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

12/8/2025

To: Interested Parties and Parties of Record

RE:	Project Name:	**#24-01649** EDWARDS - Appeal of SEPA Determination Permit 20-04869 & **#24-04572** EDWARDS II - Appeal of Site Development Activity Permit 20-04869
	Applicant:	Clinton and Meghan Edwards 11090 SE SOUTHWORTH DR PORT ORCHARD, WA 98366
	Appeal Type:	SEPA Appeal (ADMIN APPEAL) and Administrative Appeal (ADMIN APPEAL)
	Appellants	Christian Clemmensen Stella Clemmensen Greg Anderson
	Permit Number:	24-01649 & 24-04572

The Kitsap County Hearing Examiner has **DENIED in major part and APPROVED in minor part** the administrative appeals of **Permit #20-04869: EDWARDS - restore onsite buffer zone, logged pasture and new gravel drive – SDAP-GRADING 2**, **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:
Applicant/Owner: Clinton and Meghan Edwards, clinton.w.edwards@gmail.com
Applicant's Representative: Peter Durland - (Attorney, Gordon Thomas Honeywell), pdurland@gth-law.com
Appellants: Christian Clemmensen, tyderian@filmtracks.com; Stella Clemmensen, stella@filmtracks.com; Greg Anderson, ganderson.parrothead@gmail.com
County Representative: Ashlynn Ota, Aota@kitsap.gov; Neil Wachter, NRWachter@kitsap.gov
Interested Parties:
None
DCD Staff

THE HEARING EXAMINER OF KITSAP COUNTY

IN RE: Clemmensen SEPA Appeal SDAP 20-04869	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Summary

Mr. Clemmensen's appeal is sustained in minor part. Minor revisions to the MDNS under appeal have been made as outlined in track change at the end of this decision. 25-foot rural character buffers are required to run along the length of the adjoining Clemmensen and Andersen properties. Those buffers must be recorded, monitored and bonded.

As background, Mr. Clemmensen appeals a mitigated determination of non-significance (MDNS) for a site development activity permit (SDAP) for the removal of 3.79 acres of trees located on property owned by Clint and Meghan Edwards at 11090 SE Southworth Dr. Port Orchard, WA 98366. Mr. Clemmensen owns an adjoining parcel to the west. In 2019 the Edwards removed the 3.79 acres of trees to clear their property to a condition similar to the lots between their lot and the Southworth ferry terminal. However, Mr. Clemmensen had been relying upon the removed trees to provide numerous benefits to his property including screening against wind, noise and heat.

Mr. Clemmensen's objections to the Edwards tree removal[1] is largely premised on the belief that the Edwards have an obligation to retain trees to protect his property. As a policy matter, people can certainly differ as to whether landowners have a responsibility to preserve the natural condition of their property to benefit others. As a legal matter pertinent to this appeal, Mr. Clemmensen's expectations are valid to the extent that tree retention and/or mitigation is required by County development standards. Unfortunately for Mr. Clemmensen, Kitsap County hasn't adopted many tree retention requirements for rural lots. Other than trees associated with environmentally sensitive areas such as wetlands, there don't appear to be any directly applicable tree retention standards to the Edwards property.

The absence of any directly applicable tree retention standards may not be entirely the choice of the County Commissioners. In 2015, King County attempted to adopt a regulation that limited clearing of residential rural lots to 50%. That ordinance was struck down by the state's Supreme Court in *Citizens' All. for Prop. Rts. v. Sims*, 145 Wash. App. 649, 187 P.3d 786 (2008). The court found the ordinance invalid because the clearing restriction was not "roughly proportional" to the impacts of development. Similarly, at the permit review level a preliminary plat condition requiring retention of 30% of the property in open space violated the "roughly proportional" standard.[2] These cases highlight the judicial perspective that the basic rule in land use law is that, absent more, an individual should be able to utilize his land as he sees fit.[3]

Against this legal backdrop Mr. Clemmensen has wisely focused upon seeking mitigation under the State Environmental Policy Act (SEPA) for the impacts to his property as opposed to arguing that the Edwards shouldn't have removed their trees. SEPA requires that all probable significant adverse impacts be mitigated or in the alternative that they be fully assessed in an environmental impact statement. Although SEPA legal issues can be complicated, the primary inquiries in a SEPA MDNS appeal are straightforward: (1) were impacts adequately assessed; and (2) are impacts adequately mitigated.

One major point that Mr. Clemmensen hasn't recognized is that the mitigation for tree removal is already baked into the County's regulatory regime. As outlined in Conclusion of Law (COL) No. 5 below, the Kitsap County Code (KCC) is structured to authorize tree removal and agricultural practices on single-family development sites. The impacts of those activities are already addressed in the County's buffer and ~~agricultural practice standards~~. The Edwards have just as much right to rely upon those standards as all the

[1] Throughout this decision the Edwards clearing and grading activities will be referenced as the "Edwards' tree removal." It is understood that the Edwards included stump removal and grading in their 2019 tree removal.

[2] *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash. 2d 740, 49 P.3d 867 (2002), abrogated on other grounds by Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (2019).

[3] *Norco Const., Inc. v. King Cnty*., 97 Wash. 2d 680, 684, 649 P.2d 103, 106 (1982).

other lots between them and the Southworth ferry terminal that are all similarly cleared and mitigated with perimeter buffers. As a matter of law, those County's development standards set the impacts of the Edwards tree removal to acceptable levels. In this regard, the County's reliance upon those development standards meets the SEPA requirements for adequate assessment and mitigation.

The one factor where the County's development standard fall short is not requiring buffering between the Edwards property and its adjoining neighbors. The absence of such a requirement is based upon the premise that the Edwards use is compatible with adjoining uses. However, the unique circumstances of the location of the Edwards' property exacerbates the impacts of tree cutting to the level of an incompatible commercial or industrial development. The proximity of the lot to Puget Sound waters creates high winds that in turn exacerbate noise and odor impacts. The proximity to the Southworth ferry terminal also creates noise and light impacts that are more commensurate with urban areas. As established by Mr. Clemmensen, the loss of screening has exposed his cleared area to likely greater impacts than one would expect from tree removal in a quiet rural area. The buffer requirements imposed originally in the MDNS and added upon by this decision are designed to address the unique circumstances of the Edwards' tree removal.

Despite the simplicity of focus in a SEPA appeal, Mr. Clemmensen chose to take an alternate path and focus upon alleged mistakes, errors and bad faith in both the County and the Edwards. Those deficiency issues are irrelevant to the final adequacy of review and mitigation. As previously noted, all that matters in a SEPA appeal in the end is whether impacts have been fully assessed and adequately mitigated. In the end -- the end being the close of the record of this appeal -- there's no question that all impacts have been fully considered and mitigated. Mr. Clemmensen has ensured that no impact was left behind. Any mistakes, obfuscations or delays involved in the long road of this permit review doesn't change the fact that at the end all impacts have been accounted for and mitigated as required by law.

One area where mistakes could still make a material difference in the adequacy of SEPA review are the engineering calculations prepared by the Applicant's engineer in her stormwater compliance analysis. That analysis included a determination of the amount of area cleared by the Edwards as well as the amount of soil disturbance. As previously noted, the adequacy of mitigation in this appeal is largely dependent upon conformance to the County's development standards. As outlined in COL No. 7, the size of the clearing area is determinative of whether a forest practices permit is required. The amount of soil disturbance is determinative of what type of SDAP is required. As determined in Finding of Fact (FOF) No. 10 and 21 below, the Applicant's engineer correctly and accurately applied the County's stormwater regulations as pertinent to clearing area and soil disturbance. Mr. Clemmensen had his differences with how the engineer applied those

standards. However, how those standards are applied is a matter of professional judgment based upon years of engineering experience and training in applying stormwater standards. Mr. Clemmensen doesn't have that training or expertise. Further, deference is due Mr. Heacock's determination that the engineer's analysis was sufficient.

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 F56. The Transcript is not entered as evidence, but rather assigned an exhibit number to accommodate the County's record retention system. The Ex. 56 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 during the hearing via exhibit lists prepared by the Clerk to the Hearing Examiner, as follows:

- Appellant (A) Exhibits A1 – A309.
- Applicant (B) Exhibits B1 – B6
- County (C) Supplemental Exhibits C1
- Foundational (F) Exhibits F1 – F55 (with addition of Transcript as F56)

The following briefing was admitted to the record post-hearing:

September 26, 2025 Appellant Closing Brief
October 10, 2025 Applicant Closing Brief
October 10, 2025 County Closing Brief
October 21, 2025 Appellant Closing Brief
November 10, 2025 County Supplemental Brief
November 14, 2025 Appellant Supplemental Response Brief[4]
November 14, 2025 Applicant Supplemental Response email

FINDINGS OF FACT

1. Appellant. SouthworthForest.Org, represented by Christian Clemmensen, 11004 SE Southworth Dr. Port Orchard, WA 98366, tyderian@filmtracks.com. Mr.

[4] The recorded documents and DNR forms linked to Mr. Clemmensen's brief are not admitted because they constitute new evidence introduced after the close of the hearing.

Clemmensen's property adjoins the Edwards property on the Edwards northwest as shown in Ex. A78. The record doesn't appear to identify any information on the structure or membership of SouthwesstForest.Org except that one of the signatories to the appeal is Greg Anderson. Ex. F29, p. 24. Mr. Anderson owns property adjoining to the north. Tr. 306 (Anderson identified as having fencing on north property line). A list of about 31 persons identified "campaign organizers" for the organization is at the end of Ex. A82. Mr. Clemmensen testified that there are a core group of six or seven individuals. Tr. 326.

2. Applicant. The Applicants are Meghan and Clint Edwards. They were represented in this proceeding by Peter Durland, Gordon Thomas Honeywell LLP, 11201 SE 8th St., Suite 120, Bellevue, WA 98004, pdurland@gth-law.com.

3. County. Kitsap County was represented by Ashlynn Ota, AOta@kitsap.gov.

4. Property. The development site of the appeal is owned by the Edwards and located at 11090 SE Southworth Dr. Port Orchard, WA 98366. The Edwards parcel is 7.14 acres. Ex. F19, p. 1. According to the Edwards wetlands report, Ex. F9, p. 5, the Edwards property extends south from a private road off SE Southworth Drive in the Southworth area of Port Orchard (Figure 1). A gravel driveway traverses the center of the property and accesses the developed area in the east-central area of the property. The developed area contains a single-family residence with an attached garage and a shop separated from the residence by a gravel parking area.

5. Surroundings. The Southworth ferry terminal plays an important role in Mr. Clemmensen's allegations of impacts. As shown in Ex. A173, the ferry terminal is located to the northwest of the Edwards property. As further shown in Ex. A173, between the terminal and the Edwards property there are a handful of what appear to be five acre or smaller lots that are for the most completely cleared except for single-family homes and perimeter buffering. As shown in Ex. A 306, the lots adjoining the Edwards property to the west and north, however, are heavily forested. Mr. Clemmensen's property has a half-acre cleared area adjoining the northwest corner of the Edwards property. The surrounding lots are predominantly developed with single-family homes. Mr. Clemmensen's lot is currently vacant but he hopes to develop it with a single-family home as well.

6. Hearing. The hearing on Mr. Clemmensen's appeal was held on August 7, 2025, August 12, 2025, August 15, 2025 and August 28, 2025. The record was left open through October 24, 2025. An Examiner order was issued on November 4, 2025 requesting additional briefing on the regulatory basis of the County's decision making. The record was left open through November 14, 2025 for that purpose.

7. Permit. The permit and associated SEPA review under appeal is a site development activity permit (SDAP) Grade 2 application. The SDAP was approved by a Revised Acceptance Letter and Administrative Determination SDAP #20-04869 dated March 14, 2025. The SDAP decision doesn't require any landscape buffering and notes that a prior condition requiring landscaping was no longer necessary because existing plantings were found to be adequate.

8. Development. The development subject to the SDAP under appeal was limited to unauthorized tree and stumpage removal. The Notice of Application identifies the development activity as removal of trees, stumps and understory of approximately 3.7-acres. Ex. F24, p. 2.

9. Development Chronology. The Edwards were initially authorized to remove trees on this property in 2019 under a danger tree permit, KCC Permit No. 18-04575. Ex. F9, p. 5. According to Mr. Edwards, Joe Bowling, a County representative, went to the Edwards property in May 2019 and confirmed that the Edwards had cleared within authorized limits. Mr. Bowling conducted the verification due to complaints from the Appellant and a neighboring property owner. Ex. F39, p. 4; Tr. 24 (Mr. Edwards Test.). Mr. Heacock also identified in a June 21, 2018 email that from inspection photographs he had concluded that removal was limited to the authorized clearing area and that he intended to do a site visit to further verify. Ex. A 31. However, on July 16, 2025 Mr. Heacock sent an email to Mr. Edwards advising that it appeared Mr. Edwards had cleared "*well beyond the 7,000 square foot limit*." Ex. A33.

The County subsequently determined that the Edwards needed an SDAP instead of a danger permit because the tree removal conducted by the Edwards involved some stumpage removal that exceeded that authorized by the danger tree permit. According to the testimony of Ms. Olsen, County Development Engineering Manager, tree removal isn't considered ground disturbance unless it involves stump removal. As a result, the Edwards submitted a SDAP Grading 1 permit on October 14, 2020. Ex. F24. The County subsequently discovered that a Grading 1 permit was required in error. The Edwards were then required to file an application for a SDAP Grading 2 permit, The MDNS appeal under appeal addressed the impacts of the tree removal covered by the SDAP Grading 2 permit.

10. Clearing Limits. The amount of clearing conducted by the Edwards in 2019 is accurately depicted in the Edwards' civil plans, Ex. F19, as 3.79 acres.

The clearing activity is documented in Sheet C2 of the civil plans. A table entitled "*Site Areas by Surface Type*" identifies surface types such as the 2019 clearing ("clearing limits"), existing pastures and developed areas. The table identifies 3.79 acres as the

"clearing limits." The table also identifies 1.42 acres of an existing pasture on the northwest of the site, 1.37 acres on the north east and a 0.48 acre pasture on the south.

The 3.79 acres is an important data point that is central to mitigating numerous impact of the Edwards' clearing. This is the amount of clearing relied upon by the Applicant's engineer and the County's development engineering manager, Cecelia Olsen, in assessing compliance with County stormwater regulations. It was also used in the SEPA review to assess clearing impacts and as outlined in the Conclusions of Law is integral to determining whether any timber harvest permits are required of the Edwards.

Mr. Clemmensen disputes the accuracy of the 3.79 acres. He presented compelling aerial photographs that show no pasture areas as documented in the civil plans. Ex. A306 is one of the better examples of those aerials. Taken in 2018 according to Mr. Clemmensen's exhibit list, the aerial shows no cleared areas except for relatively small areas immediately adjacent to the home and a couple spots along the driveway. The aerial photographs presented by Mr. Clemmensen leave the impression that there are no pasture areas on the Edwards property.

Ms. Vader, the engineer who drew up the civil plans, testified that aerial photographs are not sufficient by themselves due to distortions caused by parallax, elevation changes and shadowing. Tr. 137. Ms. Vader's opinion was shared by Ms. Olsen. Ms. Olsen testified that engineered survey documents are more reliable than the County parcel search due to inaccuracies in parcel lines. Tr 163 Ms. Olsen also noted that forest canopy obscures site features. Tr. 163.

Ms. Vader conducted site visits to tabulate the clearing for the civil plans. She found those investigations to be more compelling than aerial photographs. Tr. 137. Ms. Vader has been a licensed professional engineer since 1994. Ex. B6. She has decades of experience in site development. The knowledge of stormwater regulations displayed in her testimony confirmed that she has extensive expertise in apply drainage manual standards and the associated site evaluation necessary to apply those standards.

Ms. Vader's testimony on the deficiencies of aerial photographs is heavily corroborated by the aerials themselves. The canopy depicted in those photographs conceals most of the driveway, which is of course known to be a cleared area. That by itself reveals that the aerials are not accurately exposing cleared areas. Ms. Edwards testified that there were "definite open spaces" without forest understory before applying for the danger tree permit, in particular to the north of the detached shop. Tr. 344. No such cleared area is shown in the aerial of Ex. A306.

Overall, the civil plans prepared by Ms. Vader are found to be the most accurate measurement of the amount of clearing conducted by the Edwards. Ms. Vader has

expertise and training in site evaluation. She visited the site to do a full site evaluation whereas Mr. Clemmensen made no mention of doing such a visit. Further, the aerial photographs relied upon by Mr. Clemmensen are clearly not accurate indicators of cleared areas.

Mr. Clemmensen asserts in his closing brief that the civil plans used to do the drainage analysis are missing required information on existing hard surfaces. The record doesn't support this conclusion. The "Site Areas by Surface Type" previously mentioned for the civil plans identifies amounts of existing gravel, existing roof and prior developed hard surfaces. The map shows where these areas are located. Mr. Clemmensen asserts that Ms. Vader testified this information wasn't necessary. Ms. Vader testified this information wasn't necessary for the cover sheet of the civil plans. She included that information in Sheet C2 of the plans. Mr. Clemmensen asserts that the plans lack finished grades as required by Section 1.4.2.3 of the County's stormwater manual. The civil plans do in fact show grades of several design features and contour lines that indicate the types of grades of the existing driveway. Whether the civil drawings provide the level of detail required for adequate drainage analysis is a matter of professional judgment that Mr. Clemmensen is not qualified to contest. Mr. Clemmensen also asserts that Ms. Vader didn't prepare a "site assessment and planning packet" required by Section 1.4.1 of the Manual. As far as can be ascertained, all of that required information is in fact provided in Section 2 of the Drainage Study, which references figures based upon the civil plans. See Ex. F20, p. 9.

Mr. Clemmensen asserts that the plans fail to show the "exact" location of bioswales as required by Section 1.4.2.3 of the Manual. Section 1.4.2.3 does indeed require an "exact" location. The civil plans show that exact location as immediately adjacent to the driveway in the existing drive detail of C6 of the civil plans. The exact location of the driveway is depicted in several sheets of the civil plans. From that exact location, the exact location of the swale can be derived by the dimensions specified in the drive detail. As recognized in Par. 16a of 1.4.2.3, the "exact" location of the swales can be designated by "dimensioning." That is precisely what Ms. Vader did by specifying the swale dimensions adjacent to the driveway.

Mr. Clemmensen further asserts in his closing brief that the drainage report fails to identify the location, detail, and specifications for silt fencing as required by Section 1.4.3.2 of the Manual. That is also incorrect. Sheet C6 of the civil plans, Ex. F20, includes 13 design parameters for silt fencing including design and specifications. The standards require that silt fencing be located parallel to any slope contours and downslope of exposed areas. If engineers in their professional judgment construe the location requirement of Section 1.4.3.2 as requiring more detail on location that is a matter of professional engineering judgment that Mr. Clemmensen is not qualified to contest.

Mr. Clemmensen also faults the civil plans for not including areas of timber trespass. The plans cannot include those areas without consent of the affected property owners. The alleged timber trespass is a civil matter between the Edwards and the property owners. It is up to the property owners, not the Edwards, to decide whether they will retain the alleged cleared trespass areas or seek alternatives such as restoration. It is the owner's responsibility to ensure that the alleged clearing on their property complies with County development standards. Of course, the owners can seek compensation from the Edwards for any costs and damages that arise from the trespasses, but again that is a civil matter between the Edwards and the owners that is beyond the scope of this review.

Mr. Clemmensen faults the civil plans for not accurately depicting the entryway point of the driveway at the northwest corner of Edwards property. Mr. Clemmensen asserts this entry point includes a trespass onto adjoining property. As far as can be ascertained from the record this trespass area is a very small area that would have a de minimus impact on stormwater compliance calculations. Further, as testified by Ms. Vader, the road has been in the alleged trespass area for a long time, meaning the Edwards may have prescriptive easement rights for that part of the easement.

The only error apparent in Ms. Vader's analysis is a discrepancy between the stormwater worksheet, Ex. F7 and her design report, Ex. F20. As testified by Ms. Olsen, the stormwater worksheet is designed to determine what level of stormwater review is required for the project. The results from the worksheet established that full drainage (i.e. highest level) review is required. Tr. 164, 172. The worksheet identified that the clearing generated 2,200 square of hard surfaces. Yet the soil amendment worksheet of the drainage report, Appendix G, identified total hard surfaces as 16,500 square feet.

There's no question that the two figures should be identical. However, Mr. Clemmensen hasn't identified how this discrepancy is in any way material to providing for required project mitigation. As previously noted, the results of the worksheet were to require full drainage analysis. Therefore if 2200 was short of actual hard surface, that made no difference for the results of the stormwater worksheet. The increase in the amount of hard surface as used in the drainage report also has no material impact to required stormwater mitigation. The greater the hard surface, the more mitigation that is required. Mr. Clemmensen has not identified any error in the final 16,500 square foot figure used by Ms. Vader for her analysis. The fact that Ms. Vader has one clear error in her stormwater calculation doesn't establish that her analysis is "*riddled with error*" asserted in Mr. Clemmensen's closing argument. It is not sufficient to discredit the results of her report.

11. SEPA Review. Mr. Heacock, the County's SEPA Responsible Official, made a searching, well-informed and realistic analysis of the Edwards' development impact. As pointed out by Mr. Clemmensen, mistakes were made along the way. However in the

end there's no question that Mr. Heacock had considered every material impact of the proposal.

Mr. Heacock issued a revised MDNS for the proposal on March 24, 2024. In the issuance of that MDNS, multiple reviewers examined the project to ensure all potential impacts were considered. Mr. Heacock coordinated the review, relying on field verification, professional reports, public comment, and information requests to the Applicant to issue a reasoned determination. Documents and reports considered by Mr. Heacock included easement documents, a stormwater pollution control plan, a wetland delineation report, a wetland stormwater concurrence memo, a drainage report, a geological assessment letter, civil plans, a SEPA checklist, a farm conservation plan and numerous public comment letters. See Ex. F2, F8, F9, F12, F16, F19, F20, F21, F22. It also involved at least two site visits.

In the revised MDNS Mr. Heacock acknowledged neighbor concerns of de-forestation of the property, dust impacts, visual impacts and reduced wildlife. Ex. 26, p. 1. In response to these comments, Mr. Heacock included two conditions in the MDNS requiring buffer screens to protect the properties owned by Mr. Clemmensen and Mr. Anderson. He also noted that he had reviewed the WDFW listed species in the Priority Habitats and Species (PHS) mapping and found no protected habitat that would limit the Edwards development. The PHS review was also addressed by the project biologist. Id.

Mr. Heacock listened to the four days of appeal testimony. At the end of the hearing the Examiner asked whether Mr. Heacock would change his threshold determination given Mr. Clemmensen's final comments. Mr. Heacock noted that through the buffer inspection process he may require alterations such as decreasing the spacing of plants to block headlight trespass. Other than that issue Mr. Heacock believed his threshold determination to still be accurate. Tr. 288, 336-337.

12. Light. The Edwards' tree removal has generated adverse light impacts to Mr. Clemmensen's property.

Mr. Clemmensen alleges light impacts from vehicular travel and the ferry terminal. Mr. Clemmensen noted that the meadow in the center of his property used to be pitch black at night and now the light crosses across the Edwards property no matter what the weather. Tr. 305. He also testified that the Edwards' property generates up to 22 trips per day, many of them at night. Id.. A166 diagrams the headlight direction of these lights. A167 also shows lights from the ferry terminal spilling across the Edwards property. Mr. Clemmensen's allegations of light impacts are uncontested by the Applicant and County.

13. Wind. The Edwards' tree removal has generated adverse wind impacts to Mr. Clemmensen's property.

Mr. Clemenson alleges that the Edwards' tree removal has resulted in increased wind due to the loss of the windscreen created by those trees. Mr. Clemmensen testified that he and his wife did not notice any strong winds prior to the tree removal. Tr. 297. Mr. Clemmensen explained that the winds are particularly strong in his area because of the proximity of the Edwards property to Puget Sound. Id. As noted in FOF No 5, only a handful of five acre or smaller lots separate the Edwards property from the ferry terminal.

Mr. Clemmens testified that those winds have been responsible for wind snap. Tr. 298. He noted the winds are so strong they bent a fence he installed with posts three to four feet into the ground. Id. The winds also bent a two and a quarter inch wide iron post. Id. One neighbor alleged in a comment letter that the winds at the northwest corner of the Edwards property did not exist prior to the tree removal. Ex. A119.

Mr. Clemmensen asserts in his closing brief that Mr. Edwards conceded that his tree removal has removed the natural windbreak and that his roadways are drier and dustier. (Tr. 56- 62). Mr. Edwards made no such concession. He in fact testified that there are no new winds and that he doesn't believe the wind pattern has changed. Tr. 56. Mr. Edwards responded "I do not know" when Mr. Clemmensen said he was trying to find out what was causing the "damage," which was apparently wind and dust damage. Tr.60-61. Mr. Clemmensen has entered numerous videos showing wind and dust with streamers depicting wind direction. *See* Ex. A194-205. All of the videos were taken after the clearing. Tr. 58. The videos show a high incidence of wind and dust. They do not establish that the wind and dust was caused or exacerbated by the Edwards' tree removal.

On balance Mr. Clemmensen's testimony about increased wind is the more compelling when compared to that of Mr. Edwards. The effects of the wind as testified by Mr. Clemmensen are extreme. It is reasonable to conclude that the trees on the Edwards property did serve as some sort of windscreen given that there are no other large stand of trees between the Edwards property and the Puget Sound as shown in Ex. A173.

14. Odor. Substantial and/or preponderance of evidence does not establish an increase in odor impacts.

Mr. Clemmensen testified that he and his wife have experienced diesel odors from the ferry terminal exacerbated as a result of the tree removal. Tr. 298-99. This testimony is uncontested by the Applicant and County. However, there is no frame of reference to gauge how adverse the odor impacts are or how much they've increased. Given the highly subjective nature of odor impacts and lack of detail on the frequency and seriousness of odor impacts, no conclusions can drawn about any change in odor.

15. Dust. Substantial and/or preponderance of evidence does not establish an increase in dust impacts.

Mr. Clemmensen presented several videos showing dust coming off the gravel drive at the northwest corner of the Edwards' property. See Ex. A194-205. The videos showed dust. However, in all except but one video the dust was created by vehicles driving on the gravel road. The one exception, Ex. A199, didn't show a vehicle but what sounded like vehicle noise at the beginning of the video suggests that a vehicle that had left the view field of the camera was still the cause of the dust. Of course, if winds have increased then the dust generated by the vehicles may be carried further into adjoining parcels. However, there was no testimony to this effect. There is no basis to conclude that even if the dust was carried further that it would have reached the occupied portions of the adjoining lots or in any way adversely affected the occupants.

As to any dust created by the clearing, it doesn't appear that the clearing has generated any additional dust. Mr. Heacock testified that the Edwards have replanted pasture grass in lieu of just leaving open ground. He believes this practice has acted as an effective means of dust control from the clearing. Tr. 249, 275.

16. Noise. The Edwards' tree removal has generated adverse noise impacts to Mr. Clemmensen's property.

According to Ex. A81, prepared by Mr. Clemmensen, the Edwards' property is located between Sedgwick Rd. and Southworth Dr.. Both roads receive significant traffic including loud motorcycles disembarking from the Southworth ferry terminal. Mr. Clemmensen testified that the motorcycles disembark from the ferry in the afternoon and that in the evenings 20 can leave at once. Tr. 299. Mr. Clemmensen noted that property owners along the exit route, Southworth Road, have installed hedging to protect themselves from the noise. Tr. 250. According to Mr. Clemmensen in Ex. A81, the horn blasts of the ferry vessels are more prominent on the west side of Edwards' property since the conversion. Loud music from homes and vehicles on Level Lloyd Ln. to Edwards' east is now noticeable for neighbors to the west and north of the Edwards property. Ex. 81, p. 6.

17. Noxious Weeds. The Edwards' tree removal has generated adverse noxious weed impacts to Mr. Clemmensen's property.

Mr. Clemmensen testified that neighbors to the west and northwest have been dealing with a significant invasion of noxious weeds and pasture grass since this conversion seen in one small portion here in exhibit A 258. Tr. 305. The weeds are choking out the native understory including sword fern suffering from exposure. Id. The increase in

noxious weeds since the tree removal is evident from photos presented by Mr. Clemmensen, including one taken on 11/7/19 and one taken 10/1/22. Ex. A254, A255. Mr. Clemmensen testified that these weeds are encroaching 100 feet into his property. Tr. 306. One neighbor submitted written comment that blackberries have infiltrated their yard since the tree removal. Ex. A113. Another neighbor confirmed in written comment that noxious weeds had invaded the Clemmensen property since the tree removal.

Mr. Edwards acknowledged that blackberry bramble has grown since the tree removal. He noted that the bramble has been removed and that he mows the fields to prevent the spread of any noxious weeds. Tr. 68.

18. Dieback/Deer Damage. The Edwards' tree removal has resulted in death and damage to vegetation on adjoining property.

Mr. Clemmensen testified that the loss of tree canopy has resulted in increased heat to adjoining properties. This added heat has necessitated irrigation near the clearing to contend with worsening soil conditions. Tr. 299. According to Mr. Clemmensen, Ex. A133 shows pasture grass in this area struggling to take root. Tr. 299. He also noted that property owned by the Keiths on the north side have suffered the worst soil impacts. Mr. Clemmensen has donated some tree plantings in the Keith area to mitigate the impact. Id. Ex. 216 and 222 show some of that damage. Mr. Clemmensen was also able to show photographs showing impacts to understory along the property boundaries between the time of the stop work order and a current picture, clearly showing a reduction in understory. Tr. 301, Ex. A150, Ex. A136, A208-232. A public comment letter also noted that understory along the Edwards property has perished since the tree removal. See Ex. A110 and A118, Mr. Edwards countered that he has seen no such impacts to adjoining vegetation. Tr. 80.

Another alleged cause of damage to trees to adjoining properties is deer rubbing their antlers on the trees. Mr. Clemmensen identified in Ex. A81, p. 33 that no such deer damage had occurred in the five years prior to Edwards clearing. A81, p. 33. Ex. A234 to A245 show the resulting damage. The damage has become so severe Mr. Clemmensen has had to install wire fencing around his young trees to protect them. Tr. 304. The Ex. A234 to A245 photographs show 10 instances of damage Mr. Clemmensen attributes to deer (assuming each picture is of a different tree – A245 just shows deer). Mr. Clemmensen's testimony on deer damage is uncontested. However, there's no apparent reason the clearing increased deer population, except speculating that perhaps pasture grass is more attractive to deer than understory. The best that can be concluded is that the Edwards' clearing likely lead to more deer damage.

The photographs shown by Mr. Clemmensen establish that vegetation bordering the Edwards tree removal on adjoining properties has suffered damage and death since the tree removal. Whether this damage is caused by heat, deer or some other factor, there does appear to be some causation between the Edwards' tree removal and vegetative damage.

19. Bald Eagle. The record does not establish the presence of any protected bald eagle habitat.

Mr. Clemmensen presented photographs of a bald eagle on the Edwards Property. A271-275. Bald eagle are included in the species protected in the WDFW PHS protected species mapping. As identified in the MDNS under appeal, Ex. 26, Mr. Heacock identified that WDFW mapped no protected species habitat at the Edwards property. This was confirmed by the Edwards biologist. Tr. 278. As testified by Mr. Heacock, the fact that a bald eagle was seen at the Edwards property doesn't mean that the bald eagle had any protected habitat at that location. According to Mr. Edwards, Mr. Heacock had done a site visit and specifically looked for eagle nests and found none. Tr. 74. Mr. Edwards testified that he and Mr. Heacock walked around the entire property and Mr. Heacock was constantly looking up into the trees. Id. Mr. Clemmensen testified that "we" suspected an eagles along the Edwards' western property line as shown in Ex. 272 and 273. Tr. 252-53.

Mr. Clemmensen notes in his closing brief that Mr. Heacock was not sufficiently aware of the characteristics of the project site to conclude that an eagle nest was not present. Mr. Clemmensen based this conclusion on the fact that Mr. Heacock's recollection of the stream and wetlands of the project site conflicted with the Applicant's wetlands report. The fact that Mr. Heacock in August, 2025 may have had inaccurate memories of the Edwards' site for a threshold determination he issued 16 months earlier in April 2024 isn't particularly probative of his understanding of the site when he issued the MDNS. At the time of MDNS issuance Mr. Heacock was able to access the Applicant's wetland and other reports as necessary to assess impacts. Substantial weight is due Mr. Heacock's determination that no bald eagle habitat is present at the project site. Mr. Heacock's findings are corroborated by WDFW mapping. The record establishes by a preponderance and substantial evidence that no bald eagle habitat is present at the Edwards property.

20. Aesthetics. The aesthetic impacts of the Edwards' tree removal is not found to qualify as an adverse impact.

Mr. Clemmensen presented photographs showing that from his clearing the tree removal had exposed views of the Edwards' barn. Tr. 302, Ex. 159 (2017), Ex. 160. Before the removal the clearing view was limited to trees.

Whether the change in view from trees to pasture and barn is an adverse impact is a highly subjective determination that would vary from person to person. There's little question that views of commercial and industrial development would be adverse to an occupant of a single-family home. That's likely one reason why County standards require buffering between residences and commercial and industrial development, but not between single-family homes.

An ordinance violates due process if its terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Anderson v. City of Issaquah*, 70 Wash. App. 64, 75, 851 P.2d 744, 751 (1993). Under *Anderson* case law SEPA cannot be interpreted to require mitigation for impacts that are reasonably debatable as qualifying as an adverse impact. The aesthetics impact of the Edwards' tree removal is not found to be qualify as an adverse impact.

21. Adequacy of Mitigation. As detailed in COL No. 5, the landscaping buffers imposed by the MDNS as a matter of law mitigate to an acceptable level of impacts. As such, the MDNS buffers are found to adequately mitigate the impacts of the Edwards' tree removal. Even without this legal standard of acceptable impact, the buffering can be reasonably concluded to mitigate impacts to insignificant levels. The existing vegetative buffering and fencing on the adjoining properties combined with the required 25 foot MDNS buffer create a light, wind, noise, deer and weed obstructing obstacle that should effectively prevent all of the impacts established by Mr. Clemmensen under the FOF above.

22. Depth of Soil Disturbance. The depth of soil disturbance caused by the Edwards' tree removal is found to be approximately six inches.

As outlined in the COLs, the SDAP 2 permit required of the Edwards was based upon the finding that soil disturbance was limited to six inches. If more soil disturbance was involved, an SDAP 3 may have been required instead.

Mr. Clemmensen testified that another County official had determined that eight to nine inches were disturbed because the Edwards parcel was not only stumped but smoothed out as well. Tr. 165. Mr. Clemmensen cited to Ex. A87 for the alleged County findings on this issue. Ex. A87 doesn't contain any such finding.

Ms. Vader's drainage report includes an assessment of cut and fill at page 75. For the stumping activity she determined that the ground disturbance was six inches. Her cut and fill calculations also included another 348 cubic yards for cut and fill activity associated with a new access drive wedge section and increased detention and some grade smoothing in the lawn area. When asked why she determined that the ground disturbance activity

was limited to six inches, Ms. Vader responded that "*Kitsap County stipulates a depth of six inches for that kind of stumpage*." Tr. 128.

Ms. Vader's calculations again prevail on the issue of ground disturbance depth. It would have been helpful if she had identified how Kitsap County "stipulates" to a six-inch disturbance. However, the assumptions and stipulations she applies in her analysis are an exercise of her professional judgement. That judgment overrides Mr. Clemmensen's lay opinion of how stormwater engineering standards should be applied. Mr. Clemmensen identified some "smoothing" that might have added to the ground disturbance. However, smoothing was already factored into the lawn portion of Ms. Vader's cut and fill calculations. In the absence of an accurate citation from Mr. Clemmensen as to what information he applied[5] to conclude smoothing had occurred, the professional judgement and expertise of Ms. Vader will prevail. The ground disturbance attributable to stumping for the Applicant's drainage report is found limited to six inches.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. KCC 21.04.100 classifies non-SEPA exempt SDAPs 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 SDAP as required by KCC 21.04.190A and WAC 197-11-680.

Substantive:

2. Zoning Designation. Rural Residential.

3. SEPA Review Criteria -- Impacts. The most important inquiry for purposes of assessing whether the County responsible official staff correctly issued a DNS is whether the project as proposed has a probable significant environmental impact. *See* WAC 197-11-330(1)(b). WAC 197-11-782 defines "probable" as follows:

> *'Probable' means likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794). Probable is used to distinguish likely impacts from*

[5] Mr. Clemmensen suggests in his questioning of Ms. Vader that there was an old logging road crossing the Edwards property that had to be smoothed out. Tr. 130. However, Mr. Clemmensen provided no evidence that such a road had existed on the Edwards property prior to the Edwards tree removal.

> *those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.*

If such impacts are created, conditions will have to be added to the MDNS to reduce impacts so there are no probable significant adverse environmental impacts. In the alternative, an environmental impact statement would be required for the project. In assessing the validity of a DNS, the determination made by the County's SEPA responsible official shall be entitled to substantial weight. WAC 197-11-680(3)(a)(viii).

4. SEPA Review Sufficient. The second most important inquiry in a SEPA appeal is whether environmental impacts have been adequately assessed. As outlined in FOF No. 11, those impacts have been adequately assessed.

SEPA appellants often find it difficult to establish inadequate assessment because they have the burden to establish that lack of analysis. In the process of identifying missing information, the appellants provide the SEPA responsible official with the information he or she needs to make a complete assessment. That assessment can be made by the SEPA responsible official during the course of the appeal. In short, SEPA appellants often find themselves defeating their inadequate assessment claims in the process of proving those claims. To the extent that Mr. Heacock failed to consider any of the impacts alleged by Mr. Clemmensen prior to his appeal, Mr. Heacock considered those impacts during the course of the appeal. With that information he did not find any need to revise his MDNS, except to note that he will be more focused upon tree spacing during final inspection of the required tree buffers to avoid headlight trespass. Tr. 336-337. The MDNS has been revised to address the headlight issue.

Washington courts have stressed that, for a threshold determination to meet the procedural requirements of SEPA, the record "*must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns*." *Conservation Nw. v. Okanogan Cnty*., 194 Wn. App. 1034, 2016 WL 3453666 at *31 (quoting Found. on Econ. Trends v. Weinberger, 610 F. Supp. 829, 841 (D.D.C May 31, 1985)). SEPA determinations must be "'*rational and well-documented*.'" *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). The threshold determination must be based on "*complete disclosure of environmental consequences*." *Alpine Lakes Prot. Soc'y v. Dep't of Nat. Res*., 102 Wn. App. 1, 15–16 (1999) (citing *King Cnty. v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 663, 860 P.2d 1024 (1993)). "*SEPA demands a 'thoughtful decision-making process' where government agencies 'conscientiously and systematically consider environmental values and consequences*." *Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022) (quoting ASARCO, Inc. v. Air Quality Coal., 92 Wn.2d 685, 700 (1979) and Richard L. Settle, The

Washington State Environmental Policy Act: A Legal and Policy Analysis § 3.01[2] at 3–4 (2021)).

In applying the adequacy standards identified above, it is important to recognize that an assessment of adequacy of review is based upon the entire record of the appeal, not just information considered prior to issuance of the threshold determination. The standard for SEPA review is the clearly erroneous standard in light of the entire record: "*[r]ather, we review the entire record and determine whether, based on the entirety of the evidence, we are 'left with the definite and firm conviction that a mistake has been committed*.'" *Wild Fish Conservancy v. Washington Dep't of Fish & Wildlife*, 198 Wn.2d 846, 866, 502 P.3d 359 (2022), citing *PT Air Watchers*, 179 Wn.2d 919, 926 (emphasis added). This standard is applied to the whole County review process, which includes the appeal hearing.

Supporting the position that the "entire record" includes the appeal is *Moss v. City of Bellingham*, 109 Wn. App. 6, 15, 31 P.3d 703 (2001). In that case the court found that a DNS had been issued prematurely before all SEPA mitigation measures had been imposed. The court still found no deficiency in SEPA review because all impacts had been thoroughly addressed during the SEPA review process:

> *...it is difficult to see how the appellants were prejudiced.... the record indicates that the project received a considerable degree of scrutiny. ... While all of the required mitigation measures should have been imposed before the DNS was issued, the appellants still have not shown that the approved project, as it was mitigated, remains above the significance threshold.*

Moss, 109 Wn. App. At 25.

As shall be discussed in COL No. 5, the types of impacts established by Mr. Clemmensen are addressed by the landscaping buffers adopted by Kitsap County. The buffer requirements that Mr. Heacock imposed in the MDNS arguably show that he adequately considered those comments. As recognized in this decision, the impacts of Puget Sound and the ferry terminal do exacerbate the impacts of tree removal. Mr. Heacock recognized this issue as well by imposing the buffers in a situation where such buffers are not required by the KCC.

To the extent that Mr. Heacock's review failed to consider the impacts identified by Mr. Clemmensen prior to issuance of the MDNS, Mr. Clemmensen gave Mr. Heacock the information he needed during the course of the appeal hearing. At the end of Mr. Clemmensen's presentation, excluding questioning of Ms. Edwards, Mr. Heacock testified that other than some buffer inspection issues he would tend to, the conclusions

he reached for the MDNS did not change as a result of the evidence presented by Mr. Clemmensen. Tr. 336-337.

Mr. Clemmensen focused a substantial portion of his appeal upon alleged mistakes and inaccuracies in County review. There's no question that a few mistakes were made, most notably requiring the wrong SDAP class of permit initially and potentially mishandling some public comment letters. However, absent a showing of lack of expertise or competence on the County's part, those mistakes are wholly irrelevant to whether the level of SEPA review adequately addressed potential impacts.

In their appeal testimony, all of the County planning staff and the Applicant's engineer displayed years of experience and detailed knowledge and familiarity with County development standards. Their recollection during permit of permit review details handled years earlier was understandably incomplete. As detailed in other parts of this decision, the County didn't commit most of the errors in its review that Mr. Clemmensen claims. Mr. Clemmensen also appears to not recognize that land use review does not have to be done with the precision of designing space shuttle o-rings. Impacts and associated mitigation are subjective and approximate. County staff have the experience to recognize what information is necessary to make an appropriate decision within these parameters and what is not. Overall there was no reasonable basis to discount the findings of staff due to any lack of experience or competence.

One of the reasons Mr. Clemmensen asserts that SEPA review was insufficient was due to alleged mismanagement and lack of consideration of public comment letters. It is important to recognize that although suggestive of the seriousness of a particular impact, the number of comments submitted on an application is irrelevant to the environmental review. The impacts identified in those comments is what is significant. With the substantial weight due to Mr. Heacock's determination that he had considered all relevant impacts, it was up to Mr. Clemmensen to identify what impacts Mr. Heacock failed to consider as a result of his alleged failure to consider all public comment letters. As noted above, Mr. Heacock had considered all pertinent impacts by the end of the appeal hearing if not before issuing the MDNS.

5. SEPA Mitigation Sufficient. As conditioned by this decision, the landscape buffers imposed by the MDNS constitute sufficient mitigation under SEPA review standards. The SEPA responsible official correctly determined that buffering is recognized as adequate mitigation under the County's SEPA policies.

Mr. Clemmensen's recitation of impacts caused by the Edwards' tree removal is largely uncontested as detailed in the FOF. In large part it can be concluded that there's no disagreement on the extent of impacts. Rather, the disagreement rests upon the adequacy of review and resulting mitigation. As outlined in COL No. 4, review was more than

adequate. The resulting mitigation, as addressed in this COL, is also found sufficient because the KCC uses buffers to mitigate the type of development activity conducted by the Edwards.

The use of regulations and adopted plans to substitute for environmental review was first expressly legislatively sanctioned in 1995 in the Regulatory Reform Act, Chapter 36.70B RCW. The legislature intended the Act to make project review more efficient and less confusing to the public[6]. In this regard the legislature adopted RCW 36.70B.030 to require that "*[f]undamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review."* RCW 36.70B.030(1). RCW 36.70B.030(4) further provides that pursuant to RCW 43.21C.240, "*a local government may determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply*."

RCW 43.21C.240(3) prohibits SEPA mitigation for impacts that have already been adequately addressed in existing development standards and comprehensive plans. Implementation of RCW 43.21C.240 is outlined in more detail in the Department of Ecology's adoption of WAC 197-11-158. WAC 197-11-158(2)biiA authorizes a finding of adequate mitigation upon a determination that the legislative body has designated impacts as acceptable under its development standards and/or policies.

Kitsap County has adopted a highly detailed set of development standards governing its rural lands. Under the RCW 36.70B.030 category of "*[f]undamental land use planning choices*" as referenced above, the County Commissioners have chosen to permit residential and agricultural uses in the RR zone without any associated tree retention standards. Further, as determined in COL No. 7, forest practice permitting requirements and associated tree retention requirements are not required for tree removal associated with single-family use. As noted in the Introduction, Mr. Clemmensen's expectation that the Edwards retain trees to benefit his property is valid to the extent that tree retention is required by the KCC. Ultimately, however, the KCC usually doesn't require any tree retention for single-family development in the RR zone except in critical areas.

One set of development standards the County Commissioners have adopted to protect adjoining uses from impacts associated with clearing are the County's perimeter buffer standards. As noted in a footnote addressing the buffers required to separate industrial development from residential development, the buffers are designed to "*reduce impacts*

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[6] RCW 36.70B.010(3) found that increasing regulation of land use "…*has significantly added to the cost and time needed to obtain local and state land use permits and has made it difficult for the public to know how and when to provide timely comments*…"

to abutting residential uses such as noise, light, odors, dust and structure bulk." FN 27 KCC 17.420.060. Those are the types of impacts Mr. Clemmensen established as detailed in the FOF.

It can be reasonably concluded that the County's buffering requirements were intended to set acceptable levels of impacts resulting from adjoining potentially incompatible uses. KCC 17.500.027 sets detailed standards for buffer types and widths depending upon the types of uses that are adjoining each other. None of that detail would be necessary if the Commissioners anticipated that studies would be required for every development to establish precisely what width and type of landscaping is required for each couplet of adjoining uses. On its face such an expectation would be absurd. County buffer standards roughly and approximately mitigate against the impacts resulting from adjoining incompatible uses. KCC 17.500.027 sets acceptable levels of impact as contemplated in WAC 197-11-158(2)biiA for adjoining potentially incompatible uses by setting buffering standards between them.

Mr. Clemmensen identified a few impacts not expressly included in the FN 27 list. However, the FN 27 list isn't all inclusive. It simply adopts the somewhat self-evident conclusion that a buffer is the most reasonable and effective means of mitigating impacts between incompatible uses. The list doesn't address all impacts for all development projects, but except for extraordinary circumstances that weren't contemplated in their adoption, they were designed to fully address compatibility concerns. The primary Clemmensen impacts not expressly identified in FN 27 are wind, weeds, dieback and deer damage. As far as can be ascertained from Mr. Clemmensen's arguments, those impacts are created either by the loss of tree screening (shielding his property from wind and heat) or addition of pasture (apparently drawing more deer and perhaps weeds). A perimeter buffer can mitigate against all of these impacts by shielding Mr. Clemmensen's property from wind and heat and serving as a barrier to the migration of deer and noxious weeds. The rural character buffer imposed by the MDNS is not precisely tailored to fully mitigate all impacts identified by Mr. Clemmensen, but it does so at the same level of precision as the impacts expressly identified in FN 27.

As previously noted, the County's buffer standards don't require buffering between single-family lots. This is based upon the obvious fact that adjoining single-family lots usually aren't considered incompatible to each other. However, the proximity of Puget Sound and the Southworth ferry terminal essentially transforms the impacts of Edwards tree removal from a benign clearing of a single-family home site to an incompatible land use similar to a commercial or industrial use. It is acknowledged that the resultant wind and heat impacts are of a different nature than those associated with typical industrial or commercial uses. However, buffering likely creates the same approximate level of mitigation. In this regard it is appropriate to consider the MDNS rural character buffering to mitigate impacts levels to a legislatively accepted level.

Given that buffering is found to serve as an acceptable level of mitigation for the Edwards' Tree removal, the next challenge is determining what type of buffering is most appropriate. Mr. Clemmensen advocates the buffering required by KCC 17.500.027B2. That buffer applies to subdivisions, commercial, industrial, or public facility development abutting a rural zone. Mr. Heacock adopted a hedgerow buffer standard adopted by the USDA Natural Resources Conservation Service for farming practices. According to Mr. Heacock those standards involve exact specifications for a hedge planting that should be effective in reducing headlight trespass and similar impacts. Tr. 274.

Given that the hedgerow planting standards are specifically designed by the USDA to mitigate against agricultural activity. Mr. Heacock's selection of that standard is found to be the most appropriate and effective choice. It is also the most legally compelling choice given the substantial weight due to Mr. Heacock's decision making on that issue.

Mr. Clemmensen also appears to disagree with the types of plantings that Mr. Heacock is requiring to meet the buffer requirement. Both Mr. Clemmensen and Mr. Heacock have extensive knowledge about the mortality of tree plantings. They've both experimented with plantings on their own properties. However, a significant portion of Mr. Heacock's job as SEPA responsible official involves requiring and monitoring tree plantings for both perimeter buffers and critical area buffers. He has decades of experience on this issue. Substantial weight is also due his findings. The types of plantings that Mr. Heacock requires for final inspection[7], to the extent that they meet the USDA hedgerow standards, are found to qualify as sufficient mitigation under SEPA.

Mr. Clemmensen would also like the required buffering to be recorded as a covenant. Covenants are not required for perimeter buffers under County regulations. Under normal circumstances this would preclude requiring a covenant for the Edwards project because the County's buffer standards set acceptable levels of impact under RCW 36.70B.030. However, the buffers required of the Edwards isn't imposed under normal circumstances. Perimeter buffers are not required between single-family homes by the KCC. For this reason, the buffer requirement may be forgotten over time over a succession of future owners. A covenant requiring the buffer will be added to the MDNS.

Finally, Mr. Clemmensen also believes that the buffering required to protect Mr. Anderson[8] and himself should extend beyond his adjoining property line to account for

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[7] Mr. Clemmensen suggested during the hearing that the County has already approved some preliminary buffering installed by the Edwards and that these plantings are sufficient. Mr. Heacock made clear that the plantings haven't yet passed final inspection. Tr. 164, 274.

[8] The MDNS requires buffering along the property of an "*additional neighbor directly to the north*." There are three properties adjoining the Edwards property to the north. As best as can be determined from the record, the "neighbor to the north" is the Anderson property, which is the middle of the three adjoining

the different angles that light, wind and so can hit his property. However, as shown in Ex. A306, there are already a significant amount of trees located on the adjoining parcels that shield the Clemmensen and Anderson properties from these other angles[9]. Mr. Clemmensen has a wide stand of trees along the southern end of his property that is complemented by an even greater number of trees on the adjoining property to the south. All three properties adjoining the Edwards property to the north also have a continuous wide stand of three bordering the entire northern Edwards property line. An additional 25-foot-wide stand of trees on the Edwards' side would likely not make any material difference in mitigating impacts.

6. Farming Practices. The SEPA review does not need to further address potential future farming practices.

For the reasons outlined in COL No. 5, the County is found to have already adopted comprehensive performance standards that set acceptable levels of agricultural impacts. The USDA buffer imposed by the MDNS adds further protection and mitigates against the unique wind and associated odor conditions arising from proximity to Puget Sound. Further, agricultural use is permitted on the Edwards' property if they meet the requirements of Chapter 17.455 KCC. As such, the merits of permitting that use cannot be revisited during permit review under RCW 36.70B.030.

Agricultural impacts may also be too "remote and speculative" under WAC 197-11-782 to qualify as a "probable" adverse impact subject to SEPA review. The Edwards have no specific farming practices in mind. Mr. Edwards did testify that one of the purposes of his SDAP permit was to facilitate farming practices. However, Mr. Edwards further testified that he may abandon those plans altogether given that his children have grown too old in the process of this permit review to benefit. Tr. 78.

7. Forest Practices Permit Not Required. A forest practices permit is not required for the Edwards's tree removal.

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properties. This is based upon Ex. A155, which shows the northern buffer planted by the Edwards as adjoining the middle northern lot and testimony from Mr. Edwards that he planted that buffer along the Anderson property, Tr. 27.

[9] In his closing brief Mr. Clemmensen asserts that the trees on adjoining property cannot be "credited" as mitigation. See Closing Brief, p. 18-19. All of the lots adjoining the Edwards property are of sufficient size to accommodate a single-family home and extensive tree buffering. Under Mr. Clemmensen's theory, the Edwards must retain trees on their property to protect adjoining uses but the adjoining uses have no responsibility to retain trees to protect themselves. That is a very backwards entitlement argument. As Mr. Clemmensen acknowledges in his closing brief, the baseline for environmental review is the current condition of the land. The current condition is that adjoining parcels already have their own perimeter buffers built in that protect the authorized single-family uses from the full range of impacts established by Mr. Clemmensen.

A key consideration in Mr. Clemmensen's right to mitigation is whether any forest practices permits were required for the Edwards' tree removal.

The issue of whether a forest practices permit is required is an important part of the resolution of Mr. Clemmensen's appeal. As outlined in the Summary, Mr. Clemmensen's expectation that the Edwards' maintain trees on their property for his benefit is largely dependent upon the Edwards' responsibilities regarding forest practices in the County's code. As testified by Mr. Heacock, danger tree permits require replanting . Tr. 203, Ex. A33. The County's forest practices regulations are designed to set acceptable level of impacts from converting forest lands to residential use.

Unfortunately, the basis of the County's decision making regarding forest practices was not very clear in the administrative record developed for this appeal. As a result the Examiner requested additional legal briefing on what the County believed to be the forest practices regulations applicable to the Edwards' tree removal. This added briefing was highly beneficial in clarifying the County's decision making. The County's forest practices regulations are very sparse. Information about County practices is necessary to determine how the regulations can be properly applied. The County briefing provided a framework theretofore missing that the Examiner could assess and apply to the facts of this case.

In its supplemental briefing the County asserts that it "*reasonably treated the SDAP review as an adequate substitute for requiring either an amended danger tree permit or a full forest practices conversion permit*." County Supplemental Brief, p. 7. To the extent that the County takes the position that an SDAP can substitute for a forest practices permit anytime a forest practices permits is required, that position is found incorrect. There is nothing in the KCC that authorizes an SDAP to substitute for a required forest practices permit. Chapter 18.16 KCC governs the applicability of forest practices permits. No text in that chapter or the SDAP chapter (Chapter 12.10 KCC) provides that SDAPs can substitute for required forest practices permits. In point of fact, KCC 12.10.040(3) provides that forest practices are exempt from SDAP permit requirements. This exemption supports the view that forest practices and SDAP clearing and grading are separate regulatory fields of review where one does not substitute for the other.

The County's briefing also asserts that a forest practices permit isn't required because such permits are inapplicable for "*developed residential property*." This depiction is technically correct but fails to include the qualification that to avoid triggering a forest practices permit the Edwards' clearing must be limited to a "residential home site." It would be difficult to characterize a fully wooded 50-acre lot as a home site just because one home was placed upon it. Since the Edwards' lot is over seven acres in size, it is not crystal clear that a forest practices permit wasn't required.

The "home site" ambiguity in the KCC stems from its definition of forest practices. As detailed in WAC 222-16-050, a Class IV forest practice in Washington State is a forest practice that occurs on lands designated for conversion to another use, such as urban development. KCC 18.16.060 requires a timber harvest permit for "*Class IV general forest practices on land proposed for conversion to a use other than commercial timber production*." KCC 18.16.030P defines a "forest practice" as any activity related to the growing, harvesting or processing timber. KCC 18.16.030O defines "forestland" as land "*which is capable of supporting merchantable timber and is not being actively used for a use which is incompatible with timber growing*."

There is no evidence in the record on how much land is necessary to support merchantable timber. The Edwards' property is seven acres in size. Such a size before the Edwards' unauthorized clearing appears to include enough swaths of forest to provide for merchantable timber.

Without more information on what is necessary to make timber merchantable, it is difficult to assess whether the Edwards property meets that standard. Interestingly the only guidance provided in the code on what kind of area qualifies as merchantable focuses on the size of the developed portion of the lot as opposed to the area left for timber harvesting. KCC 18.16.030O excludes the following from what qualifies as "forest land" for residential development:

> *As it applies to the operation of the road maintenance and abandonment plan element of the forest practices rules on small forestland owners, the term "forestland" excludes:*
>
> *1. Residential home sites, which may include up to five acres; and…*

Under the canon of statutory construction expressio unius est exclusio alterius, to express one thing in a statute implies the exclusion of the other. *In re Det. of Williams*, 147 Wash. 2d 476, 491, 55 P.3d 597 (2002). Under that canon of construction, since residential sites up to five acres are included as excluded from the forestland definition, the exclusion of sites greater than five acres is taken as included in the forestland definition.

A major ambiguity in the residential exclusion from forestland is what qualifies as a site. As identified in FOF No. 4, the Edwards' property is over seven acres in size but its cleared area excluding the driveway is less than five acres in size. There is no definition of "site" in Chapter 18.16 KCC. It's unclear if the site should be construed as the entire Edwards lot, just the cleared area or the cleared area along with the access driveway. Limiting the definition of "site" to the cleared area is the most logical choice. This helps

ensure that forest practices permits will still be required for swaths of merchantable timber on lots big enough to accommodate both a home site and merchantable timber operations.

8. Standing. Mr. Clemmensen likely does not have standing in this appeal to address the impacts to other property owners other than Mr. Anderson.

"Standing" is a judicially created concept designed to insure that litigants have an injury that grants the courts jurisdiction to adjudicate their claim as "case or controversy" jurisdiction afforded to courts Article III o the federal constitution. The Examiner rules adopt this fairly universal requirement by limiting administrative appeals to persons who are "aggrieved." Examiner Rule 2.1.1 and 2.1.3 require an appellant to be "aggrieved" if that person isn't the property owner, applicant or County staff. "Aggrieved" is defined by Examiner Rule 2.1.1 to include the requirement that the land use decision under appeal has "prejudiced or is likely to prejudice" the appellant. In short, Mr. Clemmensen cannot litigate impacts to his neighbors because he is not the one prejudiced by those impacts.

Tracing back SEPA standing doctrine, it appears to have been primarily developed in *SAVE v. Bothell*, 89 Wn.2d 862 (1978), at least for organizational standing. The SEPA standing doctrine in SAVE was not based upon any statutory standing requirement. Rather it was based upon case law from the United States Supreme Court. Id. at 866-868. The US cases in turn base their standing requirements upon US Const. Art. III, which restricts judicial power to cases and controversies. *See, e.g. Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 90 S. Ct. 827, 829, 25 L. Ed. 2d 184 (1970).

Mr. Clemmensen has the burden of proof to establish standing. The party bringing a land use appeal under the Land Use Petition Act (LUPA, Chapter 36.70C RCW) has the burden to show all the required conditions of standing are satisfied. *Behind the Badge Found. v. City of Olympia*, 12 Wash. App. 2d 1009 (2020)(Unpublished). Given that this decision is subject to LUPA review, placing the burden of proof on Mr. Clemmensen appears to be appropriate. This is also consistent with the Administrative Procedures Act, Chapter 34.04 RCW (APA). The APA also places the burden of proof to establish standing on the person challenging agency action. *Benton Cnty. Water Conservancy Bd. v. Washington State Dep't of Ecology*, 25 Wash. App. 2d 717, 724, 524 P.3d 1075, 1079, review granted in part, 532 P.3d 154 (Wash. 2023), and aff'd, 546 P.3d 394 (Wash. 2024).

To have standing to bring a SEPA challenge, a party must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA, and (2) the party must allege an injury in fact. *Lands Council v. Washington State Parks Recreation Com'n*, 176 Wn. App. 787, 799, 309 P.2d 734 (2013).

Mr. Clemmensen filed his appeal as a member of SouthworthForest.Org. As identified in FOF No. 1, the record doesn't appear to identify any information on the structure or membership of SouthworthForest.Org. One of the signatories to the appeal is Greg Anderson and a list of about 31 persons identified "campaign organizers" for the organization is at the end of Ex. A82.

FOF No. 1 suggests that Mr. Clemmensen potentially could represent the interests of his neighbors through two forms of standing on behalf of SouthworthForest.Org -- institutional through its interest as an organization and associational through the interests of its members.

Institutional Standing

Mr. Clemmensen has not established institutional standing because he has not identified any specific programmatic harm to SouthworthForest.Org.

To satisfy the LUPA prejudice requirement for standing, a petitioner must show that he or she would suffer an injury-in-fact as a result of the land use decision. *Knight v. City of Yelm*, 173 Wash. 2d 325, 267 P.3d 973 (2011). For an organization to establish "injury in fact" for standing, the allegation must be more than a setback to its abstract social interests. *Havens Realty Corp. v. Coleman*, 455 US 363, 379 (1982). For example, the mere assertion of a "special", longstanding interest in conserving the beauty and majesty of the Sierra Nevada mountains does not constitute a sufficient "injury in fact" to confer standing to the Sierra Club. *Sierra Club v. Morton*, 405 US 727 (1972). Injury must be concrete, such as the refusal to rezone property to enable an affordable housing organization to build an affordable housing complex. *See Village of Arlington Heights v. Metropolitan Development Corp*., 429 US 252 (1977). As noted in the *American Legal Foundation* case, for an association to establish "injury in fact" it must assert an interest greater than "seeing" the law obeyed or a social goal furthered. Rather, the organization must allege that discrete programmatic concerns are being directly and adversely affected by the defendant's actions. 808 F.2d at 92.

Mr. Clemmensen has not identified any specific programmatic activity that is adversely affected by the Edwards tree removal. SouthworthForest.Org as an organization has not been shown to own any land adversely affected by the Edwards' tree removal. Its interests in this appeal appear to be limited to assuring that the Edwards' tree removal be properly mitigated.

Associational Standing

Other than Mr. Anderson, Mr. Clemmensen has not established associational standing because he hasn't identified any member that has sufficient control over SouthworthForest.Org activities.

An association has standing to bring suit on behalf of its members when (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members. *Washington State Nurses Ass'n v. Yakima HMA, LLC*, 196 Wn.2d 409, 415, 469 P.3d 300, 304 (2020), as amended (Nov. 9, 2020).

In addition to the above, case law also requires that the members presented for standing have some meaningful control over association activities. Associational standing is premised on the fact that an association is representing the interests of its members, which can only be accomplished through member control over association activities. *See Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1209 (2002) ("*such a right [for association to sue on behalf of members] requires the representational right to be a strong one, in order to ensure the fidelity of the organization to those for whom it claims to speak*"). As stated in another association case:

> *…one principal undergirding the standing doctrine is that "the decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome,'…not …in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests*.'"

American Legal Foundation v. FCC, 808 F.2d 84, 91 (1986). The American Legal Foundation asserted that television viewers automatically constituted its members in a case against the Federal Communications Commission. The Friends of Tilden Park asserted that neighborhood residents were automatically members by virtue of their proximity to a development project that the organization contested. The courts in both cases readily threw those arguments out in part on the basis that the "members" had no control over the selection of association leadership, activities or financing – they largely just acted as bystanders.

As identified in FOF No. 1, Mr. Clemmensen testified that there are 31 persons in the organization he identifies as "campaign organizers" and that there are a core group of six or seven individuals. He didn't identify who comprises the core group. As best as can be ascertained, Mr. Anderson is probably part of the core group because he was the only member other than Mr. Clemmensen that signed the appeal. Mr. Anderson is the only member of SouthworthForest.Org, other than Mr. Clemmensen that has been established as qualifying as more than a bystander to these appeal issues. Under standing

doctrine, the impacts of this appeal are limited to those of Mr. Clemmensen and Mr. Anderson.

Even if standing did not preclude consideration of impacts to other neighbors, Mr. Clemmensen has not established the need for any additional mitigation for other neighbors. All of the impacts established by Mr. Clemmensen are localized along the perimeter of the Edwards' property. As shown in the aerial photographs of Exhibits A304-306, the adjoining properties and right of way are all buffered by trees on or off the Edwards property. There is no reasonable basis to conclude that additional mitigation is necessary for properties other than the mitigation required by this decision for Mr. Clemmensen and Mr. Anderson.

9. Appeal Granted in Part. As determined in COL No. 4 and 5, the SEPA review and mitigation of the MDNS under appeal is found to comply with SEPA requirements. In large part the County's SEPA determination is upheld. It is no surprise, however, that due to Mr. Clemmensen's meticulous appeal he has revealed some modest grounds for improvement. To this end the wording of the MDNS conditions will be revised to make it clear that the buffer mitigation is not a recommendation but rather a requirement. As suggested by Mr. Heacock himself, a focus will be placed upon preventing headlight trespass onto the Clemmensen and Andersen properties. Mr. Heacock can take the existence of the fences placed by Mr. Clemmensen and Mr. Anderson in his assessment on that issue. A covenant will be required to record the buffer requirements. Monitoring will also be imposed to assure that the buffers are functional and maintained over time.

DECISION

The County's MDNS is sustained and upheld with the following modifications:

1. A condition shall added to the March 17, 2025 letter of acceptance for SDAP 20-04869 requiring conformance to the MDNS. Revised Condition No. 2 of the letter of acceptance is stricken.

2. Conditions 2 and 3 of the MDNS are revised as follows with revisions from the March 29, 2024 MDNS identified in track change:

> 3. *Per KCC 17.455, the proposal is additionally guided by the Edwards Resource Management Farm Plan developed by the Kitsap Conservation District and the Edwards'. The plan provides best management practices for proposed farming activities and future farming practices. In addition to water quality best management practices, the plan provides an enhanced visual screening buffer in proximity to new farming activities to the neighbors to the west of the*

expanded area with a 25-foot rural character buffer. The Applicants are required to install the buffer by February 1, 2026[10]. At a minimum the buffer shall run along the entire length of the shared property line with the Clemmensen property. The plants and spacing, in conjunction with existing fencing on the Clemmensen property, shall be made sufficient to reasonably prevent headlight trespass onto the Clemmensen property. A covenant shall also be recorded immediately upon approval of final inspection that records the obligations imposed by this condition. A monitoring plan along with bonding as both equivalent to that required for critical area restoration plans shall also be submitted and implemented by the Applicants, subject to County approval..

4. An additional neighbor directly to the north has also requested a functional buffer screen to protect from driveway glare. A 25-foot rural character buffer will be recommended to offset visual impacts along their adjacent property line. A similar planting scheme is recommended. The Applicants are required to install the buffer by February 1, 2026. At a minimum the buffer shall run along the entire length of the shared property line with the northern property. The plants and spacing, in conjunction with existing fencing on the northern property, shall be made sufficient to reasonably prevent headlight trespass onto the northern property. A covenant shall also be recorded immediately upon approval of final inspection that records the obligations imposed by this condition. A monitoring plan along with bonding as both equivalent to that required for critical area restoration plans shall also be submitted and implemented by the Applicants, subject to County approval..

ISSUED this 5th day of December, 2025.

Phil Olbrechts

Kitsap County Hearing Examiner

[10] The planting deadlines of Conditions 3 and 4 can be delayed by staff as necessary if planting in winter is not conductive to successful installation.

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.