Kitsap County Department of Community Development

Notice of Hearing Examiner Decision

1/16/2025

To: Interested Parties and Parties of Record

RE:	Project Name:	Administrative Appeal of Arborwood Revised Critical Area Buffer Reduction (CABR) #22-02629
	Applicant (Appellant):	Bryan Telegin – Telegin Law 175 Parfitt Way SW Suite N270 Bainbridge Island, WA 98110 *(Authorized Representative for Joe Lubischer and April Ryan)*
	Application:	Administrative Appeal
	Permit Number:	24-02653

The Kitsap County Hearing Examiner has **DENIED** the land use application for **Permit 24-02653: Administrative Appeal of Arborwood Revised Critical Area Buffer Reduction (CABR) #22-02629**, **subject to the conditions outlined in this Notice and included Decision**.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS TIMELY APPEALED, AS PROVIDED UNDER WASHINGTON LAW.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at: https://www.kitsap.gov/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review by contacting the Department of Community Development; if you wish to view the case file or have other questions, please contact help@kitsap1.com or (360) 337-5777.

CC:

Applicant (Subject Property Owner of Record): Taylor Morrison Northwest LLC, PLymberis@taylormorrison.com
Applicant Authorized Agent(s): Pete Lymberis, plymberis@taylormorrison.com; Jeffrey Thomas, jethomas@taylormorrison.com; Alyssa McCabe, Amccabe@taylormorrison.com;

Applicant's Authorized Representative: Charlene Koski (Attorney - Van Ness Feldman), cbk@vnf.com; Liberty Quihuis (Attorney - Van Ness Feldman), Lquihuis@vnf.com; Ray Liaw (Attorney - Van Ness Feldman), rliaw@vnf.com; Ann Gabu (Legal Assistant - Van Ness Feldman), agabu@vnf.com
Appellant: Joe Lubischer, jslubischer@gmail.com; April Ryan, aprilryan@mac.com
Appellant's Authorized Representative: Bryan Telegin (Attorney, Telegin Law), bryan@teleginlaw.com
County/DCD Staff: Scott Diener, sdiener@kitsap.gov; Steve Heacock, sheacock@kitsap.gov
County/DCD Authorized Representative: Lisa Nickel, lnickel@kitsap.gov
Interested Parties:
Interested Parties from previous #23-03375 Arborwood Appeal of CABR (22-02629)

THE HEARING EXAMINER OF KITSAP COUNTY

In the Matter of the Appeal of the Critical Area Buffer Reduction Notice of Administrative Decision, No. 22-02629, Appeal No. 24-02653	Findings of Fact, Conclusions of Law and Final Decision

Overview

Kitsap County approval of Critical Area Buffer Reduction (CABR) No. 22-02629 is upheld with a few added conditions identified at the end of this decision.

As conditioned, the permanent fill proposed within wetland buffers is found to be consistent with the County's wetland regulations because wetland buffer functions will be fully restored. Mitigation and full assessment for hydrology impacts caused by Spine Road is deferred to stormwater review.

On the permanent fill issue, substantial evidence established that the proposed fill can be engineered to mimic the infiltration rates of previously existing buffer soils. Substantial evidence further established that buffer functions impacted by the fill can be fully restored by fairly standard mitigation measures used by wetland biologists to mitigate such impacts.

On the Spine Road issue, the Appellants presented a convincing case that the proposed buffer reduction would result in adverse hydrology impacts to a Class II wetland, Wetland P2. The proposed buffer reduction to the 200 foot buffer of Wetland P2 from 200 enables construction of Spine Road within 117 feet of Wetland P2. Spine Road is proposed to extend across the drainage basin that serves Wetland P2. The Appellants assert that Spine Road will act as a dam to surface and interflow waters that feed Wetland P2, thereby adversely affecting the wetland. The Applicant asserts that Wetland P2 is primarily fed by deep groundwater that would not be affected by Spine Road. The Applicant also presented a hypothetical road design, Ex. B14, that it asserts would minimize disruption to the movement of surface and interflow waters.

Evaluation of Spine Road impacts was complicated by the fact that stormwater review criteria overlap those of CABR review. Stormwater review will be conducted as part of a future site plan application review. One of the standards for stormwater approval requires essentially that Spine Road not impair the hydrology of Wetland P2. CABR standards similarly require that buffer reductions not adversely affect wetlands or impact their functions and values. The Applicant has declined to present a detailed design establishing conformance to this criterion, asserting that the details will be resolved during stormwater review. The Appellants assert that the proposed stormwater design is too conceptual to ascertain whether impacts will be fully mitigated.

Ultimately the Kitsap County Code (KCC) doesn't require the Applicant to provide detailed design plans to the level demanded by the Appellants. However, the Applicant must also establish by substantial evidence that its proposed design will not adversely affect wetland hydrology. Substantial evidence in this appeal establishes that Spine Road at the proposed location can be designed in a manner that doesn't adversely affect wetland hydrology. For this reason, the road is found to comply with buffer reduction criteria because stormwater review will ensure that the final design doesn't impair wetland hydrology. The stormwater review is subject to public notice and hearing examiner appeal, so any persons who disagree with the final design will have an opportunity to contest it. However, since the Applicant has elected to not commit itself to any detailed design for CABR review, the conditions of approval provide that the Applicant takes the risk of having the general design approved by CABR review subject to change as necessary in stormwater review to ensure no adverse impact to wetland hydrology.

The legal issues of the CABR review are fairly complicated and have lead to considerable confusion over the scope of review. This appeal proceeding was conducted as required by a remand order in a prior appeal to the CABR request. The remand order was issued by another hearing examiner, Examiner Marshall. Due to the complexities of the case, Examiner Marshall's remand order was subject to a clarification request. A significant part of the clarification request involved the scope of Examiner Marshall's remand order.

Despite Examiner Marshall's nine page clarification, the parties to this remand proceeding presented motions with extensive briefing further contesting the scope of Examiner Marshall's remand. Those motions resulted in a September 24, 2024 summary judgment ruling that dismissed or limited a few of the Appellants' appeal issues as beyond the scope of review.

One of the September 24, 2024 rulings limited the scope of remand more than Examiner Marshall likely intended. Specifically, the September 24 ruling found that Examiner Marshall had concluded that permanent fill in wetland buffers was authorized so long as its impacts were temporary. It appears this conclusion was in error and that instead Examiner Marshall left that legal conclusion open for consideration in the remand. To this end, since the parties did not have the opportunity to argue this issue they are authorized to ask for reconsideration on the issue. Requests for presenting new relevant evidence will also be considered after hearing from all the parties.

The accuracy of Examiner Marshall's remand order is also debatable. She limited review of fill impacts to wetland buffers while some fill is also proposed in stream buffers. The rational for this limitation is not apparent from the record. She also limited road construction review to buffer averaging as opposed to including conformance to KCC 19.200.225D. KCC 19.200.225D provides the Applicant an alternative means of authorizing Spine Road at the proposed location without having to employ buffer averaging. A reviewing court could very well find that the scope of remand should have included both of these issues, i.e. fill impacts to stream buffers and conformance to KCC 19.200.225D. However, the parties have arguably waived their right to be heard on these issues by failing to ask Examiner Marshall to reconsider her remand order on those topics. Despite Examiner Marshall's limitations on remand, it appears that the record still contains ample evidence for a reviewing court to evaluate the stream buffer and KCC 19.200.225D issues. If the parties still find the need to be heard on these issues that will be considered in reconsideration requests as well.

Exhibits

The following exhibits from the exhibit lists prepared by the hearing examiner clerk were admitted during the appeal hearing:

Exhibits F1-F52 of the Foundational Exhibits.
Exhibits C1-C6 of the County Exhibits.
Exhibit B1-B18 of the Applicant Exhibits.
Exhibit A1-A92 of the Appellant Exhibits

Testimony

Computer generated informal transcripts of hearing testimony were generated by Rev.com. The transcripts are included in the record as exhibits solely to facilitate County record keeping but shouldn't be construed as evidence admitted into the record. The transcripts provide a roughly approximate transcription of hearing testimony provided. They are not 100% accurate and are not intended to replace the formal transcripts required for judicial review. The transcripts for this hearing are cited by word file[1] page number as outlined below:

F53: Multi-day 672 transcript reference as "Tr"
F54: Cooke Rebuttal November 15, 2024 3:15 pm transcript referenced as "CR Tr"
F55: Cooke Cross November 18, 2024 10:45 am transcript referenced as "CC Tr"
F56: Heacock Testimony Transcript referenced as "H Tr"

Findings of Fact

1. Applicant, Appellant, Decision Under Appeal. The Applicant is Taylor Morrison Northwest, LLC. The Appellants are Joseph Lubischer and April Ryan. The decision under appeal is a Critical Area Buffer Reduction (CABR II) dated May 16, 2024 (Ex. F1, CABR I).

2. Plat and Development Agreement. The Arborwood Preliminary Plat is a 765-unit residential subdivision approved by hearing examiner decision dated November 5, 2009. The project is governed by a Development Agreement dated February 8, 2010 that specifies that it is vested to the version of the Kitsap County Code in effect on March 26, 2008.

3. CABR I. On July 3, 2023 the Kitsap County Department of Community Development issued an administrative Critical Area Buffer Reduction (CABR I) decision approving the use of buffer averaging for wetland buffers throughout Phases 4, 5, and 6-North of the Arborwood project. Those phases are now owned by the Applicant Taylor

[1] The Appellants created the multi-day transcript and appended it to their closing brief. However, the numbering of the transcript employed by the Appellants had some sequencing problems so the word file (or the same pdf file numbers) page numbers are used instead in this decision. Some technical problems have been encountered in the word file numbers as well so the page numbers may not always be accurate, but will be close to where the pertinent testimony can be found in the transcripts.

Morrison Northwest, LLC. Among other things, the County's July 3, 2023 decision authorized a reduction of the buffer associated with a wetland within the Arborwood project site known as "Wetland P2." This reduction, which the County approved on the basis of its buffer averaging rules, was found necessary to accommodate a proposed road commonly known as "Spine Road A," which in turn connects Phases 5 and 6 of the project. Part of the approved buffer reduction reduced the 200-foot buffer required for Wetland P2 down to 85 feet, a 58% reduction.

4. CABR I Appeal. Appellants appealed the July 3, 2023 CABR decision. One of their claims was that the 115-buffer reduction to Wetland P2 violated KCC 19.200.220.C, which limits buffer reductions resulting from buffer averaging to a maximum of 50%. In response the Applicant agreed to relocate the buffer so that the buffer would only be reduced by 100 feet, i.e. 50%. However, the relocation still involved the placement of permanent fill within the remaining 100-foot buffer to stabilize the road. The Appellants' appeal resulted in a remand decision from Examiner Marshall dated February 5, 2024 (Marshall Decision), Ex. F12.

5. Relocation of Spine Road A. As a result of the CABR I decision requiring an expansion of the Wetland P2 buffer from 85 feet to 100 feet, Spine Road A was moved a few feet to the east for a total distance of 117 feet from Wetland P2. See Ex. F18, p. 5. According to the testimony of Mr. Sharnbroich, Ex. F17 identifies the relocated portions of Spine Road. Tr. 162. Ex. F17 in turn depicts the portion of Spine Road that is subject to full critical areas review under Section n of the Examiner Marshall's CABR I decision summary. The relocated portions of Spine Road as depicted in Ex. F17 are referenced in this decision as the "non-fixed" or "relocated" portions of Spine Road and the remaining portions are the "fixed" portions of the road.

6. CABR II – Decision Under Appeal. Pursuant to the CABR I remand, Kitsap County issued a second May 22, 2024 Critical Areas Buffer Reduction decision (CABR II). Ex. F1, attachment to appeal. The Appellants filed an appeal of CABR II on June 5, 2024. Ex. F1. That appeal is the subject of this review.

7. Hearing. A multi-day hearing was held on the CABR II appeal on the Zoom application on November 5-6, 2024, November 8, 2024, November 15, 2024 and November 18-19, 2024. The record was left open through December 23, 2024 for written closing briefs.

8. Road Fill in Buffers. The Applicant proposes road fill in the buffers of several wetlands, including the following as identified in Ex. F18, p. 12-13:

> *Wetland P2*: 0.67 acres of wetland fill is proposed for the eastern edge of the buffer to a depth of about 4 feet thick.

Wetland L2: 0.30 acres of fill is proposed for this buffer with a depth of up to 20 feet.

Wetland L3: 0.20 acres of clearing and fill proposed with a depth of up to 8 feet.

9. Expert Witnesses. The appeal hearing was primarily composed of testimony from numerous highly qualified experts sharing their analysis and opinions. The experts referenced in the findings and conclusions of this decision have the following backgrounds:

Steve Heacock, a County witness, is a Senior Environmental Planner with Kitsap County Department of Community Development. Mr. Heacock holds a bachelor's degree in Geology from Central Washington University, where he also studied biology and environmental studies. Mr. Heacock began working with conservation districts in 1991, and has worked for Kitsap County since 2007. His professional experience includes working with natural resources, protection enhancements, farm management plans, wetland and stream restoration projects

Carolyn Decker, an Applicant witness, is the President and Senior Geotechnical Engineer at Terra Associates. Ms. Decker holds a bachelor's degree in Civil Engineering from Gonzaga University and has been a registered Professional Engineer in Washington for 14 years. Ms. Decker has testified as an expert witness in geotechnical engineering, geology and hydrogeology on multiple occasions. Ms. Decker began working on the Arborwood project in 2021.

Joanne Bartlett, an Applicant witness, is the Senior Wetland Biologist with Ecological Land Services and Branch Manager of the Ecological Land Services Bremerton Branch. Ms. Bartlett holds a bachelor's degree in Biology from Central Washington University and is a Senior Professional Wetland Scientist (PWS) with the Society of Wetland Scientists. Ms. Bartlett has worked as a wetland biologist for more than 30 years, previously working for more than 20 years as a wetland biologist at Wiltermood Associates.

Dr. Sarah Cooke, an Appellant witness, holds a master's degree in Botanical Taxonomy and a Ph.D. in Forestry Soils and Botany from the University of Washington, as well as bachelor's degrees in Geology and Biology and a master's degree in geobotany from McGill University. Dr. Cooke has been working as a wetlands consultant in the Pacific Northwest for more than 40 years, and specializes

in habitat creation, restoration, and enhancement projects. Dr. Cooke is a fellow of the International Society of Wetland Scientists, and was on the development board for the Society of Wetland Scientists' wetland certification program. Dr. Cooke has also taught wetland delineation and wetland mitigation for the U.S. Army Corps of Engineers, the Washington State Department of Natural Resources, Portland State University, the Evergreen State College, and the University of Washington, and currently teaches wetland mitigation and design under the Washington State Department of Ecology's Coastal Training Program.

Joseph Lubischer is one of the Appellants and a retired water resources engineer. Mr. Lubischer holds a bachelor's degree and master's degree in Mechanical Engineering from Massachusetts Institute of Technology, and was a registered Professional Engineer in Washington and Oregon during his career. His professional experience includes working with hydrogeologic studies, geologic interpretations, rotations, perched groundwater systems, and soil permeability.

Dr. Robert Roseen, an Appellant witness, is the Owner of Waterstone Engineering. Dr. Roseen holds a Ph.D. in Water Resource Engineering from the University of New Hampshire and a master's degree in Environmental Science and Engineering from Colorado School of the Mines. Dr. Roseen is a registered Professional Engineer and was named a Diplomate of Water Resources Engineering by the American Academy of Water Resources Engineering. Dr. Roseen directed the Stormwater Center at the University of New Hampshire for 8 years and served as an expert reviewer on the Washington State Department of Ecology's stormwater work.

Christopher Wright, an Applicant witness, is the President and Soil and Wetlands Scientist at Raedeke Associates. Mr. Wright holds a bachelor's degree in Agriculture from the University of Arizona. Mr. Wright has more than 30 years of experience in wetland projects, has completed wetland trainings through the Washington State Department of Ecology, and is a Certified Wetland Delineator with the U.S. Army Corps of Engineers.

Michael Moody is Principal, Senior Project Engineer, Project Manager, and Director of Engineering at Core Design and has been working on the stormwater design of the Arborwood project since 2021. Mr. Moody holds bachelor's degrees in Applied Science and Mathematics from George Fox University and in Civil and Environmental Engineering from the University of Washington. Mr. Moody has more than 20 years of experience in land development and is a registered Professional Engineer in Washington, as well as a Certified Erosion and Sedimentation Control

Lead (CESCL). Mr. Moody has served as an expert witness on civil engineering and stormwater.

10. Buffer Functions Restored. As conditioned, wetland buffer functions adversely affected by proposed road fill within the buffers will be fully restored.

In summary, the primary issue with permanent placement of wetland fill is that it maintain the permeability of the buffer soils it replaces. There was conflicting testimony about whether the proposed fill would achieve this purpose. The Applicant's experts were the most credible on this issue. Further, hydrological function can be subject to monitoring that will ensure it is maintained. The other buffer functions can be maintained by the imposition of additional mitigation measures that all the wetland experts of this proceeding have agreed are effective in maintaining buffer function.

In assessing impacts to buffer functions a logical starting point is identifying what comprises those functions. At hearing both Dr. Cooke and Ms. Bartlett agreed[2] that a 2013 wetlands study from Hruby served as a reputable source for defining wetland buffer functions as follows:

1. Width
2. Slope
3. Soil infiltration
4. Surface roughness
5. Slope Length
6. Adjacent land uses

The soil infiltration function as identified above implicates the issue of maintaining wetland hydrology, which as previously identified is the primary issue of concern addressed in this remand hearing. The Applicant has proposed to maintain soil infiltration levels by assuring that the fill has a combination of different grain sizes designed to have the same infiltration rate as the buffer soils it replaces. See Ex. F16. The specifications were designed for all of the proposed fill buffers in wetland and stream buffers[3]. The Applicant's geotechnical engineer, Carolyn Decker, took soil samples in the proposed fill area to determine their permeability. From this data Ms. Decker produced a table that

[2] Ms. Bartlett referenced the Hruby list of functions in her supplemental wetlands report, Ex. F18 and Dr. Cooke relied heavily upon the list to discuss fill impacts in her hearing testimony.

[3] The fill specification recommendations were prepared March 12, 2024 (Ex. F16) and April 3, 2024 (Ex. F15). The difference between the two documents is the scope. Ex. F16 was prepared specifically for the Wetland P2 buffers. These soils were compared to other soils found throughout the Arborwood site. They determined the fill specifications for this area could be applied to any wetland buffer on the site. With this information, they revised the fill specification to be applied throughout the Arborwood development. Tr. 323.

identified the combination of grain sizes necessary to mimic infiltration rates of existing soils. Ex. F16, p. 3.

The grain sizes proposed by Ms. Decker ranged from large cobble sizes that enabled the free passage of water to silty fines. Ms. Decker's report found that the fill could be composed of as much as 40% of the finest silt and still mimic existing infiltration rates. Ms. Decker revised her recommendation after consultation with the Applicant's hydrogeologist, Mr. Koger, to place the upper limit on the finest silt to 15%. Ms. Decker noted that her estimation of permeability was based in part upon the "Massman Equation." The Massman Equation is used in the 2005 Department of Ecology Stormwater Manual used for Western Washington.

To complicate matters, the fill must be compacted to serve its function as providing lateral support to Spine Road. Both Mr. Lubischer, Tr. 74, and Dr. Cooke disagreed with Ms. Decker's soil composition. They testified that it's not possible to have a pervious surface with compacted fill that includes silt. Mr. Lubischer noted that the compaction pushes the silt into the voids of the fill causing an impermeable surface.

Ms. Decker's assessment of soil permeability had a couple major shortcomings. First, Ms. Decker acknowledged that compaction affects permeability and that the Massman Equation doesn't take that into account. Tr. 344. She testified that she uses her knowledge from field experience to factor that into her permeability analysis. Second, Ms. Decker further acknowledged that she didn't do a lab analysis of the buffer soils to test their permeability. She acknowledged that such tests are available but that she didn't do them because it would involve removing 15 gallons of soil from the buffers. Tr. 1:31, 348. Ms. Decker did not identify any other reason for not doing the tests, such as cost or lack of accuracy. 15 gallons of soil is negligible given the amount of buffer soils that will be disturbed for the proposed buffer fill. Ms. Decker's reasons for not doing the lab testing are not found availing.

Overall, Ms. Decker's conclusions are found to be the most compelling because of all the experts testifying on the issue her expertise is the most directly applicable to soil permeability. Ms. Decker's work has involved numerous assessments of structural fills and grading. Although as an Applicant witness she may have some bias to be overconfident on the accuracy of her methods, there is no great need to do so. Ms. Decker testified that if her conclusions on soil permeability are not accurate, there's always an engineering solution to make it work. Tr. 356. In this regard Ms. Decker's testimony is consistent with the acknowledgement of Dr. Cooke at Tr. 151 that road fills can be successfully mitigated to mimic pre-existing buffer functions.

Although Ms. Decker's conclusions are the most compelling, they are also based in part upon professional judgment as opposed to precise calculations or lab tests. Ms. Decker

gave no compelling reason why lab tests could not be conducted. She also acknowledged that permeability tests can be conducted in a short period of time. For these reasons conditions have been added to the CABR II decision requiring the lab tests for a more precise assessment of permeability.

The other buffer functions potentially affected by the proposed fill are more easily addressed. Dr. Cooke noted that many of these functions would be lost for decades or even longer with placement of the fill. Tr. 141-151. Included in her concerns were (1) loss of surface roughness and increase in slope results in increased water velocity, (2) loss of buffer width results in loss of water quality, hydrology and habitat, (3) loss of infiltration through compaction results in loss of microbiome that involves the replacement of aerobic bacteria with anaerobic bacteria. The compaction can also kill mitigation plantings by preventing their roots from spreading after a few years.

Mr. Wright testified that all of the buffer functions identified as lost by Dr. Cooke can be replaced by buffer mitigation and monitoring. Tr. 187. Water velocity impacts resulting from increased slopes can be mitigated by placing logs perpendicular to the slope. Tr. 198. Original top soil can be retained and replaced. Tr. 199. He recommended 12-18 inches of topsoil to be reintroduced on top of the fill. Id. Microbiome can also be retained by retaining and reintroducing topsoil. Id.

Ms. Bartlett prepared the Applicant's wetland reports. She acknowledged that her reports didn't require the placement of logs across the increased slopes. Tr. 491. She also noted that her report only required retention and reintroduction of 4-6 inches of topsoil and agreed with Mr. Wright that 12-18 inches would be more ideal. Tr 492. Dr. Cooke noted that 4-6 inches is ineffective since that just washes away in heavy rain. CR 20. Ms. Bartlett also noted that scarification of the fill would mitigate against vegetation loss due to rooting problems. Tr. 492. Ms. Bartlett didn't include scarification as an express mitigation measure in her wetland reports, noting that in general "*that's what happens anyway*." Tr. 492. Dr. Cooke acknowledged that scarification "*would help tremendously*" but it should be included in mitigation specifications. CR 20.

As testified by Dr. Cooke, perhaps the greatest wetland function cited in the Hruby report is buffer width. Tr. 141. As previously noted, Dr. Cooke identified that loss in buffer width results in loss of hydrology, water quality and wildlife habitat. In the case of the proposed buffer fill, the loss of buffer width is construed as impacts caused by loss of buffer width separation between the fill and the wetland. In this regard, that reduction in width does not result in adverse hydrology impacts because as conditioned the fill will be designed to mimic the infiltration rates of preexisting soils. Since the soils of the project site will be used for the fill, there's nothing to suggest that the fill will have any adverse impact on water quality. As to wildlife habitat, there is nothing in the record to suggest that the fill could have any material impact on wildlife.

For the reasons outlined above, substantial evidence establishes that the proposed road fill is found to be fully mitigated with the added mitigation measures identified by Mr. Wright. Those recommended measures are added as conditions of approval.

12. Wetland Hydrology. Substantial evidence does not establish that wetland hydrology for Wetland P2 can be maintained exclusively by deep groundwater flows.

The Applicant asserts that the installation of Spine Road will have no material impact on Wetland P2 hydrology because its hydrology is maintained by deep groundwater. Substantial evidence establishes that Wetland P2 is at least in part fed by groundwater deep enough to be unaffected by Spine Road. However, substantial evidence does not establish that the deep groundwater is the only source of hydrology for Wetland P2.

Wetlands are supported by four types of hydrology. These include rainwater, surface flows through the grass and topsoil, interflow through the more permeable mantle layers underlying the topsoil and groundwater flows from within the deeper aquifer. Tr. 249-250, 312-313. All parties acknowledge that Spine Road is unlikely to alter either the quantity of rainfall entering the wetlands or the depth and function of the groundwater aquifer. Appellant Closing Brief, page 13:3-4. Wetlands may act as aquifer recharge areas for groundwater during the rainy season but are also at least partially fed by groundwater seasonally during dry periods. The two sources of hydrology the project may impact are the surficial flows and the interflows.

Mr. Lubischer testified that the topography of the swale as shown in Ex. A 85 establishes that Wetland P2 is served by both surficial and shallow sub-surface water flow. The direction of water can be ascertained as it is "…*perpendicular to the contour lines*." Mr. Lubischer further testified that sub-surface flows generally follow surficial flow. He concluded that the existing topographic swale indicates that interflow is also an important hydrologic contributor to Wetland P2.

Dr. Cooke testified that she had analyzed the site using a similar process to Mr. Lubischer, reviewing the existing topography and then reviewing the soils. Tr. 148. Additionally, Dr. Cooke indicated that she had reviewed the photographs in Ms. Bartlett's reports (Exhibit F 18). Based on that dataset and review, Dr. Cooke concluded that shallow ground water and surface water flowing through a topographic swale connects with *"….the shallow groundwater aquifer that supports the bulk of the water for that wetland P 2"* Tr. 144. Dr. Cooke testified that surface flow is a very important component of wetland hydrology. Tr. 544. She stated geotechnical analysis generally doesn't study these soils because they are not significant to the civil engineering components but are instead wetland impact issues. Ex. B17 depicts the conceptual flow to Wetland P2 from numerous uphill-surface and

near-surface flows. Dr. Roseen stated in the undeveloped condition, there is shallow sheet flow through the grass that disperses the impact of runoff to a low velocity and low intensity once it reaches the wetland.

Mr. Koger concluded that the primary contributor to Wetland P2 hydrology is deep groundwater. His conclusions were based upon field investigations and borings, the data of which is presented in Ex. B16. To evaluate the hydrology of Wetland P 2, Mr. Koger initially reviewed consultant reports specific to the Arborwood project, regional geologic hydrogeologic maps documents and transcripts of prior testimony from prior hearings. Mr. Koger also completed a site reconnaissance. After detailed review of the existing reports and studies and the site visit, Mr. Koger determined that additional research was necessary to understand and identify the key elements of site hydrology for Wetland P 2. Mr. Koger then observed the excavation and logging of exploration pits and borings and the installation of well points. Mr. Koger and his associates also monitored water levels in the wells and well points post-installation. The additional explorations of the site, included ten exploration pits, two exploratory boreholes completed as monitoring wells, and the installation of three hand-auger well points. The purpose of the monitoring was to measure water levels and obtain the information necessary to analyze groundwater flow. After a detailed review of the monitoring information, Mr. Koger developed his conclusions and prepared illustrative materials to help convey them. These materials included Ex. B16. Mr. Koger testified that Ex. B16 is the graphic result of the data obtained from the monitoring and mapping of the test wells and monitoring sites

Mr. Koger concluded that the data collected through these field investigations supports the conclusion that the hydrology of Wetland P 2 is maintained by a combination of flow from shallow interflow, deeper groundwater seepage zones, surface water runoff during some storm events, and direct rainfall. Specifically, the deep aquifer provides hydrology year round to Wetland P 2. In contrast, the shallow interflow water is seasonal. Surface water runoff or overland flow is less frequent than either interflow. A determining factor for Mr. Koger in regard to the infrequency of surface flow was the absence of any indication of a surface water channel in the fully vegetated swale that's leading to Wetland P 2. Mr. Koger concluded that any overland flow that might be occurring is intermittent and low energy and presumably can only be occurring during more significant storm events or there would be a permanent channel evident and there is no indication of that.

Ms. Decker agreed with Mr. Koger that the surface and colluvial interflow dry up in summer whereas the deeper groundwater flow is year-round. Tr. 331.

Dr. Cooke repeatedly noted that the test pits dug by the Applicant were done during the dryest part of the year (September 18, 2024 through October 30, 2024) and cannot accurately assess the impact of interflow in wetland hydrology. Tr. 554. Dr. Cooke stated interflow information is missing from the entire data set. Tr. 534. She stated the purpose of the test pits was to measure the deep groundwater. This testing would miss water that’s coming in from above in the colluvium layer. Tr. 537. Dr. Cooke agreed that groundwater

is a primary contributor to Wetland P2 in the dry summer months when the test pits Mr. Koger and Ms. Decker were discussing were dug. However, she argued the groundwater flow was only a part of the hydrology serving wetland P2. Tr. 547.

Mr. Lubischer disagreed with Mr. Koger's conclusions, testifying that the deeper groundwater is unlikely to contribute water to the whole of Wetland P 2. Tr. 622. Instead, Mr. Lubischer concluded that it is as likely that deeper groundwater only feeds a portion of the wetland and that the wetland itself could be recharging the groundwater. Tr. 631-632.

Mr. Lubischer qualified his conclusions as speculative due to the lack of longer-term monitoring by the Applicant and shortage of data. While Mr. Lubischer acknowledges that "*What Mr. Koger did is good work…*" he believes it is incomplete as a "*groundwater study would involve measuring or calculating all the inputs and outputs and watching them over the course of the year*." Tr. 627. Additionally, Mr. Lubischer differs with Mr. Koger's position that the absence of a defined channel in the swale leading to Wetland P 2 indicates intermittent and low energy surface and subsurface water flow. Mr. Lubischer stated that *"…just because you don't have an erosive channel doesn't mean that you don't have important runoff*." Tr. 626.

The Applicant and their consultants have considered and rejected Mr. Lubischer's opinions and support their original conclusion that deep groundwater is the primary source of the hydrology of Wetland P 2. The Applicant has documented the specific instances where Mr. Lubischer has misinterpreted the data and studies which they assert have led him to make errors and reach false conclusions. Applicants Closing Brief page 22-28. The Applicant and their consultants do not see the need for further monitoring to support their conclusions as they believe that testimony and evidence presented at the hearing has already established a baseline for hydrologic analysis. Applicants Closing Brief page 15.

Synthesizing the opposing testimony above, no definitive conclusions can be made as to whether deep groundwater serves as the only necessary source of hydrology for Wetland P2. Mr. Koger is found to be the most compelling witness as to the presence and characteristics of the deep groundwater. However, his opinions on the relative contributions of surface and interflow waters is not found determinative. This is because (1) his data was collected during the dryest part of the season, (2) as testified by Dr. Cooke, surface and shallow flows are not usually an item of focus in the deep groundwater borings, and (3) no measurements were taken of surface and interflow flows.

13. Relocation of Road – Hydrological and Other Impacts. Substantial evidence establishes that the hydrological and water quality impacts of the reduced separation of

Spine Road from Wetland P2 enabled[4] by the proposed buffer reduction can likely be fully mitigated via future stormwater review. Substantial evidence further establishes that the added buffer area required by buffer averaging standards is found to fully compensate for all other impacts created by the Spine Road

In summary the Appellants assert that Spine Road will serve as a dam across the drainage basin to Wetland P2 depriving that wetland of wetland of surface and interflow waters necessary to maintain its hydrology. The Applicant has presented a theoretical road design that its experts assert could maintain surface and interflow flows. See Ex. B14. Appellant witnesses have identified problems with this proposed design but corrections do not appear to be insurmountable. The Appellants' experts conceded that introduction of some added design features at the proposed Spine Road location could work to maintain wetland hydrology.

Mr. Lubischer testified that he believes the road and its abutment will remove about a third of the highest functioning portion of the catchment basin serving Wetland P2. He believes that construction of Spine Road will involve stripping off the surface soils which are highly permeable and replacing them with compacted materials to construct the roadway and abutment. He believes that the road essentially constructs a dam for surface and interflow waters for roughly 70% of the catchment area of Wetland P2. Dr. Roseen testified that by moving Spine Road and its fill within 85 feet of the wetland area, the catchment or drainage area is more heavily impacted than keeping the roadway and its abutment farther out of the wetland buffer. Dr. Cooke testified that unless the road is designed correctly and allows for the interflow from the entire catchment, there is a high percentage chance that Wetland P2 will be dewatered.

The added buffer areas resulting from buffer averaging will likely not mitigate against the hydrological impacts of Spine Road. As shown in Ex. A85, the wetlands subject to buffer averaging are located in three drainage basins. In uncontested testimony, Mr. Lubischer identified that the buffer areas added to compensate for the loss of Wetland P2 buffer are not in the same drainage basin as Wetland P2. Ms. Bartlett was unaware if the added buffer areas would compensate for the loss of hydrology to Wetland P2. Tr. 460. Mr. Heacock acknowledged that the buffer additions for Wetland P2 did not contribute to Wetland P2 hydrology because they were located downslope of Wetland P2.

To mitigate against disruption of surface and interflow flows, Mr. Koger put together some stormwater controls that will mitigate against potential Spine Road disruption of surface and interflow waters. Mr. Koger testified that the Ex. B 14 design involves a

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[4] As determined in COL 7, the impacts of Spine Road to be assessed for purpose of buffer averaging review criteria is the change in separation enabled by the buffer reduction, i.e. reducing the separation from the required 200 feet to the currently proposed location.

trench drain that would be placed at the base of the road cut on the uphill side. That drain will be connected to a permeable subgrade material placed beneath the road bed and the fill slope. A tow dispersion trench system will also be connected on the downhill side. Mr. Koger noted that the purpose of the design is to provide hydrologic connection to the interflow zone on the downslope side of the fill. Tr. 258. Ms. Decker agreed that the B 14 design would mitigate for impacts to interflow hydrology. Tr. 295-296. Mr. Moody agreed as well. Tr. 381.

Dr. Roseen acknowledged that the B 14 design could conceivably work, testifying that "*this has elements of success, but it also is missing a lot of critical details and in some very, very important substantive changes would need to be made*." Tr. 601. However, he didn't believe that the Ex. B 14 design would be able to function as intended. Tr. 605. Dr. Roseen identified numerous missing details that were necessary to establish that the design could work. Tr. 597-605. Ultimately Dr. Roseen concluded as follows:

> *We could get rid of half of the stuff we've been discussing and debating about if simply we put an infiltration trench where they're locating, run some pipes under the road to a dispersion trench, and then just work on a buffer fill specification that meets the needs of a wetland area.*

Overall as to hydrological impacts, even the Appellants' own expert witness acknowledged that hydrological impacts can be fully mitigated. The Appellants have also established, however, that the design presented by the Applicant is nowhere near specific enough to establish that the project can accommodate the surface and interflow waters of the catchment area without clogging or flooding. For all of these reasons, the most appropriate and efficient means of addressing the hydrological impacts and water quality impacts of Spine Road is to defer that assessment and mitigation review to stormwater review as outlined in COL 9.

As to impacts not associated with hydrology or water quality, the added buffer area required by the buffer averaging standards is found to serve as sufficient mitigation. The purpose of the added buffering required of buffer averaging is clearly intended to compensate for the impacts of buffer reduction. Mr. Lubischer acknowledged that unlike hydrology, buffer additions in different drainage basins can sill mitigate for loss of habitat. The Appellants have not identified any impacts other than hydrology that may not be adequately compensated by buffer additions. In the absence of any evidence that the buffer additions are inadequate to mitigate impacts, the additions are construed as adequate mitigation.

Conclusions of Law

1. Jurisdiction. Authority of Hearing Examiner. Examiner Marshall ruled in her remand decision that CABRs are Type I administrative decisions. *See* Ex. F12, pp. 6–7, 68, 107, MFOF[5] 330, MCOL 1. Appeals of Type I permits are heard and decided upon by the hearing examiner as outlined in KCC 21.04.290.

2. Scope of Review. The scope of review is limited to the scope of remand set in Examiner Marshall's remand decision, Ex. F12. Specifically, review is limited to (1) whether the placement of permanent fill within wetland buffers qualifies as an authorized "temporary" impact, (2) whether the permanent fill qualifies as an impervious surface under KCC 12.08.010(36) and (3) whether the agreed upon relocation of the Spine Road is consistent with the County's critical areas ordinance (Title 19 KCC) as consistent with the Examiner Marshall's remand decision and past decisions approving other portions/phases of the project.

Case law is clear that remand review is limited to the remand issues outlined in Examiner Marshall's remand decision. *See Kittitas Cnty. v. Sky Allpin*, 2024 WL 3507650 at *6 (cited pursuant to GR 14.1(a)) ("*A remand is not an invitation to the parties to litigate new issues outside the scope of the appellate court's ruling*.") (quoting *State v. Arlene's Flowers, Inc.*, 193 Wn.2d 469, 500, 41 P.3d 1203 (2019) (affirming trial court's refusal to "*consider new claims*" when issues to be decided on remand were "*limited*")). A remand "*is neither an outright reversal nor an open invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to reverse or correct it*." *Arlene's Flowers*, 193 Wn.2d at 489 (quoting *Gonzales v. Justices of Mun. Court*, 420 F.3d 5, 8 (1st Cir. 2005)) ("*As a general rule, when the Supreme Court remands in a civil case, the court on remand should confine its ensuing inquiry to matters coming within the specified scope of remand*")

The scope of remand as it pertains to buffer impacts is largely set by MCOL 105 and 106 and Summary Section n of Examiner Marshall's remand decision, Ex. 12. As pertinent, those provisions provide as follows:

> *The Hearing Examiner granted Appellants' motion to amend their appeal to include a sub-issue that arose during the course of the hearing concerning "temporary impacts." Appellants allege: (a) clearing is prohibited within buffers because they will not remain as "undisturbed" natural vegetation areas; and (b) that installation of fill within buffers represent additional buffer*

[5] Findings of Fact and Conclusions of Law from this decision are designated as FOF and COL. The FOF and COL from the Marshall decisions are designated as MFOF and MCOL.

reductions that need to be accounted for in the buffer averaging calculation. Substantial evidence does not support Appellants' argument that clearing of buffer areas is unlawful because KCC 19.200.215 and 19.300.315 allow clearing where the buffer can be enhanced to improve functional attributes per Conditions 10 and 11 of the CABR and testimony established that compliance with the Wetland Mitigation Report and Conditions 15-16, and 19 will enhance buffer functioning. The County did not analyze whether installation of fill, which is not a mere ground disturbance activity, is consistent with KCC 19.200.220.F which requires a building surface setback of 15 feet from the edges of the wetland buffer; see also Condition 14 of the CABR, Ex. F27 p. 23, nor whether buffer averaging calculations remain consistent with KCC 19.200.220.C.1.a(4). The CABR is reversed and remanded for additional decision-making on this issue. (GRANTED IN PART AND REVERSED AND REMANDED IN PART)

MCOL No. 105 and 106 provide as follows:

105. *Substantial evidence supports the County's approval of grading/ground disturbance work within the buffer pursuant to former KCC 19.200.215 and 19.300.315. In accordance with the Wetland Mitigation Report, Conditions 10-11, 15-16 and 19 of the CABR and as established by testimony, disturbed areas of the buffers will be enhanced to improve their functional attributes. Clearing of areas within buffers is consistent with applicable vested Code provisions and with prior land use approvals for the project including the 2009 preliminary plat, minor plat amendments and the 2009 MDNS and subsequent SEPA analyses. See Ex. F7 p. 34.*

106. *The CABR Decision does not separate analysis of ground disturbance activity, which constitutes "temporary impact," from installation of fill in the buffers of several wetlands, at the north and south stream crossings*[6]*, and in the utility corridor which substantial evidence indicates will remain in place permanently. Additional consideration and analysis of fill construction is required to determine compliance with former KCC 19.200.220.F, requiring a minimum construction setback from all critical area buffers, and whether calculations for buffer averaging continue to meet KCC 19.200.220.C.1.a*[7]*. The CABR Decision is reversed and remanded for additional decision-making on this basis.*

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[6] Examiner Marshall recognizes in MCOL No. 106 that the County didn't consider fill impacts to stream crossings but only requires remand analysis of wetland buffer impacts in her reference to KCC 19.200.220.F and KCC 19.200.220.C.1.a. Pursuant to Examiner Marshall's remand decision, remand review on fill impacts has been limited to wetland buffer impacts.

[7] Upon reconsideration by Examiner Marshall, the COL 106 reference to KCC 19.200.220.C.1.a was expanded to KCC 19.200.220.C.1.a(1) through (5). Ex. F13, p. 9.

With one exception, the MCOLs above are the only portions of Examiner Marshall's remand decision that directly address scope of remand. Those provisions limit remand to ascertaining whether the proposed placement of compacted fill within wetland buffers and wetland setbacks is consistent with the setback requirements of KCC 19.200.220F and the buffer averaging requirements of KCC 19.200.220.C.1.a.

As previously noted, in addition to Conclusion No. 106, Examiner Marshall's ruling also addressed another basis for remand. That other basis assesses whether the mutually agreed upon new Spine Road location complied with the County's critical areas ordinance. Examiner Marshall didn't include any MCOL in her remand decision explicitly remanding the Spine Road relocation. However, in her decision summary she identified that for Appeal Issue 2 that that CABR I was "*remanded for consideration of amended road location*." In MCOL 51 Examiner Marshall concluded that she had no authority to make an initial determination as to whether the Applicant's revised Spine Road alignment would comply with applicable provisions of the Kitsap County Code. From these comments it is concluded that the remand included full critical areas review of the Spine Road realignment. As noted in Finding of Fact No. 5, Spine Road was relocated along the east side of Wetland P2. That portion of Spine Road, therefore, is subject to full critical areas review.

3. Burden of Proof. Examiner Marshall set the burden of proof in her remand decision at MCOL 6 as follows:

> *Appellants bear the burden of proof to demonstrate "specific exceptions and objections to the [CABR] and the reasons why each is an error of fact or law, and the evidence relied upon to prove the error." See RoP 2.2.2(c); KCC 21.04.290(B)(3); Messer, 19 Wn. App. at 791-92* [*Messer v. Snohomish Cnty. Bd. of Adjustment*, 19 Wn. App. 780(1978)]. *Given that the Hearing Examiner reviews the appeal de novo, it is incumbent upon the Applicant to establish it meets all criteria for issuance of the CABR as it did at the outset in the CABR application.*

Appellants in their closing argument, p. 4, assert that the Appellants have the burden of proof to establish that the "*CABR was based on less than substantial evidence or in violation of the law*," quoting from the Applicant's closing brief on this issue. Appellants construe the Applicant's statement as standing for the proposition that the CABR II decision must be based upon substantial evidence developed during the staff review of the CABR II application. It's unlikely that that is what the Applicant intended – their reference to past tense "was" likely intended to reference the evidence that "was" presented during the appeal hearing.

The Appellants acknowledge that the Applicant is entitled to present new evidence to support is application in a de novo appeal such as this one. However, they jump to the added conclusion that this new evidence is an affirmative defense that shifts the burden of proof from the Appellant to the Applicant. *See* Appellant Closing Brf, p. 6. The Appellants cite to no legal authority for this position. Examiner Marshall's remand decision did not identify any such shift in burden of proof, holding at MCOL 7 that "*[t]o prevail in this appeal, Appellants must prove that there is no substantial evidence throughout the entire record to support the CABR and 'must establish that the [County]'s decision is an erroneous interpretation of law[.]' Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 837-38, 256 P.3d 1150 (2011).*"

The case law and legal authority relied upon by Examiner Marshall does not directly and expressly place a burden of proof on either party to establish the presence or absence of substantial evidence in a hearing subject to judicial review under the Land Use Petition Act (LUPA), Chapter 36.70C RCW. The LUPA standards that apply to judicial review of this decision don't assign any burden of proof except to provide that deference will be given to local government interpretations when deference is due. See RCW 36.70C.130. Ultimately to survive judicial review the conclusions of this decision regarding conformance to CABR permit criteria must be based upon substantial evidence. *See* RCW 36.70C.130(1)(c). As in all land use appeals, the Applicant presented evidence that supports a finding of conformance to permit criteria and the Appellants provide conflicting evidence that it does not. The role of the Examiner is to weigh that evidence to determine if substantial evidence still exists to support approval in light of the entire record.

The primary overall issue of this appeal is whether the CABR II application meets the County's permit review criteria. Whether or not the staff correctly applied the criteria during their administrative review has little relevance to this determination except perhaps as to any deference that must be afforded their decision making process. There is no rational reason to deny the CABR application if staff incorrectly applied permitting criteria but the evidence introduced in this proceeding establishes that the criteria are met anyway.

4. Road Construction As Buffer Exemption. As outlined below, KMC 19.200.225D authorizes road construction in wetland buffers when its standards are met. Those standards don't require conformance to buffer averaging standards. In this remand review, this provision may only be applied to the portions of Spine Road, including its fill, that have been realigned as identified in FOF 5.

As identified in MCOL 106 (quoted above in COL No. 2), Examiner Marshall's remand regarding fill in the wetland buffer encroachment was limited to application of KCC 19.200.220.F (buffer setbacks) and KCC 19.200.220.C.1.a (buffer averaging standards).

MCOL 106 does not authorize application of KMC 19.200.225D to the fill. However, as further concluded in COL 2, Examiner Marshall also required complete critical area review of the realigned Spine Road. That complete critical area review includes KMC 19.200.225D. Road fill is part of Spine Road. Consequently, for the relocated portions of Spine Road, KMC 19.200.225D can be applied to the fill within the wetland buffers.

In their closing the Applicant asserts that KMC 19.200.225D should apply to all portions of the project since "*[t]he issues the County was required to analyze on remand were limited, but the County's ability to apply its own Code was not*." TM Closing, p. 21. That statement is not an accurate reflection of Examiner Marshall's remand order. MCOL 106 specifically cited the code sections that were to be applied in the remand to assess temporary impacts. The MCOL 106 citations were limited to those applicable to buffer averaging and did not include KMC 19.200.225D. On judicial appeal a reviewing court may well find that Examiner Marshall erroneously limited fixed road review to buffer averaging standards. However, to avoid opening up the hearing to a re-litigation of resolved issues, to preserve the overall integrity of Examiner Marshall's rulings and to avoid changing the parameters of the remand order upon which the parties have relied to prepare for this proceeding, the present examiner has avoided ruling upon the validity or changing Examiner Marshall's remand order. In any event, it is certainly too late after the record is closed to change the scope of the hearing as set by Examiner Marshall. In its prehearing motions the Applicant repeatedly sought dismissal of Appellants appeal issues on the basis that they exceeded the scope of remand. In similar fashion, the Applicant's application of KMC 19.200.225D to the fixed portions of Spine Road A exceeds the scope of remand and was not considered in this decision.

The applicability of KMC 19.200.225D is significant because if its criterion are met, the road fill doesn't have to qualify as temporary to be located in wetland buffers. This is because KMC 19.200.225D authorizes road construction in wetland buffers when its criterion are met. KMC 19.200.0225D is somewhat ambiguous as to whether by its own terms road construction can be authorized within a buffer absent separate approval of buffer waiver provisions, such as buffer averaging. This ambiguity arises from the introductory language to KMC 19.200.225 which provides that "*[i[n addition to meeting the development standards of this **chapter**, those regulated uses identified below shall also comply with the standards of this section and other applicable state, federal and local ordinances.*" (emphasis added). KMC 19.200.0225D has "minimum standards" that applies to road repair, maintenance or expansion that is "allowed." The Appellants assert that the emphasis in the introductory language that conformance to KMC 19.200.225 be "in addition" to Chapter 19.200 KMC means that road construction cannot be "allowed" within buffers.

At the outset, it is important to recognize that the KMC 19.200.225 introduction applies to Chapter 19.200 (wetlands) and not to Title 19 as a whole, the County's critical areas

ordinance. This reference is a primary cause of ambiguity because Chapter 19.200 doesn't directly prohibit road development in buffers. Chapter 19.200 doesn't contain the definition of "buffer." That definition is what the Appellants use to identify what development is allowed in buffers. Chapter 19.200 also doesn't include the Chapter 19.100 applicability or exemption sections, such that Chapter 19.200 KMC by itself doesn't identify whether road construction is subject to buffer requirements or is exempt from their application.

In contrast to road construction which must only comply with Chapter 19.200, KMC 19.200.225B expands its introductory language for forest practices to require "*compliance with the provisions of this **title**, including the maintenance of buffers around regulated wetlands*." (emphasis added). If conformance to Chapter 19.200.225 included conformance to wetland buffers for all uses identified therein as asserted by the Appellants, there would be no need for this added language for forest practices.

Statutes should be construed so that no clause, sentence, or word is made superfluous, void, or insignificant; however, in special cases the court can ignore statutory language that appears to be surplusage when necessary for a proper understanding of the provision. *State v. Evergreen Freedom Foundation*, 1 Wash.App.2d 288, 299 (2018). In this case there is no need to treat the added code compliance for forest practices as surplusage. Chapter 19.200 KMC can fairly easily be construed as not including development restrictions within buffers. Chapter 19.200 KMC broadly identifies how to delineate and classify wetlands and their buffers, identifies buffer averaging procedures and sets the mitigation necessary to off-set wetland impacts. All of those provisions are at least generally applicable to road construction – wetland classification, buffer setting and wetland mitigation all still apply. What doesn't apply are provisions outside Chapter 19.200 KMC that could be construed as prohibiting road construction within wetland buffers. As previously noted, the chapter doesn't have to be read as identifying what development activities are prohibited within buffers. Those restrictions are set by the Chapter 19.100 "buffer" definition, and the Chapter 19.100 applicability and exemption sections.

In addition to forest practices being expressly subject to wetland buffers in KMC 19.200.225B, several other uses in KMC 19.200.225 are expressly not subject to wetland buffers. KCC 19.200.225.G through I provide that trails and trail-related facilities, utilities, and parks "may be allowed in wetlands or wetland buffers." Overall KMC 19.200.225B identifies one use that is prohibited in wetland buffers and several that are expressly authorized in wetland buffers. By failing to address whether roads are allowed in buffers while addressing this issue for other uses, KMC 19.200.225F is at the least ambiguous on this issue.

Ultimately, legislative intent is the paramount factor in resolving ambiguity. *Lynch v. Dept. Labor Industries*, 19 Wn. 2d 802, 809 (1944). In this case that legislative intent was clarified in recent amendments to KMC 19.200.225F that expressly provided that road construction was authorized in wetland buffers if the criterion of KMC 19.200.225F are met. The impact of clarifying legislation was identified by one court as follows:

> *But where this court has not previously interpreted the statute to mean something different and where the original enactment was ambiguous such to generate dispute as to what the legislature intended, the subsequent amendment shall be effective from the date of the original act, even in the absence of a provision for retroactivity.*

Overton v. Economic Assistance Authority, 96 Wn. 2d 552, 558 (1981).

In 2017, consistent with KCC 19.200.225.G through I, which state that certain uses such as trails and trail-related facilities, utilities, and parks "*may be allowed in wetlands or wetland buffers*," the County Commissioners clarified that the same language applies to the former KCC 19.200.225.D. The County Commissioners made this clarification by amending that section ("2017 Amendment") from saying that road construction "*shall comply with the following minimum development standards*" to "*may be allowed within a critical area or its buffer only when all of the following are met*." *See Barnhart Decl.*, ¶¶ 7–8, Ex. C5. When presenting on the 2017 Amendment to the County Commissioners, Ms. Barnhart described it as a "*clarification consistent with how that section had been interpreted all along*." Id., ¶¶ 9–10.

Given the ambiguities of the introductory language to KMC 19.200.225 and the legislative history cited above, the 2017 amendments are found to qualify as clarifying amendments under the Overton case that clearly establishes paramount legislative intent, i.e. that roads can be constructed within wetland buffers if they meet the standards of KMC 19.200.225F.

In addition to the 2017 clarification, deference is due the County position that application of KCC 19.200.225.D doesn't concurrently require conformity to buffer averaging criteria. RCW 36.70C.130(1)(b) requires deference to County interpretation of its own ordinances when deference "is due." Deference is due local interpretation when the local entity bears the burden to show its interpretation was a matter of preexisting policy. No deference is due a local entity's interpretation that was not part of a pattern of past enforcement, but a by-product of current litigation. A local entity's interpretation need not be memorialized as a formal rule but the entity must "prove an established practice of enforcement. *Ellensburg Cement Prods., Inc. v. Kittitas Cnty. & Homer L. (Louie) Gibson*, 317 P.3d 1037, 1046 (Wash. 2014). For KCC 19.200.225.D, the County produced a declaration of a County planner who testified that he consistently applied KCC 19.200.225.D to authorize road construction in wetland buffers without requiring conformance to buffer averaging standards. See Ex. C1. The County has met its standard for due deference under RCW 36.70C.130(1)(b). Deference is due its interpretation that KCC 19.200.225.D authorizes road construction in wetland buffers without having to meet buffer averaging standards.

On a functional level, the Appellants' interpretation doesn't conform to legislative intent either. The Appellants' interpretation dictates that road construction within wetland buffers be more restricted than other development rather than less. Such an interpretation could necessitate significant additional road construction and reductions to road connectivity. Those impacts in turn would create public safety problems, increase public expense and result in other adverse environmental impacts. For these types of reasons, the critical areas ordinances adopted in most if not all other jurisdictions make road construction less restrictive than other development in wetland buffers. *See, e.g.*, Auburn City Code 16.10.170; Port Orchard Municipal Code 20.162.034(1); Bainbridge Island Municipal Code Section 16.20.140H1; Bremerton Municipal Code Section 20.14.150. In all the afore-mentioned city code provisions, roads are provided relief from strict construction of critical area standards provided that there is no practical alternative to the road location.

5. Temporary Buffer Impacts Authorized. Fill is authorized in the wetland buffers of the project site if the impact is temporary. The impact is considered temporary if wetland functions are restored.

Title 19 KCC does not define temporary impacts or address if they're authorized. The closest that Title 19 comes to addressing temporary impacts is the KCC 19.150.170 definition of buffer, which defines it as a "*non-clearing native vegetation area which is intended to protect the functions and values of critical areas*." This definition at the least suggests that development encroachment into buffers is prohibited. Despite this prohibition, Title 19 KCC grants numerous exemptions and exceptions for buffer encroachments such as roads as identified in COL No. 3 and utility variances under KCC 19.100.135F.

Although Title 19 authorizes several types of encroachments into buffers, there is no express authorization for encroachments that cause temporary impacts. Despite this Examiner Marshall found such encroachments impliedly authorized in MCOL 105 and MCOL 106. MCOL 105 concludes that clearing in buffers is consistent with applicable provisions when the buffer disturbance will be fully mitigated and enhanced. In this regard, the adverse impacts of the clearing work qualify as "temporary." "Temporary" is not a term actually used in MCOL 105. However, Examiner Marshall then identifies in MCOL 106 that substantial evidence establishes that fill located within wetland buffers will be permanent and that the CABR I decision failed to separate analysis of the fill from the "temporary impact" of the clearing activity identified in MCOL 105. She required remand in MCOL 106 to address this missing separate analysis.

The interplay of MCOL 105 and 106 can lead to understandable confusion. MCOL 106 finds that County staff hadn't assessed whether fill placed in buffers conforms to buffer averaging standards as governed by KCC 19.200.220.C.1.a. MCOL 106 also

distinguishes the temporary impacts of authorized buffer clearing from the "permanent" installation of fill. In this regard, MCOL 106 could be interpreted as advocated by the Appellants that the fill isn't authorized in buffers and that her remand was requiring that the buffers be reduced to exclude the fill. That is a strained interpretation. Reducing the buffer widths to exclude fill areas would clearly result in a failure to conform to KCC 19.200.220C1a4, which requires that the total area of buffer after averaging be the same as that before averaging. If Examiner Marshall had concluded that fill could not be placed in buffers, she would have simply found that the proposal failed to meet buffer averaging standards. Instead she required further consideration as to whether the buffer averaging standards are met. It is also of note that Examiner Marshall referred to temporary "impacts" in MCOL 106 as opposed to temporary "encroachments," suggesting that she at least believed it to be possible that temporary impacts are authorized even for permanent encroachments such as fill.

Examiner Marshall's clarification decision, Ex. 13, supports the MCOL106 interpretation that she had not yet made any conclusions as to whether fill could be located in buffers as follows:

> *…The Examiner does not have legal authority to usurp staff's original decision making authority in determination of whether fill in buffers constitutes a temporary or permanent impact,* ***or*** *whether as proposed by the Applicant, the buffer ends where fill begins.*

Ex. 13,COL 12 (emphasis added).

Examiner Marshall's clarification as quoted above makes clear that she had not yet determined whether permanent fill can be placed within a buffer, i.e. "*whether as proposed by the Applicant, the buffer ends where fill begins*." Further, by focusing on "*temporary or permanent impact*," it's also evident that Examiner Marshall was leaving open the position that the temporal nature of buffer impacts as opposed to physical encroachment is what dictates whether such an encroachment is authorized by the CAO. In reading that quote above it is important to note the bolded disjunctive. Examiner Marshall was not concluding that fill with temporary impacts was authorized, she was concluding that she didn't have the authority to make the initial determination of whether the fill constitutes a temporary impact **or** whether fill simply can't be located in a buffer "*as proposed by the Appellants*," who were arguing that fill is never allowed.

County staff and the Applicant's wetlands expert did not expressly address Examiner Marshall's question on whether "…*the buffer ends where the fill begins*." It's possible that the County and Applicant interpreted Examiner Marshall's remand decision as concluding that road fill with temporary impacts is authorized in buffers as opposed to a directive to assess whether the CAO allowed that type of encroachment. Without any express

evaluation, both the Applicant and County jumped to the conclusion that fill is authorized if its impacts are temporary. Page 22 of the CABR II finds the fill acceptable on the basis that "*the areas that will be temporarily disturbed in the buffers and building setbacks will be reestablished, rehabilitated, or restored, and then remain buffer after construction is completed*." It appears that this quoted language was taken from the Applicant's wetland study prepared in response Examiner Marshall's remand order. That study identified that "*[t]emporary buffer impacts refer to impacts to buffers during construction because the areas that will be temporarily disturbed will be reestablished, rehabilitated, or restored, and then remain buffer after construction is completed*." Ex. F18, p. 7.

Although the County and Applicant wetland experts didn't directly and expressly conclude that road fill can be allowed in wetland buffers if impacts are temporary, the Appellants' wetland's expert, Dr. Cooke, confirmed that fill with temporary impacts is authorized in other jurisdictions, pursuant to the following testimony:

> Examiner Olbrechts: *Dr. Cook, a two part question. One, is it unusual for a city or county to consider road fill in this matter to be a temporary impact? And secondly, have you ever seen a city or county successfully fully mitigate road fill so that it did qualify as a temporary impact?*
>
> Dr. Cooke: *First part, yes. I have seen this happen, and when I'm a third party reviewer, which I do on a regular basis for multiple jurisdictions, I will mention to them that this is a crucial consideration. And as part of my review, we'll identify areas that I think are not temporary impacts. It's often there's a lack of consideration of the action area, which is a larger footprint than just putting in a road and its shoulders because you usually impact at least another five feet. But yeah, I do identify it and it's very, most often they take my recommendations. Second part, yes, there are ways to mitigate for more permanent impacts through a design that would allow for infiltration around the fill and through or under the fill. But the design that has been presented here does not currently include that. Although I'd scanned the most recent, there does appear to be ditches, but they're not really mentioning that they're going to get into the percolating layer that's currently present. But with correct designs, you can definitely make these impacts more temporary in effect. So yes, you can. This design is not doing that yet.*

It is unfortunate that the CABR II decision did not directly address whether temporary fill impacts are allowed in wetland buffers or whether it has allowed such encroachments as a historical practice. However, at hearing Mr. Heacock identified that "*there are dozens and dozens and dozens of examples where roadways to get into a property across the*

creek or beside a creek or beside a wetland or between wetlands to get to areas that then we don't have to impact buffers. Certainly for roadways, we have done dozens and dozens of them." Tr. 57. Mr. Wright also testified that he has worked on several projects that involve permanent road fill within wetland buffers. Tr. 195-196. Unfortunately, it's not entirely clear from the Wright and Heacock testimony whether fill was authorized under provisions such as KCC 19.200.225D as opposed to an implied exception for temporary buffer impacts.

Ultimately, given that the County had no reservations in accepting road fill within buffers in both CABRs (the first CABR without the remand directive) and Dr. Cooke's acknowledgement that this practice is accepted in other jurisdictions, it is reasonable to conclude that the County would accept road fill within buffers on the implied buffer exception for temporary impacts.

In applying the temporary impact standard applied in CABR II and presented by the Applicant, it is important to recognize that the standard requires that the specific area disturbed be mitigated, as opposed to allowing mitigation in another location. The concept that temporary impacts are allowed in wetland buffers would otherwise not be consistent with other CAO provisions. If mitigation of other areas were to be found sufficient, anyone wishing to build a house or any other structure within a wetland buffer could do so by simply producing a wetlands report that concludes that some buffer enhancement on other parts of the project site would mitigate all impacts. Such a construction would render variance and reasonable use process superfluous. Variance and reasonable use provisions authorize construction in buffers upon a showing of no adverse impacts and unique circumstances or lack of reasonable use. Applying Examiner Marshall's temporary impact conclusions in a broad manner, persons wishing to construct a building within a wetland buffer can bypass the unique circumstances and reasonable use requirements of the variance and reasonable use processes by simply establishing no adverse impacts.

Limiting mitigation for temporary impacts to restoration/rehabilitation/reestablishment serves the objectives of Title 19 KCC by adhering to its overall mitigation strategy. Taking the Title 19 regulations as a whole, protection of critical areas is primarily addressed by the imposition of buffers with narrow exceptions for innocuous and/or necessary encroachments such as utilities, roads and constitutionally protected property rights. Limiting temporary impacts to like kind restoration provides for consistency in CAO application as found important in MCOL 105 while at the same time maintaining the predominance of the buffer as the primary mechanism for wetland protection.

The Applicant's proposed fill qualifies as a temporary impact under the analysis above. Similar to the replacement of cleared vegetation with new vegetation as referenced in MCOL 105, the Applicant's fill is the replacement of soil with new soil. That new soil

can serve as adequate mitigation for the removal of existing soil if it provides the same or enhanced hydrologic function to the wetlands. As determined in FOF No. 10, all affected wetland buffer functions have been adequately restored.

A final issue related to temporary buffer impacts is how much time it takes to implement them. All of the mitigation measures necessary to mitigate the fill impacts can be implemented immediately. It is recognized that plants installed as mitigation might take some time to fully mature. However, Examiner Marshall found in MCOL 105 and 106 that mitigation involving replanting of cleared areas qualified the impacts as temporary. Given this guideline, the mitigation measures found necessary by this decision are found to qualify the fill impacts as temporary. A condition of approval requires these mitigation measures to be implemented prior to opening of the road to assure that the measures are completed as soon as practicable.

6. Pervious Fill Not Impervious Surface. As conditioned to meet the fill specifications for in-buffer fill, the fill placed in buffer setback areas is not found to constitute a prohibited impervious surface.

MCOL 106 includes compliance with KCC 19.200.220F as a remand issue. KCC 19.200.220F requires that a "*building or impervious surface setback line of 15 feet is required from the edge of any wetland buffer*." It is undisputed that the proposed fill doesn't qualify as a building. "Impervious surface" isn't defined in the County's critical areas ordinance. KCC 12.08.010(36) from the County's vested stormwater code defines impervious surface as

> *a hard surface area which either prevents or retards the entry of water into the soil mantle as under natural conditions prior to development, and/or a hard surface area which causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions prior to development.* ***Common impervious surfaces include****, but are not limited to, roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads with compacted subgrade,* ***packed earthen materials****, and oiled, macadam or other surfaces which similarly impede the natural infiltration of storm water. Open, uncovered retention/detention facilities shall not be considered as impervious surfaces. The initial 5,000 square feet of permeable pavement systems meeting the criteria set forth in Exhibit A (Kitsap County Stormwater Design Manual) shall not be considered impervious surfaces.*

(emphasis added).

Given that the County's stormwater regulations are designed in part to address impacts to critical areas, the stormwater definition of "impervious surface" is found to be an appropriate definition to apply to KCC 19.200.220F.

For this case both County staff and the Washington State Department of Ecology (DOE) staff have testified that the fill proposed by the Applicant would not qualify as impervious. As identified by the manager of the County's development engineering division, the impervious surface definition quoted above was copied from the DOE stormwater manual. *See* Ex. C6. Amanda Heye, a DOE stormwater engineer, identified that DOE would not consider a vegetated embankment that wasn't a driving surface to qualify as impervious under the current definition. Ms. Heye's assessment must be tempered by the fact that the current definition she applied replaced the referenced "hard surface" terms in the vested definition with "non-vegetated surface." However, Steve Heacock testified that the current definition with the new "non-vegetated surface" term serves to clarify that the vested definition of impervious surfaces only applies to "non vegetated" surfaces. *See* Nov. 15, 1 p.m., Tr., at 1:03–1:04:40. Consistent with Mr. Heacock, Mr. Wright and Ms. Bartlett testified that, based on their expertise as wetland scientists, impervious surfaces are not vegetated. See Nov. 6, 3 p.m. Tr., at 21:08–23:42; see also Nov. 15, 9 a.m. Tr., at 1:09:51–1:10:43, 1:12:29.

In opposition, Mr. Lubischer and Dr. Roseen testified that the compacted fill material adjacent to the buffers of Wetlands L2, 12, P2, L3, C6, and Z4 would qualify as an impervious surface under the vested stormwater definition, specifically because the fill will "impede or retard" the entry of water into the soil mantle. Tr. at 90, timestamp 1:10:30 (Lubischer testimony); id. at 122, timestamp 1:06:31 (Roseen testimony). But of course any surface with a fixed mass will block and thereby impede water flow to the earth's mantle. The vested definition not only requires the surface to not impede flows, but qualifies that requirement with "*as under natural conditions prior to development*." The quoted language is a little difficult to apply, but the only way to make logical sense of the "impede or retard" term is to construe the first sentence as providing that the surface impedes or retards stormwater flows more than natural conditions prior to development.

Unlike the case that was made for arguing that amendments to KCC 19.200.225D qualify as clarifying amendments, the case for asserting that the amendments identified above are clarifying isn't as strong. No legislative history or evidence of past practice has been presented to show that the last amendment to KCC 12.08.010(36) was intended to be clarifying as opposed to charting a new regulatory direction. Steve Hickock testified that it was a clarifying amendment but didn't back that up with any supporting evidence as was done for the KCC 19.200.225D amendment.

The risks of judicial reversal on the County/Applicant interpretation of KCC 12.08.010(36) can be avoided by simply requiring the fill placed in wetland setbacks to

mimic existing soil conditions in the same manner as that standard is applied to the buffer fill. Even if existing soils are not permeable, the "*as under natural conditions prior to development*" language would still exclude the replacement soils from the impervious soil definition.

It is recognized that subjecting the setback fill to the in-buffer fill standards might not be possible due to greater need for lateral support or other engineering constraints in the setback areas. If that is the case the Applicant can request reconsideration to have the condition removed and the merits of the Applicant's interpretation of KCC 12.08.010(36) will be further assessed.

Mr. Telegin correctly identifies in his closing brief that one of the examples in the impervious surface definition of what qualifies as impervious surface is "*packed earthen materials*." That is a compelling point. However, the definition doesn't state that all packed materials qualify as impervious surfaces. It is not too much of a logical leap to conclude that a packed surface designed to be as pervious as natural undeveloped vegetated conditions should not be construed as impervious.

As conditioned to be subject to the same mitigation as fill within wetland buffers, the proposed fill within wetland setbacks is found to qualify as a pervious surface. The testimony of County and Applicant witnesses along with the pervious characteristics of the fill as conditioned most logically qualify the proposed setback surface as pervious.

7. Measure of Buffer Impacts for Buffer Averaging. The measure of impacts for a buffer reduction is the change in development impacts from a full buffer to that of a reduced buffer. For this case that would be a change in impacts from the road located 200 feet from the wetland as opposed to the proposed location.

Examiner Marshall set the standard for measuring development impacts at MCOL 85 as follows:

> *Appellants did not present evidence that compared potential impacts to wetlands if a standard buffer was retained, as opposed to if the buffer was reduced and did not show that the CABR Decision based on the determination that the functions and values of the Wetland P2 buffer would be equal or greater through use of buffer averaging Ex. F18, pp. 9-11, was in error.*

Examiner Marshall provided further clarification of her conclusion in Finding of Fact 14 of her reconsideration decision, Ex. 13, as follows:

> *The Hearing Examiner determined that Appellants did not establish that reduced buffer widths – as opposed to construction of the Spine Road in and*

of itself - would adversely impact Wetland P2. Decision Conclusions 83, 85. Appellants did not present any legal authority to support their contention that the comparison between equivalent values and functions under these facts can only be between a scenario of "no spine road," and construction of the spine road with a 100-foot buffer setback. See Ex. F62, p. 6; Ex. F65 pp. 3-4.

MCOL 85 implements KCC 19.200.220C1a3, which requires that width averaging not adversely affect the wetland. The appropriate baseline for comparison purposes is a road built immediately outside of the required 200-foot buffer and setback. Any change in impact resulting from reduction of the buffer would in turn be attributable to the buffer reduction and under KCC 19.200.220C1a3 could not adversely affect the wetland. Potential changes in impact would then be attributable to loss of buffer width and decreased separation of the road from the wetland.

Examiner Marshall's clarification quoted above was in response to the Appellants' argument that the baseline should be no Spine Road built at 200 feet because there isn't room within existing property boundaries to build Spine Road outside of a 200-foot buffer. Examiner Marshall disagreed with this position on the basis that the Appellants hadn't presented any legal authority supporting their position. However, Examiner Marshall didn't present any legal authority supporting her position either.

Ultimately, Examiner Marshall's baseline is the most accurate means of assessing buffer reduction impacts. The Appellants premise that the road wouldn't be built with a 200-foot buffer is false. In the absence of buffer averaging, the Applicant would have other options to otherwise construct the road. The most direct would be KMC 19.200.225D, which as concluded in COL 4 authorizes road construction in wetland buffers it its criteria are met, the most pertinent of which requires no adverse impacts to the wetland. Absent KMC 19.200.225D the Applicant may qualify for a critical areas variance or reasonable use exception to the buffer width. All three of these waiver processes mechanisms require no impact to the wetland for the proposed buffer encroachments. The resulting change in baseline from a mitigated buffer encroachment authorized by a variance or KMC 19.200.225D to a reduced buffer under buffer averaging would be the mitigation required of the baseline, i.e. mitigating all impacts caused by the encroachment. That mitigation is precisely what was required by Examiner Marshall, i.e. mitigating impacts by the decreased separation of the road from the wetland.

It is recognized that the buffer encroachment mechanisms identified above are not the only development options available to the Applicant. The Applicant could also move its lot lines or theoretically reconfigure its road network. However those options are already addressed in the buffer waiver provisions identified above – the Applicant only qualifies for those mechanisms if no other reasonable alternatives are available. For critical area variances, KCC 19.100.135A5 requires that no other practicable or reasonable alternative

exists. For reasonable use exceptions, KMC 19.100.140A2 requires that no other reasonable use that would result in less impact. For KMC 19.200.225D, KMC 19.200.225D1 requires that no other reasonable alternative exists. Outside of buffer averaging, there is a good chance the Applicant would qualify for a critical areas variance or KMC 19.200.225D given how the road location has been locked in by previous development approvals. Under either scenario, the baseline would be a fully mitigated 200-foot buffer encroachment, the same baseline adopted by Examiner Marshall.

8. Measure of Temporary Impacts. Only the portions of proposed development located within wetland buffers must be mitigated to qualify as temporary impacts.

During the hearing the parties expressed disagreement as to whether a temporary impact analysis of the proposed buffer fill required mitigation of the entirety of Spine Road as opposed to just the fill located within the buffer. At the request of the Examiner, the parties briefed the applicability of shoreline cases on this issue in their written closing argument. As identified in Mr. Telegin's closing brief, in Shoreline Management Act permitting review the Shoreline Hearings Board and Court of Appeals requires consideration of the impacts of entire unified development projects in circumstances where portions of the project are within the 200-foot shoreline jurisdiction and portions are outside the jurisdiction. areas. *See, e.g., Citizens to Stop the SR 169 Asphalt Plant v. King County*, SHB No. 22-077, Findings of Fact & Conclusions of Law and Order at 44, ¶ 24 (April 12, 2023) (*citing Laccinole v. City of Bellevue*, SHB 03-025 (Mar. 10, 2024), *Merkel v. Port of Brownsville*, 8 Wn. App. 844 (1973), and *Preserve Our Islands v. King Cnty*., SHB 04-009 (Nov. 3, 2004)).

As referenced in the *Merkel* decision, piecemealing projects between portions within shoreline jurisdiction and without "*would require us to close our eyes to the obvious interrelation of this project upon wetlands and adjacent uplands areas*." *Merkel*, 8. Wn. App. At 850.

There is little question that the road fill proposed within the P2 buffer would subject the entire adjoining Spine Road to Shoreline Management Act (SMA) jurisdiction if the P2 buffer line was the shoreline jurisdictional border. However, a determinative distinction between the wetland buffer boundary and the SMA jurisdictional boundary is that the buffer demarcates an impact zone based upon best available science while the jurisdictional line is a legal construct defining the borders of state shoreline regulatory authority. RCW 36.70A.172 requires that wetland buffer widths be based upon best available science, designed to protect the functions and values of the wetlands. The buffer widths are individually tailored to the class of wetland they are designed to protect with numerous provisions that enable further tailoring the width to individual projects, such as buffer averaging.

Wetland buffers are precisely and only designed to protect wetlands by serving as "non-clearing native vegetation area[s]" pursuant to KCC 19.150.170. Title 19 KCC doesn't impose wetland restrictions on development outside wetland buffers. In short, wetland buffers serve as a legislatively determined area, based upon best available science, beyond which development is construed as creating acceptable wetland impacts. If the Spine Road and all its fill were entirely located outside of the buffer and setback, even if just an inch away, conformance to the required buffer would be viewed as sufficient mitigation under Title 19 KCC.

In contrast to the protective functions of wetland buffers, SMA jurisdictional boundaries are not entirely based upon any precise scientific determination of what is necessary to protect shorelines. The boundaries don't serve as a nonclear zone for vegetation. Rather they serve as the boundaries for a specialized zoning code that in addition to protecting ecological function also regulates shoreline uses to enhance public access, enjoyment and navigation of the state's shorelines. See RCW 90.58.020. Unlike the best available science determination for wetland boundaries that an x foot wide buffer is necessary to protect a y class wetland, the 200-foot shoreline jurisdictional boundary was designed to accommodate the wide range of shoreline use and environmental objectives of the SMA.

Given the more precisely defined and narrowly focused objectives of a wetland buffer over SMA jurisdictional lines, the approach taken by the Applicant in only addressing temporary impacts within the wetland buffer is the more logical approach. Temporary impacts are authorized upon the premise that disruption of the buffer function is only temporary and buffer function will be fully restored in short order. As previously identified, if Spine Road and its fill were entirely located just outside the buffer, no wetland mitigation would be required under the CAO. Given that the wetland buffer sets the area of necessary protection, it makes little sense to conclude that if the road is located an inch within the buffer as opposed to without that then the entire impacts of the Spine Road must be mitigated. Once the area within the buffer is fully restored by definition the buffer acts just as it is should compared to a buffer with no encroachment. At that point there is no impact difference between a road project an inch inside the boundary as opposed to an inch outside.

9. Deferral of Hydraulic and Water Quality Impacts to SDAP Review. As determined in FOF 13, substantial evidence establishes that it is reasonably likely that Spine Road can be designed at its proposed location to avoid any material disruption to Wetland P2 hydrology. However, the Applicants have not yet committed to any specific stormwater controls to achieve this objective so there is insufficient evidence at this time to determine that the proposal as designed will maintain wetland hydrology. CABR regulations do not require any level of specificity for project design plans. Maintaining wetland hydrology is a requirement for both CABR review and stormwater review. To ensure that the CABR requirement for maintaining wetland hydrology is met for this CABR application, a

condition of approval requires that stormwater controls approved in stormwater review meet the hydrologic requirements of CABR review and that the project design approved by the CABR review shall be vulnerable to modification as necessary to meet CABR hydrologic requirements.

The Appellants throughout this process have expressed well-justified frustration that they're unable to evaluate critical area impacts because project design hasn't been specific enough to identify what impacts will occur. The Applicant's response to many of the Appellants' concerns has been either that impacts will be addressed by some unspecified project design during subsequent stages of review or to present hypothetical design options introduced for the first time in this appeal proceeding that the Appellants must scramble to address.

The practice of deferring required permit review to later permit applications was roundly rejected in *King Cnty. v. Friends of Sammamish Valley*, 556 P.3d 132 (Wash. 2024). In that case the SEPA responsible official repeatedly deferred assessment of SEPA environmental issues to later permitting decisions on the basis that the proposed zoning code amendments under review were non-project actions. The court rejected this position, holding that the proposed amendments were

> *not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action…*

The same concept holds for critical areas review. Title 19 KCC primarily requires that development not adversely affect critical areas. The responsibility to make that determination cannot be deferred to future project review solely on the basis that design plans are not currently available.

An important distinguishing factor of the *Sammamish* case, however, is that the SEPA responsible official of that case appears to have wholesale deferred environmental review without providing any specifics as to how that subsequent review would satisfy SEPA review criteria. The *Sammamish* court appears to have been primarily troubled with the fact that the answer to nearly every question of Part B of the SEPA environmental checklist was "*Not applicable for this nonproject action*." The SEPA responsible official made no attempt to identify how specific regulations in subsequent development review would address specific project impacts. Overall, the primary issue of the CABR is to assure that project design will not adversely affect critical areas. If substantial evidence

exists that specific impacts will be fully mitigated in another permit review, it would appear that should be sufficient to establish compliance with CABR criteria.

In this case in particular, the County's stormwater regulations appear to be ideally suited to address the hydrologic impacts of the project. KCC 12.20.110(2) requires that "*[s]torm water discharges to wetlands shall maintain the hydroperiod and flows of predevelopment site conditions to the extent necessary to protect the characteristic functions of the wetlands*." Relying upon this criterion, one could make a fairly compelling argument that hydrologic impacts to wetlands will be fully mitigated as a result of subsequent stormwater review. In the absence of any evidence to the contrary, the County's stormwater regulations likely do qualify as necessary substantial evidence to establish no adverse impacts to wetland hydrology. In this regard, reliance upon the regulations can be considered to establish prima facie evidence of no adverse wetland hydrological impacts.

From a practical standpoint deferral also provides for more targeted and efficient review. The Appellants have repeatedly cited the difficulties in addressing critical area impacts for a proposal that hasn't yet been fully designed. At this stage of design development the Applicants have had the luxury of tossing out new hypothetical design parameters every time the Appellants raise a potential new critical area impact. If the Appellants raised their hydrology issues in an appeal of the stormwater review[8], they would have a specific[9] project design to assess.

The downside to deferring Title 19 concerns to stormwater review is that once a project design is approved in a CABR review, it cannot be collaterally attacked on grounds of critical area compliance in subsequent stormwater review. *See, e.g.. Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11 (2005)(merits of prior approved special use permit cannot be addressed in subsequent clearing and grading permit application). This is because of the overlap in review criteria between the two sets of permit review. Title 19 prohibits adverse impacts to wetlands and the stormwater regulations requires maintenance of wetland hydrology. Of course, failure to maintain wetland hydrology would qualify as an adverse wetland impact already covered by CABR review.

Case law doesn't provide much guidance on the ramifications of separate permit review that have overlapping development standards. Perhaps the most pertinent case is *Quality*

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[8] Conformance to the County's stormwater regulations is assessed for Site Development Activity Permits (SDAP). KCC 12.10.050. SDAPs are Type II permits subject to public notices of application and appeal to See KCC 21.04.110 and KCC 21.04.290C.

[9] For projects as large as that under review, stormwater plans must be of sufficient detail to "*provide all information necessary for persons trained in engineering to review the plans, as well as those persons skilled in construction work to build the project according to the design intent*." See Kitsap County Stormwater Manual Section 1.4.2 and Table II-1.3.

Rock v. Thurston, 139 Wn. App. 125 (2007). *Quality Rock* addressed the impact of a SEPA review on the ability of Thurston County to impose further mitigation under a special use permit on a proposed gravel pit expansion. Groundwater located at the gravel pit recharged the nearby Black River. A MDNS was issued for the project without any mitigation measures addressing recharge impacts to the Black River. The hearing examiner approved the special use permit without any mitigation for Black River impacts. On appeal, the Thurston County Board of Commissioners denied the special use permit, finding that the location for the gravel pit was not appropriate given its potential impacts to the Black River.

The *Quality Rock* Applicant appealed the denial to superior court, arguing in part that under principles of judicial finality the County could not find the location inappropriate under special use permit criteria because the MDNS had to be based upon a finding that the proposal would create no probable significant adverse environmental impacts. The Court of Appeals disagreed, noting that one of the criteria for special use permit approval was that the proposed use would not result in substantial or undue adverse affects to the natural environment. 139 Wn. App. At 141. Notably, the court found it significant that the County issued the MDNS without access to most of the Black River information that the hearing examiner and Board of Commissioners based their decision upon. The environmental checklist didn't even identify the Black River as a surface water body in the project vicinity.

The *Quality Rock* decision suggests at a minimum that for permits assessing impacts subject to overlapping criteria, if an issue isn't addressed in the first permit it can still be addressed in the second. Such a stance is consistent with principles of collateral estoppel if not judicial finality. Applying this principle, it is concluded that the hydrology of the fill is an issue subject to this appeal and that road design is properly deferred to stormwater review.

The hydrological impacts of the road fill is an appropriate consideration for this appeal because it was an issue addressed in the CABR administrative review. The CABR decision identifies that "*the protocols for temporary impact areas related to fill will mimic hydraulic conductivity of the existing onsite soils within the buffer to allow for a consistent hydrogeologic condition from existing conditions to the post-construction condition*." Ex. F1 CABR, p. 26. Presumably, at least in part the reason why staff chose to focus upon this impact is because one of the few new studies submitted by the Applicant for the remanded CABR was a soils study focused upon establishing continuity of hydraulic conductivity.

In contrast to the hydrological impacts of the proposed road fill, the hydrological impacts of the rest of the road were not addressed in the remand CABR application. The full extent of those impacts were also not addressed in the de novo hearing associated with the

CABR. That is because the scope of the hearing as set by this Examiner's summary judgment order limited the extent of stormwater review as follows:

> *The precise design of stormwater facilities of course does not need to be delineated at this point of review. However, the Applicant and/or County staff should be prepared to make a compelling case that full mitigation can be achieved during stormwater review.*

Order on Prehearing Motions, p. 14.

Consistent with this ruling, the Applicant did not commit itself to any specific design of stormwater facilities. Rather, the Applicant has presented Ex. B14 as a hypothetical example of how full hydraulic mitigation could be achievable under the parameters of the proposed location and conceptual design of Spine Road A. With this hypothetical the Applicant has made a compelling case that it is reasonably likely that necessary stormwater controls can be designed at the proposed Spine Road location. However, the Appellants have also raised sufficient potential problems with the design that it may not work.

Given the uncertainties and lack of specificity in project design, a condition of approval provides that approval of the CABR does not guaranty that required stormwater mitigation at the proposed location and design is possible and that stormwater review may result in road design changes as necessary to maintain wetland hydrology as required by stormwater regulations.

As is evident from the analysis above, the degree to which a CABR locks in project design is in part left to the discretion of permit Applicant. CABR regulations don't require any specific level of project design[10]. The Applicant volunteered engineering level specifics for its buffer fill so its CABR compliance can be fully assessed and approved during CABR review. The Applicant chose not to present any specific design for its stormwater control facilities so the hydrologic component of that CABR compliance must be deferred for stormwater review.

Applicant discretion in setting the level of design approval is not a new concept. In preliminary plat review, the vested rights arising from approval of a preliminary plat are limited to the extent that the Applicant chooses to disclose project and use design in its

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[10] Staff testified that they require 60% project design for CABR review, relying upon the application requirements for stormwater review. That is an administrative policy not set by the KCC. Ultimately, to comply with CABR application requirements the Applicant must present a project design that is sufficiently detailed to establish conformance to CABR standards. As demonstrated for this application, overlap in permitting criteria can justify a lack of design specificity if review can be deferred to the other review.

application. *See Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997). Given that permit Applicants bear the brunt (but certainly not all as the Appellants will attest) of the costs associated with permit review, it is reasonable that they be given this degree of control over the rights that vest as a result of their permit approvals. Projects such as Arborwood involve numerous project approvals. To enhance efficiencies it is important to give Applicants some flexibility in the timing of those reviews. For whatever reason, the Applicant has not chosen to file its CABR application concurrently with its SDAP application. That leaves the Applicant vulnerable to two administrative appeals on wetland impacts as opposed to one. That is their choice and it has been made.

As with hydrological impacts, water quality impacts are similarly deferrable to stormwater review. The County's stormwater manual contains standards on water quality that incorporate all known, available and reasonable methods of stormwater prevention, control and treatment (AKART) as required by RCW 90.52.040 and RCW 90.48.010. Stormwater manual standards are specifically designed to address water quality impacts on environmental resources such as wetlands.

Appeal Issues (As Quoted from Appellants' Appeal)

Issue A1. *The Arborwood project proposes to place large quantities of permanent fill inside the buffers of several wetlands and streams, including Wetlands L2, 12, P2, L3, C6, Crabapple Creek, and Kingfisher Creek—both within the areas of buffers to be reduced, and the areas of the buffers to be enlarged. However, KCC 19.150.170, KCC 19.300.315.A.1, Preliminary Plat Condition 6, NOD Condition 10, and RNOD Condition 10 require that buffers are "a non-clearing native vegetation area", "shall remain undisturbed natural vegetation areas", and "shall be retained in native vegetation as depicted on the preliminary plat application." KCC 19.300.315.A.1, NOD Condition 10, and RNOD Condition 10 require that buffers and setbacks "remain undisturbed natural vegetation areas." By approving of a project design that will result in the placement of large quantities of permanent fill material in critical area buffers, the NOD and RNOD are non-compliant with these provisions. A single statutory exception in 19.300.315.A.1 is "where the buffer can be enhanced to improve its functional attributes." This exception does not apply since the existing buffers are well-vegetated, forested, in good condition, functionally effective, and will not be enhanced to improve functional attributes.*

10. Fill Compliant with CAO. Appeal Issue No. 1 is not grounds for CABR II reversal. As identified in COL No. 5, the scope of remand review on fill impacts is limited to whether buffer impacts qualify as temporary. As determined in COL 7, the measure of impacts for the fill is limited to the fill located within the buffer . With these

parameters, the buffer impacts are found to qualify as temporary for the reasons identified in FOF No. 11.

Appeal A1 had been limited to assessment of buffer impacts in a September 24, 2024 summary judgement ruling because Examiner Marshall's Ex. F12 remand order had been interpreted as concluding that buffer fill was authorized if impacts were temporary. As outlined in COL 6, that interpretation has been modified to find that Examiner Marshall ruled she didn't have the authority to make that initial conclusion, i.e. that permanent fill is allowed in buffers if fully mitigated. Examiner Marshall's remand order, specifically MCOL 106, is more accurately interpreted as concluding that she intended County staff to address that legal issue on remand. In short, whether permanent fill can be allowed in wetland buffers, even if fully mitigated, is still an outstanding legal issue that can be addressed by the parties. Given this modification to the September 24, 2024 summary judgment ruling, the parties are free to seek reconsideration on Appeal Issue A1 on that basis. The parties may couple such a reconsideration request with a request to present relevant new evidence. The issue of new evidence will be addressed after all parties have had an opportunity to address its merits and how such evidence could most efficiently be presented.

Appeal Issue A2. *The County's approval of permanent fill material in critical area buffers violates DCD's stated interpretation of the critical areas code. DCD recently presented to the Kitsap County Board of Commissioners that an amendment to 19.300.315.A "Added language reflecting current practice that fill, yard-waste or other debris shall not be placed in buffers." (Code Update Matrix, Critical Areas Ordinance Update 2024). The proposed plan, buffer averaging, and RNOD are inconsistent with this policy statement to the Commissioners.*

11. Reconsideration Authorized. Appeal A2 had been dismissed in prehearing rulings because Examiner Marshall's Ex. F12 remand order had been interpreted as concluding that buffer fill was authorized if impacts were temporary. Reconsideration of that dismissal is authorized as outlined in COL 10.

Appeal Issue A3. *The placement of permanent fill within wetland and stream buffers is likely to result in adverse hydrological and hydrogeological impacts on these critical areas in violation of KCC 19.200.220.C.1.a(1) through (5), including increasing harmful surface discharges in some instances and times, and disrupting existing hydrology and hydrogeology supporting these critical areas by reducing surface and subsurface flow in other instances and times. The Applicant/County does not state or demonstrate that blocking the swale with compacted fill will meet the Code requirements to "provide as great or greater functions and values as would be provided under the standard buffer requirement" and that "will not adversely impact the wetland."*

The whole catchment area for wetland P2 was estimated at about 12 acres. About 70% is degraded buffer consisting of mowed grass on steep slopes. The remaining 30%, about 3.4 acres, is a well vegetated, forested, and functional buffer.

Under a standard 200' buffer, construction could impact about ½ acre or 16% of the buffer. Importantly, such construction would severely constrict, but not completely dam, the swale providing runoff to the P2/L2 wetlands within that swale.

With the new proposal for a 56% reduction to an 87' buffer, over 1 acre or 32% of the intact buffer is lost. Losing one-third of an intact buffer is a severe functional loss. But even worse, the swale is completely dammed by low permeability compacted fill and the supply of water via runoff from 70% of the catchment is interrupted. The first appeal demonstrated that adverse impacts to wetland P2 would occur.

The examiner ruled on Remand that stormwater impacts should be reconsidered with the SDAP. The County has now approved a stormwater design. Based on available documents, Appellants reasonably expect that the previously identified adverse impact of wetland erosion and dewatering continues to exist.

12. Fill Impacts Mitigated. Appeal Issue No. 3 is not grounds for CABR II reversal. As identified in FOF No. 11, the hydrological impacts of permanent fill within wetland buffers has been sufficiently mitigated as conditioned. The hydrological impacts of fill outside the buffer will be addressed during stormwater review and the current appeal thereof.

Appeal Issue A4: *The "temporary impact" concept used by the County to justify its approval of large quantities of permanent fill in critical area buffers is a fiction unsupported by the Kitsap County Code and any of the project Approvals or Decisions. The CABR Appeal Decision found that permanent fill was different from "ground disturbance activity, which constitutes a 'temporary impact.'"*

The County failed to require permanent fill be treated differently than a buffer disturbance or "temporary impact" (HED Conclusion ¶106). RNOD (p2) fails to quote the portion of ¶106 stating "The CABR Decision does not separate analysis of ground disturbance activity, which constitutes 'temporary impact,' from installation of fill in the buffers of several wetlands, at the north and south stream crossings, and at the utility corridor which substantial evidence indicates will remain in place permanently. Additional consideration and analysis of fill construction is required to determine compliance…" No such consideration or analysis is presented.

Rather, the County apparently relied on Attorney Liaw's letter to Heacock (Exhibit 7) that improperly overturned and effectively ignored the Examiner's Conclusion ¶106. Liaw

argued that "grading" included "filling" (per definition 19.150.380), hence the Examiner's separation of grading and permanent fill was incorrect, and therefore permanent fill was included in "grading and ground disturbing activities." The RNOD errs in relying on this logic in two ways. First, Exhibit 7 overlooked the clear intent of the Examiner's statement, which is that permanent fill is not a temporary impact. Second, interpretation of the word "grading" is tricky because of the common meaning of 'leveling or smoothing a surface.' Even the Code itself is confusing and does not follow a strict definition of grading, but also uses the term in the more common sense. Examples are "grading, filling, or other development activities" (19.200.220.C.1.a.(6)iv) and "fill or grading" (19.400.415.N.2).

The Applicant/County are required to follow the Examiner decision per KCC 21.04.090D.

13. Reconsideration Authorized. As with Appeal A2, Appeal A4 had been dismissed in prehearing rulings because Examiner Marshall's Ex. F12 remand order had been interpreted as concluding that buffer fill was authorized if impacts were temporary. As outlined in COL 6, that interpretation has been modified to find that Examiner Marshall ruled she didn't have the authority to make that initial determination and part of her remand was intended to give County staff the opportunity to address that issue. Given this modification to the prehearing motion, the Appellants are free to seek reconsideration on Appeal Issue A4 and present new evidence as relevant to the issue.

Appeal Issue A5. *For the purpose of buffer averaging, the so-called "temporary impacts" are destructive to buffers and are, in fact, buffer "takes." Buffer averaging fails to include "takes" at stream crossings of Crabapple and Kingfisher Creeks and "take" areas of permanent fill.*

14. Fill Impacts Mitigated. Appeal A5 is not grounds for CABR II reversal. As identified in FOF No. 11, the hydrological impacts of permanent fill within wetland buffers has been sufficiently mitigated as conditioned. The hydrological impacts of fill outside the buffer will be addressed during stormwater review and the current appeal thereof. As noted in prehearing rulings, Appeal Issue A5 is limited to consideration of wetland buffers.

Appeal Issue No. 6: *The RNOD (p26) states that (1) so-called "temporary disturbances" caused by the placement of permanent fill material in critical area buffers will be restored, (2) temporary disturbance will be mitigated per KCC 19.200.250.A, (3) restoration will be monitored and maintained, and (4) permeability of fill will mimic existing soil conditions. DCD errs on all these points.*

Regarding (1), (2), and (4), testimony during the first appeal conclusively established that the proposed clearing of all vegetation, removal of the upper soil horizon and biota, and

placement of mechanically compacted fill would permanently destroy the hydrologic and hydrogeologic conditions that created and sustain the in-swale wetland complex of P2/L2. The Hearing Examiner ruled that permanent fill was not a temporary disturbance. An important point here is that the proposed placement of fill permanently disrupts the existing hydrologic and hydrogeologic conditions. Replanting of mechanically compacted, hence low permeability, soil is not a mitigation for lost hydrologic and hydrogeologic functions. Regarding (2), reliance on 19.200.250.A.3.a fails because only a vegetative function is considered. Functional attributes of buffers are not adequately identified and addressed. Appellants provided expert testimony that the proposed adverse impacts to the site's hydrology and hydrogeology functions would compromise the wetlands and threaten their permanent loss.

Regarding (3), the existing soils have taken hundreds of years to form. The sub-surface pathways for water flow have also been developing for long periods of time due to bioturbation (e.g. roots and burrows), weathering processes, and establishment of micro and macro preferential pathways in the sub-surface soils. The proposed 5-year monitoring period can establish plantings, but does not begin to represent the time required to develop the soils, soil structures, and biologic communities that created and sustain the present wetlands.

Regarding (4), the Terra report (Exhibit 9) does not support the claim that mechanically compacted soil will mimic existing conditions. First, the upper soils with their fungal, bacterial, and ecologic communities are completely removed. As noted, these soils and associated biota took hundreds of years to form. The proposed steeper, smoother, and less permeable surface will accelerate runoff and inhibit treatment for water quality. Second, the in-situ soils have settled naturally and have never been mechanically compacted. Although having a significant silt content, the in-situ soils have developed and support effective movement of water to sustain the wetlands. Mechanical compaction, performed at optimum moisture content, will densify the soils compared to in-situ conditions. The relatively high silt content will help bind the soil and increase shear strength and load bearing capacity. However, compaction will increase density, reduce pore volume, and lower permeability. Compared to existing conditions, the wetlands will see greater runoff flows, more rapid runoff, less infiltration, and less water storage.
Regarding (4), DCD also errs in drawing an inference (restoring natural conditions) from a limited claim (mimicking soil permeability) in the supplemental Terra report that is both incorrect and unsupported by analysis. The report could have easily stated a conclusion of restoration, but did not do so. DCD errs twice. Firstly by relying on an expert report without actual analysis, and secondly by drawing an inference that the report does not make

15. Fill Impacts Mitigated. Appeal A6 is not grounds for CABR II reversal. As identified in FOF No. 11, the impacts of permanent fill within wetland buffers has been

sufficiently mitigated as conditioned. It is recognized that some of the characteristics of wetland buffers might be permanently altered. However, for impacts to buffer functions the issue is whether their functions in protecting wetlands has been permanently impaired. As determined in FOF No. 11, substantial evidence establishes that the conditions imposed upon placement of fill within wetland buffers have been found sufficient to restore wetland buffer functions.

Appeal Issue No. 7: *The supplemental Terra report (Exhibit 9) claims that compacted soils will mimic existing permeabilities (hydraulic conductivity). However, the report is hand-waving without analysis. There are no estimates or comparisons of existing, in-situ permeabilities with compacted permeabilities. There is no discussion of the lower in-situ density compared to a load-bearing 90% Standard Proctor density. There is no discussion that naturally settled soils (non-glacial overridden) will be more permeable than mechanically compacted soils. There is no consideration of the long-term natural weathering and bioturbation processes creating pathways for the absorption, movement, and infiltration of water through the in-situ soils. There is no acknowledgement that in-situ soils have developed effective preferential pathways, at different scales, for the movement and storage of water that manifestly sustain the observed wetlands.*

Re-creating natural systems is challenging at best and is the reason why mitigation multipliers are in the Code. The existence of the in-swale wetlands is precisely due to the unique topographic and soil conditions at the site. The simple claim that compaction will result in similar permeability is incorrect and, also, insufficient to support the Applicant's implication that existing conditions will be re-created. DCD expressly drew that inference (RNOD p26) in repeating that "fill will mimic hydraulic conductivity [permeability] of the existing onsite soils within the buffer to allow for a consistent hydrogeologic condition from existing conditions to the post-construction condition." In actuality, the hydrology and hydrogeology will change greatly. Excavation and compaction will speed runoff, lower soil permeability, reduce absorption, and block infiltration of water and thus threaten the wetlands.

RNOD staff comment (p24) cites a 90% Modified Proctor compaction specification per ASTM -1557, whereas the Terra report specifies a 90% Standard Proctor and ASTM D-968. This inconsistency is significant and requires correction.

Finally, during the first Appeal, Appellant explained how precipitation supplied the wetlands. The Appellants' analysis was accepted by the Examiner as "more credible," whereas the Applicant's theory was judged to be "not credible and illogical" (HED Findings ¶459 & ¶460, respectively). The current Examiner should consider the Findings of the previous Examiner in this matter when judging the value of the supplemental Terra report.

16. Fill Impacts Mitigated. Appeal A7 is not grounds for CABR II reversal. As identified in FOF No. 11, the impacts of permanent fill within wetland buffers has been sufficiently mitigated as conditioned. The impacts of compaction have been assessed and found to be adequately addressed under the Applicant's methodology coupled with a requirement for additional testing both before and after installation of the fill. If compaction and/or fill depth impact filtration rates more than anticipated, post-installation testing will compel additional measures to be taken to remedy the lack of performance.

Appeal Issue A8: *The Applicant's supplemental wetland report by ELS (RNOD p17, Exhibit 11) errs in making statements such as "Soils within the temporarily impacted buffers will be restored to match preconstruction soil conditions per Terra specifications" or "Terra Associates' recommendations will reestablish, rehabilitate, and restore any temporary loss of buffer function as a result of the fill." The supplemental wetland report also errs in attributing those statements to the supplemental Fill Specification Memo by Terra (Exhibit 9). First, Exhibit 11 errs in attributing the conclusory statements to the Terra report. That report (Exhibit 9) never claimed that fill would restore buffer functions. The Terra report only stated, in our opinion incorrectly and for reasons given elsewhere, that the fill specification could be used "while mimicking the general hydraulic conductivity [permeability] of the wetland buffer soils" and "mimic hydraulic conductivity…to allow for consistent hydrogeologic condition…" Second, the conclusory statements are outside the area of expertise for a wetland specialist. Third, the RNOD (e.g. p17 etc.) errs in relying on those conclusory statements and accepting them as expert opinion.*

Moreover, the RNOD (p27) and supplemental wetland report (Exhibit 11, p19) state "The vegetation component of the buffer function will be rectified through the spread of topsoil and mulch over the fill and installation of native plants that will provide the necessary roughness for rectifying the buffer functions." This statement expresses an incorrect attitude, expressed in both Applicant reports and DCD testimony, that replanting replaces or restores all buffer functions. Buffers have multi-functional attributes. The Applicant/County fail to identify the different buffer functions. The reliance on a bit of topsoil and a few plants does not recognize the great values in an existing functioning ecosystem.

Wood chips and a few inches of soil placed on high-silt compacted fill (low permeability) are inadequate to replace the deep soil structures supporting a complex fungal, bacterial, plant, invertebrate, and burrowing animal ecological system created over decades. The hydrologic functions of slowing, detaining, and absorbing runoff are not duplicated with a thin veneer of soil. The possibility of infiltration is blocked by compacted fill. Removal of toxins and nutrients from runoff and stormwater will be reduced.

The proposal would remove soils that took hundreds of years to produce, replace with compacted fill, and cover with a few inches of soil and undecomposed wood. Even with planting and 5-years of growth, it will be many decades for the ecological communities to be re-established. The pre-existing soils and soil structures with preferential pathways for water movement and storage will never be replaced. In short, the re-planting proposal does not rectify buffer functions.

17. Fill Impacts Mitigated**.** Appeal A8 is not grounds for CABR II reversal. As identified in FOF No. 11, the impacts of permanent fill within wetland buffers has been sufficiently mitigated as conditioned. It is recognized that some of the characteristics of wetland buffers might be permanently altered. However, for impacts to buffer functions the issue is whether their functions in protecting wetlands has been permanently impaired. As determined in FOF No. 11, substantial evidence establishes that the conditions imposed upon placement of fill within wetland buffers have been found sufficient to maintain wetland buffer functions. Further, all pertinent functions of wetland buffer impacts are addressed in FOF No. 11 and have been assessed by persons with pertinent expertise to render opinions on buffer impacts.

Appeal Issue 9. *Kitsap County failed to require a 100' buffer, undisturbed by permanent fill, for wetland P2 (HED Conclusions ¶50 and ¶106). The permanent fill inside the P2 buffer reduces the buffer width to about 87', which is less than the minimum required 100' buffer. The proposed buffer reduction is about 56%, which is greater than the maximum reduction of 50% potentially allowable by the code. Therefore, a Type III process and public hearing is required.*

18. Reconsideration Authorized. As with Appeal A2 and Appeal 4, Appeal A9 had been dismissed in prehearing rulings because Examiner Marshall's Ex. F12 remand order had been interpreted as concluding that buffer fill was authorized if impacts were temporary. Appeal Issue 9 is construed as taking the position that permanent fill is not allowed in wetland buffers as a temporary impact. As outlined in COL 6, that interpretation has been modified to find that Examiner Marshall ruled she didn't have the authority to make that initial determination and part of her remand was intended to give County staff the opportunity to address that issue. Given this modification to the prehearing motion, the Appellants are free to seek reconsideration on Appeal Issue A9 and present new evidence as relevant to the issue.

Appeal Issue B1: *The Arborwood project proposes to place permanent fill and other impervious surfaces within 15 feet of critical area buffers, in violation of KCC 19.200.220.F. The Arborwood project also proposes to engage in construction activities within 15 feet of the critical area buffers in violation of Condition 8 to the County's 2009 Preliminary Plat Approval. These actions are likely to have deleterious impacts on the*

critical areas and buffers, including on the hydrology and hydrogeology supporting those critical areas.

19. Pervious Fill Authorized in Setback. Appeal B1 is not grounds for CABR II reversal. The proposed fill is authorized in wetland buffers for the reasons identified in COL 6. The "construction setback" referenced in Condition No. 8 is construed the same as the "building" setback imposed by 19.200.220.F and the two requirements are construed as synonymous. There is no reason apparent from the record why the Examiner imposing Condition No. 8 would have required greater setback restrictions than that imposed by KCC 19.200.220.F and there is also no apparent difference in the meaning of the "building" and "construction" terms as applied to setback requirements.

Appeal Issue B2: *It appears from the RNOD that the Applicant and County intend to justify their violation of these provisions on the theory that permanent fill is not an "impervious surface," and therefore not prohibited by these provisions. However, even if these provisions were limited to precluding impervious surfaces within 15 feet of a critical area buffer, "packed earthen materials," such as mechanically compacted fill, are impervious surfaces per KCC 12.08.010 definition #36.*

20. Pervious Fill Authorized in Setback**.** Appeal B2 is not grounds for CABR II reversal for the reasons identified in COL 6.

Appeal Issue C1. *The Arborwood project proposes either to directly discharge untreated stormwater to the critical areas described above, or to choke off the flow of surface and subsurface water to those critical areas (or both). In one or both of these ways, the Arborwood project is likely to result in substantial adverse impacts in violation of the Kitsap County Code.*

21. Water Quality Deferred to Stormwater Review. Appeal C1 is not grounds for CABR II reversal. Water quality review is appropriately deferred to stormwater review as identified in COL 9.

Appeal Issue D1: *RNOD staff comment (p28) errs in stating that "…crossings meet the road construction criteria of 19.200.225 D." KCC 19.200.225.D.1 requires that "No other reasonable or practicable alternative exists…."*

First, the same claim was made for the prior swale crossing design by Spine Road A. And now, we see that destruction of intact functioning buffer in the P2 catchment has been easily reduced by the second design submittal.

Second, we have pointed out that further design changes can reduce buffer impacts even more. Indeed, it is obvious that a supported roadway or other creative option could more significantly reduce disturbance to the intact buffer.

Third, designs proposed to date do not address the identified hydrologic and hydrogeologic impacts of damming the swale. The increase in flow rates, the concentration of flow spatially and temporally, the disruption of the natural hydrologic cycle, loss of natural water treatment, blockage of infiltration, and related factors are harmful and destructive to the downgradient wetlands.

Fourth, the Applicant agreed to abide by the Code and it is the Applicant's responsibility to provide a design that complies with the Code. The Applicant may desire a least expensive design, but the question before the Examiner is whether alternative options are "reasonable or practical." We have submitted that realistic and practical alternatives exist, and furthermore note that at no time has the Applicant argued otherwise.

To the extent that the County found KCC 19.200.225.D satisfied with respect to the Spine Road adjacent to Wetland P2, there is no evidence that KCC 19.200.225.D.1 & D.3 are met.

22. Outside Scope of Remand. The appeal issue above is based upon a comment in p. 28 of CABR II that bridge crossings are authorized by KCC 19.200.225.D. As ruled in the September 24, 2024 prehearing summary judgment of this case, only the non-fixed portions of Spine Road are subject to remand review under KCC 19.200.225.D. As determined in FOF No. 5, the bridge crossings are not part of the non-fixed portions of Spine Road.

Appeal Issue D2: *In turn, Kitsap County errs by omission in stating "staff has also analyzed the associated bridge crossings related to wetland buffers and also find the crossings meet the road construction criteria of KCC 19.200.225.D." The County fails to note that 19.200.225 are additional requirements. The introduction to 19.200.225, entitled "Additional development standards for regulated uses," states "In addition to meeting the development standards of this chapter, regulated uses identified below shall also comply with the standards of this section and other applicable state, federal and local ordinances." Sub-section D, "Road/Street Repair and Construction" lists four development standards singularly applicable to roads. However, the title and introduction to 19.200.225 clearly state that regulated uses, e.g. 19.200.225.D, are subordinate to and not exempt from other development standards in Chapter 19.200, e.g. buffer averaging. This understanding is bolstered by the 2009 Preliminary Plat Approval which relied on the 2007 Raedeke report, which identified both stream crossing "takes" and all areas of*

permanent fill as areas included in the buffer averaging scheme. In addition, DCD CAO Update staff emphasized that buffer averaging is always the first mitigation to be applied (K. Barnhart response to a question on 19.200.220.C, CAO Update Matrix 2024, at Kingston CAC April meeting). Finally, the Applicant agreed to the 2010 Development Agreement §4 entitling the Applicant "to use buffer averaging and modifications to the extent allowed in the County Code." In other words, the Applicant agreed to follow the Code. The Applicant and County failed to properly evaluate buffer averaging as required by the Remand instructions.

23. KCC 19.200.225.D Not Subject to Buffer Averaging. As determined in COL No. 4, roads are authorized in buffers if they meet the KCC 19.200.225.D criteria. They do not need to concurrently meet buffer averaging standards. The KCC 19.200.225.D analysis arguably exceeds the scope of remand because MCOL 106 limited remand review of the bridge crossings to wetland buffer averaging standards. However, Appeal Issue D2 does not serve as grounds for reversal of CABR II because the bridge crossings were found as additional "also" grounds for approval of the road. The CABR II decision also found that the bridge crossings were consistent with wetland buffer averaging standards. Further, the KCC 19.200.225.D review only "arguably" exceeded the scope of remand. Remand of the bridge crossings in MCOL 106 is limited to "*whether calculations for buffer averaging continue to meet KCC 19.200.220.C.1.a(1) through (5).*" Finding that bridge crossings comply with KCC 19.200.225.D arguably establishes compliance with buffer averaging calculations by showing that the buffer doesn't need to be reduced for the bridge crossings.

Appeal Issue E1. *RNOD staff err in stating that "…mitigation analysis meets the requirements in 19.700, 19.700.710, and 19.700.715…"*

19.700.710, including but not limited to C(5), C(6), G, and H, require Wetland Delineation Reports to analyze hydrologic and hydrogeologic impacts. Those impacts are not even mentioned in prior reports and only minimally in the supplemental report ("necessary roughness" p19), despite the clear threats to wetland P2 identified during the first appeal.

19.700.715, including but not limited to A(6), C(5), C(9), C(10), E, F, G and H, require that Wetland Mitigation Reports include analysis of site hydrology and hydrogeology, surface and sub-surface flows, geomorphology, water regime, erosion, etc. The required analyses are not even mentioned, let alone performed.

The ability to meet the requirements of 19.700.710 & .715 are complicated because (1) a wetland specialist generally does not have expertise in hydrology and hydrogeology and (2) the reports provide no relevant expert analysis.

24. Water Quality Deferred to Stormwater Review. Appeal E1 is not grounds for CABR II reversal. Water quality review is appropriately deferred to stormwater review as identified in COL 9. The failure of an applicant to provide required information is not grounds for finding noncompliance with the review criteria for approval of a permit. The criteria for approval of proposed buffer averaging are KCC 19.200.220.C.1.a(1) through (5). The buffer averaging review criteria don't require any specific information[11]. The failure to conform to required wetland report content is probative of whether an Applicant has provided substantial evidence necessary to establish conformance to review criteria. However, as determined in COL No. 9, hydrologic review is appropriately deferred to stormwater review due to the overlap in review criteria between CABR and stormwater review. The failure of Ms. Bartlett to address hydrology in her reports is also consistent with historical practice. As identified in the appeal issue E1 and as testified by Ms. Bartlett, wetland reports don't typically include a hydrological analysis because wetland biologists don't have expertise in hydrology.

Appeal Issue F1. *KCC 19.200.220.C.1.a & .C.1.a(3) require that two conditions for buffer averaging be met: subsection C.1.a to "provide as great or greater functions and values as would be provided under the standard buffer requirement" and subsection C.1.a(3) that "averaging will not adversely impact the wetland." Buffer averaging is essentially a 1:1 mitigation of "takes" with "gives." This mitigation only works if "gives" and "takes" are functionally equivalent. Hence, the inclusion of the two conditions cited in 19.200.220.C.1 above. In this project, the buffer "take" in the swale providing water to wetland L2/P2 has been identified as causing adverse impacts to those wetlands, including erosion and dewatering, without a corresponding functionally equivalent "give". Likewise, buffer "gives" on the west side of Crabapple Creek are not equivalent to and cannot replace the hydrologic and hydrogeologic benefits destroyed by the buffer "take" above wetlands L2/2. Applicant/County fail to properly perform buffer averaging.*

25. Water Quality Deferred to Stormwater Review. Appeal F1 is not grounds for CABR II reversal. The Appellants may well be correct that the "gives" and "takes" of the proposed buffer averaging are not equivalent. However, any adverse impacts caused by that inequality are fully mitigated. The primary adverse impact identified by the Appellants resulting from the proposed buffer reduction is impairment of wetland hydrology caused by the reduced buffer width between Wetland P2 and Spine Road. As determined in FOF 13, stormwater review is anticipated to fully mitigate against those hydrological impacts. As further determined in FOF 13, all other buffer impacts are mitigated by the added buffering required by buffer averaging. Consequently, the

[11] County staff have the authority to enforce application requirements by refusing to process applications that fail to provide required information. Beyond that, denial of an application that meets all permitting criteria for failing to meet application requirements is not an authorized enforcement mechanism.

proposed buffer reduction is not found to impair buffer functions or to adversely affect Wetland P2 as required by KCC 19.200.220.C.1.a & .C.1.a(3).

The adverse impacts caused by the relocation of Spine Road don't appear to have any legal relevance to the CABR request to Wetland L2. The L2 buffer doesn't appear to be subject to the buffer reduction request to accommodate Spine Road. To the extent that the L2 buffer is subject to that request, the buffer reduction conforms to KCC 19.200.220.C.1.a & .C.1.a(3) for the same reasons it does for Wetland P2.

Appeal Issue G1: *The stream crossings have both wetlands and streams and therefore require compliance with both chapter 19.200 and chapter 19.300. Omitting the stream crossings from the buffer averaging calculations is impermissible. We also note the stream crossings were considered as part of buffer averaging in the 2009 Preliminary Plat Decision and that decision should be honored as required by KCC 21.04.090.D.*

26. Beyond Remand Scope. Appeal G1 was dismissed in the September 9, 2024 prehearing summary judgment ruling of this case as beyond the scope of remand.

Appeal Issue G2: *A utility corridor, for either buried or above ground lines, should be considered a permanent buffer "take" due to the possible, indeed likely, future destruction of the proposed restoration for maintenance, improvement, or expansion needs. The RNOD errs by not requiring the corridor to be identified as a buffer "take."*

27. Limited to Fill Impacts. Appeal G2 is not grounds for CABR II reversal. Appeal G2 was limited in the September 9, 2024 prehearing summary judgment ruling to impacts of permanent fill introduced into the utility corridor. As determined in FOF 10, the fill proposed by the Applicant will not impair wetland buffer functions and thus conforms to KCC 19.200.220.C.1.a & .C.1.a(3). Utility maintenance and repair is also exempt from Title 19 per KCC 19.100.120E. As identified in COL 10, the parties may request reconsideration on the issue of whether permanent fill is allowed in the utility corridor even if fully mitigated.

Appeal Issue H1. *The RNOD presents plan revisions. These drawings are cartoons that lack details and land contours of an engineering drawing. The lack of information prevents Appellant and the public from understanding what is actually being proposed. It is highly probable that the revisions were prepared from engineering drawings. Appellants request that the Examiner order the Applicant/County to provide those drawings and related reports.*

28. Dismissed by Prehearing Ruling. Appeal H1 was dismissed by the September 24, 2024 summary judgment ruling.

Appeal Issue H2: *The 2023 NOD and 2024 RNOD continue to incorrectly state that a Type I process is "administrative," whereas Type I is "a ministerial" process per KCC 21.04. A ministerial process does not allow discretionary actions and must follow the letter of the Code. The County has improperly made discretionary decisions and exceeded its statutory authority by accepting "temporary impacts" in buffers; allowing clearing, excavation, and fill in buffers; potentially using 19.200.225.D to claim that roads are not subject to buffer averaging; and allowing impervious fill in setbacks. The plain language and intent of the Code must be followed.*

29. Dismissed by Prehearing Ruling. Appeal H2 was dismissed by the September 24, 2024 summary judgment ruling.

DECISION

The CABR II is sustained with the added conditions below for the reasons identified in the Conclusions of Law above:

1. The Applicant's soil assessment, Ex. 15 and 16, must be verified via lab tested soil samples prior to installation of fill. Once construction of Spine Road and associated fill is completed, the Applicant shall test whether the wetland and stream buffer fill mimics existing soil permeability as anticipated and implement engineered solutions as necessary to remedy any shortcomings. The performance standard for both pre and post installation of fill shall be that soils shall mimic the infiltration rates of the buffer soils replaced by each area of fill. All mitigation measures and testing of the road fill shall be completed prior to opening of the road. County staff may delay post-installation testing past the road opening to the extent that testing methodology does not reasonably enable the testing to be completed prior to the road opening. The mitigation measures proposed by the Applicant and imposed by the CABR II decision and this decision shall also apply to the fill proposed within wetland setbacks.

2. Sufficient topsoil from removed buffer soils shall be retained to be reintroduced as a 12-18 inch layer on top of the proposed wetland buffer fill.

3. The proposed buffer fill shall be scarified to prevent replanting mortality.

4. Logs shall be installed perpendicular to buffer fill slopes to the extent necessary to maintain preexisting water velocities.

5. The Applicant has elected to not commit itself to any specific stormwater control design to mitigate Spine Road impacts at this stage of development review. This choice has not made it possible to fully evaluate and mitigate potential hydrological impacts to affected wetlands and streams. It is recognized that there is an overlap in review criteria for wetland and stream protection in critical area and stormwater review. Specifically, KCC 12.20.110(2) requires protection of wetland hydrology and other stormwater standards impose stringent water quality standards that protect both wetlands and streams. Given these considerations, critical areas ordinance hydrology and water quality impact assessment and mitigation is deferred to stormwater review. The stormwater hydrology maintenance and water quality standards shall be construed in a manner that encompasses the hydrology maintenance and water quality standards of the County's critical areas ordinance. Given this deferral, Applicant assumes the risk that the design approved by this CABR decision is subject to change as necessary to meet the requirements of the deferred critical areas review.

ORDERED this 13th day of January 2025.

Phil Olbrechts

Kitsap County Hearing Examiner

Appeal Right

Pursuant to KCC 21.04.290D, appeals of hearing examiner decisions on Type I appeals are the final land use decision of Kitsap County. Appeal of this decision must be made to superior court as governed by the Land Use Petition Act, Chapter 36.70C RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.