

**From:** [Paul Dempsey](#)  
**To:** [Kelly Bacon \(CD\)](#)  
**Cc:** [John Hein](#); [Marc Kirkpatrick](#); [Jerry Martens](#); [Larry Martin](#); [Rhondda Dietrich](#); [Shawna Holden](#)  
**Subject:** Hein Preliminary Short Plat SP-20-0004) / Applicant"s responses to agency comments  
**Date:** Friday, September 18, 2020 4:03:22 PM  
**Attachments:** [Ltr Kittitas County .pdf](#)

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Kelly,

On behalf of Applicant, please see attached. The hardcopy original of this letter is in the mail to your office today.

I'm sorry we didn't have a chance to confer again regarding the conservation easement issue. But I trust we can do so as early as next week. Following that discussion, I expect Applicant will supplement these responses to provide our final positions concerning the use of conservation easements in connection with various Adequate Water Supply requirements referenced by County Health in its recent comment letter.

Thanks again for the opportunity to participate in this process. And we look forward to continuing to work with you toward Short Plat approval...

Best,

Paul Dempsey



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Halverson Northwest Law Group P.C.

September 18, 2020

VIA EMAIL <Kelly.bacon.cd@co.kittitas.wa.us>  
AND REGULAR U.S. MAIL

**Ms. Kelly Bacon, Planner I**  
Kittitas County Community Development Services  
411 N. Ruby Street, #4  
Ellensburg, WA 98926

Re: *Hein Preliminary Short Plat (SP-20-0004)*  
*Applicant's Responses to Short Plat Application Comments*

Dear Ms. Bacon:

This firm represents applicant Hein & Hein Enterprises, LLC ("Hein" or "Applicant") under the above-noted Short Plat Application now pending with Kittitas County (the "Application"). Thank you for your letter dated August 21, 2020, and referenced documents concerning Application comments recently received from the Washington State Department of Fish and Wildlife ("WDFW") and from the Kittitas County Public Health Department ("County Health"). Applicant's responses to those comments are as follows:

### **WDFW Comments**

WDFW, through Mr. Scott Downes, issued a comment letter dated August 3, 2020, which took issue with Applicant's hydrogeologic site analysis prepared by Sewall Wetland Consulting, Inc. (the "Sewall Report"), specifically, the stream typing/classification for a north-south running dry stream bed that roughly parallels a portion of the western boundary of the proposed Short Plat. As confirmed in the Sewall Report, this feature is dry nearly the entire year, with the exception of a very short period of time in early spring, when snowmelt runoff is present. Accordingly, Applicant asserts this feature is correctly classified as a Type 4 water source under KCC 17A.02.300 and subject to only minimal buffer requirements (10' – 20') under KCC 17A.07.010. WDFW nevertheless takes the position that this feature is a "Type F" stream under WAC 222-16-030, associated with moderate to high fish habitat characteristics. Under the County Code, this would be equivalent to either a Type 2 or Type 3 stream and subject to buffer requirements as much as 100' from the Ordinary High-Water Mark ("OHWM"). KCC 17A.07.010.

While the parties obviously have different views concerning the status and habitat potential of the dry stream bed in question, that disagreement need not delay the Short Plat approval process in this case. Applicant reserves all rights to challenge WDFW's

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Alan D. Campbell++  
J. Jay Carroll  
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Carter L. Fjeld+  
Frederick N. Halverson~  
Lawrence E. Martin\*  
Terry C. Schmalz+  
Linda A. Sellers  
Michael F. Shinn  
Stephen R. Winfree+

\*Also OR Bar Member  
\*\*Also State Bar of CA Member  
+Of Counsel  
~Honorary/Retired  
++Retired

stream typing decision in another forum in the future. In the meantime, Applicant and WDFW, through Mr. Downes, have informally agreed that a setback of 25' from the OHWM will be sufficient for Applicant's development purposes, which, in addition to Short Plat requirements, include a planned remodeling of his existing home, adjacent to the stream bed and within proposed Lot 1 of the Short Plat. See attached Exhibit "A," an email exchange between Messrs. Hein and Downes, which confirms WDFW's consent to 25' setbacks, provided that: (1) existing vegetation in the vicinity of the stream bed are maintained; and (2) Applicant applies for and receives from Kittitas County any required variance from applicable setback requirements in connection with his anticipated building application.

KITT 17A.04.045 (Building setback lines from wetland buffers) provides in relevant part, "Minor intrusions into the area of the building setback may be allowed if the director determines that such intrusions will not negatively impact the wetland. The setbacks shall be shown on all site plans submitted with the application." In connection therewith, Applicant will seek any required variance or permission in connection with a future-filed construction permit application. For purposes of the pending Application, Applicant asks that 25' buffers from the OHWM be noted on the face of the Short Plat as a permanent restriction on construction and all non-exempt activities in the vicinity of the stream bed.<sup>1</sup>

A second issue raised by WDFW in this case does not have immediate implications for Short Plat approval. WDFW notes that it has not "field verified" the Sewall Report finding that two unclassified streams depicted in Department of Natural Resources ("DNR") mapping and said to run in the wooded, upland portion of proposed Lot 4 do not, in fact, exist. Accordingly, WDFW concludes that future construction within portions of Lot 4 *might* require specialized DNR Forest Practice permitting authority. In Applicant's view, future site observation will likely corroborate the Sewall Report. But, in any case, Applicant understands and agrees that future construction (if any) within Lot 4 must be consistent with all applicable permitting and regulatory requirements.

### **County Health Comments**

County Health, through Jesse Cox and Holly Erdman, submitted a comment letter dated August 11, 2020. Applicant agrees with most of County Health's Findings as to water and septic-related requirements in connection with Preliminary and Final Plat approvals, respectively. Specifically, we understand and agree that on-site septic systems must comply with all applicable State and County requirements (Onsite Sewage, Finding 1). Likewise we agree that metering will be required for all new uses of domestic water for residential well connections, as well as with the County Health's caution that Short Plat approval does not ensure that any lawful use of "exempt" wells within the Short Plat may

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<sup>1</sup> A related issue – about which there is no dispute with WDFW – is the actual routing of the stream bed across lands within the proposed Short Plat. As we understand, WDFW agrees with findings under the Sewall Report that the stream bed runs parallel to and near the western boundary of the Short Plat, before meandering toward the southeast at a point south of the Short Plat. Stream bed routing as depicted in DNR "FPARS" online mapping is incorrect. The stream bed location as depicted on the originally submitted Application survey is correct and should be carried over to final Plat determination.



be subject to judicial or administrative pro-rationing or curtailment of use under Washington water law's prior appropriation principle (Water, Findings 2 and 3; Final Plat Notes, C-1 and C-2). Applicant does, however, need to respond to several items under County Health's Finding 1, concerning Adequate Water Supply-related requirements ("AWS") under Chapter 13.35 KCC.

As a threshold matter, Applicant is considering proposing that conservation easements be imposed against proposed Lots 2 and 4 of the Short Plat, which would effectively suspend all AWS requirements for those Lots, which otherwise must be satisfied as a condition of Short Plat approval. The availability of and procedures for imposing conservation easement restrictions are addressed at KCC 16.32.050 and 16.08.061. Applicant *may*, prior to Preliminary Plat approval, propose terms for conservation easements to prohibit use of domestic water on the subject Lots – as well as for future termination of such restrictions. In connection therewith, Applicant is researching KCC 16.08.061 – particularly with respect to the process for later termination of conservation easements, if desired by the landowner/developer.<sup>2</sup> We ask that you allow us additional time to supplement these responses, when we have a clearer understanding of the practical considerations of imposing conservation easements under the Application.

With the above caveats – and in the event conservation easements are *not* recorded against Lots 2 and 4 of the Short Plat – Applicant intends to satisfy all applicable AWS requirements for the entire Short Plat. Domestic water is already provided, on a permit-exempt basis, to existing structures on proposed Lots 1 and 3, via existing groundwater wells located on said Lots. If domestic deliveries are to be made to all Lots, Applicant is prepared to either (1) record Shared Well Agreements and Covenants against Lots 1 and 2 and against Lots 3 and 4; or (2) drill new wells on Lots 2 and 4 to individually serve those respective Lots, as necessary to comply with other applicable AWS requirements concerning physical availability of potable water supply. Two issues in connection therewith merit additional consideration.

One of the two exempt well sources within the Short Plat is a 1970's era well that serves the existing home on proposed Lot 1. For unknown reasons, no well driller's report or log for that well exists. A drawdown test likely was conducted at the time of well construction, but we cannot be certain. KCC 13.03.070 requires that a four-hour draw down test be conducted on potable water wells to ensure operational capability and satisfactory water quality. In the absence of a known well log or draw down report for the Lot 1 well, County Health now requires that a new test be conducted in connection with approval of two-party/shared well arrangements. This poses an onerous and expensive challenge in this case. The subject well is located within an existing structure and likely can be accessed for testing purposes only by removal of the entire roof. Nevertheless, and absent a future agreement with County Health on a variance or modification of draw down test

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<sup>2</sup> During our recent phone conversations, you offered to provide informal guidance on that issue, following consultation with your CDS colleagues. Because there is apparently scant authority concerning the practical, land use implications for terminating such easements in Kittitas County, we hope and expect your office can provide such guidance.

requirements, Applicant is prepared to undertake the necessary structural changes to facilitate a draw down test as described in Finding 1.

The other AWS consideration in this case is County Health's comment that Short Plat shared wells must be located a minimum of 50' from Lot boundary lines. We understand this is in response to guidance recently provided by County Counsel. We respectfully suggest that well location standards under KCC13.20.040 do not require 50' setbacks for shared wells, or for larger systems including Group B systems.

KCC 13.20.040 provides in relevant part:

A well for a Shared or Group B Water System shall also be located:  
In accordance with Ground Water Source Approval and Protection Rules for Group B Water Systems (Chapter 246-291 WAC), including but not limited to a minimum one-hundred-foot sanitary control area and a duly recorded restrictive covenant;

...

A well for a Shared or Group B Water System shall have a recorded easement granting access to the well, pump house and pipeline to the future owners of the water system.

A well for an individual water system shall also be located:

... a minimum of fifty feet from all roads and property lines. The meaning of road for this Chapter shall include but is not limited to, any county, state or federal right of ways and any private road. Driveways are not considered roads under this Chapter.

Setbacks not meeting Kittitas County Code may be allowed at the discretion of the health officer. (Emphases added.)

Separately, KCC 13.03.110 confirms that an "individual water system" serves only a single dwelling unit.

In our view, the above-quoted well location standards establish two separate – but not cumulative – requirements: one for individual wells and another for shared or two-party wells. If and to the extent Applicant determines to use the well on Lot 3 as a shared/two-party well with Lot 4, the above-quoted 100' sanitary control zone requirement for shared wells will apply. And because the subject well is located near the proposed Lot boundary line, portions of both Lots will be subject to the required control zone covenants. That said, KCC 13.20.040 separately confirms that the 50' setback requirement cited by County Health applies exclusively to individual water systems, i.e., to wells that serve only a single domestic connection.

In this case, Applicant's engineering consultant, Encompass, has separately confirmed with Ms. Erdman that County Health will not insist upon a 50' setback – presumably in

recognition of the fact that Applicant was unaware of County Counsel's interpretation of KCC 13.20.040 when the original Application survey was submitted.


### **Conclusion and Next Steps**

On behalf of Hein & Hein Enterprises, LLC, thank you, again, for the opportunity to respond to agency comments on the pending Application. Concerning the above-discussed AWS-related requirements under County Health's Finding 1, Applicant expects to reach a decision concerning conservation easements for the Short Plat very soon. At that point, we will touch base again with Community Development Services to confirm our intended approach to those items.

In the meantime, if you have any questions regarding Applicant's responses under this letter, please feel free to contact me or my law partner, Larry Martin.

Very truly yours,

**HALVERSON | NORTHWEST LAW GROUP P.C.**



Paul C. Dempsey

cc: (via email)

Mr. John Hein, Hein & Hein Enterprises, LLC  
Mr. Marc Kirkpatrick, Encompass Engineering & Surveying  
Mr. Jerry Martens, Martens Enterprises, LLC  
Lawrence E. Martin, Esq.

**Exhibit "A"**

**From:** Downes, Scott G (DFW) <[Scott.Downes@dfw.wa.gov](mailto:Scott.Downes@dfw.wa.gov)>  
**Sent:** Tuesday, September 8, 2020 12:04 PM  
**To:** John Hein <[johnhein@shoemakermfg.com](mailto:johnhein@shoemakermfg.com)>  
**Subject:** RE: Hein Property - Stream Setback

John,

Good speaking with you as well and thank you for the pictures showing current conditions. As mentioned, you would need to deal with the county regarding variance application for exceptions to stream setbacks. As long as you are not removing any of the current stream shrubs or trees (i.e. riparian vegetation wouldn't change) you wouldn't need an HPA for your work from WDFW and we wouldn't object to a variance submitted to the county.

Feel free to share this email with the county.

Thanks for checking with us,

Scott

***Scott Downes***

Fish & Wildlife Habitat Biologist  
Washington Department of Fish and Wildlife  
Region 3 Habitat Program  
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Yakima, WA 98902-5720  
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**From:** John Hein <[johnhein@shoemakermfg.com](mailto:johnhein@shoemakermfg.com)>  
**Sent:** Friday, September 4, 2020 11:36 AM  
**To:** Downes, Scott G (DFW) <[Scott.Downes@dfw.wa.gov](mailto:Scott.Downes@dfw.wa.gov)>  
**Subject:** Hein Property - Stream Setback

Scott –

Great speaking with you yesterday. I was able to get some pictures together last night showing the ditch, stream and trees from the north and the south. To recap my ask would be to extent the approved Ordinary high water mark setback of 25' that was granted back in 2016 on the stream next to my shop farther south (300') allowing me to construct an addition on my house. No trees, brush or materials will be touched within the current stream or within the 25' setback.

Let me know if you would like more information. Hope you have a great

Labor Day weekend. Thanks!



**John Hein** | President  
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