



## Notice of Hearing Examiner Final Decision Upon Reconsideration

3/26/2025

To: Interested Parties and Parties of Record

RE: Project Name: Administrative Appeal of Arborwood Revised Critical Area Buffer Reduction (CABR) #22-02629  
Applicant (Appellant): Bryan Telegin – Telegin Law  
175 Parfitt Way SW Suite N270  
Bainbridge Island, WA 98110  
*(Authorized Representative for Joe Lubischer and April Ryan)*  
Application: Administrative Appeal  
Permit Number: 24-02653

The Kitsap County Hearing Examiner has **GRANTED in part** the Applicant and Appellant Motions for Reconsideration for minor adjustments to the conditions of approval of the final decision issued for **Permit 24-02653: Administrative Appeal of Arborwood Revised Critical Area Buffer Reduction (CABR) #22-02629** on 1/13/2025, **subject to the conditions outlined in this Notice and included Decision Upon Reconsideration and Final Decision** issued on 1/13/2025.

**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](mailto:help@kitsap1.com) or (360) 337-5777.

CC:

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THE HEARING EXAMINER OF KITSAP COUNTY

<p>In the Matter of the Appeal of the Critical Area Buffer Reduction Notice of Administrative Decision, No. 22-02629, Appeal No. 24-02653</p>	<p>Decision Upon Reconsideration</p>
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**Overview**

The Applicant and Appellant motions for reconsideration are granted in part for some modest adjustments to the conditions of approval of the Final Decision issued for this appeal on January 13, 2025.

A major change in the analysis of the Final Decision is a determination that the Applicant’s “temporary impact” theory<sup>1</sup> is not authorized in the County’s critical areas ordinance (CAO). The buffer encroachments of this decision are instead authorized upon application of CAO buffer exceptions specifically designed to accommodate road and

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<sup>1</sup> The Applicant’s “*temporary impact*” theory references the Applicant’s position that development is authorized in CAO buffers so long as its impacts are temporary. Under the Applicant’s position no express CAO authorization is required for such development.

1 utility buffer encroachments. The scope of remand was enlarged to consider this issue by  
2 authorizing the parties to present new evidence on the applicability of the CAO buffer  
3 exceptions.

4 This appeal has been unnecessarily complicated by the “temporary impact” theory. Had  
5 Examiner Marshal been presented with the CAO buffer exceptions that have been  
6 specifically designed to address road and utility improvements, there likely would have  
7 been no need for the remand.

8 CAOs are generally designed to accommodate road and utility stream and wetland buffer  
9 encroachments. Recognizing that road and utility networks often make buffer  
10 encroachments unavoidable, most if not all CAOs across the state include buffer  
11 exceptions that expressly authorize those encroachments if the criteria for the exceptions  
12 are met. Kitsap County has adopted these buffer encroachment exceptions as KCC  
13 19.200.225D, KCC19.300.315D, KCC 19.200.225.H and KCC 19.300.315J. They will  
14 be referenced as the “road and utility buffer exceptions” in this decision.

15 Instead of using the road and utility buffer exceptions, the Applicant took the position  
16 that if a buffer encroachment only results in “temporary impacts,” the encroachment is  
17 authorized. There is no such allowance expressly stated in the CAO. The Applicant relies  
18 in part upon KCC 19.200.250 to justify its buffer exception. KCC 19.200.250 doesn’t  
19 authorize buffer encroachments. It only addresses what mitigation is required for  
20 encroachments that are authorized.

21 Significantly, the Applicant’s temporary impacts position is premised upon the principle  
22 that the CAO does not generally prohibit development within critical area buffers. Such  
23 a position directly contravenes the plain meaning of at least two CAO provisions,  
24 undermines the CAO’s central regulatory framework and renders a substantial portion of  
25 the CAO superfluous and useless.

26 The ambiguity caused by the “temporary impacts” exception caused Examiner Marshal to  
27 issue a remand order that didn’t include the road and utility buffer exceptions within its  
28 scope. Examiner Marshal’s detailed 122-page decision doesn’t mention the road and  
29 utility buffer exceptions, presumably because they were never raised by the Applicant or  
30 County. Along these lines the County’s initial CABR<sup>2</sup> decision appealed to Examiner  
Marshal didn’t mention the exceptions either. Understandably, Examiner Marshal did not  
find sufficient justification for application of the Applicant’s “temporary impacts” theory  
and her remand order was primarily directed at assessing that standard.

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<sup>2</sup> “CABR” is an acronym for a Critical Areas Buffer reduction decision. Examiner Marshal held a hearing  
and rendered a decision on the original CABR. “CABR II” is the revised CABR decision resulting from  
Examiner Marshal’s remand order.

1  
2 Despite the fact that Examiner Marshal did not include the road and utility exceptions  
3 within the scope of her remand order, the Applicant subsequently for apparently the first  
4 time applied the exceptions in a supplemental critical areas report, Ex. F18, and the  
5 County applied the exceptions in its CABR II decision. The County and Applicant then  
6 submitted a joint motion in this remand proceeding to prohibit the Appellants from  
7 addressing the exceptions because they were beyond the scope of remand. That motion  
8 was granted. The Applicant and County were correct; Examiner Marshal's remand order  
9 only allowed consideration of the Applicant's "temporary impacts" theory and did not  
10 encompass the road and utility exceptions.

11 In the course of this proceeding it became apparent that Examiner Marshal should have  
12 included the road and utility exceptions in the scope of her remand order. It was also  
13 discovered in Examiner Marshal's reconsideration/clarification order, Ex. F13, that her  
14 remand order arguably left open the legal issue of the validity of the Applicant's  
15 "temporary impacts" theory. For these reasons, the Final Decision<sup>3</sup> broadened the scope  
16 of the appeal to encompass these two new issues. The parties were invited to present new  
17 evidence in the reconsideration process to address the issues. Once the parties were given  
18 that opportunity the validity of the Applicant's temporary impact exception was assessed  
19 by this Decision Under Reconsideration. The road and utility exceptions were also applied  
20 to the proposed buffer encroachments. The Applicant's "temporary impacts" theory is  
21 found to be invalid and the buffer encroachments have been found authorized by the road  
22 and buffer utility exceptions.

### 23 **Evidence Relied Upon**

- 24 1. Applicant and Appellants motions for reconsideration, response and reply  
25 memos, County response memo and all declarations submitted with that briefing.
- 26 2. January 27, 2025 email from hearing examiner email to parties.
- 27 3. March 5, 2025 County (amended) and Applicant responses to Kitsap County  
28 Superior Court *Centennial Highlands* decision.

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<sup>3</sup> The "Final Decision" is the final decision of this appeal under reconsideration, issued January 13, 2025.

1 **Findings of Fact**

2  
3 1. Reconsideration Chronology. The Final Decision of this appeal proceeding was  
4 issued on January 13, 2025. The Applicant and Appellants filed motions for  
5 reconsideration and clarification on January 21, 2025.

6 2. Reasonable Opportunity to Comment on Road and Utility Buffer Exceptions. The  
7 Appellants were given a reasonable opportunity to be heard on the applicability of road  
8 and utility buffer exceptions to the proposed wetland and stream buffer fills.

9 In their reconsideration reply briefing the Appellants correctly identify that they were  
10 prevented from contesting the application of the road and utility buffer exceptions by the  
11 Examiner’s September 9, 2024 summary judgment ruling. By joint motion dated August  
12 2, 2024, the Applicant and County sought to dismiss several of the Appellants’ appeal  
13 issues. Those issues included applicability of the road and utility buffer exceptions. *See*  
14 Joint Motion, p 21-25. The motion as to these provisions was granted for the fixed<sup>4</sup>  
portions of Spine Road because Examiner Marshal’s remand decision was primarily  
limited to assessing the applicability of the Applicant’s temporary impacts buffer theory.

15 The County/Applicant’s joint motion is somewhat ironic because both parties exceeded  
16 the scope of remand themselves. The County applied the road and utility buffer exceptions  
17 in CABR II and the Applicant applied the exceptions in a supplemental critical areas  
18 report. *See* Revised CABR decision, Ex. F1, p. 19-20, 28, 30, 37; Ex. F 18 Applicant  
19 Supplemental CAO, p. 5-6, 13-14. It doesn’t appear the road and utility buffer exceptions  
20 were ever identified or argued before Examiner Marshall. The original CABR decision,  
21 Ex. F1 and apparently the Applicant’s prior critical areas report made no mention of those  
22 provisions. Importantly, Examiner Marshal’s 122 pages of findings and conclusions in  
23 her final remand decision, Ex. F12, made no mention of those provisions either. It’s clear  
24 from Examiner Marshal’s remand decision that when she was limiting remand review to  
25 “temporary impacts” that she was referring to the Applicant’s “temporary impacts”  
26 theory, that buffer encroachments involving only temporary impacts could be authorized  
27 without relying upon any other waiver, exemption or exception in the CAO. *See, e.g.*  
28 Applicant’s February 28, 2025 reconsideration response, p. 3-11.

29 The importance of the road and utility buffer exceptions did not become manifest until the  
30 finding in the Final Decision of this appeal that the scope of Examiner Marshal’s remand  
included the issue of whether temporary impacts on their own could serve as the basis for  
buffer encroachments. Until that point, the September 9, 2024 summary judgment ruling

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<sup>4</sup> As identified in the Final Decision, the “fixed” portions of Spine Road are those portions of the road that weren’t relocated as a result of Examiner Marshals’ remand decision.

1 still controlled. Notably, that ruling found that Examiner Marshal had agreed with the  
2 Applicant's position on the temporary impact buffer exception. Under that ruling, the  
3 Applicant did not need to rely upon the road and utility buffer exceptions to justify the  
4 proposed encroachments.

5 The current Examiner, of course, could not base the Final Decision on an expanded scope  
6 of appeal that the parties did not have a chance to address. As noted at Page 20 of the  
7 Final Decision, "*it is certainly too late after the record is closed to change the scope of*  
8 *the hearing as set by Examiner Marshall.*" As a consequence, the Final Decision was  
9 based upon the parameters of the September 9, 2024 summary judgment ruling in which  
10 temporary impacts was applied as an approved buffer exception and road and utility  
11 exceptions were treated as beyond the scope of appeal for the fixed portions of Spine  
12 Road.

13 To address the problems with Examiner Marshal's remand order the record was then  
14 reopened by the Final Decision to provide for a proper scope of review. The first page of  
15 the Final Decision identified that the parties could present new evidence in reconsideration  
16 on the temporary impacts issue. The first page further recognized that the parties had not  
17 had the opportunity to present evidence on the road buffer exception, KCC 19.200.225D,  
18 but that substantial relevant evidence was nonetheless already in the record. The first page  
19 added that "*[i]f the parties still find the need to be heard on these issues that will be*  
20 *considered as well.*" Other portions of the Final Decision specifically authorized new  
21 evidence to be presented on the Appellants' appeal issues to the extent they were affected  
22 by application of the Applicant's temporary impacts buffer theory.

23 By email dated February 27, 2025 the Examiner advised the parties as follows:

24 *Neither party has requested the presentation of new evidence I am reconsidering*  
25 *both the issue of whether there's an implied CAO exception for buffer*  
26 *encroachments with temporary impacts and whether the proposed fill meets the*  
27 *requirements of KCC 19.200.225.D. If either party is requesting new evidence*  
28 *on these issues please advise by this Friday, 1/31/25.*

29 No request to present new evidence was made, but all parties presented declarations with  
30 new testimony with their requests for reconsideration.

The Examiner's direction on new evidence should have included invitations to provide  
evidence on stream buffer road encroachments and utility encroachments as well.  
However, given the basis of the Examiner invitation to re-open the hearing it should have  
been fairly clear that a request to present on utility and stream encroachments would likely  
have been approved. The Appellants made no such request.

1 Perhaps more significant, the Appellants were in substance given a full opportunity  
2 address all the major factual issues pertinent to the utility and road buffer exceptions.  
3 Examiner Marshal's remand order authorized consideration of the buffer averaging  
4 standards governed by KCC 19.200.220C1a for all the proposed buffer encroachments.  
5 That standard in turn triggers the mitigation sequencing requirements of KCC 19.200.250.  
6 Those sequencing standards require both avoidance and complete mitigation, which  
7 materially addresses all of the criteria for the road and utility buffer exceptions.

8 Despite the opportunity to fully address all encroachment impacts under KCC  
9 19.200.220C1a, the Appellants provided a relatively small amount of evidence or  
10 argument on buffer impacts caused by the fixed portions of Spine Road. There is little  
11 basis to believe that yet another opportunity to address the road and utility exceptions for  
12 stream buffers or the utility exceptions for wetland buffers would make any material  
13 difference in the resolution of this appeal. As conditioned the Applicant has demonstrated  
14 that the impacts of the wetland and stream buffer fill is thoroughly and completely  
15 mitigated as determined in Final Decision FOF No. 10. In any event, given the extensive  
16 nature of the proceedings thus far there is insufficient cause for re-opening appellate  
17 review a third time (remand being the first, the new evidence authorized by the Final  
18 Decision the second).

19 3. Road Fill in Wetland and Stream Buffers. CABRII, Ex. F1, lays out the factual  
20 basis for permitting staff's finding of conformance to the County's wetland and stream  
21 road buffer and stream crossing exceptions, KCC 19.200.225D, KCC19.300.315D. See  
22 pages 19, 20 and 27 of the CABRII, Ex. F1. The findings of fact of CABRII in this regard  
23 are adopted as findings of fact for this Decision Upon Reconsideration.

24 The Appellants assert that the alternatives standard of KCC 19.200.225D(1) is not met  
25 because the pedestrian improvements to Spine Road can be elevated to avoid impacts and  
26 that lot lines can be adjusted to move the road further away from affected wetlands. As  
27 to elevating road improvements over the wetlands, as noted in Mr. Heacock's declaration  
28 in response to Appellants' recon motion, he has never imposed such a burdensome  
29 requirement for a wetlands buffer. Elevation of the pedestrian improvements is not found  
30 to qualify as a reasonable or practicable alternative required by KCC 19.200.225D(1).

The Appellants also assert that Spine Road can be moved further east to avoid wetland  
impacts. However, a 50-foot buffer and right-of-way lies east of the road. The purpose  
that buffer is to separate the road from an existing neighborhood. Nov. 6, 1 p.m. Tr., at  
22:28. Requiring lot line adjustments or reduction in the buffer to accommodate further  
displacement of Spine Road is not found to be a reasonable or practicable alternative  
required by KCC 19.200.225D(1).



1 At p. 25 of their reconsideration reply brief the Appellants also request that conformance  
2 of the bridge crossings to KCC 19.200.225D be remanded because the only mitigation  
3 required are surficial replantings. The impacts and mitigation for the bridge crossings  
4 have been evaluated by both the Applicant's wetland biologist (Ms. Bartlet) and Mr.  
5 Heacock, an experienced senior County planner. In their opinions the mitigation was  
6 adequate. As determined in FOF No. 10 the impacts of buffer fill have been fully  
7 mitigated. Despite having the opportunity to address wetland and stream impacts under  
8 Examiner Marshal's remand for buffer averaging analysis and also the re-opened hearing  
9 for road buffer exceptions, the Appellants have not identified any deficiencies in the  
10 required mitigation. The mitigation is found sufficient.

11 4. Utility Fill in Wetland and Stream and Buffers. CABRII, Ex. F1, lays out the  
12 factual basis for permitting staff's finding of conformance to the County's wetland utility  
13 buffer exception, KCC 19.200.225.H. See pages 30, 31 and 37 of CABRII, Ex. F1. The  
14 findings of fact of the CABRII in this regard are adopted as findings of fact for this  
15 Decision Upon Reconsideration.

### 16 **Conclusions of Law**

17 1. Temporary Impacts do not Independently Authorize Buffer Encroachments.  
18 Encroachments that only create temporary wetland or stream impacts are not authorized  
19 in stream or wetland buffers solely on the basis that the impacts are temporary. Wetland  
20 and stream buffer encroachments must be expressly authorized by a CAO provision.

21 The Applicant argues<sup>5</sup> that any development may occur within wetland buffers so long as  
22 the mitigation sequencing requirements of KCC 19.200.250 are met. The Applicant relies  
23 upon KCC 19.200.250 as evidence that development isn't prohibited in CAO buffers.  
24 Applicant Recon Motion, p. 3-4. KCC 19.200.250 has nothing to do with the issue of  
25 what types of buffer encroachments are authorized. It only addresses how mitigation is  
26 to be performed if a buffer encroachment is authorized. KCC 19.200.250 sets the  
27 priorities for wetland mitigation measures and provides direction as to how those  
28 measures are to be implemented. In pertinent part, KCC 19.200.250 provides as follows:

29 *A. Mitigation. All regulated development activities in wetlands or buffers*  
30 *shall be mitigated according to this title subject to the following order:...*

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31 <sup>5</sup> The Applicant's KCC 19.200.250 is just one of many points raised by the Applicant in support of its  
32 temporary impacts exception. This Decision focuses upon that particular argument because it arguably was  
33 also found persuasive in the *Central Highlands* superior court decision addressed below.

1 Somehow, the Applicant interprets the “plain meaning” of the language above as  
2 authoring any encroachment in CAO buffers so long as impacts are fully mitigated. The  
3 problem with the Applicant’s interpretation is that there’s absolutely no language in the  
4 “plain” text quoted above or anywhere else in KCC 19.200.250 that expressly, impliedly  
5 or remotely suggests such an absurd interpretation. All the quoted language above states  
6 is that “all” development within wetlands and their buffers must be mitigated as specified.  
7 Nothing in that language addresses when development is authorized in wetland buffers.  
8 The plain meaning of KCC 19.200.250 is that all development within buffers must meet  
9 its mitigation standards.

10 The Applicant’s interpretation is characterized as absurd in the technical sense above  
11 because it renders a large portion of the County’s Critical Areas Ordinance unnecessary  
12 and superfluous. Courts look to statutory context as a whole to determine legislative  
13 intent. *Armstrong v. State*, 91 Wn. App. 530 (1998). Further, no part of a statute should  
14 be deemed inoperative or superfluous unless it is the result of obvious mistake or error.”  
15 *In re Det. of Strand*, 167 Wn. 2d 180, 189 (2009). The Applicant’s interpretation violates  
16 both of these statutory rules of construction by rendering the fundamental and core  
17 framework of the CAO entirely useless and superfluous.

18 As outlined below in detail, the County’s wetland and stream regulations are based upon  
19 a foundation of buffer restrictions that can be applied in relatively simple terms to most  
20 development. These buffer standards are backed up by a myriad of exceptions,  
21 exemptions and waiver procedures when the buffers prove too burdensome to a particular  
22 development. Under the Applicant’s interpretation, there is no need for any of the  
23 exceptions or waivers that comprise a substantial portion of the CAO. The exceptions  
24 and waivers all require mitigation that meets the standards of KCC 19.200.250. If  
25 conformance to KCC 19.200.250 on its own is sufficient to develop within a buffer,  
26 there’s no reason why an applicant would volunteer to take on the added burden of the  
27 other requirements of the waivers and exceptions.

28 As previously noted, the County’s wetland and stream regulations are based upon a  
29 foundation of buffer requirements in which development is prohibited absent an express  
30 exception or waiver. The CAO lists specific buffer width requirements for both wetlands  
and streams. KCC 19.200.220 lists the buffer widths for various types of wetlands and  
KCC 19.300.315 lists the buffer widths for various types of water bodies, including  
streams. The majority of the other wetland and stream regulations address when  
development is authorized within these buffers.

KCC 19.150.170 defines a buffer as “*a non clearing native vegetation area which is  
intended to protect the functions and values of critical areas.*” Of course, any  
development of any significance involves clearing of vegetation, including the fill at issue.

1 The buffer definition clearly identifies that the buffers that are addressed by the majority  
2 of the CAO is a nonclear area.

3 One of the provisions for stream buffers provides even more clarity on the functions of  
4 buffers as follows:

5 *... Buffers shall be retained in their natural condition. It is acceptable,*  
6 *however, to enhance the buffer by planting indigenous vegetation, as approved*  
7 *by the department. Alteration of buffer areas and building setbacks may be*  
8 *allowed for development authorized by Section 19.100.140 (Reasonable Use*  
9 *Exception), Section 19.100.125 (Exemptions), Section 19.100.130 (Standards*  
*for Existing Development) or Section 19.100.135 (Variances)....*

10 (emphasis added). KCC 19.300.315(2).

11 As outlined for stream buffers above, buffers serve as no clear zones as consistent with  
12 the buffer definition for both streams and wetlands. As further outlined in the stream  
13 buffer provision above, the bulk of the remaining CAO provisions are designed to serve  
14 as exceptions to the buffer requirements. Although not expressly stated as such, the same  
15 framework applies to wetlands. The same exceptions listed in KCC 19.300.315(2) above  
16 apply to wetlands.

17 In point of fact, all of the regulations in the CAO for streams and wetlands are ultimately  
18 based upon the delineation of buffers and their associated critical areas and what can be  
19 done within those buffers and critical areas. In addition to the waiver and exemption  
20 procedures identified above, the CAO contains numerous standards for decreasing buffer  
21 widths for project specific conditions for both wetlands and streams. See KCC  
22 19.300.315(4); KCC 19.200.220C. The CAO also specifically authorizes essential and/or  
23 innocuous facilities such as roads, trails and utilities within stream and wetland buffers  
24 when they meet specified standards. See KCC 19.200.225; 19.300.315.

25 The supposed “plain meaning” interpretation proffered by the Applicant renders all of the  
26 waivers and exceptions identified above completely useless. Except for exemptions, any  
27 authorized buffer encroachment or reduction identified above requires that the impacts of  
28 that allowance be fully mitigated. If KCC 19.200.250 is applied as only requiring  
29 mitigation to encroach into a buffer, what is the point of all the other requirements  
30 associated with the numerous buffer encroachment and waiver provisions?

As demonstrated above, the Applicant’s interpretation of KCC 19.200.250 completely  
undermines the fundamental framework of the CAO as expressly outlined in KCC  
19.300.315(2). It renders a substantial portion of the CAO completely unnecessary. A  
central and fundamental feature of the CAO, as expressed in both buffer definition and

1 KCC 19.300.315(2), is the premise that encroachments into buffers are not allowed unless  
2 one of the CAO waivers, exceptions or exemptions is met. KCC 19.200.250, according  
3 to its plain and undisputable terms, is not one of those exceptions.

4 In their response briefing the Applicant argues that definitions “*do not, in themselves,*  
5 *create enforceable obligations.*” Taylor response brief, at 7. As a preliminary matter, the  
6 CAO buffer definition is not used by itself to establish that encroachments are generally  
7 prohibited in buffers. Buffers widths are set within the regulatory text of the CAO itself  
8 and the definition clarifies what those buffer widths require. Further, as outlined above  
9 the regulatory framework of the CAO itself can only function as intended if buffers are  
10 construed as non-clearing areas. This intent is expressly manifest for stream buffers in  
11 KCC 19.300.315(2). At worst, the buffer definition is only used to clarify any ambiguity  
12 as to the function of wetland buffers if regulatory context by itself isn’t enough. Also, as  
13 outlined in Footnote 6 of the Appellant’s reply brief, the case law relied upon by the  
14 Applicant in discounting the applicability of definitions doesn’t apply to the significance  
15 of the buffer definition in this appeal.

16 The Applicant also relies upon the assertion that the County has historically construed its  
17 CAO as authorizing buffer encroachments on the basis of temporary impacts. The  
18 Applicant argues that deference is due that interpretation. It’s not entirely clear that the  
19 County does take that position, as opposed to conflating the road and utility exceptions  
20 with a temporary impacts assessment. *See e.g.*, Heacock Declaration in Support of County  
21 Recon Response, par. 17<sup>6</sup>. It is acknowledged that the initial CABR only referenced  
22 temporary impacts without mentioning the road and utility code provisions.

23 Ultimately, however, deference is only due for ambiguous code provisions. *Tahoma*  
24 *Audubon Society v. Park Junction Partners*, 128 Wn. App. 671, 682 (2005). The CAO is  
25 not found to be ambiguous on the issue of temporary impacts. There is no buffer exception  
26 based solely upon temporary buffer impacts and no reasonable CAO interpretation leads  
27 to the conclusion that all mitigated buffer encroachments are authorized.

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28 <sup>6</sup> Paragraph 17 is fairly typical of the County’s testimony on historical practice regarding “temporary  
29 impacts.” In that paragraph Mr. Heacock identifies that the County “*has approved several projects with*  
30 *temporary impacts*” but then goes on to qualify that statement that those projects were approved under the  
road and utility exceptions authorized by KCC 19.200.225D and KCC 19.300.315D. As argued extensively  
by Appellants, the County argued in its *Central Highlands* response that buffer encroachments are only  
authorized by express CAO buffer exceptions and waiver provisions. This strongly suggests that when the  
County states that it has authorized temporary impacts, it has done so as part of a CAO expressly authorized  
buffer encroachment exception. Unfortunately, the County has not been entirely consistent in this position.  
The initial CABR reviewed by Examiner Marshal authorized road and utility encroachments solely due to  
temporary impacts with no mention of the road and utility buffer exception or any other CAO buffer  
exception.

1 The Applicant identifies KCC 19.100.120A3 as another indicator that development is  
2 authorized in CAO buffers without express CAO authorization. KCC 19.100.120  
3 describes the Department’s review authority, which includes determining “[w]hether  
4 *proposed alterations to critical areas are appropriate under the standards contained in*  
5 *this title, or whether it is necessary for the applicant to seek a variance or other*  
6 *exception[.]*” (emphasis added). The Applicant identifies that alterations are defined to  
7 include grading that in turn is defined to include filling. Applicant Recon Response, p. 6.

8 In point of fact, KCC 19.100.120A3 does little to support the Applicant’s position. For  
9 the reasons outlined above, “*the standards contained in this title*” prohibit development  
10 within CAO buffers except when expressly authorized. KCC 19.100.120A3 suggests a  
11 distinction between buffer alterations that need a “variance or other exception” and those  
12 that do not. Those that do not are activities classified as exemptions by KCC 19.100.125.  
13 KCC 19.100.120A3 simply makes clear that the Department decides whether an applicant  
14 has to apply for a CAO exception or whether an activity is exempt and necessitates no  
15 such application. That authority is entirely consistent with a CAO regulatory regime in  
16 which development is prohibited in CAO buffers unless expressly authorized.

17 The Applicant also turns the significance of all the CAO buffer exceptions on its head by  
18 arguing that the “no clear” definition doesn’t prohibit buffer encroachments because there  
19 are so many exceptions. See Applicant Recon Response, p. 8. As outlined above, the  
20 conclusion that should be reached from the plethora of CAO buffer exceptions is the  
21 opposite of Applicant’s position. There clearly would be no need for exceptions if buffer  
22 encroachments weren’t prohibited in the first place. The buffer definition is one of the  
23 sources of that prohibition.

24 In another appeal the Examiner was made aware of a Kitsap County Superior Court  
25 decision that construed a City of Poulsbo mitigation sequencing provision very similar to  
26 KCC 19.200.250 as authorizing “all regulated development” to occur within critical area  
27 buffers because of the reference to “all regulated development” within its introductory  
28 provision. *See Central Highlands v. City of Poulsbo*, Kitsap Superior Ct. No. 15-2-02058-  
29 9. The parties to this appeal were given the opportunity to comment on the applicability  
30 of the *Highlands* decision.

The Poulsbo mitigation sequencing provision in *Highlands* and its regulatory framework  
focused on buffers and exceptions thereto is similar to that of Kitsap County. The Poulsbo  
and Kitsap County CAO’s likely are based upon a model CAO produced by the  
Washington State Dept. of Trade and Economic Development (now Dept. of Commerce),  
which has the same mitigation sequencing and regulatory framework. The *Highlands*  
decision addressed a proposed wetland filling, which is arguably distinguishable from the  
encroachment at issue in this appeal. The County also identified other arguably

1 distinguishable facts underling the *Highlands* decision in its briefing on that case  
2 submitted on March 5, 2025.

3 Ultimately, none of the parties to this appeal construed the *Central Highlands* decision as  
4 binding precedent. This position is consistent with the fact that the only statutory  
5 requirements for adhering to precedent apply to Washington Supreme Court and Court of  
6 Appeals decisions. See RCW 2.04.220 and 2.06.040. Consequently, the *Central*  
7 *Highlands* decision will not be applied to this appeal because it does not serve as binding  
8 precedent. If the Applicant prevails on its interpretation of KCC 19.200.250 in a judicial  
9 appeal of this decision, the Examiner will of course apply that interpretation in future  
10 applications to the extent that judicial determination is not overturned.

11 On another ancillary matter associated with the temporary impacts issue, the line 26, p.  
12 24 Final Decision reference to “Appellants” should be replaced with “Applicant.”  
13 Examiner Marshal’s scope of remand as to whether it includes the validity of the  
14 Appellant’s “temporary impacts” interpretation still remains uncertain.

15 Even if Examiner Marshal’s remand didn’t include the validity of Applicant’s temporary  
16 impacts exception, it was something that still needed to be addressed at some point in this  
17 proceeding. Pages 3-4 of the Final Decision identified case law that arguably required  
18 remand review to be limited to Examiner Marshal’s remand order. However, one critical  
19 distinguishing factor is that administrative remands are not subject to judicial appeal.  
20 *Harlan Claire Stientjes v. Thurston Cty*, 152 Wn. App. 616 (Wash. Ct. App. 2009).  
21 Consequently, unlike a remand from a court of appeals or the supreme court, a local  
22 remand order has no finality associated with it. Specifically, with a judicial remand the  
23 remand order can no longer be contested whereas in a local remand order the validity of  
24 the remand order itself is subject to challenge once the remand proceeding is completed.  
25 In this regard the parties to this proceeding are still free to contest the scope and validity  
26 of Examiner Marshal’s remand order. For that reason, it is most efficient and effective to  
27 address potential errors in the remand order before the appeal proceeding is completed.

28 2. Proposed Buffer Encroachments Meet Road Exception for Streams and  
29 Wetlands. The KCC 19.200.225D criteria for wetland and stream buffer road  
30 encroachments and stream crossing are found to be met for all proposed road  
encroachments for the reasons identified in pages 19, 20 and 27 of the CABRII, Ex. F1  
and FOF No. 10.<sup>7</sup>

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<sup>7</sup> Findings of Fact and Conclusions of Law from the Final Decision are referenced as FOF and COL  
respectively. Findings of Fact and Conclusions of Law from this Decision Upon Reconsideration  
are referenced as Recon FOF and Recon COL respectively.

1 3. Proposed Buffer Encroachments Meet Utility Exception for Wetlands and Streams.  
2 The KCC 19.200.225H criteria for utility encroachments into wetland buffers is found to  
3 be met for all proposed utility encroachments for the reasons identified in pages 30, 31  
4 and 37 of the Revised CABR, Ex. F1 and FOF No. 10.

5 It is noted that during the hearing the Appellants identified some ambiguity from Ms.  
6 Bartlett’s cross-examination as to whether stream buffers should have been assessed for  
7 some buffer encroachments as opposed to overlapping wetland buffers. CABRII did not  
8 address any utility encroachment under the utility stream buffer exception, KCC  
9 19.300.315J. However, the criteria for KCC 19.300.315J and KCC 19.200.225.H are in  
10 all material respects the same and the findings of CABRII are adopted for the KCC  
11 19.300.315J criteria as well.

12 4. Appellants Recon B.1<sup>8</sup>: Appellants request a ruling on whether KCC 19.200.225D  
13 authorizes the fill proposed for the nonfixed portions of Spine Road. That issue was not  
14 addressed in the Final Decision because it was determined that the fill qualified as a fully  
15 mitigated temporary impact under the Applicant’s “temporary impacts” theory. The  
16 requirements of KCC 19.200.225D are now found to be met for the reasons identified in  
17 Recon FOF No. 2.

18 5. Appellants Recon B.2: In B2 Appellants question whether the impacts of the proposed  
19 buffer reductions have been fully mitigated. The proposed buffer reductions are found to  
20 be fully mitigated for the reasons identified in FOF No. 10, 12 and 13 in addition to the  
21 buffer added as a result of the proposed buffer averaging.

22 6. Appellants C.2: In C2 Appellants request that Condition No. 1 be revised to require  
23 that buffer fill “match” existing soil permeability. As testified by Ms. Decker, it is not  
24 possible to match existing conditions. See Nov. 8, 3 p.m. Tr., at 3:44–4:09. The condition  
25 is revised to further specify that the permeability must be sufficient to maintain wetland  
26 hydrology. The Appellants also requested that fill soils have less than 15% silt content.  
27 The Applicant opposes this but its own experts made this recommendation. See Tr. 330.  
28 Condition No. 1 is revised to require the 15% limit.

29 7. Appellants C3: In C3 the Appellants request that Condition No. 1 not allow the  
30 Applicant to delay post-installation soils testing if it cannot be reasonably completed prior  
to the opening of the road. The condition already requires the Applicant to acquire  
approval from County staff for any such delays and such delays should be reasonable.

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<sup>8</sup> Recon FOF No. 4-11 address the reconsideration issues of the Appellants’ reconsideration motion using the numbering of that motion. Similarly, Recon FOF 12-18 addresses the reconsideration issues of the Applicant’s reconsideration request.

1 The condition as written provides sufficient assurance for completion of testing and does  
2 not need to be revised.

3 8. Appellants C4: In C4 Appellants seek clarification as to which wetlands the conditions  
4 of approval apply. They apply to all the affected streams and wetlands and the conditions  
5 will be clarified accordingly. It is important to recognize that the conditions so apply  
6 because the findings of sufficient wetland mitigation in this decision are based upon that  
7 understanding. Since the fill conditions apply to all wetland and stream fill, FOF No. 10  
8 is now found to apply to all of the proposed fill of the project since FOF No. 10 is based  
9 upon the fill mitigation required by the conditions.

10 9. Appellants C5: In C5 the Appellants request that Condition 5 be revised to identify  
11 more specifically what portions of the CAO apply to stormwater review. Given the  
12 unknowns of a future review process, it is best to maintain flexibility to ensure that  
13 application of the CAO does not result in unnecessary and unintended hardship. The  
14 purpose of the deferred review is to compensate for the fact that appellants at this stage of  
15 review are put at a significant disadvantage in the absence of specific development plans.  
16 That purpose should serve to provide sufficient guidance as to what CAO provisions  
17 should apply during SDAP review.

18 10. Appellants C6: In C6 the Appellants request specific standards for scarification and  
19 log placement. In their reply they removed their objection but requested that the depth of  
20 scarification to Condition No. 2 be specified as 12 inches. That request as modified has  
21 been implemented.

22 11. Appellants D: In D Appellants request a remand for application KCC 19.200.225.D  
23 to the fixed portions of Spine Road. Appellants primarily base this request upon the fact  
24 that consideration of that issue wasn't made until after the record was closed before the  
25 final decision. However, as noted in Recon FOF No. 2 the record was re-opened for that  
26 very purpose and the parties have had an opportunity both before and after issuance of the  
27 Final Decision to address impacts and avoidance issues pertinent to the fixed portions of  
28 Spine Road. Recon COL 2 also found sufficient evidence in the record to justify  
29 compliance with KCC 19.200.225.D. For these reasons the Section D request for remand  
30 is denied.

12. Applicant Clarification 1: Mr. Koger was inadvertently omitted from FOF No. 9  
of the Final Decision. FOF No. 9 is revised to add the following:

**Curtis Koger**, an Applicant witness, is a Senior Principal Geologist/Hydrogeologist at Associated Earth Sciences Inc. He has over 40 years of geologic practice experience in a wide variety of geologic settings and disciplines. His experience and expertise have been derived from extensive



1 subsurface stratigraphic exploration evaluations, groundwater projects, and from  
2 economic and geologic hazards studies.

3 13. Applicant Clarification 2: FOF No. 11 referenced in the Final Decision  
4 should be FOF No. 10.

5 14. Applicant Clarification 3: Request to modify Condition 2 to authorize that  
6 placement of topsoil for wetland mitigation can be accomplished through tilling the  
7 topsoil. Request granted.

8 15. Applicant Clarification 4: Applicant identifies that they were instructed by Kitsap  
9 County to submit their CABR application separately from their SDAP. That may be the  
10 case but the Applicant hasn't identified any regulation that would prohibit them from  
11 doing so. In this regard the timing of the submissions appears to still be technically  
12 voluntary. The Final Decision was not intended to suggest that the Applicant  
13 intentionally delayed SDAP application to make it more difficult for parties such as the  
14 Appellants to challenge CAO compliance.

15 16. Applicant Reconsideration No. 1: Applicant requests no new evidence on  
16 reconsideration. That request is denied. The admission of new evidence was necessary  
17 to assure that the parties had their procedural due process right to be heard on the  
18 expanded remand authorized by the Final Decision. The reopening of the hearing was  
19 also consistent with the Examiner Rules of Procedure. Rule 2.14 authorizes the Hearing  
20 Examiner to reopen the hearing any time before the filing of a final decision. Within  
21 the meaning of Rule 2.14, the Final Decision of this case was not in fact final because it  
22 expressly invited the introduction of new evidence to correct a potential due process  
23 violation that jeopardized the validity of the proceeding.

24 17. Applicant Reconsideration No. 2: Applicant requests reconsideration on  
25 applicability of KCC 19.200.225.D, specifically that the code section may be applied  
26 to all proposed fill. That request is granted. As previously noted, the purpose of  
27 authorizing new evidence in reconsideration was to ensure a valid review process for  
28 application of KCC 19.200.225.D.

29 18. Applicant Reconsideration No. 3. Applicant requests buffer setback  
30 encroachments authorized by KCC 19.200.220.F. That request is granted and Condition  
No. 1 has been modified accordingly. Such encroachments are required to be identified  
in the SDAP application to the extent such encroachments can be anticipated.

**Appeal Issues (As Quoted from Appellants' Appeal -- Most Revisions to associated  
Conclusions of Law from Final Decision Identified in track change)**

1  
2 **Issue A1.** *The Arborwood project proposes to place large quantities of permanent*  
3 *fill inside the buffers of several wetlands and streams, including Wetlands L2, 12, P2, L3,*  
4 *C6, Crabapple Creek, and Kingfisher Creek—both within the areas of buffers to be*  
5 *reduced, and the areas of the buffers to be enlarged. However, KCC 19.150.170, KCC*  
6 *19.300.315.A.1, Preliminary Plat Condition 6, NOD Condition 10, and RNOD Condition*  
7 *10 require that buffers are “a non-clearing native vegetation area”, “shall remain*  
8 *undisturbed natural vegetation areas”, and “shall be retained in native vegetation as*  
9 *depicted on the preliminary plat application.” KCC 19.300.315.A.1, NOD Condition 10,*  
10 *and RNOD Condition 10 require that buffers and setbacks “remain undisturbed natural*  
11 *vegetation areas.” By approving of a project design that will result in the placement of*  
12 *large quantities of permanent fill material in critical area buffers, the NOD and RNOD*  
13 *are non-compliant with these provisions. A single statutory exception in 19.300.315.A.1*  
14 *is “where the buffer can be enhanced to improve its functional attributes.” This exception*  
15 *does not apply since the existing buffers are well-vegetated, forested, in good condition,*  
16 *functionally effective, and will not be enhanced to improve functional attributes.*

13 ~~19. 19. Fill Compliant with CAO. Appeal Issue No. 1 is not grounds for CABR II~~  
14 ~~reversal. All of the fill proposed within wetland and stream buffers is authorized by KCC~~  
15 ~~19.200.225D, KCC19.300.315D, KCC 19.200.225.H and KCC 19.300.315J as~~  
16 ~~determined in Recon Conclusion of Law No. 2 and 3. As identified in COL No. 5, the~~  
17 ~~scope of remand review on fill impacts is limited to whether buffer impacts qualify as~~  
18 ~~temporary. As determined in COL 7, the measure of impacts for the fill is limited to the~~  
19 ~~fill located within the buffer . With these parameters, the buffer impacts are found to~~  
20 ~~qualify as temporary for the reasons identified in FOF No. 11.~~

21 ~~Appeal A1 had been limited to assessment of buffer impacts in a September 24, 2024~~  
22 ~~summary judgement ruling because Examiner Marshall’s Ex. F12 remand order had been~~  
23 ~~interpreted as concluding that buffer fill was authorized if impacts were temporary. As~~  
24 ~~outlined in COL 6, that interpretation has been modified to find that Examiner Marshall~~  
25 ~~ruled she didn’t have the authority to make that initial conclusion, i.e. that permanent fill~~  
26 ~~is allowed in buffers if fully mitigated. Examiner Marshall’s remand order, specifically~~  
27 ~~MCOL 106, is more accurately interpreted as concluding that she intended County staff~~  
28 ~~to address that legal issue on remand. In short, whether permanent fill can be allowed in~~  
29 ~~wetland buffers, even if fully mitigated, is still an outstanding legal issue that can be~~  
30 ~~addressed by the parties. Given this modification to the September 24, 2024 summary~~  
~~judgment ruling, the parties are free to seek reconsideration on Appeal Issue A1 on that~~  
~~basis. The parties may couple such a reconsideration request with a request to present~~  
~~relevant new evidence. The issue of new evidence will be addressed after all parties have~~  
~~had an opportunity to address its merits and how such evidence could most efficiently be~~  
~~presented.~~

1 **Appeal Issue A2.** *The County’s approval of permanent fill material in critical area*  
2 *buffers violates DCD’s stated interpretation of the critical areas code. DCD recently*  
3 *presented to the Kitsap County Board of Commissioners that an amendment to*  
4 *19.300.315.A “Added language reflecting current practice that fill, yard-waste or other*  
5 *debris shall not be placed in buffers.” (Code Update Matrix, Critical Areas Ordinance*  
6 *Update 2024). The proposed plan, buffer averaging, and RNOD are inconsistent with this*  
7 *policy statement to the Commissioners.*

8 ~~Reconsideration Authorized. Appeal A2 had been dismissed in prehearing rulings~~  
9 ~~because Examiner Marshall’s Ex. F12 remand order had been interpreted as concluding~~  
10 ~~that buffer fill was authorized if impacts were temporary. Reconsideration of that~~  
11 ~~dismissal is authorized as outlined in COL-10.~~

12 20. The amendment referenced above is largely irrelevant to the issues of this appeal.  
13 What’s most pertinent as to buffer impacts is whether the CAO authorizes development  
14 within CAO buffers. The amendment referenced above doesn’t appear to encompass  
15 development, most notably any clearing of buffer vegetation. For this reason the  
16 amendment doesn’t have much bearing on the issue of whether development is authorized  
17 in wetland buffers outside express CAO authorization.

18 **Appeal Issue A3.** *The placement of permanent fill within wetland and stream buffers*  
19 *is likely to result in adverse hydrological and hydrogeological impacts on these critical*  
20 *areas in violation of KCC 19.200.220.C.1.a(1) through (5), including increasing harmful*  
21 *surface discharges in some instances and times, and disrupting existing hydrology and*  
22 *hydrogeology supporting these critical areas by reducing surface and subsurface flow in*  
23 *other instances and times. The Applicant/County does not state or demonstrate that*  
24 *blocking the swale with compacted fill will meet the Code requirements to “provide as*  
25 *great or greater functions and values as would be provided under the standard buffer*  
26 *requirement” and that “will not adversely impact the wetland.”*

27 *The whole catchment area for wetland P2 was estimated at about 12 acres. About 70% is*  
28 *degraded buffer consisting of mowed grass on steep slopes. The remaining 30%, about*  
29 *3.4 acres, is a well vegetated, forested, and functional buffer.*

30 *Under a standard 200’ buffer, construction could impact about ½ acre or 16% of the*  
*buffer. Importantly, such construction would severely constrict, but not completely dam,*  
*the swale providing runoff to the P2/L2 wetlands within that swale.*

*With the new proposal for a 56% reduction to an 87’ buffer, over 1 acre or 32% of the*  
*intact buffer is lost. Losing one-third of an intact buffer is a severe functional loss. But*  
*even worse, the swale is completely dammed by low permeability compacted fill and the*  
*supply of water via runoff from 70% of the catchment is interrupted. The first appeal*  
*demonstrated that adverse impacts to wetland P2 would occur.*

1  
2 *The examiner ruled on Remand that stormwater impacts should be reconsidered with the*  
3 *SDAP. The County has now approved a stormwater design. Based on available*  
4 *documents, Appellants reasonably expect that the previously identified adverse impact of*  
*wetland erosion and dewatering continues to exist.*

5 ~~21.~~ 21. Fill Impacts Mitigated. Appeal Issue No. 3 is not grounds for CABR II  
6 reversal. As identified in FOF No. 10~~4~~ as expanded by Recon COL 8, the hydrological  
7 impacts of all permanent fill within wetland and stream buffers has been sufficiently  
8 mitigated as conditioned. The hydrological impacts of fill outside the buffer ~~will be~~  
9 ~~addressed during stormwater review and the current appeal thereof.~~ and within 200 feet  
10 of Wetland P2 as conditioned will not adversely affect wetland functions or values for the  
11 reasons identified in FOF No. 10 as expanded by Recon COL 8 and FOF 13.  
Hydrological impacts outside of the 200 foot pre-averaging buffer of Wetland P2 are  
outside the scope of CAO review for the reasons identified in COL No. 7.

12 **Appeal Issue A4:** *The “temporary impact” concept used by the County to justify its*  
13 *approval of large quantities of permanent fill in critical area buffers is a fiction*  
14 *unsupported by the Kitsap County Code and any of the project Approvals or Decisions.*  
15 *The CABR Appeal Decision found that permanent fill was different from “ground*  
*disturbance activity, which constitutes a ‘temporary impact.’”*

16 *The County failed to require permanent fill be treated differently than a buffer disturbance*  
17 *or “temporary impact” (HED Conclusion ¶106). RNOD (p2) fails to quote the portion of*  
18 *¶106 stating “The CABR Decision does not separate analysis of ground disturbance*  
19 *activity, which constitutes ‘temporary impact,’ from installation of fill in the buffers of*  
20 *several wetlands, at the north and south stream crossings, and at the utility corridor which*  
21 *substantial evidence indicates will remain in place permanently. Additional consideration*  
22 *and analysis of fill construction is required to determine compliance...” No such*  
*consideration or analysis is presented.*

23 *Rather, the County apparently relied on Attorney Liaw’s letter to Heacock (Exhibit 7) that*  
24 *improperly overturned and effectively ignored the Examiner’s Conclusion ¶106. Liaw*  
25 *argued that “grading” included “filling“ (per definition 19.150.380), hence the*  
26 *Examiner’s separation of grading and permanent fill was incorrect, and therefore*  
27 *permanent fill was included in “grading and ground disturbing activities.” The RNOD*  
28 *errs in relying on this logic in two ways. First, Exhibit 7 overlooked the clear intent of the*  
29 *Examiner’s statement, which is that permanent fill is not a temporary impact. Second,*  
30 *interpretation of the word “grading” is tricky because of the common meaning of ‘leveling*  
*or smoothing a surface.’ Even the Code itself is confusing and does not follow a strict*  
*definition of grading, but also uses the term in the more common sense. Examples are*

1 “grading, filling, or other development activities” (19.200.220.C.1.a.(6)iv) and “fill or  
2 grading” (19.400.415.N.2).

3 *The Applicant/County are required to follow the Examiner decision per KCC 21.04.090D.*

4  
5 13. ~~Reconsideration Authorized.~~ As with Appeal A2, Appeal A4 had been dismissed  
6 in prehearing rulings because Examiner Marshall’s Ex. F12 remand order had been  
7 interpreted as concluding that buffer fill was authorized if impacts were temporary. As  
8 outlined in COL 6, that interpretation has been modified to find that Examiner Marshall  
9 ruled she didn’t have the authority to make that initial determination and part of her  
10 remand was intended to give County staff the opportunity to address that issue. Given  
11 this modification to the prehearing motion, the Appellants are free to seek reconsideration  
12 on Appeal Issue A4 and present new evidence as relevant to the issue. Issue A4 is largely  
13 consistent with the conclusions of this Decision Upon Reconsideration. The Applicant’s  
14 creation of a temporary impact exception to buffer restrictions is not supported by the  
15 CAO. The Applicant’s reliance upon grading and filling definitions doesn’t support the  
16 temporary impact exception for the reasons identified in the analysis of KCC  
17 19.100.120A3 in Recon COL No. 1.

18 **Appeal Issue A5.** *For the purpose of buffer averaging, the so-called “temporary*  
19 *impacts” are destructive to buffers and are, in fact, buffer “takes.” Buffer averaging fails*  
20 *to include “takes” at stream crossings of Crabapple and Kingfisher Creeks and “take”*  
21 *areas of permanent fill.*

22 14. ~~Fill Impacts Mitigated.~~ Appeal A5 is not grounds for CABR II reversal. As  
23 identified in FOF No. 11, the hydrological impacts of permanent fill within wetland  
24 buffers has been sufficiently mitigated as conditioned. The hydrological impacts of fill  
25 outside the buffer will be addressed during stormwater review and the current appeal  
26 thereof. As noted in prehearing rulings, Appeal Issue A5 is limited to consideration of  
27 wetland buffers. As determined in Recon COL No. 2 and 3, the proposed wetland and  
28 stream encroachments are authorized under the road and utility buffer exceptions. The  
29 encroachments are not dependent upon meeting buffer averaging standards and thus Issue  
30 A5 is inapplicable.

**Appeal Issue No. 6:** *The RNOD (p26) states that (1) so-called “temporary disturbances”*  
*caused by the placement of permanent fill material in critical area buffers will be restored,*  
*(2) temporary disturbance will be mitigated per KCC 19.200.250.A, (3) restoration will*  
*be monitored and maintained, and (4) permeability of fill will mimic existing soil*  
*conditions. DCD errs on all these points.*

*Regarding (1), (2), and (4), testimony during the first appeal conclusively established that*  
*the proposed clearing of all vegetation, removal of the upper soil horizon and biota, and*

1 placement of mechanically compacted fill would permanently destroy the hydrologic and  
2 hydrogeologic conditions that created and sustain the in-swale wetland complex of P2/L2.  
3 The Hearing Examiner ruled that permanent fill was not a temporary disturbance. An  
4 important point here is that the proposed placement of fill permanently disrupts the  
5 existing hydrologic and hydrogeologic conditions. Replanting of mechanically  
6 compacted, hence low permeability, soil is not a mitigation for lost hydrologic and  
7 hydrogeologic functions. Regarding (2), reliance on 19.200.250.A.3.a fails because only  
8 a vegetative function is considered. Functional attributes of buffers are not adequately  
9 identified and addressed. Appellants provided expert testimony that the proposed adverse  
10 impacts to the site's hydrology and hydrogeology functions would compromise the  
11 wetlands and threaten their permanent loss.

9 Regarding (3), the existing soils have taken hundreds of years to form. The sub-surface  
10 pathways for water flow have also been developing for long periods of time due to  
11 bioturbation (e.g. roots and burrows), weathering processes, and establishment of micro  
12 and macro preferential pathways in the sub-surface soils. The proposed 5-year  
13 monitoring period can establish plantings, but does not begin to represent the time  
14 required to develop the soils, soil structures, and biologic communities that created and  
15 sustain the present wetlands.

15 Regarding (4), the Terra report (Exhibit 9) does not support the claim that mechanically  
16 compacted soil will mimic existing conditions. First, the upper soils with their fungal,  
17 bacterial, and ecologic communities are completely removed. As noted, these soils and  
18 associated biota took hundreds of years to form. The proposed steeper, smoother, and less  
19 permeable surface will accelerate runoff and inhibit treatment for water quality. Second,  
20 the in-situ soils have settled naturally and have never been mechanically compacted.  
21 Although having a significant silt content, the in-situ soils have developed and support  
22 effective movement of water to sustain the wetlands. Mechanical compaction, performed  
23 at optimum moisture content, will densify the soils compared to in-situ conditions. The  
24 relatively high silt content will help bind the soil and increase shear strength and load  
25 bearing capacity. However, compaction will increase density, reduce pore volume, and  
26 lower permeability. Compared to existing conditions, the wetlands will see greater runoff  
27 flows, more rapid runoff, less infiltration, and less water storage.

24 Regarding (4), DCD also errs in drawing an inference (restoring natural conditions) from  
25 a limited claim (mimicking soil permeability) in the supplemental Terra report that is both  
26 incorrect and unsupported by analysis. The report could have easily stated a conclusion  
27 of restoration, but did not do so. DCD errs twice. Firstly by relying on an expert report  
28 without actual analysis, and secondly by drawing an inference that the report does not  
29 make

29 15. Fill Impacts Mitigated. Appeal A6 is not grounds for CABR II reversal. As  
30 identified in FOF No. 10~~4~~ as expanded by Recon COL 8, the impacts of permanent fill

1 within wetland and stream buffers has been sufficiently mitigated as conditioned. It is  
2 recognized that some of the characteristics of wetland buffers might be permanently  
3 altered. However, for impacts to buffer functions the issue is whether their functions in  
4 protecting wetlands has been permanently impaired. As determined in FOF No. 104—as  
5 expanded by Recon COL 8, substantial evidence establishes that the conditions imposed  
6 upon placement of fill within wetland buffers have been found sufficient to restore  
7 wetland buffer functions.

8 **Appeal Issue No. 7:** *The supplemental Terra report (Exhibit 9) claims that compacted*  
9 *soils will mimic existing permeabilities (hydraulic conductivity). However, the report is*  
10 *hand-waving without analysis. There are no estimates or comparisons of existing, in-situ*  
11 *permeabilities with compacted permeabilities. There is no discussion of the lower in-situ*  
12 *density compared to a load-bearing 90% Standard Proctor density. There is no discussion*  
13 *that naturally settled soils (non-glacial overridden) will be more permeable than*  
14 *mechanically compacted soils. There is no consideration of the long-term natural*  
15 *weathering and bioturbation processes creating pathways for the absorption, movement,*  
16 *and infiltration of water through the in-situ soils. There is no acknowledgement that in-*  
17 *situ soils have developed effective preferential pathways, at different scales, for the*  
18 *movement and storage of water that manifestly sustain the observed wetlands.*

19 *Re-creating natural systems is challenging at best and is the reason why mitigation*  
20 *multipliers are in the Code. The existence of the in-swale wetlands is precisely due to the*  
21 *unique topographic and soil conditions at the site. The simple claim that compaction will*  
22 *result in similar permeability is incorrect and, also, insufficient to support the Applicant's*  
23 *implication that existing conditions will be re-created. DCD expressly drew that inference*  
24 *(RNOD p26) in repeating that "fill will mimic hydraulic conductivity [permeability] of*  
25 *the existing onsite soils within the buffer to allow for a consistent hydrogeologic condition*  
26 *from existing conditions to the post-construction condition." In actuality, the hydrology*  
27 *and hydrogeology will change greatly. Excavation and compaction will speed runoff,*  
28 *lower soil permeability, reduce absorption, and block infiltration of water and thus*  
29 *threaten the wetlands.*

30 *RNOD staff comment (p24) cites a 90% Modified Proctor compaction specification per*  
*ASTM -1557, whereas the Terra report specifies a 90% Standard Proctor and ASTM D-*  
*968. This inconsistency is significant and requires correction.*

*Finally, during the first Appeal, Appellant explained how precipitation supplied the*  
*wetlands. The Appellants' analysis was accepted by the Examiner as "more credible,"*  
*whereas the Applicant's theory was judged to be "not credible and illogical" (HED*  
*Findings ¶459 & ¶460, respectively). The current Examiner should consider the Findings*  
*of the previous Examiner in this matter when judging the value of the supplemental Terra*  
*report.*

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3 16. Fill Impacts Mitigated. Appeal A7 is not grounds for CABR II reversal. As  
4 identified in FOF No. 104~~as expanded by Recon COL 8~~, the impacts of permanent fill  
5 within wetland and stream buffers has been sufficiently mitigated as conditioned. The  
6 impacts of compaction have been assessed and found to be adequately addressed under  
7 the Applicant’s methodology coupled with a requirement for additional testing both before  
8 and after installation of the fill. If compaction and/or fill depth impact filtration rates more  
9 than anticipated, post-installation testing will compel additional measures to be taken to  
10 remedy the lack of performance.

11 **Appeal Issue A8:** *The Applicant’s supplemental wetland report by ELS (RNOD p17,*  
12 *Exhibit 11) errs in making statements such as “Soils within the temporarily impacted*  
13 *buffers will be restored to match preconstruction soil conditions per Terra specifications”*  
14 *or “Terra Associates’ recommendations will reestablish, rehabilitate, and restore any*  
15 *temporary loss of buffer function as a result of the fill.” The supplemental wetland report*  
16 *also errs in attributing those statements to the supplemental Fill Specification Memo by*  
17 *Terra (Exhibit 9). First, Exhibit 11 errs in attributing the conclusory statements to the*  
18 *Terra report. That report (Exhibit 9) never claimed that fill would restore buffer functions.*  
19 *The Terra report only stated, in our opinion incorrectly and for reasons given elsewhere,*  
20 *that the fill specification could be used “while mimicking the general hydraulic*  
21 *conductivity [permeability] of the wetland buffer soils” and “mimic hydraulic*  
22 *conductivity...to allow for consistent hydrogeologic condition...” Second, the conclusory*  
23 *statements are outside the area of expertise for a wetland specialist. Third, the RNOD*  
24 *(e.g. p17 etc.) errs in relying on those conclusory statements and accepting them as expert*  
25 *opinion.*

26 *Moreover, the RNOD (p27) and supplemental wetland report (Exhibit 11, p19) state “The*  
27 *vegetation component of the buffer function will be rectified through the spread of topsoil*  
28 *and mulch over the fill and installation of native plants that will provide the necessary*  
29 *roughness for rectifying the buffer functions.” This statement expresses an incorrect*  
30 *attitude, expressed in both Applicant reports and DCD testimony, that replanting replaces*  
*or restores all buffer functions. Buffers have multi-functional attributes. The*  
*Applicant/County fail to identify the different buffer functions. The reliance on a bit of*  
*topsoil and a few plants does not recognize the great values in an existing functioning*  
*ecosystem.*

*Wood chips and a few inches of soil placed on high-silt compacted fill (low permeability)*  
*are inadequate to replace the deep soil structures supporting a complex fungal, bacterial,*  
*plant, invertebrate, and burrowing animal ecological system created over decades. The*  
*hydrologic functions of slowing, detaining, and absorbing runoff are not duplicated with*



1 a thin veneer of soil. The possibility of infiltration is blocked by compacted fill. Removal  
2 of toxins and nutrients from runoff and stormwater will be reduced.

3 The proposal would remove soils that took hundreds of years to produce, replace with  
4 compacted fill, and cover with a few inches of soil and undecomposed wood. Even with  
5 planting and 5-years of growth, it will be many decades for the ecological communities to  
6 be re-established. The pre-existing soils and soil structures with preferential pathways for  
7 water movement and storage will never be replaced. In short, the re-planting proposal  
does not rectify buffer functions.

8 17. Fill Impacts Mitigated. Appeal A8 is not grounds for CABR II reversal. As  
9 identified in FOF No. 10+as expanded by Recon COL 8, the impacts of permanent fill  
10 within wetland and stream buffers has been sufficiently mitigated as conditioned. It is  
11 recognized that some of the characteristics of wetland buffers might be permanently  
12 altered. However, for impacts to buffer functions the issue is whether their functions in  
13 protecting wetlands has been permanently impaired. As determined in FOF No. 10+as  
14 expanded by Recon COL 8, substantial evidence establishes that the conditions imposed  
15 upon placement of fill within wetland buffers have been found sufficient to maintain  
wetland buffer functions. Further, all pertinent functions of wetland buffer impacts are  
16 addressed in FOF No. 10+ as expanded by Recon COL 8 and have been assessed by  
17 persons with pertinent expertise to render opinions on buffer impacts.

18 **Appeal Issue 9.** *Kitsap County failed to require a 100' buffer, undisturbed by permanent  
19 fill, for wetland P2 (HED Conclusions ¶50 and ¶106). The permanent fill inside the P2  
20 buffer reduces the buffer width to about 87', which is less than the minimum required 100'  
buffer. The proposed buffer reduction is about 56%, which is greater than the maximum  
reduction of 50% potentially allowable by the code. Therefore, a Type III process and  
public hearing is required.*

21 18. Reconsideration Authorized. ~~As with Appeal A2 and Appeal 4, Appeal A9 had  
22 been dismissed in prehearing rulings because Examiner Marshall's Ex. F12 remand order  
23 had been interpreted as concluding that buffer fill was authorized if impacts were  
24 temporary. Appeal Issue 9 is construed as taking the position that permanent fill is not  
25 allowed in wetland buffers as a temporary impact. As outlined in COL 6, that  
26 interpretation has been modified to find that Examiner Marshall ruled she didn't have the  
27 authority to make that initial determination and part of her remand was intended to give  
28 County staff the opportunity to address that issue. Given this modification to the  
29 prehearing motion, the Appellants are free to seek reconsideration on Appeal Issue A9  
and present new evidence as relevant to the issue. Appeal A8 is not grounds for CABR II  
reversal. Road improvements are authorized in the P2 buffer pursuant to KCC  
19.200.225D as determined in Recon COL No. 2.~~

1 **Appeal Issue B1:** *The Arborwood project proposes to place permanent fill and other*  
2 *impervious surfaces within 15 feet of critical area buffers, in violation of KCC*  
3 *19.200.220.F. The Arborwood project also proposes to engage in construction activities*  
4 *within 15 feet of the critical area buffers in violation of Condition 8 to the County’s 2009*  
5 *Preliminary Plat Approval. These actions are likely to have deleterious impacts on the*  
6 *critical areas and buffers, including on the hydrology and hydrogeology supporting those*  
7 *critical areas.*

8 19. Pervious Fill Authorized in Setback. Appeal B1 is not grounds for CABR II  
9 reversal. The proposed fill is authorized in wetland buffers for the reasons identified in  
10 COL 6. The “construction setback” referenced in Condition No. 8 is construed the same  
11 as the “building” setback imposed by 19.200.220.F and the two requirements are  
12 construed as synonymous. There is no reason apparent from the record why the Examiner  
13 imposing Condition No. 8 would have required greater setback restrictions than that  
14 imposed by KCC 19.200.220.F and there is also no apparent difference in the meaning of  
15 the ”building” and “construction” terms as applied to setback requirements.

16 **Appeal Issue B2:** *It appears from the RNOD that the Applicant and County intend to*  
17 *justify their violation of these provisions on the theory that permanent fill is not an*  
18 *“impervious surface,” and therefore not prohibited by these provisions. However, even if*  
19 *these provisions were limited to precluding impervious surfaces within 15 feet of a critical*  
20 *area buffer, “packed earthen materials,” such as mechanically compacted fill, are*  
21 *impervious surfaces per KCC 12.08.010 definition #36.*

22 20. Pervious Fill Authorized in Setback. Appeal B2 is not grounds for CABR II  
23 reversal for the reasons identified in COL 6.

24 **Appeal Issue C1.** *The Arborwood project proposes either to directly discharge untreated*  
25 *stormwater to the critical areas described above, or to choke off the flow of surface and*  
26 *subsurface water to those critical areas (or both). In one or both of these ways, the*  
27 *Arborwood project is likely to result in substantial adverse impacts in violation of the*  
28 *Kitsap County Code.*

29 21. Water Quality Deferred to Stormwater Review. Appeal C1 is not grounds for CABR  
30 II reversal. Water quality review is appropriately deferred to stormwater review as  
identified in COL 9.

**Appeal Issue D1:** *RNOD staff comment (p28) errs in stating that “...crossings meet the*  
*road construction criteria of 19.200.225 D.” KCC 19.200.225.D.1 requires that “No*  
*other reasonable or practicable alternative exists....”*

1 *First, the same claim was made for the prior swale crossing design by Spine Road A. And*  
2 *now, we see that destruction of intact functioning buffer in the P2 catchment has been*  
3 *easily reduced by the second design submittal.*

4 *Second, we have pointed out that further design changes can reduce buffer impacts even*  
5 *more. Indeed, it is obvious that a supported roadway or other creative option could more*  
6 *significantly reduce disturbance to the intact buffer.*

7 *Third, designs proposed to date do not address the identified hydrologic and*  
8 *hydrogeologic impacts of damming the swale. The increase in flow rates, the*  
9 *concentration of flow spatially and temporally, the disruption of the natural hydrologic*  
10 *cycle, loss of natural water treatment, blockage of infiltration, and related factors are*  
11 *harmful and destructive to the downgradient wetlands.*

12 *Fourth, the Applicant agreed to abide by the Code and it is the Applicant's responsibility*  
13 *to provide a design that complies with the Code. The Applicant may desire a least*  
14 *expensive design, but the question before the Examiner is whether alternative options are*  
15 *"reasonable or practical." We have submitted that realistic and practical alternatives*  
16 *exist, and furthermore note that at no time has the Applicant argued otherwise.*

17 *To the extent that the County found KCC 19.200.225.D satisfied with respect to the Spine*  
18 *Road adjacent to Wetland P2, there is no evidence that KCC 19.200.225.D.1 & D.3 are*  
19 *met.*

20 ~~22. Outside Scope of Remand. Appeal D1 is not grounds for CABR II reversal. The~~  
21 ~~appeal issue above is based upon a comment in p. 28 of CABR II that bridge crossings are~~  
22 ~~authorized by KCC 19.200.225.D. As ruled in the September 24, 2024 prehearing~~  
23 ~~summary judgment of this case, only the non-fixed portions of Spine Road are subject to~~  
24 ~~remand review under KCC 19.200.225.D. As determined in FOF No. 5, the bridge~~  
25 ~~crossings are not part of the non-fixed portions of Spine Road. The bridge crossings are~~  
26 ~~found to be consistent with the CAO for the reasons identified in Recon COL No. 2.~~

27 **Appeal Issue D2:** *In turn, Kitsap County errs by omission in stating "staff has also*  
28 *analyzed the associated bridge crossings related to wetland buffers and also find the*  
29 *crossings meet the road construction criteria of KCC 19.200.225.D." The County fails to*  
30 *note that 19.200.225 are additional requirements. The introduction to 19.200.225, entitled*  
*"Additional development standards for regulated uses," states "In addition to meeting*  
*the development standards of this chapter, regulated uses identified below shall also*  
*comply with the standards of this section and other applicable state, federal and local*  
*ordinances." Sub-section D, "Road/Street Repair and Construction" lists four*

1 development standards singularly applicable to roads. However, the title and introduction  
2 to 19.200.225 clearly state that regulated uses, e.g. 19.200.225.D, are subordinate to and  
3 not exempt from other development standards in Chapter 19.200, e.g. buffer averaging.  
4 This understanding is bolstered by the 2009 Preliminary Plat Approval which relied on  
5 the 2007 Raedeke report, which identified both stream crossing “takes” and all areas of  
6 permanent fill as areas included in the buffer averaging scheme. In addition, DCD CAO  
7 Update staff emphasized that buffer averaging is always the first mitigation to be applied  
8 (K. Barnhart response to a question on 19.200.220.C, CAO Update Matrix 2024, at  
9 Kingston CAC April meeting). Finally, the Applicant agreed to the 2010 Development  
10 Agreement §4 entitling the Applicant “to use buffer averaging and modifications to the  
11 extent allowed in the County Code.” In other words, the Applicant agreed to follow the  
12 Code. The Applicant and County failed to properly evaluate buffer averaging as required  
13 by the Remand instructions.

14 23. ~~KCC 19.200.225.D Not Subject to Buffer Averaging.~~ As determined in COL No.  
15 4, roads are authorized in buffers if they meet the KCC 19.200.225.D criteria. They do  
16 not need to concurrently meet buffer averaging standards. The KCC 19.200.225.D  
17 analysis arguably exceeds the scope of remand because MCOL 106 limited remand review  
18 of the bridge crossings to wetland buffer averaging standards. However, Appeal Issue D2  
19 does not serve as grounds for reversal of CABR II because the bridge crossings were found  
20 as additional “also” grounds for approval of the road. The CABR II decision also found  
21 that the bridge crossings were consistent with wetland buffer averaging standards.  
22 Further, the KCC 19.200.225.D review only “arguably” exceeded the scope of remand.  
23 Remand of the bridge crossings in MCOL 106 is limited to “*whether calculations for*  
24 *buffer averaging continue to meet KCC 19.200.220.C.1.a(1) through (5).*” Finding that  
25 bridge crossings comply with KCC 19.200.225.D arguably establishes compliance with  
26 buffer averaging calculations by showing that the buffer doesn’t need to be reduced for  
27 the bridge crossings. Appeal D1 is not grounds for CABR II reversal. The bridge  
28 crossings are found to comply with KCC 19.200.225D and KCC 19.300.315D for the  
29 reasons identified in Recon COL No. 2.

30 **Appeal Issue E1.** *RNOD staff err in stating that “...mitigation analysis meets the requirements in 19.700, 19.700.710, and 19.700.715...”*

*19.700.710, including but not limited to C(5), C(6), G, and H, require Wetland Delineation Reports to analyze hydrologic and hydrogeologic impacts. Those impacts are not even mentioned in prior reports and only minimally in the supplemental report (“necessary roughness” p19), despite the clear threats to wetland P2 identified during the first appeal.*

*19.700.715, including but not limited to A(6), C(5), C(9), C(10), E, F, G and H, require that Wetland Mitigation Reports include analysis of site hydrology and hydrogeology,*

1 *surface and sub-surface flows, geomorphology, water regime, erosion, etc. The required*  
2 *analyses are not even mentioned, let alone performed.*

3 *The ability to meet the requirements of 19.700.710 & .715 are complicated because (1) a*  
4 *wetland specialist generally does not have expertise in hydrology and hydrogeology and*  
5 *(2) the reports provide no relevant expert analysis.*

6 24. Water Quality Deferred to Stormwater Review. Appeal E1 is not grounds for CABR  
7 II reversal. Water quality review is appropriately deferred to stormwater review as  
8 identified in COL 9. The failure of an applicant to provide required information is not  
9 grounds for finding noncompliance with the review criteria for approval of a permit. The  
10 criteria for approval of proposed buffer averaging are KCC 19.200.220.C.1.a(1) through  
11 (5). The buffer averaging review criteria don't require any specific information<sup>9</sup>. The  
12 failure to conform to required wetland report content is probative of whether an Applicant  
13 has provided substantial evidence necessary to establish conformance to review criteria.  
14 However, as determined in COL No. 9, hydrologic review is appropriately deferred to  
15 stormwater review due to the overlap in review criteria between CABR and stormwater  
16 review. The failure of Ms. Bartlett to address hydrology in her reports is also consistent  
17 with historical practice. As identified in the appeal issue E1 and as testified by Ms.  
18 Bartlett, wetland reports don't typically include a hydrological analysis because wetland  
19 biologists don't have expertise in hydrology.

20 **Appeal Issue F1.** *KCC 19.200.220.C.1.a & .C.1.a(3) require that two conditions for*  
21 *buffer averaging be met: subsection C.1.a to "provide as great or greater functions and*  
22 *values as would be provided under the standard buffer requirement" and subsection*  
23 *C.1.a(3) that "averaging will not adversely impact the wetland." Buffer averaging is*  
24 *essentially a 1:1 mitigation of "takes" with "gives." This mitigation only works if "gives"*  
25 *and "takes" are functionally equivalent. Hence, the inclusion of the two conditions cited*  
26 *in 19.200.220.C.1 above. In this project, the buffer "take" in the swale providing water*  
27 *to wetland L2/P2 has been identified as causing adverse impacts to those wetlands,*  
28 *including erosion and dewatering, without a corresponding functionally equivalent*  
29 *"give". Likewise, buffer "gives" on the west side of Crabapple Creek are not equivalent*  
30 *to and cannot replace the hydrologic and hydrogeologic benefits destroyed by the buffer*  
*"take" above wetlands L2/2. Applicant/County fail to properly perform buffer averaging.*

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26 25. Water Quality Deferred to Stormwater Review. Appeal F1 is not grounds for  
27 CABR II reversal. The Appellants may well be correct that the "gives" and "takes" of the

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28  
29 <sup>9</sup> County staff have the authority to enforce application requirements by refusing to process applications  
30 that fail to provide required information. Beyond that, denial of an application that meets all permitting  
criteria for failing to meet application requirements is not an authorized enforcement mechanism.

1 proposed buffer averaging are not equivalent. However, any adverse impacts caused by  
2 that inequality are fully mitigated. The primary adverse impact identified by the  
3 Appellants resulting from the proposed buffer reduction is impairment of wetland  
4 hydrology caused by the reduced buffer width between Wetland P2 and Spine Road. As  
5 determined in FOF 13, stormwater review is anticipated to fully mitigate against those  
6 hydrological impacts. As further determined in FOF 13, all other buffer impacts are  
7 mitigated by the added buffering required by buffer averaging. Consequently, the  
8 proposed buffer reduction is not found to impair buffer functions or to adversely affect  
9 Wetland P2 as required by KCC 19.200.220.C.1.a & .C.1.a(3).

8 The adverse impacts caused by the relocation of Spine Road don't appear to have any  
9 legal relevance to the CABR request to Wetland L2. The L2 buffer doesn't appear to be  
10 subject to the buffer reduction request to accommodate Spine Road. To the extent that  
11 the L2 buffer is subject to that request, the buffer reduction conforms to KCC  
12 19.200.220.C.1.a & .C.1.a(3) for the same reasons it does for Wetland P2.

12 **Appeal Issue G1:** *The stream crossings have both wetlands and streams and therefore  
13 require compliance with both chapter 19.200 and chapter 19.300. Omitting the stream  
14 crossings from the buffer averaging calculations is impermissible. We also note the stream  
15 crossings were considered as part of buffer averaging in the 2009 Preliminary Plat  
16 Decision and that decision should be honored as required by KCC 21.04.090.D.*

16 26. ~~Beyond Remand Scope. Appeal G1 was dismissed in the September 9, 2024  
17 prehearing summary judgment ruling of this case as beyond the scope of remand. Appeal  
18 F2 is not grounds for CABR II reversal. The wetland and stream crossings are authorized  
19 by KCC 19.200.225D and KCC19.300.315D for the reasons identified in Recon COL No.  
20 2. The buffer averaging standards of KCC 19.200 and 19.300 do not require that buffer  
21 areas occupied under KCC 19.200.225D and KCC19.300.315D for road development  
22 must be added to a buffer averaging compensation areas. KCC 19.200.225D and  
23 KCC19.300.315D already require full mitigation such that there should not be any  
24 remaining impacts that need to be addressed via buffer averaging compensation.  
25 Appellants' KCC 21.04.090.D issue lacks sufficient detail to be addressed.~~

24 **Appeal Issue G2:** *A utility corridor, for either buried or above ground lines, should be  
25 considered a permanent buffer "take" due to the possible, indeed likely, future destruction  
26 of the proposed restoration for maintenance, improvement, or expansion needs. The  
27 RNOD errs by not requiring the corridor to be identified as a buffer "take."*

28 27. ~~Limited to Fill Impacts. Appeal G2 is not grounds for CABR II reversal. Appeal  
29 G2 was limited in the September 9, 2024 prehearing summary judgment ruling to impacts  
30 of permanent fill introduced into the utility corridor. As determined in FOF 10, the fill  
proposed by the Applicant will not impair wetland buffer functions and thus conforms to~~

1 ~~KCC 19.200.220.C.1.a & .C.1.a(3). Utility maintenance and repair is also exempt from~~  
2 ~~Title 19 per KCC 19.100.120E. As identified in COL 10, the parties may request~~  
3 ~~reconsideration on the issue of whether permanent fill is allowed in the utility corridor~~  
4 ~~even if fully mitigated. As reasoned in Recon COL No. 26, the utility fill is authorized by~~  
5 ~~KCC 19.200.225.H and KCC 19.300.315J and no buffer averaging compensation is~~  
6 ~~necessary or required as additional mitigation.~~

7 **Appeal Issue H1.** *The RNOD presents plan revisions. These drawings are cartoons that*  
8 *lack details and land contours of an engineering drawing. The lack of information*  
9 *prevents Appellant and the public from understanding what is actually being proposed. It*  
10 *is highly probable that the revisions were prepared from engineering drawings.*  
11 *Appellants request that the Examiner order the Applicant/County to provide those*  
12 *drawings and related reports.*

13 28. Dismissed by Prehearing Ruling. Appeal H1 was dismissed by the September 24,  
14 2024 summary judgment ruling.

15 **Appeal Issue H2:** *The 2023 NOD and 2024 RNOD continue to incorrectly state that a*  
16 *Type I process is “administrative,” whereas Type I is “a ministerial” process per KCC*  
17 *21.04. A ministerial process does not allow discretionary actions and must follow the*  
18 *letter of the Code. The County has improperly made discretionary decisions and exceeded*  
19 *its statutory authority by accepting “temporary impacts” in buffers; allowing clearing,*  
20 *excavation, and fill in buffers; potentially using 19.200.225.D to claim that roads are not*  
21 *subject to buffer averaging; and allowing impervious fill in setbacks. The plain language*  
22 *and intent of the Code must be followed.*

23 29. Dismissed by Prehearing Ruling. Appeal H2 was dismissed by the September 24,  
24 2024 summary judgment ruling.

## 25 DECISION

26 The Final Decision is supplemented with the Recon FOFs and COLs of this Decision  
27 Upon Reconsideration. The Recon FOFs and COLs supersede any conflicting FOFs and  
28 COLs of the Final Decision. The conditions of approval of the Final Decision are replaced  
29 with the following:

- 30 1. The Applicant’s soil assessment, Ex. 15 and 16, must be verified via lab tested  
soil samples prior to installation of fill. The performance standard for both  
pre and post installation of fill shall be that soils shall mimic the infiltration  
rates of the buffer soils replaced by each area of fill. Fill soils must have less  
than 15% silt content.

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Once construction of Spine Road and associated fill is completed and upon installation of each utility facility, the Applicant shall test whether the wetland and stream buffer fill mimics existing soil permeability as anticipated. Engineered solutions shall be implemented as necessary to remedy any shortcomings. All mitigation measures and testing of the fill shall be completed prior to opening of the Spine Road and the same shall be completed for each utility facility prior to the use of each facility.

County staff may delay post-installation testing past utility/road use to the extent that testing methodology does not reasonably enable the testing to be completed prior to the utility/road use.

2. The mitigation measures for fill proposed by the Applicant and imposed by the CABR II decision and this decision shall apply to the fill proposed within wetland and stream buffer setbacks. As authorized by KCC 19.200.220F, minor structural or impervious surface intrusions into the areas of the setback that don't meet the standards of Condition No. 1 may be permitted if the department determines that such intrusions will not adversely impact the wetland and the encroachments are reasonably necessary for road, utility and pedestrian facility stability and/or functionality. Except for encroachments that cannot be reasonably anticipated prior to construction, all authorized encroachments shall be clearly depicted in the SDAP application.
3. Sufficient topsoil from removed buffer soils shall be retained to be reintroduced as a 12-18 inch layer on top of the proposed wetland buffer fill. Installation requirements may be met by tilling the topsoil into existing soil.
4. Buffer fill shall be scarified to a depth of 12 inches to prevent replanting mortality.
5. Conditions 1-4 above apply to all wetland and stream buffer fill as well as the fill located within the pre-averaging 200-foot buffer of Wetland P2. County permitting staff may authorize deviations from required mitigation for areas outside of the averaged wetland buffers to the extent reasonably necessary to provide needed stability and support to road and utility surfaces and structures. However, any such deviations shall be identified in SDAP project design to the extent the need for such deviations can be reasonably anticipated and shall be fully mitigated to protect wetland and stream functions and values.
6. Logs shall be installed perpendicular to buffer fill slopes to the extent necessary to maintain preexisting water velocities. (1) Logs shall be 6- to 12-inch diameter. (2)



1 Logs shall be placed flat on the ground in 4 to 6-inch-deep trenches and seated  
2 with foot-tamped backfill to prevent underflow of water. (3) Logs shall be placed  
3 parallel with a contour line in a pattern to create a semi-continuous barrier to down  
4 slope flow. (4) Spacing shall be 15 feet for slopes over 50%, 30 feet for slopes 20-  
5 50%, and 60 feet for slopes 10- 20%. Reference: USDA NRCS 2012 Fact Sheet  
6 and [https://www.nrcs.usda.gov/resources/guidesand-](https://www.nrcs.usda.gov/resources/guidesand-instructions/after-the-fire-log-erosion-barriers)  
7 [instructions/after-the-fire-log-erosion-barriers](https://www.nrcs.usda.gov/resources/guidesand-instructions/after-the-fire-log-erosion-barriers).

7. The Applicant has elected to not commit itself to any specific stormwater control  
8 design to mitigate Spine Road impacts at this stage of development review. This  
9 choice has not made it possible to fully evaluate and mitigate potential  
10 hydrological impacts to affected wetlands and streams. It is recognized that there  
11 is an overlap in review criteria for wetland and stream protection in critical area  
12 and stormwater review. Specifically, KCC 12.20.110(2) requires protection of  
13 wetland hydrology and other stormwater standards impose stringent water quality  
14 standards that protect both wetlands and streams. Given these considerations,  
15 critical areas ordinance hydrology and water quality impact assessment and  
16 mitigation is deferred to stormwater review. Critical area reports will not be  
17 required for SDAP review but the Applicant must be able to document full  
18 compliance with CAO requirements. The stormwater hydrology maintenance and  
19 water quality standards shall be construed in a manner that encompasses the  
20 hydrology maintenance and water quality standards of the County’s critical areas  
21 ordinance.

18 ORDERED this 22nd day of March 2025.

19  
20 *Phil Olbrechts*

21 

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Kitsap County Hearing Examiner

22 **Appeal Right**

23  
24 Pursuant to KCC 21.04.290D, appeals of hearing examiner decisions on Type I  
25 appeals are the final land use decision of Kitsap County. Appeal of this decision  
26 must be made to superior court as governed by the Land Use Petition Act, Chapter  
27 36.70C RCW.

28 Affected property owners may request a change in valuation for property tax  
29 purposes notwithstanding any program of revaluation.  
30