Rafe Wysham
Director

KITSAP COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

To enable the development of quality, affordable, structurally safe and environmentally sound communities.

Notice of Hearing Examiner Decision

7/7/2025

To: Interested Parties and Parties of Record

RE:

Project Name:	23-00913 Silver View Apartments - Appeal of SEPA for 18-00731 ACUP & 23-02979 Silver View Apartments - Appeal of Land Use Decision for Silver View Apts ACUP 18-00731
Applicant:	Silver View LLC 9615 Levin Rd NW Ste 100 Silverdale, WA 98383
Appeal Type:	SEPA Appeal (ADMIN APPEAL) and Administrative Appeal (ADMIN APPEAL)
Appellants:	Melissa Best Peter Spitzer Kirsten Friedman Richard Friedman Deborah Best Gale Brown Pat Brown Maynard Meland Robert Best Chris Best George DeGroot Dorie Salem Silverdale Farm LLC Silver Bay Properties LLC
Permit Number:	23-00913 (SEPA Appeal) & 23-02979 (Administrative Appeal)

The Kitsap County Hearing Examiner has **DENIED** SEPA Appeal **#23-00913: Silver View Apartments – Appeal of SEPA for 18-00731 ACUP (ADMIN APPEAL)** and has **DENIED** Administrative Appeal **#23-02979 Silver View Apartments - Appeal of Land Use Decision for Silver View Apts ACUP 18-00731 (ADMIN APPEAL)** of #18-00731 Silver View Apartments Administrative Conditional Use Permit (ADMIN CUP), **subject to the conditions outlined in this Notice and included Decision**.

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

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

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

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

CC:

Appellants: Melissa Best, melissa.best@homestreet.com; Peter Spitzer, spitzerd@wavecable.com; Kirsten Friedman, kirsten.friedman@gmail.com; Richard Friedman, rfriedman@friedmanrubin.com; Deborah Best, dbest@jpclaw.com; Gale Brown, 9301 Mickelberry RD NW Silverdale, WA 98383; Pat Brown, patbrown93@gmail.com; Maynard Meland, maynard@maynardsrestaurant.com; Robert Best, 9289best@gmail.com; Chris Best, 9289best@gmail.com; George DeGroot, 4765 ERLANDS PT RD NW BREMERTON, WA 98312; Dorie Salem, salemdorie@gmail.com; Silverdale Farm LLC, 4765 ERLANDS PT RD NW BREMERTON, WA 98312; Silver Bay Properties LLC, parrod@gmail.com
Appellants' Representatives: Dave Bricklin – Bricklin & Newman LLP, bricklin@bnd-law.com; Audrey Clungeon – Bricklin & Newman LLP, clungeon@bnd-law.com
Subject Property Owner: Silver View LLC, CBHUISH@msn.com
Applicant: Silver View LLC, CBHUISH@msn.com
Applicant's Representatives: Bill Lynn – Gordon Thomas Honeywell, BLynn@gth-law.com; Reuben Schutz – Gordon Thomas Honeywell, rschutz@gth-law.com
County Representatives: Neil Wachter, NRWachter@kitsap.gov; Ashlynn Ota, AOta@kitsap.gov
County Departments: DE, PEP, DCD
Interested Parties: None
Other: Anne Bricklin – Bricklin & Newman LLP, miller@bnd-law.com; Rick Cadwell, rick@cadwell.biz; Paul McCormick – Innova Architects,

Paul@InnovaArchitects.com; Kay Shaffer – Bricklin & Newman LLP, shaffer@bnd-law.com

BEFORE THE HEARING EXAMINER FOR KITSAP COUNTY

Phil Olbrechts, Hearing Examiner

Silver View ACUP and SEPA Appeal 23-00913 and 23-02979	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION.**

Overview

In this second remand review the Applicant has now established conformance to the development standards of its conditional use permit application (ACUP) and the environmental standards of environmental review (MDNS). With added conditions, the ACUP and MDNS are sustained and the appeals denied.

The ACUP and MDNS address the code compliance and environmental impacts of a 160-unit apartment complex proposed for 9506 Mickelberry RD NW. Appeals of the ACUP and MDNS have resulted in two remand decisions. This decision addresses the three-day hearing resulting from the second remand decision.

The second remand decision determined that the Applicant had not conducted a new wetland delineation as required by the first remand and had also not conformed to under-building parking requirements. As a result, the second remand decision required additional wetland test pits and either under-building parking or production of substantial evidence that such parking was not feasible. The Applicant chose to demonstrate that under-building parking was not feasible.

The Applicant has established that under-building parking is not feasible. The Applicant's structural engineer established that under-building parking would materially risk an artesian aquifer breach that could result in substantial damage. It was largely uncontested that breach of the aquifer could potentially cause millions of dollars in damage and also result in the dewatering of wells used by surrounding properties. It was also uncontested that added parking resulting in additional excavation depths of 6-12 feet could materially risk such a breach.

The parties focused their disagreement on whether underground parking would result in added 6-12 feet of added depth. The Applicant's structural engineer gave numerous engineering design reasons why such a depth would be necessary. The Appellant's architect identified design alternatives that would not necessitate added depth.

A key point missing from these scattered examples of design features that would or would not increase depth was a cohesive design that showed how these design issues combined would or would not necessitate 6 to 12 feet of additional depth. The Applicant and Appellant witnesses both presented building envelopes that substantiated their points. However, there was no way of telling from these rough diagrams whether beams, foundations, elevator pits and so on could be combined together to actually fit within the building envelopes presented by the parties.

Ideally, the building envelopes would have been detailed enough to demonstrate via structural engineering calculations that the depths presented were actually possible or in the opposing view unavoidable. Absent this level of precision, the feasibility of the building envelopes was largely left to generalized conclusions on whether added depth was inevitable or not. Necessary depth is a structural engineering issue. Weighing which general conclusions were most compelling, the opinion of the Applicant's structural engineer would of course be the more compelling absent any apparent flaws. No such flaws were present. The structural engineer's testimony was determinative. Under-building parking is not feasible due to risk of aquifer breach.

The final remand round on wetland delineation has also been resolved in favor of the Applicant as well. Overall it should be acknowledged that the Applicant's wetland analysis has gone through two remands, has passed peer review twice and has also been approved by the Washington State Department of Ecology (DOE). The Applicant and Appellant have both probably contracted the best wetland experts available to represent their respective positions. As noted in the last remand, Phil Scoles, the Applicant's expert, provides a solid exceptionally well documented code-based wetland delineation. The Appellant's expert, Dr. Cooke, has unparalleled credentials in both plant and soil science.

On at least a couple key issues, Mr. Scoles' review is found more compelling because his applications adhere more closely to the wetlands manual than Dr. Cooke. Ironically Dr. Cooke's analysis may be more accurate than Mr. Scoles because her position only diverges from the code when supported by the latest best available science. However, the wetlands manual is a regulatory document. It is a legislative determination of what wetland indicators accurately establish the presence of wetlands and how those indicators should be assessed. In this regard even though current best available science establishes that the human eye cannot distinguish between 1 and 2% redoximorphic elements in soil samples, the wetland manual still requires that determination. Wetland scientists have developed techniques to asses those differences through the Munsell color chart. Similarly, although plowing of the project site may render the soil indicators a little off, agency practices in applying the manual don't recognize any need to correct for plowing if the plowing is less than five years old.

The most compelling point in Dr. Cooke's testimony is that the Applicant didn't actually dig their test pits in the vicinity of her test pits as required by the second remand decision. The vegetation and soil indicators of the Applicant's pits don't match those of Dr. Cooke's. The evidence in the record sufficiently establishes that differences in

vegetation are attributable to the different seasons in which the test pits were assessed. The differences in soils are not as readily explained. However, the measures taken by the Applicant to accurately locate their pits is found to be conclusive. The Applicant and peer review wetland scientists both did five-to-ten-foot sweeps around each test pit point to see if they could find similar vegetation to that noted in Dr. Cooke's pits. No such vegetation was found. The test pit coordinates used by the Applicant and peer review were based upon GIS coordinate Translations of the test pit map produced by Dr. Cooke. That map in turn was produced from GIS coordinates generated by Dr. Cooke. Dr. Cooke used a GIS device to fix her coordinates that had an accuracy of about a meter. Consequently, the test pit locations used by the Applicant and peer review are found to be well within the margin of error of the GIS device used by Dr. Cooke.

As part of the second remand the Appellants presented additional evidence that identified a new water quality treatment that could effectively remove 6PPDQ from stormwater. See Ex. A4 and A5. The parties have agreed to a condition requiring this treatment. This decision imposes that condition.

Testimony

A computer-generated Transcript of the hearing has been prepared to provide an overview of the hearing testimony. Citations to the Transcript are made by "Tr X." The Transcript is provided for informational purposes only as Exhibit F35. The Transcript is not entered as evidence, but rather assigned an exhibit number to accommodate the County's record retention system. This decision references page numbers from the Ex. 35 Transcript. The computer generated Transcript segments used by this decision have been verified as materially accurate. However, the Ex. 35 Transcript should not be used as a substitute for an accurate Transcription of the hearing recording as required for judicial review or otherwise required by law.

Exhibits

There are four groups of exhibits that have been entered into the record via exhibit lists prepared by the Clerk to the Hearing Examiner, as follows:

- Appellant (A) Exhibits A1 – A10.
- Applicant (B) Exhibits B1 – B17[1]
- County (C) Supplemental Exhibits C1
- Foundational (F) Exhibits F1 – F35 (with addition of Transcript as F35)

[1] The title to Ex. B6 is corrected to "Site Plan" perTr.3.

Findings of Fact

1. Background. This decision results from a second remand of an appeal of a State Environmental Policy Act Mitigated Determination of Nonsignificance (MDNS) and administrative approval of a conditional use permit (ACUP).

The MDNS and ACUP decisions were re-issued pursuant to a remand decision by Examiner Drummond on December 29, 2020. The DNS and ACUP approved a 160-unit multifamily complex located at 9506 Mickelberry RD NW composed of four buildings each three stories in height and a clubhouse. The Drummand remand decision required an extensive amount of project revision and evaluation including a new wetland delineation, greater conformance to Silverdale Design Standards (SDS), more advanced stormwater design review and a more detailed analysis of impacts to hydrological processes and Traffic.

The second remand decision was issued by Examiner Olbrechts. The second remand required resolution of two issues: (1) whether under-building parking was feasible as required by Silverdale Design Standard (SDS) 9.4.3D; (2) reassessment of the delineation of Wetland A and whether another wetland is located on the southwest corner of the project site.

2. Hearing. The hearing on this second remand was held over four days – June 2, 2025; June 3, 2024 and June 4, 2025 for the presentation of evidence and June 13, 2025 for oral closing argument.

Feasibility of Under-Building Parking

3. Increasing Excavation 6-12 Feet Materially Jeopardizes Artesian Aquifer. It is largely uncontested that increasing the depth of the project by 6-12 feet will materially risk a material breach of an artesian aquifer. It is further uncontested that such a breach could create significant damage.

The Applicant presented the only hydrogeologist testimony on the aquifer issue. The Applicant's hydrogeologist was Michael Piechowski. Mr. Piechowski is a Washington licensed geologist and hydrogeologist with over 30 years experience in those fields in the Pacific Northwest. Ex. B12. As noted in his declaration, site work conducted in 2021 showed that the property is covered with a layer of glacial till, under which is an artesian aquifer. Based upon eight soil borings, the overlaying till ranged from 23 feet to over 35 feet. Id, par. 5. It was concluded that the current building design would at most reduce the till thickness by 50%. Id. par. 6. Mr. Piechowski testified that as a margin of error 50% is considered the maximum till that should be removed over the aquifer. Tr.17. Mr. Piechowski added six feet of depth to the building cross-sections and found that the till was reduced by as much as 82% in some areas. Id. par. 10.

Mr. Piechowski noted that reducing the till by as much as 82% would reduce the remaining till thickness to the point where it would not have the integrity to confine the

underlying aquifer. The confining layer would fail because the hydrostatic pressure of the underlying aquifer becomes more than the confining layer can withstand. Id. par. 11.

Mr. Piechowski testified that one small artesian breach can create millions of dollars in damages. As an example he cited an incident in Vancouver BC where a contractor drilling holes for heat pump system breached an aquifer with one hole. The hole caused 10.5 million dollars in damages and jeopardized a number of structures in the area. Tr.12. He noted that the Vancouver incident is just one of many. Mr. Piechowski opined that digging any deeper than proposed presented undue risk. Tr.12.

Mr. Piechowski identified that if the aquifer is breached it would have to be dewatered to redress the damage. This could adversely affect several people who rely upon the aquifer for their private wells. Tr.17.

4. Under-Building Parking Will Increase Excavation Depth 6-12 Feet. The evidence marginally establishes that the addition of under-building parking will increase the excavation depth of the proposal by 6-12 feet. The evidence on those issues is primarily based upon the testimony of Mr. McCormick, the Applicant's structural engineer, and Mr. Adams, the Appellants' architect.

Mr. McCormick testified that *"no matter how we slice it, no matter how we do it, it is putting structured parking will go deeper with bigger, heavier foundations and deeper into background*." Tr.81. If the first floor is converted to a garage the height of the floor will have to be increased by six feet. Tr. 82. Since two stories are likely necessary for the garage either ramps will be required to access the second floor or depth will have to increase by two feet. Tr. 82. Sprinklers would also add to additional height. Tr. 81. The total would be six feet deeper – two more feet for foundation footings, two more feet for clear space and two more feet for deeper beams. Tr. 102. Adding two levels of parking would create the need for an elevator to access the six floors of the building. An additional six feet would be needed for an elevator for a total of 12 feet deeper. Id.

Mr. Adams asserted that it's possible to install the thicker foundation necessary above the depth proposed of the current proposal. 207. He asserted there are design options to thicker beams and more columns that don't necessitate going deeper. 208-09. Using concrete instead of wood can reduce necessary depth. Id. The Applicant could also go wider instead of deeper as well for necessary structural support. Id. Large portions of sprinklers can be strategically located to avoid impacting clearance. 209. The building may need to go up a little for an elevator pit, but the height could also be reduced by taking out the parapets. Mr. Miller, the Applicant's architect, acknowledged that elevator pits could be four feet deep instead of six[2]. Tr29

[2] The foundation slab would still add to the depth of the pit, but the pit itself would only increase the overall depth by four feet.

Mr. Adams identified a couple other projects in the vicinity that were able to accommodate under-building parking as well as other projects in the Seattle neighborhood of his business. While the projects in the Silverdale area supported the concept that the under building parking could be financially feasible in the Silverdale area, they did not address whether a six-story building (including parking) could be accommodated with the aquifer constraints of the project site. Mr. Adams testified that he had designed a facility with similar water table constraints at Salmon Bay. However, he did not identify how deep the foundation was for that particular facility or how the height of the building compared to the proposal. Tr.198, 209, 346-347.

The testimony of Mr. Adams and Mr. McCormick is difficult to reconcile because they both focus on general design issues that are not tied to any specific single building design. Mr. McCormick asserts these general design issues make it infeasible to avoid greater depths. Mr. Adams asserts there are reasonable alternatives. It is recognized that Mr. Adams has some well-grounded familiarity with engineering feasibility from his decades of experience in collaborating with structural engineers. However, he is not a structural engineer. Absent specifically designed plans that are supported by engineering calculations to adequately meet load and seismic standards, the issue of necessary depth is left to the generalized opinions of an architect verses a structural engineer. With nothing more specific to rely upon, the opinion of the structural engineer, Mr. McCormick, is found determinative.

Wetlands

5. Wetland A Properly Delineated with DP 16 Addition. With the addition of DP 16, the Applicant has delineated the wetlands of the project site in conformance with the County's wetland delineation manuals.

The wetland review of the project is challenging because it involves highly divergent opinions from highly qualified wetland experts. Dr. Cooke has historically proven to be a formidable expert holding developers accountable to the wetland delineation manuals. In this appeal she met her match with Paul Scoles. Mr. Scoles' meticulous and highly code-based work squarely addressed all of Dr. Cooke's concerns. It is also of course probative that the Applicant's delineations have been verified by two rounds of peer review, DOE concurrency and three rounds of test pits dug by the Applicant for two remands.

Dr. Cooke cast sufficient doubt in the last remand as to the site selections of the Applicant for its wetland test pits. As a result, the order for the present remand required the Applicant to dig additional test pits at the locations of Dr. Cooke's test pits. This work was to be subject to peer review. An additional primary issue of the Second remand was the proper application of the A11 hydric soil indicator. The Second remand required the parties to use the remand's interpretation of the A11 indicator. The parties misinterpreted this as requiring that the A11 indicator be the only soil

indicator applied. Fortunately, Mr. Wright, Ms. Hyland and Mr. Scoles still assessed the applicability of all the field indicators[3].

Dr. Cooke's report in the first remand proceeding identified five test pits she dug for Wetland A. Mr. Scoles dug his pits adjacent to four of those pits, excluding the fifth pit where Dr. Cooke found no wetland. Tr.107. Those four test pits were identified as DP15-18. Ex. F11, p. 8. Mr. Scoles also dug four test pits for the southwest corner as well. Tr.108. Those test pits were labelled by the Applicant as DP 12-14, Ex. F11 p. 7. Mr. Scoles dug the pits on May 20, 2024. T. 111. Dr. Cooke dug her pits in September, 2021.

All of Dr. Cooke's challenges to the second remand wetland delineation are individually addressed below:

A. Test Pit Locations Accurate. One of Dr. Cooke's biggest concerns with the second remand wetlands work was that it doesn't appear that the Applicant and peer review test pits were adjacent to her test pits as required by the second remand. The test pits were located in the correct areas.

It is uncontested that the vegetation and types of soils of the remand pits were not the same as Dr. Cooke's. Dr. Cooke maintains that the vegetation at her test pits tends to stay the same year-round, especially canary grass. However, Mr. Wright testified that changes in vegetative dominance in pasture settings according to season are "*not an unusual circumstance in pasture delineations at all*." Tr. 251. He noted that pasture species grow and die in months and that different species have different life cycles and begin and their lives seasonally across a year. Tr. 252. Mr. Scoles agreed that vegetation in pasture settings changes seasonally. Tr. 326.

The substantial and preponderance of evidence establishes that the remand pits were dug in the areas specified by the remand order. The Applicant's wetland consultants, Phil Scoles and Rachael Hyland, determined the location of Dr. Cooke's test pits by using a map included in her report. Dr. Cooke testified that

[3] Mr. Wright's peer review report, Ex. F13, identified that the focus of his peer review was applicability of the A11 indicator. However, he clarified in his testimony that he applied all of the 1987 Army Corps soil indicators. Tr.251. Even if Mr. Wright's work was limited to application of A11, his results still largely confirm the results of Mr. Scoles. Dr. Cooke's report, Ex. A2, identifies that the A11 indicator applied to 3 of the 4 test pits she found to establish wetland as part of Wetland A. Mr. Wright found the A11 indicator didn't establish hydric soils for 2 of those 3 pits. The one where Mr. Wright did find hydric soils has been found to establish wetland in this decision. The one Wetland A Cooke test pit that wasn't identified as A11 was DP 15. Dr. Cooke found hydric soils for that test pit to meet the F3 indicator. If Mr. Wright did in fact fail to verify for the F3 indicator at this location, Mr. Scole's reading is still found to be the more accurate given the DOE concurrence in his findings and his overall Track record in passing the majority of peer review from Mr. Wright. The same reasoning applies to the southwest corner test pits.

she generated her map from GIS coordinates inputted from her field work from a GIS submeter with less than a meter margin of error. Tr. 110, 149, 184, 196. Rachael Hyland, from Soundview Consultants, testified that the GIS experts of her firm took the maps and were able to translate it into GIS coordinates that were "*pretty dang similar*" to what Dr. Cooke could have given as GIS coordinates instead of the map. Tr. 335.

The locations of the remand test pits were also not deliberately designed to be located upland of Dr. Cooke's test pits. Mr. Scoles and Ms. Hyland searched for similar vegetation to that found in Dr. Cooke's report within five to ten feet of the mapped point with the intent of relocating not those areas if similar vegetation were found. Tr.138 and 336. Mr. Wright selected his sites in an area of similar vegetation when possible and when he had a topographic choice, he went downhill to areas that were more likely to have wetland indicators. Tr. 262.

B. 1% Redox Readings Sufficiently Verified. Dr. Cooke also asserted that soil indicators based upon less than 1% redox are not accurate because recent studies have shown that the human eye can't see less than 5%. Tr.165-66. It is agreed that 1% readings are problematical. However the 1% readings were sufficiently verified in peer review and DOE review for designation of hydric soils except for DP 16.

Mr. Wright, the peer reviewer, agreed that less than 1% was questionable. He noted that the regulatory field indicators indicate that 2% of redox features is probably the limit of what can be detected by the human eye. Tr. 261. Consequently Mr. Wright did his own test pits that found that independently found that the 1% test pits were hydric soils. Mr. Scoles disagreed, testifying that he can readily distinguish between 1% and 2% redox. He noted that the Munsell color book is designed to distinguish between such color concentrations. It has charts that assign concentration levels based upon number of redux specs that are visible per area. Tr. 322. Mr. Wrights independence, extensive experience and the consistency of his opinion with the delineation manual is found determinative on the 1% issue.

C. F6 Soils with Chroma 2 and Less than 2% Redox Not Hydric. Dr. Cooke asserted that Mr. Scoles and Soundview inaccurately applied its soil readings. She took the position that a chroma of 1 was an automatic hydric soil and a chroma of 2 with any redoximorphic features was also hydric. Tr. 154, 159. Mr. Wright agreed with this position. Tr. 260. Mr. Scoles disagreed with this position, noting that it's based upon the 1987 Army Corps manual, which has been superseded by the Western Mountain supplement. Specifically, the Western Mountain supplement provides that you can have a chromo of 1 under the F6 indicator but still must have at least 2% redux to qualify as a hydric soil. Tr. 318. Page 22 of the Western Mountains supplement corroborates Mr.

Scoles' position. His position is found to be correct as to soils subject to the F6 indicator.

D. Soils Not Problematic. Dr. Cooke argued that the soils should have been treated as problematic under the wetlands manual because past plowing had artificially affected the soil depth measurements that indicate hydric soil in soil indicators such as A11. Tr.164. That issue has already been addressed in the second remand decision, which found at Finding of Fact No. 14 that the soils are not problematic.

The additional evidence presented in the second remand hearing reinforced Finding of Fact No. 14. Mr. Wright testified that agencies generally disregard plowing impacts if older than five years, although this rule isn't incorporated into the wetland manuals. Tr. 265. Mr. Wright concluded that plowing hadn't occurred in 75 years based upon aerial photographs. Tr. 263. Mr. Scoles testified that aerials showed no plowing activity over a 30-year period and that any effect of that plowing would have been eliminated in that period of time. Tr. 137. Dr. Cooke testified that the aerials showed plowing had occurred in the last 20-30 years. Tr. 193. From this divergent testimony it is concluded that plowing had occurred at most recently 20-30 years ago and that the effects of the plowing would not have rendered the soil indicators inaccurate.

E. DP 16 is Wetland. DP 16 is found to qualify as a wetland due to the All indicator. Dr. Cooke and Mr. Wright found all three wetland indicators at this site. Mr. Scoles did not. Mr. Scoles found that Dr. Cooke had incorrectly found the soils to meet the hydric soil profiles for A11 and F3. F11, p. 10. Mr. Scoles instead found that the F6 indicator applied. The difference of opinion between Mr. Scoles and Mr. Wright appears to be in the level of redox observations. Mr. Scoles observed none to a depth of 7 inches and less than 1% from 7-9 inches. Mr. Wright found up to 5% redox in the top ten inches. As a result of Mr. Wright's findings Mr. Scoles dug six additional test pits, DP23-28, around DP16. F18, p. 3. He found no wetland at those test pits. Tr.174. Dr. Cooke believes DP 25, 27 and 28 were misinterpreted and do show wetland. Id.

Mr. Wright's objectivity as peer reviewer combined with his extensive experience is found to be determinative in the resolution of the DP16 area. DP16 is found to qualify as wetland. Dr. Cooke testified that the test pits she recorded represent the boundaries of this delineation. Tr.123. As such Wetland A shall be extended northwest up to DP 16. Rather than require a new delineation up to DP 16 that would require a third remand or a second appeal, the new wetland boundary depicted in F18, p. 4 is found to apply. As presented in that depiction, the expanded wetland area is defined by test pits in which no wetland was found by the Applicant's consultant. Id. The added area represents a reasonable synthesis of the conflicting multiple expert opinions regarding Wetland A.

F. Test Pits Dug at Appropriate Season. Dr. Cooke again emphasized that the site visits conducted by the Applicant were conducted at the wrong time of year. The test pits were taken at the correct time of year because the results were all based upon hydric soil indicators. The accuracy of the hydric soil indicators of this appeal was not dependent upon season.

Condition 4 of the MDNS as imposed by the second remand decision provided as follows:

> *If the Applicant intends to question the presence of wetland vegetation or hydrology, the investigation of such must be done at times conducive to identifying the presence or absence of those features. Appropriate times will be based on the guidance provided in the Manual.*

The Applicant did find an absence of wetland hydrology in the second remand on DP 12, 13, 14, 15, 16, 17, 21 and 22. See Ex. F11. Dr. Cooke identified that it takes only two weeks during the growing season to establish sufficient hydrology. Tr. 175. DP 14 was dug in July when hydrology indicators would typically not be present Id. Dr. Cooke didn't identify any wetland manual requirement that specified when hydrology should be measured. More important, all of the test pits that found no hydrology also found no hydric soils. The absence of hydric soils by itself is enough to disqualify a wetland. Hydric soil indicators are not dependent upon time of year. Even if the wetland manual had provisions that discouraged or prohibited hydrology assessment at the times conducted by the Applicant, the hydric soil indicators by themselves were enough to establish the absence of wetlands.

6. No Wetland in Southwest Corner. The Applicant has adequately established the lack of wetland in the southwest corner of the project site. The second remand required the Applicant to dig an additional test pit approximately midway between DP-9 and the southern property line. This condition was adopted in response to testimony from Dr. Cooke that DP-9 was the closest test pit to a likely wetland in the southwest corner. She asserted that the test pit was situated on the very edge of a blackberry patch that signified the presence of a wetland. Second Remand, Finding of Fact No. 16.

As shown in the Applicant's test pit map, Ex. F18, p. 13, the Applicant complied with the second remand requirement for an additional southwest test pit by adding DP 13 and 14. Mr. Scoles found that these areas did not contain hydric soils. This finding was verified by Mr. Wright in digging his own test pits. Ex. F13 and F18. Dr. Cooke disagreed with these findings, testifying that DP 14 had a chroma of 2 with redox, which as previously noted she believes to qualify as a hydric soil. Tr.159. Dr. Cooke now maintains that the Applicant should also have gone further south than just halfway, that there is certainly a wetland located in that direction. Id. However, this position is arguably not consistent with her testimony from the last remand hearing

where she asserted DP 9 was placed just on the edge of blackberry bushes signifying wetlands.

The Applicant complied with the remand condition and went halfway towards the south property line. The Applicant didn't go further because as testified by Mr. Scoles the southern edge is on a cut slope that would have an artificial draw down effect on the water table. Tr. 127. The test pits for the southwestern corner are found to be appropriately located. The results of the test pits were confirmed by Mr. Wright and in prior review by DOE. Consequently, no wetlands are found to be located in the southwestern corner of the project site.

6PPDQ

7. 6PPDQ. As part of the second Remand the Appellants presented additional evidence that identified a new water quality Treatment that could effectively remove 6PPDQ from stormwater. See Ex. A4 and A5. The treatment appears to be promising but DOE and the County have not as yet adopted any regulations adopting these new water quality Treatment standards. As a result of the evidence included in Ex. A4 an A5, the Applicant and Appellants have agreed to the following condition, which is adopted as part of this decision:

> *The Applicant shall follow the most current stormwater regulations adopted by Kitsap County for 6 PPDQ Treatment at the time of its site development permit application.*

Conclusions of Law

Procedural:

1. Authority of Hearing Examiner. KCC 21.04.100 classifies ACUPs as Type II permits. Appeals of Type II permits are heard and decided upon by the hearing examiner as outlined in KCC 21.04.290. SEPA appeals are consolidated with the ACUP as required by KCC 21.04.190A and WAC 197-11-680.

2. Proposal Complies with SDS 9.4.3D: The Applicant has established compliance with SDS 9.4.3D by establishing that under-building parking is not feasible.

SDS 9.4.3D provides as follows:

> *Parking will be under building where feasible for multiple unit buildings.*

As outlined in Conclusion of Law No. 6 of the Second remand, the design standard above can only be applied when its applicability is clear, i.e. when reasonably minded persons can agree on its application. This is not to be confused with burden of proof. At the least, there must be substantial evidence in the record that establishes that the proposal complies with SDS 9.4.3D as required by RCW 36.70C.130(1)(c).

Fortunately for the Applicant, reasonable minds would not disagree that a building design should not be considered "feasible" if it threatens massive damage by risking the breach of an artesian aquifer. For the reasons identified in FOF No. 3 and 4 above, substantial evidence in the record establishes that building design would not be feasible for this reason. As identified in the Overview, the Applicant and Appellant expert witnesses were adept at countering each other's general design issues that related to depth of excavation. However, there was no specifically designed example based upon engineered calculations that showed in any persuasive fashion that a shallow enough foundation could or could not be constructed. In the absence of any such detailed evaluation, the issue can only be resolved by assessing the general conclusion of the Applicant's structural engineer that the project couldn't be done at the required depth verses the general conclusion of the Appellant's architect that it could. Based upon that general level of analysis, the Applicant's structural engineer is found to have more expertise on engineering issues than the Appellant's architect.

The Applicant also argued that the under-building parking was not financially feasible and that the added height wouldn't comply with the SDS standards. Those contentions need not be resolved given the determination that parking isn't feasible due to artesian impacts. The Appellants cast some significant doubt on the Applicant's financial feasibility analysis by challenging the parking estimates presented by the Applicant. The contention that the added height would result in other SDS violations wasn't found persuasive. The under-ground parking requirement is one of the few mandatory design standards of the SDS. It prevails over most of the other SDS standards that merely encourage design specifications.

3. Wetland Delineations Conform to Wetland Delineation Manual. The Applicant has established that its wetland delineations conform to the County's adopted wetland delineation manuals.

A somewhat challenging legal issue for the wetland delineation is whether the wetland delineation is a SEPA issue or an ACUP issue. This can make a difference since substantial weight is due to the findings of the SEPA responsible official under WAC 197-11-680(3)(a)(viii) while no such deference is due to County staff's ACUP decision. The MDNS for the proposal doesn't dictate the delineation or classification of Wetland A. It is limited to addressing some of its mitigation. This suggests that County staff applied the County's critical areas ordinance independent of SEPA review as part of the ACUP review process.

Ultimately Finding of Fact No. 5[4] is reached with or without SEPA deference. Given the extensive upland testing in the second remand that is at least partially verified by

[4] The second remand identified that the issue of the southwest corner wetland was solely an ACUP issue in its Finding of Fact No. 11. The second remand did not expressly address whether the Wetland A delineation qualified as a SEPA issue. However, it did require the re-evaluation of that issue as an MDNS condition. Given Dr. Cooke's compelling findings in the first remand and the Applicant's failure

peer review, the conclusion can be reached that there is substantial evidence in the record that the wetland delineation for Wetland A meets the standards of the federal wetland delineation manual and regional supplement as adopted by KCC 19.200.210A1.

Decision

The findings and conclusions of the March 13, 2024 Final Decision are re-adopted except to the extent inconsistent with this Decision Upon Reconsideration. All prior conditions imposed by the prior second remand shall be replaced with the following:

Added MDNS Conditions:

1. The Applicant shall complete potholing and appropriate surveying of the location of all utilities that could potentially impact installation of the project stormwater facilities in the Bucklin Hill Road right of way. The site development permit required by KCC 12.10.030 shall not be issued until this potholing and survey work has been completed and demonstrates to the County's satisfaction that the proposed off-site stormwater conveyance is feasible.

2. The "Rational Method" as referenced in KCSDM, p. 4-1, § 4.2.1. shall be used to determine stormwater pipe size. The Western Washington Hydrology Model (WWHM) may be used instead of the Rational Method should potholing reveal that existing utilities cannot accommodate the pipe size required by the rational method.

3. The Applicant shall follow the most current stormwater regulations adopted by Kitsap County for 6 PPDQ Treatment at the time of its site development permit application.

Added ACUP Condition:

1. To provide a Transition in scale from the proposed multi-family buildings to the adjacent single-family zoning, Buildings C and D shall not exceed a building height of 30-feet within 50-feet of the southerly property boundary.

2. The Wetland A delineation shall be expanded to the boundaries shown in Ex. F18, p. 4

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to comply with Examiner Drummond's remand directions, the second remand for reassessment of the Wetland A remand was justified without SEPA deference. The southwest corner issue is thus still treated as an ACUP issue as specified in the second remand. The Wetland A re-assessment is left unresolved as to whether it's a SEPA issue. Resolution is unnecessary since the additional evidence provided by the Applicant in the second remand establishes that the wetland has been properly delineated with or without the benefit of SEPA substantial deference.

Dated this 7th day of July 2025.

Phil Olbrechts

Phil Olbrechts,
Kitsap County Hearing Examiner

Appeal Right

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

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