Rafe Wysham
Director

KITSAP COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

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

Notice of Hearing Examiner Decision Upon Reconsideration

5/12/2025

To: Interested Parties and Parties of Record

RE:

Project Name:	24-05386 Spring Hill Townhomes Administrative Appeal (*of Spring Hill Preliminary Plat (PPLAT) #23-03018 and Spring Hill Performance Based Development (PBD) #24-02627 SEPA Decision)*
Applicant:	Action Matrix Inc 1607 Ridgeway Ave Colorado Springs, CO 80906
Application Type:	Administrative SEPA Appeal
Appellant:	David Smith PO Box 2879 Poulsbo, WA 98370; Barry Keenan 5458 Chico Way NW Bremerton, WA 98312; Nicholas Smith 1619 237th Place SW Bothell, WA 98021
Appeal Permit Number:	24-05386

The Kitsap County Hearing Examiner has **DENIED** the Applicant's Request for Reconsideration and **APPROVED** the County's Request for Clarification for **Appeal Permit 24-05386: SPRING HILL TOWNHOMES - Admin Appeal of SEPA DS 23-03018 & 24-02627**, **subject to the conditions outlined in this Notice and included Decision**.

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

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

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

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

CC:

Applicant/Subject Property Owner: Action Matrix: ActionMatrix@comcast.net
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County Departments: DSE, PEP, DCD
24-05386 Interested Parties: Glenda Jenkins, jenkins.family@frontier.com; Joe Martin, jmartin@cityofpoulsbo.com

23-03018 & 24-02627 Interested Parties and Parties of Record Not Otherwise Listed: Keenan Design Inc, keenan1563@gmail.com; Robin Matley, robin@matley.com; Cynthia Logan, cynthialogan63@gmail.com; Tim Streeter, me@timstreeter.net; John & Stephanie Bento, jsbento@centurytel.net; Lynette Ackman lynetteackman@gmail.com; Rae Holt, raesholt@gmail.com; Jill Reynolds, jreynoldsster@gmail.com; Charmaine Doherty, charmainedoherty1@gmail.com; Dave Wetter, thepeguy@mindspring.com; Eric Boerner, uleric@gmail.com; Warren Reichard, reichspeed@netzero.net; Ian Harkins, iharkins@kitsapbuilds.com; James Leary, jlapjl@aol.com; Mary Gleysteen, marygleysteen@gmail.com; Rod Malcolm – Suquamish Tribe, rmalcom@suquamish.nsn.us; Susan Levan, slvebkm@comcast.net; Stephanie Taft, stephaniemarytaft@gmail.com; Tally Teal, tallyteal@hotmail.com; Thomas & Gayle Hiester, tom.hiester52@gmail.com; Peggy Krause, peggykrause88@gmail.com; Michael Wenberg, michaelcwenberg@gmail.com; Maja Lezo-McFarlane, majalezomcfarlane@gmail.com; Joe Lubischer, jslubischer@gmail.com; Neil Molstad – Department of Ecology Wetland, nemo461@ECY.WA.GOV; Samuel Phillips, samueljayphillips@gmail.com; Kelli Maxwell, kelli.scalzo@gmail.com; Edward Coviello – Kitsap Transit, EdwardC@KitsapTransit.com; David Snyder – WDFW, david.snyder@dfw.wa.gov; William Ugolini, billkston@gmail.com; Judith

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THE HEARING EXAMINER OF KITSAP COUNTY

IN RE:	
Spring Hill SEPA Appeal 24-05386	Decision Upon Reconsideration

The Applicant request for reconsideration is denied. The County request for clarification is addressed below under the Decision Upon Reconsideration section. The County has correctly identified a couple errors in the Final Decision of the above-captioned matter.

The County request for clarification on the parameters for assessing project feasibility has resulted in the removal of the parameters set by the Final Decision. The County request highlights the fact that the administrative record of this proceeding doesn't contain enough information to set parameters for assessing and defining the purpose of the project under the avoidance mitigation standard of KCC 19.200.230. Consequently, Ruling No. 2 of the Final Decision has been simplified to maximize the options to work out a proper assessment of Applicant entitlements under the avoidance mitigation standard. As detailed in the analysis below, application of the avoidance mitigation standard to affordable housing is not materially different from the minimum reasonable use analysis that applies to other permit review processes, such as variance and reasonable use applications.

The issues raised in the reconsideration/clarification motions from the Applicant and County are all individually addressed below by quoting from each motion section in italics.

Applicant Issue No. 1: *Whether it is an error of law to give the County an opportunity to contradict the Department of Ecology's approval of the project's avoidance under the mitigation sequencing process.*

There is no error of law in allowing the County to exercise its authority to administer its critical area ordinance (CAO) regulations.

So far as presented by the Applicant, there has been no Department of Ecology (DOE) approval of its wetlands avoidance that would have any potential legally preclusive effect. The only "approvals" provided by DOE are permit processing comments emailed to the Applicant. *See* Ex. B53 and B54. These comments show that thus far DOE is satisfied with the mitigation proposed by the Applicants. Those comments have no preclusive or binding effect on either DOE or Kitsap County. Until DOE issues an approved wetlands permit, DOE can change its mind at any time. In similar fashion, since no final land use decision has been issued by DOE, there is no preclusive effect on County decision making.

The Applicant characterizes DOE as the "sheriff" and Kitsap County as its "deputy" in SEPA review. Such a characterization has no basis in law. The County is the lead agency for the Spring Hill SEPA review. As noted in WAC 197-11-050(2):

> *The lead agency shall be the agency with main responsibility for complying with SEPA's procedural requirements* ***and shall be the only agency responsible for****:*
> *(a) The threshold determination; and*
> *(b) Preparation and content of environmental impact statements.*

(emphasis added).

Pursuant to DOE's adopted SEPA regulation, Kitsap County is the only agency responsible for its threshold determination. DOE has no supervisory authority over Kitsap County's administration of its SEPA regulations. If DOE disagrees with how Kitsap County SEPA decisions, it must appeal those decisions in the same manner as any other person or entity. If DOE fails to appeal a Kitsap County SEPA decision, it will be bound to that decision the same as everyone else per the string of finality cases starting with *Chelan Cnty. v. Nykreim*, 146 Wash. 2d 904 (2002).

The Applicant's broad-based on DOE authority appear to be an attempt at arguing preemption. There is surprisingly little case law on the issue of Clean Water Act (CWA) supremacy over local wetland regulatory authority. That may be because the CWA itself is so clear about the issue. 33 USC 1344(t) of the CWA provides that " *[*n*]othing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State*." Applying this provision, the Supreme Court of Minnesota concluded that the CWA did not preempt state authority to regulate the dumping of fill material into navigable waters. *Bartell v. State*, 284 N.W.2d 834 (1979).

County regulations also assign no preemptive regulatory authority to DOE. The Final Decision of this appeal found that DOE approved wetland filling was authorized within wetlands because the County's critical areas ordinance (CAO) doesn't identify what uses are allowed or not allowed within wetlands. Army Corps approved filling was found to be an implied authorized use within wetlands.

There is no need to resort to implied standards when it comes to the mitigation standards for such filling. KCC 19.200.230 as vested to this proposal required mitigation sequencing for "*[a]ll impacts to wetlands or buffers…*" Filling of wetlands certainly impacts those wetlands. The plain language of KCC 19.200.230 requires mitigation of wetland filling. KCC 19.100.120A assigns the Kitsap County Department of Community Development with the role and authority of assuring compliance with the County's CAO. The CAO does not give DOE any authority to apply the CAO to development projects.

The Applicant also argues that the Final Decision basis for finding an implied CAO right to fill wetlands is inconsistent with retaining County mitigation authority. As noted at Page 9 and 10 of the Final Decision, it's appropriate to allow Army Corps filling because the Army Corps has expertise in regulating wetland filling and Army Corps permit standards require full mitigation. As previously noted, creating an implied right to fill wetlands was only possible because the CAO doesn't address what activities are permitted within wetlands. There is no such CAO regulatory gap for required mitigation. As noted in the prior paragraph, the CAO has specific mitigation requirements for the filling of wetlands. The examiner has no authority to waive CAO standards absent express authority to do so, such as via a variance or reasonable use exception.

It should also be noted that although Army Corp expertise and mitigation serves as basis for an implied right for Army Corps approved wetland filling, those factors don't extend to the finding that Army Corps expertise and mitigation are sufficient to satisfy County mitigation requirements. As previously noted, the Clean Water Act doesn't preempt local regulation of wetland filling. This means that local standards can be more restrictive than CWA standards.

Even though the mitigation sequencing required for Army Corps permits may be highly similar to the CAO standards, this doesn't mean they must be applied in the same manner. The sequencing standards, with avoidance in particular, are very broad. The meaning of those standards is highly dependent upon regulatory context. Deference is also due to local implementation, which can evolve over years of application and setting of precedent in response to local conditions.

A straightforward example of the concept above is the County's application of avoidance to residential development. Avoidance necessitates the definition of an applicant's development objectives. The County defines the residential development objective as achieving the minimum density required by the County's zoning code. Minimum density in Kitsap County is unique to Kitsap County. It is not a standard adopted or applied by DOE (as is evident from its preliminary review comments in Ex. B53 and B54). In short, County mitigation standards may be more restrictive than DOE standards even though the standards are similarly worded. There is nothing inherently contradictory in such a a development scheme.

Applicant Issue 2: *Where it is an error of law to require a 50-year affordability covenant regardless of whether the project participates in an affordable house incentive program?*

It was not error to require the 50-year affordability covenant. The covenant is an option provided to the Applicant if the Applicant wants to benefit from beneficial treatment as an affordable housing project.

The Applicant asserts that it shouldn't have to warrant it will provide affordable housing with a 50-year affordability covenant. The Applicant states that it is "*merely … exercising its rights under County code, just like any other project applicant could*." If the Applicant wishes to be treated "*like any other project applicant*," it is free to do so. To be treated like all other residential development applicants, it will be subject to the same minimum density standards as all other residential development applicants. If the Applicant wishes to be given preferential treatment from other residential projects, then it will have to sign the covenant.

The Applicant relies upon the nexus requirement imposed by cases such as *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595 (2013). Cases such s *Koontz* require that there must be a nexus "*between the government's demand and the effects of the proposed land use*." Id. at 595. The "*effects of the proposed land use*" when it comes to development in wetlands involves more than just wetland impacts. Limiting density because of critical areas in urban growth areas harms the environmental resources of outlying areas by placing additional pressure for urban sprawl. Limiting density creates

the additional harm of increasing the costs of development and reducing affordable housing options.

For residential development in general under the avoidance standard, the County has reached a proper balancing of the conflicting development impacts in wetlands by reducing density to that necessary for the County to accommodate its growth targets, which is set at a level to minimize urban sprawl. The Final Decision takes on the added impact to affordable housing by giving affordable housing projects preferential treatment, i.e. waiving the minimum density standard. To secure the mitigation resulting from that preferential treatment, it is necessary to have something in place that actually warrants that proposed affordable housing will in fact be affordable housing. That is the nexus to the affordable housing covenant.

County A: *Correction to apparent typographical errors.*

The County is correct that the third full paragraph on Page 2 is missing a "no". The Final Decision is revised accordingly below.

County B: *The County's trigger for the DS.*

The County has correctly identified that the Final Decision mischaracterizes the basis for the DS. Foundation Ex. 54, the DS, identifies that the basis for the DS was incomplete mitigation sequencing analysis. The mischaracterization makes no substantive difference to the conclusions reached in the Final Decision, but the error is noted and the Final Decision is revised accordingly below.

County C: *Application of "Feasibility" Under KCC 19.200.230.*

The County requests additional specificity in Ruling 2 of the Final Decision regarding the standards to be applied to the avoidance component of KCC 19.200.230. The County's request reveals that Ruling No. 2 actually incorporates too much specificity. Resolving how avoidance can be met necessitates information outside of the record. Ruling No. 2 will be reduced in scope to provide for the flexibility necessary to address the issue.

It is somewhat ironic, but wholly understandable, that the County is concerned about vagueness when the Examiner's conditions provide significantly more specificity than the avoidance standard itself. The vagueness of the avoidance standard is certainly not the County's fault. KCC 19.200.230 mirrors the mitigation sequencing standards adopted into most if not all critical area ordinances throughout the state. The source of the County's mitigation sequencing is likely a result of the WAC definition of "mitigation" for the WAC regulations governing the content of GMA zoning ordinances. See WAC 365-196-210(23).

The challenges in applying avoidance to the proposal of this review are not unique. Similar considerations apply to assessing whether a proposal meets "minimum reasonable use" or similar standards in variance and reasonable use standards. For example, whether a proposed single-family home in a reasonable use or variance application satisfies "minimum reasonable use" is often assessed by comparing home sizes in the surrounding area.

The avoidance standard itself creates comparable vagueness challenges when applied to other types of development. As noted in the Final Decision, the avoidance standard would be just as difficult to apply to a commercial or industrial project as it does to an affordable housing project. If someone wants to build a strip mall on a parcel inundated with wetlands, what is the minimum size to which the applicant is entitled? That question doesn't appear to be too different from assessing the Applicant's entitlement in this case.

There is limited legal guidance on how to comply with the avoidance requirement. The most helpful information comes from p. 56 of Ex.C3. P. 56 contains a link to a DOE webpage that explains that for avoidance of most wetland impacts "*wetland laws require applicants to demonstrate there is no practicable alternative to reasonably accomplish the project's purpose without the impact*." P.55 of Ex. C3 recognizes that permitting agencies may require feasibility studies, analysis of practicable alternatives, and modifications to designs. As noted in the County's prehearing brief, while a project's purpose is part of the consideration, an applicant cannot define the project so narrowly as to preclude the consideration of reasonable alternatives. *Friends of Santa Clara River v. Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018)(citing S*ylvester v. Army Corps of Engineers*, 882 F.2d 407 (9th Cir. 1989)); *see also City Club of New York v. United States Army Corps of Engineers*, 246 F. Supp. 3d 860, 870 (S.D.N.Y. 2017).

In terms of properly defining the project, affordable housing should be just as compelling a development objective as singe-family development in general. As previously discussed, the County use of minimum density to limit single-family development ultimately comes from a balancing of GMA goals that underly the County's development standards. Minimum density furthers the goal of avoiding urban sprawl. Affordable housing should be construed as the same level of significance. As recognized by the courts, while the GMA goals collectively convey some conceptual guidance for growth management the GMA explicitly denies any order of priority among the thirteen goals and it is evident that some of them are mutually competitive. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wash. 2d 224, 246, 110 P.3d 1132, 1144 (2005). Consequently, since the basis for segregating development objectives can at least in part be based upon GMA goals, there is usually no basis to prioritize one of those resulting objectives from another. A development objective targeted at affordable housing is just as legitimate from an avoidance standpoint as residential development in general.

In terms of recognizing feasibility as a relevant consideration in avoidance, Ruling 2 of the Final Decision properly identifies feasibility as a relevant consideration in assessing the adequacy of avoidance. However, the numerous questions posed by the County in their request for reconsideration highlight that the parameters of assessing feasibility are dependent upon market information and expert opinion. That type of information is not in the record of this proceeding. At this point it's unclear what a feasible rate of return would be for an affordable housing project and how to measure it. A real estate professional may be able to make a convincing case that a simple comparison of a couple other affordable housing projects in the vicinity can establish what densities are necessary for a reasonable rate of return. More of that type of information is needed if the County wants to require a rigorous feasibility analysis.

The questions raised in the County's request for clarification raise even more complicated questions that are even more dependent upon standards of the affordable housing industry and the expertise of real estate professionals. The examiner cannot answer those questions with the record developed for this proceeding. The lack of necessary information reveals that the parameters that were set by Ruling No. 2 of the final decision may set unnecessary limits on how to address feasibility or in the broader sense avoidance. As a result Ruling No. 2 will be simplified to maximize the flexibility for the parties to work out a mutually agreeable

As previously noted, the lack of specific standards for avoidance is not unique to this project. Variance, reasonable use and avoidance mitigation cases are regularly resolved by Kitsap County and all other WA jurisdictions based upon ill-defined applications of minimum reasonable use. The Applicant has the burden of proof for establishing that its proposed density and wetland encroachment is the minimum necessary to achieve its affordable housing objective. Feasibility is likely a primary consideration in such an evaluation. Whatever the Applicant comes up with to justify its development objective will hopefully serve as a solid working foundation to work out avoidance.

In its response to the County's request for clarification, the Applicant asserts essentially that the County is biased against its project and that parameters must be set to assure a fair remand process. The issues that were ultimately resolved by this appeal show no such bias or any unreasonable code interpretation made by the County. The County's decision to not grant any preferential avoidance status to affordable housing was based upon the entirely reasonable premise that development uses are defined by the permitted uses of the applicable zoning district and that minimum densities of the zoning district set the maximum development expectation to which residential developers are entitled. Employing such an interpretation enabled the County to latch onto an objective standard that could be uniformly applied and that was solidly based upon its zoning code. As detailed in the Final Decision, the County position on the need for a variance was also

soundly based upon a reasonable interpretation of the CAO. The County showed no bias in the positions it took in relation to SEPA review.

Decision Upon Reconsideration

1. The third full paragraph on Page 2 is corrected with track change as follows :

The CAO has <u>no</u> express exceptions for affordable housing. The Hearing Examiner has no authority to waive CAO requirements for affordable housing projects.

2. The Final Decision erroneously determined that the reason the County required a DS was because the Applicant failed to acquire a variance for proposed wetland fill. The primary basis for the DS was the failure of the Applicant to completely document conformance to required mitigation sequence. The Final Decision is superseded by this finding to the extent inconsistent.

3. Ruling 2 of the Final Decision is revised in track change as follows:

~~*Project feasibility for affordable housing shall serve as the primary criterion in assessing avoidance under KCC 19.200.230. The Applicant shall fully document the feasibility need for its proposed footprint. The County may subject this analysis to peer review at Applicant expense.*~~[1] *Dwelling units will qualify as affordable housing if they meet the definition of WAC 365-200-030. If allowed density under avoidance is increased to enable affordable housing units the units shall be subject to a covenant requiring that they remain affordable for 50 years (the same period of time required in RCW 36.70A.540).*

4. The exhibit lists submitted by the parties were composed of document links that linked each exhibit to the document described in the link. The document linked to Ex. C3 erroneously failed to match the document identified in the exhibit list. The proper intended document has been admitted into the record post-hearing after an opportunity for comment from the Applicant. The post-hearing adopted document is T*he Wetland Mitigation in Washington State – Part 1: Agency Policies and*

[1] Deletion of the requirement for Applicant paid peer review is not intended to serve as a finding that such peer review cannot be required. The County is certainly free to required Applicant paid peer review to the extent it is legally authorized to do so.

Guidance, Washington Department of Ecology, Version 2, 2021 (Publication 21-06-003)

Issued this 9th day of May 2025.

Phil Olbrechts
Kitsap County Hearing Examiner

Appeal Rights

Remand decisions are apparently not subject to judicial appeal under *Harlan Claire Stientjes v. Thurston Cty*, 152 Wn. App. 616 (Wash. Ct. App. 2009). Potential judicial appellants should make their own determination as to whether a judicial appeal is available and consult with an attorney as necessary.