

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF MUKILTEO**

In the Matter of the Appeal of)	No. SEPA2021-010
)	
David Tyler, Erich Volkstorf, Sylvia)	Harbor Grove DNS Appeal
Kawabata, Emmi Brant-Zawadzki,)	
Jon Boyce, and Marilyn Strand)	
)	FINDINGS, CONCLUSIONS, AND
<u>From a Determination of Nonsignificance</u>)	DECISION

SUMMARY OF DECISION

David Tyler, Erich Volkstorf, Sylvia Kawabata, Emmi Brant-Zawadzki, Jon Boyce, and Marilyn Strand (collectively, “Appellants”) appeal the issuance by the City of Mukilteo (City) of a Determination of Nonsignificance (DNS) pursuant to the State Environmental Policy Act (SEPA), chapter 43.21C RCW, on August 30, 2023. The DNS related to an application by Jake Drake of the BlueLine Group, LLC, on behalf of Sea-Pac Homes, LLC, and, subsequently, Atwell (collectively, “Applicant”), for preliminary approval of the plat of Harbor Grove, a proposed seven-lot subdivision on 2.43 acres of land located at 9110 53rd Avenue West. The Hearing Examiner concludes that the Appellants have not met their burden to show that the City’s issuance of the DNS was clearly erroneous or unlawful. Therefore, the Appellant’s appeal is hereby **DENIED**. The application for preliminary approval of the Harbor Grove plat will be treated in a separate companion decision to this decision on the SEPA appeal.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the SEPA appeal on December 18 and 19, 2023, using remote access technology. The hearing on the SEPA appeals was consolidated with the public hearing on the Applicant’s underlying proposal for preliminary approval of the Harbor Grove plat. The consolidated record created in the course of the hearing applies equally to the Hearing Examiner’s decision on the SEPA appeals (this decision) and the Hearing Examiner’s decision on the preliminary plat application (issued as a separate land use decision concurrently with this decision).

Testimony:

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

Andy Galuska, Community Development Director
Sarah Kress, Associate Planner
Brian Wirt, Senior Engineering Technician
Matthew Geiger, Senior Service Technician
Thomas Colleran, Applicant Representative, Project Manager

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Brett Pudists, Civil Engineer for the Applicant
Scott Kindred, Hydrogeologist for the Applicant
Lucas Zirotti, Project Engineer for the Applicant
Trevor Price, Land Entitlement Consultant for the Applicant
Erich Volkstorf
Marilyn Strand
Kenneth Willett
Peter Brant-Zawadzki
David Tyler, Appellant Representative
Ben Lee, Landau Associates, Civil Engineer for the Appellants
Sylvia Kawabata
Greg Chapdelaine
Steve Schmalz
Brendon-Jon Boyce

Attorneys and Representatives:

Attorney Pat Schneider represented Appellant David Tyler, who, in turn, served as the representative for all the Appellants. *See Prehearing Order* (Oct. 5, 2023). Attorney Duana Koloušková represented the Applicant. The City was represented by non-attorney Andy Galuska, Community Development Director.

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated December 4, 2023
2. SEPA Determination of Nonsignificance, dated August 30, 2023
3. SEPA Checklist, dated April 24, 2023
4. Critical Area Reconnaissance Report, prepared by Wetland Resources, dated December 9, 2021
 - 4.1.1.1 Wetland Resources Report Clarification Email, dated March 28, 2022
 - 4.1.1.2 Department of Ecology Results, dated March 22, 2022
 - 4.1.1.3 Update Regarding Ecology Site Visit, dated March 23, 2022
 - 4.1.1.4 Sketch of 9110 53rd Avenue W., undated
5. Harbor Grove Geotech Report, prepared by Earth Solutions NW, LLC, dated July 30, 2021
6. Civil Plans, dated April 19, 2023
7. Topo Survey, dated January 4, 2022
8. 2010 Pre-Design Report for Smugglers Gulch Retrofit, dated August 27, 2010
9. Arborist Data, dated April 27, 2023
 - 9.1.1 Arborist Tree Tags, dated April 27, 2023
10. Comment of Tyler, and City Response, dated March 8, 2023
11. Drainage Report, prepared by BlueLine, revised April 20, 2023
12. Hydrologic Impact Assessment, prepared by Kindred Hydro, dated April 19, 2023

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13. Quantitative Analysis Memo, prepared by Blueline, dated April 21, 2023
14. Slope Report, prepared by Earth Solutions NW, LLC, dated April 26, 2023
15. Slope Fill Detail, dated April 26, 2023
16. Stormwater Pollution Prevention Plan, prepared by Blueline, dated April 19, 2023
17. Exhibits to Sewer Easement, dated February 13, 2023
18. Comment of Borromeo, dated November 29, 2021
19. Comment of Brant-Zawadzki, dated November 30, 2021
20. Comment of Carli, dated November 30, 2021
21. Comment of Chapdelaine, dated November 30, 2021
22. Comment of Cole, dated November 30, 2021
23. Comment of Delorey-Lytle, dated November 29, 2021
24. Comment of Tyler, dated November 23, 2021
25. Comment of Hix, dated November 29, 2021
26. Comment of Hoffman, dated November 30, 2021
27. Comment of Kirk, dated January 19, 2022
28. Comment of Malone, dated December 12, 2021
29. Comment of Schmalz, dated November 29, 2021
30. Comment of Van Citters, dated November 29, 2021
31. Comment of Visser, dated November 30, 2021
32. Comment of Willett, dated November 25, 2021
33. Comments on DNS by David Tyler, dated September 12, 2023
34. Comments on Harbor Grove by David Tyler, dated November 30, 2021
35. Harbor Grove Follow-up Letter by David Tyler, dated December 30, 2021
36. Tyler Letter about Retaining Walls, dated March 6, 2023
37. First Rugosa Ridge HOA Comment Letter, dated November 30, 2021
38. Second Rugosa Ridge HOA Comment Letter, dated September 27, 2022
39. Galuska Email, dated February 3, 2023
40. Wirt Email, dated February 2, 2023
41. Tyler Email, dated November 23, 2021
42. Geiger Email, dated August 3, 2023
43. Additional Information Requested Letter by City of Mukilteo, dated February 17, 2022
44. Clearing Impacts by David Tyler, undated
45. Kawabata Comments, Part One, dated November 30, 2021
46. Kawabata Comments, Part Two, dated November 30, 2021
47. Hydrogeologic and Stormwater System Design Assessment, prepared by Landau Associates, dated September 11, 2023
48. Notice of Application by City of Mukilteo, issued November 16, 2021
49. Perteet Review Comments Memo by Perteet Assoc., dated December 20, 2022
50. Perteet Review Comments Memo by Perteet Assoc., dated July 7, 2023
51. Harbor Grove Subdivision Project SEPA Review Process PowerPoint presentation by David Tyler, dated November 3, 2023
- ~~52. Unused Placeholder~~

53. Groundwater Elevation Evaluation, prepared by Cobalt Geosciences, dated March 14, 2022
54. Wall Design Plans, dated April 24, 2023
55. Tree Retention and Landscaping Plans, dated September 30, 2021
56. Soil Management Plan, received November 24, 2021
57. Notice of Intent – Department of Ecology Stormwater Application, dated August 12, 2022 (08/12/22)
58. Public Comments Received Prior to SEPA Determination, various dates
59. Additional Information Request Letter, dated August 21, 2023
60. Example 1 Walls SD Hunttings Hilltop SD-2021-001, revised June 25, 2013
61. Example 2 Walls SP Kari SP-2012-001, revised March 25, 2013
62. Example 3 Walls SD Mukilteo Highlands, dated April 18, 2005
63. Example 4 Walls SD Highland Terrace, dated 2009 (2009)
64. Example 5 Walls SFR 9055 Hargreaves, approved July 31, 2012
65. Example 6 Walls SFR 9115 Hargreaves, approved August 1, 2012
66. Additional Information Request Letter, dated February 17, 2022
67. Additional Information Request Letter, dated January 4, 2023
68. Curriculum Vitae of Todd Oberg, undated
69. Curriculum Vitae of TC Colleran, undated
70. Curriculum Vitae of Luca Zirotti, undated
71. Curriculum Vitae of Henry Wright, undated
72. Curriculum Vitae of J. Scott Kindred, undated
73. Curriculum Vitae of Nate Perkl, undated
74. Curriculum Vitae of Trevor Price, undated
75. Harbor Grove Development Hydrologic Impacts Assessment-Revised, dated November 15, 2023
76. Report from Perkl's Properties, dated November 17, 2023
77. Rebuttal to City's Exhibits 60-65 – Walls Exhibits, undated
78. Resume of Benjamin Lee, undated
79. Land Use Application, dated October 4, 2021
80. Land Use Supplemental Application, dated October 4, 2021
81. Engineering Permit Application, dated November 24, 2021
82. Civil Plans, revised September 8, 2023
83. Title Report, dated April 2023
84. Determination of Completeness, issued November 9, 2021
85. Mukilteo School District Availability Letter, dated November 23, 2021
86. Water and Wastewater Utility Availability Letter, dated March 26, 2021
87. Electricity Utility Availability Letter, dated January 4, 2022
88. Harbor Grove Detention Vault Calculations, dated September 8, 2023
89. Harbor Grove Detention Vault Drawings, dated September 8, 2023
90. Comments Received between August 30, 2023 and November 29, 2023
91. SEPA Appeal Application, received September 27, 2023

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92. ~~Unused Placeholder~~
93. City Hearing Presentation, dated December 18, 2023
94. City Responses to Comments, various dates
95. Comments Received in December prior to Hearing, various dates
96. Notice of Public Hearing, issued December 5, 2023
97. Response to Review Comments, prepared by Earth Solutions NW, LLC, dated August 4, 2022
98. Response to Review Comments, prepared by Blueline, dated August 11, 2022
99. Response to Review Comments, prepared by Blueline, dated April 21, 2023
100. Kawabata PowerPoint, dated December 18, 2023
101. Tyler PowerPoint, dated December 18, 2023
102. Boyce–Galuska Emails, dated October 4, 2023
103. Editorial by Boyce, published in the *Mukilteo Beacon*, dated November 29, 2023
104. Excerpt from Smugglers Gulch Drainage Report from Boyce, undated
105. Kindred Site Visit Photos, undated
106. Kindred Western Washington Hydrologic Model Spreadsheet, undated
107. State SEPA Template from Galuska, undated
108. City of Everett DNS for Chelsea Heights Lot, issued January 18, 2023
109. Applicant’s Proposed Language for Condition of Approval no. 22, dated December 20, 2023
110. Appellants’ Response to Proposed Language for Condition of Approval no. 22, dated December 22, 2023

Additional Filings by the Parties:

- Appeal of Neighbor Group, received September 27, 2023
- Notice of Prehearing Conference, issued September 27, 2023
- Prehearing Order, issued October 5, 2023
- Statement of Appeal Issues, stipulated October 19, 2023
- Parties’ Consolidated Exhibit List, dated November 30, 2023
- Appellants’ Prehearing Brief, dated December 1, 2023
- Applicant’s Prehearing Brief, dated December 11, 2023
- City’s Prehearing Brief, dated December 11, 2023

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

FINDINGS

Application and Notice

1. On October 5, 2021, Applicant submitted applications for land use approval and engineering permit approval related to a proposed seven-unit subdivision of a 2.43-acre property located at 9110 53rd Avenue West. The Applicant proposed grading, drainage improvements, landscaping, street frontage, and utility improvements for the subdivision.

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The City determined the application was complete on November 2, 2021. *Exhibit 1, Staff Report, pages 1 and 2; Exhibit 79, Exhibit 80; Exhibit 81; Exhibit 84.*

2. On November 16, 2021, the City issued notice of the development application with a 14-day comment period ending on November 16, 2021. The City posted notice on its website as well as on the City's notice boards and at the post offices, as well as on the subject property. The City mailed postcards to neighbors within 300 feet of the subject property, published notice in the *Everett Herald* newspaper. Public comments received in response to this notice are described below. Additional materials received from the Applicant are described below. *Exhibit 48; Testimony of Sarah Kress.*

SEPA Determination

3. The City received the Applicant's revised SEPA Checklist on April 20, 2023. The City issued a Determination of Nonsignificance (DNS) for the proposal on August 30, 2023. The DNS was noticed in the same manner as the application: by posting on the subject property, the City's website, and the City's public notice boards, by publication in the *Everett Herald*, and by mailing to property owners within 300 feet of the subject property. In addition, the DNS was provided to parties of record who had submitted comments on the proposal. The DNS gave a public comment deadline of September 13, 2023. Public comments received in response to this notice are described below. *Exhibit 2; Testimony of Sarah Kress.*
4. The DNS gave an appeal deadline of September 27, 2023 (14 days after the expiration of the comment period). Appellants timely filed their appeal. The appeal is discussed further, below. *Exhibit 2; Exhibit 91.*

Public Comments Prior to Issuance of DNS

5. Throughout 2021, 2022, and 2023, the City continued to receive comments on the proposal. The comments did not always clearly distinguish between the question of whether the City should approve the proposed subdivision and what the City's SEPA threshold determination should be.¹ *Exhibit 1, Staff Report, pages 3–4, 8–9.*
6. Public comments objected to the Applicant's proposal to fill and grade the subject property, particularly the western portion of the property. The Applicant proposed to create a new, finished grade at a height of up to 20 feet above existing grade. Single-family houses would then be built atop the new, finished grade. The new, finished grade would be supported by a retaining wall near the western property line, a proposal which would place the retaining wall close to the backyards of homeowners to the west. Commenters questioned whether it was compliant with City codes to allow the existing

¹ Because the subdivision application and the SEPA appeal draw from a consolidated record, the Hearing Examiner will treat all comments as relevant to both the subdivision application and the SEPA appeal, regardless of whether a particular comment was explicitly directed at one or the other.

grade to be raised up to 20 feet above existing grade, and whether the City code allowed (or otherwise regulated the height of) retaining walls so close to property lines. A commonly repeated refrain was that the City code would prevent a seven-foot fence within a property line setback, yet the Applicant was proposing a 20-foot retaining wall within a property line setback. Some commenters suggested that a variance for the proposed retaining wall should be required, if the retaining wall were even allowed at all. Commenters believed the retaining wall itself, as well as the associated raising of the existing grade, would create severe aesthetic impacts for adjacent properties. One commenter supplied a rendering depicting the proposed retaining wall overlayed on the existing view from an adjacent backyard. *Exhibit 10; Exhibit 24; Exhibit 25; Exhibit 30; Exhibit 34; Exhibit 36; Exhibit 37; Exhibit 38; Exhibit 41; Exhibit 58.*

7. Commenters took issue with the City's calculation of required vegetation to be retained. Commenters argued that the City should adopt a slope-by-slope approach to evaluating how much vegetation is required to be retained under the code, not a site-wide, slope-averaging approach. As commenters observed, a site-wide, slope-averaging approach would tend to disguise portions of the site that have steeper-than-average slopes, where the vegetation retention requirements should be higher. *Exhibit 40; Exhibit 41; Exhibit 44; Exhibit 45.*
8. Commenters also suggested that the Applicant was proposing too much impervious surface on the subject property, increasing the risk of landslides and flooding onto adjacent properties. Commenters suggested that there be less clearing and grading and more retention of existing vegetation. Commenters also believed that at least some of the existing vegetation constituted old-growth trees that should be preserved because of their benefits to habitat and soil stabilization. The loss of trees would lead to visual and privacy impacts to adjacent properties. *Exhibit 19; Exhibit 21; Exhibit 22; Exhibit 23; Exhibit 24; Exhibit 27; Exhibit 28; Exhibit 29; Exhibit 30; Exhibit 31; Exhibit 32; Exhibit 34; Exhibit 35; Exhibit 45; Exhibit 58.*
9. Commenters believed the proposed stormwater system was inadequate. They believed the plan to maintain the stormwater system over time lacked specificity and enforceability. Commenters were concerned about the potential for flooding of adjacent properties to the west, along Hargreaves Place. They observed that flooding already occurs on the Hargreaves properties and believed that the proposal could exacerbate flooding, both by increasing the amount of impervious surface and by installing an inadequate, failure-prone stormwater management system. Commenters doubted that the proposed stormwater pump would handle predicated flows, and they speculated that the pump might fail at some point. Commenters also questioned whether the Applicant had sufficiently accounted for the possibility of stormwater flow to the east of the project, in the direction of and across 53rd Avenue West. *Exhibit 19; Exhibit 20; Exhibit 21; Exhibit*

22; *Exhibit 24; Exhibit 25; Exhibit 28; Exhibit 30; Exhibit 34; Exhibit 37; Exhibit 38; Exhibit 41; Exhibit 45; Exhibit 58.*

10. Commenters believed that the proposed subdivision would increase traffic and that existing pedestrian facilities in the area, such as along 53rd Street, were inadequate. Commenters also believed construction traffic associated with the proposal would affect neighboring residences because it would take hundreds of dump trucks to transport enough fill to implement the proposed grading of the site. *Exhibit 21; Exhibit 28; Exhibit 32; Exhibit 34; Exhibit 58.*
11. Commenters identified a wetland and creek in the vicinity the subject property, which they believed could be impacted by the proposed subdivision. *Exhibit 18; Exhibit 26; Exhibit 32; Exhibit 58.*
12. One commenter claimed to have an easement that was omitted from the proposed plat map and that would be affected by the proposed subdivision. This commenter claimed the stormwater vault would cut off access to his house. This commenter also claimed he would have to share the access with construction vehicles and wondered whether this would be possible or whether construction vehicles would impede his access. *Exhibit 22.*

Applicant's Additional Filings Prior to Issuance of DNS

13. Throughout the period between the October 5, 2021, application and the August 30, 2023, issuance of the DNS, the Applicant continued to file reports and studies in response to the City's ongoing review and in response to public comments (discussed below). The City hired Pertec to conduct third-party review of the filings. *Exhibit 1, Staff Report, page 3.*
14. A geotechnical report, dated July 30, 2021, confirmed there are no steep slopes or landslide hazard areas. *Exhibit 5.*
15. A report published for the nearby Smuggler's Gulch land use project in 2010 (referenced in public comments) indicated the presence of a wetland on the subject property. However, the Applicant's critical area reconnaissance report did not find a wetland onsite. To resolve the discrepancy, the City asked the Washington State Department of Ecology to visit the site, which Ecology did. Ecology confirmed no wetlands onsite. *Exhibit 4; Exhibit 5; Exhibit 8; Exhibit 33; Exhibit 58; Exhibit 104.*
16. The Applicant submitted a preliminary stormwater plan, with modeling of stormwater off the subject property using the Western Washington Hydrologic Model. The Applicant's modeling was revised, in response to public comments, to include consideration of groundwater flows, not just surface runoff. Based on the stormwater modeling, the Applicant proposed a live storage vault with a capacity of 18,088 cubic feet. According

to the Applicant's drainage report, produced May 3, 2022, and revised April 20, 2023, the stormwater vault would receive stormwater via gravity flow from the eastern portion of the property. Stormwater from the western portion of the property would infiltrate into soils and flow beneath the ground as interflow to be captured at the base of the retaining wall. A pump at the base of the retaining wall would then pump the stormwater back uphill through a stormwater conveyance system to the top of the hill. From there, the stormwater would drain via gravity to the stormwater vault. The Applicant's modeling concluded that stormwater flow to the west—in the direction of the retaining wall and pump—would actually be reduced as a result of the project, relative to existing conditions. The reduction in westward surface flow would occur thanks mainly to the proposed fill, which, by raising the grade up to 20 feet above existing grade, would redirect a majority of surface flows to the east, directly into the stormwater vault. Only a minority of current westward flows would remain following the grading, and the pump and conveyance would be more than adequate to deal with this remnant westward flow. As a result, virtually all of the stormwater flowing from the subject property would be channeled through the stormwater vault. Only a small portion of stormwater in the corners of the site, not co-located with any proposed development, would infiltrate. A native growth protection area would handle most of the infiltration. The City's senior surface water technician, Matthew Geiger, reviewed the proposal and agreed with the conclusions of the Applicant's stormwater reviewer. Mr. Geiger concluded that, in the pre-developed conditions, 1.24 acres drain to the west, whereas in the proposed post-developed condition, only 0.24 acres would drain to the west to be handled by the pump and conveyance. *Exhibit 11; Exhibit 12; Exhibit 42; Exhibit 53.*

17. In response to public comments about the potential for pump failure, the Applicant proposed several mitigation measures:
 - A backup pump.
 - Variable width private drainage and maintenance access easements for inspection and maintenance of the system.
 - Formation of a homeowner association (HOA) to include maintenance, repair, and operation of the stormwater system.
 - A reserve budget specifically called out in the HOA documents for the pump.
 - Float installation with a visual and auditory alarm panel connected to Lot 6.*Exhibit 1, Staff Report, page 8.*
18. The Applicant submitted an arborist report and landscaping plan. According to these documents, the subject property currently has 90 significant trees. The Applicant is proposing to remove 67 and maintain 23. City staff concluded that this proposal would meet the City's 25 percent minimum tree retention requirement. Also, the landscaping plan proposes replanting 20 trees. In addition, as noted above, the Applicant proposes a portion of the subject property to be reserved as a native growth protection area for

purposes of stormwater control. *Exhibit 1, Staff Report, page 9; Exhibit 9; Exhibit 55; Exhibit 82.*

Service Availability Letters

19. Mukilteo Water and Wastewater District provided comments on November 19, 2021. The District did not object to the project. There is sufficient capacity for the project. The Applicant should be responsible for any permits, a Developer Extension Agreement, and associated costs. The City incorporated the District's recommendations into proposed condition of approval 25. *Exhibit 1, Staff Report, page 7; Exhibit 86.*
20. Snohomish PUD, provider of power service, sent a letter to the City on January 14, 2022, confirming that the site has sufficient service. City staff captured the PUD's requirements in proposed condition 24. *Exhibit 1, Staff Report, page 7; Exhibit 87.*
21. Mukilteo School District submitted a comment on November 23, 2021. The Applicant would need to pay impact fees to the School District prior to the issuance of any building permit. The School District transportation staff requested curb, gutter, and sidewalk for the project. The City, however, did not recommend these improvements as a condition of approval because doing so would be inconsistent with the City's Development Standards. City staff did incorporate the School District's request for impact fees as a proposed condition of approval. *Exhibit 1, Staff Report, page 7; Exhibit 85.*

City's Third-Party Review

22. In addition to its own staff review, the City hired Perteet to conduct third-party review of the Applicant's filings in advance of the City's issuance of a SEPA threshold determination. *Exhibit 1, Staff Report, page 3; Exhibit 66.*
23. Perteet's first review, dated December 20, 2022, focused especially on the Applicant's civil plans, stormwater plans, and the studies in support thereof. Perteet identified dozens of minor issues with the Applicants' reports related to vagueness in various place names and details missing from the preliminary plans for the stormwater system and the civil site plans. But Perteet did not identify any fundamental issues in the Applicant's plans to raise the existing grade, install a retaining wall, and pump stormwater from the westernmost part of the property to the proposed stormwater vault, which would also serve most of the eastern portions of the property. The City forwarded Perteet's concerns to the Applicant, and the Applicant revised its plans accordingly. *Exhibit 49; Exhibit 67; Exhibit 99.*
24. In response to revisions by the Applicant, Perteet concluded in its second review, dated July 7, 2023, that "most of [its] previous comments have been addressed, just a few items are left to finalize these plans." Perteet recommended City attorney review of any covenants related to maintenance of the stormwater pump but did not raise any

substantive objection to the pumping scheme or other aspects of stormwater maintenance. The only remaining issues identified by Perteet were minor, including the lack of a road name for one of the proposed roads and the possibility that Tract 999 (proposed to be deeded to a neighboring property) did not meet the definition of open space.² The City forwarded Perteet's concerns to the Applicant. *Exhibit 50; Exhibit 59.*

Public Comments Received After Issuance of DNS

25. Following the issuance of the DNS on August 30, 2023, a group of neighbors of the project (who would shortly go on to appeal the DNS) hired Landau Associates to review the stormwater plan and supporting studies. In a memorandum dated September 11, 2023, Landau issued its professional opinion that "the project design plans and other documentation—as updated in April 2023—do not provide sufficient assurance that adverse environmental impacts due to project development can be avoided or mitigated as presently proposed." Landau argued that:
- Stormwater flow calculations should have included not only estimates of surface runoff but also estimates of shallow groundwater, including the types known as horizontal interflow and perched groundwater. Inclusion of shallow groundwater flows in the *westward* direction would more realistically represent post-development conditions. Instead, the Applicant's materials assume all surface water will flow in an *eastward* direction, ignoring the water that flows westward as horizontal interflow or perched groundwater.
 - Stormwater infiltration calculations should have included the retaining wall area itself, which should have been modeled using type A/B outwash soils.
 - The use of a stormwater pump in perpetuity, without an emergency overflow or bypass system, is risky. "In-perpetuity pumping is not standard practice for retaining wall drainage design." If emergency bypass flows will drain westward by gravity, some type of overflow and conveyance system would typically be appropriate to protect the neighboring parcel(s) from impacts. If the bypass flows will be retained on the site, the retaining wall design should explicitly include considerations for ponding of water (and therefore increased hydrostatic pressure) behind the retaining wall system to ensure structural stability of the retaining walls. A backup system should be incorporated into the design of the stormwater conveyance at the base of the retaining wall.

Exhibit 47; Exhibit 90.

26. Following the issuance of the DNS, commenters continued to express the belief that the retaining wall within the western property line setback was a violation of the municipal code, or at least that a variance should have been required. Commenters continued to believe the retaining wall and 20-foot-elevation fill plan would have significant aesthetic, groundwater, stormwater, and soil impacts and would violate the municipal code.

² The Applicant had previously attempted to clarify that it did not intend to use Tract 999 to meet open space requirements. *Exhibit 98.*

Commenters believed the retaining wall could fail, or else the drainage system below the retaining wall could fail, either way leading to significant impacts to adjacent properties. Commenters doubted the City would be able to compel the future properties owners, or their HOA, to perform adequate maintenance on the retaining wall. Commenters also believed the retaining wall itself would inhibit access by future maintenance crews to the strip between the base of the retaining wall and properties to the west. Commenters believed the project's reliance of grading, fill, and the retaining wall would lead to a design that was visually and physically incompatible with the surrounding neighborhood. They also believed the wall would create shadow impacts to nearby properties. *Exhibit 33; Exhibit 90.*

27. Commenters expressed mistrust in the proposal's reliance on a stormwater pump below the retaining wall to convey stormwater uphill and eastward to a stormwater vault. Commenters did not believe a stormwater pump—which could be prone to failure sometimes years or decades hence—should be a permanent component of the stormwater management system for the proposal. Commenters believed that the Applicant had underestimated the volume of stormwater and groundwater the pump (and other parts of the stormwater system) would have to handle. *Exhibit 33; Exhibit 90.*
28. Commenters argued that the Applicant had failed to supply slope and vegetation removal data as required under Mukilteo Municipal Code (MMC) 15.16.050.C, Table 1, Clearing Matrix. The absence of the vegetation removal data precluded the City from knowing the environmental impacts related to topography, vegetation, or hydrology. Commenters continued to believe that the removal of existing tree canopy would have significant, adverse environmental impacts that required further study. *Exhibit 33; Exhibit 90.*
29. Commenters observed that many features of the project with the potential to affect the environment were not discussed in the Applicant's SEPA Checklist. Examples include the height and location of the retaining wall along the western part of the project and the placement of a stormwater pump, stormwater conveyance, and drainage swale close to adjacent residential properties. *Exhibit 33; Exhibit 90.*
30. Commenters continued to perceive significant, adverse impacts related to construction, including insufficient stormwater facilities installed during the construction phase and the potential for the retaining wall to block access to a proposed interceptor swale during construction. Commenters believed there could be erosion or flooding impacts during construction. *Exhibit 33; Exhibit 90.*
31. Commenters continued to doubt that there are no wetlands on the subject property. Even if the only wetlands were some distance from the property, commenters believed the proposal could have impacts on salmon habitat that required further study. *Exhibit 90.*

32. Commenters argued that the fill height would be as high as 20 feet in some places, not the 10 feet contemplated in the Applicant's geotechnical materials. *Exhibit 90.*
33. Many commenters complained that the City had not provided timely notice of the DNS to give the public a chance to review the supporting materials and respond. *Exhibit 90; Exhibit 95; Exhibit 102.*
34. A commenter argued that the Applicant had previously violated the municipal code and had not been punished. *Exhibit 103.*
35. Commenters repeated arguments previously expressed prior to DNS issuance that the proposal would violate setback regulations, building height limits, and vegetation retention requirements. *Exhibit 90; Exhibit 95.*

Applicant's Response to Post-DNS Comments

36. The Applicant submitted a letter, dated November 13, 2023, in response to some of the post-DNS comments. (Many other post-DNS comments continued to come in after November 13, including up to the eve of the public hearing.) The Applicant argued that setback requirements apply to structures, but a retaining wall is not a "structure." The Applicant argued that the City had previously allowed retaining walls in the setbacks of other properties, thereby establishing a precedent that retaining walls are not prohibited "structures." The Applicant cited other cities' codes, which regulate various features of retaining walls. The Applicant argued that building height limits are measured from the post-development grade in the case of plats and short plats, not the pre-development grade. Again, the Applicant cited other cities' codes to illustrate its point. The Applicant argued that site-wide slope averaging was the correct reading of the code for purposes of vegetation retention, not the public commenters' preferred slope-by-slope approach. The Applicant argued that the application materials, including not only the SEPA checklist but the entirety of the project file, provided a complete and accurate description of the project, sufficient to enable the City to evaluate the project's environmental impacts. The Applicant claimed that all impacts had been disclosed and analyzed. *Exhibit 76.*
37. The Applicant also submitted a response, dated November 15, 2023, from one of its stormwater consultants, Kindred Hydro, to the September 11 post-DNS Landau memorandum. The November Kindred Hydro response to Landau reiterated that the proposed filling and grading proposal would *reduce* stormwater flows in a westward direction relative to existing conditions, even if no stormwater pump were installed at all. With the pump, the westward offsite flow would be zero, because all westward stormwater would be conveyed uphill to the stormwater vault. Kindred Hydro denied that any groundwater was observed at the site, but Kindred Hydro did run new simulations of groundwater recharge, and developed conditions using A/B soil types. Kindred Hydro also modeled interflow of the type called out in the Landau memo. Based

on these revised model runs, Kindred Hydro concluded that stormwater flow to the west would *still* be some 49 percent less than existing conditions, and that the proposed pump would be more than capable of handling the total volume of flow. Kindred Hydro did not believe the pump was even a necessary piece of equipment to avoid risks to properties to the west. *Exhibit 75*.

38. The Applicant also supplied several examples of previous projects in Mukilteo in which retaining walls were approved for construction within setbacks. The Appellants then submitted a rebuttal to each of these, arguing that the previously approved retaining walls were not comparable in their purpose, height, impacts to neighbors, accessibility for maintenance, and importation of fill. *Exhibits 60–65; Exhibit 77*.

Administrative Appeal of the DNS

39. On September 27, 2023, Appellants filed an administrative appeal of the DNS. Following a prehearing conference, the parties agreed to a stipulated statement of appeal issues. In the statement of appeal issues, the Appellant allege the following six violations of SEPA:
1. The SEPA documents do not address the fact that the project proposes to construct two parallel retaining walls within the 25-foot backyard setback, contrary to MMC 17.20.080.A. The lower wall is 170 feet in length and proposed to be within 12 feet of the property line, and the higher wall is proposed to be about 20 feet from the property line and 250 feet in length. The combined walls would retain 10,000 cubic yards of fill and the combined height of the walls would raise the existing grade by as much as 20 feet next to the adjoining lots, which would require a stormwater pump system with 160 lineal feet of force main piping and a drainage swale adjacent to the lower elevation residential properties to the west. None of this development within the backyard setback is acknowledged or addressed in the checklist, and the Department cannot rely on the code to address such impacts because MMC 17.20.080.A prohibits structures, including retaining walls, within the setback.
 2. The SEPA documents do not address the fact that the project proposes to clear all native vegetation from steep slopes in excess of the maximum limits for such clearing in Table 15.16.050.C, and the Department cannot rely on the code to address the impacts of such clearing because the code prohibits it.
 3. The SEPA documents do not address the aesthetic or drainage impacts, including the risk of failure of the stormwater pumping system, to abutting properties to the west that will be created by the proposed retaining walls and fill within the backyard setback that will raise the existing grade by as much as 20 feet.

4. The SEPA documents do not impose any mitigation, nor explain why the impacts of the project caused by the retaining walls and fill, do not require mitigation.
5. The SEPA documents do not acknowledge or respond to the approximately 54 individual detailed comments submitted by the public, nor do they acknowledge or respond to the hydrological assessment prepared by Landau Associates that Appellant David Tyler submitted during the SEPA comment period.
6. The SEPA documents do not acknowledge or make public the results of the technical review by an outside consultant hired by the City in 2022, thereby hiding relevant information from the public.

Exhibit 91; Statement of Appeal Issues, stipulated October 19, 2023.

40. In its prehearing brief, the Appellants argued that the City had not met the requirement to demonstrate prima facie compliance with the procedural requirements of SEPA. The Appellants argued that the City had not demonstrated that it had considered environmental factors in a manner sufficient to demonstrate prima facie compliance—namely, a thoughtful, conscientious, and systematic consideration of the environmental values affected by the proposed subdivision. The Appellants cited, among other authorities, WAC 197-11-655(2) and WAC 197-11-030(2)(c) for the proposition that the City must “prepare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made.” The Appellants argued that the City’s core documents (Exhibits 1–17 of this decision)³ did not show any of the following:

- Any acknowledgment of environmental impacts
- Any analysis of environmental impacts
- Any request to the applicant or its consultants to analyze environmental impacts
- Any internal communications about environmental impacts
- Any external communications about environmental impacts
- Any meeting notes about environmental impacts
- Any analysis of mitigation for environmental impacts
- Any analysis of conflicts between the proposal and the zoning code
- Any analysis of public comments from neighbors and citizens who identified environmental impacts.

Appellant’s Prehearing Brief.

41. In its prehearing response brief, the Applicant argued that the standard of review for the DNS is the “clearly erroneous standard.” The Applicant noted that the Appellants’ prehearing brief did not explicitly address any of the six issues identified in the stipulated statement of appeal issues (which mainly involve stormwater and municipal code

³ Per the prehearing order, “The core documents are those the City relied on in reaching its DNS.” *Pre-hearing Order, issued October 5, 2023.*

compliance), but rather focused solely on the City's prima facie compliance with SEPA procedures. The Applicant argued that the City had demonstrated prima facie compliance with SEPA, because it had issued its threshold determination based on information sufficient to evaluate the impacts of the proposed subdivision. The Applicant cited not only the SEPA checklist but also the many reports and reviews in the record, described above. The Applicant argued that the proposal would not violate any provision of the municipal code:

- Retaining walls are allowed in setbacks, because MMC 17.20.080 specifies height limits for fences built within setbacks *atop retaining walls*.
- The City has a pattern of permitting retaining walls within setbacks.
- Maximum allowable height of buildings is measured from the post-development ground level in the case of plats or short plats under MMC 17.08.020.
- The landscaping, vegetation retention, and tree retention plans were all consistent with the City's clearing and grading code requirements.
- The stormwater plan had been reviewed by multiple experts and had been found to be feasible and in compliance with the stormwater manual. When Kindred Hydro performed additional stormwater monitoring in response to the Landau memorandum, the result was the same: a feasible, manual-compliant stormwater system.
- The City was not required to respond to public comments, nor to allow any comment period longer than a single, integrated comment period. However, the City continued to receive and respond to a large volume of public comments throughout the permitting and SEPA review processes.
- The City is not required by SEPA to publish every document it relied on in the course of its SEPA review.

Applicant's Prehearing Response Brief.

42. In its prehearing response brief, the City argued that it had based its SEPA determination on adequate information, and that compliance with the City codes would sufficiently mitigate any adverse impacts of the proposal, such that a determination of significance was not required. The City argued that its core documents, Exhibits 1 through 17 contained adequate information, in and of themselves, for the City to arrive at a SEPA determination. The City argued that the Appellants' post-DNS Landau report (Exhibit 47) did not introduce any significant, adverse impacts not considered by the City during its initial review of the project's impacts. The City argued that it was not required to document, issue by issue, each of the environmental factors it considered in reaching its DNS. The City argued, however, that its response to the public comments in Exhibit 58, as well as its requests to Applicant for the hydrological impact assessment in Exhibit 12 and a groundwater-specific geotechnical report in Exhibit 53, were evidence that the City had, in fact, carefully considered the environmental impacts of the proposal. The City argued that, since the proposed subdivision had been found to comply with all municipal codes, its environmental impact was *per se* mitigated to the point of

nonsignificance. The City denied that there were any aesthetic impacts that it failed to consider. The City argued that a mitigated DNS would be appropriate only if there were significant, adverse impacts that had not already been addressed by project design or by code compliance. The City cited WAC 197-11-158(5) and RCW 43.21C.240 for the proposition that it could not require mitigation for probable, significant impacts if its code already addressed those impacts, which the City believed was the case here. The City also argued that retaining walls are allowed within setbacks, under MMC 17.20.080.A.2, and that the vegetation retention requirements of MMC Table 15.16.050.C require a site-wide review, not a “bit-by-bit” review of discrete segments of the site. *City’s Prehearing Response Brief*.

Notice of Public Hearing

43. Notice of the combined public hearing on the subdivision application and DNS appeal was issued on December 5, 2023. Notice was issued in the same manner as for the issuance of the DNS: posting on-site, at the City’s public boards, and on the City’s website; mailed to property owners within 300 feet; published in the *Everett Herald*; and sent to parties of record. Additional comments received in response to this notice have been summarized above in the section on post-DNS comments. *Exhibit 96; Testimony of Sarah Kress*.

City and Applicant Testimony

44. Andy Galuska, Community Development Director, testified that the City’s review of the proposal had been underway for years. He testified that the code did not set forth minimum requirements for open space, but he believed this proposed subdivision did offer sufficient open space, in the form of the large lots. He acknowledged that this would be private open space, not public open space.

On the subject of the stormwater pump proposed for the base of the retaining wall, Mr. Galuska testified that the Hearing Examiner could add as many conditions as necessary to ensure that the subdivision’s HOA had the resources and responsibility to keep the pump functional. Mr. Galuska acknowledged that pumps “are never anybody’s first option,” but because of the site design and the location of the hill, there are no other ways to get the stormwater uphill. Mr. Galuska said the City team had considered the risks of using a pump, but as he pointed out, stormwater currently falls on the undeveloped hillside and flows unimpeded onto properties to the west. After the filling and grading of the subject property, the total volume of stormwater heading west would be significantly decreased, and what little westbound stormwater remained would be pumped up to the stormwater vault. Mr. Galuska believed that any failure of the stormwater system, including the pump, could be addressed through the City’s normal code enforcement process (chapter 13.12 MMC), just as it would be at any other property suffering a stormwater system failure. In addition, in the case of an imminent threat, Public Works would go to the subject property and pump the system, just like any other property facing an imminent

threat of flooding. Mr. Galuska testified that he had approved stormwater pumps before and did not see any reason not to approve this one. *Testimony of Andy Galuska.*

45. Sarah Kress, City Associate Planner, testified generally about the proposal. She described the public notice for each of the following: the notice of development application, SEPA comment period, issuance of SEPA DNS, and the public hearing. In each case, she testified, the City had published notice in the *Everett Herald* newspaper; posted notice on-site; posted notice at the City's various notice boards and on the City's website; and mailed notice postcards to property owners within 300 feet of the subject property. In addition, for the latter three notices, the City also sent notice to parties of record.⁴

Ms. Kress testified that the lots surrounding the proposed subdivision are residential lots similar in size to the proposed subdivision. Currently, there is a single, abandoned house on the subject property. The property was in a wooded area but had largely been cleared. Ms. Kress testified that the proposed lots meet the setback requirements and lot size requirements. There would be some landscaping at the front of the property (along 53rd Avenue West, to the east of the property) and the rear of the property (to the west). The landscaping to the west would be associated with the retaining walls. Ms. Kress described the process by which the Washington State Department of Ecology had been called in to verify that there are no wetlands on the subject property, and that she agreed with Ecology's determination. She did not perceive any other critical areas on the subject property, either. The only reason for a geotech report was a general requirement to have such a report for subdivisions, not a reflection of any suspicion on the City's part that a critical area might exist.

Ms. Kress testified that other, previously approved subdivisions had included retaining walls, including the City's most recent subdivision in 2012. The 2012 subdivision had employed retaining walls for the purpose of changing the site elevation, just as the Applicant's subdivision proposed. She noted that the Applicant would be required to pay park impact fees, as well as traffic and school impact fees. Impact fees would be assessed at the time of permit issuance and need not be calculated as part of preliminary plat approval.

Ms. Kress testified that proposed condition of approval no. 22 had been added to address concern from residents regarding the longevity and maintenance of the stormwater pump proposed for the base of the retaining wall.

Ms. Kress testified that the City had received over 50 public comments. The City had accepted comments throughout the application and SEPA review processes, not just

⁴ Not applicable in the case of the notice of development application, since there were not yet any parties of record at that stage other than the Applicant.

within 14 days of the various notices that had gone out. She testified that the City had a website with project documents, although she acknowledged the website was not always kept up to date.

On the subject of traffic, Ms. Kress did not believe a traffic impact analysis was necessary. The project was for only seven homes, on lots over 12,500 square feet in size. The City determined that each new lot would generate only one PM peak trip per day, a figure Ms. Kress testified was drawn from the municipal code, MMC 3.107.180. There would be a traffic impact fee associated with the added traffic.

Ms. Kress testified that proposed condition of approval no. 22 was aimed at addressing public concerns about the maintenance of the stormwater system. Condition no. 5 was aimed at aesthetic concerns. The condition would require a fence on the top of the retaining wall, with the houses to be setback from the fence. *Testimony of Sarah Kress.*

46. Brian Wirt, City Senior Engineering Technician, testified that the proposed subdivision would have a private roadway, named 91st Way, designed to the City's standards for a seven-lot development. All seven lots would have access easements for the private road. No sidewalks were required on the west side of 53rd Avenue West (the public outlet for the subdivision), but sidewalks would be required on the east side, per the City's plan. There would be a bioswale along the west side of 53rd Avenue, and a 10-foot right-of-way dedication to the City.

On the subject of tree retention, Mr. Wirt explained that he had calculated the slope of the site as a 30-foot rise with a 516-foot run. He had come up with a site-wide average slope of 5.8 percent. For sites under 15 percent in grade, the code's minimum retention requirement for significant trees was 25 percent of all significant trees onsite to be retained. Here, the Applicant was proposing to retain 23 trees out of 80 existing, thus meeting the 25 percent retention requirement.

With regards to the stormwater pump at the base of the retaining wall, Mr. Wirt explained that the pump would collect water that had pooled behind the retaining wall, so that there would not be a "surcharge" of water pressure on the wall. The water would be collected behind the walls, put into a catch basin, and pumped uphill to the stormwater detention vault.

The only alternative to a pump that Mr. Wirt could think of was a stormwater conveyance via pipe across the properties to the west. Westward conveyance would, however, require the assent of those property owners, who are not associated with the subdivision.⁵

⁵ The Hearing Examiner notes that many of the Appellants own properties to the west of the subject property and would likely be the ones across whose property stormwater would have to be conveyed, in the absence of a pump.

It was not possible simply to release stormwater at the base of the retaining wall because it would flow westward and affect neighboring properties.

Mr. Wirt testified that the City had allowed similar, permanent stormwater pump installations at other properties elsewhere in the city. He added that the proposed pump here was a dual pump, and was also equipped with an audio and visual alarm in case the pump failed. Mr. Wirt said that, in one instance, the City had required a homeowner to put in a backup generator for a stormwater pump in case power were to fail. He said that such a requirement could be a condition of approval in this instance, as well.

Mr. Wirt testified that, even if the pump were to fail, all that would happen is that the catch basin would overflow. This would direct stormwater onto neighboring properties to the west, but those properties were already receiving stormwater now, in the undeveloped condition. The volume of stormwater in the post-developed condition would be less than the undeveloped condition, so even in the event of a total failure of the stormwater pump, the volume of stormwater moving onto westward properties would be less than today. In addition, the overflowing catch basin would prevent a buildup of “surcharge” water pressure behind the retaining wall. *Testimony of Brian Wirt.*

47. Matthew Geiger, City Senior Service Technician, testified that he had reviewed the subdivision’s proposed stormwater management system against both the recommendations in the Applicant’s geotechnical materials, the municipal code, and the Department of Ecology stormwater manual. The amount of flow control required was based on a forested, pre-developed condition of the subject property. The Applicant had calculated that some 17,500 cubic feet of live storage would be required, and some 18,000 cubic feet of live storage would be provided in the form of a detention vault. After detention, stormwater would be treated and then released through the City stormwater system along 53rd Avenue, from which it would flow to the southwest, along 92nd Street, and then to an outfall on Smuggler’s Gulch Creek, near Hargreaves Place. This flow route would preserve the natural drainage flow path off the subject property.

Mr. Geiger explained that the stormwater pump at the base of the retaining wall on the west side of the property would lift stormwater falling on the western edge of the property up to the stormwater vault. The pump would not serve the impervious surfaces where the seven homes were proposed. *Testimony of Matthew Geiger.*

48. Thomas Colleran, Applicant Representative, testified that he is the Applicant’s project manager. He testified that Blueline, the original applicant, had been acquired by Atwell, who had now taken over the application. Mr. Colleran testified that the ditch along 53rd Avenue would be altered and enhanced as a swale. He testified that the native growth

Based on the Appellants’ opposition to multiple aspects of the subdivision, the Hearing Examiner believes it is unlikely they would grant a stormwater easement across their properties for the benefit of the subdivision.

protection area was a stormwater manual requirement, not an open space requirement. Open space would be provided by complying with the requirement for less than 30 percent lot coverage on each lot; there would not be (nor was there required to be) a separate, shared open space tract. In response to an earlier question to City staff, Mr. Colleran cited MMC 17.15.020.B.4 for the proposition that a project generated ten or fewer PM peak hour trips did not require a traffic impact analysis.

Mr. Colleran testified that the extensive fill and grading proposed for the subject property was aimed at minimizing stormwater impacts. Thanks to the fill and grading, the great majority of the stormwater flow would be directed eastward, into the vault. Raising the grade would, however, require the retaining walls to be built on the western portion of the property. Mr. Colleran testified that each of the two pumps on the western edge of the property had a capacity of 24 gallons per minute, whereas stormwater modeling indicated that the catch basin would receive a total of 8.95 gallons per minute during a 100-year storm event. *Testimony of Thomas Colleran.*

49. Brett Pudists, Civil Engineer for the Applicant, testified that, in the absence of the proposed retaining walls (he used the plural),⁶ surface water would flow downhill onto properties to the west. With the retaining walls, enough fill could be added that the majority of stormwater falling on the property would flow eastward. Mr. Pudists acknowledged that the retaining wall-plus-fill design would also increase the buildable area of the western lots. Mr. Pudists testified that, as designed, the retaining walls would not suffer any buildup of surcharge water pressure. Water would drain beneath the walls. *Testimony of Brett Pudists.*
50. Scott Kindred testified that he was the hydrogeologist who wrote the expert report in Exhibit 75 on behalf of the Applicant. He testified that he had produced Exhibit 75 in response to the Appellants' Landau report (Exhibit 47), which had criticized certain aspects of the Applicant's earlier stormwater modeling and design. Mr. Kindred testified that stormwater and groundwater may already be discharging into the Hargreaves properties (west of the subject property) even in the undeveloped condition.

Mr. Kindred agreed that the subject property's soil is underlain by impermeable glacial till. Stormwater infiltrating into the soil will encounter the glacial till, which stormwater cannot infiltrate. Once the stormwater encounters the glacial till, it will flow along between the till and the overlying soil, a process called interflow, or perched groundwater. Mr. Kindred had not detected any interflow or perched groundwater in his test pits, but he did not deny the likelihood that it would exist during times of rain. He

⁶ The Hearing Examiner notes that the proposed retaining wall consists of a tier of two walls, the upper one set back slightly atop the lower one. Witnesses and exhibits used the singular "wall" interchangeably with the plural "walls." In most instances in this decision, the Hearing Examiner will use the singular, but the Hearing Examiner recognizes that the retaining wall is, technically, a tier of two walls.

believed that surface flow, interflow, and deep groundwater flow could all combine to affect properties to the west.

Mr. Kindred acknowledged that, even with the Applicant's fill and grading scheme, interflow to the west would still occur, because the grading and fill would not affect the glacial till underlying the surface soils. He believed, however, that any interflow would flow beneath the catch basin proposed for the retaining wall and thus would not enter the proposed pumps.

In addition, Mr. Kindred believed the total volume of interflow westward would decrease, not because of any grading of the glacial till, but because new, impervious surfaces on the subject property (namely, homes and roads and the like) would direct their stormwater into the detention vault. Post-development stormwater encountering the new, impervious surfaces would have no opportunity to seep into the soil, encounter the glacial till, and flow west as interflow—which it all currently does in the undeveloped condition.

All that said, Mr. Kindred did conduct new modeling to account for interflow to the west. In the undeveloped condition, between surface stormwater and interflow, the total annual discharge to the west is 2.85 acre-feet per year. In the post-developed condition, between surface stormwater and interflow, the total annual discharge to the west would be 1.44 acre-feet per year. And that number was assuming zero capture of any flow by the catch basin and stormwater pump. Therefore, even in the complete absence of the pump, post-development westward stormwater flow would only be half of what it currently is, even after accounting for interflow. *Testimony of Scott Kindred.*

51. Lucas Zirotti, Project Engineer for the Applicant, testified that he had assisted with the drainage calculations. Mr. Zirotti offered Exhibit 97, a summary of Earth Solutions NW, LLC's calculation that water would be detained behind the retaining wall at a rate of 0.5 gallons per minute during peak wet season. He also cited Exhibit 98 and Exhibit 99 as evidence of how the Applicant team had responded to the City's concerns during the design process. *Testimony of Lucas Zirotti.*
52. Trevor Price, Land Entitlement Consultant for the Applicant, cited Exhibit 76 as examples of retaining walls being built within setbacks. He cited other jurisdictions' regulations for retaining walls, which explicitly allowed (and regulated the height and other features of) retaining walls within setbacks. Mr. Price also argued that grade height could be changed as part of the plat process under the Mukilteo code. *Testimony of Trevor Price.*

Public Testimony

53. Erich Volkstorf testified that his home on 53rd Avenue West sits adjacent to a historic peat bog, which hosts a variety of birds and mammals. He argued that the proposed subdivision would not enhance the quality of life in the city or neighborhood. He argued that the City had inadequate information about the project's environmental impacts. He cited a Blueline report, dated May 2022, which he said misidentified the drainage basin for the subject property as the Snohomish River Basin.⁷ He acknowledged this misidentification was later corrected. He also argued that the proposal was not compliant with the municipal code grading standards in MMC 15.16.050, Table 1. Mr. Volkstorf claimed that the City and Applicant had erred in calculating the site's "average slope" because such an average would tend to obscure the presence of portions of the property where slopes were steeper. As he put it, the "average slope" between Seattle and Vantage is 3.4 percent, never mind the existence of an entire mountain range between the two. He also argued that a 20-foot retaining wall with thousands of cubic yards of backfill were not necessary. He also argued that removing 75 percent of the vegetation would have adverse effects, which the City and Applicant had never addressed, especially in the areas of passive water storage and wind buffering. He argued that the proposed clearing and grading was not consistent with the purpose of the clearing and grading code set forth in MMC 15.16.010. He also argued that the City was leaving it to the property owners to the west to defend their own properties in the event of a stormwater overflow event. He also cited the Applicant's alleged past violations of the municipal code that he claimed had never been fully addressed by the City. He doubted that the City had the code enforcement capacity or will to supervise the Applicant's current project.

Testimony of Erich Volkstorf.

54. Marilyn Strand testified about the impact of some 10,000 cubic yards of fill being trucked to the subject property. She estimated there would be 2,000 dump truck trips to transport the quantity of fill she believed would be imported. She was concerned that such a large number of heavily laden trucks would degrade the asphalt. Ms. Strand argued that such a large volume of fill was unnecessary for the development of the subject property. She suggested that the trucks, if they must come, should use 92nd Street instead of 53rd.

Ms. Strand doubted that the City had the expertise to oversee the project, neither during the permit application phase nor during the implementation phase. She also doubted whether the future homeowners would have the expertise needed to supervise the proposed stormwater system. She did not relish the idea of the future HOA and the existing neighbors battling one another, potentially in court, over stormwater management responsibilities. *Testimony of Marilyn Strand.*

55. Kenneth Willett testified that he understood, based on the preceding witnesses' testimony, that the regrade would allow more stormwater to flow eastward. He questioned what would happen to property owners east of the subject property, on the far

⁷ He did not cite an exhibit number.

side of 53rd Avenue, as a result. He worried the eastward properties would suffer additional flooding. *Testimony of Kenneth Willett.*

56. Peter Brant-Zawadzki testified that his property, to the west of the subject property, already experiences flooding. Drainage in the neighborhood is inadequate, such that his property develops ponding in its front yard and flooding within the crawlspace of his house. He testified that previous efforts to control stormwater in the neighborhood had not worked as well as their designers had hoped. He anticipated that the large retaining wall adjacent to his backyard, and the associated stormwater pump, might also fail to function as well as the proponents were claiming they would. *Testimony of Peter Brant-Zawadzki.*
57. David Tyler, Appellant Representative, testified that he is a city planner with 28 years of professional experience, mostly in the City of Everett. He testified with the aid of a PowerPoint presentation, Exhibit 101, which he closely following in the course of his testimony. He also cited his comment in Exhibit 33, which he described as a detailed analysis of the environmental impacts of this project and the project's non-compliance with the municipal code.

Mr. Tyler pointed out that the development proposed here could last 100 or 200 years, so long-term thinking about the project was necessary. He argued that the project had a severe, fundamental flaw in its scheme to pump stormwater uphill. He argued the pump was inherently risky and should be an option of last resort, not a permanent solution to removing stormwater from the site. He stated that in over 25 years of development review, he had never seen a single project approved that incorporated a stormwater pump. This approach, he argued, should never be allowed in a residential neighborhood. He pointed out that the system relied on electrical pumps with no backup in the event of a power failure. He argued that the system failed to direct water away from adjacent properties in the event the pumps failed. He disputed any implication by the City that the flooding of adjacent properties was a private dispute. He argued that the City should, instead, require the Applicant to obtain an easement to convey stormwater westward using an unpowered, gravity-based conveyance. (He did not, however, volunteer to grant any such easement across his own property, which lies westward of the subject property.)

Mr. Tyler argued that maintenance of the stormwater system would be difficult or impossible, because the retaining wall itself impeded pedestrian access. He argued that it was unrealistic to expect a landscaper or other maintenance crewmember to walk some 400 linear feet to handle landscaping or maintenance issued along the retaining wall, hand-carrying any tools or supplied they needed. He also argued that the area between the two tiers of the retaining wall would be difficult to maintain, absent a ladder. In the absence of maintenance, Mr. Tyler expected landscaping to fail and stormwater features to potentially fail. He did not think the City could serve as an adequate substitute for

maintenance duties, because the City would have difficulty accessing or seeing the area below the retaining wall. He did not think the HOA members were likely to understand the need for property maintenance, or be able or willing to implement it.

Mr. Tyler argued that the project should not rely on a massive retaining wall with fill, directly abutting neighboring properties. He also argued that the City staff who had originally been reviewing the project had quit, leaving the review to new staff who were unfamiliar with the project and unfamiliar with their own municipal regulations.

Mr. Tyler argued that retaining walls are structures, and structures are prohibited within setbacks. He also argued that the municipal code appears to set no height limit on retaining walls, which he argued was evidence that they are not allowed at all—otherwise, a 40- or 50-foot wall could be built within a setback, a result that he appeared to believe was absurd and that, therefore, was evidence that the code should not be interpreted to allow retaining walls at all within setbacks. He argued that an eight-foot fence would be prohibited within a setback, so a 20-foot retaining wall should even more obviously be prohibited.

Mr. Tyler argued that the proposed grading would cause the buildings to exceed the maximum allowable height, because the grading alone would add up to 20 feet in height, and then a 30-foot house would be added on top.

Mr. Tyler argued that the design of the proposed subdivision, with its abrupt drop-off to the west and its 500 linear foot retaining wall, was not compatible with surrounding development, especially given that the drop-off was so close to the property line.

Mr. Tyler demonstrated that some portions of the subject property have slopes that are over 25 percent. He argued that the City's site-wide slope averaging approach, which he claimed yielded a site-wide slope of around 4 percent, was not a realistic description of the slopes that were actually present. (Slope has implications for the amount of vegetation required to be retained under the clearing and grading code.) Moreover, even if the entire property were a 15 percent slope or less (which would require 25 percent native vegetation to be retained), the Applicant was not retaining 25 percent native vegetation. Mr. Tyler estimated the quantity of existing native vegetation in a table he had produced on page 20 of Exhibit 101. Using the numbers in this table, some of which he had pulled from the record and others of which represented his own estimates, Mr. Tyler concluded that the Applicant was preserving only 9 percent of existing native vegetation, far below the minimum standard of 25 percent even if the entire subject property had a slope average under 15 percent.

Mr. Tyler pointed out that the Applicant had never submitted a shade study, nor had the City ever requested one. He presented his own rough estimate of shade (which he

acknowledged was not a formal shade study) on pages 29–34 of Exhibit 101. Based on his estimates of shade (for which he did not identify a time of year or time of day, but for which he used a consistent 40-degree angle of sunlight), he testified that much more shade would reach his property within the proposed subdivision than without, and especially with the proposed retaining wall than without. There would also be privacy impacts from the subdivision houses elevated atop their retaining wall, staring into his backyard and his house.

Mr. Tyler argued that other plat designs, more sensitive to the surrounding neighborhood, were feasible. He argued that this design was overly reliant on engineering. *Testimony of David Tyler.*

58. Ben Lee, Landau Associates, was the civil engineer who prepared Exhibit 47. He testified as an expert witness on behalf of the Appellants.⁸ Mr. Lee testified that, in his Exhibit 47 report, he had wanted to express his belief that the proposed retaining wall pump and conveyance system is unclear. He had documented, in his report, what seemed to him to be some deficiencies in the assumptions used in the initial stormwater modeling by Mr. Kindred. He believed, at that time, that Mr. Kindred had used the wrong soil type for part of his modeling and had failed to account for interflow—stormwater that infiltrated the top layer of soil, but then could not infiltrate the underlying layer of glacial till. Mr. Lee testified that the Applicant’s proposal to grade most of the site would not affect the underlying glacial till. Mr. Lee did not have specific stormwater numbers of his own; he simply believed Mr. Kindred’s initial numbers tended to understate the volume of stormwater likely to arrive at the catch basin and pump.

Mr. Lee testified that, as a result of the Applicant’s initial unrealistic assumptions about stormwater volume, it was possible that the pump (or pumps) would have to handle more than the estimated 8.95 gallons per minute. He thought the true flow rate might be higher, although, again, he acknowledged that he did not know what the true number should be. He could not say whether the flow rate would exceed a pump’s capacity of 24 gallons per minute (let alone the second pump’s capacity, which would also be 24 gallons per minute), but he thought it was a possibility that should have been examined.

Mr. Lee testified that he was “encouraged” by Mr. Kindred’s response to Mr. Lee’s Exhibit 47, which appeared in Mr. Kindred’s Exhibit 75. Mr. Lee testified that the Exhibit 75 modeling did include not only surface flows but also interflows, and used a more realistic outwash soil type, thereby addressing Mr. Lee’s concerns about unrealistic modeling assumptions. He said, however, that Mr. Kindred’s Exhibit 75 only showed annual flows, not peak flows. Mr. Lee believed that the inclusion of an estimate of peak flows would have addressed Mr. Lee’s concerns about system capacity.

⁸ Because of a scheduling conflict, Mr. Lee testified during the public testimony portion of the hearing, not the SEPA appeal portion.

Mr. Lee's other major area of concern was the fundamental concept of using a pump in the first place. He agreed with Mr. Tyler that a pump was unnecessarily complex. He believed the stormwater flows should be conveyed west via gravity, without a pump, by means of an easement. If an easement were rejected by the westerly property owners, however, then a pump would be the next-best solution. *Testimony of Ben Lee.*

59. Sylvia Kawabata testified with the aid of a PowerPoint presentation, Exhibit 100. Ms. Kawabata argued that the municipal code requires a slope report, and the Applicant's slope report was deficient. She argued that the code requires a soils report and a hydrological report. The Applicant's slope report in Exhibit 5 was, according to Ms. Kawabata, based on cuts and fills of five to 10 feet, when in reality, there would be much higher fill in some places, especially in the southwest corner. She claimed the Cobalt report, Exhibit 53, made the same mistake. Those reports, she argued, served as the foundation for the Applicant's later studies, including those by Kindred related to stormwater. She argued that all the reports were flawed because they were all based on this initial, erroneous estimate of the height of the fill. Ms. Kawabata argued that this was grounds both to deny the plat application and reverse the SEPA DNS.

Ms. Kawabata argued that the Applicant had unfairly and unlawfully been given many months to respond to the City's correction notices, when it should only have been granted 90 days to respond, followed by a maximum of two 90-day extensions. Ms. Kawabata argued that MMC 17.13.060 required the Planning Director to deem the application lapsed, not simply keep giving the Applicant more time. Ms. Kawabata contrasted the Director's favorable treatment of the Applicant with his unfavorable treatment of the public, who, she said, were given only a 14-day comment period with no extension, not even for Thanksgiving.

Ms. Kawabata argued that some slopes on the property are up to 35 percent in grade. She argued that the City should not have measured the grade from the southwest corner to the northeast corner, because that approach would conceal the presence of portions of the site with steeper slopes. Ms. Kawabata mapped the areas of the property with significant trees against the areas with steeper-than-average slopes to argue that significant trees in those steeper-than-average areas, at least, should have been retained at a higher density than what the Applicant proposed. Ms. Kawabata argued that the City used a lot-by-lot approach to slope evaluation during the building permitting phase, so it should use a lot-by-lot approach to slope evaluation during the platting phase.

Ms. Kawabata did not think the City's proposed condition regarding pump maintenance was adequate. She thought any covenants, conditions, and restrictions (CCRs) related to maintenance should be made available for public review now, not drafted afterward and approved by the City attorney outside the public review process.

Ms. Kawabata argued that the French drains at the base of the retaining wall would fail to capture groundwater flows, because the drains were higher in elevation than the groundwater table.

Ms. Kawabata argued that the City had made it too difficult for the public to obtain documents about the project and had been too slow in responding to her Public Records Act requests. *Testimony of Sylvia Kawabata.*

60. Greg Chapdelaine testified that he believed the Applicant's plan to build a 20-foot retaining wall within feet of Mr. Chapdelaine's backdoor would cause the Applicant's proposed houses to exceed the height limit. He believed the houses would tower something on the order of 60 feet above his backyard. He believed the amount of engineering necessary to support the proposed subdivision was evidence of its incompatibility with its surroundings. He believed the proposed pump would be within one foot of his lot line, and he doubted its long-term mechanical reliability. He also doubted its ability to cope with anticipated stormwater flows. He argued that alternative and more compatible subdivision designs are available and should have been used here. He was concerned about the seismic risk posed by the thousands of cubic yards of fill, especially in light of a worst-case scenario: a record rainfall, saturated soils, pump failure, and a major earthquake, all occurring simultaneously. He pointed out that Mukilteo lies atop a seismic fault. He suggested that any future catastrophic failure of the retaining wall and stormwater system might implicate the City for approving those features. *Testimony of Greg Chapdelaine.*
61. Steve Schmalz testified that properties to the east of the subject property receive substantial flooding. Roads in the vicinity occasionally have to be closed due to flooding. Mr. Schmalz encouraged the Hearing Examiner to look more closely at stormwater issues. *Testimony of Steve Schmalz.*
62. Brendon-Jon Boyce testified that, according to his calculations, the Applicant was about to create 100 additional car trips per day, a figure Mr. Boyce had calculated using a rate of three car trips per house.⁹ He argued that this number of cars demanded mitigation measures, especially for pedestrians, but no mitigation was supplied. Mr. Boyce doubted that the proposed HOA would be able or willing to handle stormwater management issues. As mitigation against the possibility of HOA nonperformance, he suggested a \$1 million bond be a condition of approval.

Mr. Boyce testified that documents relevant to the project had not been posted to the City's website. He testified that the Applicant had cut trees on the property, and yet the

⁹ Mr. Boyce did not testify as to the number of houses he believed the Applicant was proposing as part of this subdivision application.

City had failed to take any enforcement action against the Applicant. He testified that a superior subdivision design was feasible at this site and should have been adopted, rather than the retaining wall with fill proposed by the Applicant. He believed the Applicant's main interest in the wall-and-fill scheme was to create scenic views. He calculated that the Applicant's fill proposed would result in some 500 trucks entering the property to deliver fill material. He argued that the Applicant was cutting down the last old growth trees in the neighborhood, which would adversely affect the character of the neighborhood. He predicted that the stormwater management system would ultimately fail. *Testimony of Brendon-Jon Boyce.*

City and Applicant Responses to Public Testimony

63. Andy Galuska testified that the project did not expire due to slow response times. Instead, the Applicant had responded to some of the City's questions and disputed the need to respond to others. The City insisted, at which point the Applicant did respond. Mr. Galuska did not see the back-and-forth debate as a failure by the Applicant to timely respond.

Mr. Galuska testified that the code's definition of structures was broad. Even things like telephone poles and meter boxes could fall under the definition of structure. Since things like telephone poles and meter boxes are, as a practical matter, ubiquitous within setbacks, the Hearing Examiner should not interpret the definition of structure too broadly. Mr. Galuska also cited MM 17.20.080, which contemplates and allows *fences* within setbacks and sets regulations for fences within setbacks that sit atop rockeries and retaining walls—evidence, in Mr. Galuska's mind, that rockeries and retaining walls must also be allowed within setbacks. He also found multiple previous examples in which the City had approved retaining walls within setbacks, citing Exhibits 60–65. He testified that these approved retaining walls had not included variances, to the best of his ability to research.

Mr. Galuska could not identify any regulation in the code related to the height of retaining walls. He acknowledged that the subdivision approval criteria might be used to limit the height of retaining walls on a case-by-case basis, but he did not see any need to limit the 20-foot wall proposed here. He testified that he had seen other residential developments with taller retaining walls. He argued that breaking the wall into two tiers, with landscaping between the tiers, would mitigate the visual impact. In addition, it was set back some 10 feet from the property line, further reducing its visual impact.

Mr. Galuska acknowledged that there had been clearing and grading by the Applicant, but he said it had occurred on an unrelated short plat adjacent to the subject property, not on the subject property.

Mr. Galuska testified that, for purposes of vegetation retention under Table 1, MMC 15.16.050, it was better to use a site-wide approach than a slope-by-slope approach. A slope-by-slope approach was the approach used for vegetation retention on critical area steep slopes, where the goal was slope stabilization to prevent erosion or landslides. For the more general vegetation retention requirement in MMC 15.16.050, the point was a more general retention of vegetation to slow the movement of water on a site-wide basis. He testified that the City had, for years, used a slope-by-slope approach for vegetation retention for critical areas but used a site-wide approach for vegetation retention under MMC 15.16.050.

Mr. Galuska testified that the stormwater manual did allow pumps as a permanent component of a stormwater management system, and that other cities Mr. Galuska had worked in had approved stormwater pumps. He acknowledged that a pump would have to be maintained over a period of many decades, but he pointed out that all forms of infrastructure and utilities require maintenance over decades, not only pumps. He also testified that the City inspected private stormwater facilities once a year and would do so here as a normal part of the City's procedures.

Mr. Galuska believed that much of the site had been cleared, and much of the vegetation currently growing onsite was non-native. For this reason, he disagreed with the testimony of David Tyler that only 9 percent of native vegetation was being retained. In reality, very little of the site, if any, had any native vegetation, at least insofar as Mr. Galuska could observe during his own site visit. In light of the paucity of existing native vegetation, the Applicant's proposal was sufficient to guarantee 25 percent retention—all that was required under MMC 15.16.050. Mr. Galuska suggested that, even if the Applicant had failed to preserve 25 percent of existing native vegetation, it was something that could be fixed via approval conditioning.

Mr. Galuska testified that he had considered the impacts of shading on neighboring properties. There is already a hill on the west side of the property, and the height of that hill is not changing. The hill is being "pushed" westward by the wall-and-fill scheme, but its height is not changing. The houses atop the hill will be setback from its edge, and the houses would be limited in height to 30 feet. Some existing trees on the hill would also be removed. All in all, Mr. Galuska did not believe the situation warranted a formal shade study. *Testimony of Andy Galuska.*

64. Matthew Geiger testified that the post-detention stormwater would be treated and then directed to an existing municipal stormwater conveyance. Eastward flows from the subject property would not simply be directed eastward in the direction of neighboring properties. He believed water quality would be improved as a result of the project, due to the treatment of stormwater. Mr. Geiger also cited the stormwater manual, 2014 edition,

BMP C 205, which he testified allows stormwater pumps.¹⁰ *Testimony of Matthew Geiger.*

65. Brian Wirt testified that the clearing and grading matrix, Table 1 of MMC 15.16.050, spoke of the “grade of site or slope.” Thus, it was appropriate to use a site-wide approach to slope averaging, not a slope-by-slope approach. In calculating the site’s average slope, he testified he had picked the lowest point on the property and the highest point to use for the rise, and then he had picked the two most distant points on the property to use for the run. He had not used the horizontal distance between the lowest and highest points for the run. His reasoning was that he had to find the slope average for the entire site, not simply the slope from the lowest to the highest point. Mr. Wirt added that, of the two oldest, largest trees onsite, one was proposed for removal and one for retention.
Testimony of Brian Wirt.
66. Thomas Colleran testified that he had just redone the site-wide average slope calculation, using the horizontal distance between the highest and lowest points as the run. The result was a slope of 12.8 percent, higher than what the Applicant and City had calculated using Mr. Wirt’s earlier alternative, but still lower than the 15 percent threshold that would trigger greater vegetation retention requirements under MMC 15.16.050, Table 1. Mr. Colleran testified that forgoing the retaining wall and building the houses into the slope, perhaps through the use of daylight basements, would result in more stormwater leaving the property to the west than under the wall-and-fill proposal with the pump.

Mr. Colleran denied that the City code would allow unregulated retaining walls, unlimited in height. He cited MMC 15.16.140 for the proposition that there are height limits on retaining walls, in this case 40 feet. That section provides for a required setback of the toe of the fill slope of one-half the height of the fill slope, with a maximum setback of 20 feet. Since the setback must always be half the height of the fill slope, this implies a maximum fill slope height of 40 feet (for which there would need to be a 20-foot setback). Here, the proposed 20-foot fill slope with 10-foot setback was only half the contemplated allowable height. That same section goes on to discuss “provision for retaining or slough walls,” which are included under “special precautions [that] shall be incorporated in the work as the permit authority deems necessary to protect the adjoining property from damage.” Mr. Colleran also pointed out that his proposal was, technically, two walls, the lower of which was only eight feet high and the higher of which was 12 feet high.

Mr. Colleran testified that the pump would seldom actually run, perhaps even never. It would only be necessary, if at all, during heavy stormwater events.

¹⁰ The Hearing Examiner takes official notice that the version of the stormwater manual in effect in 2014 includes BMP C205, which says, in relevant part, “An adequate outlet for the [interceptor] drainage system must be available either by gravity or by pumping.”

Mr. Colleran testified that the total fill import would be 5,400 cubic yards, with 296 truckloads, not the 500 or 1,000 described in public testimony.

Mr. Colleran agreed to a potential condition that 25 percent of the site be planted or replanted with native vegetation. He said he believed that most of the site was vegetated in blackberry or other non-native vegetation. Mr. Colleran shortly returned to the stand to testify that, even under the assumption that the entire site was currently in native vegetation (which he said is not the case), the Applicant's current proposal, with no modification, would yield a 20 percent retention. He proposed a condition of approval that 20,000 square feet, or 20 percent of the entire site area, whichever is larger, be retained or planted in native growth—regardless of the quantum of native growth currently existing onsite. *Testimony of Thomas Colleran.*

67. Scott Kindred testified that he had site visit pictures, Exhibit 105, which he hoped would show mostly non-native vegetation. Some of the photos showed obviously non-native plants such as lawn grass, while others showed obviously native plants such as sword ferns and western red cedar. Mr. Kindred, an engineer, was unable to testify knowledgeably about most of the plants in his photos.

Turning to stormwater, his actual area of expertise, Mr. Kindred testified that both surface and subsurface flow to the west would be reduced by 50 percent as a result of the proposal. He pointed out that Mr. Lee had never disputed that conclusion nor had anyone put forward any competing analysis. The actual reduction would likely be even more, given the proposed swale and vegetation. Mr. Kindred agreed that the stormwater system would not intercept any deep groundwater flow, but the subdivision would also not cause any new deep groundwater flow—only interflow, which would be intercepted. Unfortunately, the neighbors should not expect their flooding problems to go away as a result of the proposal, but that is because the subject property is not the source of the majority of the water that floods neighboring properties. Most of the flooding comes from the fact that this neighborhood is in a groundwater discharge area for an area much larger than the subject property. The Applicant's proposal will not alter groundwater flows.

Mr. Kindred agreed with Mr. Lee, of Landau Associates, that it was appropriate to model the imported soils as Type A/B outwash, which Mr. Kindred had done in his Exhibit 75, responding to the Landau Exhibit 47. Mr. Kindred explained that he did, in his modeling, account for groundwater recharge and flow (and assumed groundwater flowed west), as well as surface flow and interflow. Mr. Kindred did assume, however, that all groundwater would pass beneath the sump and pump, simply based on the elevation of the latter. He had not been able to detect groundwater onsite, which was further evidence, in his mind, that any groundwater would simply flow under the system. In a

spirit of conservatism, however, he had added groundwater to the sump and pump capture in his modeling in Exhibit 75 and had determined that, even with all groundwater flow entering the pump, the maximum rate would still be only 13.4 gallons per minute. This is higher than the 8.9 gallons per minute without groundwater capture, but still well below the capacity of even one of the pumps. *Testimony of Scott Kindred.*

68. Brett Pudists testified that properties to the east would receive no stormwater flows as a result of the project. He cited the civil plans in Exhibit 6 to show that all stormwater would go into the detention vault, then to treatment, then to an existing City conveyance. None of it would be moved eastward.

Mr. Pudists cited the municipal code section 2.3.3¹¹ for the proposition that the engineering permit would require covenants and a maintenance plan to be submitted as part of engineering permit approval. Mr. Pudists testified that he had worked on a number of stormwater pump systems in the past, including in Kirkland. He added that septic systems often have pumps, with visual and audio alarms, implying that there is nothing difficult or unusual about the long-term maintenance of pumps. *Testimony of Brett Pudists.*

69. Trevor Price reminded the Hearing Examiner that Mr. Colleran had found a code section regulating retaining walls and argued that Mukilteo would be a strange outlier if the City did not allow retaining walls. *Testimony of Trevor Price.*

SEPA Appeal Testimony

70. The Appellants called Mr. Galuska as a hostile witness.¹² Mr. Galuska testified that he was the SEPA responsible official, so the threshold determination was his to make, not the Hearing Examiner's. He believed the documents submitted as part of the SEPA record would serve to inform the Hearing Examiner of the proposal's environmental impacts. Mr. Galuska acknowledged that his DNS, (Exhibit 2) cited WAC 197-11-350, the WAC section on "mitigated" DNS (MDNS), and that his DNS stated that "the proposal has been clarified and changed by the applicant, and conditioned to include necessary mitigation measures to avoid, minimize or compensate for probable significant impacts." Mr. Galuska acknowledged that it is WAC 197-11-340 that describes regulations for DNS, whereas WAC 197-11-350 describes regulations for MDNS—which the Exhibit 2 DNS is not.

The Appellants asked Mr. Galuska why his DNS did not include the language from WAC 197-11-158(2)(d): "The lead agency has determined that the requirements for

¹¹ The Hearing Examiner can find no such section and cannot determine what section Mr. Pudists may have been referring to.

¹² The Applicant and City deferred cross-examination of Mr. Galuska, since they called him as a direct witness in response.

environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158. Our agency will not require any additional mitigation measures under SEPA.” Mr. Galuska replied that the proposal complies with the City’s regulations, and he had determined that no other mitigation beyond that would be required.

The Appellants asked Mr. Galuska where he had documented his consideration of the various potential adverse environmental impacts of this proposal, and why he had not prepared a memorandum describing his analysis. Mr. Galuska said it was not the City’s practice to prepare such a memo and that he had not written down any kind of impact-by-impact analysis, although he claimed he and the City staff had, in fact, considered each impact. Mr. Galuska relied on the contents of the record as a whole to show the kind of impacts he and the City staff had considered.

Citing WAC 197-11-158(2)(b), the Appellants asked Mr. Galuska whether the City’s “comprehensive plan, subarea plan, or applicable development regulations” had identified the impacts of the proposed subdivision and adequately mitigated them, including the impacts specific to the retaining wall. Mr. Galuska said they had been identified and mitigated through the code, even though he could not cite any code provision regulating retaining walls. Having considered the specific impacts of this proposed retaining wall in light of the project file, however, Mr. Galuska did not believe the impacts of the retaining wall were in any way unusual for residential development, and thus, there was no need for any kind of mitigation measures through an MDNS.

The Appellants questioned Mr. Galuska as to whether the SEPA checklist, Exhibit 3, fully disclosed all the environmental impacts of the proposal. Mr. Galuska acknowledged that the checklist did not include all details about the retaining wall, such as its height and length, but he said the checklist was only a starting point. Other documents in the project file, such as the civil plans, contained information about the retaining wall’s height and length. In a similar vein, Mr. Galuska acknowledged that the checklist did not contain information about the Applicant’s plans for native vegetation retention or removal, but again, he said that information was available elsewhere in the record prior to the issuance of his DNS. The same was the case for aesthetics: barebones answers in the SEPA checklist, detailed answers in the rest of the record.

Upon questioning by the Appellants, Mr. Galuska was not able to identify another subdivision project with a 20-foot-high retaining wall. He believed, however, that the Mukilteo Heights project had a retaining wall that was even higher. He acknowledged that a more common height for retaining walls was around four, five, or six feet.

On the subject of shade, Mr. Galuska repeated his earlier testimony that he had not required a formal shade analysis, but did not believe shade would be a significant issue. He testified that he had considered shade, but the total height of the subject property would actually be slightly reduced as a result of the wall-and-fill plan, and some trees on the property would be removed, which might reduce shading effect. With regards to aesthetic effects, Mr. Galuska believed the setback of 10 feet, and the design choice to use pre-engineered stacking block as opposed to rockery, would reduce the aesthetic impact such that he did not see a significant, adverse impact.

Mr. Galuska acknowledged that, in the event of a pump failure occurring simultaneously with a 100-year storm, the proposed stormwater system would tend to concentrate stormwater at the sump location, from which it might be expected to discharge in a westward direction. Mr. Galuska was not able to state the volume. He was, as he explained, not a stormwater engineer. But, because the proposed stormwater system was compliant with the manual (and had been reviewed by the City's stormwater staff with the manual in mind), Mr. Galuska did not believe that any such hypothetical scenario would be likely to cause a significant, adverse impact. *Testimony of Andy Galuska.*

71. The Appellants called David Tyler. Mr. Tyler relied on a different PowerPoint this time, Exhibit 51, his description of the SEPA review process. He testified as to his opinion that a pre-application meeting is a very important part of the SEPA review process. He testified that he could find nowhere in the record any documentation by the City of a pre-application meeting with the Applicant. The only evidence he could find that the City had considered specific impacts, discussed mitigation, analyzed alternative designs, or evaluated public impact was in the two-page DNS itself—which did not describe any of those considerations in any detail. Mr. Tyler acknowledged that the City had numerous documents in its possession prior to its issuance of the DNS, but he testified the City had not produced any document of its own showing its own analysis of the record.

Upon questioning by the Hearing Examiner, Mr. Tyler testified that the City's decision not to produce an impacts analysis memorandum "could be technically allowed." But he said it was not a good way to respond to public comments; nor did the posting of the documents that the City had considered substitute for the lack of a City analysis memo. He said that, based on his 28 years of experience, a City would normally produce a SEPA analysis memo summarizing its conclusions about impacts, mitigation, alternatives, and public comment, especially when there had been so much public comment. Mr. Tyler highlighted that the City has discretionary authority to condition, mitigate, and otherwise limit a project, and that he had reminded the City of its power during the SEPA review process, including in Exhibit 34.

On cross-examination, Mr. Tyler testified that he did not know whether the City of Everett, might have ever issued a DNS missing the language in WAC 197-11-158(2)(d). *Testimony of David Tyler.*

72. The Applicant called Andy Galuska as a direct witness. He testified that, in his experience as a planner across multiple jurisdictions in Washington State, he had never relied solely on a SEPA checklist to issue a DNS. He had always relied on the other documents in the project file. He believed SEPA allowed him to rely on materials other than just the checklist. He was not aware of any requirement to put together any kind of analysis matrix justifying his issuance of a DNS. The only requirement was to be aware of and consider each project's impacts, not necessarily to document awareness and consideration. Mr. Galuska testified that the language of WAC 197-11-158(2)(d) did not appear in every DNS. In fact, he had relied on a DNS template published by the Washington State Department of Ecology, Exhibit 107, and that template did not include the language from the WAC.

Mr. Galuska testified that his understanding of WAC 197-11-350 was that, if a project was clarified, changed, or conditioned, then a DNS should be issued.

Mr. Galuska testified that the pump system was not part of the Applicant's original proposal. It had been added, during the course of review, to address stormwater concerns from neighboring property owners. The pump was the outcome of long discussions between the Applicant and the City reviewers.

Mr. Galuska testified that he had been in communication with Mr. Tyler multiple times over a long period, including at least one face-to-face meeting, to learn about and address Mr. Tyler's concerns about the proposal. He also believed the City's engineering staff had met with Mr. Tyler. There had also been a large volume of email correspondence. He apologized if he had ever not responded to one of Mr. Tyler's emails, but he and the City staff had attempted to respond to as many emails from the public as possible, including Mr. Tyler. The communications with the public had been one of the sources of information for Mr. Galuska and the rest of the City staff during the City's evaluation of the proposal's environmental impacts. Public comments had also been forwarded to the Applicant for review and, potentially, for response.

On cross-examination by the Appellants, Mr. Galuska repeated that there is no single document in which he listed all the project's impacts and his evaluation of the significance thereof. He was not aware of any requirement to identify impacts to the Hearing Examiner on an impact-by-impact basis. *Testimony of Andy Galuska.*

73. The Applicant called Brett Pudists. Mr. Pudists noted that the stormwater pump will have a natural-gas generator to power it in the event of an electric grid failure. He

suggested the new idea of putting in a dispersion trench or a level spreader. That way, if the power failed, and the generator failed, and the first pump failed, and the second pump failed, overflowing stormwater (if any) would be dispersed across an area, rather than as a point discharge.¹³ *Testimony of Brett Pudists.*

Closing Arguments

74. Attorney Pat Schneider gave the Appellants' closing arguments. Mr. Schneider argued that the City had failed to demonstrate prima facie compliance with SEPA's procedural requirements. He argued that the City had the burden to demonstrate prima facie compliance. The Appellants' job was to demonstrate that the City had failed to meet its burden.

Mr. Schneider argued that the City had failed to comply with RCW 43.21C.240 and WAC 197-11-158. He argued these two provisions require the City to identify adverse impacts, which the City had not done. He said the City had left the Hearing Examiner to go through the record and figure out what impacts the responsible official believed might be adverse. Mr. Schneider argued that the City was required, under SEPA, to identify to the Hearing Examiner not only significant adverse impacts but all adverse impacts, which he argued it had not done. He specifically cited RCW 43.21C.240(4) for this requirement. Mr. Schneider clarified, in response to a question by the Hearing Examiner, that he believed RCW 43.21C.240 and WAC 197-11-158 required the City to identify adverse impacts in writing. If the City did not identify adverse impacts in writing, then it failed to inform the Hearing Examiner of those impacts, which, in turn, deprived the Hearing Examiner of the opportunity to make an informed decision about the proposal.

Mr. Schneider did not disagree with the Hearing Examiner's observation that the vast majority of DNS, in the vast majority of jurisdictions, do not include an explicit identification, in writing, of non-significant, adverse impacts. But Mr. Schneider argued that even a widespread wrongful practice was still wrong. Particularly here, where the City had denied any need to mitigate any impact, he believed it was important for the City to identify in writing to the Hearing Examiner each of the impacts it had considered. He cited Mr. Galuska's Ecology-issued template DNS, Exhibit 107, which left space on the template for "findings and conclusions" to support the DNS—something Mr. Galuska had not supplied in his actual DNS, Exhibit 2. Mr. Schneider further argued that Mr. Galuska had not even complied with the requirement to identify impacts in his own mind, much less identify the impacts to the Hearing Examiner.

If the DNS were to be reversed, the plat could not be approved. It could either be denied outright or else the Hearing Examiner could retain jurisdiction and wait for a new threshold determination. Mr. Schneider argued that a subdivision requires an affirmative finding that

¹³ After conversation among the parties, the Applicant and City both rejected the idea of a dispersion trench. The Hearing Examiner will omit further discussion of it in this decision.

the proposal will be in the public interest, and that appropriate provisions had been made for public health, safety, and welfare. He pointed out that the staff report, Exhibit 1, does not even explicitly say these things, nor were they true. The retaining wall alone was reason to find that the public interest would not be served but rather was a purely private interest.

Mr. Schneider also argued that the subdivision proposal violates the code. Under the code definition of setback, “‘Setback’ or ‘yard requirements’, means the required open space distance that buildings, uses *or structures* must be removed from their lot lines,” and under the code definition of structure, “‘Structure’ means a *combination of materials constructed or erected on the ground* or water, or attached to something having a location on the ground or water.” MMC 17.08.020 (emphasis added). Thus, he argued, a retaining wall is a structure, and therefore, it is prohibited within a setback.

Mr. Schneider dismissed the City and Applicant’s reliance on MMC 17.20.080.A.2.d, which he described as height regulations for fences, not any kind of acknowledgment that retaining walls are allowed inside setbacks in the first place. The fence height requirements in MMC 17.20.080.A.2.d would apply to a fence atop a retaining wall *outside* a setback, but did not, by their own terms, authorize the placement of a retaining wall *inside* a setback.

The Hearing Examiner asked whether Mr. Schneider’s definition of “structure” would prohibit all sorts of other built objects within a setback, including, for example, a driveway, which must, by definition, cross a setback. Mr. Schneider replied that a well-written code would contain provisions allowing such things, and at any rate, the code must be applied as it is written to the case at hand, which involved retaining walls within setbacks.

Mr. Schneider argued that the Hearing Examiner was not required to defer to the City staff’s interpretation of its own code, even if the interpretation was one of longstanding, such as the interpretation allowing retaining walls within setbacks.

Mr. Schneider argued that the vegetation retention requirements in MMC 15.16.050, Table 1 were requirements to *retain a certain coverage of existing* native vegetation, not to *replant a certain coverage in new* native vegetation. Thus, the Applicant was required to have a competent professional examine the lot to determine its present coverage of native vegetation. Otherwise, the Applicant could not demonstrate compliance with Table 1, regardless of any replanting plan. Mr. Schneider also read Table 1 and MMC 17.08.020’s definition of “average slope of property” to require measuring the rise and run from lowest point to highest point. He acknowledged that Mr. Colleran had ultimately done so, and did not dispute that the number was somewhere around 13 percent. But he argued that the correct approach was slope-by-slope, not just site-wide average. There was no dispute from any witness that the property had slopes greater than 20 percent in some places and greater than 35 percent in some places. Vegetation retention in those places should be greater.

Mr. Schneider argued that, in allowing the stormwater pump, the City would be setting up his clients and other downstream neighbors to receive a concentrated discharge of stormwater in the event of pump failure. He argued that a gravity-based conveyance would be safer, and that, if the neighbors would not grant an easement for such a conveyance, then the system (and any development dependent on the system) simply could not be built.
Argument of Pat Schneider.

75. Attorney Duana Koloušková gave the Applicant's closing argument. She argued that the burden was on the Appellant to show, affirmatively and conclusively, that a mistake in the City's environmental review had been made. The SEPA determination was entitled to substantial weight upon review by the Hearing Examiner. Ms. Koloušková argued that the record showed that the City had carefully considered every impact in advance of the issuance of its DNS. The post-DNS comments, including the Landau report arguing that the initial stormwater assumptions were unreasonable, were an attempt to poke holes in the DNS, but those attempts had failed. The post-DNS Kindred response, adopting Landau's assumptions, had run the modeling again and still found a feasible stormwater system—proof that the City had gotten it right the first time when it issued its DNS.

Ms. Koloušková argued that the language in WAC 197-11-158(2)(d) did not appear in the template DNS Mr. Galuska had followed, nor was it required to appear in Mr. Galuska's DNS. Ms. Koloušková argued that, under *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001), the courts do not require the language in WAC 197-11-158(2)(d) to appear in every DNS. She also argued that the DNS's citation to WAC 197-11-350 (the MDNS section) was not necessarily wrong. WAC 197-11-350(3), she argued, allowed a proposal to be changed, and then a DNS to be issued. Here, the Applicant had changed its proposal in response to City concerns and public concerns, including about stormwater. Thus, it was appropriate to issue a DNS.

Ms. Koloušková argued that, under WAC 197-11-158(2)(b), there was not a requirement to identify impacts in writing. She said the code did not require the identification to be made in such explicit terms but merely required that the City identify the impacts in the course of its review. She also pointed out that the record contains evidence of back-and-forth discussions between the City staff, the Applicant, and the public, which she said showed the City did identify and evaluate impacts. Ms. Koloušková argued that WAC 197-11-335 directs the City to look at the SEPA checklist, *as well as* additional information, but that nothing anywhere in the rules required the City to summarize all that material in writing.

Ms. Koloušková agreed that, if the DNS were reversed, the subdivision could not be approved. She recommended the matter be remanded to the City for a new threshold determination.

Ms. Koloušková cited *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) for the proposition that an agency’s past interpretation of an ambiguous statute (or, here, ordinance) entitles the agency to deference so long as the interpretation has been a matter of established enforcement practice. Here, she argued, the City’s established practice was to allow retaining walls in setbacks, both on individual lots and for subdivisions, and so the Hearing Examiner should defer to that interpretation.

Ms. Koloušková argued that, under MMC 15.16.050, Table 1, replanting would be as good a substitute as retaining native vegetation, especially here on a lot where the vegetation was, at best, degraded.

Ms. Koloušková denied that the purpose of the regrading was to allow views. The purpose was stormwater control. Even though the flooding of neighboring properties was not due solely, or even in large part, to stormwater flowing off the subject property, still the evidence showed that the project would result in a substantial reduction in stormwater runoff. The very worst-case scenario, in the event of multiple pump and generator failures during a 100-year storm, would be a flow of 13.4 gallons per minute flowing off the property—still less than what flows off today. The stormwater design complies with the manual. Speculation about a worst-case scenario concentrating stormwater runoff onto one property (as opposed to dispersing it across multiple properties) was not a required part of SEPA review. The stormwater manual was designed for worst-case scenarios. As for speculation that the HOA might not maintain the stormwater system, including the pump, Ms. Koloušková argued that it fell into the same realm of speculation as “what if my neighbor is a bad neighbor,” which was not the kind of analysis required under SEPA. She offered to work on revised language for condition of approval no. 22 to ensure that well-drafted CCRs for stormwater maintenance would be recorded once the project was in its final stages—not that even that measure was a requirement of the stormwater manual or SEPA. *Argument of Duana Koloušková.*

76. Attorney Pat Schneider gave the reply argument for the Appellants. He argued that *Sleasman v. Lacey*, cited above, required that the courts defer to a city’s interpretation, not that a hearing examiner defer to city staff’s interpretation. In any event, *Sleasman* deference applies only where there is ambiguity in the code, which Mr. Schneider argued is not the case with regard to the definitions of setback and structure in MMC 17.08.020.

Mr. Schneider argued that the burden was on the City to demonstrate prima facie compliance with SEPA. The Appellants would only bear the burden of proof, and face the “substantial weight” hurdle, if the City could first show prima facie compliance, which he argued the City had not done.

Mr. Schneider argued that a “garden variety” DNS was required to be supported by findings and conclusions, as demonstrated in the template DNS. By contrast, a more

barebones DNS, one relying solely on code compliance instead of findings and conclusions, was subject to strict procedural requirements under WAC 197-11-158 and RCW 43.21C.240, which the City had not met here. He distinguished *Moss v. Bellingham* by arguing, without explanation, that the facts were very different. Mr. Schneider also disputed Ms. Koloušková's argument that the Applicant had changed the proposal, such that a DNS could be issued under WAC 197-11-350(2). WAC 197-11-350(2) would apply only if changes were made such that significant impacts would be mitigated to the point of becoming insignificant. Here, he argued, the City had determined (without evidence or explanation) that there would be no unmitigated impacts at all.

Mr. Schneider denied that the months-long process of consulting with experts and communicating with the public, including the SEPA Appellants themselves, was sufficient to demonstrate prima facie SEPA compliance, because the purpose of SEPA was to create documents that would accompany the proposal through the decision-making process to aid the decision-maker, meaning the Hearing Examiner, an apparent reference to WAC 197-11-655(2), which he had cited in his prehearing brief. Here, he argued, there was no document to inform the Hearing Examiner what the adverse impacts were. The Hearing Examiner was left to divine the impacts himself, but that is not what SEPA requires.

Mr. Schneider argued that the City should not permit the Applicant to discharge stormwater onto its neighbors' property, which he said would occur if the proposed stormwater system were to fail. He did not see it in the public interest to create a complicated, failure-prone stormwater system that, he said, would concentrate stormwater discharge in the event of a failure. *Argument of Pat Schneider.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction over administrative appeals of a SEPA threshold determination of nonsignificance. *MMC 17.13.070, Table 6; MMC 17.84.170*. The administrative appeal of a SEPA threshold determination of nonsignificance must be consolidated with the public hearing on the underlying application (here, the subdivision application) into a single, simultaneous hearing. *MMC 17.13.090.A; MMC 17.84.170.C and .D; WAC 197-11-680(3)(a)(v)*.

Standard of Review

SEPA requires an agency considering a proposal to make a "threshold determination" of whether the proposal might "significant affect the quality of the environment." *RCW 43.21C.030(2)(c); RCW 43.21C.033; WAC 197-11-310*. The agency must make its threshold determination based on information "reasonably sufficient to evaluate the environmental impacts of the proposal." *WAC 197-11-100(2); WAC 197-11-335*. A SEPA Checklist is an important source of

information for the agency's investigation into a proposal's impacts, but it is not the only possible source of information. *WAC 197-11-100(1)* ("An applicant *may* be required to complete the environmental checklist ... Additional information *may* be required at an applicant's expense, but not until after initial agency review of the checklist...") (emphasis added); *WAC 197-11-100(2)* ("...additional information required by an agency after its initial review of the checklist..."); *WAC 197-11-315(1)* ("Agencies shall use the environmental checklist ... *to assist* in making threshold determinations for proposals...") (emphasis added).

A City issuing a DNS has the burden to establish prima facie compliance with SEPA's procedural requirements, meaning "actual consideration of environmental factors." *Gardner v. Pierce Cty. Bd. of Commissioners*, 27 Wn. App. 241, 617 P.2d 743 (1980). On appeal of a threshold determination to the Hearing Examiner, assuming the City can show prima facie compliance, the Hearing Examiner shall uphold the threshold determination unless he determines that the threshold determination was "clearly erroneous." *Anderson v. Pierce Cty.*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). A DNS is clearly erroneous if the record leaves the Hearing Examiner with a firm and definite conviction that a mistake has been made. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 926, 319 P.3d 23 (2014). The Hearing Examiner must accord a DNS "substantial weight." *RCW 43.21C.090*.

Conclusions Based on Findings

- 1. The City has met its burden to establish prima facie compliance with SEPA's procedural requirements.** As noted above, SEPA requires "actual consideration" of environmental factors prior to issuance of a DNS. Here, there can be no doubt that the City considered environmental factors regarding the Harbor Grove subdivision. During the nearly two years between October 5, 2021, when the application was submitted, and August 30, 2023, when the DNS was issued, the City held multiple meetings with staff members and the Applicant, commissioned third-party review of the stormwater system, required the Applicant to submit additional documentation about various aspects project and demonstrate changes to its site plans, received dozens of public comments, met with the public, wrote to the public, and brought in the Department of Ecology. Issues raised, on multiple occasions, during this process included: stormwater, groundwater, views and aesthetics, privacy, shade, municipal code compliance, wildlife impacts, roads, traffic, schools, parks, open space, native vegetation, wetlands, streams, and many more. No party has identified a single element of the environment, as set forth in WAC 197-11-444, that was not brought to the City's attention in some fashion during the City's review process.

The City's review process was not merely some pro forma exercise. It resulted in genuine changes to the proposal, not the least of which was the inclusion of a stormwater pump on the western portion of the property, in an effort to respond to neighbors' concerns about stormwater. It is apparent to the Hearing Examiner that the City did

engage in “actual consideration” of the proposal’s environmental impacts, and therefore the prima facie burden is met.

The Hearing Examiner rejects the Appellants’ argument that meeting the prima facie burden—or any other requirement of SEPA—requires the City to produce a written memorandum summarizing the environmental impacts the City considered in advance of issuing the DNS. The Hearing Examiner does not perceive a requirement in WAC 197-11-030(2)(c) for the City to prepare such a memorandum. WAC 197-11-030(2)(c) requires agencies to “[p]repare environmental documents that are concise, clear, and to the point, and are supported by evidence that the necessary environmental analyses have been made.” Here, the environmental document is the DNS, and the DNS is supported by the evidence contained in the hundreds of pages of documents that were provided during the nearly two-year-long review process. There is not a requirement to produce a separate, summarizing memo.

The Hearing Examiner rejects the argument that WAC 197-11-655(2) requires a summarizing memo. That section requires that “[r]elevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions.” Here, the DNS and the large volume of documents supporting its issuance have accompanied the proposal to the subdivision hearing, where the Hearing Examiner used them to issue his decision on the subdivision (a separate, companion decision to this decision on the DNS). Again, there is no requirement for a supporting memorandum explaining to the Hearing Examiner how the evidence supports the DNS.

The Hearing Examiner rejects the argument that WAC 197-11-158 and RCW 43.21C.240 require a summarizing memo. Those sections require specific likely adverse impacts to be identified and require the SEPA responsible official to determine whether the impacts have been adequately addressed in the City’s development regulations by avoiding or otherwise mitigating the impacts. These sections require the SEPA responsible official to identify impacts and consider whether they have been mitigated; they do not require the SEPA responsible official to explain his or her reasoning to the Hearing Examiner. Again, the lengthy and well-documented review process satisfies the Hearing Examiner that the SEPA responsible official, Mr. Galuska, did identify the likely impacts of the proposal and did consider whether compliance with the City’s regulations would avoid or mitigate those impacts. Mr. Galuska was required to do this work, but he was not required to show this work to the Hearing Examiner—although, as will be discussed below, he did show his work in the course of the appeal.

There is a requirement, unrelated to SEPA, for City staff to produce a memorandum of recommendations regarding the subdivision proposal. *MMC 16.12.010.C.10*. That

memorandum is the staff report, Exhibit 1, and it contains information about the proposal and its impacts, drawing in large part from the same documents that the City relied on to produce the DNS. In the wake of a two-day hearing involving 19 witnesses (many of whom testified multiple times) and 110 exhibits (many of which were expert reports and expert responses to other expert reports), the Hearing Examiner does not conclude that he lacked any information he needed about the proposal or its impacts. If, for some unfathomable reason, the DNS had been the only document presented to the Hearing Examiner in his review of the subdivision application, the Hearing Examiner would have concluded that he lacked sufficient information about the project to reach an informed decision. But the DNS was accompanied by the hundreds of pages of evidence that supported the DNS, as well as additional information generated in response to the DNS appeal and prepared for the staff report. The Hearing Examiner was not uninformed about the subdivision's environmental impacts when he issued his decision on the subdivision. Neither was Mr. Galuska when he issued the DNS. *Findings 1–76.*

2. **The Appellants have not met their burden to show that the DNS was issued in error.** The City having met its burden to show prima facie compliance with SEPA's procedural requirements, the burden shifts to the Appellants to show that the issuance of the DNS was clearly erroneous. The Appellants have not met that burden.

The Appellants' strongest arguments relate to alleged violations of the municipal code in the subdivision's design. These arguments are, obviously, relevant to the Hearing Examiner's consideration of whether to approve the subdivision application, but they are also relevant to the SEPA decision. *See WAC 197-11-330(3)(e)(iii)* ("In determining an impact's significance . . . the responsible official shall take into account the following, that: . . . [a] proposal may to a significant degree . . . [c]onflict with local, state, or federal laws or requirements for the protection of the environment.") Of the Appellants' code-based arguments, the strongest is the argument that a retaining wall is a structure, and a structure is prohibited in a setback.

"Structure" means a **combination of materials constructed or erected on the ground** or water, or attached to something having a location on the ground or water. For the purposes of Chapter 17.17, Wireless Communication Facilities (WCF) Attached and Detached, "structure" is a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or commingled with other types of services).

MMC 17.08.020 (emphasis added).

"Setback" or "yard requirements" means the required open space distance that buildings, uses or structures must be removed from their lot lines.

MMC 17.08.020.

On their face, these two provisions would appear to prohibit a retaining wall within a setback. A retaining wall is obviously a combination of materials constructed or erected on the ground, so it meets the definition of a structure. A setback clearly requires that a structure must be removed from the lot line by the distance of the setback. Here in the RD 12.5 zone, the setback distance is 25 feet. *MMC 17.20.015, Table 2.* The proposed retaining wall is set back only 10 feet from the western lot line, so it is squarely within the setback.

Of all the arguments advanced by the parties on the setback issue, the Hearing Examiner is most persuaded by that of Thomas Colleran, presented during his testimony. The grading and excavation code, chapter 15.16 MMC, is one of the few places anywhere in the municipal code where retaining walls are specifically mentioned. The grading and excavation code has a section, MMC 15.16.140, helpfully titled “Setbacks,” and that setbacks section includes the following provision:

Toe of Fill Slope. The toe of fill slope shall be made not nearer to the site boundary line than one-half the height of the slope with a minimum of two feet and a maximum of twenty feet. Where a fill slope is to be located near the site boundary and the adjacent off-site property is developed, special precautions shall be incorporated in the work as the permit authority deems necessary to protect the adjoining property from damage as a result of such grading. These precautions may include but are not limited to:

1. Additional setbacks;
2. Provision for retaining or slough walls;
3. Mechanical or chemical treatment of the fill slope surface to minimize erosion;
4. Provisions for the control of surface waters.

MMC 15.16.140.C.

The Hearing Examiner concludes that this section explicitly contemplates fill slopes being placed as close as two feet from property lines. And, when necessary to protect “adjoining property from damage as a result of such grading,” the permit authority “shall” incorporate “special precautions,” including “provision for retaining or slough walls.” Thus, not only are fill slopes allowed as close as two feet from property lines, retaining walls are, too.

The grading and excavation code does not explicitly carve out an exception to the general, 60-foot setback requirements in *MMC 17.20.015, Table 1.* It was Appellants themselves, however, in their closing arguments, who advanced a theory that the definition of setback precludes *any* constructed or erected materials on the ground, and

that any proposed construction within the setback, such as a driveway, for example, would have to rely on a specific exception to the general rule. Here, the Hearing Examiner concludes that the grading and excavation rule, allowing fill slopes and retaining walls within a two-foot setback of a lot line, should be read as an exception to the general setback rule. Therefore, the Applicant's proposed retaining wall does not violate the code. The Hearing Examiner finds no need to defer to the City's well-established (and commonsensical) practice of allowing retaining walls to be constructed within setbacks, because the Hearing Examiner concludes that the grading and excavation code unambiguously allows such construction.

The Hearing Examiner also rejects the argument that the raising of the finished grade some 20 feet above predeveloped condition would lead to a violation of the building height limits. Turning once again to the definitions section of the code:

“Building height” means the vertical distance from the mean ground level (prior to any elevation change in native existing grade except as approved through a plat or short plat) to the highest point of the coping of a flat roof or to the deck line of a mansard roof or to the height of the highest gable or roofline of a gable or pitched roof.

MMC 17.08.020.

The Hearing Examiner agrees with the City and Applicant that this provision allows the grade to be changed in the course of platting, with the building height to be measured from the post-grade elevation. Therefore, a 30-foot house atop a 20-foot fill slope does not violate the code.

The Hearing Examiner also rejects the argument that the Applicant has failed to preserve the required 25 percent of existing native vegetation, as required by MMC 15.16.050, Table 1. The Hearing Examiner agrees that it is not clear exactly what percentage of the existing, predeveloped site is covered in native vegetation. Scott Kindred's site visit photos were inconclusive at best, in that they showed some native vegetation, some nonnative vegetation, and much vegetation that no witness could identify. Nowhere was there a comprehensive survey of existing native vegetation, but it was clear that Mr. Galuska was wrong to assume, as he testified he did, that no native vegetation exists simply because the property was formerly developed with a house and yard.

Reading MMC 15.16.050 as a whole, the Hearing Examiner concludes that native vegetation may be temporarily removed so long as it is replaced. The Hearing Examiner especially relies on Table Note 2.b.iii, which allows clearing and grading of vegetation on slopes in excess of 35 percent, provided that trees are not removed (unless hazardous) and provided that a revegetation plan is provided (among other requirements). Slopes steeper than 35 percent enjoy the highest degree of vegetation retention required under

MMC 15.16.050, Table 1. If even those highly protected slopes can be cleared, graded, and revegetated, then it stands to reason that lesser-protected slopes can be, as well. Given that the exact quantum of existing native vegetation is not known, and given that at least some nonnative vegetation is known to be present, the Hearing Examiner accepts the Applicant's suggestion that 20 percent of the total project area be retained or replanted in native vegetation as a condition of approval. Provided that condition is met, there is no violation of the municipal code.

The Hearing Examiner accepts the City's suggestion to use a site-wide approach to slope vegetation under MMC 15.16.050, Table 1, as opposed to a slope-by-slope approach. Table 1 says "grade of site or slope," which the Hearing Examiner concludes allows either a site-wide or slope-by-slope approach. If a site-wide approach were not permissible, Table 1 would simply say, "grade of slope."

The Hearing Examiner rejects Sylvia Kawabata's argument that the requirement in MMC 15.16.050.C.2.b.i for a slope report was not met—an issue which, as a threshold matter, was not part of the stipulated statement of appeal issues. By the time of the issuance of the DNS, the nature and depth of the soil had been repeatedly reviewed by multiple experts. It may be the case that early design documents estimated only 10 feet of fill, not the maximum of 20 feet that were ultimately proposed for a portion of the property. However, it is normal for projects to evolve throughout the review process—indeed, that is one of the main purposes of review. The Hearing Examiner is satisfied that soils and hydrology were well-studied. The issue of the depth of the proposed fill was raised loudly, early, and often. There were no reviewers on either the City team or Applicant team who would have been surprised to learn that the proposed fill was up to 20 feet deep.

The foregoing discussion dispenses with the Appellants' code-based arguments raised in the stipulated statement of appeal issues (a statement, which, the Hearing Examiner notes, did not raise the building height or slope report issues at all). The Hearing Examiner also rejects the remaining, non-code-based arguments in the statement of appeal issues, because he is not left with a firm and definite conviction that the City failed to consider aesthetic or drainage impacts, or impose any mitigation measures that might be required.

As described in Conclusion 1, the City's review of stormwater-related issues was exhaustive. The proposed stormwater system, including the pump, will result in less stormwater leaving the property in a westward direction even if the pump (and its generator, and the backup pump) were to fail completely. Even with the post-DNS inclusion of groundwater and interflow in the modeling, the pump will never exceed 13.4 gallons per minute, well under its rated capacity of 24 gallons per minute—and it is not clear that groundwater, in particular, will ever enter the sump or the pump, so the 13.4

gallon per minute rate will not likely ever be reached. If groundwater does not enter the pump, it will continue to flow westward, as it currently does, but there is no reason to believe the subdivision will add to its volume. On the contrary, by creating new impervious surfaces, all of whose stormwater will enter a detention vault and never reach the groundwater, the subdivision will result in either less groundwater flow or no change to the groundwater flow. Nothing in Ben Lee's testimony or in the Landau report he authored contradicts Mr. Kindred's conclusion, supported by the City, that the subdivision will simply not cause any increase in stormwater flow to the west. The evidence also supports a conclusion that the stormwater system will all but eliminate stormwater flow to the east, thanks to the detention, treatment, and conveyance scheme.

The Hearing Examiner was not impressed by the speculation of the Appellants that westward stormwater flow would be concentrated into a single point in the vicinity of the pump, as opposed to dispersed across a wide area as it presently is, and that the concentration of stormwater could pose a unique threat to a particular property to the west. The speculation about the unique dangers of stormwater concentration was not proffered by the Appellants' stormwater expert, Mr. Lee. It was non-expert speculation and argument by the Appellants. The Hearing Examiner is satisfied by the testimony of Matthew Geiger that the proposed system is compliant with the stormwater manual. That being the case, the non-expert speculation that a manual-compliant stormwater system could create a unique threat that the stormwater experts somehow all failed to notice does not create a definite and firm conviction in the Hearing Examiner's mind that a mistake was made.

The Hearing Examiner also does not agree that the possibility the future members of the HOA will fail to maintain the stormwater system justifies a reversal of the DNS. The Hearing Examiner is satisfied by the City staff testimony that a system of inspection and code enforcement exists to prevent lapses in maintenance, and that emergency pumping is available in the unlikely event of a catastrophic failure. There is no evidence to suggest that the future HOA members will fail to abide by the conditions imposed in the subdivision approval to maintain their stormwater system. If they do fail to abide by the conditions, the Appellants and any other affected parties are free to summon the code enforcement officer.

With regard to aesthetic impacts, the Hearing Examiner concludes that the City gave adequate, though not outstanding consideration prior to issuance of the DNS. A formal shade study would have been more convincing than Mr. Galuska's seat-of-the-pants estimate that shade was not likely to be a significant impact on neighboring properties. The Appellants, however, did not offer their own shade study to prove him wrong. The closest they came was David Tyler's shade drawings in his Exhibit 101, but those drawings were based on an arbitrary solar angle of 40 degrees, with no discussion of when (if ever) the sun would be at that angle and for how long. In the absence of reliable

data demonstrating a significant, adverse impact, the Hearing Examiner cannot conclude that Mr. Galuska was clearly mistaken in his belief that shade would not be a significant impact. Nor can the Hearing Examiner conclude that the wall itself would constitute a significant aesthetic impact. True, it is 20 feet tall at its highest, but it is set back 10 feet, and stepped back in two tiers, and composed of materials that Mr. Galuska described as more aesthetically pleasing than rockery. The retaining wall's mere presence does create an adverse aesthetic impact, but the Hearing Examiner is not persuaded that it is a significant adverse impact or one that the City overlooked.

With regard to the final two issues raised in the stipulated statement, the Hearing Examiner is not aware of any provision of SEPA requiring the City to acknowledge or respond to public comment, including expert comment by Landau, nor is the Hearing Examiner aware of any SEPA provision that requires the City to "acknowledge or make public the results of the technical review by an outside consultant hired by the City in 2022." The Appellants did not brief these issues in their prehearing brief or closing arguments, and no witness cited any provision of SEPA that would require the City to do any of these things. The Hearing Examiner is not even aware which "technical review by an outside consultant hired by the City in 2022" the issue statement is referring to. In general, the Hearing Examiner was impressed by the amount of public communication and engagement the City offered, with the multiple comment periods, the acceptance of comments far outside the designated comment periods, the City's direction to the Applicant to respond to issues the City was learning about through public comment, the City's direct email correspondence with the public, and the City's meetings with the public, including the Appellants. The Hearing Examiner believes that this lengthy and involved public process served to better inform the City about the project's environmental impacts. Certainly, there was no violation of SEPA in any of this.
Findings 1–76.

DECISION

Based on the preceding findings and conclusions, the Appellant's appeal of the August 30, 2023, DNS is hereby **DENIED**.

DECIDED this 5th day of January 2024.



ALEX SIDLES
Hearing Examiner