Kitsap County Department of Community Development

Notice of Hearing Examiner Decision

02/05/2024

To: Interested Parties and Parties of Record

RE:	Project Name:	Administrative Appeal – Arborwood Taylor *(of Arborwood Critical Area Buffer Reduction #22-02629)*
	Applicant:	Taylor Morrison Northwest LLC 13810 SE Eastgate Way Bellevue, WA 98005
	Application Type:	Administrative Appeal
	Appellant:	Joe Lubischer 8185 NE Loughrey Ave Indianola, WA 98342 & April Ryan 24653 Hillbend Lane NE Kingston, WA 98349
	Permit Number:	#23-03375

The Kitsap County Hearing Examiner has **GRANTED** *in part* **and DENIED** *in part,* Appeal **#23-03375 Arborwood Taylor Administrative Appeal** *(of Arborwood Critical Area Buffer Reduction (CABR) #22-02629);*

The Kitsap County Hearing Examiner **AFFIRMED** *in part***, REVERSED** *in part* **and REMANDED** *on certain issues set forth in this Decision*, **the Administrative Decision** for land use application **#22-02629, Arborwood Critical Area Buffer Reduction (CABR)**, **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 and appellant are 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 or (360) 337-5777.

CC: Appellants: Joseph Lubischer, jslubischer@gmail.com and April Ryan, aprilryan@mac.com
Appellant's Authorized Representative: Bryan Telegin, bryan@teleginlaw.com
Applicant (Subject Property Owner of Record): Taylor Morrison Northwest LLC, LRowse@taylormorrison.com
Applicant's Authorized Representative: Ray Liaw, rliaw@vnf.com and Liberty Quihuis, Lquihuis@vnf.com
County/DCD Staff: Scott Diener, Jeff N. Smith, Steve Heacock, Katharine Shaffer, Cecilia Olsen, Jeff Rimack, David Kinley, Caitlin Schlatter
County/DCD Authorized Representative: David Gecas, Kitsap County Pros
Interested/Other Parties:
Taylor Morrison – Cavell, Lisa, lcavell@taylormorrison.com, Rawlings, Richard, RRawlings@taylormorrison.com; GIBBS SHAWN M, shawngibbs1@yahoo.com; Moreland, Julia, juliemail7@gmail.com; Cooper, Betsy, betsycooper1@gmail.com; Kalisz, Glen - WSDOT Habitat Biologist, KalisGL@wsdot.wa.gov; Hershfield, Marc - WSDOT Habitat Biologist; hershfm@wsdot.wa.gov; Hillbend Lane POA, hillbendpoa@gmail.com; Goldsmith Engineering Attn: Trish Clements, tclements@goldsmithengineering.com; Pulte Homes of Washington, Inc. - Kamawal, Mujib, mujib.kamawal@pultegroup.com, Wilcox, Tyler, tyler.wilcox@pultegroup.com, Lavaring, Nicholas, nicholas.lavaring@pulte.com; Core Design, Inc, permits@coredesigninc.com; Rose, Jon – Raydient, jon.rose@raydient.com; ECOLOGICAL LAND SERVICES, INC, joanne@eco-land.com; Nancy Tietje, calicodoxie@gmail.com; Emil (David) Tietje, david@edt3.com; ERIC CLARKE w/ Element Residential, Inc., eric@resconsultants.biz; Jackie Kelly, jkelly@wavecable.com;

BEFORE THE HEARING EXAMINER
FOR KITSAP COUNTY

In the Matter of the Appeal of the Critical Area Buffer Reduction Notice of Administrative Decision No. 22-02629	)))))	File No. 23-03375 ARBORWOOD TAYLOR - CABR FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The administrative land use decision of the Kitsap County Department of Community Development dated July 3, 2023, which granted approval of the application for Critical Area Buffer Reduction (CABR) to applicant Taylor Morrison Northwest, LLC ("Applicant"), subject to conditions of approval in Permit No. 22-02629 (the "CABR" or "CABR Decision"), *Ex. F29*, is **AFFIRMED** in part, **REVERSED** in part and **REMANDED** on certain issues set forth in this Decision.

The July 18, 2023 appeal of the CABR Decision, Kitsap County Permit Number 23-03375 (the "Appeal") *Ex. F1* timely filed by Joseph Lubischer and April Ryan (collectively, "Appellants"), File No. 23-03375, is **GRANTED** in part and **DENIED** in part.

The bases for the Hearing Examiner's Decision are summarized briefly as follows:

a) **Appeal Issue 2**: Wetland P2 was appropriately rated as a Category II wetland and considered as such in the CABR, requiring a 100-foot buffer under KCC 19.200.220.C.1.a. and KCC 19.200.220.A and B. Substantial evidence does not support the Applicant's assertion that Wetland P2 was originally rated as part of a "mosaic" with Wetlands L1/L2. Substantial evidence supports a finding that Wetland P2 is hydrologically connected to Wetlands L1/L2. There is no factual or legal basis in the record to re-categorize Wetland P2 as a Category III or Category IV wetland or to otherwise reduce the required 100-foot buffer on this basis. The parties agreed that the Examiner may condition the CABR on compliance with a minimum 100-foot buffer for Wetland P2. The Examiner does not have authority to review and approve a new proposed Spine Road location; the matter is remanded for consideration of such a proposal (**MOOTED IN PART GRANTED IN PART AND REMANDED FOR CONSIDERATION OF AMENDED ROAD LOCATION**);

b) **Appeal Issue 3**: The CABR is a Type 1 administrative decision that does not require public notice. Inconsistencies identified by Appellants in the CABR were resolved and addressed at hearing. Appellants have not established any resulting prejudice that requires reversal or remand on this basis (**DENIED**);

c) **Appeal Issue 5**: The CABR is categorically exempt under SEPA; there is no administrative appeal to challenge a determination of SEPA categorical exemption (**DENIED**);

d) **Appeal Issue 6**: The Arborwood Project is vested to the critical areas ordinance and other regulations in effect when the original preliminary plat application was submitted, as per the Development Agreement. Prior Arborwood land use decisions did not approve or otherwise permit a greater than 50% reduction of the buffer associated with Wetland P2. The CABR decision is the first County review and approval of buffer averaging for the Arborwood North project. KCC 19.200.220.C.1.a applies to prohibit a more than 50% buffer reduction at any point (**GRANTED; REVERSED IN PART**);

e) **Appeal Issue 7**: Substantial evidence supports the CABR Decision as it relates to Wetlands 301 Q1 and Q2, which were determined to no longer exist (**DENIED**);

f) **Appeal Issue 8**: Substantial evidence supports the CABR Decision as it relates to Wetland Z3, which determined such wetland has a low habitat function (**DENIED**);

g) **Appeal Issue 9**: As determined in the Hearing Examiner's Order on Prehearing Motions, the CABR unlawfully approved a greater than 50% buffer reduction associated with Wetland P2, which was rated as a Category II wetland and considered as such in the CABR, requiring a 100-foot buffer under Former KCC 19.200.220.C.1.a. and KCC 19.200.220.A and B. The parties agreed that the Examiner may condition the CABR on compliance with a minimum 100-foot buffer for Wetland P2. As noted in Appeal Issue 2, the Examiner does not have authority to review and approve a new proposed Spine Road location; the matter is remanded for consideration of such a proposal (**MOOTED IN PART GRANTED IN PART AND REMANDED FOR CONSIDERATION OF AMENDED ROAD LOCATION**);

h) **Appeal Issue 11**: Although there is evidence of potential impacts to Wetland P2 that may result from construction of the Spine Road from a hydrologic and hydrogeologic standpoint and water quality and water quantity may be affected, there was no showing that a reduced 100-foot P2 buffer will not function as well as if the standard 200-foot

buffer was maintained. KCC 19.200.220.C.1(a)(3). There will be impacts of the development on Wetland P2, but without proof that the Spine Road development will be less deleterious on Wetland P2 at a distance of 200 feet than from 100 feet, the CABR Decision was not in error. (**DENIED**).

i) **Appeal Issue 12**: Although there is evidence of potential adverse impacts to Wetland P2 that may result from as of yet-to-be finalized stormwater management facilities, the County's review of stormwater management for the Project is ongoing and not complete. Such evidence is not relevant to consideration of whether the CABR approval of a reduced 100-foot P2 buffer is lawful, without a showing that such reduced buffer will not function as well as if the standard 200-foot buffer was maintained. KCC 19.200.220.C.1(a)(3) (**DENIED**).

j) **Appeal Issue 13**: Appellants failed to present substantial evidence to support their claim that the proposed stormwater detention ponds will impact a critical aquifer recharge area. The Hearing Examiner finds this issue was abandoned (**DENIED**);

k) **Appeal Issue 14**: Appellants failed to present substantial evidence to support Appellants' claim that proposed stormwater detention ponds will adversely affect fish-bearing streams (**DENIED**);

l) **Appeal Issue 15**: Appellants failed to present substantial evidence that proposed erosion control of regraded slopes with a reduced buffer will not function as well as if the standard 200-foot buffer was maintained. KCC 19.200.220.C.1(a)(3). Appellants provided testimony regarding potential adverse impacts to Wetland P2 that may result from project construction (including potential delay of construction), piping of stormwater and intercepted groundwater and increased flows into Wetland P2, but did not establish that such impacts exceed that which would result if the standard buffer was not averaged (**DENIED**);

m) **Appeal Issue 16**: Substantial evidence supports the adequacy of the CABR Decision which approved control of invasive plants as consistent with applicable regulations (**DENIED**).

n) **Amendment to Appeal**: 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 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**)

SUMMARY OF RECORD

Appeal Issues

The Appeal sets forth sixteen (16) separate assignments of error. *Ex. F1*. Appeal Issues 1 and 4 were dismissed voluntarily dismissed by Appellants. *Ex. F33*. Appeal Issues 3, 6 and 12 were clarified and revised by the parties in a Joint Status Report Regarding Clarification of Appeal Issues 3, 6 and 12. *Ex. F30*. Appeal Issues 2, 9, 5 and 10 were addressed by the Examiner in an Order on Prehearing Motions dated November 13, 2023, incorporated herein by this reference. *Ex. F51.*

On Appeal Issue 2, the Hearing Examiner agreed with Appellants that the CABR allowed Wetland P2's eastern buffer to be reduced by more than 50% of the buffer width established after categorization and buffer adjustments were applied. *Ex. F51* p.5. Because such a buffer reduction is inconsistent with KCC 19.200.220.C.1.a, it cannot be administratively approved pursuant to a Type I administrative approval in the CABR. *Id*. The Examiner ruled that, the Applicant would have an opportunity to establish through testimony and evidence at hearing either: (a) that a 200-foot wide buffer should no longer apply to Wetland P2 – *i.e.*, if the Applicant established that Wetland P2 is no longer appropriately categorized as a Category II wetland requiring a 200-foot buffer; or (b) that the Spine Road and pedestrian walkway can be relocated further east to avoid permanent buffer impacts within 100 feet of Wetland P2, it is possible that compliance with KC 19.200.220.C.1.a(5) could be established. *Ex. F51*, pp. 5-6. The parties agreed to a stipulated condition requiring that buffer averaging for the Arborwood Development shall not result in buffer widths of less than 100 feet for Wetland P2. *Ex. F34* p. 6; *Ex. F52* p. 2; *Ex. F36* p. 4.

On Appeal Issue 9, the Examiner denied summary judgment to Appellants and rejected the argument that the County's rules for buffer averaging and administrative buffer reduction only apply to the so-called "standard buffer," which would preclude the County from administratively approving an 85-foot buffer for Wetland P2. *Ex. F51*, pp. 6-7.

Appellants argued that the standard or "base" buffer is 100 feet and that the County may modify the standard 100 foot buffer, but cannot modify, average or reduce the additional 100 feet of buffer required as an adjustment under the code. *Ex. F31, F33*. In other words, Appellants asserted that the "standard buffer" means the base buffer width is based solely on a wetland's categorization, rather than the regulated buffer width comprised of the base buffer width and any adjustments for land use intensity and habitat level required under KCC 19.200.220.A-B. The County argued that use of buffer averaging is not limited to the "standard buffer" as characterized by Appellants and has not been so limited since at least 2007. *Ex. F52*. The Examiner ruled that buffer averaging is allowed not just to the "standard buffer," but to the entire buffer under former KCC 19.200.220.C.1.a. *Ex. F51*, p. 7.

The Examiner denied the Applicant's Motion to Dismiss Appeal Issue 5, which challenged the County's finding that the CABR is SEPA exempt. *Ex. F51*, p.9. The Examiner granted the Applicant's Motion to Dismiss Appeal Issue 10. *Ex. F51*, pp.9-10. The Examiner ruled that the CABR Decision is an Implementing Approval under the Development Agreement (*Ex. F8*) and is not subject to the current Code, but rather to the critical areas ordinance ("CAO") in effect in 2008. *Id*. Appeal Issue 10 (alleging inappropriate buffer reduction and averaging plans under KCC 19.200.220.C.A(a)(5)), was dismissed. *Id*.

This Decision addresses the remaining Appeal Issues, summarized as follows:

1. **Appeal Issue 2**: Based on the findings and conclusions of the Examiner in the Order on Prehearing Motions (*Ex.F51*, pp. 5-6), whether the Applicant can establish that the buffer reduction proposed for Wetland P2 will be less than 50%, required for a Type 1 administrative permit, either pursuant to a revised wetland categorization for Wetland P2 (requiring a smaller buffer) or by adjusting the location of the Spine Road to the west. Current Code requires a Type III process for buffer reduction exceeding 50%.
2. **Appeal Issue 3**: The Decision contains unresolvable inconsistencies with respect to cited Ecological Land Services (ELS) reports and figures. The scope of the requested variance is not clear.
3. **Appeal Issue 5**: The Decision is not SEPA Exempt; the CABR is not a "minor land use action."

4. **Appeal Issue 6**: The Original Plat Vested in 2010 did not include allowable buffer reduction or averaging to achieve its volume (no diagram indicating actual development relative to buffers). The same 50% maximum was allowed in 2010.
5. **Appeal Issue 7**: The Decision erroneously relies on ELS reports concerning Wetlands 301, Q1 and Q2 to disqualify such wetlands previously identified by Raedeke survey report. The loss of those wetlands should be mitigated by wetland improvements elsewhere.
6. **Appeal Issue 8**: Destruction and mitigation of wetland Z3 is unwarranted. The Decision improperly described wetland Z3 as having low habitat function.
7. **Appeal Issue 9**: The Decision does not comply with KCC 19.200.C.1(a)(5). The buffer reduction exceeds 50%.
8. **Appeal Issue 11**: The Decision does not comply with KCC 19.200.220.C.1(a)(3) which requires that buffer averaging must not adversely impact a wetland.
9. **Appeal Issue 12**: The Decision makes unsupported statements that wetlands will not be adversely impacted by buffer reduction (in the context of Stormwater Management Facilities).
10. **Appeal Issue 13**: Stormwater Retention Ponds impact Critical Aquifer Recharge Area. There is no evidence that the proposed ponds will recharge the aquifer
11. **Appeal Issue 14**: Stormwater Retention Ponds adversely impact Fish-Bearing Streams.
12. **Appeal Issue 15**: Erosion Control of Regraded Slopes is insufficient and will leave soil vulnerable to erosion, resulting in sedimentation of affected streams. In addition, proposed piping of stormwater and intercepted groundwater directly into P2 will be deleterious and will likely result in erosion.
13. **Appeal Issue 16**: Proposal for control of invasive plants is inadequate.

Amended Appeal Issue: The Hearing Examiner granted Appellants' motion to amend their appeal on Day 5 of the hearing to include a challenge to "temporary impacts" within required buffers, based on new evidence and testimony not previously discoverable.

Hearing Date

Pro Tempore Kitsap County Hearing Examiner Stephanie Marshall held a limited open record hearing on the appeal on November 13-14, 2023 using remote access technology. The hearing was continued to December 1, 2023, thereafter continued to December 4, 2023, then to December 8, 2023 and finally to December 22, 2023, for a total of six (6) days of hearing. All continuances of the hearing were conducted using remote access technology.

Per the parties' agreement, the record was left open until January 12, 2024, to allow for submission of closing briefs. The Hearing Examiner did not establish a page limit for closing briefs. The record closed on January 12, 2024. Appellants submitted a Closing Brief on January 12, 2024. *Ex. F59*. The

Applicant and County submitted a Joint Closing Brief on January 12, 2024. *Ex. F60*. The Hearing Examiner issued a Decision Update on January 29, 2024, stating that a Decision would be issued no later than February 5, 2024. *Ex. F61*.

Exhibit and Witness Lists

The parties filed exhibit lists, exhibits and witness lists prior to hearing. *Exs. F41* (County's Witness List); *F42* (Appellants' Witness and Exhibit List); *F43* (Respondent's Witness List); *F44* (Respondent's List of Exhibits).

Witnesses

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

- Joseph Lubischer, Appellant and hydrology and hydrogeology
- Dr. Robert Roseen, stormwater and civil engineering
- Dr. Sarah Cooke, wetlands and ecologist
- Joanne Bartlett, wetlands and ecologist
- Steve Heacock, Kitsap County Department of Community Development, Senior Environmental Planner
- Katharine Schaffer, Kitsap County Department of Community Development, Planning Supervisor
- Pete Lymberis, Taylor Morrison Division President
- Lisa Cavell, Taylor Morrison Vice President of Land Acquisition, Entitlement and Development
- Christopher W. Wright, Raedeke Associates, Inc., President and Soil and Wetlands Scientist
- Kolten T. Kosters, Raedeke Associates, Inc., Wetland Scientist
- Eric Clarke, CORE Design, Inc., Development Manager and Associate
- Gary Sharnbroich, CORE Design, Inc., Principal and Senior Project Manager
- Michael Moody, CORE Design, Inc., Director of Engineering and Principal
- Cecilia Olsen, Kitsap County Department of Community Development
- Jeff Smith, Kitsap County Department of Community Development
- Carolyn Decker, President of Terra Associates, Inc.

Attorney David Gecas represented Kitsap County at the hearing.

Attorneys Ray Liaw and Liberty Quihuis of Van Ness Feldman LLP represented the Applicant/Respondent at the hearing
Attorney Bryan Telegin, Telegin Law PLLC represented Appellants at the hearing

Exhibits

The following exhibits were admitted into the record:

Foundational Exhibits (F)

F1. Appeal Submittal Documents (23-03375), received July 17, 2023
F2. Emails – Staff and Lubischer RE Appeal Application dated July 17, 2023
F3. Emails – Clerk and Parties RE Pre-Hearing Conference, dated July 28-August 16, 2023
F4. Kitsap County Code – Title 19 – Critical Areas Ordinance (2005)
F5. Wetland Delineation and Assessment (Raedeke) (07-47662 PPlat), dated December 20, 2007
F6. SEPA Mitigated Determination of Non-Significance (MDNS) & Notice of Adoption of Existing Environmental Documents (07-47662 PPlat), dated July 23, 2009
F7. Notice of Decision – Preliminary Plat Approval (07-47662 PPlat), dated December 5, 2009
F8. Development Agreement with Appendices – Kitsap County & OPG Properties LLC (07-47662 PPlat), dated February 8, 2010
F9. Technical Memo RE Wetland Boundary Verification (Raedeke) (18-00619 PPlat Minor Amendment), dated August 13, 2018
F10. Notice of Administrative Decision – Preliminary Plat Minor Amendment Approval (18-00619 PPlat Minor Amendment). Dated December 30, 2019
F11. Critical Areas Report – Phase 4 (Ecological Land Services), dated November 17, 2020
F12. Memo RE Critical Areas Overview – Arborwood Phases 2, 4, 6 & Culvert Crossings E1-E4 (Ecological Land Services) (21-05805 PPlat Amendment Minor 2), dated November 3, 2021
F13. Habitat Management Plan – Arborwood Phases 4, 5 & 6 (22-01583 C-MISC), dated January 31, 2022
F14. North Bridge Detail (22-01583 C-MISC) dated February 16, 2022
F15. South Bridge Detail (22-01583 C-MISC) dated February 16, 2022
F16. Storm Drainage Plans (22-02629 CABR) dated February 16, 2022
F17. Hydraulic Project Approval (WDFW) (22-02629 CABR) dated April 5, 2022
F18. Wetland Buffer Reduction Plan (Averaging) (22-02629 CABR) dated April 22, 2022
F19. Wetland Mitigation Plan (Fill Mitigation) (22-02629 CABR) dated April 26, 2022

F20. Early Clearing and Grading (EC&G) Phasing Plan with Plat Overlay (22-02629 CABR) dated April 27, 2022
F21. Application Submission Form (22-02629 CABR) dated May 26, 2022
F22. Wetland Mitigation Plan (also included in Appeal Submittal) (22-02629 CABR) dated August 30, 2022
F23. Wetland Buffer Mitigation Plan (22-02629 CABR) dated September 7, 2022
F24. Comment Response Letter (Incomplete Application) (22-02629 CABR) dated October 11, 2022
F25. Notice of Complete Application (22-02629 CABR) dated March 8, 2023
F26. Notice of Administrative Decision – Preliminary Plat 2nd Minor Amendment Approval (21-05805 PPlat Amendment Minor 2) dated April 17, 2023
F27. Staff Report (22-02629 CABR) dated June 27, 2023
F28. Notice of Administrative Decision (22-02629 CABR) dated July 3, 2023
F29. Emails – Heacock to Ryan, Lubischer RE Requested Delay of CABR (22-02629 CABR) dated July 13014, 2023
F30. Joint Status RE Appeal Issue Clarification submitted September 12, 2023
F31. APPELLANT – Request for Overlength Motion; Motion for Summary Judgment & Alternatives 1, 2; Declarations of Christopher W. Wright, Gary Sharnbroich, Joanne Bartlett, Kolten T. Kosters, submitted September 22, 2023
F32. APPLICANT – Request for Overlength Motion; Motion to Dismiss Issues 1, 4, 5, 10; Declaration submitted September 22, 2023
F33. APPELLANT – Response to (Applicant) Motion to Dismiss submitted September 29, 2023
F34. APPLICANT Response to (Appellant) Motion for Summary Judgment submitted September 29, 2023
F35. [*Stricken as duplicate*]
F36. APPELLANT – Motion to Strike submitted September 29, 2023
F37. APPLICANT – Response to (Appellant) Motion to Strike submitted October 6, 2023
F38. APPLICANT – Motion for Discovery submitted October 12, 2023
F39. APPELLANT – Response to (Appellant) Motion for Discovery submitted October 17, 2023
F40. APPLICANT – Email RE Motion for Discovery dated October 17, 2023
F41. COUNTY – Witness List submitted October 17, 2023
F42. APPELLANT – Witness & Exhibit List submitted October 17, 2023
F43. APPLICANT – Witness List submitted October 23, 2023
F44. APPLICANT – Exhibit List submitted October 23, 2023
F45. Notice of Appeal Hearing dated October 27, 2023
F46. Email Clerk RE Hearing Examiner Update dated October 31, 2023
F47. APPLICANT – Pre-Hearing Brief dated November 6, 2023

F48. APPLICANT – Motion in Limine RE Experts & Exhibits & Motion to Exclude (Appellant) Reply Brief dated November 6, 2023
F49. APPELLANT – Response to (Applicant) Motion in Limine RE Experts & Exhibits & Motion to Exclude (Appellant) Reply Brief dated November 7, 2023
F50. Notice of Appeal Hearing – REVISED dated November 9, 2023
F51. Order on Prehearing Motions dated November 13, 2023
F52. COUNTY – Response to (Appellant) Motion for Summary Judgment; Declaration of Steve Heacock, submitted September 29, 2023
F53. APPELLANT – Motion to Disqualify Hearing Examiner, submitted November 21, 2023
F54. APPLICANT – Notice of Filing in Response to Motion to Disqualify, submitted November 27, 2023
F55. APPLICANT – Response to Motion to Disqualify Hearing Examiner, submitted November 30, 2023
F56. APPELLANT – Limited Reply in Support of Motion to Disqualify, submitted November 30, 2023
F57. Order on Motion to Disqualify, dated November 30, 2023
F58. Corrected Order on Motion to Disqualify, dated November 30, 2023
F59. APPELLANT – Closing Brief, submitted January 12, 2024
F60. APPLICANT – Joint Closing Brief with County, submitted January 12, 2024
F61. Hearing Examiner Decision Update, dated January 29, 2024

Appellant Exhibits (A)

A1. Kitsap County Stormwater Management Design Manual (04/01/1997)
A2. Kitsap County Code Title 19 (2007)
A3. Kitsap County Code Title 12 (2007)
A4. Corps of Engineers Wetland Delineation Manual (01/1987)
A5. User's Guide 2021 Nationwide Permits in Washington State (03/2021)
A6. User's Guide for Nationwide Permits in Washington State (03/2017)
A7. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (05/2010)
A8. Puget Sound Steelhead East Kitsap DIP Recovery Plan – Executive Summary (04/2010)
A9. Suquamish Tribe Letter re Great Peninsula Conservancy - Carpenter Creek Estuary Protection (03/11/2022)
A10. Arborwood Preliminary Geotechnical Report (07/29/2021)
A11. Geotechnical Pre-Design Evaluation (12/18/2007)
A12. Kitsap Public Utility District Office (Water Year Oct 1st-Sept 30) (10/09/2023)
A13. WFC Water-typing Surveys (10/2023)

A14. P2 Swale Cross-Section (10/2023)
A15. Lubischer Email (07/13/2023)
A16. NOD Site Plan (06/27/2023)
A17. Arborwood CABR 22-02629 permit page (10/20/2023)
A18. Google Earth Photographs
A19. Wetland P2 – Basin Acreage
A20. Wetland P2 – Basin Boundary

Applicant/Respondent Exhibits (B)[1]

B1. Curriculum vitae of Christopher W. Wright, ,S,
B2. Curriculum vitae of Kolten T. Kosters, M.S., PWS
B3. Memorandum from Raedeke Associates, Inc. RE: Appeal Issues 7, 8 and 16, dated October 17, 2023
B4. Curriculum vitae of Joanne Bartlett, SPWS
B5. Wetland Rating Overview for Wetland P2, for Arborwood Phase 5 prepared by Joanne Bartlett, Ecological Land Services, dated October 17, 2023
B6. Curriculum vitae of Eric Clarke
B7. Curriculum vitae of Gary Sharnbroich, PE
B8. Curriculum vitae of Michael Moody, PE
B9. Spine Road "A" Plan, Arborwood North Phase 6, Sheet G-5
B10. Storm Drainage Plan, Arborwood North Phase 4 & 5, Sheet SD-1
B11. Storm Drainage Plan, Arborwood North Phase 4 & 5, Sheet SD-2
B12. Storm Drainage Plan, Arborwood North Phase 4 & 5, Sheet SD-3
B13. Storm Drainage Plan, Arborwood North Phase 4 & 5, Sheet SD-4
B14. West Detention Pond Plan, Arborwood North Phase 4 & 5, Sheet SD-21
B15. East Detention Pond Plan, Arborwood North Phase 4 & 5, Sheet SD-23
B16. South Detention Pond Plan and Sections, Arborwood North Phase 4 and 5, Sheet SD-24
B17. Storm Drainage Plan, Arborwood North Phase 6 North, Sheet SD-5

[1] No prehearing order was issued. The designation used to create the Indexed Record, as prepared and distributed by the Clerk prior to the hearing, were labeled and digitally stamped as F for Foundational, A for Appellant and B for Applicant. The Clerk noted a preference to keep the label for Applicant as "B," however, the parties and the Hearing Examiner and the parties referred to the exhibits introduced by the Applicant/Respondent as "R" exhibits throughout the proceedings. This Decision refers to the Applicant's exhibits with "B" references, however, numerous documents in the record include the "R" references.

B18. Arborwood North Early Clear and Grading Plans, Phases 4 5 and 6 SDAP 22-00374 for Taylor Morrison Northwest, LLC, Kingston Washington
B19. Core Design - Storm Drainage Report for Arborwood, Kitsap County WA, dated March 31, 2023
B20. Arborwood North Phase 4 and 5, Stormwater Plan Overview
B21. Arborwood North Phases 4, 5, and 6, Stormwater Plan Overview with Flow Calculation
B22. Arborwood North Phases 4 and 5 SDAP 21-06120 Cover Page
B23. Arborwood North Temporary Erosion Control Plans, EC3-EC5
B24. Arborwood North Grading Plans (dated July 20, 2023)
B25. Arborwood North Road Storm Drain Profiles
B28. Curriculum vitae of Carolyn S. Decker, PE
B29. Supplemental Subsurface Exploration Memo (dated November 28, 2023)
B33. Ecological Land Services Photos of Wetland P2 and Upslope Gully
B34. (Demonstrative) Exhibit A16 with J. Bartlett Comments
B35. Zipper TP-115 and Terra Background
B36. (Demonstrative) Summary of Reports Prepared by Joanne Bartlett, ELS

Orders

1. An Order on Prehearing Motions dated November 13, 2023 (*Ex. F51*) ruled on the following:

    a) Appellants' Motion for Summary Judgment; Motion for Overlength Brief; Appellants' First (Alternative) Motion for Summary Judgment and Appellants' (Second) Alternative Motion for Summary Judgment (*Ex. F31*);
    b) Respondent Taylor Morrison Northwest LLC's Motion to Dismiss Issues 1, 4, 5 and 10 and Request to File for Overlength Brief (*Ex. F32*);
    c) Appellants' Response to Respondent's Motion for Summary Judgment (*Ex. F33*);
    d) Taylor Morrison Northwest LLC's Response to Appellants' Motion for Summary Judgment (*Ex. F34*);
    e) County Response to Appellants' Motion for Summary Judgment (*Ex. F52*);
    f) Appellants' Motion to Strike (*Ex. F36*);
    g) Taylor Morrison Northwest LLC's Motion to Strike Appellants' Motion to Strike and Response to Appellants' Motion to Strike (*Ex. F37*);
    h) Taylor Morrison Northwest LLC's Motion to Allow Discovery (*Ex. F38*);
    i) Appellants' Response to Taylor Morrison Northwest LLC's Motion for Discovery (*Ex. F39*);
    j) Taylor Morrison Northwest, LLC's Motion in Limine Regarding Appellants' Witnesses and Exhibits (*Ex. F48*); and

k) Appellants' Response to Respondent's Motions in Limine (*Exhibit F49*).

2. An Order on Motion to Disqualify (*Ex. F57)*, and a Corrected Order on Motion to Disqualify *Ex. F58*) were entered on November 30, 2023 addressing the following:

   a) Appellants' Motion to Disqualify Hearing Examiner Pro Tempore Stephanie Marshall (*Ex. F53*);
   b) Notice of Filing Regarding Taylor Morrison Northwest LLC's Response to Appellants' Motion to Disqualify Hearing Examiner Pro Tempore Stephanie Marshall (*Ex. F54*);
   c) Taylor Morrison Northwest LLC's Response to Appellants' Motion to Disqualify Hearing Examiner Pro Tempore Stephanie Marshall (*Ex. F55*); and
   d) Limited Reply in Support of Appellants' Motion to Disqualify Hearing Examiner Pro Tempore Stephanie Marshall (*Ex. F56*)

3. No written order was issued by the Examiner ruling on Taylor Morrison Northwest LLC's Supplemental Motion in Limine to Admit Rebuttal Witness and Evidence, submitted on December 3, 2023. The Examiner considered oral arguments of the parties on day 4 of the hearing (December 4, 2023) and ruled on the record, allowing consideration of admission of rebuttal witness and evidence on a case-by-case basis.

4. No written order was issued by the Examiner ruling on Appellants' motion to amend appeal, which motion was made orally on day 5 of the hearing (December 8, 2023) based on new evidence and testimony provided by Mr. Heacock. The Examiner granted Appellants' motion.

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

FINDINGS

Background

A. Development Background and CABR Decision

1. Kitsap County issued a Notice of Administrative Decision on July 3, 2023 for Permit Number 22-02629 (*Ex. F28*) which provided notice of the County's Staff Report approving with conditions the land use application for Critical Area Buffer Reduction (CABR) requested by applicant Taylor Morrison Northwest, LLC, with conditions. *Ex. F27*.

2. The CABR was issued as one of numerous project approvals required for a subdivision development, located west of the intersection of NE South Kingston Road and Taree Drive, NE in Kingston, WA. *See Ex. F27*, p. 3. The Applicant purchased the northern portion of the vested Preliminary Plat (PP) and Performance-based Development (PBD), Arborwood. *Id*. The property is zoned Urban Cluster Residential ("UCR").

3. Applicant is developing phases 4, 5 and the northern portion of phase 6 as defined in a preliminary plat amendment processed in 2022 to demark development plans for the Applicant (Taylor Morrison NW) and Pulte Homes of Washington. *Ex. F27*, p.1.

4. Development is planned in phases beginning at the southwest corner in phase 1 (Divisions 1 and 2), currently under construction by Pulte Homes. *Ex. F27*, pp. 1-2. The undeveloped portions of the property are in commercial timberland and there are areas of the forest and clear cuts with logging roads and trails. *Id*.

5. Phase 4 of Arborwood is located at the north end of the development, lying north of NE Hillbend Lane and west of South Kingston Road NE. Phases 5 and 6 are located west of NE Hillbend Lane and west of Taree Division 2, respectively, and will be accessed by the proposed road through phase 4, which originates at the northeast corner of the Arborwood development. *Ex. F27*, pp. 1-2. The associated Spine Road A connects with the road from the south end near the phase 3/5 boundary. Currently, there is no road access except from the end of Hillbend Lane where the old logging road begins and extends south through phase 6. Associated SDAP and building permits are in review and are pending the buffer CABR approval. *Id*.

6. The CABR application was submitted for review of a critical area buffer reduction for the reduction of category I and II wetland buffers using buffer averaging (up to 50%) and minimized areas of buffer reductions (up to 25%) for areas necessary for the construction of roads, trails, utilities and infrastructure. *Ex. F27*, p. 2. Buffer reductions of associated standard F-type stream buffers (50% reduction) and incorporating buffer averaging (not to exceed a 25% reduction) were also reviewed with the application. *Id*.

7. The Staff Report states that it is a variance and is subject to a Type I process with Director's approval. *Ex. F27*, p. 2. The reductions of buffers are considered a minor land use action and determined to be SEPA Exempt. *Id*.

8. The "Project Name" as stated on the first page of the Staff Report is "Arborwood Critical area Buffer Reduction." *Ex. F27*, p. 1.

9. The Staff Report noted that the proposed buffer averaging is an administrative decision and as such did not require a Notice of Application. There were no public comments regarding the application. *Ex. F27*, p. 11.

10. The associated SDAPs and building permits are subject to the conditions of approval for the CABR as follows: LSUB SDAP 21-06120; SDAP Grading 3, Phases 4, 5 and portions of phase 6; Early Clear and Grade permit 22-00374; LSUB SDAP Spine Road A 22-00785; North bridge permit 22-01582, and South bridge permit 22-01583. *Ex. F27*, p. 2.

11. The subject phases of the CABR review (Phases 4, 5 and 6 north) incorporate approximately 162 acres. *Ex. F29*, p. 2.

12. The Staff Report states that the plat is a vested subdivision and most recently had been the subject of a major plat amendment (2009) to revise the development area into the associated Urban Cluster Residential zoning, per the adopted December 2006 Comprehensive Plan. *Ex. F27*, p. 3. In order to densify the re-zoned urban cluster residential property, wetland and stream buffer averaging was implemented as part of the plat and associated performance-based development application to compress development, incorporate wildlife corridors and minimize land impacts to incorporate buffer reductions of up to 25% and wetland averaging by up to 50 %. *Id*.

13. Table 1 of the CABR sets forth Comprehensive Plan Designation and Zoning. Table 2 of sets forth Setback for Zoning District. *Ex. F27*, p. 3-4. Tables 3 and 4 set forth Surrounding Land Use and Zoning and Public Utilities and Services, respectively. *Id*.

14. The site has existing access from South Kingston Road NE via a planned access road, NE Arborwood Drive, located west of the intersection of Taree Drive NE. The road will be conveyed through the property via a spine road connection (hereinafter the "Spine Road") to NE Whitehorse Drive. *Ex. F27*, p. 4.

15. The image on page 5 of the Staff Report shows the proposed buffer averaging and reduction plans. *Ex. F27*. The Staff Report references as exhibit 3 the Wetland Buffer Mitigation Plan by Ecological Land Services, Inc. ("ELS") dated September 2022. *Ex. F27* p. 4 (citing *Ex. F23*).

16. The Staff Report states that the 2009 major plat amendment decision incorporates the elements of the Arborwood Final Environmental Impact Statement which analyzed the Land

Use Goals and Policies of the 2006 Kitsap Comprehensive Plan. *Ex. F27*, p. 10. It states that the conditions of the CABR Decision reflect these elements and are further directed in the permit conditions which will be transmitted to the Phases 4, 5 and Phase 6 North for associated Site Development Activity Permits, Wall Permits and the permits for bridge crossings (see Conditions section, with emphasis on condition 17). *Id*.

17. The Staff Report lists "Documents Consulted in the Analysis," and notes that a complete index of exhibits is located in the project file. *Ex. F27*, pp. 10-11. The documents listed on page 11 are: Project submission (May 26, 2022) (*Ex. F21*), Wetland Buffer Mitigation Plan (September 7, 2022) (*Ex. F22*), Wetland Buffer Mitigation Site Plan (September 7, 2022) (*Ex. F23*), South Bridge Plan and habitat crossing (21-05805) (April 3, 2023), North Bridge Plan and aerial view (21-05805) (December 14, 2021) and Early Clear and Grade site plan (May 26, 2022) (*Ex. B18*). *Ex. F27*, p.11.

18. The County found that the proposal meets all zoning standards of the Urban Cluster Residential (UCR) Zoning designation Kitsap County Code Title 17. *Ex. F27*, p. 11. It also found that, per KCC 17.500, landscaping elements are required to be analyzed with the associated land development permits. *Id*.

19. Section 10(h) of the Staff Report on **Development Engineering/Stormwater** states, "Development Services and Engineering has reviewed the land use proposal and finds the concept supportable in its approach to civil site development. Further review will occur with associated Site Development Activity permits." *Ex. F27*, p.11.

20. Section 10(i) of the Staff Report (*Ex. F27* pp. 12-20) on **Environmental** addresses "Wetlands and associated Streams," "Wetland Report and Wetland Buffer Averaging and Wetland Buffer Reduction," "Temporary Buffer Impacts," "Mitigation Sequencing," "Buffer Averaging," "Buffer Restoration," "Temporary Buffer Impacts – Sewer Line Corridor," "Permanent Buffer Impacts – Sewer Line Corridor," "Wetland Buffer Restoration Plan," "Goals, Objectives and Performance Standards," "Buffer Restoration Areas," "Specifications for Planting," "Plant Materials," "Planting Specifications," "Planting Methods," "Maintenance," "Monitoring Plan," "Vegetation," "Monitoring Report Contents," and "Contingency Plan."

21. With respect to wetlands and associated streams, the CABR states, "[t]he project is proposed mostly outside the required wetland buffers and building setbacks per the hearing examiner decision (Examiner 2009). Buffer alterations are necessary in areas where the wetlands or portion of wetlands lie within 150 or 200 feet of the proposed development (See Exhibit 4)

and the associate Table 2 from the report, below." *Ex. F27* p. 12 (citing *Ex. F7*). It states that most of the reductions are proposed within Phase 5 to accommodate the stormwater ponds, portions of the main roadways, and grading slopes necessary to support the ponds and roads. "The alteration of buffers includes buffer averaging and temporary buffer impacts caused by grading needs, for which restoration through plant installation is proposed." *Id*. It cites the wetland mitigation report provided by ELS dated September 7, 2022. *Id*. (citing *Ex. F27*).

22. The CABR states that buffer reductions are proposed in five areas to accommodate the stormwater pond and main road as well as some of the building lots. *Ex. F27* p. 12 (citing Figure 4). Overall, averaging proposes to subtract 1.02 acres of buffer and add 1.03 acres of buffer mostly within Phase 5 (0.88 acres) and fewer smaller areas in Phase 6 (0.18 acres). *Id*. (citing Table 2). The greatest area of reduction is proposed for the construction of the stormwater pond and the spine road within Phase 5. Id. (citing Figure 5). The 2010 KCC to which this project is vested allows buffer averaging as the first step in the buffer reduction sequencing. *Id*.

23. The CABR reviewed former KCC 19.200.220.C.1.a governing buffer averaging and found the analysis meets the requirements set forth therein. *Ex. F27* pp. 12-14.

24. The CABR finds there is no documented habitat for endangered, threatened, or sensitive fish or wildlife habitats within Phases 5 and 6. *Ex. F27*, p. 13.

25. Regarding "Width averaging will not adversely impact the wetland," (KCC 19.200.220.C.1.a(3)), the CABR finds, "Phase 5 was designed to utilize upland that is outside the buffers of Wetlands L2, L3, P2 and 12 to avoid adverse impacts to these wetlands, However, reductions and temporary impacts area necessary along the entire length of this phase and are spread out into smaller areas (Figure 5 see Exhibit 4). This allows for smaller reductions in several locations rather than larger reductions in one or two locations, which reduces the potential for adverse impacts to occur to the wetlands. Temporarily impacted buffer areas are located near or next to the areas where buffer will be subtracted so there will be improvement of buffer functions that will avoid adverse impacts to the wetlands. The buffer reductions are not as extensive in Phase 6 because there are fewer wetlands than in Phase 5 (Figure 6). The reductions are proposed along Wetlands C2 and O, which lie on the west and east edges of Phase 6, respectively, to accommodate the backs of residential lots. These reductions are very minor and are scattered along the outer edge of the buffers so will not result in large areas of [sic] (0.18 acres). Because the subtracted buffers are mostly small in area and are scattered along the outer eastern buffer

of these wetlands, the impacts to the buffers are minimized. The buffer additions are also proposed in proximity to the reductions to maintain the functions of the required buffer widths. Runoff generated on the existing and new impervious road surfaces will be directed to the stormwater facilities, which will reduce potential water quality impacts to the wetlands. *Ex. F27*, p. 13.

26. Regarding "The total buffer area after averaging is not less than the buffer area prior to averaging" (KCC 19.200.220.C.1.a.(4)), the CABR finds that Table 2 provides an overview of the proposed buffer averaging and the figures entered show that the buffer area after averaging is not less than the buffer area prior to averaging. The buffer reduction totals 0.84 acres in Phase 5 and the added buffer totals 0.84 acres and in Phase 6, the subtracted and added buffers total 0.18 acres. *Ex. F27* p. 13.

27. Regarding "The minimum buffer width will not be less than 50 percent of the widths established after the categorization is done, and any buffer adjustments applied" (KCC 19.200.220.C.1.a(5)), the CABR finds, "The averaging plan does not propose to reduce the buffers by more than 50 percent in any location. There is a slightly lower buffer at the east end of Wetland P2, but it be [sic] accompanied by buffer restoration, which will provide some additional buffer protections in this area. This reduction is needed to grade the proposed road and cannot be altered because of the development to the east." *Ex. F27*, pp. 13-14.

28. The CABR addressed Temporary Buffer Impacts and stated such impacts are "those areas where grading is required within the buffer and will remain buffer after the project is complete." *Ex. F27* p. 14. It continues, "The largest temporary impact is proposed at the north end of Wetland L2 where 0.55 acres of buffer will be impacted by grading for the proposed roadway and stormwater pond (Figure 5), There are smaller areas of temporary impact at the south end of Phase 5 that total 0.33 acres around Wetlands L3 and P2. The temporary impacts overlap slightly with some of the reduced buffer areas, but each is a separate part of the proposal. The total area of temporary buffer impact is 0.88 acres, and all areas will be planted with native vegetation to recover the functions of these buffer areas." Id. Staff found that the analysis meets the requirements in 19.200.220.C.1.a and impacts will be restored in accordance with the code, per the buffer restoration plan. *Id*.

29. The CABR addressed Mitigation Sequencing, which requires that projects that propose impacts to wetlands and buffers must first demonstrate that the impacts cannot be avoided, minimized, or rectified before proposing mitigation. *Ex. F27* p. 14 (citing KCC 19.200.250.A). The Staff Report first addressed "*avoiding the impact altogether by not*

taking a certain action or parts of actions," (KCC 19.200.250.A.1), which is not an issue in this appeal. *See id*. With respect to "*minimizing the impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to reduce impacts*" (KCC 19.200.250.A.2), the CABR discussed buffer averaging and buffer restoration and found that the total area of buffer after averaging matches the area prior to averaging. It also found that "[b]uffer restoration is proposed in areas where grading is necessary to achieve the appropriate project grades mostly for the proposed stormwater ponds and portions of the future roadway. … Buffer restoration will replace the vegetation to restore the function of the temporarily impacted buffer areas." *Id*. at pp. 14-15.

30. Addressing buffer restoration, the CABR finds that "[t]he project proposes no direct impacts to wetlands so compensatory wetland actions are not warranted." *Ex. F27*, p. 15. It also found that "[t]he function of the buffer in the temporarily impacted buffer will be restored by planting a variety of native vegetation. The planting plan not only restores the lost vegetation, but it will also increase vegetative diversity by planting a variety of species ranging from ground cover to conifer trees." *Id*. The CABR states that "[c]ompensation for the buffer reductions is proposed through the averaging process, which essentially provides substitute buffer areas by adding upland areas to the buffer. The added buffer areas exceed the subtracted buffer areas so there is a net increase in buffer area and function." *Id*. It continues, "[t]he restored buffer areas will be monitored for a period of 5 years following installation of plants They will be monitored for plant success, plant growth, and invasive plant coverage and any deficiencies will be corrected to ensure successful development of a forested buffer." *Id*. The CABR concludes, "[t]his project utilizes a combination of avoidance and minimization methods to reduce long term impacts to the wetlands and buffers. Buffer averaging will maintain the current buffer acreage and areas of temporary impact will be planted to restore buffer functions." *Id*.

31. Pages 15-16 of the CABR reviewed "temporary buffer impacts," incorporating the description and definition used at page 14 of the CABR. *Ex. F27*, pp. 15-16. It separately addressed temporary buffer impacts associated with the sewer line corridor that will result from installation of the sewer and water lines. *Id*. at 16. "The sewer line corridor in the western buffer of Wetland L2 will follow the existing logging road/path to the existing culvert and follow it for a short distance before curving to the south. It will then cross through the outer half of the buffer of Wetland C6/Crabapple Creek to the proposed sewer line/stormwater pond across road (Figure 5). Temporary impacts in the western buffer of Wetland L2 totals 0.08 acres and on the east side totals 0.03 acres. The temporary impacts to the eastern buffer of Wetland C6 overlap slightly within the Wetland L2 impacts and

totals 0.26 acres. The total area of temporary buffer impacts is 0.37 acres within the sewer line corridor." The CABR also separately addressed permanent buffer impacts of the sewer line corridor for, among other things a 246-foot long by 10-foot wide maintenance road proposed at the south end of the sewer line corridor beginning at Spine Road A. *Id*.

32. The CABR finds the analysis meets requirements in 19.200.250 (A through D) and impacts will be restored in accordance with the code, per the buffer restoration plan. *Ex. F27* p. 16.

33. The CABR states, "Wetland buffer restoration is proposed to restore the functions of buffer where temporary grading impacts will occur. Restoration will include placement of topsoil, woody mulch, and installation of a variety of native trees, shrubs and ferns followed by 5 years of maintenance and monitoring to adequately restore buffer functions." *Ex. F27*, p. 16. The project goal is to "[r]estore buffer functions where temporary buffer impacts are proposed which will replace vegetation lost during construction," and "the performance standards focus on keeping cover by invasives low and having a high survival rate of planted species so that there will be a resulting increase in percent cover." *Id*.

34. The CABR states, "[d]uring Years 1 through 5, invasive species will be removed and suppressed around the installed plants in the mitigation area as often as necessary to meet a performance standard of no greater than 10 percent cover by invasive species. Percent cover will be recorded annually and included in monitoring reports." *Ex. F27*, pp. 16-17. It continues, [t]he project will maintain 100 percent survival of plants in Years 1 through 3. After Year 3, the plants should be surviving and growing well within the buffer areas so additional survival rate monitoring may not be warranted. Plant species number will be recorded annually and compared with as-built conditions for inclusion within the monitoring report." *Id*. at 16. The CABR details specifications for planting, plant materials, planting specifications, planting methods, maintenance requires a monitoring plan to document vegetation, with a description of monitoring report contents required, and sets forth a contingency plan. *Id*. at pp. 16-20 (*see also* Table 3 Wetland Buffer Restoration Plant List).

35. The CABR finds that the analysis meets the requirements in 19.700, 19.700.710 and 19.700.715 and impacts will be restored in accordance with code, per the buffer restoration plan. *Ex. F27* p. 20.

36. The CABR finds the proposal is consistent with the Comprehensive Plan and the zoning standards for the Urban Cluster Residential (UCR) zone in Title 17 and the proposal meets

the criteria for a critical area variance in KCC 19.100.135 for the reasons set forth in the Staff Report. *Ex. F27* p. 21. The CABR was approved by the Director with conditions. *Id*.

37. The CABR Decision includes nineteen (19) conditions of approval. Relevant to this appeal are the following:

    a. **Condition 5**: "Commercial development will be revised in the associated Site Development Activity Permits and with the accepted plans under SDAP 22-00374, SDAP 21-06120, SDAP 22-00785 and related bridge permits 22-01582 and 22-01582 once approved. *Ex. F27* p. 22.
    b. **Condition 6**: "Construction techniques shall implement best management practices to ensure protection of the wetlands, streams, associated buffers, and local water quality. Such best management practices shall include protective silt fencing in defined work areas, protective orange construction fencing along defined work areas, work during periods of limited rainfall or potential for adverse erosion and seeding of exposed soils as needed to prevent adverse erosion." *Ex. F27*, p. 22.
    c. **Condition 7**: "Due to the mapped slopes on this parcel, work on sloped areas shall be guided by the associated geotechnical reports and geotechnical specialists." *Id*.
    d. **Condition 8**: "Prior to final approval for each SDAP phase, the common boundary between stream and wetland buffers and the adjacent land shall be permanently identified with critical area buffer signs. …" Id.
    e. **Condition 9**: "Equipment shall be staged in designated areas. Avoid staging within the critical area buffer." Id.
    f. **Condition 10**: "Permit application approval is subject to chapter 19.200.215 and 19.300.315 of the Kitsap County Code, which states that buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Refuse shall not be placed in buffers." *Id*.
    g. **Condition 11**: "Clearing and tree removal within the established stream and wetland buffers shall be the minimum necessary to support the proposed improvements. Clearing limits must be clearly shown on the site plan with the associated building permit and clearing outside of the approved limits will require prior County approval. *Id*.
    h. **Condition 12**: "Due to area constraints from on-site streams and wetlands and their associated buffers, averaging was applied. The total area contained within the buffer after averaging shall be no less than that contained within the standard buffer prior to averaging. The decrease in buffer widths is the minimum size required for the regulated activity and is no less than 50% of the required width. The minimum

applied width is 85 feet as shown on the approved site. In addition, a building or impervious surface setback line of 15 feet is required from the edge of the wetland buffer." *Ex. F27*, pp. 22-23.

i. **Condition 13**: "As shown on the approved site plan, additional buffer areas shall be provided per the mitigation report." Ex. F27 p. 23.
j. **Condition 14**: "Unless otherwise allowed through this Critical Area Buffer Reduction, a 200 foot and 150-foot native vegetation buffer must be maintained along the delineated wetland boundaries, as depicted on the approved plans and 150-feet for the F-type creek. In addition, a building or impervious surface setback line of 15 feet is required from the edge of the buffer, unless otherwise approved by this variance." *Id*.
k. **Condition 15**: "The project shall adhere to the mitigation measures and recommendations within the approved wetland Mitigation Report prepared by ELS, Inc. dated September 7, 2022." *Id*.
l. **Condition 16**: "Vegetation planting shall occur as specified in the approved planting plan produced in support of this permit. Planting of native vegetation shall occur within the first dormant season once the permitted project has been constructed and approved. When planting is complete, the applicant must contact Development Service and Engineering Staff at (360)337-5777 for a site inspection and as-built approval. Monitoring and maintenance of the planted area shall be conducted for three years after DCD staff approves planting. Monitoring includes live and dead vegetation counts and records of all maintenance activities. Maintenance activities can be defined as, but are not limited to, removal practices on invasive or nuisance vegetation and watering schedules. Monitoring information shall be summarized in a letter with photographs depicting conditions of the vegetation and overall site Monitoring reports are due to Kitsap County Department of Community Development Services and Engineering Division by December 31 of each monitoring year. If more than 20 percent of the plantings do not survive within any of the monitoring years, the problem areas shall be replanted, and provided with better maintenance practices to ensure higher plant survival." *Id*.
m. **Condition 18**: "Due to area constraints from the on-site stream and associated buffer, the application of a Habitat Management Plan (HMP) shall be implemented to compensate for a buffer reduction at the minimum necessary to accommodate the proposed bridge installations and associated development infrastructure and temporary impacts under permit 22-01582 and 22-01582. This buffer reduction is allowed for the south and north bridge stream crossings, as there are no other alternatives to access the plat, the bridge access is vested per the 2009 Plat decision/Developer Agreement, and the bridge access is the minimum necessary of

the required buffer. The modified buffer is related to the required benching for wildlife access to and through the wildlife open space tracts and corridors. The bench minimum specification is at least 2 feet above the stream Ordinary high-water line and includes a 5-foot wide path and minimum 10-foot-high clearance above the path. The bench minimum specification shall include a coir-fabric armored slope-face to reduce stream cutting into the bridge trail. The coir shall be pinned into the bank. If armoring is necessary, it shall be done with rounded cobble or river rock, per Washington State Fish and Wildlife specs and under HPA direction." *Ex. F27*, pp. 23-24.

n. **Condition 19**: Upon successful completion of the required plantings, restoration work, monitoring and maintenance conditions and actions (and completion of associated bonds), a Homeowners Association (or the developer) will be required to maintain buffers, open space tracts, landscaping and critical area protections." *Ex. F27*, p. 24.

38. Spine Road A will be a dedicated County Road and will be required to be constructed to Kitsap County Road standards, per KCC Title 11. *Ex. F27*, p. 24.

B. Property Characteristics

39. The Arborwood project area has undergone land manipulations prior to (predominant) pre-European settlement when ancestors of the Suquamish Tribe lived, hunted and gathered food and resources from these lands. *Ex. F27*, p. 2. The land was later harvested for timber beginning in the mid-to late 19th century when the region was logged, cleared, farmed and settled. The project area has historically been managed as forest land where skid roads rail logging and log truck roads were built to transport timber to markets and mills. *Id*.

40. The project site is a forested property with an approximately 40-year old even-aged stand of timber within significant wetlands, slopes and streams. The timber stands are comprised of Douglas fir, Western Red Cedar, and Red Alder with predominant understory vegetation of assorted forbs, salal, sword fern, Oregon grape, Salmonberry, Red elderberry, Indian plum, Twinberry and Beaked hazelnut. *Ex. F27*, p. 2.

41. The property is generally dominated by two drainage systems, Crabapple Creek to the west, and Kingfisher Creek to the east. The creek systems also include significant riparian and sloped wetlands that attenuate stream flows which transmit surface and spring water from north to south into Appletree Cove. *Ex. F27*, p. 2.

42. An existing plat of the Hillbend community is located to the east and is comprised of Urban low designated single-family homesites. *Ex. F27*, p. 2. The Taree community is located to the north and east. Development is focused on the eastern portion of the property, and significant wetland areas will be protected. *Id*.

C. <u>2009 Preliminary Plat, Development Agreement and Plat Amendments</u>

43. On December 5, 2009, the County approved the overall Arborwood preliminary plat/performance-based development application (07-47662 PPlat). *Ex. F7*.

44. On July 23, 2009, the County approved a SEPA Mitigated Determination of Nonsignificance (MDNS) and Notice of Adoption of Existing Environmental Documents. *Ex. F6*.

45. On February 8, 2010, the prior owner of the property, OPG Properties, LLC entered into a Development Agreement with Kitsap County for the approximately 360 acres to be developed as the Arborwood project. *Ex. F8*.

46. The Development Agreement references Ordinance No. 352-2005 which provides that a development agreement shall be executed by the County and OPG for the property to establish development standards and an applicable vesting period. *Ex. F8, p.1.* It notes that OPG has a vested plat application for the property for 765 residential units (LU-1074, submitted September 16, 1991), but OPG will withdraw that plat application upon execution of the Development Agreement and termination of all appeals of the Agreement or the Plat. It states that OPG submitted a complete preliminary plat/performance based development application (07 47662) on March 26, 2008 and that such application is considered the "Preliminary Plat" or "Plat" for the entire property. *Id*.

47. Section 2 of the Agreement sets forth Project Development Standards, including zoning, densities and uses (Section 2.1), roads/transportation standards (Section 2.2), water and sanitary sewer standards (Section 2.3), stormwater standards (Section 2.4) greenway conservation easement and dedication/open space and trails (Section 2.5), capital facility standards (Section 2.6), latecomer agreements (Section 2.7) and impact fees (Section 2.8). *Ex. F8,* pp. 2-4.

48. Section 3 of the Agreement governs SEPA and Mitigation. Section 3.1 states, "The Property has been the subject of prior SEPA analysis, including the EIS Appendices and Addendum

for the original Arborwood plat (formerly known as Applewood) and the Kingston Sub-Area Integrated Plan and EIS as listed on Attachment D-1." *Ex. F8* pp. 4-5.

49. Section 3.2 of the Agreement states, "As part of the Plat application and review, the County issued a Mitigated Determination of Non-Significance and Notice of Adoption of Existing Environmental Documents ("MDNS/Adoption") on July 21, 2009, based on the prior SEPA documentation and the additional studies and analysis set forth in the County's SEPA determination on this Project. The MDNS/Adoption is attached hereto as Attachment D. A further listing of prior EIS and SEPA documentation and environmental studies relating to the Property is set forth in Attachment D-1. This project-level SEPA compliance is intended to satisfy all SEPA requirements for the subsequent build-out of the Project through Implementing Approvals (defined in Section 4). The SEPA documentation analyzed a "Project Envelope" representing the maximum allowable Project densities and uses described in Section 2.1 above using the Development Standards and mitigation measures approved in this Agreement ("Project Envelope"). The SEPA process to be followed for Implementing Approvals is set forth in Attachment C." *Ex. F8*, p. 5.

50. Section 4 of the Agreement governs Mitigation and states, "[t]he mitigation measures specified in the project-level SEPA documentation and the Plat have been determined to address and avoid significant adverse environmental impacts of the Project. The parties acknowledge the Project is entitled to use buffer averaging and modifications to the extent allowed in the County Code as of March 26, 2008. The Development Standards and other provisions of this Agreement satisfy all applicable concurrency and level of service requirements and constitute adequate and sufficient public facilities and services for the Project, unless modified by mutual consent." *Ex. F8*, p. 5.

51. The term of the Development Agreement is for a maximum of fifteen (15) years, which term may be extended for one (1) additional five (5) year period under certain specified conditions. *Ex. F8*, p. 5.

52. Section 6.2 of the Development Agreement addresses vesting. Section 6.2.1 governs project elements and development standards. It states, in relevant part, "[i]n accordance with the Plat Statute and the Development Agreement Statute, the Project herein is vested to the Project Elements and Development Standards in Sections 1 through 3 in effect on March 26, 2008, the date the complete Preliminary Plat application was submitted. *Ex. F8*, p. 6. This section continues "[d]uring the term of this Agreement, all Implementing Approvals shall be governed by these vested Development Standards. Copies of the County code and other County standards that are the vested Development Standards for the Project are

included as Attachment E to this Agreement for convenience in administering this Agreement and processing of Implementing Approvals. 'Implementing Approvals' mean the applications submitted after adoption of this Agreement for land use approvals, entitlements and permits which implement phasing and subsequent approvals for the Project, including but not limited to the Plat and all Phases, permits for grading, site development and infrastructure approvals." *Id*.

53. On December 30, 2019, the County issued a Notice of Administrative Decision – Preliminary Plat Minor Amendment Approval (18-00619 PPlat Minor Amendment). *Ex. F10*.

54. On April 17, 2023, the County issued a Notice of Administrative Decision – Preliminary Plat 2nd Minor Amendment Approval (21-05805 PPlat Minor 2). *Ex. F26*.

D. Pre-Hearing Background

55. On July 18, 2023, Joseph Lubischer and April Ryan filed a timely appeal of the CABR to the Kitsap County Hearing Examiner, Kitsap County Permit Number 23-03375, setting forth sixteen (16) separate assignments of error. *Ex. F1*.

56. Former Kitsap County Hearing Examiner Andrew Reeves held a Prehearing Conference for this appeal on September 1, 2023. *See Ex. F3*. No formal Prehearing Order was issued. The parties discussed and agreed to deadlines established at the Prehearing Conference for: (a) submission of a Joint Status Report for clarification of issues 3, 6 and 12[2]; (b) filing of dispositive motions; (c) exchange of witness and exhibit lists; and (d) hearing on this appeal.

57. RoP section 2.4.1 addresses Prehearing Conferences. The purpose of a prehearing conference is for consideration of: a. Identification, clarification, and simplification of the issues; b. Disclosure of witnesses to be called and exhibits to be presented; c. Motions; d. Opportunities for mediation; and e. Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.

58. The Hearing Examiner originally assigned to this matter withdrew in October 2023 and did not rule on any of the parties' prehearing motions. Hearing Examiner Pro Tempore Stephanie Marshall was assigned to this matter on approximately November 7, 2023. As noted above, an Order on Prehearing Motions was issued on November 13, 2023. *Ex. F51*.

[2] *Exhibit F-30*.

59. In the Order on Prehearing Motions, the Examiner ruled that neither the Applicant nor the County established that any genuine issue of material fact exists to refute Appellants' argument that the CABR allows Wetland P2's eastern buffer to be reduced by more than 50% of the buffer width established after the categorization is done and any buffer adjustments applied. *Ex. F51*, pp. 5-6. Neither the Applicant nor the County argued that a greater than 50% buffer reduction can be administratively approved under KCC 19.200.220.C.1.b as it existed in 2008. *Id*.

60. The Hearing Examiner determined that the CABR Decision is based on the fact that Wetland P2 is categorized as a Category II wetland and requires a 200-foot buffer. *Ex. F51*, pp. 5-6. The Examiner declined to rule that submitted declarations evidenced a genuine issue of material fact with respect to the appropriate categorization of Wetland P2 and its associated required buffer. *See id*.

61. The Examiner did not rule prior to hearing on the Applicant's argument that its revised proposal to relocate the Spine Road and abide by a minimum 100-foot buffer width for Wetland P2 will comply with KCC 19.200.220.C.1.a(5). *Ex. F51*, p. 6.

62. The Hearing Examiner rejected Appellants' argument that the County's rules for buffer averaging and administrative buffer reduction only apply to the "standard buffer." Appellants argued that the standard or "base" buffer is 100 feet and that the County may modify the standard 100 foot buffer, but cannot modify, average or reduce the additional 100 feet of buffer required as an adjustment under the code. In other words, Appellants asserted that the "standard buffer" means the base buffer width is based solely on a wetland's categorization, rather than the regulated buffer width comprised of the base buffer width and any adjustments for land use intensity and habitat level required under KCC 19.200.220.A-B (the "regulated buffer"). *Ex. F51*, pp. 6-7.

63. The Examiner found that there was no evidence the County intended to limit use of buffer averaging to the standard buffer or the base buffer width based solely on a wetland's categorization under the 2008 critical areas ordinance. *Ex. F51*, pp. 6-7. She ruled that the Appellants' interpretation of the term "standard buffer" under former KCC 19.200.220.C.1.a is not supported and that deference to Kitsap County as the agency charged with the administration and interpretation of its CAO (current and former) is due. *E.g. Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 43 (2009). *Id*.

64. The Examiner ruled that the County established that use of buffer averaging is not limited to the "standard buffer" in the manner characterized by the Appellants. *Ex. F51*, p. 7.

65. Through pre-hearing motions and responses thereto, the parties stipulated to a condition that buffer averaging shall not result in buffer widths of less than 100 feet for Wetland P2. *Ex. F52*, p.2; *Ex. F34* p. 6; *Ex. F36* p. 4.

66. Appellants argued in prehearing motions that it is the duty of County administrative staff to independently review wetland ratings and classifications to determine whether outside peer review is needed to corroborate the applicant's analysis, to determine the appropriate, unmodified (or pre-modified) buffer width for the affected wetlands based on the applicant's analysis and any necessary peer review, and to evaluate the approval criteria for buffer averaging in the Code as applied to that buffer. *Ex. F36*, p.2.[3]

67. Appellants argued that the Examiner sits in an appellate capacity to hear challenges to County staff's decision and has no authority to decide any of these issues as an original matter; that is the role of County administrative staff. *See, e.g.,* Former KCC 19.100.130.A (stating it "shall be the responsibility of the department" to determine "[t]he nature and type of critical area and the adequacy of any special reports required in applicable sections of this code"). *Ex. F36*, pp. 2-3.

68. Appellants argued that Applicant has never requested review by County staff of a different pre-modified buffer and that County staff have not evaluated whether third-party review should be required to corroborate any analysis supporting a new buffer width. County staff have not issued a decision an alternative pre-modified buffer for the Examiner to review on appeal. *Ex. F36*, p. 3. Appellants argued that Applicant should be required to submit a new CABR application. *Ex. F36*, p.3.

69. Appellants argued that no detailed plans have been submitted demonstrating that a new road alignment will avoid any impacts within 100 feet of the wetland and that the new alignment will comply with applicable code provisions and requirements of prior decisions governing the Arborwood project. *Ex. F36*, p. 4. The new road alignment was not part of the project when Appellants drafted their appeal and that they have been deprived of an opportunity to investigate the plans and to raise code compliance and environmental impact concerns

[3] Although the Examiner granted Applicant's Motion to Strike Appellants' Motion to Strike (*Ex. F37*) in the Order on Prehearing Motions (*Ex. F51*), the basis for granting Applicant's Motion to Strike was the fact that neither the Rules on Procedure nor the Code allow for a reply brief in support of a dispositive motion, and Appellants' Motion to Strike was determined to be an impermissible reply brief. Although not considered for purposes of Appellants' Motion for Summary Judgment, the Examiner considers Appellants' arguments in their Motion to Strike in the broader, overall context of this appeal.

relating to the new alignment. *Id*. Appellants allege that it is improper for the Examiner to consider the new road alignment as an original matter. *Id*.

70. Appellants agreed that the Examiner should impose a condition that "buffer averaging for the Arborwood Development shall not result in buffer widths of less than 100 feet for Wetland P2." *Ex. F36*, p. 4; *Ex. F52*, p.2. But Appellants argued that whether the new road alignment will or will not comply with that condition, and whether it can be approved at all, should be addressed by County staff as an original matter in a new decision. *Ex. F36*, p. 4.

71. Applicant argued in its Prehearing Brief (*Ex. F47*) that Arborwood has been the subject of exhaustive environmental review, entitlements, and approvals over the past three decades, all of which have been unchallenged by Appellants until this appeal. It alleges that the vast majority of concerns raised by Appellants have been reviewed and addressed in conditions set forth in prior land use decisions. *Ex. F47*, p.1.

72. Applicant argued that the Appellants are collaterally attacking three decisions issued by the County which govern the Arborwood development activities: a 2009 Mitigated Determination of Nonsignificance and Notice of Adoption of Existing Environmental Documents ("2009 MDNS"), *see Ex. F6*; the 2009 Arborwood Preliminary Plat and Performance Based Development ("2009 Preliminary Plat"), *see Ex. F7*; and the 2010 Development Agreement between OPG Properties, LLC and the County ("2010 Development Agreement"), *see Ex. F8*. *Ex. F47*, pp. 1-2.

73. Applicant argued that all Arborwood proposed wetland impacts are consistent with the 2009 Preliminary Plat and comply with the Vested Code. *Ex. F47*, pp. 9-12.

74. Applicant argued that the proposed stormwater management facilities are consistent with the original stormwater design recommended for approval by the County engineer during the hearing for the 2009 Preliminary Plat. It submitted that the proposed facilities are consistent with the Stormwater Regulations under the Vested Code and use best management practices described in the Stormwater Regulations. Applicant argued that the proposed construction of the stormwater facilities will be consistent with industry standards and conform to all best management practices and noted its plans are awaiting County approval. *Ex. F47*, p. 13.

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Testimony

Katharine Schaffer

75. Appellants called Katharine Schaffer, Kitsap County DCD Planning Supervisor to testify. She testified that she reviewed and signed the CABR Staff Report, indicating her approval. *Ex. F27*.

76. Ms. Schaffer testified that there are eight (8) persons on her current planning team and that her supervisor is Steve Heacock. She stated that she did not write any reports. Ms. Schaffer testified that the Director made the CABR decision, and that it is a team effort. She testified that she did not review the seven (7) documents referenced on pages 10-11 of the Staff Report (*Ex. F27*), referred to in the Staff Report as "Documents Consulted in the Analysis."

Steve Heacock

77. Appellants called Steve Heacock, Kitsap County Senior Planner and Project Lead as stated in the Staff Report, *Ex. F27*, p. 24. Mr. Heacock has been employed by the County since July 2007. He authored the Staff Report, *Ex. F27*.

78. Mr. Heacock testified that he has wetland delineation training and knows how to identify wetland soils, but he is not a certified wetlands specialist.

79. Mr. Heacock testified that there are several categories of wetland buffers, and that the purpose of wetland buffers are to protect wildlife habitat, water quality, understory and overstory, as well as avian and terrestrial wildlife and upland uses. He further explained that soil quality within the buffer protects the wetland itself.

80. Mr. Heacock explained how some soil characteristics relate to wetlands and how they function within a wetland buffer. These features include porosity, filtration, soil compaction and cation exchange – water permeating through the soil column. He stated, "wetlands are not for storm water." However, prevention of stormwater surges is "not typically addressed in CABR review." The slope of a buffer affects its function.

81. The County determined the modification/width averaging will not adversely impact the wetland, referring to *Ex. F8* and KCC 19.200.220C.1.a(3). He explained that the County considers "whether it meets the intent of the wetland 'ask'." Mr. Heacock considered the history of the Arborwood project itself, the environmental impact statement (EIS) and

associated mitigated determination of non-significance (MDNS) and the development agreement (*Ex. F8*). He noted that this is a complex project and such documents and determinations are not going to be re-reviewed in the CABR process. Page 6 of the Development Agreement and Attachment E reference the rules to be applied for buffer averaging. *Ex. F8*.

82. Mr. Heacock explained that buffer averaging is where a wetland buffer is reduced in one area and increased in another area, e.g. a trade-off. He testified that he reviewed the 2009 plat decision and that it approved buffer averaging. *Ex. F7*. It is also addressed in the Development Agreement (*Ex. F8*).

83. Mr. Heacock testified that he reviewed the previous MDNS, approved minor plat alteration and phasing of the development itself. He reviewed stormwater plans, but didn't review drainage reports. Mr. Heacock admitted that the Habitat Management Plan was not listed among the documents reviewed for the CABR, but that it was incorporated in one of the listed documents. He was not sure if it was made available to the public in the portal. *Ex. F27* p. 11. He also reviewed the preliminary plat minor amendment approval (18-00619 PPlat Minor Amendment) *Ex. F10*.

84. Mr. Heacock affirmed the accuracy of the proposed buffer averaging/reductions shown on page 5 of the Staff Report, *Ex. F27*. He explained that the bridge component was referenced (*Ex. F8*, p. 11), but that the wildlife crossing is not part of CABR review. He stated it was prudent to reference this. There is no buffer issue with bridge crossing; Bridge permits will process those reviews. Wildlife has nothing to do with the CABR, this is a reference to elements of prior approval. The Decision merely "anchors" that bridge crossings meet requirements for wildlife crossing. He testified that an hydraulic permit approval (HPA) was issued by Washington State Department of Fish and Wildlife (WSDFW).

85. With respect to the April 22, 2022 Wetland Buffe Reduction Plan (Averaging) (*Ex. F18)* the red area illustrates roadway clearing. Mr. Heacock explained that the blue areas are those that compensate for red areas. Orange areas are areas of minor impact for grading but will be fully restored. These are temporary impacts. Pursuant to sequencing, these areas will be fully restored to be a functioning wetland buffer. He stated to reference the monitoring and mitigation report. A mitigation bond will be in place for 5 years. He does not know if bond money will be used to restore if the fill needs to be removed.

86. Mr. Heacock is satisfied with the replanting plan. He does not know if it will be irrigated. Mr. Heacock testified that the slope may change. He stated that the grading permit is a condition

of approval and will result in temporary impacts only. The fill to be put into the wetland buffers is referenced as temporary. He explained that "temporary" means no adverse impact to wetlands. See pages 12-13 of the Staff Report (*Ex. F*27).

87. Mr. Heacock testified that the 200-foot buffer was determined on a conservative basis.

88. Mr. Heacock testified that the County does not review groundwater impacts. He stated that the Washington Department of Ecology, Fish and Wildlife and the Tribes have all been out to the site. With respect to Wetlands 302, Q1 and Q2, these agencies and the DOE wetlands specialist "Neal," met prior to issuance of the ELS report that concludes these wetlands no longer exist. The Department of Ecology was aware of the prior classifications of these wetlands.

89. Mr. Heacock does not know the size of the drainage basin. He has not reviewed the revised plans proposed by the Applicant concerning the Wetland P2 100-foot buffer.

90. Mr. Heacock testified regarding SEPA. He said this is a minor land use action. Per WAC 197-11-800(6)(e) and the SEPA rules in KCC 18.04, it is categorically exempt. A buffer modification is a type of variance, which is a type 1 decision. The Decision was not issued under KCC 19.100.135, it was issued as a CABR. The majority of the application is a CABR for buffer averaging. A determination of categorical exemption is not subject to appeal. See KCC 18.04.110(A), use of exemptions.

91. Mr. Heacock testified that under KCC 19.700.715, temporary impacts are considered. It is always the County's practice to consider temporary impacts. *See Ex. F8*, p. 578.

Joanne Bartlett

92. Appellants called Joanne Bartlett, Senior Biologist at Ecological Land Services (ELS). See *Ex. B4.*

93. Ms. Bartlett visited wetland P2 in October 2023 and prepared a Wetland Rating Overview for Wetland P2 dated October 17, 2023. *Ex. B5*. She previously authored the Wetland Buffer Reduction Plan (Averaging) (*Ex. F18*), Wetland Mitigation Plan (Fill Management (*Ex. F19*) and Wetland Buffer Mitigation Plan (Ex. *F23).* Prior to her review of Wetland P2 in October 2023, the wetland had been rated a Category II wetland with a 200-foot buffer. She testified that *Exs. F5 and F9*, the prior Raedeke reports in 2007 and 2018, had erroneously considered

wetland P2 as part of a mosaic wetland with wetlands L1/L2. She determined in October 2023 that it should be recategorized as a stand-alone slope wetland.

94. Mr. Telegin questioned Ms. Bartlett as to why Raedeke would have made such a mistake, given that the definition of a mosaic requires less than 1 acre and L2 is 12 acres in size. There is no basis in the Washington wetland rating manual for such a mistake.

95. It is Ms. Bartlett's expert opinion that P2 is not one wetland system with L1/L2. She stated that water sloping down prevents L1/L2 from sharing water with P2; there are not level areas of water and no surface water connection. Ms. Bartlett testified that the water in P2 is not flowing to L2 and is disrupted by an old road.

96. Ms. Bartlett testified that *Ex. B5*, Fig. 1, shows a berm separating P2 from L1/L2 and an existing logging road. It is a trail - bare earth - and not regularly used. Ms. Bartlett viewed upland and facultative plants in this area, including salmonberry, sword fern and blackberry. There are no test pits in the road. She opines this area is not wetland.

97. Mr. Telegin asked why the 2007 Raedeke report, *Ex. F9*, p. 11 shows a culvert connecting the two wetlands? Ms. Bartlett testified that Raedeke "got it wrong." The culvert is 5-6' long.

98. Ms. Bartlett did not delineate P2 or L2 in October 2023.

99. Ms. Bartlett testified that wetland hydrology can change, with factors such as more wells and/or less rainfall. "We see it all the time." Wetlands can shrink or expand.

100. Ms. Bartlett addressed questions regarding wetlands Q1, Q2 and 302, which were identified as wetlands in 2007 and 2018 (*Exs. F5* and *F9*), but she determined they no longer exist. Ms. Bartlett testified regarding her analysis of a series of test pits on which she based her determination that hydric soil criteria not met. See *Ex. F18*, page 23, which is a map of test pits. She detailed the various data in soil profiles, including "YR," which stands for "yellow red," and is a type of "paint chip" analysis of soil colors, hue and chorma. "YR" stands for "yellow red."

101. Ms. Bartlett testified regarding redoximorphic features, which are analyzed to determine if there is a color change, indicating a level of potential groundwater. Oxygenated soils present differently than those that are not oxygenated.

102. Ms. Bartlett testified that Q2 no longer meets all three criteria. With respect to Q1, hydric soils are missing.

103. On cross examination by Applicant's attorney, Ms. Liaw, Ms. Bartlett testified that it is typical to require re-evaluation of wetlands. It varies, but this is typically every 3-5 years.

104. In response to a question from Mr. Gecas, Kitsap County attorney, Ms. Bartlett testified that Mr. Heacock did not ask her to go back out to look at the wetlands. This was said directly to her before the appeal was filed.

Dr. Robert Roseen

105. Appellants called Dr. Robert Roseen to testify as an expert witness. He has a doctorate in civil engineering and a PhD in civil water engineering. He has a masters degree in environmental studies. Dr. Roseen does not have a PWS certification and is not licensed in Washington State, but is familiar with applicable regulations and standards. He has worked as faculty at UNH until 2012. Dr. Roseen is a diplomat in American Academy – DWRE. He works to help people get stormwater permits. He is familiar with shallow groundwater, stormwater/waste water and nutrient loading. Dr. Roseen is able to determines system performance, water quality and quantity. He teaches ASCE classes. Dr. Roseen is not a licensed hydrogeologist or geologist.

106. Dr. Roseen reviewed the Arborwood stormwater plans and the preliminary plat. He did not prepare a report for this case and did not conduct a site visit.

107. Dr. Roseen has not done a wetland delineation; he hires wetland scientists for evaluation/compliance. He believes that accurate delineation of wetlands is a "bit of a game."

108. Dr. Roseen's testimony does not pertain to delineation questions, but rather to stormwater and other impacts to wetlands.

109. With respect to the 1997 Kitsap County Stormwater Manual, Dr. Roseen testified that the proposal is "not remotely in compliance."

110. Reviewing *Ex. F16*, Storm Drainage Plans Sheet C4, dated February 22, 2022, Dr. Roseen determined there is no stormwater quality for the road. He testified stormwater from the road will directly discharge to P2 wetland, which is sloped to the uphill side.

111. Dr. Roseen testified that all developed area must drain to a detention pond, but that all of Spine Road drains untreated directly to wetland. For Phase 5 Spine Road, there is only 20% water quality management, and no water treatment to the north or south of Spine Road. Water treatment is necessary to allow total suspended solids (TSS) to settle out. However, the swale is an untreated roadside ditch. For water quality, it needs to have elements for settling, not biofiltration simply through the use of ponds. *See Ex. B19*, p. 4-14 section 4.6 (no mention of water quality swales). The Spine Road is 25% of the developed area.

112. Dr. Roseen testified that the existing topography and proposed contours/grading will result in a transformation of the hillside with 15 feet of fill at a 13% grade. He estimates there will be a greater than 1:1 slope, which is a challenge to revegetate.

113. Dr. Roseen noted there will be a retaining wall on east side of the road and that there will be no crown in the middle of the road. He testified that road runoff includes TSS nutrients, tire derivative, metals, zinc, copper, and other contaminants that affect salmon. Aquatic habitat will be impacted. Dr. Roseen testified that the pollutant export rate for 1.1 acres of roadway is 272 pounds of TSS.

114. Dr. Roseen testified that the stormwater plan is already approved but it doesn't meet requirements. Stormwater runoff will adversely impact the P2 wetland.

115. Dr. Roseen testified that buffers are significant for overall water quality and that wetlands need buffers.

116. Dr. Roseen testified that water quantity is also a factor. As a result of the development, the drainage area will increase dramatically with all water directed to a single point. He opined there will be a tremendous increase in volume and peak.

117. Dr. Roseen testified regarding the meaning and importance of hydroperiod. He explained that the slope wetland is 11-24" deep and that water flows slowly through it at a rate of 1 foot per day. With the proposed development, water velocity will increase to 15 feet per second. Currently, the water is just seeping through the hillside. The proposed development and re-directed water will create an erosion channel and result in a lowered water table by 2-3 feet. The stormwater will feed wetland like a firehose during periods of rain and it will become an intermittent stream. There is zero channel protection. Dr. Roseen testified that the slope will be going from 13% to 65% and increasing water flow from 21 feet

per second to 49 feet per second, more than doubling. The hydrology will change due to the road.

118. Dr. Roseen testified that an energy dissipator is "old school."

119. Dr. Roseen testified regarding the purpose of fill material and noted there is a conflict of goals. Fill and compaction destroys soil structure, creating a dam. It will cut off shallow surface level flow in order to provide structural stability of the road. He estimates there will be a couple thousand yards of fill.

120. Dr. Roseen noted that the retaining wall has drain pipes at the bottom for groundwater flow and testified that he believes Wetland P2 will be impacted. He testified that the slope of fill material to be installed for the road is within the buffer which is supposed to be an "undisturbed area." Dr. Roseen testified that the distance to the wetland is decreased from 200 feet to 100 feet, but that there will be disturbance as close as 65-feet away from the wetland. With a proposed revised buffer of 100 feet instead of 85 feet, and even if the centerline of the road is moved back 15 feet, he still expects adverse impacts to the wetland. He testified that it appears that fill material is closer than 85 feet away from the Wetland. He opined there will be a thermal impact on stormwater ponds/fisheries.

121. Dr. Roseen testified he believes there is "no way" to imagine "no adverse impact" on Wetland P2. Dr. Roseen opines there will be a big impact on L2 and that over 1000 feet of wetland will not see water. In his opinion, this will change wetland functionality.

122. Regarding condition 10 in the CABR (*Ex. F27*, p.22*),* Dr. Roseen testified that he did not believe the buffer will be enhanced. Microtopography will be lost. The added area/buffer will not have any positive impact; pollutant load from catch-basins will not be eliminated.

123. On Cross-Examination by Ms. Liaw, Dr. Roseen testified that if he knew the Spine Road development was for temporary use at this time, used only for emergency access, that would change his opinion a little. He stated the same water quality impacts would result, but not to the same extent. The impervious surface itself is the issue. Dr. Roseen testified that paved/lightly used is better than gravel.

124. Dr. Roseen was asked to review *Ex. B17*, Storm Drainage Plan, Arborwood North, Phase 6 (updated stormwater plan) and compare it to *Ex. F16* (Storm Drainage Plans dated February 16, 2022). He testified that, based on the road detail, the updated plan still shows the road is crowned to the ditch. Asked about the fact that the catch basins will direct

stormwater to the north to stormwater detention pond, Dr. Roseen testified that some of the road runoff is captured, but not all.

125. Dr. Roseen testified that, with respect to steep slope revegetation a 3:1 slope is good and 2:1 is not the best.

126. Ms. Liaw directed Dr. Roseen's attention to *Ex. B11*, Storm Drainage Plan, Arborwood North Phase 4&5, Sheet SD-2. He admitted that the outfall into the detention pond is in a better place than originally proposed and will improve its function and stated the pond design has improved.

127. Dr. Roseen testified regarding the fact that erosion control is important to stormwater management. He did not review the geotech reports or retaining wall plans. Dr. Roseen opines that groundwater is at about 10 feet throughout the site. He opines that there is not only surface water runoff to P2, also groundwater.

128. Mr. Gecas asked Dr. Roseen about the updated plans moving water to the north (*Ex. B17*) and why Dr. Roseen believed there would still be an impact to wetland P2? Dr. Roseen testified that it will be an improvement, but there will still be adverse impacts from untreated stormwater. Dr. Roseen admitted that, in catch basins, sediments do settle and it is "pretreatment." Dr. Roseen testified that fish habitat needs filtration.

129. On re-direct, Dr. Roseen testified, "It is the road that is causing the impact," and noted that the County did not have the new stormwater document when it made the CABR Decision. Dr. Roseen agreed that conditions could be put in later, but he expected it would be difficult to add new conditions to protect wetland P2.

130. Dr. Roseen testified that the County was not justified in finding no adverse impact to wetlands. He testified that the standard is that you cannot use buffer averaging if there is any adverse impact. He also noted that, typically you would have stream channel protection.

131. With respect to *Ex. B17*, Dr. Roseen testified that there will still be untreated discharge to P2 and stated that direct discharge is a problem. He testified that more buffer is better, but that distance and what the buffer was intended to be used for are both considerations, independent of each other.

Joseph Lubischer

132. Appellants called Joe Lubischer to testify as an expert witness. Mr. Lubischer is one of the appellants. He provided testimony regarding hydrogeology – ground water and transfer of water through the soil – and hydrology – stream and surface water and water just below the surface – perched groundwater. Mr. Lubischer does not have training or certification in hydrogeology or hydrology; he stated that he learned while working as a consultant on geology and hydrology reports. He is not a civil engineer; he has a masters degree in mechanical engineering, licensed in Washington.

133. Mr. Lubischer's work includes analysis of streams and rivers out of the Olympic Mountains and analysis of glacial depositions in soils to determine how water is moving around. He analyzes water balance in drainage basins. Mr. Lubischer testified that with Puget Sound glacial geology there are glacial deposits. He stated that wetlands are evidence of perched ground water.

134. Reviewing *Ex. F8*, attachment B, p. 15, Mr. Lubischer testified regarding the location of Crabapple Creek, which flows south to north, following the black line. He stated that this is a flat, broad wetland.

135. Mr. Lubischer addressed Appeal Issue 11 and testified that he believes subsurface storage and perched groundwater will be interrupted by grading and construction of retaining wall for Spine Road A. He referenced *Ex. F27*, p. 5, construction of fill, and *Ex. A13*, Wild Fish Conservancy Services report. Mr. Lubischer stated that the black squiggly line on *Ex. A13* is an intermittent stream/channel.

136. Mr. Lubischer testified that he believes perched groundwater flows from east to west. In reviewing *Ex. A11* (Zipper Zeman Associates, Inc.) dated July 18, 2007, he noted this was a pre-design evaluation. Mr. Lubischer testified that p. 12 of *Ex. A-11* evidences test pits. He stated that TP 115 is close to L1/L2 and P2. The soil log for this hole shows the correct geologic structure for perched groundwater in his opinion. *Ex. A-11*, p. 31. He did not measure how close TP 115 is to L1/L2 and P2 and did not make any conclusions based on surveys or GIS.

137. Reviewing *Ex. A-10*, Arborwood Preliminary Geotechnical Report dated July 29, 2021, Mr. Lubischer testified that you do not see recessional outwash up north; Section 3.2 soils are mapped mostly as Vashon Till. He stated that that unit continues to the east then it thins out. He opines there is some recessional outwash to the east end of P2.

138. Mr. Lubischer testified that the Hillbend site collects and funnels surface water into swale that feeds wetland P2. He stated that surface water is a big component to maintaining groundwater. He believes that construction of the Spine Road will block ground water flow.

139. Reviewing *Ex. A14*, P2 Swale Cross-Section dated October 2023, Mr. Lubischer testified this uses existing contour lines and shows where the cut begins. He stated that six feet of soil will be removed upgradient above the retaining wall. He also noted that the cut is five feet deep and believes it will intercept any groundwater. Mr. Lubischer testified there will be a 47-foot straight line, creating impermeable surface. Mr. Lubischer opined that the stormwater system/road design of the Spine Road will result in water being funneled to a ditch, taking it away from contributing to the wetland.

140. Mr. Lubischer testified that well compacted soil is highly impermeable, such that there will be no opportunity for water to infiltrate. Mr. Lubischer testified that exact flow paths of water were not analyzed in staff report and that there is no information in foundational documents.

141. Mr. Lubischer testified that only about 50 feet of undisturbed buffer with natural vegetation will be left for infiltration. As a result, he believes the geology and hydrogeology will be completely changed, resulting in adverse impacts to P2. Mr. Lubischer stated that direct discharge does not recharge the wetland and infiltration takes weeks or months; the timing is known as a hydroperiod.

142. Mr. Lubischer would never postulate a disconnection between L2 and P2. He reviewed the *Ex. B5* map prepared by Joanne Bartlett and viewed the culvert. He testified that it is 20 feet long, not 5 feet long, and that there is no berm for the road. Mr. Lubischer testified that the area looks a little drier and harder, and you can see the path of old track. The area is dark, black, covered with leaves; some vegetation exists including salmonberry and sword fern.

143. Mr. Lubischer opined regarding a groundwater connection between L1 and P2; he stated there is a hydrogeological connection. He testified that it all looks like one wetland that someone drove through. Mr. Lubischer testified that P2 is not a "source" of water/hydrology for L1/L2; there is a hydrogeological connection. Mr. Lubischer testified we would need to use piezometers to measure the hydraulic "head."

144. Mr. Lubischer testified that *Ex. A16* (NOD Site Plan dated June 27, 2023) is a mark-up of one of the exhibits that he created to try to understand buffer averaging. He testified that he believed some fill is incorrectly identified as temporary impacts; this is permanent fill (orange areas). Mr. Lubischer testified this is the improper way to do buffer averaging. He also noted that the bridge crossings also involve fill, and questioned whether those areas are being adequately mitigated.

145. Mr. Lubischer testified regarding Appeal Issue #16 – invasive species. He stated that these include scotch broom, ivy, morning glory and Himalayan blackberry and explained that removal and eradication all require different techniques. Mr. Lubischer said that, if you leave 10% of invasive species, you will make no headway. He also noted there is an adverse effect of mowing. Based on *Ex. A12*, a graph downloaded from Kitsap Public Utility District (PUD) website, invasive plant removal should be at 100%.

146. On cross-examination, Mr. Lubischer admitted *Ex. A13* (WFC Water-typing Surveys) does not show a regulatory stream, despite the fact he called some of the lines "intermittent streams" or "channels."

147. Concerning water entering the site, referring to *Ex. A14* (P2 Swale Cross-Section) Mr. Lubischer did not determine the approximate distance between Spine Road and flow path or how big the drainage area is. He stated that he looked at drainage plans and the fact that Hillbend has had to deal with significant runoff as there are steep backyards which funnel to swale. He also noted that you can see the direction of slopes, with both visual observation and contours in grading plan. Mr. Lubischer stated the flow path is narrow due to topography.

148. Mr. Lubischer testified that surface and groundwater will both be captured by the retaining wall and it will intersect a recessional outwash. He opines there is no groundwater below four feet. Mr. Lubischer testified regarding perched groundwater vs. regional aquifer and explained how water has a referential pathway through highly permeable soils. He stated he is not offering an opinion on what exists deeper in the soil.

Dr. Sarah Cooke

149. Appellants called Dr. Sarah Cooke to testify as an expert witness. She has a doctorate in soils and has been a consulting ecologist for 47 years, 36 years of which were in the Pacific Northwest. Dr. Cooke is a Professor, teaching courses on wetlands, upland plants hydric soils and restoration. She worked for Raedeke years ago. Dr. Cooke is a member of the Soil Science

Society and authored a white paper on Best Available Science for the Washington Department of Ecology. Her expertise is in wetlands ratings and delineations.

150. Dr. Cooke did not go on site to independently evaluate wetlands. Her testimony is based on a review of photographs taken by Ms. Bartlett and reports prepared on behalf of the Applicant.

151. With respect to Wetlands 302, Q1 and Q2, she questioned the change by ELS staff from wetlands to no longer wetlands. *Ex. F18* compared to *Ex. F9* (Raedeke report).

152. Dr. Cooke examined and discussed each photo in *Ex. F18* (Wetland Buffer Reduction Plan (Averaging) dated April 22, 2022) and concluded that the determination of "not wetland" was questionable, primarily based on the hydric soils criterion. She testified that you need all three factors for wetland indicators per the United States Army Corps of Engineers Wetland Delineation Manual (*Ex. A7*). Dr. Cooke testified that dark colors are present from organic acids, oxidized iron/bacteria in soil.

153. Dr. Cooke testified that wetlands need to be evaluated during the growing season and that she believed evaluation in late March is on the cusp. She also noted that the samples were taken during a several year drought and that this was not mentioned in the report.

154. Dr. Cooke testified that, "anything that is a 1 or 2," requires additional hydroxymorphic analysis. She explained that Hydric soil indicators are hydroxymorphic features. The top number indicates saturation of color and the bottom number indicates intensity of color (for example 2/2). Dr. Cooke explained that where there are mottles/concentrations, you should have had redox dark surface checked.

155. Dr. Cooke testified that the ELS/Bartlett analysis for test pit (TP) 1 is questionable because it notes 1% of redox features. She opined that the human eye cannot detect 1%. Dr. Cooke also stated that brownish mottles are often more than 1%. Dr. Cooke discussed that oxidized rhizospheres are found along living roots; this only happens during the growing season. She stated that when soils are drained, they get bright red because they are oxidized.

156. Dr. Cooke testified that for TP 2, 5% was indicated at a depth of 12-16 inches. Dr. Cooke opines it is probably 10% and very likely a hydric soil. She stated that it is too marginal, especially given what she can see in the photograph.

157. With respect to TP 4 (near wetland Q1), Dr. Cooke had the same comments as TP 2. She stated that, with a 2/1 chroma, a chroma 1 makes it automatically a wetland soil. Dr. Cooke stated that dark soils are masked by organic acid.

158. On TP 9 (near wetland Q2), Dr. Cooke testified she sees wetland vegetation in the photograph. She stated that usually at least 5-10% of iron is within 12 inches of surface. Dr. Cooke would say this shows hydric soil because of the original assessment by Raedeke in 2007 (*Ex. F5*) and commented that it is hard to believe there is no saturation.

159. Dr. Cooke testified regarding TP 11 and TP10 (Q2). She stated that TP 10 is much more marginal than the other two and that it may actually be excluded.

160. Dr. Cooke testified regarding hydrology indicators and discussed the fact that there is a hydrogen sulfate odor when oxygen gives off electrons. She explained that when exposed to oxygen, bacteria in the soil grabs electrons for energy. She testified that you have to grab the soil and smell it; you do not necessarily smell it when you dig.

161. Dr. Cooke testified that an evaluation is just a snapshot. She stated that a single analysis does not mean it is not a wetland. In her opinion, the fact that the previous consultant twice found wetlands means you need a tiebreaker. Dr. Cooke testified that another evaluation should be made later in the growing season.

162. Dr. Cooke questioned the change in evaluations. She testified that soils take decades to develop features and that they do not change fast. She noted that there are no other changes nearby. Dr. Cooke testified that a scientist should look for this year's roots to determine whether they have rust on them. She stated that vegetation and hydrology change much more quickly than hydric soils. It is her opinion that the County needs to do a tie-breaker.

163. Dr. Cooke addressed the culvert connecting P2 and L2. It is her opinion it is one continuous wetland. Based on her review of photographs, she does not agree that the skid track is a logging road. Dr. Cooke testified that it is pretty clear that P2 was part of L1/L2 until the skid road was created. She stated that the wetland has reestablished itself. In Dr. Cooke's opinion, this is one continuous system and is part of a riverine system. Therefore, Wetland P2 should be categorized as Category II, not Category IV.

164. On cross-examination by Mr. Gecas, Dr. Cooke admitted there is not a reference in Army Corps of Engineers manual for the best time to do delineations. She also admitted that seasonality does not have any impact on hydric soils. Dr. Cooke could not answer the question

as to whether, after some time, one would just accept that drought conditions are the way things are now.

165. On cross-examination by Ms. Liaw, Dr. Cooke admitted that you cannot determine hydric soils from photographs. She is only looking at the color in providing her testimony.

166. Dr. Cooke testified that oxidized rhizospheres are shown in hydrology but should be in soils (hydric soils). She believes that Ms. Bartlett should have performed analysis 1-2 months later. Dr. Cooke testified that hydric soil indicators are all redox features. It is her opinion that Ms. Bartlett interpreted data sheets incorrectly and that the dark soils in photos are likely a chroma of 2. She stated that she believed Ms. Bartlett's analysis was incomplete/inaccurate and that there are contradictions in Ms. Bartlett's data sheets. Dr. Cooke testified that the County should not have just accepted this.

167. Dr. Cooke testified that the effect of the drought is more related to the lack of hydrology found. She said there is no connection between drought year and the soils characteristics. She testified that TP 9, 10, 12 and 13 were all affected. In Dr. Cooke's opinion, more recent clear-cutting would not have made a difference in the presence of hydrology in 2009, but stated that on-site localized soil conditions could impact conditions.

168. Dr. Cooke testified that she believes wetland P2 has a flow between L1/L2, but there was an artificial "lopping" off. She stated that wetland vegetation is re-emerging up the historical logging road and that "the two are joined still to this day." Dr. Cooke testified that the "berm" identified by ELS is just vegetation growing over the culvert. She also noted that Mr. Lubischer saw wetland vegetation and wetland soils. In her review of the photographs, the soils are very dark.

169. On re-direct, Dr. Cooke testified that you need standing water for oxidized rhizospheres if there are newly growing roots. A chroma of 1 means there is no oxygen left in the soil because it has been drowned by water. She testified that you need to sample where there is vegetation to see if there are oxidized rhizospheres. Dr. Cooke testified that a neutral third party should sample where it looks like a wetland.

Pete Lyberis

170. Applicant called Pete Lyberis to testify. He has been with Taylor Morrison for 3 years and is division president. Taylor Morrison acquired north half of Arborwood in late 2021 from Olympic Property Group (originally Pope Resources). 2019 was the last action by OPG,

which was a plat minor modification. Pulte Homes is owner of other half, which will be comprised of 410 homes,104 acres of open space dedicated and a 3-acre community park. There will be 8000 feet of new trails and a connection to Kitsap Heritage Park to be dedicated in a conservation easement.

171. Pulte Homes has completed development of one portion of homes. It has their SDAP approved and a portion of the Spine Road. Pulte Homes has not had to defend any appeals.

172. The Development Agreement (*Ex. F8*) sets timing, establishes vesting, public benefit, plat, and infrastructure layout. Mr. Lyberis testified that Implementing Approvals are vested. He also testified that, for SEPA, as long as there are no major changes, there will not be any additional SEPA review. The two plat modifications are changes to the project. The second plat amendment is for phases 4 and 5. The third plat amendment will be for Phase 6.

Lisa Cavell

173. The Applicant called Lisa Cavell to testify. She has been Taylor Morrison's VP of land acquisition and entitlements for 2 years and oversees the forward planning manager. She testified this was Richard Rawlings's project before he left.

174. Ms. Cavell was not involved at the time the Hearing Examiner decision was issued in 2009 (*Ex. F7*). With respect to *Ex. F6*, the MDNS for original preliminary plat decision, she testified that several environmental impact statements (EISs) began in the1990s. *Ex. F6* includes mitigation measures for traffic, stormwater and wetlands.

175. Ms. Cavell testified that plat modifications made in 2018 modified streets and lots to make them more efficient and reduce disturbances to critical areas, and also to increase the capacity of stormwater plan. *See Ex. F10*. Buffer averaging requests also were contemplated.

176. On April 17, 2023, the County approved a 2nd minor modification to the preliminary plat (*Ex. F26*), relating to Arborwood North and Arborwood South. The requested changes included a reductio of phases from 23 to 6 revision of the north entrance of Spine Road to require a roundabout.

177. Ms. Cavell testified that the SEPA review for the 2nd minor amendment was a SEPA addendum but that no new impacts were identified. The County received two comments questioning open space, but the Appellants did not submit any comments. Ms. Cavell testified that there is no SEPA checklist for the CABR because SEPA review is not required

178. Ms. Cavell testified that the north and south creek crossings use an arched culvert design with input from Washington State Fish and Wildlife.

179. In addition to the CABR application, Ms. Cavell testified that Taylor Morrison has submitted for early clear and grade (ECG), which is ready to issue, site development approval permit (SDAP) which is under review and pretty close to issuance, building permits for walls and bridges, which she understands are ready to issue, and preliminary plat modification #3. She does not know why the County required a separate CABR for phase 5/6 for ECG, Spine Road and Stormwater; Pulte Homes was not required to get a separate CABR.

180. On cross-examination, Ms. Cavell admitted that, per the Preliminary Plat 2nd Minor Amendment (*Ex. F26*), condition 4 states that review of buffer reduction is a future permit. It was not approved in the minor amendment, but must be separately reviewed.

Eric Clarke

181. Applicant called Eric Clarke to testify. Mr. Clarke is with CORE Design, Inc. He has a mechanical engineering BS degree. *See Ex B6* (resume). He does not have a professional engineering license. Mr. Clarke's testimony was focused on erosion/sediment control.

182. He has been involved with Arborwood Construction and Project Management since 2021. Mr. Clarke did not prepare the site plans. He testified that the second minor plat amendment was submitted in November 2021 and approved on April 17, 2023. There is an application for SDAP for phases 4 and 6. The ECG (*Ex. F20*) was submitted for phases 4, 5 and 6 to get a head start on project, logging, etc. Mr. Clarke testified that the SDAP applies to "everything" (utilities, bridges, sewer lift station) except building homes.

183. Referring to the 2021 SDAP application, Mr. Clarke stated that the following were included: utilities, sewer storm drawing, intersection/traffic, construction of bridges over creeks, geotech report, draft wetland mitigation report and technical information. Mr. Clarke testified these were all included under an earlier version of the storm drainage plans, *Ex. F16*.

184. Mr. Clarke testified that wetland averaging and buffer modifications were not accepted, and thus were not processed by the County as part of the SDAP. So, they applied for CABR under separate cover. He stated that the sequencing of approvals is as follows: CABR – SDAP – ECG. The ECG (*Ex. F20*) does not extend to any permanent improvements.

185. The U.S. Army Corps of Engineers (ACOE) submitted a letter that a Corps permit is not required.

186. Mr. Clarke testified that improvements can be shown in the SDAP (roads, drainage plans), but that the submitted drainage plans are not final; they will not be permanent. The ECG does not approve the actual permanent stormwater ponds. Mr. Clarke testified that *Ex. F16* – Storm Drainage Plan is only for review of the ECG.

187. Mr. Clarke testified that the SDAP been through several reviews and is close to finishing after the CABR is finalized. There is one more review to implement for the SDAP. The storm drainage plans changed since SDAP application was submitted.

188. Reviewing Ex. *F20* (Early Clearing and Grading (EC&G) Phasing Plan with Plat Overlay)) dated April 27, 2022, Mr. Clarke testified that the red and blue show the original clear and grade limits.

189. Mr. Clarke was surprised that the County decoupled the approvals for CABR and SDAP here and not for Pulte.

Gary Shambroich

190. Applicant called Gary Shambroich to testify as an expert witness. He is a licensed professional engineer in Washington and has worked on well over 100 residential subdivisions and stormwater drainage plans. Mr. Shambroich is Principal and Senior Project Manager at CORE Engineering, Inc. He was contacted in 2021 by Taylor Morrison to work on grading, utility design and construction management.

191. With respect to bridge crossings, Mr. Shambroich testified that the preliminary plat conceptually showed these, but the Applicant had to get a hydraulic permit approval (HPA) and go through a County cross check.

192. Mr. Shambroich coordinated with Joanne Bartlett and provided the original grading concepts and designs, and performed staking in the field, in conformance with her recommendations. He stated that minor adjustments to buffer modifications were proposed.

193. Mr. Shambroich testified that buffers previously were contemplated to be adjusted from that originally shown on the preliminary plat. The only changes to the preliminary plat from the original were to wetlands 302, Q1, Q2 and these changes are not regulated.

194. Mr. Shambroich reviewed geotech reports which he stated are relevant because they deal with soils, drainage, placement of material and stripping on site.

195. Mr. Shambroich testified that Spine Road "A" will provide access for Taylor Morrison and Pulte Homes. He stated that the north bridge crossing crosses Kingfisher Creek which feeds into Crabapple Creek.

196. Mr. Shambroich testified that the SDAP covers improvements for Phases 4 and 5, but not 6. A separate permit application for Phase 6 has not yet been submitted and will be submitted this spring. He stated that Phase 6 ends north of the wetland that is adjacent to the Spine Road.

197. He testified that the SDAP is only for phases 4 and 5 because it is a complex site. Mr. Shambroich stated that the hope is to get that permit ahead of time and to shorten the work time period. He said work will be done when it dries out; there is no work in the wet season.

198. Mr. Shambroich testified that *Ex. B18* is the ECG plans submitted July 3, 2023. He explained that the earth work does not balance out between Phases 4/5 and 6, so Applicant needs to do grading in Phase 6 to fill Phase 5. *Ex. B18* page 4 sets forth clearing limits. He noted that the final detention pond during SDAP will be used for sedimentation; it is a temporary pond with construction access and interceptor swales. Applicant will use the method used by Pulte in Phase 1. Discharge from pond will be via pumping and a dispersion or flow spreader.

199. Mr. Shambroich testified that the temporary road construction access is only until bridge is built. He stated that stormwater is routed north to the main sedimentation pond. A temporary culvert will carry water from Phase 5 to discharge to the large sedimentation pond. He also testified that another pond was added to the south, which will be a park eventually. This temporary pond will catch runoff until the area is brought up to final grade.

200. *Exhibit B22* is a 1-page document: cover sheet for SDAP 21-06120. This exhibit relates to *Exs. B10, 11, 12* and *13*. Mr. Shambroich testified that plans are still in a state of change based on County comments. He discussed the fact that *Ex. B12* shows runoff through a conveyance system to the pond at the north.

201. Mr. Shambroich testified that *Ex. B24*, sheet SD-3, is a storm drain report dated July 20, 2023 that has not been submitted to the County yet. He testified that they considered

updating the ditch on the east side of road. Mr. Shambroich confirmed that catch basins 64, 62 and 63 are temporary. Referring to *Ex. B9* (Sheet G5), Spine Road "A" Plan, he stated this plan is for Phase 6. The County has only seen the preliminary plat layout, but it shows the same location of the Spine Road as in the CABR application.

202. Mr. Shambroich testified that Exhibit 1 to his Declaration in Support of Taylor Morrison Northwest LLC's Response to Appellants' Motion for Summary Judgment *Ex. F34,* p. 30, shows a realignment of the Spine Road and shifted 100-foot buffer. He testified that permanent improvements will be outside of the 100-foot buffer and will still comply with the preliminary plat approval. *See also Ex. F34*, pp. 27-28. This realignment was prepared soon after the appeal was filed. Comparing to *Ex. B9, Ex. F34* p. 30 shows the Road shifted east by three feet and a 3-foot planter strip removed for a total of more than six feet. In addition two-foot shoulders were removed to be replaced by guard rails. Mr. Shambroich testified that engineering plans to approve construction of the Spine Road have not been submitted and that final design will be at a later date.

203. With respect to the P2 wetland, Mr. Shambroich testified that grading activities will be 50-60 feet (toe of grade) to the north of the wetland, south and west. There will not be any grading inside the buffer. He again stated no detailed plans have been reviewed by the County.

204. Mr. Shambroich testified there will be a retaining wall with cut rockery and drain rock behind pipes to eliminate hydrostatic pressure; the design is to allow passage of water. He stated that there are monthly meetings with County staff. He also noted that the scope of CABR application provides only general information on stormwater management.

205. On cross-examination, Mr. Shambroich testified he is familiar with the preliminary plat minor modification (*Ex. F26*, p. 34). He stated that condition 27 relies on the CABR which had yet to be decided. Mr. Shambroich compared the stormwater plans in *Ex. F16* (dated 2/16/22, original submittal set) with *Ex. F24* (dated 10/11/22). Reviewing *Ex. B18* ECG Plan dated July 3, 2023, he stated that the area without hatching is Phase 4/5 and area with hatching is Phase 6. The ditch on east side of Spine Road flows north into Phase 5. Mr. Shambroich stated that this is just rough grading.

206. Because the CABR Staff Report is dated June 27, 2023, the County was not in possession of the July 3, 2023 document when CABR decision was made, but Mr. Shambroich testified there may have been discussions before then.

Jeff Smith

207. Applicant called Jeff Smith to testify. He is a senior planner with the County and has been with the County for 25 years. Since Taylor Morrison acquired the north half of the project, he has been involved in ECG, SDAP, minor preliminary plat amendment, CABR, retaining wall permit and north and south bridges review. Mr. Smith testified that the County's land use reviews interrelate with the preliminary plat approval, preliminary plat amendment and environmental review.

208. Mr. Smith coordinated with Mr. Heacock with respect to the CABR. He stated that permits are reviewed concurrently and the team is aware of all revisions to permits, balances all that is going on and coordinate responses. He testified that Steve Heacock drafted the CABR and Mr. Smith reviewed it.

209. Mr. Smith testified that this approval spans multiple phases 4, 5 and 6. The CABR is Type 1 decision and is "small." The overall scope of the project should be considered more holistically. The CABR decision has to be in place before ECG and SDAP.

210. Mr. Smith testified that the County did not make a decision on buffer averaging before issuing the Decision.

Cecilia Olsen

211. The Applicant called Cecilia Olsen, Kitsap County Community Development Department, as a witness. She is a senior engineer.

212. Ms. Olsen testified that she reviewed *Ex. F16* (Storm Drainage Plans dated February 16, 2022) in connection with the CABR. She understands that the status of plans is conceptual, with design at 60%. She stated that final design is considered at SDAP stage. She is also reviewing the SDAP and ECG applications. Ms. Olsen testified that there is not a heavy level of review at the CABR stage because of the preliminary plat amendment review. She also testified there will be plenty of opportunity to make comment on the SDAP application. Ms. Olsen testified that Mr. Heacock could not issue the CABR without her approval.

213. Looking at the plans for the Spine Road, Ms. Olsen testified regarding catch basin 64 and noted that there will be another series of catch basins reviewed with the SDAP for Phase 6. She stated that the road will be in a temporary state. Ms. Olsen testified that wall drains

and upstream runoff will be discharged to P2. Looking at *Ex. F18* (ECG phases 4, 5 and 6) there will not be any stormwater discharge to P2. She explained that the stormwater from the roadway will be directed to wetponds and not to P2.

214. Ms. Olsen testified that the stormwater manual does not allow discharge to wetlands directly. Even if *Ex. F16* (60% design stage) showed temporary discharge to wetland, the County would not have been able to approve that. She stated that stormwater must be treated.

215. Ms. Olsen testified that there will be a total of three rounds of review for the ECG and two rounds of review on the SDAP.

216. Ms. Olsen testified that she does not have any concerns regarding the gabion energy dissipator or the amount of water being directed. She stated that Appellants misunderstand how much water would be discharged and that it is a very small subbasin. Ms. Olsen noted that the geotech did not recommend any subsurface drain under the Spine Road.

217. On cross-examination, Ms. Olsen testified she was not sure of the grade of the Spine Road as shown on *Ex. F16*, but stated it slopes downward. It will be graded with cross-slope so water goes to the ditch. She is not sure how long the road will be gravel.

218. Ms. Olsen testified that she reviewed the CABR decision but did not write the conditions.

219. Ms. Olsen testified the drainage basin is two acres in size. She does not know how it relates to the size of the buffer that will be taken away and does not know how much water will be coming out of gabion. She stated that the gabion is bigger than it needs to be. She does not know whether there will be more or less water flowing into Wetland P2 than in the natural condition. She stated there is nothing in the Code that addresses potential channelization related to a gabion.

220. On re-direct, Ms. Olsen testified that a condition of approval could be added to require all water to be directed north. See *Ex. B18*. She testified that discharge to P2 is not approved and noted that construction that follows ECG will be conditioned. The final design is not approved. Ms. Olsen clarified that the concept for discharging to P2 was technically "approved," but under the ECG, there will not be any discharge. The staff report contemplated there will be additional review. Ms. Olsen testified that the staff report draws conclusions on impacts from buffer averaging and then the conditions of the CABR get rolled into future decisions.

Christopher Wright

221. Applicant called Christopher Wright, B.S. to testify as an expert witness. *Ex. B1*. He is President of Raedeke and Associates and is a Soil and Wetland Scientist. Mr. Wright has various professional certifications, including certified wetland delineator from the United States Army Corps of Engineers and has participated in Washington State Department of Ecology trainings for Washington State Wetland Rating Systems for both the Eastern and Western regions in 2004 and 2014. He has done thousands of wetland delineations in past 30 years. He authored the 2007 wetland report for Arborwood.

222. Mr. Wright testified that hydric soils are those with prolonged saturation by water. They have redoximorphic features. Because we live in a xeric moisture climate, with wet winters and dry summers, summer and early fall are poor times to do wetland delineations. The best time is at the early part of the growing season when the ground is not frozen (March-October is growing season).

223. Mr. Wright testified that a site visit is required to do a wetlands delineation. You cannot contradict a wetland report without being on site.

224. In reference to the supplemental photos provided by Appellants, Mr. Wright testified there are no clear indicators of wetlands. There is some leaf litter, lack of leaves, and the photographs were taken outside of the growing season.

225. Mr. Wright testified that use of the wetland rating system is required and there is an 8-page questionnaire for each wetland on which scores on various function are made. The highest rating is a I and lowest is a IV.

226. Mr. Wright testified that the purpose of a wetland buffer is to protect water quality, habitat, and hydrogeologic functions. Buffers help allow sedimentation to settle out and water to fall out to prevent flooding. He testified that different buffer widths are required based on the category of wetland. Where there is a high level of habitat value, the buffer may be extended beyond the standard wetland buffer width. For example, the 100-foot buffer for P2 was increased by 100 feet because of wildlife habitat.

227. Mr. Wright disagrees with Dr. Roseen regarding the scope of impacts to wetland buffers. He testified that best available science shows that most water quality impacts are

within 75 feet of a wetland. Beyond those widths, there are diminishing returns in protecting a buffer.

228. Mr. Wright testified that the site is subject to regular, frequent timber harvest.

229. Mr. Wright stated it is not difficult to re-establish vegetation on 60% slope. He said that, for steeper slopes, you use other techniques. In his opinion, it is not impossible and not difficult.

230. Mr. Wright strongly disagreed with the opinion that wetland delineation is a "game." He has 30 years of expertise and the company has been in place for 40 years. Wetland work is based on science. He also explained that a wetlands consultant is not the ultimate arbiter – it is the agency with jurisdiction, which is also subject to Department of Ecology and U.S. Army Corps of Engineers. There is "no way" all these levels would allow their (Raedeke's) work if it was a game. If there was bias they would not be able to stay in business.

231. Mr. Wright testified that Raedeke was retained by OPG in the 1990s. In 2003, OPG asked for more work. A wildlife biologist was involved and the report was used for preliminary plat application. In preparing *Ex. F5*, Wetland Delineation and Assessment, 2007 December, they used the 2004 wetland ecology rating system and USCOE 1987 manual.

232. Mr. Wright testified that wetlands P2, 302, Q1 and Q2 were all small wetlands within a swale. *Ex. F5*, page 42 is a surveyed map of wetlands and streams. He stated that page 48 indicates that wetland P2 is a mosaic wetland with L1/L2 riverine wetland and is Category II. Mr. Wright believes P2 was mischaracterized as a mosaic.

233. Mr. Wright testified that re-evaluation of wetlands should be done every 5 years to confirm boundaries and classifications. He last visited the site in 2018 and noted it was crisscrossed with logging roads.

234. Mr. Wright testified that P2 may have been created by damming up wetland L1/L2. He also testified that P2 is groundwater discharge and is a slope wetland.

235. Mr. Wright testified that wetland 302 is a depressional wetland Category III with a standard 50-foot buffer, expanded by 30 feet with habitat score. Wetland Q1 is a slope wetland, Category IV, standard buffer of 30 feet, expanded by 20 feet with habitat score. Wetland Q2 is a depressional wetland with a clustered unconsolidated bottom. Category III with 50 foot buffer, plus 30 for habitat.

236. Reviewing the 2007 report (*Ex. F5*), figure 5, Mr. Wright noted that wetland P2 is not labeled on the map. On *Ex. F5*, page 45, Figure 7 is the buffer averaging plan. This allows compensatory make-up buffers elsewhere. He stated that the "give" must equal or be greater than the "take." *Ex. F5*, page 24 addresses direct wetland impacts.

237. Mr. Wright testified that Q1 and Q2 are "direct impact" wetlands. *Exhibit F5*, page 25 sets forth wetland buffer encroachments/mitigation and mitigation sequence. He testified that Q2 is located in a portion of site that slopes downward. He explained that timber activities had just occurred in 2006 prior to the 2007 evaluation, so there was more rapid runoff then.

238. Mr. Wright reviewed *Ex. F18*, page 24, Photos 1, 2 and 3 of wetland 302. During the growing season, he stated that facultative plants can be wetlands or uplands. He stated that March 24, 2022 is during the growing season. Mr. Wright referenced newly emerging plants in the photos. He testified you cannot tell anything about hydric soils from photos. Mr. Wright noted that there is no surface water visible and commented that you cannot presume hydric features. Mr. Wright testified that hydric soil characteristics are not seasonal dependent

239. Mr. Wright testified that oxidized hydrospheres are not a redox feature. These are used to determine if soil is saturated. See 1987 COE manual (*Ex. A4*) and 2010 regional supplement (*Ex. A7*). References are as follows: A – All indicators, S – Sandy soils, F – loamy or clay soils. He also testified that Dr. Cooke made an incorrect statement regarding *Ex. F6*. He explained that, if a value is chroma 3/2, it has to have 5%; a chroma of 2/1 has to have 2%. He opined that the human eye can see this.

240. On cross-examination, Mr. Wright testified there are people on the staff at Kitsap County that have wetlands expertise. They can also bring in outside third party reviewers. Raedeke is one of these third party reviewers. Mr. Wright did not personally do the field work in 2006. He was the primary author compiling field data and was the lead wetlands scientist at that time. He stated that there is internal quality control.

241. Mr. Telegin asked why wetland P2 was not evaluated on its own but with L1/L2 Mr. Wright agreed that it is not shown in the 2007 report as a "mosaic" and the report does not explicitly state "mosaic." He stated that they were rated together as one wetland complex. He could not explain his statement in paragraphs 9 and 12 of his declaration that "The Department of Ecology changed their guidance." Looking at the rating manual, Mr. Wright could not identify where the change had been made. In 2018, all Raedeke did was verify that

wetlands were still present. Because the 2018 wetland boundaries had not changed, they presumed the categorization was the same.

242. Mr. Wright did not coordinate with ELS. He does not know why P2 was re-evaluated after the appeal was filed.

243. Mr. Wright testified that habitat score may increase a buffer, but the standard buffer will not be reduced due to a habitat score. He testified that the buffer is not the sensitive area. Mr. Wright agreed that development 180 feet away from a wetland could have an impact.

244. Mr. Wright testified that it takes six months for wetland soils to form. The minerality of soils affects how fast soils can become hydric. He explained there is no specific soil type that is more or less likely hydric – it is the presence or absence of water.

245. Mr. Wright testified that wetland P2 is a groundwater discharge site; it intercepts groundwater in the swale. To change the wetland, you must cut off water in all directions. He admitted he is not a hydrogeologist.

246. Mr. Telegin asked Mr. Wright how wetlands 301 and 302 could have been affected by timber harvest, directing his attention to *Ex. B3* (October 17, 2023 letter). Mr. Wright testified that wetland conditions may change with change in precipitation.

247. On re-direct, Mr. Wright testified that if there was not a mistake or misunderstanding on L1/L2 and P2, they may have been categorized together under a conservative approach to provide maximum possible benefit. He said, "Always err on the side of the resource." He also testified that the road berm shows it is not one wetland.

248. Mr. Wright testified that photo interpretation is just that; you need site specific data to make accurate determinations.

Kolten Kosters

249. The Applicant called Kolten Kosters to testify as an expert witness on wetland delineations and assessments. He is with Radeke Associates and was previously with ESA and David Evans and Assoc. *Ex. B2*. He testified he is not biased and believes in integrity.

250. Mr. Kosters reviewed the 2007 delineations and 2018 report. Pursuant to a request by the County to re-verify wetlands, he performed site visits on May 1-2, 2018. *Ex F9*, p.2. Mr.

Kosters testified that with respect to wetlands P2 and Q1 there were no substantial changes. The project is vested to the 2005 manual. *Ex. B3* (October 17, 2023 report).

251. Addressing Appeal Issue 16, Mr. Kosters testified it is not difficult to revegetate a slope. He stated that control to 10% does not mean that 10% of invasive species will be left.

252. With respect to Hydrogen Sulfide, Mr. Koster testified you usually smell it right away, 5-8 inches from your face.

253. On cross-examination, Mr. Koster testified that wetlands are not static to a landscape. He was asked where the change in the rating manual regarding mosaics is, and why he made the statement he did in his declaration (*Ex. F34*, p. 34 paragraph 12). Mr. Koster testified that best available science has changed since the last evaluation of P2 in 2018. He could not answer the question of who told him they rated P2 as part of a mosaic. He agreed that the table did not use the word "mosaic."

Joanne Bartlett (Applicant's Case)

254. Applicant called Joanne Bartlett to testify as an expert witness. She has been a wetlands biologist since 1995, and has been with ELS for the past 10 years. *Ex. B4*. Ms. Bartlett estimates she has completed approximately 1500 wetland delineations and wetland mitigation plans, as well as habitat management plans. 85% of her work is in Kitsap County

255. Ms. Bartlett testified that her general impression of Raedeke's work is good. She agreed that there are ideal seasonal parameters for wetlands work. In response to Dr. Cooke's testimony, Ms. Bartlett testified she was not trying to take advantage of late March "timing" in performing wetlands work.

256. Ms. Bartlett testified that oxidized rhizospheres are not typical and disagrees with Dr. Cooke's testimony. She also testified that you do not need to take soils up to your nose to smell hydrogen sulphide. Ms. Bartlett does not frequently encounter hydrogen sulphide, as such conditions would be where soils are inundated and not on the edges of potential wetland areas. Ms. Bartlett also disagrees with Dr. Cooke's testimony regarding the human eye as being unable to see 1% redox features.

257. Ms. Bartlett started work at Arborwood in Spring 2020. She is familiar with the geographic area and she prepared the ELS reports. She used the vested code – found in Development Agreement (*Ex. F4* (vested code); *Ex. F8* (Development Agreement)).

258. Reviewing demonstrative *exhibit B36*, Ms. Bartlett testified that this document provides an overview of the following reports/foundational exhibits:

- *F11* - critical areas report (11/7/20)
- *F12* – critical areas overview including culvert memo (11/3/21)
- *F13* – original habitat management plan (1/31/22)
- *F18* – wetland buffer reduction plan – Spine Road (4/22/22)
- *F19* – Wetland Z3 (4/26/22)
- *F22* - added buffer averaging (8/30/22)
- *F23* – wetland buffer mitigation plan ECG – updated *Ex. F19* only for ECG and include sewer line (9/2/22)

259. Ms. Bartlett testified regarding *Ex. F11* (11/17/22), which is a critical areas report for Phase 4. She stated it does not include a wetland delineation, but is more of a wetland confirmation. Ms. Bartlett tested that Wetland Z3 is Category III and had not changed since it was delineated. This wetland is depressional and outlets to the north. She noted that the preliminary plat showed it would be filled. Ms. Bartlett also stated that the plat layout for Phase 4 allowed for fill of wetland under the vested code.

260. Ms. Bartlett testified that *Ex. F22* is an updated report for Phase 4 wetland Z3 and is a precursor to mitigation. Mitigation for fill of Z3 is associated with Kingfisher Creek. She pointed out Wetland O to the south – shown in light orange is the created wetland (*Ex. F22*). She stated that five years of monitoring and performance standards are required and considered adequate to mitigate for the loss of Z3.

261. Ms. Bartlett testified that wetland mitigation is last resort. It provides compensation for loss. A 2:1 ratio for Category III wetland in the same watershed is applied. With respect to wetlands, Ms. Bartlett stated the goals are as follows: avoid, minimize, rehab, rectify, compensate.

262. Ms. Bartlett testified that *Ex. F18* is the wetland buffer reduction plan for phase 5-6. In phase 5, the following wetlands are addressed: L1/L2, wetland 12, P2 and L3 to the east, wetland 302, Q1 and Q2 which is east of wetland C2.

263. Ms. Bartlett relied on the Raedeke reports of 2007 (*Ex. F5*) and 2018 (*Ex. F9*) and met onsite with other agencies. She testified that what prompted her to re-look at wetlands in

March 2022 were the following: (a) for those that were proposed to be filled in original plat, she had to develop a mitigation plan; and (b) input from a Department of Ecology representative who directed Ms. Bartlett to "go ahead and see if still wetland." Ms. Bartlett used this guidance for wetland 301, Q1 and Q2. She determined they lacked hydric soils and did not have wetland hydrology. Ms. Bartlett stands by her conclusions despite Dr. Cooke's testimony. She testified that, even if they were still wetlands, the critical areas ordinance authorizes fill.

264. Ms. Bartlett testified that mitigation could be proposed onsite if the application was remanded. She stated that that could be accomplished.

265. Reviewing the Wetland Buffer Mitigation Report (*Ex. F23*), Ms. Bartlett testified that the test plots showed that wetland identifiers were no longer present.

266. Ms. Bartlett confirmed that where there will be temporary impacts to buffers, approval will still need to be obtained from the County before work in the buffers may occur.

267. With respect to wetland P2, Ms. Bartlett performed another onsite investigation after appeal was filed. She had questions concerning whether it is a separate wetland and potential buffer changes. *Ex. B5* was drafted by Ms. Bartlett. She confirmed there is separation between P2 and L1/L2 and that P2 is not part of a mosaic. Ms. Bartlett testified that there is approximately 30 feet between P2 and L1/L2 and an existing culvert and old logging road. Ms. Bartlett stated that P2 is a Category IV sloped system and not part of L1/L2 riverine wetland.

268. Ms. Bartlett testified that she did not observe a water connection between P2 and L1/L2 and stated that you would see such a connection if the wetland is bisected. She testified there is no evidence of water flow. They should be regulated as separate wetlands.

269. Ms. Bartlett testified that there will be impacts within 200 feet of Wetland P2. She stated that the buffer for sloped wetland is considered lower functioning. With a Category IV wetland, there is a straight 50-foot buffer. The purpose of the outer 100' of buffer is for habitat functions. Buffers serve functions of protection wetlands against impacts from noise and light, water quality impacts, and to provide an additional area for scouring.

270. When asked if she had any water quality concerns from reducing a 200-foot buffer by 50%, Ms. Bartlett said she did not. The sloped wetland is fed by groundwater. The

Groundwater comes from the east, and receives water drainage from slopes to the north and south.

271. When asked about *Ex. A16*, Ms. Bartlett testified that the source of information in that exhibit is the ELS April 22, 2022, which was superseded.

272. Ms. Bartlett testified that the overall purpose of *Ex. F23*, wetland buffer mitigation plan dated September 7, 2022 is to restore areas temporarily impacted by project activities, specifically to revegetate the areas near wetland P2. She testified that there are many successful revegetation projects on steeper slopes. Ms. Bartlett further explained that a maximum of 10% invasive species is the industry standard and is based on her past experience. She stated that birds and wind can bring in seeds of invasive species. If there becomes a level greater than 10%, all invasive plants must be eradicated.

273. Ms. Bartlett testified that fill is identified as temporary impacts because the fill will not be imported. Therefore it is temporary until grading is done. Then the area will be replanted so it functions as a buffer.

274. On cross-examination, Mr. Telegin asked Ms. Bartlett whey she went back out to the site on October 11, 2023. She stated that no one asked her to go out there, but she had some questions. Ms. Bartlett has not wanted to recategorize Wetland P2 because she was concerned that her ethics and/or motives would be questioned.

275. Ms. Bartlett testified that Mr. Heacock was asking her about Wetland P2. She said that he suggested maybe it was not a Category II wetland with a 200-foot buffer. She stated that she expressed to him several times that she did not want to re-evaluate the wetland. She did, however, to show everyone what it would be. When she went back to the site and examined conditions, she determined wetland P2 was a Category IV.

276. Ms. Bartlett does not know why Raedeke thought P2 was part of a mosaic. She relied on footnote 7 of the 2007 report (*Ex. F5*). Ms. Bartlett stated there was a misinterpretation of mosaic language. She did not know whether Raedeke saw that P2 was bisected by road and then called it all one wetland. With respect to whether the area was disturbed, Ms. Bartlett testified that you can tell if hydrophytic vegetation was removed. Ms. Bartlett testified that the road and area was last clear cut in the early 1990s.

277. Ms. Bartlett testified that she did not observe any recent evidence of water flowing through the culvert between P2 and L1/L2. She stated that one should go in the winter or early spring to see if water is flowing.

278. Ms. Bartlett testified that her October 11, 2023 visit was for the purpose of categorization/rating and not for delineation. She stated that, even when herbaceous vegetation dies back, you can still see it. Ms. Bartlett testified that she did not redelineate wetland P2 and did not re-flag it because the boundary had not changed.

279. Ms. Bartlett testified that development within the buffer will not interfere with groundwater flow because the wetland is much further down the slope. She also explained that the steeper the slope, the less the buffer functions to minimize light intrusion, to dissipate and slow water with vegetation and soils in the buffer, or to address scouring and take up pollutants.

280. On re-direct, Ms. Bartlett confirmed that the old logging road is not a wetland area. She said no wetland hydrology or hydric soils were found in the test pit in the road and that there is a mix of facultative and upland vegetation.

281. Ms. Bartlett testified that it could be that Raedeke categorized L1/L2 with P2 to be conservative. She did not see hydrologic connection or bilateral flow. There was no surface water connection like a stream. Ms. Bartlett stated that she agreed with Mr. Wright that it was possible P2 was created by the logging road.

Michael Moody

282. Applicant called Michael Moody to testify as an expert witness. He has been with CORE since 2011. Mr. Moody has five licenses and three certifications. He has been a professional civil engineer since 2005 and is licensed in Washington. *Ex. B8*. His testimony will address stormwater design elements and compliance with stormwater regulations, 1997 Kitsap Stormwater Manual and Title 12 KCC, as they existed at the time of the Development Agreement.

283. Mr. Moody discussed that the 2009 preliminary plat includes a conceptual stormwater design, but does not include detail. He also stated that there will be additional review for the SDAP for phases 4-5, phase 6 and for bridge crossings. Mr. Moody testified that Triad did the original engineering for the preliminary plat. CORE design took over the project and needed to verify that the analysis is still valid

284. Mr. Moody testified that the post-developed condition should mimic the pre-development condition with respect to natural drainage, stormwater detention, flow control, and flow rates.

285. Mr. Moody testified that the stormwater manual does not allow for treatment of less than 100%. He noted that the plans (*Ex. F16*) that were submitted with the CABR application in February 2022 and also with the SDAP application are 60% design plans. At the second submittal, design plans will be one step beyond that. Applicant has submitted twice and is addressing comments received in the interim. There are multiple rounds of review for a big, complicated project such as this one.

286. Mr. Moody testified that the plans are consistent with the code and construction standards and are able to be constructed. He discussed construction sequencing. They will mark clearing limits in the field, install temporary erosion control filter fabric fence, the construction entrance and temporary erosion control ponds, as well as interceptor ditches. Work is done typically during dry season (May 1 through September 30). Construction will be active during dry season then buttoned up during rainy season. They will use a seasonal suspension plan, then then re-open for the next construction season.

287. Applicant *Ex. B23*, Arborwood North Temporary Erosion Control Plans, is a supplemental exhibit. Sheet EC 7/2023, is the TESC Plan. Mr. Moody testified that this shows a surface feature with a ditch and flow directed to the southwest corner of the park; it is a temporary pond. Applicant *Ex. B24* (Arborwood North Grading Plans) is part of the same set as *Ex. B23*. Mr. Moody stated that this is a grading plan while erosion control measures are in place.

288. Referring to p. 4 of *Ex. B24*, Mr. Moody reviewed the road sections that apply from south to north, sections AA through GG; Section DD is the start of the ultimate buildout. He stated that there is a thickened edge that serves as a gutter and flows with road slope. There is a ditch/swale to the east, then rockery. During the temporary construction condition, water goes into the swale. Mr. Moody testified that eventually Spine Road will have the improvements all the way down. With the permanent condition, stormwater flows to the pond. All three elements have to function for stormwater management: outfall to the north, flow control meter to slow water, and permanent pool of water in all three cells (cleans, slows, discharges at natural locations). Mr. Moody testified that there will be no loss of stormwater to Crabapple Creek and that the design will avoid the impacts that Dr. Roseen testified to.

289. With respect to the Spine Road, Mr. Moody testified that there will not be construction vehicles on the road until Phase 6, and then the location would be different. Water flowing into catch basins 63 and 64 will be routed to the north in Phase 5 for the permanent condition. The surface ditch is temporary; at the ultimate condition, water will be piped. He noted that plans are still under review. The purpose of the design of the stormwater system for the ultimate condition is so that the road does not drain into the wetland.

290. Mr. Moody testified that it is his opinion that the Spine Road will not dam water. The stormwater management design anticipates flow from east to be collected and routed to the west. He testified that Applicant is not require to treat stormwater from the Hillbend site.

291. Addressing Mr. Lubischer's testimony, Mr. Moody stated that the road contours will not result in channeling. There are no tributaries leading to L1/L2.

292. Mr. Moody testified that *Ex. B17* is the storm drainage plan and noted that Phase 6 SDAP plans have not yet been submitted to the County. He noted that with the ultimate buildout, the new shading shows catch basins and pipes. Mr. Moody testified there will be no significant loss in surface water because water is routed to the north. He stated that 3.3% (11.5 acres) of the total basin area is managed and 0.38 acres will be bypassed.

293. Mr. Moody addressed the change in slope with the Spine Road. Currently there is a 40% slope; post-construction there will be a 15-27% slope.

294. Mr. Moody provided additional testimony regarding the gabion, which is a wire basket filled with rock to dissipate energy at the outfall. Energy from water flow would otherwise dislodge soil, but with a gabion, the energy is removed before the water touches native ground. He stated that there will be a gabion "mattress" with multiple baskets.

295. Mr. Moody analyzed sizing of the gabion considering the location of catch basins 62 and 64 and the slope to determine a velocity calculation at discharge point. He testified that the gabion is appropriately sized per Table 7-4 of the 1997 Kitsap Manual (FHA for higher rate). It will not degrade water quality. Mr. Moody stated that a flow rate of 15.9 ft/second is good for a gabion. He stated again that, in the ultimate condition, all stormwater goes to the Phase 5 pond. This is only a temporary condition and the interim road will not be subject to any traffic except emergency vehicles. It is Mr. Moody's expert opinion that the temporary condition is not a pollution generating condition.

296. Mr. Moody testified that the project will maintain a flow pattern with drain rock behind the wall; the layer of drain rock is permeable. He stated that there will not be a firehose/channeling effect in wetland P2. Gabion baskets are U-shaped and prevent scouring; the gabion mattress also protects against scouring. Mr. Moody testified that the system used is for water velocities of 20 ft/second at pipe, but the rate here is 15.9 ft/sec. The system is designed the dissipate well under 5 ft/second when the water gets to P2.

297. On cross-examination by Mr. Telegin, Mr. Moody was asked about sequencing and whether the *Ex. B23* TESC Plan will be in place for more than two construction seasons. Mr. Moody explained that the goal is to eliminate the middle "stormwater schema" that discharges to P2. *Ex. B23* manages stormwater during construction.

298. Mr. Moody explained that *Ex. F16* is similar to *Ex. B24*, but is an older plan. He noted that the Phase 6 SDAP application was submitted not long after application for Phase 4/5 SDAP. Mr. Moody stated that *Ex. B-17* is not before the County yet.

299. Mr. Moody explained that in preparing *Ex. B21* (Arborwood North Phases 4, 5 and 6, Stormwater Plan Overview with Flow Calculation) he used a CAD program. This shows contours, surveyed data and LIDAR for Hillbend.

300. Mr. Moody testified that the water volume does not change, the velocity does (16.59 CFS flowrate (volume/amount of water) and 15.90 FPS – corresponding velocity at flow). He testified that wetland P2 is fed primarily by subsurface. Mr. Moody testified he made a conservative calculation. He testified that he did not draw the basin larger than it actually is; the basin is correct to the wetland and he kept it conservative.

301. Mr. Telegin asked, how is this mimicking pre-development? Mr. Moody testified that the goal is to "mimic, not match." Mr. Moody admitted the interim condition could have higher flow/velocity. Mr. Moody confirmed the basin would be accurate during the interim period because there will be more water coming from the north.

302. Mr. Moody testified that the gravel road is only polluting if vehicles travel on it. There will be no sediment coming off of it and therefore no sediment load.

303. On re-direct, Mr. Moody testified that the drainage swale is grass lined and has a bioswale effect. He stated that, if there was a delay in construction, the road/swale design could be modified.

304. Mr. Moody testified that the flowrates are for a 100-year storm event, which is not an average day. He stated that the system is based on an over-designation for more water than has ever been seen. Mr. Moody stated that the rational method to calculate flow rate is the most conservative method.

305. With respect to the Spine Road in a gravel state, Mr. Moody testified that the Ecology regulations allow a gravel road. There will not be any illicit discharge under an NPDES permit.

306. Mr. Moody testified that most conveyances are designed to 25-year flood detention and metering for the entire project.

Steve Heacock (Applicant's Case)

307. Applicant called Steve Heacock to testify. Mr. Heacock was previously called to testify by the Appellants in their case-in-chief. He was the staff lead for the CABR approval and is also lead on the minor modification of preliminary plat, the ECG and SDAP applications. He worked with staff assembling data and SEPA review. Mr. Heacock stated that 2/3 of the permits he reviews involve reviewing wetland delineations.

308. With respect to SEPA, Mr. Heacock referred to *Ex. F8* Development Agreement, section 3.2 page 5, the vesting document, attachment C and the preliminary plat minor modification #2 (*Ex. F26*), p. 6 SEPA addendum. He stated that the County was not required to adopt the SEPA document for the CABR under WAC 197-11-600(4)(a). It was not necessary to say it was categorically exempt because the SEPA exemption decision is not subject to administrative appeal.

309. Mr. Heacock confirmed that the stormwater plan (*Ex. F16*) submitted is subject to the 60% design standard and is not final. He reviewed all listed reports prior to issuing the CABR.

310. Turning to conditions 25-28 in the Staff Report, Mr. Heacock testified that he consulted with management about condition #27. He stated that the project is multi-phase and there are many pieces of the puzzle. Usually these issues are reviewed as part of the SDAP itself, but because of the various pieces here, the County had to break out some pieces to address separately in the CABR.

311. Mr. Heacock testified that smaller, isolated wetlands are not regulated. These include Category III, less than 2,500 square feet and Category IV up to 7,500 square feet. He also testified that temporary impacts to buffers are allowed.

312. With respect to the bridge crossings, Mr. Heacock testified that all that changed were wildlife crossings, which were reviewed by state Fish and Wildlife biologists

313. With respect to a potential relocation of the Spine Road, Mr. Heacock testified that this was not submitted to the County formally. He has no concerns with shifting the Spine Road over. The County has not finalized the location of road, so the location can be modified.

314. Mr. Heacock testified that the road between wetland P2 and L1/L2 appears to be an old railroad grade. The area was logged by rail which would have caused significant impacts at the turn of the century. The roadbed matches old railroad grade. He testified that the culvert could have been installed with the cut created for creation of grade itself.

315. Mr. Heacock testified that Ms. Bartlett's report (*Ex. B5*) substantiates what he had actually thought all along regarding wetland P2. He stated that it is best to have an accurate representation of wetlands. He accepts Ms. Bartlett's analysis that Wetland 302, Q1 and Q2 no longer meet wetland criteria.

316. Mr. Heacock testified that if the CABR is remanded on issues related to wetland P2 or if the Applicant decided to modify the application, a re-write of the CABR would not be necessary for a Category IV with 50-foot buffer. The County could revise the condition or re-issue the CABR with an addendum report. If it is remanded, it is possible that the Applicant can just propose mitigation.

317. With respect to the buffer restoration plan, Mr. Heacock testified that it meets applicable standards. He stated that the Applicant has done an excellent job of weed management, as determined from field review. A monitoring plan is required and review will occur in years 1, 2, 3 and 5. This will include temporary impact areas and a performance bond may be required.

318. On cross-examination, Mr. Telegin asked why Mr. Heacock to explain why he believes the area was logged by railroad. Mr. Heacock stated that the skid road is exactly shaped where logs dragged to landing; there is a large "u" shaped area that matches diameter and spring board notches. Mr. Heacock stated that Highway 104 used to be a railway. In the

site, roads are not very wide and have a low gradient because they were cut as narrow as possible.

319. Mr. Heacock testified that as the result of a skid trail wetland Q2, Q1 and 302 are man-created wetlands, unintentionally created. However, he stated that it is not relevant that they were man-made under KCC 19.150.685. Mr. Heacock testified that the railroad track went through between L2/P2 and between Q1/Q2 and 302. His opinion is because L2/P2 matches topographically with features of Q1/Q2 that have existed since the turn of last century.

320. Mr. Heacock testified that he told Ms. Bartlett he thought wetland P2 was a separated feature and did not think the wetland had the right categorization. He suggested that Ms. Bartlett look at the wetland before he wrote the decision. *Ex. B5* substantiates what he has thought all along: Wetland P2 is a Category IV wetland.

321. Mr. Telegin noted that KCC 19.200.220(C)(2)(a) governing buffer averaging indicates that the P2 buffer cannot be reduced to less than 100 feet and asked why it was reduced down to 85-feet. Mr. Heacock stated, "because it was vested." Mr. Telegin asked whether reduction of the buffer down to 85 feet was approved in 2009, referring to condition 9 which requires the County to review wetland buffering averaging proposals on a case-by-case basis. Mr. Heacock testified that the Raedeke map does not show temporary impacts in the buffer.

322. Mr. Heacock testified that the revised plan for Spine Road shows a 100-foot buffer; before it was only 85-feet away. He stated that buffer averaging will not adversely affect wetland P2. Mr. Telegin asked that if the road/retaining wall blocks subsurface flow to wetland P2 would that be an adverse impact? Mr. Heacock testified that the headwaters of wetland P2 is a spring, and that areas to the north and south of the wetland also are part of the contributing basin.

323. Mr. Heacock testified that the ditch is a bioswale transmitting water to the wetland and providing clean surface water; it is a water quality feature. The ditch and gabion are connected.

324. Mr. Heacock does know if the County evaluated possible fill impacts prior to the CABR decision. He stated that the fill is a temporary condition; a temporary impact area is temporary in nature. Mr. Telegin asked how stripping vegetation and putting in structural fill

within 50 feet of the wetland "retaining" the buffer, referring to KCC 19.200.215 and 19.300.315.

325. Mr. Heacock testified that any "dramatic hydrologic impact" is offset with the gabion. He explained that the CABR does not approve water quality and that the County looked at 60% design. The County relies on stormwater reviewers to provide any conditions. Mr. Heacock noted that, in the future, these conditions will change so that all drainage will be directed to the north. He referred to the phasing of decisions. He said that normally a CABR is part of an SDAP, which is a construction level permit. An ECG is a Type III grading permit. Once water quality systems are in the ground, then the applicant can go to shovels.

326. Mr. Heacock testified that the 2009 plat decision looked at all components, but it is now 14 years later and there are two different builders. He stated that the public is aware of the ask, including what was changing, wetlands that no longer existed and the bridge crossings. Again, he stated this is a multi-phase review (three phases). Mr. Heacock testified that a separate CABR decision was the best mechanism to address buffer reductions and averaging, to verify wildlife crossing criteria and to consider all mitigating pieces of the puzzle.

327. With respect to SEPA, Mr. Heacock testified that the CABR is a type of variance. The County did not determine it was within the scope of the MDNS; it is exempt.

328. Mr. Heacock testified regarding the scope of the CABR decision. He does not know why the habitat management plan dated January 31, 2022 (*Ex. F13*) was not included in the foundational documents. He noted that the CABR Decision, *Ex. F27*, condition 18, refers to the habitat management plan. Mr. Heacock testified that temporary impacts do not need to be "averaged in/averaged out."

329. On re-direct by Mr. Gecas, Mr. Heacock testified that the road does not block water or negatively impact wetland P2, consistent with Mr. Moody's testimony.

330. Mr. Heacock referred to *Ex. F29*, a July 14, 2023 email from him in response to one of the appellants, Ms. Ryan. He confirmed there was not a comment period associated with the CABR, which is a Type I decision and there is no notice of application per KCC 21.04.110. Mr. Heacock also explained that staff is not required to state all the contents of file in the Notice of Decision.

331. Referring to *Ex. F28*, page 16 regarding buffer restoration, Mr. Heacock confirmed that this included analysis regarding the sewer line corridor. It references an existing disturbed area. Mr. Heacock confirmed that this is why he considered it a temporary disturbance and that temporary impacts are allowed in buffers. Grading and fill is considered temporary if disturbances are restored.

332. Regarding questions on the Spine Road, Mr. Heacock testified that the road between phases 5 and 6 needs to be constructed because fire needs access throughout site and there needs to be alternative access points. He noted that the Pulte south portion is developing ahead of Taylor Morrison. Addressing Mr. Telegin's earlier questions about the possibility of a permanent road not being built, Mr. Heacock testified that Pulte will still need the road, so it will not remain in a temporary gravel condition, even if Taylor Morrison "folds." Further, bonds will be required for completion of the road.

333. Mr. Heacock relies on Cecelia Olson for analysis of water quantity and water quality.

334. Mr. Heacock testified that he agrees with Mr. Wright's testimony in which he stated that the water quality impacts are mitigated within the first 100 feet or less of the wetland. He stated that this is consistent with the rating system, which considers habitat and water quality, referring to the Department of Ecology rating system in existence in 2004, when the project vested. Mr. Heacock reiterated that the intent is to protect wetlands, not buffers.

335. Mr. Heacock confirmed his earlier testimony that a historic logging road bisects wetland P2 from L1/L2 and there is no surface water connection. He stated there is no reason to consider it all as one wetland.

336. On re-cross, Mr. Telegin directed Mr. Heacock to KCC 19.150.170, buffer definition, which states that modifying a buffer must meet criteria "unless previously vested." Mr. Heacock stated that buffer averaging will not adversely impact the wetlands. He confirmed that every phase of the project has to meet the criteria.

337. Mr. Telegin asked, "What is a temporary impact," referring to *Ex. A6*, User's Guide for Nationwide Permits in Washington State, pg. 13. Mr. Heacock testified that condition 13 of the CABR is only for temporary fills in wetlands and is not talking about buffers. There will be temporary impacts associated with temporary construction staging. Mr. Heacock testified that he did not think that "adverse impact" is defined.

Carolyn Decker

338. Applicant called Carolyn Decker as a rebuttal expert witness. She is a licensed geotech engineer, experienced hydrogeologist (*Ex. B28*) and is the President of Terra Associates, Inc. She has worked on Arborwood since 2021.

339. Ms. Decker reviewed *Ex. A11*, Zipper Zeman report. She stated that test pit 115 is not close to Wetland P2.

340. She was asked why Terra prepared an updated report in 2021 (Ex. *A10*). Ms. Decker stated this was to better reflect property development and that the phases were better defined.

341. Ms. Decker described the differences between a test pit and test boring. A test pit is made with an excavator and is invasive. A test boring is made with a drill rig and is a standard penetration test (SPT). *Ex. B35* is an illustrative overlay prepared with AutoCAD.

342. Ms. Decker testified that the depth of groundwater is 9-12 feet below surface. She disagreed with Mr. Lubischer's testimony that perched groundwater is at 4 feet below surface and stated there is no evidence of this.

343. Ms. Decker testified that the types of soils (glacial deposits/glacial till) that are on site result in deeper seepage. Persistent groundwater seepage is upgradient and could be coming from miles away. It is Ms. Decker's opinion that compaction of fill will not affect flow of groundwater; it will continue to flow in its native state. There is no shallow perched water.

344. Ms. Decker testified regarding additional test holes made with hand equipment on November 27, 2023. They did not find recessional outwash as per Mr. Lubischer's testimony. Ms. Decker reviewed *Ex. B29* dated November 28, 2023. The hand auger test holes (TH) are: TH 103, 104, 105 and 106 (east to west). TH 101 is east of the Spine Road. Instead of recessional outwash, Ms. Decker testified they found alluvium colluvium.

345. Ms. Decker testified that the hydrology of wetland P2 is fed from the north and the south. She noted that they found shallow ground water in TH 101, 102, but no evidence of water in TH 103. She testified that it does not look like water continues to flow to the east.

346. Ms. Decker noted that Mr. Lubischer is a mechanical engineer, which does not compare to her credentials as an engineer with geotechnical geology and hydrogeology expertise. Mr. Sadler is a licensed engineering geologist and hydrogeologist.

347. Ms. Decker also commented on Dr. Roseen's testimony regarding excavation and fill and his testimony that fill compaction will create a "dam." She does not agree with low porosity. Ms. Decker testified that native soil on the site is very dense with very low permeability. When you remove the soil, you make it less dense. Ms. Decker also testified that you cannot recompact soil to native state; it will be more porous than in predeveloped state. She stated there will not be an adverse impact from compaction of fill.

348. On cross-examination, Mr. Telegin asked Ms. Decker why she referred to "shallow interflow from adjacent areas" as opposed to "groundwater interflow. She admitted she does not know what the contributing basin is and that it was possible that the water could have already "daylighted" prior to TH 103. Ms. Decker opined that there is a closed depression on the neighboring property to the east.

349. Ms. Decker's opinion is that wetland P2 is being fed with deeper groundwater seepage and there is no reason to believe that flow would be interrupted. She testified that they had not previously looked at groundwater contribution to wetland P2.

350. Ms. Decker testified that she believed water can still infiltrate the fill on the side of the road. She discussed that retaining walls have drains, because, if water comes through to the fill, it will saturate that fill. You need to protect the fill. Deep groundwater will not be blocked by the road. Ms. Decker testified that there are different ways water can move east to west.

Dr. Sarah Cooke (Appellants' Rebuttal Case)

351. Appellants called Dr. Sarah Cooke on their rebuttal case.

352. Dr. Cooke testified that she did not believe that Raedeke made a mistake in classifying P2 with L1/L2 as a mosaic and they did not do so. Dr. Cooke explained that Wetland 12 and Wetland L3 are also within 100 feet of L1/L2 and were not identified as a "mosaic." Q1, Q2 and 302 were reviewed as a mosaic. Reviewing the map from the 2007 report (*Ex. F5*), it shows a stream flowing through P2 to L1/L2. There is also a surface stream channel from Wetland 12 to L2 and a stream channel from L3 to L2. Why would Raedeke differentiate P2 from 12 and L3? Dr. Cooke testified that it did not make sense.

353. Dr. Cooke discussed the critical areas ordinance, KCC Title 19 in effect when the project was vested (2005). She testified that P2 and L1/L2 are "wetlands divided by manmade features," and there is a surface water connection.

354. Reviewing Ms. Bartlett's photographs in *Ex. B33*, Dr. Cooke noted that in the second photograph taken at the eastern end of wetland P2, you can see the eroded channel; leaves flowed with water in the channel. It is located in a trough. Water flows in one direction downhill into the east end of P2.

355. In Photograph 8 (*Ex. B33*), which is a photograph of outfall from the culvert, Dr. Cooke pointed out a visible water elevation line in the culvert. There are leaves, small gravel and debris which indicates that water was traveling at a high enough velocity to carry stones and pebbles. Dr. Cooke stated that the culvert should be checked in winter or spring to see if water is flowing. She testified that the culvert on the ground is evidence of surface water connection.

356. Dr. Cooke testified that the extremely dark soil in the photographs indicate that the road area is reverting back to wetland. She disagrees with theory that the road created wetland P2. Referring to Photograph 5 (*Ex. B33*), Dr. Cooke stated that the dark soils are caused by elemental iron. She stated, "You don't just get black soils like this." In her opinion, the wetland has been there hundreds if not thousands of years.

357. Dr. Cooke testified that wetland P2 is a slope wetland near L1 and that wetland P2 feeds L1. She also stated that no one has drilled down through the road or placed fill on top. Dr. Cooke stated that geotech reports seldom help with wetland determinations.

358. Referring to Photograph 7 (*Ex. B33*), Dr. Cooke testified that this appears to be a "full on wetland," in the process of converting back to wetland. She noted that the soils look dark. Dr. Cooke suggested that test pits should be made and, because it is fill, dig beyond the fill.

359. Referring to Photograph 6 (Ex. B33), in the area of the old road, Dr. Cooke stated it "looks like wetland again."

360. Dr. Cooke noted that wetland P2 has not been re-delineated since 2006. She recommended that it be delineated again. Dr. Cooke said that we would be jumping the gun in re-rating it. She reaffirmed her testimony that wetland P2 is not a mosaic. Dr. Cooke said there are grounds for going out to see if it is connected to L1/L2.

361. Dr. Cooke testified regarding Ex. F18, the test plot sheets for Q1, Q2 and 302. She stated that she has a has PhD in soils. Dr. Cooke stated that a lab analysis (chemical tests) is

required to get percentages and noted that Ms. Bartlett did not do so. She said that May-June is the optimal time. Dr. Cooke stated that chemical reactions are not part of hydrology.

362. Dr. Cooke testified that one of the benefits of buffers is to maintain hydrological connections; it is not just a matter of replanting vegetation. She said to refer to Department of Ecology guidance. Dr. Cooke opined that the whole eastern part of P2 could go away and L1/L2 could also be affected. She does not agree that P2 is fed by deep groundwater.

363. Dr. Cooke testified regarding the Ecology wetland rating system (2004), which applies under KCC 19.200.210(A)(2), see section 4.1 – identifying unit boundaries. The wrong section of manual was used; you have to go to the sloped section. Dr. Cooke explained that L1/L2 are riverine wetlands and P2 is a sloped wetland. She stated that they were rated together because of landscape, not because of a mistake.

364. Dr. Cooke rejects the theory that the wetland was created by a logging road. Her opinion is based on the age of the soils.

365. In response to Mr. Wright's testimony that he does not believe it takes many years to create hydric soils, Dr. Cooke testified that there is a difference between mineral and organic hydric soils. Mr. Wright did not differentiate.

366. Dr. Cooke also disagrees with Mr. Wright that human eye can see 1-2%, stating "not when the soils are that dark." Soils are very hard to read. She also noted that soils cannot be dark for reasons other than water. Color indicates high organic content.

367. Dr. Cooke noted that she also does third party review for jurisdictions.

368. Dr. Cooke reviewed *Ex. B5*, wetland rating forms dated September 23, 2023. She stated that the difference between slope and riverine wetlands is based on the source of hydrology. There are hydrogeomorphic classes (HGM). Dr. Cooke testified that Slope + Riverine = Riverine and Slope + Depressional = Depressional. She stated that the maximum score for riverine is much higher than you could score with slope.

369. Dr. Cooke testified that it is inaccurate to say that the Department of Ecology changed its guidance as it pertains to mosaics. The only time "mosaic" came up was after Ms. Bartlett's report. Dr. Cooke stated that this is all speculation by all of us. There is no evidence that "mosaic" is what Raedeke was thinking.

Joseph Lubischer (Appellants' Rebuttal Case)

370. Appellants called Joseph Lubischer on their rebuttal case.

371. Mr. Lubischer commented on Christopher Wright's testimony, referring to *Ex. B3*, page 2. He noted that Crabapple Creek is a bifurcated creek and that south of Hillbend there is a fork confluence. There are two channels steeply incised and the wetlands fall to the east side of the east fork. Therefore, Mr. Lubischer stated that the logging that occurred would have had no effect on wetlands; water does not flow up hill.

372. Mr. Lubischer testified that the Applicant failed to provide designs that meet buffer averaging requirements.

373. In response to Carolyn Decker's testimony regarding extensive groundwater at 9-12 feet deep, Mr. Lubischer stated that, for a regional groundwater body, that would be true. But it is usually somewhat limited in extent. He stated it is "sketchy" the statement that it is "extensive." Referring to the Terra Associates July 2021 report, B1, B14, TP9 all had water and these are far away from wetland P2.

374. Referring to the supplemental Terra Associates report dated November 28, 2023 (*Ex. B29*), Mr. Lubischer testified that the test holes are pretty much in the northwest/southeast swale. He noted that the finding in TH 104 – 5 feet of recessional outwash –is "consistent" with what he talked about before regarding alluvium colluvium. Mr. Lubischer noted that TH 106 was more mixed with silty sand on top. Mr. Lubischer testified that there is a hydrogeologic connection between the two wetlands.

375. Mr. Lubischer testified that the top one foot or so will get into recessional outwash. He stated that glacial geology is highly variable. There are preferential pathways for water, which always finds the most permeable pathways. Mr. Lubischer stated that there needs to be a groundwater study using piezometers over the course of a year.

376. Mr. Lubischer addressed Ms. Decker's opinion that the water in P2 comes from direct rainfall. He also noted that the date from test pits was not entered into the record, referring to *Ex. B21* (drainage basin post-development).

377. Mr. Lubischer examined the P2 basin and acreage in a surface water exercise, considering topography, flowlines perpendicular to elevation lines and Lidar at 5-foot

intervals. The catchment basin shows surface and shallow groundwater flow in the upper 1-2 feet of the soil.

378. Mr. Lubischer testified regarding areas captured by the drainage ditch. He stated that the extra areas are tributary to P2 under final Phase 5. With the gravel road and catch basin, that ditch catches the .5 acre plus 3.6 acres. Mr. Lubischer stated that, in the natural state, 9.6 + 2.2 = 11.8 acres. Now, all together the number is 15.9 acres, so it is 4.1 acres larger and only 2.2 acres are left in a natural state. Mr. Lubischer testified that the result will be about 13.7 acres of water put into a pipe to the wetland; the catch basin is all concentrated to a single point. This will result in a speeded up flow, reaching the wetland faster than in the natural condition. There will be no natural slowing and no infiltration.

379. Mr. Lubischer testified regarding *Ex. A19*, illustrating the P2 basin acreage, and *Ex. A20*. The second diagram on *Ex. A19* shows the P2 basin boundaries. The black arrows show the flow direction of water flowing downhill in catchment basin. There are different flow paths to P2. In the natural condition, there is not a single point to P2, but now, there will be point source dischargement.

380. Mr. Lubischer explained that there is a ridge in the topography that constrains stormwater flow. He stated that the smaller triangle is 6.6 acres and that the "natural catchment area" is in the middle of the triangle. Mr. Lubischer testified that the project will effectively double the catchment area from 6.6 to 13.7 acres. He stated that the amount of area tributary to the gabion is more than double.

381. Mr. Lubischer testified that the water getting to P2 is from direct precipitation, stormwater runoff downhill through the woods, which is absorbed in the upper layer of soil, moves laterally downhill and infiltrates vertically into recessional outwash. When the soil gets wet, it makes the absorption infiltration process work faster.

382. Mr. Lubischer testified that a groundwater study would involve observation wells and piezometers – 1-inch pipe driven into the ground. He suggested that the area should be "peppered" with multiples of this at varying depths.

383. Regarding *Ex. A10*, Arborwood Preliminary Geotechnical Report dated July 29, 2021, Mr. Lubischer commented that page 16 shows the borings/test pits are not in the natural drainage basin. He also stated that there should be additional test pits near the Spine Road.

384. Mr. Lubischer testified there is not a showing of pervasive groundwater seepage and that there has to be further investigation to determine localized perched groundwater. He noted that geotech borings are not for hydrogeological purposes because you do not see detail. Mr. Lubischer commented that the paucity of cases in which they found wet soil is not proof of "extensive pervasive," let alone that ground water is being supplied from miles away.

385. Regarding *Ex. B29,* Mr. Lubischer noted that Terra Associates found moisture in TH 104. He also noted that TH 101, 102, 103 were holes dug shortly after the first heavy rain of the season. TH 101 and 102 were starting to absorb water. Groundwater had not gotten as far west as TH 103; it is a "wetting front." He stated that permeability increases as soil gets wet. TH 103-106 span across 50 feet.

386. Mr. Lubischer stated that he was not discounting the possibility of some deep water movement, but recessional outwash catches and stores water like a sponge. Even as water dries out, you still have a capillary fringe to sustain plants. It is the simplest, easiest way for water to get to wetlands. Mr. Lubischer commented that Applicant's theory is a much slower, harder way for water to move. He noted that it is illogical to say that precipitation gets down to 10 feet below surface and then moves back up. The deep perched groundwater theory is not probable. Precipitation is the water source for wetland P2 and the underlying "sponge" of the soils. He stated that, while the Applicant suggested low permeability, there is not a single piece of evidence of perching in tiller slope.

387. Mr. Lubischer testified that there is a lobe of wetlands sloping upgradient into a swale, stretching east from L1/L2.

388. Mr. Lubischer testified that the road is going to bisect the system with tons of permanent fill material. It will be like building a dam that has a 150-foot longitude and is 11.5 feet deep. He stated that the east edge of the road will be cut into the hillside and will pick up interflow. There will be an impervious surface 70-feet wide. Where the fill is in the swale, the water will be losing the possibility of infiltration.

389. Mr. Lubischer testified that the natural system will be relegated to just 2.2 acres. The water will be blocked, collected and dumped into the gabion. He asked how, with this concentration in space and time, will this not have a negative impact?

390. Mr. Lubischer testified that the topography will not stay the same. There will be flow over the top of L1/L2. Adverse impacts of sedimentation and channelization will result. He stated that, if you cut a channel, it will drain the wetland. Mr. Lubischer used the example of

cutting a ditch through to drain a swamp. He stated that the erosion risk associated with the gabion was not considered and that you lose biofiltration with faster runoff. Mr. Lubischer testified that habitat for wildlife is impacted when you lose duff and topsoil. There will be biological and hydrological impact and hydrological functions will not come back.

391. Mr. Lubischer testified that the road takes away from the buffer. He stated that the "temporary" area will be completely covered with fill. It will essentially be a 75% buffer reduction. He stated these are not "temporary impacts." He said that the surface slope will steepen from 10-40%. As a result, the buffer will lose all water quality and quantity benefits. Mr. Lubischer stated that this should have been part of the buffer averaging scheme.

392. Referring to *Ex. B32*, the habitat management plan dated October 24, 2022, page 35, Mr. Lubischer testified there will be similar "temporary" impacts at the bridge crossings north and south. The fill will be up to 20 feet thick for the south bridge crossing. He also noted the "temporary" impacts shown in *Ex. F23* at page 26 for the sewer line corridor.

393. Concerning the road area between P2 and L1/L2, Mr. Lubischer testified that this area is not "actively maintained" it is overgrown, built by a bulldozer, using local soils from cuts and no road bed put in.

394. On cross-examination, Mr. Lubischer admitted that Mr. Moody is an experienced engineer and used tested technology. He admitted that water can move vertically or laterally, depending on the makeup of soils but stated that deeper water would not migrate vertically.

395. Mr. Lubischer testified that 3 of 26 holes is not evidence of "pervasive groundwater seepage." He also noted that, with respect to the testimony that groundwater is at depths of 9-12 feet, the "logs actually show wet soil."

396. Mr. Lubischer testified that we know there are deeper aquifers "confined within advance outwash deposit" between till and silt and that there are groundwater seeps and springs. With respect to Artisanal pressure, he stated that it was inferred, but not found.

397. Mr. Lubischer stated that Zipper Zeman looked at a different area than Terra Firma. He also testified that, with respect to TP 115 in the vicinity of wetland P2, the fact that "high porosity was not found by Terra" was not relevant because they only dug down 8 feet and did not get down to the advance outwash. Mr. Lubischer stated that, "geologists are always making generalizations, and that you need to look at the final scale which requires more complicated interpretations. He stated that, "all they are doing are inferences," and that these

are theories based on interferences. Mr. Lubischer testified that of Zipper Zeman's fifteen test pits, all but one showed recessional outwash and also noted that Mr. Sadler's test holes 104, 105, 106 showed recessional outwash. He emphasized again that recessional outwash acts like a sponge.

398. With respect to *Ex. B29,* Terra Associates supplemental report dated November 28, 2023, which only found recessional outwash to the west of wetland P2 and not to the east, Mr. Lubischer stated that they did not go deep enough. He said that it was entirely possible if they dug deeper in TH 103 that they would also find colluvium "covered over." Mr. Lubischer stated that with respect to Mr. Sadler's test pits, this is the best evidence of a "wetting front" moving in. He stated that there is "no reason to invoke the idea of deeper groundwater coming up from the depths of 9-10 feet."

399. Mr. Lubischer testified that the Spine Road will change the rainfall contribution to wetland P2. He disagrees with Ms. Decker's testimony of mechanically compacted vs. glacial compaction. He noted that earthen dams are still a low permeable soil. The basis of his opinion is "working with soils" and "common knowledge." Mr. Lubischer also noted that placing fill with a structural load on top has to be compacted and that you "need the right moisture capacity for bearing capacity." With the compaction of the road, you will see "soils cemented." Glacially compacted fill will create a "hard pan." Mr. Lubischer stated that a road needs to have solid foundation. The road cut will go down five feet underneath the fill and all soft material will be removed.

400. Mr. Lubischer testified that a proper study should include sampling throughout the year at various locations. He also noted that with low soil permeability there is a fast route for water to travel. Mr. Lubischer stated, "we know how water flows through the basin." The top 1-2 feet is the most disturbed area and has the loosest soils; the deep groundwater is the regional aquifer. He stated that you follow the topographical flow of surface flow to determine shallow subsurface flow.

401. Mr. Lubischer testified that, with the intrusion into the buffer, you will be losing absorption and infiltration. Interflow – The top couple of feet of interflow will be interrupted by the road. Water will sheet off to Crabapple Creek. The project will be changing the nature and manner of how water reaches wetland P2.

Dr. Robert Roseen (Appellants' Rebuttal Case)

402. Appellants called Dr. Robert Roseen in their rebuttal case.

403. Dr. Roseen testified that there are three different conditions under consideration: temporary construction, the ECG, and construction stormwater controls. He stated that we only have Phase 5 for consideration of impacts; we do not have information for Phase 6. Dr. Roseen stated that it is not uncommon for late phases to take a long time.

404. Addressing Mr. Moody's testimony on water quality impacts, Dr. Roseen referred to KCC 12.08.360, which Mr. Moody interpreted as referring to paved, not gravel roads. Dr. Roseen noted that the earliest reference to this provision is 2016. In the applicable 2007 version of Title 12, there is not a provision like this one. Rather, a gravel road is an impervious surface. See *Ex. A1* (1997 Stormwater Manual) and *Ex. F8*, p. 290 and 611, which provide that the project is vested to the "old" Title 12, KCC 12.20.040 (*Ex. F8*, p.628).

405. Dr. Roseen testified that a gravel road creates a lot of pollutants with a compacted subgrade. Best Management Practices apply to the maximum extent practicable. The gravel road will be a pollution generating impervious surface. Dr. Roseen noted that gravel roads get washed out and stated that the amount of travel on a gravel road makes little to no difference with respect to pollution generation. He testified that the gravel road will be an eroding surface. Stormwater will wash off and carry sediment to the catch basins and then to wetland P2. Dr. Roseen opined that hundreds of pounds of sediment will be moved annually from this 0.7 acres of impervious surface.

406. Dr. Roseen testified that the road swale is not designed as a water quality swale. Lining it with grass will not take care of the problem. He commented that it is a conveyance ditch little to no benefits. Dr. Roseen noted that *Ex. B10* takes credit in the stormwater management plan for the swale, and also notes that it did not discuss routing stormwater to the pond in the north.

407. Referring to *Ex. A1*, Kitsap County Stormwater Management Design Manual, section 6-3, page 692, Dr. Roseen testified that the water quality design for the project is not that high. It does not address backyards, contains no calculations of water quality, and does not look at seed mixtures.

408. Referring to *Ex. B12*, Storm Drainage Plan, Arborwood North Phase 4 & 5, Sheet SD-3, Dr. Roseen testified that the green area is not an accurate depiction of the basin and that the basin boundaries are not complete. He noted there was no stormwater analysis for Phase 6. Dr. Roseen stated that Mr. Moody's analysis only applies to phase 6 because of the reference to "bypass."

409. Dr. Roseen testified that the basin boundary discrepancy makes a difference. He compared 11.5 to 13.8 acres with additional adjusted area. Looking at flow, Dr. Roseen testified: pre-development is 23 CFS, post Phase 6 is 16.59 CFS (which Dr. Roseen estimates to be 26.74 CFS) and post Phase 5 is 27.83 CFS. This is a calculated 17% increase for Phase 6 and 21% increase for Phase 5. He noted that these calculations are for a 100-year storm. The runoff coefficient is barely over .58. Dr. Roseen went through similar calculations for a 2-year storm which similarly resulted in a 17% increase for Phase 6 and 21% increase for Phase 5. Dr. Roseen disagreed with Mr. Moody's predictions of CFS.

410. Dr. Roseen testified that Mr. Moody only looked at one storm. Using the rational method, Q2 is the most important data point: channel forming discharge. Under geomorphology principles, a channel will reach equilibrium. When you have bankful discharge, in other words, channel forming discharge, it will adjust until it reaches equilibrium. You must comply with channel protection standards.

411. Dr. Roseen referred to the NRCS Soil Erodibility Index and noted that silts have the highest erodibility. Therefore, he expects to see changes in channels downstream.

412. Dr. Roseen testified that the gabion will prevent a large hole from developing at the outlet, but will not change or mitigate the equilibrium condition. He referred to the Revised Universal Soil Loss Equation. Dr. Roseen testified that, notwithstanding peak flow controls, the pre-development CFS is not focused flow. It is his opinion that a 12-ich pipe will not be able to handle the CFS and water will overtop the road.

413. Dr. Roseen testified that wetland P2 is a sloped wetland fed by water oozing out of the hillside. The theory that water is 9-10 feet below the surface is not supported because wetland plants require hydrology. Water at these depths would not create wetland plants. He explained that a channel will form from discharge at the point of the gabion, which will lower the surficial water table. The roots of plants will no longer be in the water table, which will affect their viability.

414. Dr. Roseen testified that gabions are very effective but cannot be compared to current conditions. There is no channel present now; the wetland is fed by seepage, which is very slow (feet per day vs. feet per second). The velocity of water entering the wetland will be very different, like a thumb over a water hose. We will see impacts immediately.

415. Dr. Roseen testified that, with turbid water, you need to have treatment. This is reflected in the ECG. He stated that the gabion in and of itself is not sufficient because too much water is itself a "pollutant."

Hearing Examiner's Evidentiary Findings

Prior Review, Vesting and SEPA

416. The County completed environmental review and approved the preliminary plat for the Arborwood development in 2009 ("2009 MDNS"). *Ex. F6*. The 2009 MDNS evaluated the environmental impacts of the Arborwood preliminary plat, which as documented in multiple SEPA addenda, has not significantly changed from the 2009 proposal for a 361-acre site consisting of 751 residences. *See Exs. F6, F26*.

417. The 2009 MDNS provided that "[w]etland buffer averaging is proposed for some portions of the site development" and imposed a condition requiring that wetland buffer proposals be reviewed "pursuant to the applicable requirements at KCC 19.200.220.C(1)(a)" upon SDAP review. *See Ex. F6*, pp. 3-4. The 2010 Development Agreement incorporated the 2009 MDNS and concluded that "project level SEPA compliance is intended to satisfy all SEPA requirements for the subsequent build-out of the Project[.]" *See Ex. F8*, pp. 4-5.

418. Condition 4 to the 2009 Mitigated Determination of Non-Significance ("MDNS") stated that "[w]etland/stream crossings and buffer averaging proposals shall be reviewed for compliance with Kitsap County Code Title 19 (Critical Areas)," and that "[b]uffer averaging requests may be altered pursuant to the applicable requirements at KCC 19.20.C(1)(a)." (*Ex. F8*, p. 28). This condition envisioned future review of the Arborwood project to evaluate compliance with buffer averaging rules.

419. Paragraph 4 of the 2010 Development Agreement stated "[t]he parties acknowledge that the Project is entitled to use buffer averaging and modifications to the extent allowed in the County Code as of March 26, 2008." *Ex. F8*, p. 5. The 2010 Development Agreement preserved a 15-year timeline for development of the Arborwood plat, subject to the development regulations and terms therein. *Ex. F8*, pp. 5-6.

420. After an open record hearing, the County Hearing Examiner recommended approval of the 2009 Preliminary Plat, which included fill of individual wetlands and the use of buffer averaging, based on the 2007 Wetland Delineation and Evaluation prepared by Raedeke Associates, Inc. ("Raedeke"), as well as the conceptual stormwater management plans. *See*

Ex. F7, pp. 3-28. The 2009 Preliminary Plat approval addressed the proposed stormwater design and made eight findings, noting that "some stormwater runoff would be released toward on-site buffers to recharge wetlands," recognized "drainage ditches lined with vegetation to manage stormwater runoff generated by the construction of spine roads for access to the subject property" would need to be constructed, and imposed ten conditions of approval related to stormwater control and erosion and sedimentation control. *Id*., pp. 15-18, 36-43. The County's Engineering Division "reviewed the Applicant's proposed stormwater management plans, and determined plans should be approved with ten proposed conditions of approval" to "address compliance with KCC Title 12 stormwater control, treatment, erosion and sedimentation control regulations in effect at the time the County deemed the [performance based development] application complete." *Id*., pp. 17-18, pp. 36-43. The Hearing Examiner made six findings concerning impacts to wetlands, including fill and buffer averaging, based on a 2007 Wetland Delineation and Evaluation prepared by Raedeke and authored by Christopher Wright. *Id*., pp. 11-15.

421. Condition 9 to the 2009 Plat Decision states that "[w]etland buffer averaging proposals will be reviewed on a case by case basis, and may be adjusted accordingly pursuant to the criteria at KCC 19.200.220.C." *Ex. F7*, p. 35. This condition envisioned future review of the Arborwood project to evaluate compliance with buffer averaging rules.

422. Applicant argues that the current location of the Spine Road, encroachment into Wetlands P2 and 302, and fill of Wetlands Z3, Q1, and Q2 were contemplated in the 2007 Wetland Report of the 2009 Preliminary Plat, and the impacts previously identified are consistent with those authorized in the CABR Decision.

423. In 2021, Applicant acquired the development rights for Phases 4, 5, and 6 of Arborwood and began to pursue Implementing Approvals for the 2009 Preliminary Plat.[4] The Applicant submitted a minor amendment to the 2009 Preliminary Plat to modify the plat configuration, including refinements to creek crossings and revisions to the Spine Road design, and shortly thereafter, applications for early clearing and grading ("ECG") permits and site development activity permits ("SDAP") to construct, *inter alia*, the Spine Road, stormwater detention ponds, and bridge crossings.

[4] Pulte Homes of Washington acquired the development rights for Phases 1, 2, and 3, and is currently constructing portions of Phase 1.

424. Since 2010, the County approved two minor modifications to the 2009 Preliminary Plat, issuing SEPA Addenda to document the changes as not warranting additional environmental review under SEPA. *See Ex. F26*. Applicant submitted an application for the Second Minor Amendment of the 2009 Preliminary Plat ("Second Minor Amendment") on November 12, 2021, and multiple applications for SDAPs on December 7, 2021, January 14, 2022, and June 25, 2023. *Exs. F26, F28*. As testified by County staff and Applicant's consultants, the SDAPs authorize clearing and grading and site development work to implement required conditions of the 2009 Preliminary Plat and minor modifications. These conditions also require administrative approval of certain critical area disturbances prior to issuance of the SDAPs.

425. In April 2023, the County approved the minor amendment to the 2009 Preliminary Plat ("Preliminary Plat Minor Amendment") and issued an addendum to the Preliminary Plat MDNS ("MDNS Addendum"). *Ex. F26*. The MDNS Addendum concluded that the Preliminary Plat Minor Amendment "does not substantially change" the analysis previously conducted for the 2009 Preliminary Plat. *Id*. Appellant, Joe Lubischer, was a party of record to the Preliminary Plat Minor Amendment decision. *Id*., p. 2. Neither the Preliminary Plat Minor Amendment nor MDNS Addendum were appealed.

CABR Decision and Pending ECG and SDAP

426. At the direction of the County, the Applicant submitted a separate CABR application to modify applicable buffer widths in connection with the work proposed in the ECG and SDAP. Condition 27 to the County's second preliminary plat minor amendment (April 17, 2023) provides "[p]ermit approval subject to approval of CABR administrative permit where buffer averaging, reductions, and wetland fill are being processed. The CABR permit and conditions are found in permit 22-02629." *Ex. F26*, p. 34. This condition cites the CABR Decision (permit 22-02629) as the decision in which buffer averaging is addressed. The ECG permit, which will incorporate conditions of the CABR Approval to authorize clearing and grading, is pending issuance following resolution of this appeal.

427. The SDAP application submitted December 7, 2021 (No. 21-06120) is for site development work in Phases 4 and 5. *Exs. B22, B25*. The application submitted January 14, 2022 (No. 22-00374) is for early clearing and grading work in Phases 4, 5, and 6. *Exs. B23, B24*. The application submitted June 25, 2023 (No. 23-03138) is for early clearing and grading work in Phase 6. SDAPs 21-06120 and 22-00374, as well as SDAP 22-00785, North Bridge Permit 22-01582, and South Bridge Permit 22-01583, are subject to the conditions of approval of the CABR. *Ex. F27*, p. 4.

428. The CABR Decision states that "The minimum buffer width will not be less than 50 percent of the widths established after the categorization is done and any buffer adjustments applied." *Ex. F27*, p.13 (referring to former KCC 19.200.220.C.1.a, governing buffer averaging). It continues, "The averaging plan does not propose to reduce the buffers by more than 50% in any location. There is a slightly lower buffer at the east end of Wetland P2 but it be [sic] accompanied by buffer restoration which will provide some additional buffer protection in this area. This reduction is needed to grade the proposed road and cannot be altered because of the development to the east." *Id*.

429. The CABR Decision cites Former KCC 19.200.250 in support of allowing permanent fill material in the buffer. *Ex. F27* pp. 16–17. Under that provision, any work performed in a wetland or its associated buffer must ultimately be rehabilitated or restored, compensation must be made through substitute resources or environments, or environmental processes must be improved. *Ex. F4* p. 46 (KCC 19.200.250.3.a–c).)

430. Mr. Heacock testified that typically, the County evaluates buffer reductions as part of its review of site development activity permits, not in advance of those decisions. The parties agree that final plans have not been submitted for aspects of the development that will be affected by the CABR. County staff witnesses all testified that the conditions of approval set forth in the CABR will continue forward to apply to the County's review and approval of ECG and SDAP applications.

431. Appellants argue that the CABR, if not reversed, would immediately allow development of "phases 4, 5, and the northern portion of phase 6." *Ex. F28* at 3. Appellants appear to contend that this is the Applicant's strategy, despite testimony from several Applicant witnesses who noted that Pulte Homes had not been required to obtain a separate CABR and established that it was the County that directed a separate CABR application from the Applicant. There is no evidence to support these arguments.

432. By virtue of how the County has directed the procedure and processing of Applicant's permits for development of Phases 4, 5 and 6, the Applicant can only address those issues that relate to buffer averaging – to show that a reduced buffer will provide equivalent functions as a standard buffer – in the CABR. This narrow scope of review, limited to consideration of analysis between impacts expected under a standard and under a reduced buffer, was carved out from the more comprehensive SDAP and ECG review by the County, which review is ongoing. Broader ranging questions regarding compliance with stormwater

regulations and impacts of the Project on critical areas have not yet been addressed and are premature.

433. The County's decisions approving the Second Minor Amendment (*Ex. F26*) and CABR, together with the testimony of County staff, demonstrate that the CABR is intended to establish conditions for the future Phases 4, 5, and 6 SDAPs, which future decisions will ensure protection of the functions and values of on-site wetlands. Given the intent to establish future conditions for the SDAP, the road design and stormwater plan for Phases 4, 5, and 6 have changed, or will change, after approval of the CABR. Multiple County staff testified they anticipate further revision and review of Applicant's plans submitted for the SDAPs to address potential concerns, having already addressed some concerns raised by Appellants during regular meetings held with Applicant's civil engineers.

434. Applicant's civil engineers confirmed that stormwater infrastructure designs and specifications had been redesigned from the original 60% design submittal, demonstrating that less than five percent of the quantity of stormwater would be diverted as compared to its undeveloped condition (based on a conservative estimate) and describing measures that will be incorporated throughout the construction process and final design to ensure water quality standards are met.

435. The CABR represents the first time the County has evaluated the Arborwood project's compliance with the County's buffer averaging rules. At no prior time did the County evaluate or make a determination that the Spine Road complies with the buffer averaging rules at KCC 19.200.220.C.1.a. The CABR is the only decision in which the County evaluated the averaging plan and determined whether it complies with buffer averaging rules.

436. The CABR identifies ground disturbing limits for bridge crossings and wetland buffers and approves certain wetland buffer reductions and wetland buffer averaging proposals. Applicant and the County contend that the CABR includes conditions necessary to ensure final design of the roads, stormwater, and other site development infrastructure mitigates adverse impacts to wetlands and note that the County issued the CABR based on SDAP plans at the 60% design stage is consistent with the Department of Community Development's typical practices and mirrors the 2009 Preliminary Plat and its attendant environmental review such that conditions imposed by the CABR govern subsequent, more specific and detailed review with respect to construction and final design.

Allowable Buffer Reduction for Wetland P2

437. The County determined that the required buffer for Wetland P2 is 200 feet in its CABR Decision, pursuant to KCC 19.200.220.A & B (Tables 19.200.220(A) & 19.200.220(E)), based on wetland delineation and assessment work performed by the Applicant's wetlands scientists (Raedeke Associates and Ecological Land Services). *Ex. F27*, p. 12 (Table 2); *See Ex. F28* p. 14.[5] The CABR Decision approved reduction of the buffer at the east end of Wetland P2 to be reduced from 200 feet to 85 feet in order to accommodate the Spine Road. *Ex. F4*, p. 38. This reduction constitutes a greater than 50% buffer reduction, as the Hearing Examiner found in the Order on Prehearing Motions, *Ex. F51* pp. 5-6.

438. After Appellants filed a motion for summary judgment, the parties stipulated and agreed to a modified condition of approval for the CABR requiring that the Wetland P2 buffer must be at least 100 feet at all points. *Ex. F52,* p.2*; Ex. F34*, p. 6; *Ex. F36*, p.4.

439. After this appeal was filed, the Applicant argued that Wetland P2 is not Category II. The Applicant first opined that Wetland P2 might be a Category III wetland requiring a smaller buffer. *Ex. F34*, p. 5, p. 34 (Declaration of Joanne Bartlett, ¶10). Then, Applicant submitted a new report authored by Ms. Bartlett, opining that Wetland P2 should be typed as a Category IV wetland, requiring only a 50-foot buffer. (*Ex. B5* pp. 2–3.) Applicant did not itself appeal the CABR with respect to the County's determination that Wetland P2 is a Category II wetland that requires a 200-foot buffer.

440. For the reasons detailed below, substantial evidence in the record does not support a finding that these experts and consultants erroneously determined that Wetland P2 was part of a "mosaic" with the larger Wetland L2, thereby wrongly inflating the rating of Wetland P2 by rating them together.

a. Raedeke's wetland reports (*Exs. F5* and *F9*) did not describe Wetland P2 as part of a "mosaic" with Wetland L2.

b. The "mosaic" issue was not ever raised in any of multiple reports by Ecological Land Services (e.g., *Exs. F13, F18, F19,* and *F23*). Nor was the issue raised by the County during its reviews.

[5] This was also the conclusion of Ecological Land Services (ELS) in every report submitted to the County leading up to the CABR Decision. (E.g., *Ex. F18*, p. 5 (ELS April 22, 2022 report; Table 1)); *Ex. F23*, p. 6 (ELS Sep. 7, 2022 report; Table 1).

c. There is no evidence – only speculation – that Raedeke originally rated Wetland P2 as a Category II wetland because Raedeke thought it was part of a "mosaic" with wetland L2 (a Category II wetland).

d. Wetland L2 is more than 12 acres in size, as delineated by Raedeke itself. (*See Ex F5*, p. 46 (Table 1).) It would be illogical to find that Raedeke considered Wetland P2 as part of a "mosaic" with Wetland L2, because Raedeke knew that L2 was over 12 acres in size. It would further be illogical to find that such a mistake persisted over 14 years of project review without notice and/or correction.

e. Substantial evidence does not support a finding that Raedeke made a mistake in interpretation of the mosaic rules found in the 2004 wetland ratings manual.

f. The definition of a "mosaic wetland" has not changed over the past two decades.[6]

g. Wetland P2 is one of three small wetlands immediately adjacent to Wetland L2—the other two being Wetlands 12 and L3, as pictured in Raedeke's 2007 report, *Ex. F5* p. 42. Wetlands P2, L3 and 12 are all under one acre in size. (*Ex. F5* p. 46) and are all less than 100 feet from Wetland L2. Only Wetland P2 was grouped with Wetland L2 for rating purposes. It would be illogical to find that Wetland P2 would have been rated as part of a mosaic with L2, when Wetlands 12 and L3 were not.

h. Wetlands 12 and/or L3 were not rated together with L2 because neither of those wetlands are separated from L2 by a manmade feature.

i. Applicant's wetlands experts stated that Raedeke's "mistake" had to do with Wetland P2's hydrogeomorphic class and/or changed guidance from the Department of Ecology. (*See Ex. F34* p.18 (Christopher Wright Decl., ¶12 (opining that "the Department of Ecology has now changed their guidance and no longer suggests that wetlands with differing hydrogeomorphic classes be categorized together")); *id*. at 4 (Kolten T. Kosters Decl., ¶12 (opining that

[6] As explained in Ms. Bartlett's October 17, 2023 memorandum (*Ex. R5*), a wetland mosaic is a cluster of small wetlands located very close to each other. Under the 2004 and 2014 Wetland Rating Manuals published by the Department of Ecology, when a mosaic exists, all of the wetlands get rated together, not individually. In order to be a "mosaic," each individual wetland must be under one acre in size, and the individual wetland patches must be less than 100 feet apart, on average. (*Ex. R5* pp. 2–3.)

"Department of Ecology wetland guidance no longer states that smaller wetlands, such as Wetland P2, should be categorized based on their association to larger wetlands, such as Wetlands L1 and L2")); *id*. at 48 (Joanne Bartlett Decl., ¶10 (opining that Wetland P2 should not be grouped with Wetland L2 because of their differing hydrogeomorphic classes, with P2 being a slope wetland, and L2 being a riverine wetland)).) However, the Hearing Examiner finds that none of these statements have anything to do with the rules for mosaics.

j. The Hearing Examiner finds that Raedeke did not rate Wetland P2 with Wetland L2 because it thought they were part of a "mosaic." Raedeke did not rate them together based on old Ecology guidance or because of their hydrogeomorphic classes. Raedeke rated them together because those two wetlands were required to be rated together under former KCC Section 19.200.210.D.1.

441. The Hearing Examiner finds persuasive Dr. Sarah Cooke's testimony that Wetlands P2 and L2 meet the criteria of former KCC Section 19.200.210.D.1 and were properly rated together with the same Category II rating: (1) Wetlands P2 and L2 are separated by a manmade feature, an old logging road and a culvert (*Ex. F5*, p. 42; *Ex. F9*, p.11); (2) there is an intermittent surface water connection between Wetlands P2 and L2, as evidenced by the culvert, Raedeke's map of a stream flowing through the culvert from P2 to L2 (*Ex. F5*, p. 42) and Ms. Bartlett's photograph of the culvert outfall which shows a water line midway up the culvert and visible sediment and pebbles in the bottom of the culvert, evidencing water flow (*Ex. B33*, photo 8).

442. There is not substantial evidence in the record to support a finding that Wetlands P2 and L2 used to form a single wetland prior to construction of the road that bisects them. Dr. Sarah Cooke testified that her opinion was based on the continuity of the wetland plant species in both wetlands and between them and referenced dark hydric soil in a photograph from Wetland P2 (*Ex. B33*, photo 5). However, Dr. Cooke did not go on site to test the soils for wetland characteristics and cannot therefore make a reliable determination as to the presence or absence of wetland soils. No on-site evaluation or study has been made recently to determine if the area between Wetland P2 and L2 is itself a wetland.

443. Substantial evidence does not support a finding that Wetland P2 is no longer a Category II wetland nor that it does not requires a 200-foot buffer. The Examiner was not persuaded by testimony of Ms. Bartlett or Mr. Kosters in this regard, nor by the findings and conclusions in *Ex. B5* which were made at the site visit in October 2023. While based on the

passage of time, site conditions may have changed such that a reevaluation of Wetland P2 was necessary, Applicant's new evidence is not convincing.

444. Substantial evidence supports the original categorization of Wetland P2 as a Category II wetland, based on the 2007 and 2018 wetland delineation and assessment work performed by Raedeke Associates and the wetland assessment work performed by Ecological Land Services in 2022. *Ex. F27*, p. 12 (Table 2); *See Ex. F28* p. 14; *Ex. F18*, p. 5 (ELS April 22, 2022 report; Table 1)); *Ex. F23*, p. 6 (ELS Sep. 7, 2022 report; Table 1.

Revision to Spine Road Location

445. In its current location as identified in the plans on which the CABR Decision was based, and with Wetland P2 categorized as a Category II wetland, the proposed Spine Road will be located approximately 85 feet from Wetland P2, which is a greater than 50% reduction of a 200-foot boundary (approximately 58%).

446. Applicant proposed a revision to the Spine Road design and alignment to move the road and extend the distance between the Spine Road and Wetland P2 after this appeal was filed. *Ex. F34*, p. 30. Appellants contend that the proposed Spine Road revision does not comply with the 2007 critical areas ordinance to which the Project is vested.

447. Applicant asserts that even if the regulated buffer for Wetland P2 remains at 200 feet wide, remanding the CABR decision is unnecessary because Respondent's civil engineer has determined that the Spine Road and accompanying pedestrian walkway can be relocated further east and avoid permanent buffer impacts within 100 feet of Wetland P2.

Amended Appeal Issue on "Temporary" Impacts

448. Appellants sought and obtained permission from the Hearing Examiner to supplement their appeal to include challenges to "temporary impacts," which they allege represent additional buffer reductions that need to be accounted for in the County's buffer averaging calculations. Appellants' amended appeal claims address testimony provided for the first time on day 5 of the hearing, when Mr. Heacock testified that that the CABR approved "temporary impacts" depicted in the Habitat Management Plan. Appellants noted that the Habitat Management Plan depicting these impacts was not posted on the City's online permit database and that impacts from the stream crossings were not disclosed and evaluated on the face of the CABR Decision.

449. Appellants challenge the County's determination of fill as constituting a "temporary impact" because they argue that fill placement will be permanent. Appellants assert that, because fill will create permanent impacts, they must be accounted for in the Applicant's buffer averaging plan as buffer reductions. The CABR determined that areas covered by fill will be revegetated to "recover the functions of these buffer areas." *Ex. F27* p. 16.

450. Appellants allege the proposed buffer averaging plan fails to comply with the 50-percent buffer reduction limit at KCC 19.200.220.C.1.a because Applicant proposes to place permanent, compacted, structural fill material as close as 50 feet to Wetland P2, in order to provide structural support for the Spine Road. *See Ex. F18*, p.21; *Ex. 28*, p.7. They argue that the location of the buffer edge affects not only land-disturbing activities within the buffer, but also land-disturbing activities outside the buffer. Appellants argue that Applicant has not accounted for these areas of permanent fill in its buffer averaging plan (specifically as areas of buffer reduction), and proposes to place this permanent fill material as close as 50 feet from the eastern edge of Wetland P2. Therefore, Appellants argue that the buffer is reduced at Wetland P2 to 50 feet, which is 25% of the required 200-foot buffer.

451. Appellants' amended appeal issue also challenges the County's decision to allow fill material to be placed in a wetland buffer as a "temporary impact" in: (a) the buffers of Wetlands Z4 and C2 for stream crossings, pages 35 and 36 of the October 24, 2022 Revised Habitat Management Plan. *Ex. F32*, p. 35; *Ex. F13*, p. 14; and (b) the buffers of Wetlands L3, C6 (within the utility corridor), and L2. See *Ex. F23* p. 25 (Figure 4).

452. Appellants argue that the utility corridor will not be permanently restored because the risk remains that this area will need to be cleared and dug up for access and to perform maintenance on the utilities. Because this area may need to be cleared for future access and maintenance, it does not meet the definition of a "buffer"—i.e., "a non-clearing native vegetation area which is intended to protect the functions and values of critical areas." *Ex. F4* at 15 (KCC 19.150.170) Like the areas of permanent fill, this area must be counted as a buffer reduction for purposes of the Applicant's buffer averaging plan.

453. Appellants argue that "temporary impacts" do not comply with conditions requiring the retention of natural vegetation and impair or eliminate the beneficial hydrologic benefits of buffers that protect the wetlands and streams. They argue that both items cause adverse impacts to the wetland.

454. The CABR Decision states that allowing these impacts "meets the requirements in 19.200.220.C.1.a," a rule that addresses buffer averaging. *Ex. F27*, pp. 14, 15-16. But

Appellants allege that the County's buffer averaging rules do not specify that temporary impacts are allowed, or that they do not need to be accounted for in buffer averaging calculations.

455. Appellants argue that placing fill material in the buffer is part of "construction," and that the areas of so-called "temporary" impacts are not temporary. Rather, these are permanently impacted areas for which the Applicant proposes a partial restoration plan, restoring only one aspect of the damaged environment (vegetation cover). Appellants argue that no code provision allows the County to approve permanent fill in wetland buffers, unless those areas are completely and wholly restored or enhanced. (See *Ex. F4* p. 46 (KCC 19.200.250.3.a–c).) After these areas are cleared, they will no longer meet the plain language of the definition of "buffer"— a "non-clearing native vegetation area." (*Ex. F4* p.15 (KCC 19.150.170).) If the Applicant desires to place permanent fill material in the Wetland P2 buffer, then it needs to count all areas so impacted as buffer reductions that need to be "averaged out" through the addition of additional buffer areas. (*See Ex. F4* p. 38 (KCC 19.200.220.A.1.a(4), providing "[t]he total buffer area after averaging [must be] no less than the buffer area prior to averaging").)

456. Appellants also challenge a potential proposed plan to modify its plan for the Spine Road to provide a 100-foot buffer at the east end of Wetland P2, alleging that this amended proposal does not comply with KCC 19.200.220.C.1.a because (a) the Applicant neglected to account for the 15-foot building, construction, and impervious surface setbacks required by KCC 19.200.220.F and Condition 8 to the County's 2009 Preliminary Plat Decision, and (b) even the amended proposal would place permanent fill in the buffer, erroneously described as a "temporary impact."

457. The County addressed temporary buffer impacts resulting from ground disturbance activities (*e.g.* grading) at pages 14 and 15-16 of the CABR (*Ex. F27*). There is not substantial evidence to support Appellants' claims that this work will be inconsistent with KCC 19.200.215 and 19.300.315 with the substantial revegetation requirements set forth in the CABR Decision, required compliance with the approved Wetland Mitigation Report dated September 7, 2022, and testimony provided on these issues. *See* Conditions 10, 11, 15, 16 and 19. *Ex. F27*, pp. 22-24. The evidence shows these disturbed areas will be restored and enhanced to improve the buffers' functional attributes.

458. The County did not address buffer impacts resulting from the installation of fill within buffers. Testimony at hearing indicates that such impacts were considered to be addressed by the conditions required for revegetation discussed in the finding above following ground

disturbance work. The County did not analyze whether "subsurface" work (*e.g*. below the revegetation) will intrude into buffers and, if so, did not calculate the extent of such intrusion, or determine compliance with KCC 19.200.220.F. While grading/ground disturbance work was analyzed, addressed and will be mitigated, the CABR does not address or analyze the impacts of fill construction on buffers.

Groundwater Flow/Recharge of Wetland P2

459. The Hearing Examiner finds the testimony of Mr. Lubischer regarding groundwater flow and recharge of Wetland P2 is more credible than the testimony of Ms. Decker on these issues. The Examiner does not discount all aspects of the November 23, 2023 Terra Associates report (*Ex. B29*), but finds that the conclusion there is no shallow interflow through recessional outwash that flows from east to west towards Wetland P2 is questionable in light of Mr. Lubischer's rebuttal testimony.

460. The Hearing Examiner finds that substantial evidence in the record supports a determination that the precipitation, runoff, and shallow subsurface water flow currently recharge Wetland P2, which is located in a topographic swale that extends eastward from Wetland L2 uphill toward the Hillbend Neighborhood. While Ms. Decker testified that she believed Wetland P2 also was fed by "persistent perched groundwater" at a depth of about ten feet, "probably coming from somewhere upgradient," and potentially from a source "miles away," this theory was not credible and illogical.[7] There is not substantial evidence to support a finding that Wetland P2 is recharged by substantial deep perched groundwater.[8]

461. Water will take the path of least resistance, which means that the most natural way for water to enter Wetland P2 is through surface and shallow sub-surface flow through the duff and topsoil to the east of Wetland P2, as testified by Mr. Lubischer. The recessional outwash sand layer in the soils is a high permeability and high porosity soil. The glacially consolidated till beneath this layer has low permeability and lower porosity. These attributes mean water

[7] Ms. Decker testified that the absence of shallow groundwater found in TH-103 of the November 28, 2023 Supplemental Subsurface Exploration memo (*Ex. B29*) indicates that the wetland is not fed by shallow groundwater from the east. However, Mr. Lubischer testified that the presence of shallow groundwater in TH-102 and TH-101—and that fact that these investigations were performed after the first significant rainfall of the season—likely means that Terra Associates merely encountered a "wetting front," the edge of shallow groundwater that had not made its way yet to TH-103.

[8] Mr. Lubischer testified that finding moist or wet soils in glacial till is not uncommon. But confirmation of significant perching requires observation of seepage that fills a boring and can be measured with a water level indicator. Presence of perched groundwater can also be tested by inserting a small pump and observing times for depletion and refilling. Neither type of testing was conducted.

can easily infiltrate downward from the surface into the sand, and be held within the sand on top of the till. The permeability of till is significantly less than for the surficial and outwash layers. Water flowing laterally along the till-silt interface will remain at 10-foot depth and would have to be forced upward through the till in order to reach the outwash sands and the wetland, which is less likely than the least resistant flow path through surficial and outwash layers.

462. When water reaches the recessional outwash layer beneath the wetland, it is then stored like a sponge to continually recharge the wetland in wet and dry periods alike. Even as water level is lowered in the recessional sand, the roots of hydrophytic plants will still obtain moisture via the capillary fringe extending above the water surface.

463. Notwithstanding the above findings, the record does not support a finding that a 50% buffer reduction will reduce groundwater hydrology to wetland P2 to a degree that adverse impacts to wetland P2 will be greater than that which would be associated with a standard buffer. Ms. Decker testified, based on her education, licensing, and extensive experience as a geotechnical engineer, that the multiple geotechnical investigations and reports prepared by Zipper Zeman and Terra Associates establish multiple sources of hydrology to wetland P2: direct rainfall, runoff and shallow interflow from adjacent areas during precipitation events, and shallow interflow from the recessional outwash from the north.

464. Mr. Lubischer's testimony did not establish that adverse impacts to Wetland P2 will result from reducing the buffer to 100-feet. Mr. Lubischer argued that shallow interflow from recessional outwash east of wetland P2 could be impacted by the construction of the Spine Road, but did not connect such impacts to the buffer reduction, nor show that such impacts would be greater than expected with a standard buffer. Mr. Lubischer conceded that only a groundwater study could definitively prove the sources of wetland P2 hydrology. This level of analysis is not required to demonstrate that the reduction of a standard wetland buffer will not compromise the functions and values of a standard buffer.

465. Appellants' concerns that designs of the Spine Road and stormwater infrastructure would divert extensive amounts of water as compared to the undeveloped conditions, prompt erosion near Wetland P2, and degrade water quality because there appeared to be no consideration of best management practices or water quality control measures, do not constitute a basis to reverse or remand the CABR, particularly where substantial evidence shows the road and stormwater management plans were reviewed at a 60% completed stage, which is standard practice. The plans relied on by Appellants' witnesses are outdated and current plans have not yet been approved by the County.

Stormwater Quality and Quantity Impacts to Wetland P2; Impacts from Spine Road

466. Over six days of hearing and with the introduction of over 5,500 pages of record documents, the parties presented extensive evidence – as well as conjecture and speculation - in an attempt to diminish or conflate adverse impacts to Wetland P2. The Hearing Examiner finds that it is without question there will be impacts to Wetland P2 and other wetlands addressed in the CABR as a result of construction and use of proposed necessary infrastructure associated with the Arborwood development, which infrastructure has been approved in the 2009 Preliminary Plat and two minor amendments, all of which have been subjected to extensive permitting and SEPA review. Missing from the extensive evidence produced is a comparison of potential impacts to wetlands *if a standard buffer was retained*, as opposed to if the buffer was reduced. The Hearing Examiner attempted to ask Dr. Robert Roseen this question on Day 2 of the hearing, but his answer was not definitive.

467. As detailed in the Conclusions of Law below, the Applicant need not establish there will not be *any* adverse impacts to wetlands as a result of development to comply with the 2007 critical areas ordinance. That would be an impossible standard to meet. Rather, the question is whether a proposed reduction of a wetland buffer will provide as great or greater functions and values as would be provided under the standard buffer requirement. Former KCC 19.200.220.C.1.a.

468. ELS's critical area reports established that the functions and values of the wetland P2 buffer would be equal or greater through use of buffer averaging. *See Ex. F18*, pp. 9-11. Ms. Bartlett and Mr. Wright testified that the exterior 100-foot buffer, based on the prior Wetland P2 rating, is intended to protect the functions and values of habitat. Mr. Wright further testified that water quality benefits for wetlands are primarily gained within the first 50- to 75-feet of a wetland buffer perimeter.

469. Appellants argued that the impervious road surface and the cut and retaining wall will intercept 80% of precipitation and runoff that currently supplies Wetland P2. They submit that most of this water will be lost to the wetland system; water will be concentrated at a point discharge and will sheet flow through the wetlands to the creek. Appellants also argued the removal of loose surface soils and placement of structural fill needed to construct the road would eliminate direct precipitation, surficial flow, and shallow sub-surface flow that feeds the wetland and infiltrates into the recessional outwash sand, which acts like a "sponge" to sustain the wetland during dry periods.

470. The foundation and fill for the proposed Spine Road is likely to impede ground water flow from east to west toward Wetland P2. The degree to which the road will have such an effect is inconclusive on this record. The proposed design of the Spine Road includes a cut and retaining wall on the east side, removal of loose soil and placement of compacted fill in the swale, and creation of a impervious surface for a two-lane road, shared-use-path and drainage ditch. These features will collect some of the water currently available to the wetlands and will also impede some of the natural surface and shallow subsurface flow that recharges Wetland P2.

471. The fill will impact the swale and will affect hydrologic benefits of the buffer, including slowing and detaining water, providing biofiltration, absorbing water in the uppermost soil layer, and moving water by shallow subsurface flow and infiltration. The cut and fill is proposed to extend the full width of the swale and about 150 feet across the swale. Using the Applicant's grading plans, Mr. Lubischer provided a scale drawing of the fill material planned for this area. (*Ex. A14*). He testified that the fill will be as deep as 11.5 feet and will extend to within 50 feet of the wetland. Conflicting testimony was provided concerning the increase of the slope that will result from fill, from the road to Wetland P2.

472. The Spine Road is proposed to be constructed with a gravel surface, as depicted in the staff report to the CABR Decision and in the Applicant's stormwater plans submitted in support of the CABR Decision. *Ex. F27* p. 5 (staff report depicting gravel road); *Ex. F16* pp. 3–4 (CABR stormwater plans). There is not a dispute that plans have not yet been submitted to the County seeking authorization to pave the road. Nor is there any dispute that one cannot see into the future to determine how long the Spine Road will remain in a gravel condition. Applicant will have to submit bonding to ensure completion of the road. Alternatively, if Applicant were to abandon the project for any reason, Pulte Homes will still need the Spine Road. Speculation concerning various potential future outcomes is not a basis for reversal or remand of the CABR.

473. A roadside ditch approximately 300 feet long will collect stormwater runoff from the gravel Spine Road and will also intercept runoff and groundwater coming down the hill from the east. Prior to approval and implementation of the Phase 6 stormwater management plan, which has not been finalized or reviewed by the County, this collected water will be routed to Catch Basin 64 ("CB 64"), which will then discharge into a gabion at the east end of P2. A gabion system will be installed at the discharge point, which is designed to slow water flow, but which does not act to reduce water volume Wetland P2. *Ex. F16*, pp. 3-4. Competing testimony was introduced regarding the extent to which water will flow into Wetland P2 from the catchment and drain system as a result of the design of the gabion system.

474. The catchment basin currently designed for the Spine Road roadside ditch is larger than the area that is currently tributary to Wetland P2. Mr. Lubischer calculated that, after the new road and stormwater system are constructed, that area will more than double. The water collected will be collected and piped from CB 64 to discharge into Wetland P2. Mr. Lubischer and Dr. Roseen testified that this concentrated and untreated discharge, in turn, is likely to have significant adverse water quality and quantity impacts on Wetland P2.

475. The swale in which Wetland P2 is located has a catchment of about 11.8 acres, which concentrates precipitation, runoff, and shallow near-surface flow into the wetland. This surface hydrology shows why the wetland extends upgradient to the east, uphill from Wetland L2. The hydrology of Wetland P2 is subsurface geology. The uppermost layer of soil is duff, topsoil, and weathered soil. Below are layers of relatively uncompacted recessional outwash sand; glacially consolidated till; and glacially consolidated silt. *Ex. A11*, p. 12, 31 (map and data for test pit 115); *see B29*, p. 8 (Terra Associates' November 28, 2023 Supplemental Subsurface Exploration Memo) (data for test hole 104). The outwash sand and till layers were draped over the underlying silt by the most recent glaciation and have been found adjacent to Wetland P2. The current topography thus follows the pre-existing silt surface.

476. Applicant's Storm Drainage Report states that under the proposed conditions, stormwater from 2.6 acres of the gravel Spine Road will be discharged directly to Wetland P2. *Ex. B19* p. 21. There was competing testimony as to whether the grass-lined roadside ditch will perform any water quality treatment. It is not designed as a biofiltration swale.[9] In the Applicant's stormwater report, no water quality treatment credit for the swale is claimed.

477. Gravel roads produce a high pollutant load during storm events, particularly in the form of sediment and phosphorous, whether or not it is used. Dr. Roseen estimated a wide range of volumes of pollutants that could be generated during storm events, ranging anywhere from 3,000 mg/L to 100,000 mg/L of total suspended solids, with 3,000 mg/L produced even in normal-intensity storms. Runoff from the gravel Spine Road, directed to Wetland P2, would adversely impact the wetland.

478. Applicant argued that the road will eventually be paved, and that stormwater from the road prism itself will eventually be directed to a detention pond at the north end of the project.

[9] The 1997 Kitsap County Stormwater Manual section on biofiltration contains many criteria for designing water-quality treatment swales, including criteria for geometry, channel flow, residence time, and seed mixture. *Ex. A1* p. 293 (1997 KC Stormwater Manual).

This potential future phase of development is represented in *Ex. B17*, an undated, unsigned stormwater plan that has not been submitted to the County for review.

479. Applicant's stormwater expert, Mr. Moody testified that pollution from the gravel road is not an issue, because infrequently-used maintenance access roads are not defined as pollution generating surfaces in the County's current stormwater code, citing the current version of KCC 12.08.360 (defining "pollution-generating impervious surface"). But this version of the code was not adopted until 2016, as indicated by the notes following KCC 12.08.360. The applicable 2007 version of the stormwater code and the referenced 1997 stormwater manual (*Ex. A1*) do not distinguish between pollution-generating and non-pollution-generating impervious surfaces. The County's 2007 stormwater code (KCC 12.20.040), to which the Project is vested, required that "[w]ater quality best management practices (BMPs) shall be used to the maximum extent practicable." *Ex. F8* p.162.

480. Mr. Moody explained the specific and identified erosion and sedimentation control requirements specified in the Storm Drainage Report for Arborwood related to stabilizing exposed and unworked soils, requiring equipment and labor on-site to stabilize and prevent erosion, imposing protection requirements on adjacent properties through vegetative buffers, and construing sediment barriers as the first step in grading. *See Ex. B9*, p. 2.

481. Mr. Moody also testified that the 2009 Preliminary Plat required the use of stormwater ditches adjacent to the Spine Road so that stormwater can be filtered through stormwater filtration ponds, and then will refill adjacent wetlands. Mr. Moody described that this stormwater design, including the routing of stormwater around the Spine Road, complies with the Stormwater Regulations under the Vested Code. The proposed erosion control measures for activities proposed under the ECG and SDAP comply with all appliable conditions of the 2009 MDNS and 2009 Preliminary Plat, Vested Code requirements, and best management practices.

482. Dr. Roseen testified regarding "channel forming discharge" that results from increasing the two-year flow rate and leads to changes in the downstream channel morphology. Dr. Roseen explained that by increasing the two-year flow rate into Wetland P2, we can expect to see increased erosion, channelization, and down-cutting. Because soils within Wetland P2 are silty, with some of the highest erodibility according to the NRCS (Natural Resources Conservation Service) Soil Erodibility Index, based on the Revised Universal Soil Loss Equation ("RUSLE"), the projected changes to the two-year storm event are likely to result in even greater erosion, channelization, and down-cutting. The channel-forming discharge operates independently of velocity—rather, it is a function of flow rate

(measured in CFS). He testified that, even though Applicant proposes to place a gabion at the discharge point to Wetland P2, this velocity mitigation does not address the adverse impacts of the increased flow rate (CFS) in the form of increased erosion, channelization, and down-cutting. While the gabion will reduce the velocity of water coming out of the pipe, the velocity of water entering the wetland will still be "orders of magnitude" greater than in the pre-developed state. Focusing all of the water into a single point source discharge will, independently of the channel-forming discharge, result in even greater erosion, channelization, and down-cutting.

483. Given the increase in channel-forming discharge, high erodibility of downstream soils, and concentration of flow into a single twelve-inch pipe, Dr. Roseen opines that these changes will result in immediate adverse impacts to Wetland P2, in the form of erosion and increased channelization. These changes have the potential to dewater the wetland, reducing the shallow water table needed for wetland hydrology and wetland plants.

484. Appellants contend that the Spine Road and proposed stormwater system would result in adverse water quantity impacts through a dramatically increased rate of discharge, under both the gravel "Phase 5" and hypothetical paved "Phase 6" conditions. As Dr. Roseen explained that, under either scenario, the Arborwood proposal would result in a significant increase in the channel-forming discharge. He opined that increased discharge would cause erosion, channelization, and down-cutting of the wetland.

485. Appellants are correct that the 2007 version of the County's critical areas code provides that when stormwater is discharged to a wetland, "[t]he discharge shall neither significantly increase or decrease the rate of flow and/or hydro-period, nor decrease the water quality of the wetland." KCC 19.200.225.F. In addition, "[p]re-treatment of surface water discharge through biofiltration or other best management practices (BMPs) shall be required." *Id*. The Applicant's stormwater plan is not on appeal, however. The question for the Hearing Examiner is whether the *buffer averaging plan* meets the requirements of KCC 19.200.220.C.1.

486. Evidence was not presented to compare impacts to Wetland P2 with a standard 200-foot buffer as opposed to a reduced 100-foot buffer. Appellants raised arguments regarding estimates of discharge volume and velocity during and post-construction and all phases of the project, water quality and water quantity impacts and catchment basin size, all of which may impact Wetland P2 and should be considered by the County when it reviews Applicant's final stormwater management plan for compliance with KCC 19.200.225.F. Appellants did not

present evidence to show that the size of the buffer itself will increase any adverse impacts to Wetland P2.

487. Notwithstanding evidence of impacts to Wetland P2 that may result from construction of the Spine Road (in both a temporary, gravel condition and at ultimate buildout), water quality and water quantity impacts, the catchment basin/piping stormwater system to the wetland (both under the gravel road and paved road conditions) and water quantity impacts detailed in the findings above, Appellants' arguments are based objections to the development of the Spine Road in and of itself. While the Preliminary Plat and minor modification decisions did not "vest" or approve the buffer modifications approved in the CABR, the plat decisions reflect general approval of the location of the Spine Road and have been subjected to extensive environmental review.

488. There was consensus between the parties' witnesses that the intent of a wetland buffer is to mitigate the effects of stormwater runoff by filtering sediments and other pollutants and reducing erosion. Testimony and evidence presented by Appellants was focused on discharge from the road into Wetland P2 and an alleged modification of/increase in water flow and velocity into Wetland P2. The width of the buffer has no relationship to these allegations.

489. No evidence was presented to establish that a reduced buffer of 100 feet from Wetland P2 would not provide as great or greater functions and values as would be provided under a standard 200-foot buffer. Water quality and water quantity impacts to the wetland, and impacts to the swale in general, are expected as a result of development and are addressed at each separate review stage. The pertinent question in this appeal is the impact of a 100-foot, as opposed to a 200-foot buffer on the functions of Wetland P2.

490. Mr. Moody and Gary Sharnbroich, Applicant's engineers and testifying experts established that the proposed stormwater management facilities are consistent with the original stormwater design recommended for approval by the County engineer during the hearing for the 2009 Preliminary Plat. The proposed facilities are consistent with the Stormwater Regulations under the Vested Code and are awaiting approval from the County.

491. Mr. Sharnbroich and Eric Clarke testified that through the use of best management practices described in the Stormwater Regulations, the Applicant's proposed construction of the stormwater facilities will be consistent with industry standards and conform to all best management practices.

492. Dr. Roseen conceded on the final day of hearing that all of his concerns regarding water quantity and water quality impacts could be mitigated through conditions specifying that the stormwater infrastructure be designed to avoid the potential adverse impacts identified in his testimony.

Slope Revegetation and Maintenance

493. Applicant is required to revegetate the areas cleared during the construction process. *See Ex. 27*, pp. 16-20. Appellants argue that there is no plan to restore other known benefits of buffers that protect wetland and stream functions. Mr. Lubischer testified that revegetating this area means that lost wildlife values may be restored to the portion of the buffer covered with fill, but there will be loss of hydrologic and hydrogeologic benefits and several adverse impacts: increased and faster surface runoff due to the steeper slope of the fill material, loss of biofiltration, and loss of absorption and infiltration due to the replacement of natural soils with densely packed fill material that may be permanently lost.

494. Appellants argue that clearing a portion of the buffer for placement of fill is not "retaining" the area in native vegetation, even if the area is eventually replanted. Appellants argue that, although the areas of fill may ultimately be revegetated, there is no evidence that the buffer's hydrologic beneficial attributes will ever be restored, let alone "enhanced," when considering the increased slopes and lack of infiltration of stormwater caused by dense fill material.

495. Appellants relied on the testimony of Mr. Lubischer, based on his personal experience as a volunteer park steward. Mr. Lubischer conceded that it can be difficult to meet a 100% removal minimum requirement, it may be impossible to meet that standard, and the persistent removal of 100% of invasive species is a "goal" that is often not met.

496. Applicant's consultant, ELS, prepared the Wetland Buffer Mitigation Report accompanying the CABR Decision (*Ex. F23*), which is an invasive management plan that Mr. Heacock and Raedeke's wetland biologists testified is consistent with the critical areas ordinance, industry standards and best practices. Ms. Bartlett described that the goal of wetland buffer vegetative management is to remove all invasive species, but in the absence of achieving repeated 100% removal of invasive species, there will be no adverse impacts to a wetland or its buffer if invasive species are kept below 10%. Appellants did not present testimony to rebut this determination. Ms. Bartlett and Mr. Heacock confirmed that Applicant must comply with the mitigation plan, monitor the spread of invasives, and remove invasive species in accordance with industry standards. Ex. F27, pp. 16-20.

497. Ms. Bartlett and Mr. Kosters testified that a maximum coverage of 10% invasive species, specified in the Wetland Buffer Mitigation Report, is consistent with industry standards and best practices. The Vested Code does not require "[r]epeated removal of 100% of invasives," prohibit mowing, nor require an applicant to control invasive species on undefined and undisturbed "adjacent areas."

498. As with its other arguments and evidence presented, Appellants did not show that the potential impacts from clearing and placement of fill adjacent to a reduced buffer would result in a situation in which the *reduced buffer* would be unable to provide as great or greater values and functions as would be provided under the *standard buffer* requirement.

Elimination of Wetlands Q1, Q2 and 302

499. Wetlands Q1, Q2, and 302 were originally mapped by Raedeke in its 2007 Wetland Delineation and Assessment report, describing them as small Category III and IV wetlands. *Ex. F5* pp. 48–49; *see also id*. p. 43 (map of wetlands). Raedeke identified them again in its August 13, 2018 report. *Ex. F9* p. 13. In 2022, Ecological Land Services performed an on-site investigation and determined these wetlands no longer exist, due principally to the lack of hydric soils. *Ex. F18* pp. 6–7. As a result, the CABR did not include analysis of these former wetlands.

500. Ms. Bartlett and Mr. Heacock testified that a representative from the Department of Ecology suggested during a site visit that Ms. Bartlett (ELS) reevaluate whether some mapped wetland areas remain regulated wetlands. Ms. Bartlett acted on this suggestion and determined that wetlands 302, Q1, and Q2 no longer meet the definition of regulated wetlands based on the lack of hydric soils, and in some test pits, lack of hydrology.

501. Ms. Bartlett conducted a site visit in April 2022 to evaluate Wetlands 302, Q1, and Q2, collected data to evaluate whether each met the three wetland criteria, and explain why she concluded that each no longer demonstrate the presence or indicators of wetland hydrology. *See Ex. F18*. Mr. Kosters testified that he has reviewed both the data collected and reports prepared by Ms. Bartlett. *See Ex. B3*, pp. 1-2. He explained that two different reports can reach differing conclusions as to the presence of wetland hydrology, yet both can be correct. *Id*. Mr. Kosters corroborated Ms. Bartlett's conclusions that Wetlands 302, Q1, and Q2 are no longer wetlands. *Id*.

502. Ms. Bartlett described the circumstances, methodology, and analysis which led to the conclusion that wetlands 302, Q1, and Q2 no longer meet all three wetland criteria, and Mr. Heacock, the County's senior environmental planner, accepted Ms. Bartlett's differing conclusions in this area from those of Raedeke.

503. Speculative testimony and evidence was presented as to what occurred during the time between the 2018 and 2022 assessments such that these wetlands no longer exist (potentially logging in 2017 that increased surface runoff to the areas in question). *E.g. Ex. B3* at p. 2. The Hearing Examiner does not find this evidence persuasive, nor helpful because it is speculative. *See Ex. A18* (aerial image of 2017 logging) p. 2.

504. Regardless of speculation as to the "how," the evidence that supports *why* Wetlands Q1, Q2, and 302 no longer exist is set forth in *Ex. F29*, pp. 30–57 (ELS Wetland Determination Data Forms), completed by Joanne Bartlett. A map of the sampling points is found in *Ex. F29*, p. 23. Appellants' wetlands expert, Dr. Sarah Cooke, disagreed with the determinations made by Ms. Bartlett in late March/early April 2022 when she re-evaluated these wetlands. All wetlands experts agreed with the fact that a wetland cannot be assessed by review of photographic evidence alone; a scientist must go into the field to collect data directly to make an accurate determination. Dr. Cooke did not.

505. Notwithstanding Dr. Cooke's expertise as a professional wetlands scientist with a Ph.D. in soil science, Dr. Cooke's testimony regarding numerous photographs she was asked to review and on which she provided comment concerning "wetland characteristics" is not sufficient to rebut Ms. Bartlett's report which is based on direct examination in the field. This is not to say that Ms. Bartlett's data forms are above reproach. Dr. Cooke identified several inconsistencies in Ms. Bartlett's data forms that she suggested warrant another site visit and additional test pit analysis, and testified that she (Dr. Cooke) would have reached a different conclusion than Ms. Bartlett based on the data set forth in the forms.

506. The presence of wetlands is determined by the presence or indicators of (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology. *See Ex. F5*, p. 9 (citing Army Corps of Engineers Wetland Delineation Manual, 1987 and Washington State Wetlands Identification and Delineation Manual, 1997). All three characteristics must exist for a wetland to be present.

507. Dr. Cooke presented testimony regarding the presence of wetland vegetation in photographs in the record and pointed out what appeared to be evidence of hydrology in

certain locations. However, all three wetlands experts agreed that one cannot definitively determine the presence or absence of hydric soils from photographs alone.

508. Dr. Cooke also questioned Ms. Bartlett's determination that soils in TP-4 near Wetland Q1 were not hydric soils, based on the notation "10YR" in the data form, which indicates the color and the notations of "2" before the slash, which indicates the "matrix" or color saturation and "1" after the slash, which indicates the "chroma" or color intensity. Under standard wetland field indicators, Dr. Cooke explained that when soil located in the top 12 inches has a matrix of 3 or less and a chroma of 1, then the soil is automatically considered a wetland soil because soils that dark only form under wetland conditions.

509. Dr. Cooke specifically addressed several alleged inconsistencies in Ms. Bartlett's report. For example, in TP-4, Ms. Bartlett found that the matrix was 2 and the chroma was 1, but did not report this as a hydric soil. Appellants argue that, because this location was also reported as having wetland vegetation and hydrology (*see Ex. F18* p. 36), this location qualifies as a regulated wetland. Dr. Cooke testified that, in her opinion, Ms. Bartlett made the same mistake in her data form for TP 14, located at the west end of Wetland Q2. *See Ex. F18* p. 23. Dr. Cooke also explained that soils with a matrix of 3 or less and a chroma of 2 qualify as hydric, provided redoximorphic ("redox") features are also found with a value of 5% or more. The term "redoximorphic features" refers to red or rust-colored mottling in the soil, the result of persistent, long-term soil saturation. Dr. Cooke questioned whether the human eye can detect the presence of less than 5% (specifically 1%) of redox features as indicated on the data forms completed by Ms. Bartlett in several instances. Ms. Bartlett and Mr. Kosters disagreed on this point.

510. Without evidence or testimony based on Appellants' own soils analysis conducted on site and/or reviewed at a laboratory, Dr. Cooke cannot definitively say that any of the soils examined by Ms. Bartlett were in fact hydric soils. Moreover, while Dr. Cooke identified some potentially questionable aspects of Ms. Bartlett's data and conclusions, that does not, in and of itself, support a determination that the soils tested were, in fact, hydric soils. Analysis of data sheets in a vacuum without a corresponding onsite evaluation does not constitute substantial evidence of hydric soils, or more importantly, the existence of a wetland.

511. There is not substantial evidence to support a finding that the timing of Ms. Bartlett's field investigation in late March-early April was in error, such that the conclusions reached are unreliable. There was competing testimony regarding the "ideal" time to analyze conditions for wetland characteristics, but consensus among the fact that late March/early

April is within the growing season. Whether or not the area was in a 4-year drought period is not a sufficient basis on which to disregard the conclusions in Ms. Bartlett's report, as the region-wide conditions would similarly affect all wetland and stream analyses.

512. Dr. Cooke's testimony regarding one of the indicators for wetland hydrology, the presence of "Oxidized Rhizospheres along Living Roots," which are essentially rust that forms on living roots only under hydric soil conditions, produced by the chemical reaction of living micro-organisms, while instructive, does not provide a basis to disregard Ms. Bartlett's data or report. Because Dr. Cooke did not perform a site-specific analysis, she can only hypothesize that oxidized rhizospheres would have been present at a different time of year at the test pits analyzed by Ms. Bartlett, or at any other location on the property.

513. Both Raedeke and Ecological Land Services, are "well regarded companies." All four wetland experts who testified at hearing agreed that wetland ratings, and even classifications, can change over time. That there are different expert conclusions, even differing reports between 2018 and 2022, is not sufficient evidence on which to reverse or remand the CABR on this basis. Wetland scientists from Raedeke, one of which serves as a third-party reviewer for the County, previously conducted on-site wetland delineations of this area, reviewed ELS's recent wetland reports, and concurred that Ms. Bartlett's conclusions are sound.

514. Appellants relied on expert testimony from Dr. Cooke who has never visited the Arborwood site, and who demonstrated a difference of opinion on relevant factors for assessing one of the three wetland indicators. While Dr. Cooke suggested that third-party evaluation should have been required, there is no provision in the Vested Code that requires third party review. Appellants did not establish substantial evidence to support a conclusion that that the CABR Decision erred in eliminating Wetlands Q1, Q2, and 302 from the analysis nor in allowing their exclusion from the Applicant's wetland mitigation plan.

Wetland Z3

515. The fill of Wetland Z3 was approved in the 2009 Preliminary Plat and analyzed in the 2009 MDNS. This specific impact is shown in the figures throughout Mr. Wright's 2007 Wetland Report. *See Ex. F7; Ex. F5*, p. 24, p. 43 (Figure 5, Table 5) ("Several small, hydrologically isolated, non-mosaic wetlands [will] also be filled in order to . . . provide area for the development of home sites). The analysis supporting the Wetland Z3 fill complies with the critical areas ordinance vested at the time and an appropriate mitigation plan will compensate for its fill.

516. Appellants' assertion that Wetland Z3 should be rated as having a moderate habitat function is unsupported by substantial evidence. Mr. Wright established why Wetland Z3 was originally delineated as a Category III wetland with a moderate habitat score and noted that that habitat scores can change over the course of 15 years. *Ex. F5* p. 48. Wetland Z3 has a low habitat score, the proposed mitigation plan will compensate for the unavoidable impacts to Wetland Z3, and mitigation will increase the ecological functions of surrounding area. See *Ex. F19*.

SEPA

517. Applicant states that the original proposal and extensive environmental analysis for Arborwood dates back to 1993, including completion of multiple environmental impact statements ("EIS") and that Appellants are collaterally attacking three key decisions issued by the County which govern the Arborwood development activities: a 2009 Mitigated Determination of Nonsignificance and Notice of Adoption of Existing Environmental Documents ("2009 MDNS"), *see Ex. F6*; the 2009 Arborwood Preliminary Plat and Performance Based Development ("2009 Preliminary Plat"), *see Ex. F7*; and the 2010 Development Agreement between OPG Properties, LLC and the County ("2010 Development Agreement"), *see Ex. F8*. *Ex. F47*, pp. 1-2.

518. The 2009 MDNS reviewed the Arborwood preliminary plat, a 361-acre site consisting of 751 residences and dedication of a 104-acre greenway area that is now being developed, in part, by Respondent. *See Ex. F6*. The 2009 MDNS expressly adopted multiple EISs for Arborwood and constituted "a continuation of the phased SEPA review from a non-project action to a project action." *Id*., p. 1. The 2009 MDNS included updated geotechnical, habitat, stormwater and wetland studies for the plat, and noted that "[w]etland buffer averaging is proposed for some portions of the site development" and "all such activity will be subject to the specific provisions of KCC 19.200 (Wetlands) upon Site Development Activity Permit review." *Id*., p. 3. One of the mitigation measures requires wetland buffer proposals to be reviewed "pursuant to the applicable requirements at KCC 19.200.220.C(1)(a)." *Id*., p. 4. The 2009 MDNS was not appealed. *See Ex. F7*, pp. 7, 32.

519. The 2010 Development Agreement expressly incorporated the environmental reviews for Arborwood and stated the 2009 MDNS "project-level SEPA compliance is intended to satisfy all SEPA requirements for the subsequent build-out of the Project through Implementing Approvals." *See Ex. F8*, pp. 4-5. The 2010 Development Agreement vests Arborwood to land use regulations specified in Exhibit E in effect as of March 26, 2008, including but not limited to the entire CAO, Stormwater Regulations, and County land use

procedures. *Id*., p. 24. The Development Agreement stated, "all Implementing Approvals shall be governed by these vested Development Standards." *Id*., p. 6.

520. Applicant argues that the 2010 Development Agreement documents the County's determination that the 2009 MDNS "is intended to satisfy all SEPA requirements for the subsequent buildout of the Project" because "[t]he SEPA documentation analyzed a 'Project Envelope' representing the maximum allowable Project densities and uses . . . and mitigation measures approved in this Agreement." *See Ex. F8*, p. 5. It asserts that, because the Applicant's requested CABR Approval, as well as the ECG and SDAP, are within the Project Envelope and the impacts of wetland buffers and stormwater facilities were fully contemplated in the 2009 MDNS, the Applicant argues that the Development Agreement establishes that the County does not require another threshold determination for SEPA compliance. *Id*., p. 17. *Ex. F47* at p.7.

521. Applicant argues that the Arborwood proposal and environmental impacts at issue in this appeal were fully identified in the 2009 MDNS and the County identified appropriate measures to mitigate those impacts. The 2009 MDNS describes the proposal as a "[p]reliminary plat consisting of 751 residences," and describes the wetland, stormwater, clearing and grading, and geotechnical impacts that Appellants challenge in this appeal. *See Ex. F6*, p. 1. In issuing the MDNS Addendum in April 2023, the County reaffirmed that Applicant's minor modification to the 2009 Preliminary Plat do not substantially change the analysis in the 2009 MDNS. *See Ex. F26. Ex. F47,* pp. 6-7.

522. Applicant argues that the County was not required to adopt the prior 2009 MDNS for the CABR Approval. The 2010 Development Agreement expressly references WAC 197-11-600(4)(a), which states "[a]gencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document." Because "[a] harmless procedural error may not serve as a basis for the reversal of a land use decision," see RCW 36.70C.130(1)(a), "the failure to formally incorporate a prior environmental document is harmless error." *See Ellensburg Cement Products, Inc. v. Kittitas County*, 171 Wn. App. 691, 709-10, 287 P.3d 718 (2012). *Ex. F47*, p. 7.

523. The County determined the CABR is categorically exempt from SEPA under KCC 18.04 and WAC 197-11-600(6), stating "The reductions of buffers are categorized as a variance and are considered a minor land use action. Minor land use actions are SEPA Exempt under KCC 18.04, and the State Environmental Policy Act, per 197-11-800(6)(e)." Ex. F27, p.2. Minor land use actions are SEPA Exempt under KCC 18.04 and the State Environmental Policy Act, per WAC 197-11-800(6)(e). *Ex. F27* p. 4.

524. Applicant argues that Appellants' appeal is an untimely challenge to the County's prior SEPA determination for the development which contemplated wetland buffer modifications approved in the CABR Decision.

CONCLUSIONS

Jurisdiction, Standard and Scope of Review

1. The Hearing Examiner has jurisdiction to hear and decide appeals of administrative land use decisions. KCC 21.04.290.C. The CABR Decision on appeal is a Type I decision under KCC 21.04.050.A.1; the Director had review authority for the CABR under KCC 21.04.100. An administrative appeal to the Kitsap County Hearing Examiner is a quasi-judicial proceeding. KCC 21.04.290.C.

2. KCC 21.04.290.C provides "The hearing examiner shall hear appeals on Type I and II decisions in a *de novo* open-record hearing in accordance with the hearing examiner rules of procedure." The appeal was conducted as an "open record appeal hearing," as defined in KCC 21.02.235; *see also* RCW 36.70B.020(3). No open record pre-decision hearing was held on the project permit. As defined in RoP section 2.1.18, the open record appeal hearing "creates the County's official record through testimony and submission of evidence and information under the procedures prescribed in Title 21 KCC." *See also* RCW 36.70B.020 (similarly defining "open record hearing" and specifying that "[a]n open record hearing may be held on an appeal").

3. In an open-record hearing, new evidence may be submitted on appeal, and is not limited to evidence before the County at the time the challenged decision was made. *See, e.g.,* RCW 36.70B.020(3) ("'Open record hearing' means a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the local government by ordinance or resolution.").

4. The Hearing Examiner conducted the hearing "*de novo*," which is a Latin term that means "anew," or "from the beginning"; under this scope of review, the Hearing Examiner decides the issues without reference to any legal conclusion or finding made by County staff in the administrative CABR Decision. *E.g., Sheppard v. Rhay*, 73 Wn.2d 734, 736 (1968) (explaining that a "hearing *de novo*" is one that is conducted "as if originally commenced in the court hearing the case").

5. The function of *de novo*, open-record hearings is to allow parties to develop and submit additional evidence to a Hearing Examiner, such as revised site plans, additional geotechnical reports, and wetland analysis, that were presented as exhibits and described through testimony in this appeal. *See Messer v. Snohomish Cnty. Bd. of Adjustment*, 19 Wn. App. 780, 789, 578 P.2d 50 (1978) (where code provides for a *de novo* hearing, the reviewing tribunal takes testimony, admits evidence, and considers objections to the granting of a permit).

6. 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. 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.

7. To prevail on this appeal, Appellants must prove that there is not "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). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 66-67, 52 P.3d 522 (2002).

8. Appellants must prove that the CABR Approval was procedurally and substantively issued in error, and the relief sought in the appeal should be granted. *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 740, 291 P.2d 930 (2013). Appellants must prove that there is not "substantial evidence" throughout the entire record to support the CABR Decision. *Phoenix Dev*., Inc., 171 Wn.2d at 830 (substantial evidence is "a sufficient quantum of evidence . . . to persuade a reasonable person that the declared premise is true."); *See* RoP 2.12.1(d).

9. Contrary testimony in and of itself is not sufficient to warrant reversal. *Miller v. City of Sammamish*, 9 Wn. App.2d 861, 881, 447 P.3d 593 (2019) (substantial evidence supported examiner's conclusion as to the presence of regulated wetlands despite competing expert testimony); *See also City of Fed. Way v. Town & Country Real Est., LLC*, 161 Wn. App. 17, 42-43, 252 P.3d 382 (2011) (hearing examiner conclusion of "absence of data" supported by substantial evidence). Nor is a "technical error" sufficient to reverse or remand a decision. *Jones v. Town of Hunts Point*, 166 Wn. App. 452, 462-63, 272 P.3d 853 (2011).

10. Appellants "must establish that the [County]'s decision is an erroneous interpretation of law[.]" *Phoenix Dev., Inc*., 172 Wn.2d at 837-838. The Examiner must give "considerable deference" to the County's interpretations of its regulations. *Families of Manito v. City of Spokane*, 172 Wn. App. 727, 740-41, 291 P.3d 930 (2013). Regulations must be looked at "as a whole to derive its intent." *Young v. Pierce Cnty*., 120 Wn. App. 175, 182-83, 84 P.3d 927 (2004) (affirming hearing examiner's interpretation of critical areas ordinance "[b]ased on the intent of [the critical areas ordinance] and the substantial weight we give to an agency's interpretation of regulations within its expertise.")

11. Under statutory interpretation principles, a statute or rule is given its plain meaning and each sentence cannot be read separately as if it is one clause. *See, e.g., State ex rel. Banks v. Drummond*, 187 Wn.2d 157 (2016). Provisions must be read together. *Barnes v. Thomas*, 25 Wn. App. 515 (1980).

12. The Hearing Examiner's Decision must be "based upon a consideration of the whole record and supported by substantial evidence in the record." RoP 2.12.1(d).

13. The Hearing Examiner lacks authority to adjudicate constitutional issues. *E.g. Exedine v. City of Sammamish*, 127 Wn. App. 574, 586-87 (2005). Therefore, arguments made in pleadings submitted to the Examiner and/or during the hearing concerning allegations of denial of due process rights are not addressed.

Vested Rights

14. The Arborwood development is vested to the regulatory requirements in existence on March 26, 2008, per the 2009 Preliminary Plat Decision (*Ex. F7*) and 2010 Development Agreement (*Ex. F8*) at page 88 (Attachment E). *See also Ex. A2*, p. 38 and *Ex. F4*. The applicable wetland buffer averaging, reductions and disturbances for Phases 4, 5 and 6 of the Arborwood development are set forth in KCC 19.200.220.C.1.a of the 2007 Kitsap County Code.

15. The Development Agreement vested all future entitlements and approvals to the appropriate Codes in effect at the time the Development Agreement was entered into. *See* KCC 21.04.270(A)(4). Section 6.2.1 of the Development Agreement acknowledges that "the Project herein is vested to the Project Elements and Development Standards in Sections 1 through 3, in effect on March 26, 2008, the date the complete Preliminary Plat application was submitted," and "all Implementing Approvals shall be governed by these vested Development Standards." These standards are attached as Exhibit E to the Development Agreement. *Ex. F8*.

16. The CABR Decision is an Implementing Approval under the Development Agreement.

17. In Washington state, the term "vested" refers to the right of a developer to have a land use application reviewed under the regulations in effect at the time a complete application is submitted; a municipality cannot require adherence to later-adopted regulations. *E.g. Friends of the Law v. King County*, 123 Wn.2d 518, 522 (1994). The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 278, 943 P.2d 1378 (1997). The protections given to developers under the vested rights doctrine extend to development agreements, subject to the development agreement's terms. *See Westridge-Issaquah II LP v. City of Issaquah*, 20 Wn. App.2d 344, 357 (2021).

18. A development agreement is not subject to either amendments or the adoption of new zoning ordinances, development standards, or regulations adopted after the effective date of the agreement. *See* RCW 36.70B.180. The Arborwood Project is vested to the critical areas ordinance and other regulations in effect when the original preliminary plat application was submitted.

19. Neither the original 2009 Preliminary Plat Decision (*Ex. F7*) nor the 2010 Development Agreement (*Ex. F8*) "vest" the Arborwood Development in such a manner as to allow bypass of future review or summary approval under applicable buffer averaging regulations, or to allow any specific buffer reduction or averaging.

20. Appeal Issue 6 is granted, however this aspect of the Decision does not require reversal or remand of the CABR decision given the parties' stipulated condition to require a minimum 100-foot buffer associated with Wetland P2.

SEPA

21. Appellants did not timely appeal either of the following two SEPA decisions for the Arborwood Project: (a) the 2009 MDNS project-level SEPA review; or (b) the most recent SEPA Addendum, issued three months prior to the CABR.

22. The County was not required to reference the 2009 MDNS or the SEPA Addendum in the CABR decision. Under SEPA regulations, "agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document." WAC 197-11-660; KCC 18.04.180.

23. SEPA regulations allow agencies to "establish procedures for [a SEPA] appeal, or [to] eliminate such appeals altogether, by rule, ordinance or resolution[,]" WAC 197-11-680(2), as the County has done for categorical exemptions. *See* KCC 21.04.290(E)(1); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 375-76, 223 P.3d 1172 (2009) (affirming determination that a permit was exempt from SEPA and not subject to administrative review).

24. The Code does not authorize administrative appeal of the department's determination that a project is categorically exempt from SEPA, as DCD did here with respect to the CABR. KCC 18.04.110.A. ("The department's determination that a proposal is exempt shall be final and not subject to administrative review.")

25. The Examiner does not have jurisdiction to consider any SEPA challenge in this appeal because the County's determination that the CABR is categorically exempt from SEPA is not subject to administrative appeal.

26. Appeal Issue 5 is denied.

Amendment of Appeal Issues

27. Appellants timely filed their administrative appeal in accordance with RoP 2.2.1.

28. The Hearing Examiner granted Appellants' motion to amend appeal issues to include challenge to temporary impacts in the regulated wetland buffers following new testimony of Mr. Heacock on Day 5 of the hearing, which corrected previous testimony he provided on Day 1 of the hearing.

29. The Hearing Examiner determined that granting the motion to amend was necessitated and lawful given the fact that new bases for the CABR Decision had just been disclosed and had not been available to Appellants prior to that time. Appellants could not have included a "temporary impact" issue with their appeal.

30. Appellants' appeal constitutes a challenge to the County's buffer reduction and buffer averaging plans; therefore, allowing assertion of a new sub-issue regarding "temporary" impacts is within the scope of originally asserted Appeal Issues.

31. Appellants' amendment of their appeal statement is not time-barred by the Rules of Procedure.

Applicable Standards

32. The Director has review authority to review Applicant's CABR application under KCC 21.04.100.

33. Section 19.200.220.C.1.a of the 2007 KCC ("Former" KCC or " Vested Code"), applies to the County's review of the CABR and the Hearing Examiner's review of this appeal. The Arborwood project is vested to the 2007 version of the County's critical areas ordinance per the 2009 Preliminary Plat Decision and 2010 Development Agreement. *Ex. F8,* p.88 (part of Attachment E). *See also Ex. A2*, p. 38 and *Ex. F4*.

34. Former KCC 19.200.220.C.1.a provides that when averaging the width of a wetland buffer (i.e., reducing the width of some parts, while increasing others), "[t]he buffer shall not be reduced by more than 50 percent of the standard buffer width at any point" This establishes a limit on the amount or degree to which a wetland buffer may be reduced at any one point, even if the width is increased at other points.

35. The buffer for Wetland P2, a Category II wetland, with a high habitat score, to which an adjacent a high intensity land use is proposed, is 200 feet. *See* Former KCC 19.200.220.A & B (Tables 19.200.220(A) & 19.200.220(E)).

36. Approval of a reduced buffer for Wetland P2 from 200 feet to 85 feet cannot be administratively approved under former KCC 19.200.220.C.1.b. *See* Order on Prehearing Motions *Ex. F51* at p. 5. If the Applicant requires a larger buffer reduction at that location, it must apply for a Type III variance under former KCC 19.200.220.C.1.c.

37. Former KCC 19.200.220.C.1.a provides that the County may only approve buffer averaging "where it can be demonstrated that such averaging can clearly provide as great or greater functions and values as would be provided under the standard buffer requirements."

38. The width of the regulated buffer for an individual wetland is determined by: (a) the wetland category, and (b) the land use intensity based on development types. Limitations on development activities under the former critical areas ordinance apply to the full regulated buffer width. DCD looks at the regulated buffer width, not just the base buffer width, to determine whether the proposal meets criteria set forth in subparts (1) through (6) of former KCC 19.200.220.C.1.a.

39. With respect to the minimum buffer width that may be used for buffer averaging, former KCC 19.200.220.C.1.a(5) states that "The minimum buffer width shall not be less than 50 percent of the widths established after the categorization is done and any buffer adjustments applied." The County has interpreted KCC 19.200.220.C.1.a as allowing buffer averaging to modify the regulated buffer, not just the "standard buffer," and for minimum widths to not exceed 50% of the regulated buffer. Buffer averaging applies to the entire buffer, not just to the "standard" buffer, as per former KCC 19.200.220.C.1.a. The County's interpretation of its own ordinances, including how the County interprets buffer width requirements, is entitled to deference. *Phoenix Dev., Inc.*, 171 Wn.2d at 830.

40. Former KCC 19.200.210(B)(3) ("Activities affecting isolated, non-mosaic Category III wetlands that are less than 2,500 square feet may be allowed provided that the wetlands report identifies the specific wetland function affected or at risk, and the proposed mitigation to replace the wetland function, on a per function basis."); - .210(B)(4) ("Activities affecting isolated, non-mosaic Category IV wetlands that are less than 7,500 square feet may be allowed provided that the wetlands report identifies the specific wetland function affected or at risk, and the proposed mitigation to replace the wetland function, on a per function basis"); *See Ex. F5*, pp. 46-47 (listing Wetland 302 as a 782 square foot, Category III wetland, Wetland Q1 as a 584 square foot, Category IV wetland, and Wetland Q2 as a 93 square foot, Category III wetland).

41. Former KCC 19.200.210.D, titled "Criteria for Determining Wetlands Divided by a Manmade Feature." contains criteria unique to the Kitsap County Code (not included in the 2004 Ecology Wetland Rating Manual) for when applicants are required to rate wetlands together as a single unit. That section provides:

> 1. When a wetland is divided by a manmade feature (e.g., a road embankment), the wetland shall be rated as if it is not divided, if there is a perennial or intermittent surface water connection between the two wetlands and either of the following criteria is met:
>
> > a. It can be demonstrated that the separate wetlands were one discrete wetland prior to construction of the manmade feature. This may be accomplished through an analysis of secondary information such as aerial photographs and soils maps; or
> >
> > b. The two separated wetlands can be shown to function as one wetland. This shall be determined based on normal conditions (i.e., in the absence of

unauthorized activity, the wetlands possess similar vegetative or wildlife assemblages or hydrologic regime).

(*Ex. F4* at 32. *See also Ex. F8* at 84,

42. Former KCC 19.200.220.F, titled "Building or Impervious Surface Setback Lines, provides: "[a] building or impervious surface setback line is required from the edge of any wetland buffer." Condition 8 to the County's 2009 Preliminary Plat approval provides: "A minimum 15-foot construction setback shall be maintained from all critical area buffers." (*Ex. F7* p. 34) Under these provisions, all construction and all impervious surfaces must be set back 15 feet from the Wetland P2 buffer.

43. Former KCC 19.300.315 provides that "[b]uffers shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes."

Authority to Modify or Add Conditions of Approval

44. The Hearing Examiner has authority to modify a decision on appeal by adding conditions pursuant to the Rules of Procedure. RoP 2.12.1(d); *See In re King Cnty. Hr'g Exam'r*, 135 Wn. App. 312, 319-22, 144 P.3d 345 (2006) (relying on delegation of authority in King County Code); *Woodinville Water Dist. v. King Cnty*., 105 Wn. App. 897, 906, 21 P.3d 309 (2001)(same); *Ishmael*, 68 Wn. App. at 469-72 (same); *Phillips 66 Co. v. Whatcom Cnty. Washington*, 2022 WL 593731 at *6-*7 (relying on delegation of authority in Whatcom County Code). After an administrative appeal hearing, the Rules of Procedure require the Hearing Examiner to issue a "decision as to the outcome of the appeal (affirm, deny, modify, or reverse)." *See* RoP 2.12.1(d).

45. The Kitsap County Code does not address the Examiner's authority to modify a decision subject to administrative appeal. KCC 21.04.290 (titled "Appeals") says only that following the notice of hearing, "[a] staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed to parties to the appeal." KCC 21.04.290.C.

46. Washington courts have affirmed both procedural and substantive conditions added by a hearing examiner after an administrative appeal. *See Young*, 120 Wn. App. at 185-86 (after administrative appeal, hearing examiner did not err in requiring property owner to consolidate a wetland determination and wetland review process). In *Families of Manito*, 172 Wn. App. at 737, the city code stated that "the hearing examiner may affirm, modify, remand or reverse the decision being appealed[.]" *Id*. at 737. Pursuant to this authority, the examiner modified

the permit on appeal by adopting a revised site plan that was presented by the applicant on the second day of hearing. *Id*. at 734-35. The Court of Appeals found that "the hearing examiner acted in accordance with its [authority under the code]," including its reliance on the city's testimony that the revised plan would comply with the code, and concluded that the revised plan "provided the hearing examiner with a solution to address [the opposition's] concern that the city planner's decision did not adequately mitigate the adverse impact" of the project. *Id*. at 736-39.

47. Respondent's Response to Appellants' Motion for Summary Judgment, *Ex. F34* at p. 6, ("[Taylor Morrison] proposed the Hearing Examiner modify the CABR to include a condition that buffer averaging for the Arborwood Development shall not result in buffer widths of less than 100 feet for Wetland P2."). In the County's Response to Appellant's Summary Judgment Motion, *Ex. F52*, p. 2, "[T]he County stipulates to modifying the decision approving the critical area buffer reduction to include a condition that buffer averaging for the Arborwood Development shall not result in buffer widths of less than 100-feet for Wetland P2." Appellants agreed to this condition in Appellants' Motion to Strike, *Ex. F36*, p.4 ("[W]e agree with the County that the Examiner should impose a condition that 'buffer averaging for the Arborwood Development shall not result in buffer widths of less than 100 feet for Wetland P2.'").

48. The Hearing Examiner has been delegated authority to modify a permit decision as part of its decision in an administrative appeal and retains the authority to impose the stipulated condition of approval (the "Proposed Condition"). *See* RoP 2.12.1(d); *Young*, 120 Wn. App. at 185-86; *Families of Manito*, 172 Wn. App. at 740. This modification is "based upon consideration of the whole record" and is "supported by substantial evidence in the record." *See also* RoP Section 2.2.

49. The Proposed Condition meets the requirements of the Code and there is substantial evidence in the record that it is feasible from an engineering perspective.

50. Based on the authority set forth above to modify an appealed permit, the Hearing Examiner accepts the Proposed Condition. Because the CABR is remanded on other bases, the Examiner's Order directs staff to modify the CABR to include the Proposed Condition as a new condition of approval.

51. The Examiner does not have authority to make an initial determination as to whether the Applicant's revised alignment of the Spine Road will comply with applicable provisions of the Kitsap County Code. The CABR is remanded on this issue for County staff to make that

determination as an original matter.

Conclusions on Remaining Individual Assignments of Error

Issues 2, 6 and 9

52. The CABR Decision does not comply with the requirement at KCC 19.200.220.C.1.a that buffer averaging may not result in more than 50% reduction at any point with respect to the Wetland P2 buffer. *See Ex. F18*, p. 21; *Ex. F28*, p. 7.

53. Appellants did not meet their burden to show that the buffer reduction for wetland P2, as conditioned by stipulated agreement, does not comply with the vested Code.

54. Appellants' claims in Issue 2, as well as Issues 6 and 9, that the wetland P2 buffer cannot be reduced to less than 100-feet will be remedied by the Proposed Condition, discussed above. The Proposed Condition conforms to the Code and findings of the CABR that Wetland P2 is a Category II wetland requiring a 200-foot buffer which can be reduced to 100 feet. See KCC 19.200.220.C.1.b.5.

55. The Hearing Examiner determines the Proposed Condition of approval renders portions of Issue 2 and Issue 6, and the entirety of Issue 9, moot. The Examiner notes that this Decision includes other findings and conclusions on Issues 2 and 6.

56. The Examiner determines that under Washington case law, including *State ex rel. Morrison v. City of Seattle*, 6 Wn. App. 181, 193 n.7, 492 P.2d 1078 (1971), the error in the CABR in approving a 58% buffer reduction associated with Wetland P2 is cured by the parties' agreement to the Proposed Condition.

57. Issue 2 is granted in part, denied in part on the merits, denied in part as moot, and the CABR is remanded for modification to include the Proposed Condition as a new condition of approval.

58. Issue 6 regarding vested rights is granted for the reasons set forth in the Conclusions above and is mooted in part. However, this conclusion does not require reversal or remand of the CABR.

59. Issue 9 is denied as moot.

Issue 3

60. Appellants failed to demonstrate procedural error in the CABR decision or staff report.

61. The CABR Decision was issued in compliance with Kitsap County Code 21.04 Land Use and Development Procedures. The Director has review authority for the CABR application under KCC 21.04.100 and may approve, approve with conditions, or deny the application. The Decision included four (4) planning and zoning conditions of approval, one (1) development engineering condition of approval, and fourteen (14) environmental conditions of approval. *Ex. F27*, pp. 21-24.

62. The Code requires that a notice of decision include information to define the decision on the project permit application, any SEPA threshold determination, the procedure for an administrative appeal, and a statement that the complete case file is available for review. *See* KCC 21.04.260(B). The decision stated that the SEPA Addendum was issued prior to the CABR, that an administrative appeal must be filed with the County within 14 days and provided an explanation regarding the appeal submittal process, and that the complete case file was available for review with the County. *See Ex. F28*. Appellants did not establish that the inclusion or exclusion of certain exhibits as "foundational" was prejudicial.

63. Appellants did not establish the County violated the Code in issuing the CABR, but argued that Appellants were confused about the information in the case file. This is not reversible error. Moreover, as the testimony at hearing confirmed, the CABR decision approved wetland and stream buffer impacts for Phases 4, 5, and 6, Spine Road A, and associated access bridges.

64. When Appellants argued that new information regarding documents that were considered in the County's issuance of the CABR came to light through Mr. Heacock's testimony on Day 5 of the hearing, the Hearing Examiner granted Appellants' motion to amend their appeal statement to include a challenge to "temporary" impacts.

65. The County substantially complied with the notice requirements of its Code and Appellants' interests were not prejudiced. *Prosser Hill Coal. v. Cnty. of Spokane*, 176 Wn. App. 280, 291-92, 309 P.3d 1202 (2013) ("The key to achieving substantial compliance with a procedural statute is the satisfaction of the substance essential to the purpose of the statute.").

66. Appeal Issue 3 is denied.

Issue 7

67. Substantial evidence supports the County's decision not to address wetlands 302, Q1, and Q2 in the CABR because these areas are no longer regulated wetlands. Appellants failed to meet their burden to show that former wetlands 302, Q1, and Q2 should still be considered regulated wetlands. In the alternative, even if these former wetlands were still regulated wetlands, Appellants failed to show they cannot be filled under the Vested Code.

68. The Vested Code requires a re-evaluation of wetlands every three years. *See* KCC 19.200.215.A.2.

69. Conflicting expert opinion does not demonstrate that the County issued the CABR in error. *See City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn. App. 23, 37, 108 Wn. App. 836 (1999) ("When an agency is presented with conflicting expert opinion on an issue, it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences."); *Gerla v. City of Tacoma*, 12 Wn. App. 883, 894, 533 P.2d 416 (1975) ("At the very least, the decision was debatable and made upon conflicting evidence. As such, it is not subject to judicial interference.")

70. The conflicting expert opinions presented at hearing do not constitute substantial evidence that the County erred in excluding former wetlands 302, Q1 and Q2 from analysis in the CABR. Appellants did not present "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Thornton Creek Legal Def. Fund*, 113 Wn. App. at 66-67. Appellants presented conflicting evidence on this issue, but ultimately the opinion of Dr. Cooke is not enough for the Examiner to reverse or remand the CABR on this issue because her analysis of data and photographs in the absence of onsite evaluation is not evidence in "sufficient quantum" to convince the Examiner a mistake was made by Ms. Bartlett.

71. Appellants failed to prove that wetlands 302, Q1, and Q2 should be deemed to be regulated wetlands. *See Thornton Creek Legal Def. Fund*, 113 Wn. App. at 66-67 (affirming hearing examiner's finding that testimony from a wetland ecologist established that a drainage pipe was not a creek as asserted by appellants). There is no legal basis on which the Examiner may order reversal and remand for third party evaluation.

72. Appeal Issue 7 is denied.

Issue 8

73. Impact to and fill of Wetland Z3 were approved in the 2009 Preliminary Plat. The Applicant is entitled to rely on the approved preliminary plat, including the conditions imposed through its approval. *See HJS Dev., Inc. v. Pierce Cnty., ex rel. Dep't of Planning and Local Srvcs*., 148 Wn.2d 451, 475, 61 P.3d 1141 (2003). After "[r]eceiving preliminary plat approval, an owner or developer may proceed to prepare detailed engineering drawings, construct improvements, and prepare the final plat in compliance with the terms and conditions of the approved preliminary plat." (noting that "[a]pproval (with terms and conditions) of [an] application by the local government acknowledges the developer's reliance on that approval in undertaking the plat subdivision process.").

74. Approval of the 2009 Preliminary Plat constitutes a determination that the plat is able to comply with all relevant requirements, including the location and proposed fill of Wetland Z3. *See Friends of the Law v. King Cnty*., 123 Wn.2d 518, 528-29, 869 P.2d 1056 (1994).

75. Appellants' challenge to the fill of Wetland Z3 is a collateral attack on the 2009 Preliminary Plat and must be dismissed. *See Durland v. San Juan Cty.,* 174 Wn. App. 1, 13, 298 P.3d 757 (2012) ("[A] party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision.")

76. Appeal Issue 8 is denied.

Issues 11 and 12

77. The Vested Code does not require Applicant to disprove potential adverse impacts to Wetland P2. Former KCC 19.200.220.C.1.a. establishes that, "[t]he department may allow wetland buffer averaging where it can be demonstrated that such averaging can clearly provide as great or greater functions and values as would be provided under the standard buffer requirement."

78. One enumerated standard for buffer averaging provides that "[w]idth averaging will not adversely impact the wetland." Regulations must be looked at "as a whole to derive its intent." *See Young*, 120 Wn. App. at 182-83 (affirming hearing examiner's interpretation of critical areas ordinance "[b]ased on the intent [of the critical areas ordinance] and the substantial weight [given] to an agency's interpretation of regulations within its area of expertise.").

79. Appellants' interpretation of the buffer averaging requirements of the Vested Code is not supported by law. Appellants' narrow focus on one subsection of the buffer averaging requirements incorrectly conflates what the Code requires Applicant to demonstrate for the use of buffer averaging.

80. Substantial evidence in the record establishes that buffer averaging applied to wetland P2 will provide at least as great of functions and values as would be provided under the standard buffer requirement. Appellants failed to prove otherwise.

81. The County's decisions approving the second minor amendment (*Ex. F26*) and the CABR itself (*Ex. F27*) support the conclusion that the CABR is intended to establish conditions for the future Phases 4, 5 and 6 SDAPs which, in turn, will ensure protection of the functions and values of onsite wetlands.

82. It would be inappropriate for the Hearing Examiner to determine this appeal based solely on SDAP plans on file with the County at the time of the CABR application where SDAP plans are still under review and subject to modification. *See* KCC 21.04.290.C; RoP 2.1.18; *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island,* 106 Wn. App. 461, 476, 24 P.3d 1079 (2021).

83. Appellants' arguments were based on outdated plans substantial evidence demonstrated that Appellants' concerns had been, or would be, addressed through redesign of the roads and stormwater system or were otherwise based on failed understanding of the timing of construction for the complete Spine Road and stormwater systems supporting Phase 6.

84. Appellants did not present substantial evidence that reduction of the Wetland P2 buffer to 100 feet, as stipulated by the parties, will fail to provide as great or greater functions and values as would be provided under the standard buffer requirement.

85. 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.

86. Appellants' allegations that buffer averaging and unfinalized and not yet submitted stormwater management plans will adversely affect Wetland P2 are not supported by substantial evidence and are based on an unsupported, out-of-context reading of the Code.

87. Appeal Issues 11 and 12 are denied.

Issue 13

88. Appellants' unsupported allegations regarding potential impacts of Applicant's stormwater retention ponds on recharge of the aquifer supporting Kitsap County Public Utility District's ("KPUD") wells are outside the scope of the County's regulatory authority under the critical areas ordinance.

89. Notwithstanding the lack of evidence to support Appellants' allegation that the stormwater retention ponds will adversely impact the aquifer supporting Kitsap County Public Utility District's ("KPUD") wells, the County was not required to notify KPUD nor impose requirements to analyze impacts on the aquifer.

90. Arborwood is located in a Category I Critical Aquifer Recharge Area ("CARA"). The critical areas ordinance regulates land uses in a Category I CARA to avoid groundwater contamination, not to protect aquifer recharge. KCC 19.600.610(A).

91. The 2009 Preliminary Plat did not authorize any "activit[y] with potential threat to groundwater[.]" See KCC, Table 19.600.620. The County was not required to notify KPUD nor to impose requirements on Applicant to analyze impacts on the aquifer. *See* KCC 19.600.615(A)(2) (only requiring a hydrogeological report to be reviewed by affected water purveyors when prohibited land uses are proposed).

92. For developments located within a Category I Critical Aquifer Recharge Area ("CARA"), such as Arborwood, the Vested Code regulates potential land uses to avoid groundwater contamination. See KCC 19.600.610(A). There is no regulatory requirement to evaluate or even provide recharge effects to aquifers in Category I CARAs. *Compare* KCC 19.600.610(B) ("Category II critical aquifer recharge areas are areas that provide recharge effects to aquifers that are current or potentially will become potable water supplies and are vulnerable to contamination based on the type of land use activity.")

93. Even if the critical areas ordinance required land uses in Category I CARA to recharge the aquifer, which it does not, Appellants' allegations are untimely as they concern alleged impacts of the stormwater retention ponds on aquifer recharge, raised more than a decade after the 2009 MDNS and 2009 Preliminary Plat hearing.

94. There is no evidence to support a conclusion that the County failed any duty to prevent community harm with regarding to the Critical Aquifer Recharge Area in approving the Application.

95. Issue 13 is denied.

Issue 14

96. Appellants abandoned this issue as no evidence was presented to support the assertion that stormwater retention ponds impact upon fish-bearing streams.

97. Issue 14 is denied.

Issues 15 and 16

98. Appellants' assertion that the proposed erosion control plan will result in adverse impacts to Wetland P2 is not supported by substantial evidence in part because it relies on a speculative assumption that construction of the Spine Road will take more than one season to conclude and/or that the Applicant will not comply with Conditions 6 and 7 of the CABR, requiring implementation of best management practices including silt fencing, construction fencing, work during periods of limited rainfall or potential for adverse erosion, and seeding of exposed soils, and requiring work on sloped areas to be guided by geotechnical reports and geotechnical specialists. *See Ex. F27*, p. 22.

99. Speculation is not substantial evidence. *See, e.g. Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P.3d 842 (2004).

100. Appellants did not present substantial evidence that Applicant's proposal for control of invasive plants through mitigation, management plan, and proposed monitoring of invasive species, approved in Condition 16 of the CABR (*Ex. F27*, p. 23) is inadequate.

101. The Code does not specify a threshold level of invasive species that must be controlled as part of wetland buffer revegetation. Nor does the Code set a threshold level of invasive plant species allowed to exist within a wetland buffer, nor impose strict guidelines regarding the vegetative management approach, nor state that the presence of invasive plant species render a mitigation plan inadequate. The Code only requires an Applicant to prepare a mitigation report that includes an ecological assessment of the existing plant communities

and fauna and a monitoring plan for the continued evaluation of vegetation and fauna. *See* Former KCC 19.700.715.

102. A maximum coverage of 10% invasive species, specified in the Wetland Buffer Mitigation Report, is consistent with industry standards and best practices. The Vested Code does not require "[r]epeated removal of 100% of invasives," prohibit mowing, nor require an applicant to control invasive species on undefined and undisturbed "adjacent areas."

103. Issues 15 and 16 are denied.

Amended Appeal Issue re: Temporary Impacts

104. Appellants argue that placement of permanent, structural fill in the buffer reduces the buffer width itself, referring to the Code definition of "buffer," which is "a non-clearing native vegetation area which is intended to protect the functions and values of critical areas." *Ex. F4* p. 15 (KCC 19.150.170).

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, 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(4). The CABR Decision is reversed and remanded for additional decision-making on this basis.

107. The Amended Appeal Issue is granted in part and denied in part.

DECISION

Based on the preceding findings and conclusions, the Hearing Examiner **AFFIRMS IN PART AND REVERSES AND REMANDS IN PART** Administrative Decision Permit Number 22-02629 and **GRANTS IN PART AND DENIES IN PART** Appeal Number 23-03375.

DECIDED this 5th day of February, 2024

STEPHANIE E. MARSHALL
KITSAP COUNTY
PRO TEM HEARING EXAMINER