

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

In the Matter of the Application of)	No. SD-2021-001
)	
Jake Drake, on behalf of Blueline)	Harbor Grove Preliminary Plat
Group, LLC, and Sea-Pac Homes, LLC,)	
and Atwell, LLC)	
)	FINDINGS, CONCLUSIONS, AND
<u>For Approval of a Preliminary Subdivision)</u>	DECISION

SUMMARY OF DECISION

The request for a preliminary subdivision to subdivide a 2.43-acre lot located at 9110 53rd Avenue West into seven single-family residential lots, with associated clearing, grading, and fill, including construction of retaining walls, as well as stormwater and frontage improvements, and landscaping, is **APPROVED**. Conditions are necessary to mitigate specific impacts from the proposal. The appeal of a Determination of Nonsignificance (DNS) pursuant to the State Environmental Policy Act (SEPA), chapter 43.21C RCW, issued August 30, filed by David Tyler, Erich Volkstorf, Sylvia Kawabata, Emmi Brant-Zawadzki, Jon Boyce, and Marilyn Strand (collectively, “Appellants”), is treated in a separate companion decision to this decision on the preliminary plat application.

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 Collieran, Applicant Representative, Project Manager
Brett Pudists, Civil Engineer for the Applicant
Scott Kindred, Hydrogeologist for the Applicant

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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
13. Quantitative Analysis Memo, prepared by Blueline, dated April 21, 2023
14. Slope Report, prepared by Earth Solutions NW, LLC, dated April 26, 2023

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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 Collieran, 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
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. 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.*

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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 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

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.

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 Pertect 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. 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

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

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. The arguments and outcome of that appeal are treated in a separate, companion decision to this decision on the preliminary plat. *Exhibit 91*.

Notice of Public Hearing

40. 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*.

Comprehensive Plan and Zoning

41. The subject property is designated “Single-Family Residential—Low Density” in the City’s Comprehensive Plan. The Single-Family Residential—Low Density is subject to a maximum density of 3.48 lots per acre, with a minimum lot area of 12,500 square meet. *Comprehensive Plan, pages 15 and 176*. The implementing zoning is either RD 12.5 or RD 12.5(S). *Comprehensive Plan, page 15*. City staff identified the following goals and policies as relevant to the proposed subdivision, and determined that the proposal was consistent with the same:

- LU1b: The city shall support a steady rate of growth which will allow the population to reach the target of 22,000 within the current city boundaries.
- LU2d: New development and redevelopment shall provide housing, increased opportunities for employment, services, retail options, recreational activities, and enjoyment of the arts compatible with and complementary to the residential character of the neighborhoods.
- LU3: Property rights of landowners shall be respected by protecting those rights from arbitrary and discriminatory actions by the city.

Exhibit 1, Staff Report, pages 1, 4, 5.

42. The subject property is zoned RD 12.5. Single-family residential uses on lots at least 12,500 square feet in area are allowed outright in the RD 12.5 zone. *MMC 17.12.010; MMC 17.16.040, Table*. City analyzed the proposed subdivision against the zoning requirements in chapter 17.20 MMC and chapter 17.56 MMC and determined that the proposed subdivision would comply with the following:
- Minimum lot width requirements would be 60 feet at setback, 40 feet at lot line, and 60 feet for corner lots.
 - Maximum building height would be 30 feet.
 - Minimum building setbacks would be 25 feet front, 5 feet interior (with total side yard of 15 feet), 20 feet corners, and 25 feet rear.
 - Minimum parking provided would be two spaces per unit.
 - A ten-foot right-of-way dedication alongside 53rd Avenue would be required.
 - Private roads within the subdivision must include a 40-foot right-of-way with two, ten-foot-wide travel lanes, and an eight-foot parking area on one side, and a five-foot walkway on one side, and a three-foot gravel shoulder on both sides.
- Exhibit 1, Staff Report, pages 1, 2, 4, 5; Exhibit 82.*
43. City staff calculated that the site had an average, site-wide slope of less than 15 percent. Accordingly, City staff determined there would need to be 25 percent retention of existing trees under MMC 15.16.050, Table 1. The site has 90 significant trees. The Applicant is proposing to remove 67 and maintain 23, thereby meeting the 25 percent minimum tree retention requirement above. In addition, the landscaping plan proposes replanting 20 trees. *Exhibit 1, Staff Report, pages 8 and 9³; Exhibit 9; Exhibit 82.*
44. In addition, the City Anticipated that the newest iteration of the International Residential Code (IRC) will require removal of trees within 30 feet of new structures. Any tree removal required to comply with the IRC will be reviewed as part of the building permit application on individual lots. If compliance with the IRC requires removal of trees proposed for retention as part of the plat, the city will require replacement at a ratio of 3:1. *Exhibit 1, Staff Report, page 9.*
45. City staff addressed the visual impact of the Applicant's proposed retaining wall in the following terms:
- It is common for plats to adjust the grade on a site to create larger, flat areas for development. This proposal includes changes to the mean ground level through infill and tiered retaining walls. Retaining walls on the west portion of Lots 5, 6 and 7 vary in height between 2' and 12' per tier; retaining walls on the south and east portion of Lot 7 vary in height

³ City staff did not discuss, in writing, the second of requirement of MMC 15.16.050, Table 1, namely, a maximum allowable removal of 75 percent of existing native vegetation. However, this issue was treated in detail during City testimony, summarized below. *Testimony of Andy Galuska; Testimony of Sarah Kress; Testimony of Brian Wirt; Testimony of Matthew Geiger.*

between 4' and 10' (Exhibit 82). The visual impact of the retaining walls on the western portion of the site are broken up with the addition of landscaping at the base of the westernmost wall (closest to existing neighbors) and with plantings in the 7' between the two tiers (Exhibit 82, page 18). Additionally, the type of wall is a lock and load pre-engineered wall with a stone appearance. The city feels that the design of this wall is more appropriate for a residential zone. The building height calculations will be based on the new mean ground level, consistent with the definition above.

Exhibit 1, Staff Report, page 6.

46. City staff was aware of the arguments raised by the Appellants and other members of the public that the proposal would not comply with the building height, setback, and landscaping requirements. The City's responses to those arguments in best captured in the testimony of the City witnesses, summarized below. *Testimony of Andy Galuska; Testimony of Sarah Kress; Testimony of Brian Wirt; Testimony of Matthew Geiger.*

Existing Conditions and Adjacent Properties

47. The lot currently has a vacant, abandoned single-family residence on it that will be demolished prior to construction. The site is vegetated, with a mixture of native and nonnative plants, including large, significant trees, as described above. There are no critical area steep slopes on the site, but there are portions of the site that have slopes as steep as 20 percent, and other portions that are steeper than 35 percent. Stormwater on the site currently flows in two directions. Approximately half of the site flows in a westward direction, and the other half in an eastward direction. *Exhibit 1, Staff Report, page 3; Exhibit 9; Exhibit 100; Exhibit 101; Exhibit 105; Testimony of Andy Galuska; Testimony of Scott Kindred; Testimony of Thomas Collieran; Testimony of David Tyler; Testimony of Sylvia Kawabata; Testimony of Ben Lee.*
48. The subject property is surrounded on all four sides by RD 12.5-zoned properties in residential use. The lot sizes are similar to those proposed at the subject property. Properties to the west of the subject property, along Hargreave Place, sit below the subject property, beneath the subject property's westward-sloping grade. *Exhibit 1, Staff Report, page 4; Exhibit 100; Exhibit 101; Exhibit 105; Testimony of Andy Galuska; Testimony of Scott Kindred; Testimony of David Tyler; Testimony of Sylvia Kawabata; Testimony of Ben Lee.*

Subdivision Approval Criteria

49. City staff reviewed the proposal against the subdivision approval and concluded the following:
- The proposal meets the minimum performance standards and regulations required for a preliminary subdivision.

- The subdivision will have no adverse impact to the surrounding properties, and, more generally, it will not adversely affect the public health, safety and general welfare if conditioned as recommended.
- The proposal is consistent with the City of Mukilteo Comprehensive Plan and the Mukilteo Municipal Code.
- All public noticing requirements have been met.

City staff recommended 35 conditions of approval. *Exhibit 1, Staff Report, pages 9 and 10.*

City and Applicant Testimony

50. 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.*

51. 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 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.

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.

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.*

52. 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 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

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. 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.

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.*

53. 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.*

54. 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 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.*

55. 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.*
56. 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 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.

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.

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.*

57. 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.*
58. 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

59. 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”

⁷ He did not cite an exhibit number.

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.

60. 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.*

61. 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 side of 53rd Avenue, as a result. He worried the eastward properties would suffer additional flooding. *Testimony of Kenneth Willett.*
62. 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.*

63. 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.*

64. 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.

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.*

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

65. 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.*

66. 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.*
67. 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.*
68. 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 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

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

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

69. 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.*

70. 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.*

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."

71. 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.
72. 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.

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.*

73. 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.*

74. 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.*

75. 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

76. 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 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

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.

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.*

77. 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.*

78. 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.*

79. 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.*

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.

Staff Recommendation

80. City staff recommended the proposed subdivision be approved, subject to the 35 proposed conditions of approval in the staff report, the modification of proposed condition no. 22¹⁴ to more firmly guarantee that the HOA would be able to maintain the stormwater system, and a new condition to provide for a minimum 20 percent site coverage in native vegetation. The Applicant did not object to any of these proposed conditions. *Testimony of Andy Galuska; Testimony of Sarah Kress; Testimony of Thomas Colleran.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction over requests for preliminary subdivisions. *MMC 2.38.030; MMC 16.12.010; MMC 17.13.030.B; MMC 17.13.070, Table 6.* The Hearing Examiner may approve, deny, or approve with conditions. *MMC 16.12.010.C.11, -C.12, -C.13, -D.2; MMC 16.12.030.B; MMC 17.13.080.A.* 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, -.D; WAC 197-11-680(3)(a)(v).*

Criteria for Review

In considering preliminary plats, the city shall inquire into the public use and interest proposed to be served by the establishment of a subdivision. The city shall determine if appropriate provisions are made in the subdivision for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and whether the public interest will be served by the subdivision and dedication. If the city finds that appropriate provision is made for the specified items and that the public interest will be served by the platting of the subdivision and dedication, then it shall be approved. Dedication of land to the city, provision of public improvements to serve the subdivision, and/or impact fees imposed pursuant to state law and city ordinances may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat.

MMC 16.12.010.C.11.

After considering all input at the public hearing, if the city finds that the proposed plat does not make appropriate provisions as outlined in subsection (C)(11) of this

¹⁴ The Applicant's proposed revisions to condition 22, submitted in Exhibit 109, were extensive. The Hearing Examiner incorporates the proposed revisions as conditions 22–29, below.

section, or that the public use and interest will not be served, the preliminary plat will then be disapproved. Construction of protective improvements may be required as a condition of approval. The improvements shall be noted on the final plat. No preliminary plat shall be recommended for approval by the city concerning any land situated in a flood control zone, as provided in Chapter 86.16 RCW, without prior written approval by the Department of Ecology of the state.

MMC 16.12.010.C.12.

Conclusions Based on Findings

1. **With conditions, the proposed preliminary plat would satisfy the requirements for a land division under the City code.** The City provided reasonable notice and opportunity to comment on the proposal and to testify at the open record hearing. The City received numerous comments on the proposal from members of the public in response to its notice materials, and many members of the public testified at the open record hearing. During the review process, 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. Comments and testimony on the proposal from members of the public expressed opposition to the proposed subdivision, generally raising concerns about clearing and grading, the erection of a retention wall up to 20 feet in height within the required rear-yard setback, the construction of houses atop the newly filled grade, aesthetic, privacy, and shade impacts, traffic impacts, stormwater flooding including flooding due to the possible failure to proposed stormwater system, traffic, and sidewalks.

While the Hearing Examiner recognizes that several neighboring residents have expressed opposition to the proposal, it must be noted at the outset that community displeasure, alone, cannot be the basis of a permit denial. *Kenart & Assocs. v. Skagit Cy.*, 37 Wn. App. 295, 303, 680 P.2d 439, *review denied*, 101 Wn.2d 1021 (1984). Rather, the Hearings Examiner must review the proposal for compliance with governing regulations.

The subject property is zoned and designed for low-density, single-family residential development on lots at least 12,500 square feet in area. The Hearing Examiner agrees with the City's analysis that the proposed lots meet the dimensional standards set forth in the code.

Among the issues raised during the hearing is the Appellants' argument that the construction of the retention wall just 10 feet from adjacent properties would violate the read-yard setback requirement. This argument is based on the Appellants' interpretation

of the code that the retaining wall is a structure, and that structures are prohibited within setbacks:

“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. 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 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 concludes that the proposal will result in a public benefit with regard to stormwater.

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.

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. However, the Hearing Examiner does agree it would be appropriate to improve the language in proposed condition no. 22, and has done so below.

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. Certainly, the Hearing Examiner does not perceive any threat to the public health, safety, or general welfare from the aesthetic and shade impacts of the retaining wall.

Adequate access to the proposed subdivision would be provided, compliant with the City's design standards for private roads. In addition, there will be sidewalk improvements made to 53rd Avenue, a benefit to the public. There is no indication in the record that children living within the subdivision will be deprived of a safe route to walk to school, especially in light of the proposed sidewalk improvements.

The Hearing Examiner agrees with the City's testimony and reasoning that no traffic impact study is required. The addition of seven single-family dwelling units does not trigger a traffic impact study under the code, and there is no feature unique to the proposal or the subject property that would require a traffic impact study notwithstanding the code. While there will be a large number of dump trucks service the property during the clearing and grading phase, the Hearing Examiner did not see evidence, other than non-expert speculation which the Hearing Examiner discounts, to indicate that the dump trucks would damage the road or otherwise impair access for neighboring property owners.

Unlike some jurisdictions, the Mukilteo municipal code does not contain specific requirements for open space. It does not require any set amount of "public" open space or "private" open space. There is only the general requirement, under the subdivision approval criteria, for "appropriate provisions" for open space. The Hearing Examiner concludes appropriate open space has been provided in the form of large lots with a limited amount of lot coverage, as well as the proposed native growth protection area. While these open spaces do not allow public access, even privately owned open space benefits the public in the form of open views and a low-density environment.

The Hearing Examiner concludes that the proposed impact fees, which will be calculated during building permitting, constitute adequate provision for schools, parks, and traffic. The utility availability statements lead the Hearing Examiner to conclude there will be adequate provision for water and sanitary waste.

The City reviewed the Applicant's environmental checklist and other information on file and determined that the proposal would not have a probable significant adverse impact on the environment. In a separate decision accompanying this decision on the preliminary plat, the Hearing Examiner upholds that determination. The Hearing Examiner determines that the public use and interest would be served by the platting of the subdivision. Conditions, as detailed below, are necessary to ensure that the proposal satisfies the criteria for a preliminary plat and that the proposed development complies with all other applicable local, state, and federal regulations. *Findings 1–80.*

2. **With conditions, the requirements of RCW 58.17.110 would be satisfied.** The requirements for a land division set forth in the City code are similar to and encompass the criteria for a land division under the Revised Code of Washington. With conditions, as detailed in full below, the proposed would satisfy all local and state requirements for plat development. *Findings 1–80.*

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat to subdivide a 2.43-acre lot located at 9110 53rd Avenue West into seven single-family residential lots, with associated clearing, grading, and fill, including construction of retaining walls, as well as stormwater and frontage improvements, and landscaping, is **APPROVED**, with the following conditions:¹⁵

General:

1. Preliminary plat approval shall be effective for a maximum of five years (MCC 16.16.030(E)) before which time a final plat meeting all conditions of the plat approval must be submitted and approved in accordance with MMC 16.12.030(F). A one-year extension may be granted, subject to the approval of the Community Development Director.
2. All contractors and subcontractors working on the project must have a valid City of Mukilteo business license.
3. If the Applicant intends to work in the wet season, a Wet Weather SWPPP and updated recommendations from the geotechnical engineer are required.

¹⁵ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

4. Minor modifications of the site plan submitted may be approved by the Community Development Director or Public Works Director if the modifications do not require a change to the findings of fact or conclusions.
5. Any fencing atop the retaining walls (either for security or aesthetic reasons) shall be set back at least two feet from the top of the wall. The distance between the fence and the houses shall be either the setback requirement of the underlying zone, or the setback requirement of the International Residential Code, whichever is greater. This will be determined at the time of building permit submittal.
6. The Fire Department requires that detention vaults and pipes in the roadway be capable of supporting the imposed loads of fire apparatus per requirements of the International Fire Code. The Applicant must submit evidence of compliance with this standard prior to plat finalization.

Prior to Engineering Permit Issuance:

7. Submit a performance surety in the amount of 150% of the engineer's estimated cost of construction for all right-of-way improvements and stormwater facilities. The surety shall cover the cost of design defects and/or failure in workmanship of the facilities throughout the construction timeframe.
8. Pre-Construction meeting to confirm installation of Temporary Erosion and Sediment Control (TESC), marking of clearing limits, installation of temporary signs and fencing for Native Growth Protection Area, tree protection fencing, and clear marking of property corners by a surveyor.

During Construction:

9. TESC in place along with all installations and markings required in Condition 8 clearly visible.
10. All development shall proceed in accordance with the recommendations listed in the Geotechnical Report dated 07/30/2021.
11. Any special inspections from the geotechnical engineer or outside agency shall be submitted to the City within 48 hours of receipt.
12. The City reserves the right to request special inspections and any time.
13. All construction equipment, building materials, and debris shall be stored on the Applicant's property, out of the public right-of-way. In no case shall the access to any private or public property be blocked or impinged upon without prior consent from the affected property owners and the City of Mukilteo.

14. If at any time during clearing, grading, or construction the streets are not kept clean and clear, all work will stop until the streets are cleaned and maintained in a manner acceptable to the Public Works Director.
15. Adhere to the requirements of the PUD and MWWD for clearance surrounding current infrastructure.
16. Temporary power for the pump system shall be installed on Lot 6 until a house is constructed.

Prior to Final Plat:

17. Install a split rail fence along the NGPA border and place NGPA signs atop the fence at no less than 50' increments. At least two signs are required on Lots 1 and 2. One sign is required for Lot 3.
18. The NGPA on Lots 1, 2 and 3 shall be shown on the final plat map and shall be noted as follows:

There shall be no clearing, excavation, or fill within a native growth protection area shown on the face of this site plan/plat, with the exception of required utility installation, removal of dangerous trees, thinning of woodlands for the benefit of the woodlands as determined by a certified landscape architect or arborist, and removal of obstructions on drainage courses, or as allowed under Section 17.52A.070, Vegetation management on steep slopes.

19. The Applicant shall have a Registered Professional Engineer prepare, or supervise the preparation of, and place his/her professional seal on the "as-built" civil drawings to be reviewed, approved, and signed by the City Engineer upon satisfactory installation of the required private access, utility, and other public improvements.
20. Submit a maintenance bond in the amount of 15% of the engineer's estimated cost of construction for all right-of-way improvements and stormwater facilities. The maintenance bond shall cover the cost of design defects and/or failure in workmanship of the facilities throughout the two-year maintenance period that begins after satisfactory completion of the facilities and release of the performance bond.
21. Submit a maintenance bond in the amount of 15% of the landscape architect's estimated cost of improvements including labor costs. The maintenance bond shall cover the cost of design defects and/or failure in workmanship throughout the two-year maintenance period that begins after satisfactory completion of landscaping improvements.

22. At the time of engineering permit application, the Applicant shall submit a draft covenant for maintenance of the permanent stormwater improvements in accordance with section 2.3.3.1 of the City of Mukilteo Development Standards 2019 Amendment. A final version of the covenant shall be included with final plat application.
23. An interim stormwater management sump and pump system will be installed during clearing & grading operations and removed once the permanent stormwater pump system is installed.
24. The permanent stormwater pumps shall initially be installed with a temporary electrical panel to allow a functional system prior to construction of homes. An interim gas-powered generator shall be provided until a permanent generator is installed.
25. The permanent pump system shall be connected to, and shall be in operation, prior to final plat approval.
26. At the time of home construction, a permanent electrical panel shall be installed and generator with automatic transfer switch be provided to serve as a backup energy supply in the event of a power outage.
27. The pump and generator system shall include an audio and visual alarm system, placed at a location that is visible from the site access road, to alert members of the Homeowners Association in the event of pump system failure.
28. A gate shall be placed within an easement area on the project site. The City shall have access to this area for annual inspections of the stormwater system.
29. The HOA CC&Rs will include a regular inspection and maintenance schedule based on the larger stormwater system Operations and Maintenance Manual pursuant to the City's adopted stormwater regulations. At final plat application, City Attorney shall review and approve the CC&Rs with respect to the final maintenance language for the pump system to ensure consistency with these preliminary plat conditions.
30. All improvements shall be installed, inspected, and approved by the City in accordance with the approved engineering plans and preliminary plat map.
31. Provide a letter from the Snohomish County Public Utilities District No. 1 confirming that all electric utilities have been installed.
32. Provide a letter from the Mukilteo Water and Wastewater District confirming that all sewer and water utilities have been installed. An approved set of water plans approved by

the Mukilteo Water and Wastewater District shall be submitted to the City prior to permit issuance.

33. All existing and proposed easements and maintenance agreements shall be clearly shown and labeled on the final plat with the associated recorded documentation listed.
34. The maintenance and access easement to allow access to inspect/maintain pump shall be reviewed by the City prior to recording.
35. Any encroachments from neighboring properties shall be resolved prior to Final Plat approval using a method acceptable to the City i.e., boundary line adjustments, easement and/or physical removal or relocation of encroaching structures as agreed to with the affected property owners.
36. The title block on the final plat map shall have the names of all the legal owners of the property named on the plat and the name of the surveyor/engineering firm which prepared the final plat map.
37. ROW dedication for the 10 feet to the east of the property shall be recorded.
38. Proof of relinquished easements shall be provided including AF #s: 200408310086, 2217413, 200805210796, 8205200088, 200501130457.
39. A revised landscaping plan shall be provided to demonstrate that at least 20 percent of the total site area either is currently planted with native vegetation or will be replanted with native vegetation.

Prior to Building Permit Issuance:

40. The final subdivision shall be recorded at Snohomish County Recording Office.
41. Per MMC Title 3, the Applicant is required to pay impact fees in place at the time of building permit application or seek an allowable deferral.
42. An updated geotechnical report shall be submitted prior to the construction of the single-family homes that includes final design specifications of the structures.
43. If the International Residential Code (IRC) requires removal of trees proposed for retention as part of this plat, the City will require replacement at a ratio of 3:1, with trees at least 8' in height and 2.5" caliper.

DECIDED this 5th day of January 2024.

A handwritten signature in black ink, appearing to read "Alex Sidles", with a long horizontal flourish extending to the right.

ALEX SIDLES
Hearing Examiner