



KITSAP COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

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

Rafe Wysham
Director

Notice of Hearing Examiner Decision

4/3/2025

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 **REMANDED** the land use application 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
Applicant/Appellant: David Smith, smithhouse4@comcast.net; Barry Keenan, chbsc2002@yahoo.com; Nicholas Smith, nick.centralhighlands@gmail.com; Hayes Gori – Law Office of Hayes Gori PLLC (Appellant's Representative), hayes@hayesthelawyer.com
County Representative: Lisa Nickel, Kitsap County Prosecutor, lnickel@kitsap.gov; Ashlynn Ota, Kitsap County Prosecutor, aota@kitsap.gov
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, jlapij@aol.com; Mary Gleysteen, marygleysteen@gmail.com; Rod Malcolm – Suquamish Tribe, rmalcom@suquamish.nsn.us; Susan Levan, sivebkm@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 McQuade, mcquadeja@hotmail.com; Alexandra Lezo, sachalezo@aol.com; Margaret Lemay, lemaymarg@gmail.com; Adams,

Goldsworthy, Oak Land Surveying LLC, gavin@agols.com; Timothy & Marguerite Goss, 416 Cosgrove St Bainbridge Island, WA 98110

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THE HEARING EXAMINER OF KITSAP COUNTY

<p>Spring Hill</p> <p>Preliminary Plat, Performance Based Development and SEPA Appeal</p> <p>Permit Number: 23-03018 (PPLAT), 24-02627 (PBD) and 24-05386 (Appeal)</p>	<p>Findings of Fact, Conclusions of Law and Decision Requiring Remand</p>
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Overview

The SEPA DS¹ threshold determination of the above-referenced matter is remanded² for re-evaluation under the rulings of this decision, specifically: (1) a critical areas variance is not required for wetland fill approved by an Army Corps of Engineer permit, (2) the feasibility of an affordable housing project is a factor to be considered in mitigation sequencing, and (3) excess wetland area can serve as a wetland buffer in compensation

¹ A “SEPA DS” is a State Environmental Polic Act Determination of Significance. It is a determination that an environmental impact statement is required for the proposal.

² The remand of the proposal requires the County to re-evaluate its SEPA determination applying the rulings of this decision. Once the County issues a new SEPA threshold determination another hearing will have to be held on the proposal. A final decision will not be issued for the proposal until after the second hearing.

1 wetlands. Given that Army Corps review cannot be conducted until County SEPA review
2 is complete for this proposal, the SEPA review shall include a condition requiring Army
3 Corps approval to avoid the variance requirement.

4 The County's past practice in authorizing Army Corps approved wetland filling without
5 a variance is determinative on the variance issue. The County has historically authorized
6 wetland filling without a variance when filling is approved by an Army Corps permit. The
7 County's critical areas ordinance is silent as to what activities are authorized in wetlands.
8 Since restrictions within wetlands must be based upon implication, the County's past
9 practice on wetland filling tips the scale in finding that practice consistent with the CAO³.

10 But for past practice, it is recognized that the practice is not the most compelling
11 application of the CAO. Under the County's past practice, an absurd ensuing result is that
12 it's easier to justify wetland filling then to encroach into the buffers designed to protect
13 them. The inconsistency of the situation is mitigated by the fact that the practice hands
14 over wetland fill review to the Army Corps. The Army Corps has extensive nation-wide
15 expertise in mitigating filling impacts. Wetland impacts under such a process are still
16 fully mitigated under Army Corps review criteria.

17 The Appellant has leveraged most of its arguments with the affordable housing component
18 of its proposal. This in turn has drawn a significant amount of community support. It
19 should be emphasized that affordable housing has no relevance to several of the key
20 regulatory issues of this appeal. The CAO has express exceptions for affordable housing.
21 The Hearing Examiner has no authority to waive CAO requirements for affordable
22 housing projects.

23 The one area where affordable housing makes a difference is defining the purpose of the
24 proposal. Proposed wetland and wetland buffer encroachments can be accommodated
25 under mitigation sequencing to the extent necessary for a project to feasibly accomplish
26 its purpose. It is agreed in this decision that the purpose of this project can be defined as
27 providing feasible affordable housing.

28 The Appellant has advocated a CAO interpretation that is not supportable by the plain
29 meaning or regulatory context of the CAO. The Appellant asserts that KCC 19.200.230,
30 which governs mitigation, authorizes any wetland or wetland buffer encroachment a
developer chooses anytime that impacts can be fully mitigated. Nothing in the text of
KCC 19.200.230 remotely suggests such a result. That interpretation renders the CAO
variance, reasonable use and other buffer exceptions superfluous. Any of those exceptions

³ The "CAO" is the County's Critical Areas Ordinance, Title 19 KCC. As required by the Growth Management Act, the CAO protects environmental resources such as streams, wetlands, fish and wildlife conservation areas, critical aquifer areas and geologically hazardous areas.

1 too require full mitigation under KCC 19.200.230. Anyone wishing to encroach in a
2 wetland or wetland buffer, therefore, would have no reason to tack on the additional
3 requirements of the buffer exceptions if all they had to do was engage in mitigation as
4 required by KCC 19.200.230. Under the Appellant’s interpretation, the dozens or
5 hundreds of such exceptions that developers have had to apply for have all been
6 completely unnecessary. Instead of going through the public hearings and added criteria
7 of those exception processes, according to the Appellant all they had to do was produce a
8 wetlands report establishing KCC 19.200.230 mitigation. As detailed in Conclusions of
9 Law No. 3 below that position is not consistent with the plain meaning of CAO provisions
10 or how the CAO was intended to function.

11 The County’s reversal of past practice by requiring a variance is equally untenable. The
12 Appellant’s two wetland experts identified numerous projects reviewed by Kitsap County
13 where no critical area variances were required for filling wetlands. They testified that
14 Kitsap County had never before this application required variance approval for filling of
15 wetlands. Kitsap permitting staff acknowledged that filling was authorized for past
16 projects without a variance. The only reason the County could cite for the past practice
17 was that Army Corps permits had been approved before County review took place. There
18 is nothing in the CAO that authorizes filling of wetlands if Army Corps approval is first
19 acquired. There is nothing in the record to suggest that Army Corps approval first would
20 make it any more difficult for the County to require a variance. The County disputes that
21 there is any federal preemption that supersedes local wetland regulation. That is likely
22 correct. Without preemption, there is no reason why the timing of approval under the
23 CAO should have any relevance to whether or not a variance is required for filling of
24 wetlands.

25 A final central issue of this appeal is whether a portion of a wetland can serve as a buffer
26 to that wetland. DOE⁴ guidance is determinative on that issue. It recognizes that wetland
27 area can serve the same functions as a “dry” wetland buffer. In this regard the manual
28 allows wetland area to serve as a buffer in compensatory wetlands to the extent those areas
29 exceed the required amount of compensation. To the extent that wetland area is used in
30 this fashion, the County should allow that practice for this proposal.

Exhibits

During the hearing the staff report exhibits were admitted as Exhibits 1-58 and Appellant Exhibits B1-B70. Ex. B71-B75 and Staff Report Ex. 59 were admitted during the hearing. Admitted post-hearing after no objection from the SEPA parties was Ex. C1-C3 and F1-F62. A computer-generated transcript of the hearing is referenced as Ex F63. The

⁴ “DOE” is the Washington State Department of Ecology. DOE has published several wetland regulatory guidance documents.

1 transcript is not admitted as evidence but just for the convenience of persons seeking an
2 approximate rendering of hearing testimony. References to the F63 transcript are identified
3 as “Trx” in this Decision. The references are designed to provide the location of testimony
4 in the hearing recording.

5 **Findings of Fact**

6 **Procedural:**

7 1. Applicant/Appellant. The Applicant according to the staff report⁵ is Action Matrix
8 Inc, 1607 Ridgeway Ave, Colorado Springs, CO 80906. The SEPA Appellant is David
9 Smith, PO BOX 2879 Poulsbo, WA 98370.

10 2. SEPA Appeal. The SEPA appeal for this proposal was filed on December 17,
11 2024. The appeal contests a determination of significance issued December 2, 2024. The
12 appeal generally challenges the need for a critical areas variance, the County’s
13 requirement for mitigation avoidance and the County’s denial of the Applicant’s use of
14 wetland area for a wetland buffer.

15 3. Hearing. A consolidated hearing on the application and SEPA appeal was held on
16 February 27, 2025, March 7, 2025 and March 14, 2025.

17 **Substantive:**

18 4. Proposal. Action Matrix, Inc. proposes to build 230 single family residential –
19 attached (SFR-Attached) dwelling units on approximately 20 acres composed of two
20 parcels (262702-1-008-2003 and 262702-1-007-2004) in Kingston, WA. The Applicant
21 is requesting zero lot line development which requires a Performance Based
22 Development (PBD) permit to supplement the Preliminary Plat (P-Plat) permit. The
23 Applicant’s traffic report and hearing testimony identify that 60% of the proposed units
24 will qualify as affordable housing.

25 The proposal includes some filling of wetlands and development within the buffers of
26 existing wetland buffers. The County required critical area variance approval for this
27 filling. The Applicant declined to apply for the variance. As a result the City issued it’s
28 Determination of Significance.

29 _____
30 ⁵ Contrary to the staff report, the SEPA appeal identifies the Applicant as David Smith.

1 5. County Practice is to Not Require Variances for Wetland Filling. The County has
2 historically not required variances for wetland filling approved by the Army Corps of
3 Engineers.

4 The Appellant’s two wetland experts, with 50 years combined experience, testified that
5 Kitsap County has never in their experience required a variance for wetland filling. Tr.
6 228. Ms. Bartlett, one of those witnesses, identified four specific projects in which a
7 variance was not required. Tr. 59.

8 Mr. Gurney, the planner assigned to the project, identified another wetland filling project
9 not requiring a variance. Tr. 12. Mr. Gurney was asked multiple times over the days of
10 the hearing as to why variances were not required for past projects. His answers
11 suggested either that it was because the Army Corps permit was issued before CAO
12 review, Tr. 12; that it was because the Applicant, County and Army Corps worked
13 together, Tr. 223; or that simply each project is unique and he didn’t have the details, Id.
14 No explanation was given by anyone testifying for the County as to why variances have
15 not been required in the past.

16 No County testimony was ever presented to show that a variance has ever previously
17 been required for the filling of a wetland. No County testimony was ever presented as to
18 any formal change in policy that changed how wetland filling was to be processed under
19 the CAO. The Appellants alleged throughout the proceeding that the County’s
20 processing of the application has been influenced by a newly adopted “no impact” policy
21 to wetlands. However, the County never attributed this policy to its decision to require
22 a variance for filling of wetlands.

23
24
25 **Conclusions of Law**

26 1. **Authority of Hearing Examiner.** KCC 21.04.100 classifies Performance Based
27 Development and Preliminary Plat applications as Type III applications. Appeals of
28 Type III permits are heard and decided upon by the hearing examiner as outlined in KCC
29 21.04.290. SEPA appeals are consolidated with the Type III applications as required by
30 KCC 21.04.190A and WAC 197-11-680.

Substantive:

2. **SEPA Appeal Review Criteria.** The relevant inquiry for purposes of assessing
whether the City responsible official staff correctly issued a DNS is whether the project

1 as proposed has a probable significant environmental impact. See WAC 197-11-
2 330(1)(b).

3 In this case the County has largely based its finding that the proposal will have probable
4 significant adverse impacts because the Applicant is filling wetlands without a critical
5 areas variance. A second reason is that the proposal is not sufficiently avoiding impacts
6 by reducing building footprint. In this regard the County's finding of impact is largely
7 based upon contested interpretations of the CAO. As determined in the Conclusions of
8 Law below, the Decision finds that the County has applied its wetland regulations more
9 strictly than required. The SEPA determination is remanded so that County staff can
exercise their expertise in evaluating the facts of the application under the interpretations
rendered in this Decision.

10 3. **Mitigation Sequencing Doesn't Authorize Filling.** Complying with mitigation
11 sequencing standards does not on its own authorize wetland or wetland buffer
12 encroachments.

13 The Appellant's primary basis for arguing against a critical areas variance is that
14 conformance to KCC 19.200.230 mitigation sequencing on its own authorizes wetland
15 filling. Conformance to KCC 19.200.230 clearly does not authorize wetland filling absent
16 CAO authorization to do so. KCC 19.200.230 has nothing to do with the issue of what
17 types of wetland and wetland buffer encroachments are authorized. It only addresses how
18 mitigation is to be performed if an encroachment is authorized. KCC 19.200.230 sets the
priorities for wetland mitigation measures and provides direction as to how those
measures are to be implemented. In pertinent part, KCC 19.200.230 provides as follows:

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

21 Somehow, the Appellant interprets the language above as authorizing any encroachment
22 in CAO buffers so long as impacts are fully mitigated. The problem with the Appellant's
23 interpretation is that there's absolutely no language in the text quoted above or anywhere
24 else in KCC 19.200.230 that expressly, impliedly or remotely suggests such an absurd
25 interpretation. All the quoted language above states is that "all" development within
26 wetlands and their buffers must be mitigated as specified. The plain meaning of KCC
27 19.200.230 is just as it says, all development within wetlands and their buffers must meet
KCC 19.200.230 mitigation standards.

28 The Appellant's interpretation is characterized as absurd in the technical sense above
29 because it renders a large portion of the County's Critical Areas Ordinance unnecessary
and superfluous. Courts look to statutory context as a whole to determine legislative
30 intent. *Armstrong v. State*, 91 Wn. App. 530 (1998). Further, no part of a statute should

1 be deemed inoperative or superfluous unless it is the result of obvious mistake or error.”
2 *In re Det. of Strand*, 167 Wn. 2d 180, 189 (2009). The Appellant’s interpretation violates
3 both rules of construction by rendering the fundamental and core framework of the CAO
4 entirely useless and superfluous.

5 As outlined below in detail, the County’s wetland and stream regulations are based upon
6 a foundation of buffer restrictions that can be applied in relatively simple terms to most
7 development. These buffer standards are backed up by a myriad of exceptions when the
8 buffers prove too burdensome to a particular development. Under the Appellant’s
9 interpretation, there is no need for any of the exceptions that comprise a substantial portion
10 of the CAO. The exceptions all require mitigation that meets the standards of KCC
11 19.200.230. If conformance to KCC 19.200.230 on its own is sufficient to develop within
12 a buffer, there’s no reason why a developer would volunteer to take on the added burden
13 of the other requirements of the exceptions.

14 The CAO lists specific buffer width requirements for both wetlands and streams. KCC
15 19.200.220 lists the buffer widths for various types of wetlands and KCC 19.300.315 lists
16 the buffer widths for various types of water bodies, including streams. The majority of
17 the other wetland and stream regulations address when development is authorized within
18 these buffers.

19 KCC 19.150.170 defines a buffer as “*a non clearing native vegetation area which is*
20 *intended to protect the functions and values of critical areas.*” Of course, any
21 development of any significance involves clearing of vegetation. The buffer definition
22 clearly identifies that the buffers that are addressed by the majority of the CAO is a
23 nonclear area. This no clear concept is further reinforced for stream buffers, where KCC
24 19.300.315A1 provides that “[*b*]uffers shall remain undisturbed natural vegetation areas
25 *except where the buffer can be enhanced to improve its functional attributes.*”

26 In point of fact, all of the regulations in the CAO for streams and wetlands are ultimately
27 based upon the delineation of buffers and their associated critical areas and what can be
28 done within those buffers. In addition to reasonable use and critical area variance
29 standards, the CAO contains numerous standards for decreasing buffer widths for project
30 specific conditions for both wetlands and streams. *See* KCC 19.300.315(4); KCC
19.200.220C. The CAO also specifically authorizes essential and/or innocuous facilities
such as roads, trails and utilities within stream and wetland buffers when they meet
specified standards. *See* KCC 19.200.225; 19.300.315.

The interpretation proffered by the Appellant renders all of the exceptions identified above
for buffers completely useless. Except for exemptions, any CAO authorized buffer

1 encroachment or reduction requires that the impacts of that allowance be fully mitigated⁶.
2 If KCC 19.200.230 is applied as only requiring mitigation to encroach into a wetland or
3 its buffer, what is the point of all the other requirements associated with the numerous
4 buffer encroachment and waiver provisions?

5 As demonstrated above, as to buffers the Applicant's interpretation of KCC 19.200.230 is
6 completely at odds with the function and intent of the CAO. Ironically the argument for
7 wetlands as opposed to their buffers is not as strong because the CAO has no express
8 provisions prohibiting development in wetlands. However, the regulatory structural
9 argument still applies, i.e. there would be no need for all of the wetland buffer exceptions,
10 waivers and variances if all mitigated development was allowed to encroach. Further,
11 since wetland buffers are designed to separate development from wetlands, it is not a
12 major leap to conclude that development within the buffers is generally not allowed absent
13 express exceptions. Finally, since KCC 19.200.230 does not distinguish between buffers
14 and critical areas, it is reasonable to interpret it under its plain meaning, which is simply
15 that all development with wetlands and buffers must be fully mitigated. Nothing more.

16 Appellants cite to a Kitsap County Superior Court decision that construed a City of
17 Poulsbo mitigation sequencing provision very similar to KCC 19.200.230 as authorizing
18 "all regulated development" to occur within critical area and critical area buffers because
19 of the reference to "all regulated development" within its introductory provision. *See*
20 *Central Highlands v. City of Poulsbo*, Kitsap Superior Ct. No. 15-2-02058-9. The Poulsbo
21 mitigation sequencing provision in *Highlands* and its regulatory framework based upon
22 wetland buffers is similar to that of Kitsap County. The Poulsbo and Kitsap County
23 CAO's likely are based upon a model CAO produced by the Washington State Dept. of
24 Trade and Economic Development (now Dept. of Commerce) in the 1990s, which has the
25 same mitigation sequencing and regulatory framework. The County disputes the
26 applicability of the *Highlands* decision to County's CAO.

27 The *Central Highlands* is not found to be binding precedent. The only statutory
28 requirements for adhering to precedent apply to Washington Supreme Court and Court of
29 Appeals decisions. *See* RCW 2.04.220 and 2.06.040. To the extent that the *Highland's*
30 reasoning applies to the County's CAO, that reasoning is not found persuasive. As noted
above, construing KCC 19.200.230 as allowing any wetland or wetland buffer
encroachment renders a substantial portion of the CAO meaningless and overrides
decades of County practice. That interpretation is also directly contrary to the plain

⁶ One could argue that the "buffer" to which mitigation sequencing applies under KCC 19.200.230 for
variances and reasonable use requests is the reduced buffer resulting from successful application of the
reasonable use/variance. Under that interpretation, KCC 19.200.230 would not apply to encroachments
authorize by variance and reasonable use review. That doesn't appear to be consistent with County practice.
In any event, that position is certainly not consistent with the purpose and intent of the CAO to protect
wetlands from development impacts. KCC 19.200.230 applies to the buffer that applies before an authorized
reasonable use or variance reduction.

1 meaning of KCC 19.200.230. For all of these reasons, *Central Highlands* is not found
2 applicable to the CAO if it is construed as holding that KCC 19.200.230 independently
3 authorizes wetland and wetland buffer encroachments.

4 **4. Army Corps Approval Doesn't Require Variance.** Wetland filling approved or
5 to be approved by an Army Corps permit does not require a critical areas variance.

6 As previously noted, one important distinguishing factor between wetlands and their
7 buffers is that unlike buffers there is nothing in the CAO that expressly requires wetlands
8 to be maintained in their native state or that prohibits any encroachments. Since wetland
9 buffers are designed to separate development from wetlands, it is not a major leap to
10 conclude that development within the buffers is generally not allowed absent express
11 exceptions. On that basis the County position is the most logical and defensible, i.e. that
12 a critical areas variance is required for any filling of wetlands.

13 Unfortunately for the County, its requirement for a critical areas variance for the project
14 under review is not consistent with past practice. As detailed in Finding of Fact No. 5,
15 the County has historically authorized wetland filling approved by the Army Corps
16 without a variance. As further outlined in Finding of Fact No. 5, the County offers no
17 cogent explanation for the current difference in treatment and identifies no formal or even
18 informal change in policy. Mr. Gurney suggested initially that the reason why variances
19 hadn't been approved for some past projects was because the Army Corps permits were
20 issued prior to CAO review. There is nothing in the record to suggest that Army Corps
21 approval first would make it any more difficult for the County to require a variance. The
22 County disputes that there is any federal preemption that supersedes local wetland
23 regulation. That is likely correct. Without preemption, there is no reason why the timing
24 of approval under the CAO should have any relevance to whether a variance is required
25 for filling of wetlands.

26 Given the lack of any express language in the CAO that directly addresses when wetlands
27 can be filled or encroached there is a measure of ambiguity as to when such encroachments
28 are authorized. For ambiguous provisions, deference is due a county's interpretation of
29 its land use code when that interpretation is based upon an established practice of
30 enforcement. *Ellensburg Cement Prods., Inc. v. Kittitas Cnty. & Homer L. (Louie) Gibson*, 317 P.3d 1037, 1046 (Wash. 2014). As outlined in Finding of Fact No. 5, that
established practice of enforcement is to not require a variance for Army Corps approved
wetland filling. To date the County has not identified any formal change in policy to
change that practice. To treat the Appellant differently, therefore, would hazard arbitrary
decision making.

A filling exception for Army Corps permits is not the most compelling interpretation of
the CAO but is legally supportable to justify the County's past practice. The CAO silence

1 on wetland encroachments can be construed as recognizing that state and federal permits
2 are designed to specifically address the filling of wetlands. Since CAOs don't address
3 filling and federal and state regulations do, it isn't entirely illogical to conclude that filling
4 has been deferred to other agencies that specifically in addressing those impacts. Further,
5 that deferral is consistent with the CAO purpose of protecting wetlands since the Army
Corps review criteria require full mitigation.

6 5. Affordable Housing Feasibility Pertinent to Mitigation Avoidance. The feasibility
7 of a an affordable housing project is directly relevant to the efforts an applicant must make
8 to avoid wetland impacts. The number of units for an affordable housing proposal should
9 not be limited to minimum density but rather on the number necessary to make the
proposal feasible.

10 A major issue for the Appellant is that the County is requiring the proposal to be limited
11 to the minimum zoning density of the project site to meet the avoidance standards of
12 mitigation sequencing. The Appellant asserts that project feasibility should set the
13 number of dwelling units allowed for the proposal. The Appellant position is found the
14 more compelling on this issue.

15 The governing mitigation standard that impacts number of units is KCC 19.200.230A1,
16 which requires as a first step in mitigation sequencing to avoid "*the impact altogether*
17 *by not taking a certain action or parts of actions.*" In this regard impacts can be avoided
18 by reducing wetland and buffer encroachments by reducing the footprint (and hence
number of dwelling units) of the development.

19 The County's prehearing brief asserts that "*avoidance must be demonstrated to the*
20 *maximum extent practicable, according to Ecology's 2021 publication Wetland*
21 *Mitigation in Washington State Part 1: Agency Policies and Guidance, ... C3 at 52-53.*"
22 Ex. C3 at P. 52-53 in fact has no discussion of avoidance. The most pertinent reference
23 to avoidance and practicality that can be found in the DOE publication is at p. 131, which
24 provides that one of the "general approach" to wetland regulation is to "*[a]void direct*
25 *impacts to a wetland or its buffer to the extent practicable by allowing impacts only when*
26 *there is no reasonable alternative.*" In this regard the CAO definition of "practicable
27 alternative" is pertinent, defined as:

28 *an alternative that is available and capable of being carried out after*
29 *taking into consideration cost, existing technology, and logistics in*
30 *light of overall project purposes, and having less impacts to critical*
areas. ...

KCC 19.150.465.

1 Kitsap County has narrowly applied the definition above to require that the most the
2 applicant would be entitled is the minimum density applicable to the project site. If
3 limiting development to this standard makes it infeasible for affordable housing, that
4 would defeat the “overall project purposes” under the KCC 19.150.465 definition. The
5 only apparent way the County position would be justifiable under such circumstances is
6 if the purpose of the development is residential development as opposed to affordable
7 housing.

8 The purpose of the proposal should be framed as affordable housing for this proposal.
9 The County’s reliance upon minimum density provides an objective standard of
10 measurement and also promotes the GMA goal of preventing urban sprawl by assuring
11 densities necessary for efficient use of infrastructure. See RCW 36.70A.020(1) and (2).
12 However, an equally important goal of the GMA is to encourage affordable housing. See
13 RCW 36.70A.020(4). So long as wetland impacts are fully mitigated⁷, the GMA goals
14 implemented in the County’s zoning ordinance can be appropriately addressed by
15 authorizing affordable housing projects within critical areas and buffers to the extent
16 necessary to make such projects feasible. This more flexible approach is consistent with
17 how other avoidance standards are applied in the County’s development standards, such
18 as general zoning variances (“minimum necessary,” KCC 17.560.010D) and stormwater
19 manual infiltration feasibility standards, see Examiner *Meadowview* Final Decision, 24-
20 04549 and 24-04555, on stormwater feasibility issues. It is also likely consistent with
21 how nonresidential proposals would be evaluated. Those types of uses of course would
22 not be subject to minimum density standards and avoidance would more likely be based
23 upon economic feasibility.

24 No finding is made in this decision as to whether the Appellant’s proposal is the
25 minimum necessary for feasibility. In remand the County may well find it necessary to
26 require peer review on that issue. A market analysis identifying a reasonable rate of
27 return for affordable housing development and applying that to the costs of the proposal
28 would be most helpful in assessing minimum encroachment.

29 6. Excess Compensation Wetland Areas Can Serve as Wetland Buffers. Excess
30 compensation wetlands can serve as wetland buffers.

The use of wetland areas to serve as wetland buffers has been a matter of some dispute
between the County and Applicant. See County prehearing brief, 10-11; Appellant appeal,
Ex. 55, p. 16-17.

Section 6.6.3 of Wetland Mitigation in Washington State Part 1 resolves the issue fairly
clearly, providing that if compensation wetland area is provided in excess of that required

⁷ Another GMA goal requires protection of the environment, RCW 36.70A.020(10).

1 that the area may serve as wetland buffer. The section recognizes that such excess
2 compensation area serves the same type of beneficial function as a “dry” buffer area.

3 Footnote 2 of the County’s prehearing brief recognizes that excess compensatory wetland
4 areas can serve as buffer areas. The County just disputes that existing wetlands can be
5 used for this purpose. The County is correct in this regard. Only excess compensatory
6 wetland areas can be used to serve as wetland buffers.

7 8 **Appeal Issues**

9 *The Appellant’s Appeal Issues are quoted Below and evaluated in corresponding conclusions of law.*

10
11 **Appeal Issue No. 1:** *Whether the project proposes to fill multiple wetlands.*

12 7. The number of wetlands to be filled does not need to be resolved at this stage of
13 remand review. The number of wetlands filled may have some relevance to County
14 application of mitigation sequencing during remand review. As previously noted, the issue
15 of whether filling can occur in wetlands can be addressed by implication and transferred to
16 Army Corps decision making. The issue of required mitigation cannot. KCC 19.200.230
17 mitigation sequencing applies to “all” regulated development within wetlands. There is no
18 compelling cause to find an implied exception within that provision for Army Corps
19 review.

20 **Appeal Issue No. 2:** *Whether the project proposes to develop in buffers and setbacks.*

21 8. The County position that the Applicant is developing within buffers and setbacks
22 appears to be largely based upon the understanding that the wetlands are being improperly
23 filled and thus basing buffers and wetland boundaries on the existing wetlands. Wetland
24 buffer and setbacks should be based upon wetlands remaining after filling authorized by
25 the Army Corps. KCC 19.200.220A requires that wetland buffers should be measured
26 from wetland edges. To serve its intended purpose, the “edge” should be the edge, if any,
27 remaining after wetland filling.

28 **Appeal Issue No. 3:** *Whether the project fully analyzes the mitigation sequencing.*

29 9. As determined in Conclusions of Law No. 7, County staff will assess the adequacy
30 of mitigation sequencing during remand review.

1 **Appeal Issue No. 4:** *Whether the lead agency, in issuing the DS, had a basis to*
2 *determine that the project has a probable significant and adverse environmental impact.*

3 10. As determined in Conclusion of Law No. 2, the County assessment of impact was
4 based upon some overly-strict construction of County code and the threshold
5 determination is remanded on that basis.

6 **Appeal Issue No. 5:** *Whether issuance of the DS was in error.*

7 11. See Conclusion of Law No. 10.
8

9 **DECISION**

10 SEPA DS 24-05386 is remanded for reconsideration by staff applying the following
11 rulings:

12 (1) A critical area variance is not necessary to fill wetlands if the Applicant has or will
13 acquire Army Corps approval for the filling. The SEPA determination from
14 remand shall be based upon the understanding that Army Corps permit approval
15 will be acquired and conditioned as such.

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

24 (3) Excess wetland compensation areas may serve as wetland buffers as authorized by
25 Section 6.6.3 of DOE Wetland Mitigation in Washington State Part 1, Publication
26 06-06-011a.

27 ORDERED this 2nd day of April 2025.

28 
29 Phil Olbrechts
30 Kitsap County Hearing Examiner

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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.