



## Notice of Hearing Examiner Decision

12/08/2022

To: Interested Parties and Parties of Record

RE: Project Name: Apple Tree Point Highlands Phase 3  
Applicant: Apple Tree Point Highlands LLC  
Attn: David Fortune  
1215 S Ogden St  
Denver, CO 80210  
Application Type: Shoreline Substantial Development Permit (SSDP)  
Permit Number: 19-02164

The Kitsap County Hearing Examiner has **APPROVED** the land use application for **Permit #19-02164 Apple Tree Point Highlands Phase 3 Shoreline Substantial Development Permit (SSDP)**, 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://kitsapgov.com/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](mailto:help@kitsap1.com) or (360) 337-5777.

CC: Applicant/Owner: Apple Tree Point Highlands LLC Attn: David Fortune, [david8fortune@gmail.com](mailto:david8fortune@gmail.com)  
Authorized Agents: Ian Faulds with LDC INC, [ifaulds@ldccorp.com](mailto:ifaulds@ldccorp.com); Ross Adachi, [radachi@kdcla.com](mailto:radachi@kdcla.com) Ray Liaw, [hrl@vnf.com](mailto:hrl@vnf.com)  
Biologist: Ed Sewell, PO Box 880 Fall City, WA 98024  
Engineer: Mark Villwock, [mvillwock@ldccorp.com](mailto:mvillwock@ldccorp.com)

Health District  
Public Works  
Parks  
Navy  
DSE  
Fire Marshal  
Kitsap Transit  
North Kitsap Fire District  
North Kitsap School District  
Puget Sound Energy  
Water Purveyor  
Point No Point Treaty Council  
Suquamish Tribe  
Port Gamble S'Klallam Tribe  
Squaxin Island Tribe  
Puyallup Tribe  
WA Dept of Fish & Wildlife  
WA State Dept of Ecology  
WA State Dept of Ecology-Wetland Review  
WA State Dept of Ecology-Shoreline Review  
Interested Parties: Dave Bricklin, [bricklin@bnd-law.com](mailto:bricklin@bnd-law.com); Audrey Clungeon, [clungeon@bnd-law.com](mailto:clungeon@bnd-law.com); Yangin Hulten, [oceantanya@gmail.com](mailto:oceantanya@gmail.com); Melissa A. Fleming, Ph.D., [melissa@stillwatersenvironmentalcenter.org](mailto:melissa@stillwatersenvironmentalcenter.org); Jenn Stebbings, [jlstebbing@gmail.com](mailto:jlstebbing@gmail.com); Ruthanne Gustafson, [rsgust@outlook.com](mailto:rsgust@outlook.com); Stephen King, [sking.chat@gmail.com](mailto:sking.chat@gmail.com); Dean Tarbill, [jdeantarbill@gmail.com](mailto:jdeantarbill@gmail.com); Catherine Tarbill, [cgtarbill@gmail.com](mailto:cgtarbill@gmail.com); John S. & Kerry L Barlow, 12102 NE APPLE TREE POINT LN KINGSTON, WA 98346

**BEFORE THE HEARING EXAMINER  
FOR KITSAP COUNTY**

In the Matter of the Application of	)	No. 19-02164
	)	
<b>David Fortune, on behalf of</b>	)	<b>Apple Tree Point Highlands</b>
<b>Apple Tree Point, LLC</b>	)	<b>Phase 3 SSDP</b>
	)	
	)	
<u>For a Shoreline Substantial Development Permit</u>	)	FINDINGS, CONCLUSIONS, AND DECISION

**SUMMARY OF DECISION**

The request for a shoreline substantial development permit to allow development of a stormwater system—consisting of a detention pond that would collect and treat stormwater associated with residential lots being developed within Phase 3 of the Apple Tree Point subdivision, part of a larger project being developed on a marine bluff above Puget Sound; 2,400 linear feet of stormwater piping that would convey the treated stormwater down the bluff; and a flow splitter that would distribute some water to an area wetland to provide hydrologic recharge and the rest to a below-ground infiltration gallery at the base of the marine bluff, adjacent to Puget Sound—located at 12020 NE Apple Tree Point Lane in the Kingston area of unincorporated Kitsap County, is **APPROVED**. Conditions are necessary to address specific impacts of the proposal.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on October 27, 2022, utilizing a hybrid approach allowing for live participation or participation by remote access technology. The record was left open until November 3, 2022, to allow for the submission of additional comments and materials on the proposal.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Steve Heacock, County Senior Environmental Planner  
Jeff Smith, County Senior Land Use and Environmental Planner  
Mark Villwock, Project Civil Engineer  
Sara Frey  
Catherine Tarbill

Attorney Ray Liaw represented the Applicant at the open record hearing.

*Findings, Conclusions, and Decision  
Kitsap County Hearing Examiner  
Apple Tree Point Highlands Phase 3 SSDP  
No. 19-02164*

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated October 20, 2022
2. Shoreline Permit Application, received June 17, 2019, with Site Photographs
3. Project Narrative, LDC, Inc., dated May 14, 2019
4. Site Plan, dated January 22, 2019
5. SEPA Environmental Checklist, undated
6. Joint Aquatic Resources Permit Application, dated May 14, 2019
7. Hydraulic Project Approval Submittal Receipt, undated
8. Submittal Waiver, dated May 13, 2019
9. Information Request, dated October 10, 2019
10. Geotechnical Report, Myers Biodynamics, Inc., dated December 11, 2003
11. Revised Critical Areas Report, Sewall Wetland Consulting, Inc., dated December 3, 2019
12. Incomplete HPA Application Letter from Washington State Department of Fish and Wildlife, dated June 26, 2019
13. Information Request Response, dated December 30, 2019
14. Geotechnical Engineering Study, Earth Solutions NW, LLC, revised December 11, 2019
15. Hydrogeologic Report, LDC, Inc., dated December 6, 2019
16. Second Information Request, dated August 26, 2020
17. Email Thread between Tom Abbott, LDC, Inc., and Army Corp of Engineers, dated September 3, 2019, to November 12, 2020
18. Second Information Request Response, dated November 20, 2020
19. Revised Project Narrative, dated November 11, 2020
20. U.S. Army Corp of Engineers Special Notice, dated February 21, 2020
21. Notice of Application, dated September 2, 2021
22. Third Information Request, dated September 3, 2021
23. Stormwater Summary Memorandum, LDC, Inc., dated June 15, 2021
24. Overview of Alternatives Memorandum, LDC, Inc., dated October 8, 2021
25. Revised Construction Plans, dated October 21, 2021
26. Full Drainage Report, LDC, Inc., revised October 2021
27. Third Information Request Response, dated November 10, 2021
28. FEMA Habitat Technical Memorandum, Soundview Consultants, LLC, November 3, 2021
29. Shoreline and Fish and Wildlife Habitat Assessment and Habitat Management Plan, Soundview Consultants, LDC, Inc., dated November 4, 2021
30. Public Comments:
  - a. Comment from John and Kerry Barlow, dated April 8, 2021
  - b. Comment from Jenn Stebbings, dated October 1, 2021
  - c. Comment from Jenn Stebbings and Ruthanne Gustafson, dated September 27, 2021
  - d. Comment from Catherine Tarbill, dated October 1, 2021
  - e. Comment from Catherine Tarbill, dated September 30, 2021

- f. Comment from Catherine Tarbill, dated September 10, 2021
  - g. Comment from the Suquamish Tribe, dated October 8, 2021
  - h. Comment from John Barlow, Mark Novack, and John Salinas, Apple Tree Point Lane Road Maintenance Committee, dated November 25, 2021
  - i. Comment from Melissa A. Fleming, dated January 10, 2022
31. SEPA Determination of Nonsignificance, dated July 29, 2022
  32. Notice of Public Hearing, dated October 12, 2022
  33. Notice of Administrative Decision – Apple Tree Point Highlands Phase 3 Minor Amendment to Preliminary plat (Permit No. 20-05800), dated October 17, 2022, with Administrative Staff Report, dated October 11, 2022
  34. Stormwater Conditions Memorandum, LDC, Inc., dated October 18, 2022
  35. Constructions Plans, dated October 17, 2022
  36. Revised Drainage Report, revised July 28, 2022
  37. Stormwater Summary, LDC, Inc., dated July 28, 2022
  38. Certification of Public Notice, dated October 20, 2022
  39. Staff Presentation
  40. Public Hearing Sign-in
  41. Public Comments:
    - a. Comment from Ruthanne Gustafson, dated October 2, 2021
    - b. Comment from Ruthanne Gustafson, dated October 24, 2022
    - c. Comment from Catherine Tarbill, dated October 25, 2022
    - d. Comment from Dean Tarbill, dated October 26, 2022
    - e. Comment from Mark Vigna, dated October 26, 2022
    - f. Comment from Catherina Tarbill, dated November 3, 2022
    - g. Comment from Ruthanne Gustafson, dated November 7, 2022
  42. Applicant Annotated Staff Report, received October 27, 2022
  43. Revised Conditions as Agreed Upon by the Applicant and Department of Community Development, dated November 8, 2022
  44. Public Hearing “Chat” Comments, dated October 27, 2022

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

## **FINDINGS**

### Background

1. Over 26 years ago, Apple Tree Point, LLC (Applicant) requested approval of a preliminary plat/planned unit development (PUD) to create a 106-lot subdivision on 123 acres. The former Kitsap County Hearing Examiner approved the proposal for 73 lots (as opposed to the 106 requested) on October 31, 1995. The Kitsap County Board of Commissioners then granted preliminary approval for the 106-lot proposal on January 22,

1996, as initially requested.<sup>1</sup> Although the original application for the proposal did not seek approval to develop the project in phases (let alone to do so over nearly three decades), Kitsap County (County) staff later determined it would be appropriate to allow the Applicant to pursue a “three-phased” development approach for the project. Accordingly, Phase 1A was completed in 2008 and Phase 1B was completed in 2018, totaling 41 lots. Phase 2 will consist of 24 lots but has been paused in the permitting process. Completion of Phase 3 would only be possible with approval of the subject stormwater system and is discussed in further detail throughout this decision. *Exhibit 1, Staff Report, pages 2 and 3; Exhibit 33.*

#### Application

2. David Fortune, on behalf of Apple Tree Point, LLC, requests a shoreline substantial development permit (SSDP) to allow for the development of a stormwater system ancillary to a minor plat amendment for Phase 3 of the Apple Tree Point proposal.<sup>2</sup> Phase 3 of the Apple Tree Point proposal would include creation of residential lots on 30.82 acres of a 73.78-acre parcel, with associated improvements, including paving of an existing gravel surface, and installation of a pedestrian walkway and utilities.<sup>3</sup> A minor plat amendment (No. 20-05800) recently receiving administrative approval reduces the number of proposed residential lots in Phase 3 from 44 to 42, reconfigures the plat to preserve open space and native vegetation while providing usable lands for lots with septic systems, and renumbers the lots with an amended lot layout.<sup>4</sup> The remaining 42.96 acres of property would remain undisturbed through the construction of Phase 3. *Exhibit 1, Staff Report, pages 1 through 5, and 7; Exhibits 2 through 4; Exhibit 10; Exhibit 11;*

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<sup>1</sup> The Association of Rural Residents appealed the Commissioners’ approval to King County Superior Court, who affirmed the decision by the Commissioners. The Association then appealed the decision by King County Superior Court. In 1999, the Court of Appeals affirmed in part and reversed in part the decision by King County Superior Court. The court reversed in part on issues relating to the urban growth area designation and vesting of the planned unit development. On appeal, the Washington State Supreme Court remanded the case back to King County Superior Court for reconsideration of the court’s ruling on the SEPA threshold determination. Specifically, there were concerns of probable significant adverse impacts on the environment with respect to traffic, pollution, slope stability, and wildlife. *Exhibit 1, Staff Report, pages 1 through 5.*

<sup>2</sup> The SSDP application was deemed complete on June 19, 2019, prior to the adoption of Ordinance 598-2021, which, as relevant here, amended Kitsap County Code (KCC) 21.04.100 to make the Director, rather than the Hearing Examiner, the reviewing authority for SSDPs.

<sup>3</sup> Phase 3 of the Apple Tree Point project is located along Apple Cove Lane, approximately 2,450 feet west of the intersection of Apple Cove Lane and McIntosh Loop NE. The property is identified by Kitsap County Assessors Tax Account No. 5641-000-0008-0006. *Exhibit 36.*

<sup>4</sup> The Hearing Examiner notes that, even with a lot reduction from 44 to 42 within Phase 3 of the Apple Tree Point proposal, the total number of lots (according to staff’s analysis) would appear to be 107, as opposed to the 106 that were previously approved.

*Exhibit 14; Exhibit 15; Exhibit 18; Exhibit 19; Exhibit 23; Exhibits 25 through 29; Exhibits 33 through 37; Exhibit 42.*

3. The minor plat amendment was approved administratively by the County Department of Community Development on October 17, 2022. Kitsap County Code (KCC) 21.04.180 would have allowed for consolidated review of the minor plat amendment and SSDP by the Hearing Examiner, given the intrinsic connection between the two requests, and both the notice of application and notice of the County's determination under the State Environmental Policy Act suggested that consolidated review of the minor plat amendment and SSDP would occur. Nevertheless, the Hearing Examiner is addressing only the SSDP for the development of the stormwater system ancillary to the minor plat amendment because, as noted above, County staff approved the plat amendment administratively prior to the current hearing. The Hearing Examiner also notes the unusual approach to vesting associated with the proposal, as determined by the County. The original proposal vested in 1994 to zoning codes adopted in June 1983 and last amended March 1, 1990 (Ordinance 93-M-1989). The minor plat amendment vested to these zoning codes for land use purposes only, according to County staff. The current SSDP proposal, however, vests to stormwater regulations in place at the time this application was deemed complete on June 19, 2019, including the 2014 Kitsap County Shoreline Master Program (SMP), according to County staff. *Exhibit 1, Staff Report, pages 1 through 5, and 7; Exhibits 2 through 4; Exhibit 10; Exhibit 11; Exhibit 14; Exhibit 15; Exhibit 18; Exhibit 19; Exhibit 21; Exhibit 23; Exhibits 25 through 29; Exhibit 31; Exhibits 33 through 37; Exhibit 42.*
  
4. There is a Category II depressional wetland located in the vicinity of the property associated with the Phase 3 development. The east end of the subject property at the base of the marine bluff includes the ordinary high water mark (OHWM) of Puget Sound, which has a shoreline with a narrow sand beach. The proposed stormwater system would collect runoff from the Phase 3 development area of the plat (Phase 3 Property), which is located on top of a bluff, and would convey treated runoff into either the wetland through a dispersion trench or into an underground infiltration gallery located at the bottom of the bluff, adjacent to Puget Sound. The proposed system would exclusively serve the lots in Phase 3 and would be independent of the stormwater systems supporting Phases 1 and 2 of the Apple Tree Point development. Specifically, stormwater from the Phase 3 residential lots would be collected in a stormwater detention pond and treated via a PerKFilter cartridge filtration vault downstream of the pond. Treated stormwater would then be released at a mitigated rate through a storm drainpipe adjacent to Apple Cove Lane, down the bluff, then to a flow splitter, wherein a portion of the stormwater outflow would be directed to a wetland buffer through a dispersion trench at a rate equivalent to the predevelopment peak discharge, and the remaining outflow would be routed through an energy dissipation system and discharged into dune soils along the shoreline of Puget Sound via an infiltration gallery located slightly waterward of OHWM but landward of

the mean high water (MHW). During ten-year storm events, flows would discharge overland through the energy dissipation structure and outfall directly to Puget Sound. The upland detention pond would be maintained by the County, and the remaining portion would be maintained by the homeowner's association (HOA). The infiltration gallery and energy dissipation system would be located in an easement on 12020 NE Apple Tree Point Lane, a shoreline residential property (down bluff from the Apple Tree Point development) owned by Mr. Fortune (Fortune Property).<sup>5</sup>

The proposed system is designed to mimic natural drainage conditions and to avoid permanent direct impacts to the wetland. To avoid impacts to the wetland, the pipe crossing the wetland would be elevated on two-inch diameter galvanized steel pin piles, with the remaining pipe placed underground. The underground portion of the pipe would be located within a Federal Emergency Management Agency (FEMA) 100-year floodplain. The proposed stormwater system would result in 3,351 square feet of temporary wetland impacts, 2,369 square feet of temporary wetland buffer impacts, and 3,614 square feet of temporary shoreline buffer impacts. All temporary impacts would be fully restored. The proposed stormwater system would also result in 189 square feet of permanent wetland buffer impacts to accommodate the dispersion trench within the wetland buffer. To mitigate for permanent impacts to the wetland buffer, the Applicant would enhance 13,630 square feet of buffer by planting native species.<sup>6</sup> Water quality of the outflow to Puget Sound would be tested annually. *Exhibit 1, Staff Report, pages 1 through 5, and 7; Exhibits 2 through 4; Exhibit 10; Exhibit 11; Exhibit 14; Exhibit 15; Exhibit 18; Exhibit 19; Exhibit 23; Exhibits 25 through 29; Exhibits 33 through 37; Exhibit 42; Testimony of Jeff Smith; Testimony of Mark Villwock.*

#### Notice

5. Kitsap County (County) determined that the application was complete on June 19, 2019. On September 2, 2021, the County provided notice of the application to property owners within 800 feet of the subject property and to reviewing departments and agencies. As noted above, the notice of application included information related to both the SSDP application under review here and the associated minor plat amendment. On October 11, 2022, the County provided notice of the open record hearing associated with the SSDP application by mailing notice to interested parties and to property owners within 800 feet of the site, publishing notice in the County's publishing newspaper of record, and posting

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<sup>5</sup> The property is identified by Kitsap County Assessors Tax Account No. 241702-1-006-2007. *Exhibit 36.*

<sup>6</sup> Land-disturbing activities would include pipe installation over the wetland (located on parcel No. 242702-4-049-2000); installation of the flow splitter and dispersion system (located on parcel No. 242702-4-054-2002); and installation of the energy dissipation and infiltration gallery (located on parcel No. 24702-1-006-2007). *Exhibit 36.*



notice at the subject property. *Exhibit 1, Staff Report, page 12; Exhibit 21; Exhibit 32; Exhibit 38.*

6. The County received the following comments on the proposal in response to its notice materials:
- The Suquamish Tribe recommended that an archaeologist develop a monitoring plan and inadvertent discovery plan for the proposed development. The Tribe also requested that a no net loss/shore mitigation plan be provided for review, the critical areas report be reviewed to address mitigation sequencing for the proposed development, and that more detail be provided regarding the infiltration at the shoreline. The Tribe also noted that the 2019 Critical Areas Report did not address the potential impacts to mapped Priority Habitats and Species. The Tribe requested that the 2019 SEPA environmental checklist be revised to address the FEMA 100-year floodplain, groundwater withdrawal, cultural resources, and Priority Habitats and Species.
  - John and Kerry Barlow expressed concerns that the proposed development would impact the ingress and egress to their home and 30 other homes on Apple Tree Point Lane. The Barlows noted that the area contains steep and unstable slopes with severe erosion potential. They also raised concerns about water quality and impacts to the shoreline, wetland, and wildlife.
  - Jenn Stebbings requested additional information about the SEPA environmental review.
  - Catherine Tarbill echoed concerns about slope stability, impacts to marine wildlife, and water quality. She also raised concerns about flooding, erosion of the shoreline, maintenance of the proposed development, increases in stormwater runoff to the wetland and the Fortune property, and the frequency of storm events. Ms. Tarbill requested clarification about which HOA would be responsible for the maintenance of the drainage system.
  - John Barlow, Mark Novack, and John Salinas (The Apple Tree Point Lane Road Maintenance Committee) requested additional information about who would be responsible for pipe maintenance or potential pipe failure and inquired about whether the responsible party would be financially capable of meeting potential obligations.
  - Ruthanne Gustafson raised concerns about inaccuracies in the permit application documents, environmental impacts, and the installation of stormwater fixtures in sand dunes. Ms. Gustafson also expressed concerns that the Applicant had not fully evaluated alternatives to the proposed development. She echoed concerns about slope stability, mitigation of environmental impacts, water quality, and impacts to wildlife.
  - Dean Tarbill raised concerns about saltwater breach flooding on surrounding properties during storm events. Mr. Tarbill also expressed concerns that the

homeowner's association (HOA) responsible for inspecting and maintaining the tidal community has failed to perform its duties.

- Mark Vigna echoed concerns about who would be financially responsible for and would maintain the stormwater system. He also echoed concerns about the impacts of a potential pipe failure on residents in the area. Mr. Vigna raised concerns about impacts of the wetland and the capacity of the wetland and tide gate.

*Exhibit 1, Staff Report, page 12; Exhibit 30; Exhibit 41.*

7. County staff provided the following responses to concerns raised by members of the public:

- **Pipe Failure:** County DCD Development Engineering has reviewed the geotechnical, hydrology, and preliminary storm drainage reports for downstream analysis, slope stability and public safety required by Kitsap County Code and the King County Superior Court remand. During peak storm events the storm drainage system as proposed is designed to protect the hillside and meter storm drainage flows to the wetland and the Puget Sound. High-density polyethylene pipe is proposed for much of the line and should provide structural integrity for over 50 years.
- **Storm Drainage Maintenance:** County Public Works, Clean Water Kitsap Division and DCD Development Services and Engineering require storm drainage systems to be bonded and certified after two years of operation. The proposed storm drainage concept changed from the original approval with overflow drainage from the ravine west of Phase 3, to the saltwater shoreline. The County would not perform the storm drainage facility outfall maintenance, as county trucks cannot negotiate the steep narrow private road. The developer would convey the system to the HOA for maintenance. County Public Works, Clean Water Kitsap would maintain the stormwater pond for Phase 3, but not the outfall infiltrator at the Puget Sound shoreline.
- **Financial Obligations:** The Preliminary Plat/PUD would be conditioned for the Homeowners Association (HOA) to take over ownership for management of the plat open space, any private roads, storm drainage facilities and applicable utilities. Washington State updated laws governing HOA's for maintaining a cash reserve (RCW 64.90.545). A reserve study professional is responsible for the determination of the amount of cash reserves to maintain the improvements within the development. The developer has agreed that the HOA would assemble a budget based on a reserve study for Phase-3 for maintenance of the storm drainage facilities, consistent with current State law.
- **Impacts to Wetland and Shoreline:** Ed Sewall prepared an updated wetland delineation report and habitat management plan, dated November 4, 2021. The report identified one wetland and associated stream within the study area (Wetland A) which is classified as a Category II depressional wetland with habitat

score of eight, requiring a standard 150-foot buffer. The southern portion is located within the Rural Conservancy designation within the Shoreline Master Program jurisdiction (see SDAP 19-00611) and stormwater would be collected and treated in the detention facility before being conveyed to the storm drainage line. The stormwater pipe would be mounted on pin piles over the wetland and below the ground within the 100-year floodplain. The project proposal includes a portion of the stormwater which will be metered into the wetland buffer to maintain wetland hydrology. Pursuant to KCC 19.200.225.E, stormwater impacts are permitted when there are not feasible alternatives. Temporary impacts are calculated at 3,614 square feet for pipe construction and temporary impact to the wetland buffer. The impaired area would be required to be restored and plant augmentation would be required to provide screening of the above-ground pipe system.

- **PSE Cable Replacement:** It is best management practices to coordinate construction of facilities and utilities whenever possible. However, different agencies have different work programs which are tied to funding and projects may not line up.

*Exhibit 1, Staff Report, pages 13 through 15.*

#### State Environmental Policy Act

8. The County acted as lead agency and analyzed the environmental impacts of the project as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The County used the optional DNS process under Washington Administrative Code (WAC) 197-11-355 and provided notice of the threshold determination with the notice of application issued on September 2, 2021. The County's notice materials indicated that the County expected to issue a Determination of Nonsignificance (DNS) for the proposal and provided a SEPA comment deadline of 30 days from the date of the notice of application. After analyzing the Applicant's environmental checklist and other available information, the County determined that, with mitigation measures, the project would not have a probable significant adverse impact on the environment. Accordingly, the County issued a Mitigated Determination of Nonsignificance (MDNS) on July 29, 2022.

The MDNS was not appealed and requires the Applicant to comply with the following measures to mitigate for the project's anticipated environmental impacts:

- The Applicant must adhere to the conditions and associated findings of fact from the SEPA MDNS issued July 20, 1995, for the original plat/PUD application. The plat is vested to the MDNS and rural plat decision. Recommendations for the minor plat amendment shall also be guided by the SEPA decision, including density revisions, open space tracts, landscaping, off-site parking requirements, and vested rural road standards.

- The proposed development must follow all conditions of approval within the 2014 Shoreline Master Program (SMP) under Chapter 12 KCC. The outfall for stormwater overflow has been revised to contain an infiltrator system buried beneath shoreline dune deposits via easements with private landowners. The area would be vegetated with dune grass plantings to reduce erosion concerns, consistent with the No Net Loss Report provided by Soundview Consultants.
- Stormwater maintenance initially would be conducted by the Applicant until the system is accepted by Kitsap County Clean Water Kitsap. The system would be bonded, and a stormwater operator’s design and maintenance manual would be provided through implementation of the associated Site Development Activity Permit.
- The proposal would be conditioned to follow all the requirements of the Critical Area Ordinance in effect at the time of application. As modified, wetland impacts would be conditioned to follow Chapter 19.200 KCC. Wetland impacts would be minimized by careful installation of the above-ground pipe, which would be founded on pin-piles over the wetland surface. The associated perimeter of the pipe would be revegetated with native plantings, per the mitigation planting plan.
- The proposal would be conditioned to follow all of the recommendations of the associated geotechnical studies for the project, per Chapter 19.400 KCC.
- The proposal would be conditioned to follow the stormwater design manual under Chapter 12 KCC. The manual guiding the proposal is from 1994. Stormwater would be treated prior to discharge and infiltrated into dune soils. County staff recommends that outfall water quality be tested periodically to assure that shellfish is not contaminated by facility discharges.
- The proposal would be reviewed and shall be consistent with the SMP and the 2016 Kitsap County Comprehensive Plan.
- Traffic management would be conditioned to follow the vested application under Chapter 11 KCC.

*Exhibit 1, Staff Report, pages 5 and 6; Exhibit 5; Exhibit 20; Exhibit 31.*

Comprehensive Plan, Zoning, and Surrounding Properties

9. The property is designated “Rural Residential” by the County Comprehensive Plan. County staff identified the following Comprehensive Plan goals and policies as relevant to the proposal:
  - Encourage and support shoreline diversity through planned and coordinated development, which gives preference to water-dependent uses, traditional and historic use patterns, and environmental protection. [Policy SH-1]
  - Uses and activities along shorelines and in the waters of Kitsap County should not have a significant adverse effect on water quality. [Policy SH-3]

- Land use activities shall be sited and designed to minimize conflicts with and impacts on the shoreline environment. [Policy SH-8]
- Encourage the designation and development of utility corridors and facilities in a manner consistent with the needs and resources of Kitsap County. [Policy UT-2]

*Exhibit 1, Revised Staff Report, pages 7, 9, and 10.*

10. The Phase 3 property is zoned “Rural 2.5” (RU-2.5) under the vested zoning classification, per County staff’s determination. The purpose of rural lands is to preserve to the maximum extent feasible the rural lifestyle of the County. Under this former zoning classification, development of platted lots without a PUD has a maximum density of one dwelling unit per 2.5 acres on non-waterfront properties and two units per acre on waterfront properties. County staff also determined that properties to the north, east, and west were also zoned RU-2.5 at the time the original plat vested and that the property to the south was zoned “Residential 2 Mobile Home” (R-2 MH). All surrounding properties are currently zoned Rural Residential. Properties to the north are currently undeveloped. Properties to the east and west are developed with single-family residences. Some properties to the south of the subject property are developed with single-family residences and other properties remain undeveloped or forested. *Exhibit 1, Staff Report, page 8; Exhibit 33.*

#### Existing Site and Critical Areas

11. The Phase 3 property is currently undeveloped except for an existing gravel portion of Apple Tree Cove Lane, which generally runs from west to east/northeast. The remainder of the site is forested, consisting primarily of second growth trees with moderately heavy underbrush. Steep slopes border the proposed Phase 3 area to the east and west. Runoff on the western portion of the site currently travels northwest as sheet flow before channeling into a ravine on the western portion of the property and flowing northeast to ultimately discharge, down the marine bluff, into Puget Sound. Runoff on the east portion of the property currently drains overland as sheet flow to the northeast and discharges over the slopes. *Exhibit 1, Staff Report, pages 6 and 7.*
12. Sewall Wetland Consulting, Inc., submitted a Critical Areas Report on behalf of the Applicant on December 3, 2019. The report identified a 4.5-acre Category II depressional wetland south of the Phase 3 property with a habitat function score of 8. The wetland requires a buffer that ranges from 150-feet for low impact activities, 225 feet for moderate impact activities, and 300-feet for high impact activities. *KCC 19.200.220.D.* The report also determined that the east end of the property includes the OHWM of Puget Sound, which requires a 130-foot standard buffer. *KCC 19.300.315.* Soundview Consultants, Inc., submitted a Shoreline Assessment Report and Habitat Management Plan on behalf of the Applicant on November 4, 2021. The report determined that all temporary impacts to the wetlands (as detailed by Ed Sewall) would

be restored. The proposed development would result in 189 square feet of permanent wetland buffer impacts for the proposed dispersion trench within the buffer. The Applicant would mitigate for permanent buffer impacts by enhancing 13,630 square feet of wetland buffer with native vegetation. The report determined that the proposed development would result in no net loss of shoreline ecological function or wetland buffer function. *Exhibit 1, Staff Report, pages 3 through 5, and 11; Exhibit 10; Exhibit 11; Exhibit 14; Exhibit 15; Exhibit 23; Exhibit 24; Exhibit 28; Exhibit 29; Exhibit 36; Exhibit 37.*

13. In a memorandum dated October 8, 2021, LDC, Inc., provided an analysis of alternative stormwater systems and determined that the proposed development would minimize impacts to adjacent slopes in comparison to alternatives. Earth Solutions NW, LLC, prepared a geotechnical report on behalf of the Applicant. The report indicated that the site is within a Category I Critical Aquifer Recharge Area (CARA). The report also determined that the central drainage ravine is a moderate erosion hazard, and the eastern slope area is a high erosion hazard. Development activities that require clearing in erosion hazard areas require a standard 25-foot native vegetated buffer and 15-foot building setback. *KCC 19.400.435.* The Applicant would provide a 40-foot setback. The proposed development would also be constructed in the FEMA 100-year floodplain. On November 3, 2021, Soundview Consultants, LLC, submitted a technical memorandum providing a FEMA habitat assessment. The memorandum determined that the proposed development would not adversely impact water quality and quantity or flood storage capacity. The Applicant does not propose to increase impervious surfaces within the FEMA floodplain. *Exhibit 1, Staff Report, pages 3 through 5, and 11; Exhibit 10; Exhibit 11; Exhibit 14; Exhibit 15; Exhibit 23; Exhibit 24; Exhibit 28; Exhibit 29; Exhibit 36; Exhibit 37.*

#### Shoreline Management Act and County Shoreline Master Program

14. Much of the proposed stormwater system serving Phase 3 of the Apple Tree Point development would be located within 200 feet of the Puget Sound ordinary high water mark (OHWM). The State Shoreline Management Act (SMA) and the County Shoreline Master Program, Title 22 KCC, govern work within 200 feet of the Puget Sound OHWM. *RCW 90.58.030(2)(e) and (g); KCC 22.200.100.A.* A portion of the wetland is located within 200 feet of Puget Sound, and, therefore, under the City's SMP and critical areas ordinance, the entire wetland is subject to shoreline development standards. *KCC 22.400.115; Chapter 19.200 KCC.* Any "substantial development" within the shoreline jurisdiction requires approval of an SSDP. Substantial development is any development for which the total cost or fair market value exceeds \$7,047, or any development that materially interferes with the normal public use of the water or shorelines of the state. *RCW 90.58.030(3)(e); KCC 22.150.605.* The Applicant's Joint Aquatic Resources Permit Application (JARPA) form lists the fair market value of the project as above this

threshold and, therefore, approval of an SSDP is required. *Exhibit 1, Revised Staff Report, pages 13 through 16; Exhibit 14.*

15. The primary goal of the SMA is to protect the public interest in the state's shorelines through a coordinated development process. The SMA contemplates protecting against adverse effects to the public health, the land, the vegetation, the wildlife, and the waters, and preserving the public's opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Permitted uses in the shorelines must be designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and any interference with the public's use of the water. *RCW 90.58.020.*
16. The purpose of the County Shoreline Master Program (SMP) is to guide the future development of the shorelines in Kitsap County in a manner consistent with the Shoreline Management Act. *KCC 22.100.110.* The SMP establishes six shoreline environment designations "based on the existing development pattern, the biophysical capabilities and limitations of the shoreline being considered for development, the provisions of WAC 173-26-211 and the goals and aspirations of the citizens of Kitsap County as expressed in the Comprehensive Plan." *KCC 22.200.105.* The proposed development would be located within the "Rural Conservancy" environment. The purpose of the Rural Conservancy environment is to "protect ecological functions, conserve existing natural resources and valuable historic and cultural areas in order to provide for sustained resource use, achieve natural floodplain processes, and provide recreational opportunities." *KCC 22.200.125.* Utilities are permitted in the Rural Conservancy environment. *KCC Table 22.600.105. Exhibit 1, Staff Report, pages 18 through 23; Exhibit 29.*
17. *KCC 22.300.125* provides general policies for shoreline use and planning that apply to all use and development activities within the SMP jurisdiction, regardless of shoreline environment designation. The purpose of the SMP's general shoreline use and site planning policies is to "[p]reserve and develop shorelines in a manner that allows for an orderly balance of uses by considering the public and private use, along with the development of shorelines and adjacent land areas with respect to the general distribution, location and extent of such uses and development." *KCC 22.300.125.* *KCC 22.300.140* provides general policies for transportation and utilities that apply to all use and development activity within the SMP jurisdiction. The purpose of the SMP's general transportation and utilities policies is to "[p]lan, locate and design transportation systems and essential utility facilities in shoreline areas where they will have the least possible adverse effect on shoreline ecological functions and/or processes and existing or planned water-dependent uses." *KCC 22.300.140.* County staff reviewed the proposal and determined that it would be consistent with several SMP general policies related to shoreline use and site planning and to public access and recreation.

The applicable policies identified by County staff are listed below, together with County staff's analysis of how the proposal would be consistent with those policies (in italics):

- Policy SH-41. Plan, locate and design proposed transportation, parking facilities, and utility facilities where routes will avoid a net loss of shoreline ecological functions or will not adversely impact existing or planned water-dependent uses. *No existing water dependent uses would be impacted.*
- Policy SH-43. New or expanded transportation routes and essential utility facilities shall, to the extent feasible:
  1. Be located in areas that do not require shoreline stabilization, dredging, extensive cut/fill, and other forms of shoreline alteration.
  2. Be limited to local access and public shoreline access routes.
  3. Be located in existing rights-of-way and corridors.
  4. Not be built within the shoreline jurisdiction when other options are available.

*The proposal requires no armoring. The roadway is private, would not be modified, and is located in the existing right of way. The outfall pipe would be located on private property, within existing easements. There are no other practicable or reasonable alternatives to locate the stormwater infiltration facility.*

- Policy SH-44. Transportation and utility projects shall be consistent with the public access policies and plans of this program. *Public access would not be significantly modified by this proposal.*
- Policy SH-46. Maintenance of existing transportation corridors and utility facilities shall be carried out in a manner that:
  1. Will avoid a net loss of shoreline ecological functions; and
  2. Where feasible and appropriate, improve shoreline ecological functions. Unavoidable adverse impacts shall be mitigated.

*There would be a net gain of habitat upon completion of the project as the adjacent residence will require replanting of the shoreline. A trail for maintenance of the system is unavoidable. Mitigation and restoration of adjacent beach, surface pipe, and above ground wetland outfall area is proposed.*

*Exhibit 1, Staff Report, pages 18 and 19.*

18. KCC 22.400.110.A provides application requirements and development standards for mitigation of environmental impacts. County staff reviewed the proposal and determined that it would comply with all applicable requirements, standards, and mitigation sequencing, noting:
  - The proposed development has undergone various site designs to carefully avoid impacts to the shoreline of Appletree Cove Point and the identified critical areas. However, complete avoidance of impacts to the identified shoreline, wetland, and associated buffer is not possible due to these areas being located between the



Phase 3 development and the shoreline. The proposed development would temporarily impact approximately 3,351 square feet of wetland, 2,369 square feet of wetland buffer, and 3,614 square feet of shoreline to accommodate the placement of the stormwater pipe across the wetland and the infiltration gallery along the shoreline. The proposed development would result in 189 square feet of permanent wetland buffer impacts for the placement of the proposed dispersion trench within the wetland buffer, which is permitted under KCC 19.200.225.E.

- To minimize impacts, the stormwater piper would be elevated one to four feet above the wetland by securing the conveyance pipe on a steel beam elevated above a pair of two-inch galvanized steel pin piles at 20-foot intervals. The installation of the stormwater outfall to the shoreline would be constructed during low tide, and in-water work would be avoided. The proposed stormwater pipe would be installed under the existing gravel and paved roadbed and would not increase impervious surfaces. The conveyance system has been carefully designed to minimize impacts by retaining all trees within the shoreline buffer and reducing the length of the conveyance pipe to the greatest extent possible. The Applicant would implement all appropriate best management practices (BMPs) and temporary erosion and sediment control (TESC) measures throughout the duration of the project. Enhanced water quality treatment and an infiltration gallery would be provided to ensure that contaminants are reduced according to the stormwater standards prior to runoff release to Puget Sound.
- On-site restoration and enhancement actions would compensate for minor disturbances within the shoreline and associated wetland and buffer. Approximately 13,630 square feet of the wetland buffer would be enhanced by removing non-native invasive species and planting disturbed areas with native trees, shrubs, and groundcover, exceeding a 1-to-1 replacement ratio. The enhancements would provide increased screening and habitat within the buffer by providing increased structural complexity and diversity on-site and would result in a net increase in ecological functions. The proposed enhancement actions would occur concurrently with construction of the proposed development.
- The proposed enhancement actions would be preserved through monitoring and maintenance. The monitoring plan proposes that the enhancements actions would be maintained for a minimum of five years to ensure the success of mitigation actions. Additional potential impacts to the critical areas would be reduced over time by the installation of permanent sensitive area signage and fencing between the buffer and development in order to discourage trespassing and reduce habitat disturbance.

*Exhibit 1, Staff Report, pages 20 through 22 [with revisions pursuant to Exhibit 42].*

19. KCC 22.600.185 provides application requirements and development standards for utilities. County staff reviewed the proposal and determined that it would comply with all applicable requirements and standards for utilities within the Rural Conservancy Environment, noting:
- The proposed development would infiltrate treated stormwater from Phase 3 of the Apple Tree Point Highlands plat to Puget Sound via infiltration into the shoreline dunes.
  - The proposed development is necessary to provide a stormwater overflow outlet of treated water from the stormwater detention facility. Due to landslide hazards and balance with septage infiltration, discharging the treated stormwater on-site has been determined to be infeasible for Phase 3 by the project geotechnical engineer. Alternative outfall locations have been reviewed by County staff in the field and there is no alternative due to stream bed constraints, downstream outlet constraints, and nearby residences. Maintenance would also be problematic with other alternatives.
  - The proposed development would not include any additional facilities.
  - The drainpipes would outlet stormwater into the dune substrate located above the mean high water and the ordinary high water lines. Turbidity is not anticipated as the facility is located entirely beneath the ground surface and is conveying treated stormwater. Once construction is completed, disturbed areas would be restored.
  - The proposed development has been designed to avoid work below the mean higher high water line (MHHWL) of the marine shoreline. The proposed enhancement and restoration actions include, but may not be limited to, the following recommendations:
    - Enhance the on-site buffer areas.
    - Remove any trash and other debris within the shoreline, wetland, or wetland buffer areas.
    - Pre-treat invasive plants an herbicide approved by the Washington State Department of Agriculture or hand remove invasive plants. Any pre-treatment of the invasive plants should occur a minimum of two weeks prior to removal.
    - Apply topsoil and/or compost as needed to provide a suitable substrate in the restoration and enhancement areas.
    - Replant all restoration and enhancement areas with native plants, or substitutes approved by the responsible project scientist, to help retain soils, filter stormwater, and increase biodiversity.
    - Replant American dune grass along the shoreline around the existing impervious surfaces.
    - An approved native seed mix may be used to seed the restoration and enhancement areas after planting.
    - Maintain and control invasive plants annually at a minimum or more frequently if necessary. Maintenance to reduce the growth and spread of

- invasive plants is not restricted to chemical applications but may include hand removal, if warranted.
- Provide dry-season irrigation as necessary to ensure native plant survival.
- Direct exterior lights away from the critical areas wherever possible.
- Place all activities that generate excessive noise (e.g., generators and air conditioning equipment) away from the on-site critical areas where feasible.
- Much of the project would be located in a private roadway easement, on private property, or in provided easement areas.
- A geotechnical report has been prepared for the proposed development. The report meets all County guidelines, including KCC 19.400.415 and Chapter 19.700 KCC.

*Exhibit 1, Staff Report, pages 22 and 23.*

#### Testimony

20. County Senior Environmental Planner Steve Heacock testified generally about the proposal, the review process that occurred, and how, with conditions the proposal would be consistent with the County’s Comprehensive Plan, zoning ordinances, critical areas ordinances, and shoreline master program and would meet the requirements for approval of a shoreline substantial development permit. Mr. Heacock explained that the stormwater system would be associated with Phase 3 of the Apple Tree Point subdivision, a proposal that vested in the mid-1990s, prior to implementation of growth management. He clarified that the original plat did not include phasing but that the County later instituted phasing when the Applicant applied for Phase 1 permits about ten years ago. He noted that Phase 1 was completed four years ago, and that Phase 2 is currently on hold while the Applicant seeks approval of a stormwater transfer basin variance. Mr. Heacock also explained that the subject stormwater system is associated with a minor plat amendment that addresses the issues remanded by King County Superior Court. He noted that part of the remand was to address concerns that Phase 3 would load the bluff and soils because rural plats have individual septic systems.

Mr. Heacock explained that stormwater associated with Phase 3 would be conveyed down from Apple Tree Point Lane into a flow splitter, where some outflow would be discharged into an area wetland and the remaining outflow would be discharged into the shoreline through an underground infiltration gallery. He commented that the Applicant would install vegetation to shield the elevated pipe in the wetland from site. He noted that the stormwater system would be constructed with high density polyethylene pipe, which is resilient for conveying stormwater and would last at least 50 years. He clarified that the proposed system has been designed to meet the standards for the 2021 Stormwater Management Manual for Western Washington. He noted that the infiltrator system would be located at 12020 Apple Tree Point Lane NE, which is a property owned by one of the co-applicants (Mr. Fortune), and that necessary easements have been

secured for development of the proposed stormwater system. Mr. Heacock noted that the circumstances around the SEPA conditions had altered. Specifically, he explained that the County would not be able to maintain the entire stormwater system because County trucks would not be able to travel down the steep road for maintenance. He noted that the County would maintain the facilities on top of the marine bluff, but that the rest of the system would be privately maintained. He explained that the maintenance system would be certified by the County and that after certification a fund to maintain the system in perpetuity would be established. He stated that details regarding maintenance would be determined during the site development activity permit process. *Testimony of Mr. Heacock.*

21. County Senior Land Use and Environmental Planner Jeff Smith explained that the County allowed the Applicant to introduce phasing of the plat during the early 2000s through the site development activity permit (SDAP) process. He testified that County staff believe that the proposal was appropriately phased and emphasized that the Hearing Examiner has not been tasked with addressing this aspect of development in association with the current proposal. Mr. Smith noted that the County had established that stormwater from the plat would need to flow down to Puget Sound about 15 years ago after King County Superior Court remanded the case associated with the original plat. Mr. Smith also clarified that the original plat vested to the 1977 County Comprehensive Plan and the 1983 zoning code for land use development standards only. *Testimony of Mr. Smith.*
22. Attorney Ray Liaw, on behalf of the Applicant, argued that the open record hearing should be limited to the shoreline jurisdiction and review of the SSDP. She explained that the proposed development supports the preliminary plat that has been previously approved, and that the County provides mechanisms for extending plat approval by allowing the Applicant to apply for extensions beyond the typical three-year period of approval. She noted that the parallel minor plat amendment application is a small change to accommodate the proposed stormwater facility. She also acknowledged that the appeal period had not yet run for the administrative approval of the minor plat amendment. Attorney Liaw explained that Phase 1 of the plat was approved in 2008, Phase 1A was approved in 2015, and Phase 1B was approved in 2018 and that construction of the phases has been generally completed in recent years. *Statements and Argument of Attorney Liaw.*
23. Project Civil Engineer Mark Villwock provided a detailed description of the proposed stormwater system, mostly consistent with the findings above. He explained that stormwater from the Phase 3 residential development would flow into a lined stormwater pond on the plateau (atop the marine bluff) and be treated before being piped down the bluff to the flow splitter where water would discharge to either the wetland through a dispersion trench or toward the shoreline through an underground infiltration gallery

located in the dunes. He noted that stormwater would be metered before flowing downstream to the flow splitter and at the wetland and infiltration gallery. He explained that any water that would not infiltrate into the dunes, such as may occur with a ten-year storm event, would flow directly to Puget Sound through a “bubble up” structure located just above the mean meter high tide. He stressed, however, that even with such an occurrence the discharged water would already have received enhanced treatment in the lined stormwater pond atop the marine bluff, ensuring no detrimental impacts to Puget Sound. Mr. Villwock also noted that the Applicant would utilize an enhanced stormwater facility for water treatment that would exceed requirements.

Mr. Villwock also expressed several concerns about County staff’s recommended conditions of approval:

- County Public Works would not be responsible for maintaining the entirety of the stormwater system. Instead, a homeowner’s association associated with the Apple Tree Point development would have such responsibility until the County accepts the upland portion of the system. The HOA would be responsible for maintaining all other parts of the system, including those located at the bottom of the bluff.
- Stormwater facilities would be designed in accordance with regulations in effect at the time the SSDP was deemed complete, on June 17, 2019, except those portions of the drainage system proposed under the associated Site Development Permit. Those stormwater improvements would comply with the 2021 Kitsap County Stormwater Design Manual.
- Flow control mitigation occurs upstream in the system, downstream flow control should be treated as discharge rather than flow charge.
- The Applicant is not responsible for permanent signage. The Applicant is only responsible for providing proper signage during construction.
- The Applicant is currently working with the Washington Department of Fish and Wildlife (WDFW) to secure a Hydraulic Project Approval (HPA) permit. In addition, the Applicant has made changes to the project in response to comments made by area tribes.

*Testimony of Mr. Villwock.*

24. Sara Frey explained that the drainpipe would come down a steep, private road that is prone to landslides and provides the only ingress and egress to several area homes. She expressed concerns that a breach in the pipe could prevent access for residents living off the road, which has occurred before. She requested clarification about who would maintain the system and whether there would be insurance to cover any potential damages associated with the proposed stormwater system. Ms. Frey also raised concerns about additional stress on an existing tidal gate and the frequency of significant storm events. She expressed concerns about the maintenance of the tidal gate, commenting that the County has not been conducting inspections. *Testimony of Ms. Frey.*

25. Catherine Tarbill echoed concerns about the frequency of significant storm events and stated that properties in the area are flooded several times a year. She requested clarification about whether the stormwater system would filter out pollutants. Ms. Tarbill raised concerns about the maintenance of the private road, noting that the Applicant has not been maintaining the road as required by a 1994 road maintenance agreement. *Testimony of Ms. Tarbill.*
26. Attorney Liaw responded to several concerns raised at the hearing, noting: the Applicant acknowledges the existing road maintenance and there is an ongoing discussion about who has obligations to maintain it; the road would become a public road at some point and maintenance would be turned over to the County with a limited portion that the HOA would maintain; and the HOA is obligated to maintain insurance for coverage of catastrophic events related to the stormwater system. *Statements and Argument of Attorney Liaw.*
27. Mr. Villwock also responded to several concerns raised at the hearing, noting: the proposed stormwater system would mimic existing flows and would not increase the amount of water flowing into the wetland; the stormwater system would be maintained by the HOA; roads in the plat would be public roads and the County would maintain them; the County would be responsible for maintaining the detention pond and the HOA would be responsible for maintaining the proposed system downstream of the detention pond; if the HOA fails to maintain the system, the County would perform any necessary emergency maintenance and charge the HO; the proposed development would include the highest level of water quality treatment available. *Testimony of Mr. Villwock.*

#### Additional Materials

28. The record was left open until November 3, 2022, to allow for the Applicant and County staff to submit a revised list of recommended permit conditions after conferring together. Staff also conveyed to the Hearing Examiner that the administrative plat amendment was not appealed. *Exhibit 43.*

#### Staff Recommendation

29. Mr. Heacock testified that County staff recommends approval of the SSDP, with conditions. *Exhibit 1, Staff Report, pages 25 through 29; Exhibit 43; Testimony of Mr. Heacock.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide applications for a shoreline substantial development permit. *KCC 2.10.070; KCC 21.04.050; KCC 21.04.080; KCC 21.04.180; KCC 22.500.100.*

## Criteria for Review

### *Shoreline Management Act*

The Shoreline Management Act is codified at Chapter 90.58 RCW. Applicable policies of RCW 90.58.020 include those to foster “all reasonable and appropriate uses”; protect against adverse effects to the public health, the land, and vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alternations to the natural condition of the shoreline. Nonetheless, “private property rights are ‘secondary to the SMA’s primary purpose, which is to protect the state shorelines as fully as possible.’” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (internal quotation marks omitted) (quoting *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)). Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” *RCW 90.58.020*. See also *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). In promulgating the Shoreline Management Act of 1971, the legislature recognized that

“ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development” of the state’s shorelines. *RCW 90.58.020*. The legislature also determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” *RCW 90.58.020*. Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. *RCW 90.58.080(1)*.

### *Shoreline Management Act Regulations*

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 WAC sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the Shoreline Substantial Development Permit (SSDP) application under the following criteria:

- (1) A substantial development permit shall be granted only when the development proposed is consistent with:
  - (a) The policies and procedures of the act;
  - (b) The provisions of this regulation; and
  - (c) The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

*WAC 173-27-150.*

*Findings, Conclusions, and Decision*  
*Kitsap County Hearing Examiner*  
*Apple Tree Point Highlands Phase 3 SSDP*  
*No. 19-02164*

Thus, the Hearing Examiner must review the SSDP application against the County SMP policies and regulations. The County SMP contains general development policies and regulations related to mooring structures and activities and recreation and public access, as detailed in the findings. Consistent with the requirements under WAC 173-27-150, the County SMP provides that an SSDP shall be granted only when “the applicant can demonstrate that the proposed development is consistent with the policies and procedures of the [SMA] and the [SMP], as well as criteria in WAC 173-27-150.” *KCC 22.500.100.B.3*

Under *KCC 22.500.100.B.5*:

All applications for shoreline substantial development permits or permit revisions shall be submitted to the Department of Ecology upon a final decision by local government pursuant to WAC 173-27-130. “Final decision by local government” shall mean the order of ruling, whether it be an approval or denial, that is established after all local administrative appeals related to the permit have concluded or the opportunity to initiate such appeals has lapsed.

The criteria for review adopted by the Kitsap County Board of County Commissioners are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040*.

#### Conclusions Based on Findings

**With conditions, the proposed project would be consistent with the policies of the Shoreline Management Act (SMA), the SMA shoreline regulations, the Kitsap County Shoreline Management Master Program (SMP), applicable County SMP policies and regulations, and the specific criteria for approval of an SSDP under KCC 22.500.100.B. and other applicable County policies and regulations.** Applicable policies of RCW 90.58.020 include those that “[r]ecognize and protect the statewide interest over local interest;” result “in long term over short term benefit;” and “[p]rotect the resources and ecology of the shoreline.” Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” *RCW 90.58.020*. The proposed stormwater facility would be consistent with these SMA policies by providing utilities for residential development, while implementing a mitigation plan ensuring no net loss of shoreline or wetland ecological functions following project completion.

The County provided reasonable notice and opportunity to comment on the proposal. The County received several comments on the proposal in response to its notice materials, and members of the public testified at the open record hearing. Concerns primarily related to the stability of the road, maintenance of the road and the tidal gate, environmental impacts to critical



areas, the amount of outflow, and the frequency of significant storm events. The County would (after acceptance by Clean Water Kitsap) be responsible for maintaining the stormwater detention pond located on the marine plateau, as well as portions of the system within or immediately adjacent to rights-of-way maintained by the County. The rest of the stormwater system would be maintained by the HOA. If the HOA fails to maintain the stormwater system, the County could perform any necessary maintenance and charge the HOA. The proposed stormwater system would mimic existing flow conditions and would be metered in order to ensure appropriate hydrologic conditions within the wetland. Excess outfall from significant storm events would be discharged into Puget Sound through an energy dissipation system located at the mean meter high tide. The stormwater system would include the highest level of water quality treatment available and water quality would be tested annually. Part of the road would become public and would be managed by the County, with the remaining portion of the road being maintained by the HOA.

The County SMP designates the property as within the Rural Conservancy environment, which allows utilities with a shoreline substantial development permit. The proposed stormwater system would be consistent with several SMP general policies related to expanding essential utility facilities; providing utility projects consistent with public access policies; maintaining utility facilities in a manner that would avoid a net loss of shoreline ecological functions and, where feasible and appropriate, improve shoreline ecological functions; and mitigating for unavoidable adverse impacts. The proposed development would result in approximately 3,351 square feet of temporary wetland impacts, 2,369 square feet of temporary wetland buffer impacts, and 3,614 square feet of temporary shoreline impacts. All temporary impacts would be fully restored. The proposed development would result in 189 square feet of permanent wetland buffer impacts to accommodate the dispersion trench within the wetland buffer. To mitigate for permanent impacts to the wetland buffer, the Applicant would enhance 13,630 square feet of buffer by planting native species.

Conditions, as detailed below, are necessary to ensure that the Applicant obtains all necessary permits and approvals, conducts shoreline and wetland activities in a manner minimizing impacts to critical areas and adjacent properties and constructing the proposed stormwater system to achieve no net loss of shoreline and wetland ecological functions, and completes the project in a timely manner. *Findings 1 – 29.*

## **DECISION**

Based on the preceding findings and conclusions, the request for a shoreline substantial development permit to allow development of a stormwater system—consisting of a detention pond that would collect and treat stormwater associated with residential lots being developed within Phase 3 of the Apple Tree Point subdivision, part of a larger project being developed on a marine bluff above Puget Sound; 2,400 linear feet of stormwater piping that would convey the treated stormwater down the bluff; and a flow splitter that would distribute some water to an area wetland to provide hydrologic recharge and the rest to a below-ground infiltration gallery at the

base of the marine bluff, adjacent to Puget Sound—located at 12020 NE Apple Tree Point Lane in the Kingston area of unincorporated Kitsap County, is **APPROVED**, with the following conditions:<sup>7</sup>

1. The project shall follow all conditions of approval within the 2014 Shoreline Master Program, per KCC Title 22. The outfall for stormwater overflow has been revised to be an infiltrator system, buried beneath shoreline dune deposits via easements with private landowners. The area shall be vegetated with dune grass plantings to reduce erosion concerns, per the no net loss biological report by Soundview Consultants and others.
2. Stormwater Maintenance of the upland Phase 3 stormwater pond, roadside ditches in the ROW and any stormwater facility upstream of CB3 will be initially conducted by the applicant until such time that such portions of the system are accepted by Kitsap County Clean Water Kitsap (KC Public Works, stormwater management). The system shall be bonded, and a stormwater operator’s design and maintenance manual shall be provided through implementation of the associated Site Development Activity Permit.
3. The project shall be conditioned to follow all requirements of the Critical Area Ordinance in effect at time of application. As modified, wetland impacts shall be conditioned to follow KCC Title 19.200. Wetland impacts shall be minimized by careful installation of the above-ground pipe, which will be founded on pin-piles over the wetland surface. The associated perimeter of the pipe shall be revegetated with native plantings, per the mitigation planting plan.
4. The project shall follow all recommendations of the associated geotechnical studies for the project, per KCC Title 19.400.
5. The proposal shall follow the stormwater design manual, per KCC Title 12. Outfall water quality shall be tested annually to assure that shellfish are not contaminated by facility discharges. Testing shall occur in marine waters adjacent to the infiltration gallery/bubble-up structure and conform to the Washington State Health shellfish testing guidelines. Should tests exceed fecal coliform standards, results shall be referred to Washington State Department of Health for further evaluation. Should test results reveal consistent and acceptable levels, the timeframe may be expanded to biennial or a greater period of time.

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<sup>7</sup> This decision includes conditions required to reduce project impacts as well as conditions required to meet County Code standards. While the Applicant and County proposed several “agreed upon” conditions (see Exhibit 43), the Hearing Examiner is not bound by any such concurrence/agreement and, accordingly, has eliminated or altered any conditions that he has determined are superfluous, especially given the highly circumscribed nature of his involvement with the proposal—including his having no involvement with the plat amendment intrinsically associated with the present SSDP proposal.

6. As determined by County staff, the proposal shall be consistent with the 2014 Shoreline Master Program and the 2016 Kitsap County Comprehensive Plan for the portion of the project that is within the shoreline jurisdiction.
7. Construction plans and profiles for all roads, storm drainage facilities and appurtenances prepared by the developer's engineer shall be submitted to Kitsap County for review and acceptance. No construction shall be started prior to said plan acceptance.
8. The stormwater facilities proposed shall be designed in accordance with Kitsap County Code in effect at the time the Shoreline Substantial Development Activity Permit was deemed complete, June 17, 2019. Any portions of the storm drainage system, however, proposed under Site Development Activity Permit 19-00611 shall be designed in accordance with the 2021 Kitsap County Stormwater Design Manual.
9. The project proponent shall be responsible for installing any necessary off-site downstream drainage improvements. Procurement of any permits or easements necessary to install off-site improvements shall be the responsibility of the project proponent.
10. During the construction of the proposed infiltration facilities, the Project Engineer shall provide an inspection(s) to verify that the outfall facilities are installed in accordance with the design documents and that actual soil conditions encountered at the outfall infiltration facility meet the design assumptions. The Project Engineer shall submit the inspection report(s), properly stamped, and sealed to Development Services and Engineering.
11. The Homeowner's Association shall be responsible for maintenance of the storm drainage facilities from CB3 to outfall following construction. Before requesting final inspection for the SDAP for this development, the person or persons holding title to the subject property for which the storm drainage facilities are required shall record a Declaration of Covenant that guarantees the County that the system will be properly maintained. Wording must be included in the covenant that will allow the County to inspect the system and perform the necessary maintenance in the event the system is not performing properly. This would be done only after notifying the owner and giving him a reasonable time to do the necessary work. Should County forces be required to do the work, the owner will be billed the maximum amount allowed by law.
12. Prior to SDAP plan acceptance, the Applicant or Project Engineer shall submit the completed Operation and Maintenance Manual for privately maintained and/or non-standard stormwater facilities.

13. All conditions of the associated Site Development Activity Permit #19-00611, currently under review, and any addendums thereto, shall apply to this Shoreline Substantial Development Permit.
14. If any work is to be done below the ordinary high water mark, a Hydraulic Project Approval permit shall be obtained from the Washington Department of Fish and Wildlife. Project work shall be subject to the conditions of the Washington Department of Fish and Wildlife Hydraulics Project Approval (HPA), should an HPA be determined to be necessary.
15. Shoreline construction activities shall be conducted in compliance with all applicable regulations and shall not encroach on private properties adjacent to the project area.
16. All recommendations of the Geotechnical Report by Earth Solutions and the Shoreline and Fish and Wildlife Assessment Habitat Management Plan, prepared by Soundview Consultants must be followed.
17. Upon final permit issuance, all construction for the project must commence within two years and be complete within five years. A one-time one-year extension is available but only if requested on or before ninety days of original permit expiration. No exceptions are allowed unless provided for by law, as determined by County staff.
18. Mitigation shall conform to the Shoreline and Fish and Wildlife Assessment Habitat Management Plan and Mitigation Plan, prepared by Soundview Consultants, and dated November 2021, which shall guide all construction activities and required mitigation work.
19. All temporary construction traffic control devices on public and private roads shall comply with the Manual on Uniform Traffic Control Devices as amended by the Washington Administrative Code. This is in accordance with 23 Code of Federal Regulations (CFR), Part 655.

**DECIDED** this 8<sup>th</sup> day of December 2022.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center