ownership challenges" the County should be required to provide a title insurance policy from a reputable title insurance company.[1]

We recognize that the County has submitted a decision of a federal court judge in an effort to try to dissuade the City from requiring title insurance and/or argue that the Property Owners have effectively already lost their property rights to the Corridor. However, this case does not stand for such a broad proposition, and is further under appeal.[2] While it is true that Judge Pechman, in a federal case, U.S. District Court Case No. 2:15-cv-00970 ("Federal Case") ruled that the County had the authority to build the trail through ***a few*** properties farther South along the trail than the Property Owners reside, the Federal Case has nothing to do with the Property Owners and there has been ***no*** determination by any court that the County's trail Corridor is 200-feet wide across the Property Owners' properties. If either the Federal Case decision is reversed and/or the Property Owners prevail on what may ultimately become litigation over their properties, *after* the City has allowed the County to build the trail (and destroy hundreds of thousands, if not millions, of dollars of property, landscape, and amenities) the Property Owners, and others damaged by the County's installation of the trail, will sue not only the County for damages, but also very likely the City.

The presumed reasons the City enacted SMC 20.05.040(2)(d) are at least: a) to have the backing of title insurance in the event the applicant and/or the City get sued based on a claim of a lack of title to the project site; and b) to receive an independent verification that the applicant does in fact have the requisite title authority to construct the project. The City should step back and ask itself, "why has the County failed to provide a copy of its title insurance to the subject property?" Should that not be a red flag?

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[1] The City will also benefit from title insurance because if the permit is issued, and the Property Owners and/or other injured City residents bring legal action challenging the ownership issue then the City will be able to call upon the title insurance to defend itself in any such proceeding. Of course, if the Property Owners/others prevail and it is determined the permit was wrongfully issued, then the City will also have a source of recovery for the likely multi-million dollar damage claim said residents will have if the trail is constructed and ultimately determined to be violative of the Property Owners' property rights.

[2] It is important to note that Judge Pechman's decision is currently under appeal to the 9th Circuit. It is also important to note that the 9th Circuit allowed the record to be supplemented to show that the County did not, as alleged in the hearing before Judge Pechman, pay taxes on the Corridor property. While the Property Owners argue that this shows that Judge Pechman's decision will likely get reversed, at a minimum it shows that the decision has at least some risk of reversal, and basing a decision to not insist on title insurance on a case that could be overturned on appeal not does seem to fall within the definition of "unnecessary." In fact, it would appear under these circumstances that it is absolutely necessary to require the County to provide title insurance.

Since the SMC does not define the word "unnecessary," (the ***only*** grounds upon which the City Director can ignore the requirements of SMC 20.05.040(2)(d)) the word should be given its ordinary meaning. Webster's defines "unnecessary" as "not needed" or of "no import." Applying this definition to the question at hand, the Hearing Examiner must decide, "is requiring the County to provide title insurance not needed or of no import to the City?" How can the answer to this question be "no?" It must be yes. Securing title insurance will give the City an independent, experienced, third party opinion that the County does indeed have ownership/exclusive rights to the subject property and more importantly, that the insurance is there to cover damages if the Property Owners bring legal action against the County and/or City in the event they prevail in the State Case and/or other affected property owners prevail on appeal in the Federal Case.

*Additional Grounds for Requested Relief*

Most, if not all of the Property Owners will individually provide the Examiner with their comments on how the proposed project will impact them and their respective properties and how, if the Examiner does not deny the Permit Application, imposing the conditions outlined by the Director are imperative to protecting their residences and the shoreline. Accordingly, we will not provide all of the substantive grounds for denying the Permit Application nor will we detail the negative impacts the trail will have on each of the Property Owners – even though for some of them it is quite substantial. What we will do, however, is share with you some illustrative examples of the impact the proposed "improvement" will have on individual Property Owners as well as how this project is inconsistent with decades of prior use (including being inconsistent with prior County and City action).

**1. Conditions 2 and 3 must be imposed because the purported "Corridor Parcel" literally runs through improvements that were permitted and properly installed by the Property Owners.**

While the County is, at the present time, seeking to use "only" 20 feet of its purported 100 feet of width of the "Corridor Parcel,"[3] the City should share with its citizens the grave concern that granting the Permit Application could be used by the County to assert ownership over the entire Corridor Parcel. A review of the Corridor Parcel shows that it runs through the properties and improvements of a number of Property Owners. Many of these residences and improvements have been in place for years, first constructed when the Railroad was operating and the County had no interest in the land. For example, the County poured the concrete steps and erected the very fences that it now says the Property Owners cannot have going forward. Most of those residences are still in the exact footprint built out with County approval, and those that have expanded upon original footings have done so with the proper County or City approval, depending on the timing.[4] The initial subdivision of the land that many of the

[3] The County uses the term "Corridor Parcel" to define both the width of the trail along the abandoned railroad bed but also 50 feet out from the midway point each way, for a total purported width of 100 feet (the County does concede that by recorded instrument the 200 feet width of the Corridor Parcel is less than this amount on a few lots). While the Property Owners disagree that there is a Corridor Parcel running through their properties, solely for purposes of definition they will use this term.

[4] It is interesting that the County never had a problem with the owners' improvements when the Railroad was in operation (neither did the Railroad) and even approved the majority of the same without requiring permission from the Railroad because the County understood that the land was not controlled or owned by the Railroad.

Property Owners' lots sit on was accomplished in the 1940s, with the rights to the waterfront acreage included in Property Owners' legal descriptions since that time.

It is critically important that the Examiner requires the County to amend its plans, using conditions 2 and 3, to avoid the destruction of structures that are not owned/controlled by the County but are nevertheless properly installed via County/City permits.

**2. Failure to Robustly Impose Conditions 2 and 3 will destroy portions of the Property Owners' properties and improvements that the County and other municipal authorities authorized.**

While the individual owners will be submitting specific examples of how the "improvement" to the trail and the land being sought by the County as its "Corridor" will impact improvements to their properties that they have made with the authorization and blessing of the County, by way of general example, the County seeks to eliminate fencing that keeps the Property Owners' docks private and potentially eliminating the docks themselves, as well as access to shorelands that the Property Owners have properly enjoyed for years, callously calling these Property Owners trespassers in an attempt to demean and smear their ownership rights with the color of impropriety.

**3. Granting the Permit Application without imposing Condition 4 will damage the lake and critical areas bisected by the Corridor Parcel.**

Condition 4 is critical for the preservation of the shorelands near the trail. The Examiner should impose at least the conditions on the County, preventing any westward development of the trail toward the lake, if it is inclined to grant the application at all. Doing so not only protects the cherished shoreline of the lake and critical areas nearby, but potentially leaves their care in the hands of private owners, who have and will continue to take specific interest in the maintenance of these natural resources. These Property Owners have the most to lose by the deterioration of these areas, far more than any County employee who perhaps has never even been to the area and has no connection to the land, and preventing the County from construction activities that further encroach on the lake is a wise condition set forth by the Director. Additionally, if the County's plan is allowed to move forward as currently constituted, it will eliminate all security in place that keeps the general public from the shorelands. From a safety standpoint, allowing this kind of access is not only against the recommended Conditions, but will require a significant police and safety-assurance presence by the County/City that will be cost prohibitive. Essentially, the County's plan will turn this area into an unsupervised public beach.

**4. Granting the Permit Application without enforcing the Conditions will be inconsistent with prior County and City action.**

The County and City have previously taken the position that some of the Property Owners own, and are entitled to build and improve, within the Corridor Parcel.

Additionally, as outlined above, the County has, for many years, stated that it does not own the whole Corridor and has cut deals with Property Owners along the trail that demonstrate the fact that the County does not need a full 200-foot wide Corridor to operate a trail. The County's previous statements about

ownership are bolstered by the fact that the Property Owners are taxed as having waterfront access and are taxed on the docks and shorelands that the County now claims does not belong to the Property Owners.

These properties have docks that have been permitted, maintained and in use for nearly fifty years. The County has helped the Property Owners make improvements to access the trail and their waterfront properties; thus, encouraging further investment and their private use and enjoyment of their entire properties.

**5. The County must be made to comply, if it can, with all the Conditions recommended by the Director before construction of the trail "improvements" should be allowed to move forward.**

The City is not recommending that the County be given carte-blanche to begin construction even if the Examiner approves the Permit Application. It has set forth requirements that the County must adhere to and comply with, if it can, prior to the issuance of any permit and the beginning of construction. Many of the conditions, including Conditions 2, 3, 4, 8 and 9, seek to have the County mitigate the damage it will do to the properties across which it seeks to "improve" the trail—not just the Property Owners represented by this office. These areas include critical areas regulated by Sammamish City Code and other regulatory schemes, all of which will be impacted by the "improvements" to the trail. For example, the County seeks to significantly change the width and nature of the trail, proposing to widen and pave the same, which will drastically increase the volume of water run off in the area. Given the topography, the County, through conditions imposed by the Examiner, must demonstrate and put into practice, its plans for dealing with this storm water in a way that will not negatively impact critical areas, the lake itself, and the private properties being bisected by what amounts to this new road being installed.

Thank you for your time in reading the Property Owners' response in opposition. Both the Property Owners and I are available to answer any questions the City staff has regarding this Response.

Thank you for your service to the great city of Sammamish!

Sincerely,
ROMERO PARK P.S.

*/s/H. Troy Romero*

H. Troy Romero

cc: Clients