Olbrechts & Associates, PLLC
18833 74th St. NE | Granite Falls, WA 98252 | (206) 650 - 7268
olbrechtslaw@gmail.com

January 30, 2026

Tim Smith
Director, Community Planning and Economic Development
City of Olympia
601 4th Ave E
Olympia, WA 98507-1967

Re: Statement of Qualifications for Hearing Examiner Services

Thank you for considering me as a hearing examiner for the City of Olympia. It would be a great honor to serve as its Hearing Examiner. My proposal is for the primary or alternate examiner position.

In summary, I have conducted over 2,000 land use hearings as a hearing examiner since the 1990s. I serve as Hearing Examiner for thirty-three municipalities, as alternate Hearing Examiner for two municipalities and City Attorney for two others. As detailed in my proposal below, I am regularly requested to conduct hearings on the most complex and controversial hearings in Washington State.

My hourly rate is $230 per hour. My attorney subcontractor rates are 90% of my rate and planner subcontractors 75% of my rate. I have a team of seasoned subcontractors with decades of experience between them. I would conduct all the hearings for the City except for rare instances of scheduling conflicts. I'm immediately available to begin work for the City on any day preferred by the City.

I've included two recent writing samples to demonstrate the range of my decision making. One involves a routine plat decisions that was billed for a few hundred dollars. The other was for a five-day SEPA appeal hearing that cost a bit more.

I'm already mentoring and training several individuals for hearing examiner work and am happy to continue to do so.

Thank you for your consideration of my proposal.

Phil Olbrechts

Phil Olbrechts
Olbrechts and Associates, PLLC Managing Member

Olbrechts & Associates, PLLC
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HEARING EXAMINER STATEMENT OF QUALIFICATIONS

Please accept this as my Statement of Qualifications to provide hearing examiner services to the City of Olympia, as managing member of Olbrechts and Associates, PLLC. Based upon historical performance, I would probably conduct over 90% of the hearings assigned to me by the City of Olympia. In very rare circumstances I would seek permission from the City for an alternate examiner to fill in if I have an unexpected conflict with a previously scheduled hearing.

Qualifications and Experience

A. Overview:

I have represented cities as a city attorney since 1989 and have held hearing examiner contracts since 1997. I currently serve as Hearing Examiner for Auburn, Medina, Mercer Island, Federal Way, Fife, Mason County, Monroe, Mount Vernon, Langley, Newcastle, Port Townsend, Mountlake Terrace, Mill Creek, Algona, Fircrest, Edmonds, Renton, Puyallup, Dupont, Roy, Sumner, Bainbridge Island, Ruston, Port Orchard, Kitsap County, Tukwila, Blaine, Lacey, Bonney Lake (Appellate Examiner), Oak Harbor, Orting, Mukilteo and Burien and as an alternate examiner for Seattle Public Schools and Snohomish County. I have conducted over 2,000 hearings in the past twenty-eight years. I also serve as City Attorney for Buckley and Index. Working with planning staff of these cities daily gives me a unique understanding of how hearing examiner decisions are implemented at the staff level.

As a hearing examiner I have held hearings on every type of land use issue and permit imaginable, with projects ranging in size from removal of utility easements from Mason County subdivisions to the Villages and Lawson Hills Master Plan Developments in Black Diamond. I have the resources to handle cases of any size and complexity. As one example, the Villages and Lawson Hills Master Plans involved the construction of over 6,250 dwelling units, mostly composed of single-family homes, and over a million square feet in commercial space. Valued at over a billion dollars, the master planned communities were the largest residential development ever reviewed in King County. The hearings took over 40 hours and involved more than 3,000 pages of exhibits. The decision (EIS adequacy) and recommendations (master plan and development agreement) were issued in the requisite ten days from the close of the hearing without extensions. I've also held hearings on large master plan developments for Mount Vernon, Renton and Jefferson County and served as City Attorney in master plan developments in Poulsbo and Milton. I held a multi-day hearing on a 500-acre motorsports facility for Snohomish County involving over 600 public comment letters, an all-day hearing in Mason County for a racetrack and a hearing on the PSE Energize Eastside project. Some of my more recent contentious hearings include the redevelopment of the Weyerhaeuser campus for Federal Way, a regional methadone clinic in Sequim and a proposed 60-acre gravel pit in Belfair.

In years past as a land use attorney, I have represented neighborhood groups and developers on land use issues. I've represented parties in all levels of the courts, including the United States Supreme Court, the Growth Management Hearing Board, and the Shoreline Hearings Board

B. Career Development:

I received a B.S. in molecular biology from the University of Washington in 1986 and a J.D. with honors from Seattle University School of Law in 1989, the year I was admitted into practice. After stints as City Attorney and Planning Director of Forks, Washington (1991-94), and Planning Director of Sequim (1994), Washington, I became an associate at Ogden Murphy Wallace, P.L.L.C. ("OMW") in 1994. I left OMW for three years in 1997 to teach land use law in the graduate planning program at the University of Washington and to work on other projects. During that time, I developed my hearing examiner practice, working for Mount Vernon, McCleary, and Shelton. I passed those clients on to my alternate examiner and returned to OMW in 2000 as *of counsel*, where I subsequently became a partner in 2004. In my time at OMW I served as City Attorney for Monroe, Buckley, Milton, Gold Bar, Index and Carnation. OMW had over forty attorneys and I worked in the firm's municipal department, where I had the privilege of collaborating with the state's best municipal attorneys on land use issues. I was elected to OMW's executive board, where I managed the firm as the partner representing the firm's municipal department.

I established Olbrechts and Associates, PLLC on November 1, 2010 to maintain competitive rates for my clients. Hearing examiner compensation rates are not feasible with the overhead expenses of major Seattle law firms. Over 90% of my practice is devoted to examiner services. The remaining portion of my practice is primarily composed of providing land use services to city attorney clients. As a hearing examiner, I currently conduct five to fifteen hearings per month.

C. Expertise:

Land Use Law. I'm fully up to date on the leading edge of developing land use law due to the numerous land use seminars and courses I teach each year. I present two land use case law update webinars every year for the Municipal Research Services Center for an audience of a couple hundred planners, attorneys and municipal officials. I created and presented the land use "boot camps" for the Planning Association of Washington. Those camps involve a day long program of legal presentations on topical land use issues and "bread and butter" training on recurring land use issues. I've done several dozen land use case law presentations at professional conferences throughout the state. I've written several land use articles for organizations such as the Municipal Research Services Center and the Washington State Bar Association ("WSBA"). I have co-chaired the yearly conference of the Environmental and Land Use Law Section of the WSBA. I've also taught several credits of land use law in the graduate program at the University of Washington Department of Urban Design and Planning, covering both constitutional law and Washington's land use statutory framework. I've presented a couple hundred "short courses" for planners and local officials across the state on behalf of the Washington State Department of Commerce to educate local officials on planning and open government laws. Because of this extensive involvement in developing case law, my land use decisions are always consistent with developing judicial and legislative requirements.

Over the years I've worked with dozens of local land use codes. As a city attorney I've been responsible for the legal review of major code updates, including the land use codes of Edmonds, Monroe, Milton,

Buckley, Index, Gold Bar, Poulsbo and Carnation. As a Hearing Examiner for multiple jurisdictions I've became familiar with those codes as well. For twenty years I have also advised on local code compliance issues to my city attorney clients.

Through my extensive involvement in public education on land use law, I've developed a focus upon my favorite topics – constitutional takings and vesting law. Through my work I've been asked to testify at the state legislature on vesting legislation and I've made numerous presentations on how to write and implement "reasonable use" standards for critical area ordinances.

I've held hearings on hundreds of administrative land use appeals, including SEPA, code enforcement and impact fees. I've done extensive design review hearings for cities with excellent design standards such as Mercer Island, Edmonds, Renton and Kirkland. I have a couple years of engineering education from the University of Washington that I enjoy applying in adjudicating public works issues.

Environmental Law. My science education enables me to critically assess the scientific evidence that is often disputed in environmental proceedings. I have ruled upon and participated in dozens of SEPA appeals (threshold determinations and EIS adequacy), critical area ordinance reasonable use hearings and compliance issues with the National Environmental Policy Act.

Shoreline Management Act. I have issued hundreds of shoreline decisions for Mason County, San Juan County and the City of Edmonds. Some of my decisions have been appealed to the Shoreline Hearings Board. All decisions have been sustained. Through this work I've accumulated a significant amount of knowledge on shoreline issues, such as aesthetic impacts, shading impacts and protection of endangered fish and eelgrass and kelp.

Code Enforcement. I've been involved in dozens of code enforcement hearings, either as a hearing examiner, city attorney or prosecutor. The code enforcement hearings include dangerous building appeals, zoning code violations, building code violations, stormwater violations and health department violations (including solid waste violations and junk vehicle abatement). I've also written or updated several code enforcement ordinances as a city attorney.

Other Hearings. As a hearing examiner, I've conducted hearings and issued decisions on dangerous dog appeals, street vacations, vehicle impounds, drug property and sex crime forfeitures, rental housing violations, local improvement district formation, building code appeals and business license revocations. As a city attorney, I've been involved in the full spectrum of hearings held by city councils.

Local Project Review Act: As a former and current City Attorney for several cities I've been responsible for preparing revisions to local zoning codes to conform to the Local Project Review Act in its initial adoption in 1995 and its more recent revisions.

Method and Approach

My objectives as a hearing examiner are to maintain a hearing process that inspires trust in its competency and integrity. I believe that unlike the judicial system, local review processes are designed to be accessible to the public. Participation shouldn't require the training of a lawyer to be effectively heard. I seek to create a system that is accessible and responsible to the public and provides a fair opportunity for all hearing participants to

express their concerns and have them addressed in a meaningful way. I'm always vigilant in road mapping hearings for citizens and am constantly inquiring whether hearing participants understand the process. If hearing comments do not appear to be relevant, I will explain the relevant criteria and will work with the hearing participant(s) on ensuring that relevant concerns are placed within the proper regulatory context.

The most challenging part of my hearing examiner practice is making administrative appeals accessible to pro se appellants. There is a fine line between assisting someone in an appeal while at the same time not being perceived as taking sides by making their case for them. I focus upon explaining options and responsibilities while avoiding making any recommendations that could be construed as making a case for a party.

Although I'm naturally inclined to want to help people, I've also come to understand that control and order are sometimes necessary to protect hearing participants. In highly adversarial proceedings where testimony can sometimes get personal and some may try to dominate a proceeding, I've developed substantial experience in ensuring that everyone is still able to be heard and that no one feels intimidated from seeking that opportunity.

The objectives of my written decisions and recommendations are similar to those of the hearing process. My goals are to issue decisions that are: (1) legally bullet-proof; (2) fair; (3) responsive to the concerns of hearing participants; (4) understandable to lay persons; (5) consistent with past decisions, (6) successful in mitigating all impacts to the extent legally permissible, and (7) reflective of the values of the community as identified in the comprehensive plan and applicable code provisions. I attempt to ensure that all public concerns are individually addressed in my decisions. As shown in my preliminary plat writing sample, I often focus on neighborhood concerns in the introduction section to ensure my responses are easily accessible to the public.

My decisions are thorough. I recognize that courts give deference to the factual findings of an Examiner as well as the Examiner's interpretation of local ordinances. However, a court cannot provide this deference unless the decision makes very clear what findings and interpretations are made. Also, I will have far more expertise in land use law than any reviewing judge. For these reasons, I provide a detailed written analysis of all significant legal and factual issues, quoting every applicable regulation and precisely identifying why a code criterion is satisfied or not satisfied. This thorough writing style leaves no room for reasonable disagreement from a reviewing judge and provides clarity to all hearing parties.

I primarily rely upon subcontractors for any assistance I need in writing decisions, which is rare. I review all of their work and it's rare anything gets past me without some revision. As previously mentioned, I was able to write a decision on the Black Diamond master plan applications within the requite ten business days despite the 3,000 pages of exhibits and 40 hours of testimony. I did this by hiring a half dozen planners to help me assess and evaluate the factual issues of that project. I have repeatedly addressed many of the largest and most controversial projects in the Puget Sound area and have never had any problem meeting deadlines and workloads with high quality written decisions and effective resolutions. I am happy and prefer to work exclusively with electronic documents. I handle scheduling myself.

Compensation

My hourly rate is $230/hour. The rate for planners such as Ms. Terrell would be 75% of my rate and other I would also seek reimbursement for hearing transcription costs. I currently use Rev.com, which charges $0.25/minute of hearing. I also request reimbursement for City business license fees. 1.0 hour of travel would be assessed for in-person hearings.

The invoices for my writing samples show variety in my hourly rates. This is only because I didn't raise any of my rates for the first 15 years or so of conducting my examiner practice. In the last couple years I've started increasing rates to keep up with inflation. I generally increase my rate by $5 for every new client. A couple of my newest clients are charged $225/hour.

Alternate Examiners and Decision Writers

I rely upon several contractors to ensure that my decisions are timely and complete. I extensively use several retired planning directors given their extensive experience in land use work and addressing community concerns. Including Ms. Terrell, I currently have three retired planning directors working for me and I'm talking to two others. Hearing examiner work is an ideal means for the public to benefit from the life work of these individuals. As a person who has spent hundreds of hours teaching the public about land use law, I truly enjoy the collaboration involved in working with these skilled individuals.

Emily Terrell is my primary subcontractor. She is the Principal of Sound Municipal Consultants, a planning and municipal consulting firm. Emily is a consulting planner and hearing examiner. Until recently she was the planning director of the City of Buckley. She has also served as my alternate examiner since at least 2011 and has also served as the Hearing Examiner for Pacific County, WA. Ms. Terrell is available to hold hearings in the very rare circumstances when necessary due to scheduling error, illness or conflict of interest preventing Mr. Olbrechts from conducting the hearing.

Availability

I can generally accommodate any hearing date, day or night, with a preference for Tuesdays and Wednesdays for in-person hearings.

Professional References

Vanessa Dolbee
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City of Lacey
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Chris Larson
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Kell Rowen
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OLBRECHTS AND ASSOCIATES, PLLC
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Renton, WA 98057
olbrechtslaw@gmail.com

Phil A. Olbrechts

INVOICE

DECEMBER 2025 HEARING EXAMINER SERVICES

JANUARY 18, 2026

TO:

Kell Rowen, DCD Administrator
615 West Alder Street
Shelton, WA 98584

Total Invoice: $1,069.00

Per Case

Walker Plat – $708.50
Oakes Plat – $326.50
Rabenstein Easement – $34.00

DESCRIPTION	HOURS	RATE	DATE
Phil Olbrechts		170.00/hr	
Prep for Walker performance subdivision and hearing	1.2		11/26/25
Prep for Oakes performance and hearing	0.3		12/10/25
Prep of Walker performance subdivision	2.9		12/19/25
Prep of Oakes performance	1.6		12/25/25
Prep of Rabenstein easement elimination	0.2		1/9/26
TOTAL OLBRECHTS	6.2	$1,054.00	
Walker Performance trans		$11.50	
Oakes Performance trans		$3.50	

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Renton, WA 98057
olbrechtslaw@gmail.com

Phil A. Olbrechts

DECEMBER 2025 HEARING EXAMINER SERVICES

JANUARY 18, 2026

TO:

Alex Wenger
Director, Dept. of Community Development Services
City of Blaine
435 Martin, Suite 3000
Blaine, WA 98230

Total Invoice: $ 11,057.75

DESCRIPTION	HOURS	RATE	DATE
Phil Olbrechts		$180/hr	
Prep of Avista	4.8		12/29/25
Prep of Avista	6.8		12/30/25
Prep of Jerome St. transcript	0.1		12/30/25
Prep of Avista	6.9		12/31/25
Prep of Avista	7.8		1/1/25
Prep of Avisa	6.2		1/2/25
Prep of Avista	8.0		1/3/25
Prep of Avista	7.3		1/4/25
Prep of Avista	4.1		1/5/25
Proof and revisions to Avista	0.2		1/6/25
Total Olbrechts	52.2	$ 9,396.00	
Emily Terrell		$135/hr	
Jerome prep and hearing	1.8		12/17/25

Prep of Jerome	1.6		12/30/25
Prep of Jerome	3.9		1/5/26
Prep of Jerome	4.9		1/6/26
Total Terrell	12.2	$1,647.00	
Jerome St. Trans		$14.75	
TOTAL INVOICE		$ 11,746.25	

CITY OF BLAINE
COMMUNITY DEVELOPMENT SERVICES DEPARTMENT
435 MARTIN STREET, STE. 3000 • BLAINE, WA • 98230
PHONE: (360) 332-8311 • FAX: (360) 543-9978• WEBSITE: www.cityofblaine.com

NOTICE OF FINAL DECISION

Avista at Birch Point Planned Unit Development and Preliminary Plat and SEPA Appeal

On January 26, 2026, the Blaine City Council approved Ordinance 26-3041, a Final Decision on the Avista at Birch Point Planned Unit Development, Preliminary Plat, and SEPA appeal. A copy of the ordinance and supporting Hearing Examiner recommendation are attached. You are receiving this notice because you are a party of record or other interested party.

Appeals: Type II-CC final decisions are subject to judicial appeal as provided in BMC 17.06.190. Pursuant to BMC 17.06.190, Type II final decisions made by the City Council shall be final and conclusive unless an appeal is made to Whatcom County superior court within 21 days of the date the decision or action became final by filing both a petition for review in the Whatcom County superior court and serving the petition on all necessary parties in conformity with the requirements of the State Land Use Petition Act, Chapter 36.70C RCW.

ORDINANCE NO. 26-3041

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BLAINE, WASHINGTON, RENDERING A FINAL DECISION REGARDING THE AVISTA AT BIRCH POINT PROJECT, DENYING THE AVISTA AT BIRCH POINT SEPA APPEAL, AND APPROVING THE AVISTA AT BIRCH POINT PLANNED UNIT DEVELOPMENT AND PRELIMINARY PLAT

WHEREAS, the Avista at Birch Point Planned Unit Development (PUD) and Preliminary Plat applications (Project) were determined to be complete applications by the Community Development Services Department (CDS) on May 15, 2024;

WHEREAS, the CDS Director issued a State Environmental Policy Act (SEPA) Mitigated Determination of Nonsignificance (MDNS) for the Project on June 25, 2025;

WHEREAS, the SEPA MDNS for the Project was appealed by Whatcom County and the Blaine Water Coalition within the 14-day appeal period after the SEPA MDNS was issued as later determined by the City Hearing Examiner;

WHEREAS, Whatcom County withdrew their SEPA appeal in advance of the hearing before the Hearing Examiner;

WHEREAS, the Blaine Water Coalition SEPA appeal was consolidated with the PUD and preliminary plat into a single hearing scheduled before the Hearing Examiner on November 5, 2025;

WHEREAS, the Hearing Examiner held a duly noticed public hearing consisting of five days of testimony between November 5-14, 2025; reviewed the Project applications; considered the merits of the SEPA appeal; considered the CDS recommendation; and considered public testimony, including written comments, and exhibits submitted at the public hearing, all as further detailed in the Hearing Examiner's written recommendation;

WHEREAS, the Hearing Examiner issued Findings of Fact, Conclusions of Law and Recommendation to City Council on January 5, 2026 (the Hearing Examiner Recommendation), which is attached hereto as Exhibit A and incorporated herein by this reference;

WHEREAS, on January 26, 2026, after due notice was provided to the parties of record, the City Council held a consolidated closed record SEPA administrative appeal and closed record determination of the underlying permit applications for the Project;

WHEREAS, City Council considered the subject Project proposal, the Hearing Examiner Recommendation, the official record established before the Hearing Examiner, and oral argument related thereto;

WHEREAS, the City Council finds the SEPA MDNS appeal should be denied;

WHEREAS, the City Council finds the proposed Project to promote the public good and not to be detrimental to the public health, safety, and general welfare;

WHEREAS, the City Council finds the proposed Project consistent with the relevant goals and policies of the City of Blaine Comprehensive Plan; and

WHEREAS, the City Council finds the proposed Project to be consistent with the Planned Unit Development and Preliminary Plat approval criteria contained in the Blaine Municipal Code.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BLAINE DOES ORDAIN AS FOLLOWS:

SECTION 1: Findings of Fact and Conclusions of Law. The City Council adopts the above recitals and the findings of fact and conclusions of law contained in the Hearing Examiner Recommendation in their entirety, as the findings of fact and conclusions of law in support of this Ordinance. Collectively, such findings of fact and conclusions of law constitute the findings of Council pursuant to BMC 17.60.140-150.

SECTION 2: SEPA Appeal. The City Council denies the Avista at Birch Point SEPA appeal.

SECTION 3: PUD and Preliminary Plat. The City Council approves, subject to the conditions set forth in the Hearing Examiner Recommendation, the Avista at Birch Point Planned Unit Development and Preliminary Plat, a 181-acre planned unit development subdivision proposed to contain up to 490 residential units developed in multiple phases with the Phase I preliminary plat comprising 79 lots and 1.9 acres of neighborhood retail development.

SECTION 4: Conditions. These determinations and approvals are subject to the conditions set forth in Exhibit A (Hearing Examiner Recommendation) which is incorporated into this Ordinance by reference.

SECTION 5: Severability. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance.

SECTION 6: Effective Date, Final Decision. This Ordinance shall take effect and be enforced upon its passage by the City Council and approval by the Mayor, if approved; otherwise, as provided by law and five (5) days after the date of publication. This Ordinance is the final decision by the City Council on the above referenced appeal and applications pursuant to 36.70.C, RCW.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF BLAINE,

WASHINGTON, at a regular meeting thereof held the 26th day of January, 2026.

Mary Lou Steward

Mary Lou Steward, Mayor

Approved as to form:

Peter Ruffatto, City Attorney

Attest:

Sam Crawford, City Clerk

BEFORE THE HEARING EXAMINER FOR THE CITY OF BLAINE

Phil Olbrechts, Hearing Examiner

RE: Avista at Birch Point Planned Unit Development and Preliminary Plat Permit No.: 2024025 and	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION TO CITY COUNCIL**

SUMMARY

Semiahmoo Highlands, LLC has applied for planned unit development (PUD) for the development of 181 acres into up to 490 residential units along with some minor commercial development and other associated uses. The PUD proposes five phases of development over the 181-acre project site. Consolidated with the PUD application is a preliminary plat application for Phase 1 of the PUD. The Phase I preliminary plat takes up 33.51 acres and proposes 79 lots and 1.9 acres of neighborhood retail development. The public hearing on the permit applications included an appeal of the project's SEPA MDNS[1] by Otto Pointer (alias) and the Blaine Water Commission. The project site is located on the west side of Semiahmoo Parkway bounded on the south and west by the Blaine City Limits. It is recommended that the City Council approve the permit applications and deny the SEPA appeal.

This summary provides a six-page overview of the major issues addressed during the Avista public hearing. For those wishing to focus upon the impacts of the project, attention is directed to Finding of Fact (FOF) No. 6 and 7 below, which address adverse impacts and infrastructure needs respectively at pages 13-32. An explanation of the legal limits to the City's stormwater regulations is addressed in Conclusion of Law (COL) No. 9 at Page 40. An explanation of why this review likely couldn't address aquifer issues is outlined in COL No. 3 at page 33.

[1] A SEPA MDNS is a State Environmental Policy Act Mitigated Determination of Non-significance. Such a finding is a determination by the City's planning director that the proposal will not create any probable significant adverse impacts and thus no environmental impact statement needs to be prepared for the project.

The hearing on the project applications was spread over five days and was watched on zoom for most of that time by 19-25 people. The proposal likely drew considerable community interest because of historical flooding problems surrounding the project site. The SEPA appellants also had concerns about potential impacts to what they believe to be a critical aquifer recharge area (CARA).

The SEPA Appellants, most notably Mr. Pointer, exerted a monumental effort in representing the concerns of the surrounding community. They had to absorb thousands of pages of technical information within the compressed timeframes of the appeal review process. Despite these efforts, they could not overcome the near bullet-proof permit record compiled by City planning staff and the Applicant. The City hired independent experts to peer review the Applicant's stormwater, traffic and wetlands analysis. The City has also adopted the most effective and stringent stormwater standards available to it as prepared and refined by the Washington State Department of Ecology (DOE). DOE adopted and has repeatedly updated those standards with the latest stormwater technology since 1992. Short of hiring engineering consultants to somehow improve upon the 1108-page DOE Stormwater Manual, the City cannot do much more to make its stormwater regulations more effective.

The 2019 edition of the DOE Stormwater Manual was used for the project. The SEPA Appellants claim that the more recently issued 2024 Manual should have been applied. As identified in COL No. 9 below, the City could not legally require the 2024 edition because of a preliminary plat vested rights (grandfathering) statute. The SEPA Appellants have also not identified any flow control improvements that the 2024 edition would make over the 2019 version. The Applicant's civil engineer testified that as to flow rates, there is no difference.

Of course, for the surrounding community the most important consideration is not how good the City's regulations or staff may be. Rather what's important is whether the proposed development will adversely affect their lives, most pertinent as to stormwater and aquifer impacts. Mr. Pointer unquestionably established that flooding is a current problem in the area and that future development may make it worse. The detailed hydrological modelling conducted by the Applicant almost as unquestionably shows that the project won't make the flooding any worse. The detention facilities proposed by the Applicant were demonstrated to reduce off-site peak flows from current conditions. Flooding may very well become more severe in the future in the surrounding area, but that likely won't be because of Avista.

The one shortcoming in the Applicant's modelling is that it's based upon precipitation data from 1948-2009. As testified by Mr. Pointer without substantiation[2], climate change may be increasing the frequency and severity of storm events since 16 years ago. DOE has not approved any computer modelling that integrates more recent precipitation data. Mr. Pointer did not present any evidence that the estimated increases in storm events would render the DOE required modelling ineffective. The Applicant's modelling established that its stormwater facilities could convey up to 100-year storm events based upon the 1948-2009 data. Even if Mr. Pointer had been able to show that climate change has rendered this mitigation ineffective, the City is arguably[3] legally bound to limit stormwater mitigation to the standards it has adopted. In practical terms, as previously noted, it would be difficult for the City to have adopted anything more effective.

The Appellants had no qualified expert to contest the engineering work of the Applicant's civil engineer. The centerpiece of the Appellants' challenge to the Applicant's stormwater design was modeling results from 2011 (14 years before Avista) that show maximum allowed flow rates exceeding predevelopment levels by 809%. The problem with these flow rates is they aren't the flow rates generated by the proposal. They're the flow rates modelled in a study prepared by Whatcom County in 2011 to show future flow conditions into Roger's Slough stormwater facilities. The Applicant's stormwater report included the 2011 study to provide background information on the condition of off-site stormwater facilities (hence its placement in Appendix B of the Applicant's report, labelled "Background Documents"). The modelling prepared for Avista, in contrast, addressed stormwater flows generated by the Avista development, not the entire basin feedings Roger's Slough. The Avista analysis established that off-site flows generated by the Avista wouldn't exceed the forested, predeveloped condition of the Avista project site. The stormwater facilities of the Rogers Slough may very well still far exceed predeveloped flow conditions of the basin feeding into it, but Avista won't be contributing to that exceedance.

The one weak point in the City's review was its CARA review. As authorized by its code, the City issued a CAO determination without public comment. That determination, a separate permit decision[4], found that the proposal conformed to the

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[2] Mr. Pointer did try to admit some evidence from the University of Washington that forecast increases in storm events. Unfortunately, he hadn't included that evidence in his exhibit list that was required to be filed prior to the hearing. As such, that evidence was not admitted.

[3] SEPA is commonly referred to as a "gap filler" that is intended to fill in gaps in regulations, i.e. address issues not anticipated in regulations. Whether the impacts of climate change could qualify as an extraordinary circumstance that would merit additional mitigation is debatable. The Examiner isn't aware of any jurisdiction that has as yet attempted to impose more than required by its stormwater standards through SEPA on the sole basis of climate change.

[4] Local jurisdictions differ as to whether to allow CAO review to be done separately from discretionary permit review. Jurisdictions like Blaine and Mason County authorize separate review. See BMC

City's CAO standards. Those standards regulate environmentally sensitive areas such as CARAs and wetlands. Under current case law, that determination cannot be challenged in this project review because it wasn't appealed. An appellate court decision has specifically held that even if a decision is issued without public notice, it can't be challenged except through a timely appeal. *See* COL No. 3 at page 33 below.

Although legally it's unlikely that the CARA and wetland issues could be addressed in this proceeding, the evidence on both issues was presented during the hearing without objection by the City and Applicant on that basis. The record supports the City's wetland and CARA determinations, but only marginally so on the CARA issue[5]. The City's evaluation of the presence of a CARA appears to have been solely based upon a finding that the City's CARA map didn't include the Avista site as within a CARA. City code makes clear that the City's CARA and wetland maps only serve as a "*source of generalized information*" and do not conclusively determine the presence of critical areas. BMC 17.82.060E.

Contrary to the City's CARA map, the County's CARA map shows the Avista site within a CARA area of high risk of aquifer susceptibility. This conflict in CAO maps should have prompted the City to do further investigation to at least assess the comparative accuracy of the maps. No such testimony was presented by the City. However, the Applicant's geotechnical report and some somewhat speculative testimony from its civil engineer suggested that a CARA was not present. The Appellants provided no evidence to the contrary other than to assert defects in the studies supporting the City map. Mr. Pointer asserted that the County map studies were more site specific. He didn't present the studies for either map into evidence. Mr. Pointer has no expertise in aquifer or geotechnical issues. Given the SEPA requirement that substantial weight must be given to the findings of the SEPA official issuing the MDNS, the record supports the City's determination that there is no CARA at the project site.

The wetland issue was much more easily resolved. The Applicant's wetland classifications and delineations were verified in a separate peer review by the City. The peer reviewer conducted his own site visit and did a document review as he found

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17.82.070; Mason County Code 8.52.190c. Other jurisdictions require CAO review to be consolidated with discretionary permit review, which in effect enables the public to comment on CAO compliance. See, e.g. Auburn City Code 16.10.070D("*To the extent possible, the city shall consolidate and integrate the review and processing of critical area-related aspects of proposals with other land use and environmental considerations and approvals*.";

[5] The Applicant's civil engineer testified that the project already implements what could be required if the proposal was located over a CARA. Specifically, the CC&Rs of the project prohibit pesticides, stormwater controls don't include infiltration and the detention pond is lined to prevent infiltration. Tr. 68. If the Applicant believes they meet CARA requirements even for high risk aquifers, they could volunteer a condition requiring to compliance to CARA standards.

necessary to assess the Applicant's wetlands report. The Appellants had a well qualified wetlands expert as well, Oliver Grah. Mr. Grah volunteered (presumably) a substantial amount of his time to assist BWC. Mr. Grah has a master's degree in water science and has served as a senior planner, supervisor and natural resources manager for Whatcom County.

Mr. Grah testified that he found that Wetland C should be classified as a Type II wetland instead of a Type III wetland as designated by the Applicant. He also testified that its buffer should be 225 feet instead of 75 feet. Tr. 446-447. However, Mr. Grah didn't provide the code basis for this determination in his testimony. He also didn't provide a report substantiating his findings. Mr. Pointer's closing and reply briefs provided the code basis for purportedly justifying a larger buffer. Those citations were to the wrong type of wetlands. Mr. Pointer's briefs asserted that the Wetland C buffer was incorrectly calculated because the Applicant failed to account for polluted waters being both discharged into Wetland C and out of Wetland C. The City's wetland regulations only make those factors applicable to depressional and flats wetlands. It is uncontested that Wetland C is a slope wetland. The City's wetland regulations don't recognize polluted waters as a factor supporting a larger buffer for slope wetlands such as Wetland C.

Mr. Pointer's closing brief also noted that disturbed soil conditions rendered the wetland identification methodology used by the Applicant ineffective. The City's wetland regulations have a specialized methodology for identifying wetlands in disturbed soil situations. The Applicant's wetlands expert found the site was stable enough to not necessitate the added methodology. It had been more than 20 years since the soils had been disturbed. The Applicant's opinion on this issue was based upon site visits, soil borings and research of the historical disturbance of project site soils. The independent biologist who did the peer review also didn't cite disturbed soils as a problem in his report. Other than referencing DOE comments that stated aerials may show the presence of additional wetlands, Mr. Grah provided no evidence as to why be believed the site to be sufficiently disturbed to necessitate the additional methodology. Given the relatively sparse evidence relied upon by Mr. Grah, the Applicant's delineation and classifications are found to be sufficient using the standard wetland indicators of the City's wetland regulations.

The Appellants also cited to comment letters provided by DOE and the Army Corps that suggested that the City may have overlooked some protected waters. DOE's letter identified the documents it reviewed. Those documents didn't include the City's peer review report. The DOE letter noted that the number of test pits (a requirement for wetland delineation) were minimal and that "*[s]aturation [of soils] viewed from aerial images can be an indicator of wetland hydrology*." DOE recommended further investigation and offered to review the site itself. Apparently unbeknownst to DOE, the City had already implemented DOE's recommendation by its peer review. The

City's peer reviewer, another qualified biologist, had conducted his own site visit and done his own review of pertinent documents. Given the peer review, the site visits by both Applicant biologist and peer review biologist and the extensive evaluation conducted by both biologists, this recommendation determines that DOE's concerns were adequately addressed and that the wetlands were properly delineated.

The Army Corps letter identified that some proposed filling of ditches may violate the federal Clean Water Act because those ditches could qualify as waters of the United States. Direct violations of federal law are beyond the scope of this permit review. However, the Army Corps concerns raise the issue of whether the ditches may qualify as streams protected by the City's critical areas ordinance (CAO). The CAO exempts artificial water courses as qualifying as protected streams. The Applicant's biologist and the City's peer reviewer both expressly determined that the ditches qualify as artificial water courses.

The proposal generated about 24 public comments. April Hashimoto, on behalf of the Semiahmoo Homeowner's Association, wrote a particularly good and comprehensive outline of neighborhood concerns[6]. See Ex. 36. Other than traffic, the public comments largely tracked the concerns raised in the SEPA appeal. For traffic the City has adopted level of service (LOS) standards that set allowed levels of congestion. Public works standards set the standards for frontage improvements and pedestrian facilities. The City's public works staff and third party traffic review for LOS found compliance with City standards on those transportation issues.

Some public commentators didn't feel adequate steps were taken for public engagement. Staff outlined how notice and participation requirements were met in the staff report. Comments were made about impacts to wildlife. City staff and the Applicant's biologist found no protected species at the project site. See Ex. C18, p. 2. Some people also found the proposed densities to be inappropriate for the area. State law, specifically RCW 36.70B.030(3), prohibits the reconsideration of densities authorized by the City's zoning code. The density of the project cannot be challenged so long as it is consistent with that authorized by the zoning code. Comments were also made that more area-wide planning should be involved for transportation

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[6] In her letter Ms. Hashimoto asserts that the City has been delegated authority by the Department of Ecology to administer a comprehensive stormwater study as a condition of approval of the Avista project. Her references to a "stormwater study" don't directly correspond to any BMC requirement or state statute. It appears she may have been referring to the obligations of some cities and counties in Washington State under the Clean Water Act to implement some waterbody specific Clean Water Act protection measures. As identified in COL 3, Whatcom County is subject to those requirements while Blaine is not. Despite the inapplicability of this Clean Water Act requirement (specifically National Pollutant Discharge Elimination System permit conditions), the City has volunteered to assume the most pertinent and effective requirement of the Clean Water Act for this project review, i.e. the Department of Ecology Stormwater Management Manual for Western Washington.

improvements. The City already conducts city-wide transportation planning in the transportation element of its comprehensive plan and its six year street improvement plan.

ORAL TESTIMONY

A computer-generated transcript of the hearing has been prepared to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. The transcript is not intended to provide a precisely accurate rendition of testimony by generally identifies the subjects addressed during the hearing. Appendix A page citations are referenced in this recommendation as "Tr. X."

EXHIBITS

Admitted are listed from each of the parties as follows:

City Exhibits (Prefix "C"):

Exhibits C1-C232 of the City's PUD/Plat Exhibits list as of November 5, 2025 were admitted during the first day of hearing on November 5, 2025 along with the following seven public comment letters:

C233.	11/4/25	Hashimoto
C234.	11/3/25	Cohenour
C235.	11/3/25	Pentland
C236.	11/4/25	Keats and Garland
C237.	11/4/25	Alpisa
C238.	11/4/25	Kulman
C239.	11/4/25	Steel

Applicant's Exhibits (Prefix "S")

The seven exhibits listed in the Applicant's October 10, 2025 exhibit list were admitted into the record without objection during the hearing.

Appellant Exhibits (Prefix "A", Webpage Exhibits Prefix "W") :

A4 Birch Bay Watersheds Characterization and Planning Study 2007
A5 Birch Point Subwatershed Drainage Study Report.
A7 BLA 460 Geotech Report
A22 HE Decision Inverness Appendix A
A68 2025.10.03 - Aamot - 2025 Update - Email to Blaine
A83 Doralee Booth Photographs of November 21 storm

Post Hearing

Appellant Closing Brief pages 1-25 submitted 12:59 11/19/25
City Closing Brief dated 11/26/25
Applicant's Closing Brief 11/26/25

Note: Emails including the Examiner and all SEPA parties should be considered admitted to the extent they address procedural issues. The parties engaged in dozens of emails over the course of this review arguing objections to the admission of evidence and other procedural matters.

FINDINGS OF FACT

Procedural:

1. Applicant. Wayne Schwandt, Semiahmoo Highlands, LLC, 965 Grand Blvd. Bellingham, WA 98229

2. Hearing. The Hearing Examiner conducted a virtual hearing on the application starting November 5, 2025. The hearing was continued over four additional days of testimony to November 6, 2025, November 10, 2025, November 12, 2025 and November 14, 2025. The record was left open for written closing and consideration of additional Appellant exhibits through December 6, 2025.

3. Appellant Exhibits. Separate findings of fact are presented on the admission process for the Appellants' exhibits because the circumstances of their admission are highly extraordinary. This is the least consequential finding in this recommendation for those looking for findings to skip. The next FOF starts at Page 10.

The Appellants were given four opportunities to present the 84 exhibits they listed on their exhibit list into the record. To avoid what likely could have been as much as ten hours of debate on the admissibility of the Appellants' exhibits, the Appellants were encouraged to present their exhibits as citations in their closing brief so that relevancy could be more efficiently assessed. In the end, only six of the Appellants 84 exhibits were admitted because the Appellants didn't even try to have most of those exhibits admitted.

The prehearing order for the hearing required the City to submit their exhibit list by September 26, 2025 and the Applicant and Appellants by October 24, 2025. Rebuttal lists were due of all parties by October 26. 2025. The Appellants didn't present any exhibit list on October 24, 2025.

The rebuttal lists were due October 26, 2025. The Appellants emailed the Examiner on 2:03pm on October 27, 2025 requesting an extension to 5 pm that day since October 26, 2025 was a Sunday. The Appellants then submitted their rebuttal list at 4:52 on October 27, 2025. The Examiner responded "*late admission accepted*" by email 6:47 pm, October 27, 2025. The Appellants then submitted a different rebuttal list later that evening with more exhibits by email at 10:02 pm. At hearing the Examiner identified that the 10:02 pm list would be used as the numbering for the Appellants' exhibits. Tr. 241. The Appellants then proceeded to use a different numbering order throughout the rest of the proceeding from an unknown source.

The Appellants' rebuttal list presented a problem to the other parties. Since those exhibits were presented for the first time the other parties had no opportunity to provide prehearing rebuttal exhibits. More important, the relevancy of the exhibits was not apparent. For these reasons, the City and Applicant were unwilling to have the exhibits admitted all at once. Given the adversarial nature of the proceeding and the Appellants' lack of expertise in evidence, it was evident that the average time used to debate each exhibit could easily reach ten minutes, thus taking more than an entire day to get through the Appellants' 84 exhibits.

In circumstances where there are lengthy exhibit lists and the parties aren't willing to stipulate to wholesale admission, its common to have the parties present their exhibits during their presentations as the exhibits become relevant to their case. The remaining exhibits are then addressed individually at the end of the party's presentation of its case. The City and Applicant objected to this procedure on the basis that the Appellants should have presented the exhibits in their opening exhibit list rather than a rebuttal list. However, given that the City had presented its record well before the opening lists were due, it was partially understandable that the Appellants would believe they were presenting rebuttal exhibits. Consequently, the Appellants were given a second opportunity to present their exhibits by presenting them individually as part of their case in chief.

In their second opportunity to admit their exhibits, the Appellants only presented five of their 82 exhibit list documents in the course of their presentations of evidence with one additional document that wasn't in the list. As previously noted, when exhibit list exhibits are required to be presented individually in the course of a party's presentation, the remaining exhibits that weren't presented are offered up at the end of the presentation. In this case the Appellants still had 77 exhibits remaining. This didn't resolve the original problem of too many exhibits to debate all at once. Consequently, the Examiner offered and the Appellants agreed to present their exhibits as citations in their closing brief as a third opportunity to admit their exhibits. This would provide an efficient way to establish relevancy. The City and Applicant were of course given the opportunity to provide new rebuttal evidence if necessary in response to any admitted documents, since they weren't given that opportunity to provide rebuttal lists before as

part of the prehearing exhibit exchange process. This new process created the risk of having to reopen the hearing if cross examination or the like became necessary. That risk was found worth taking given the alternative of taking an entire day debating admissibility.

Another problem with the Appellants exhibits was that some of them were just links to website that contained hundreds of pages of webpages and/or linked documents. To address the webpage links identified as exhibits, the Appellants were allowed to remedy that error by saving the documents and/or webpages from the links they wished to present as evidence as pdfs. For documents generated at the website by entering data inputs, the Appellants were directed to print out the resulting documents as pdfs and identify the inputs used to generate the documents. These web-based documents were due November 7, 2025. The Appellants didn't produce the requested pdfs. The Examiner, the City and the Applicant all instead received an email on November 7 with no pdfs attached, exhibits that weren't in the Appellants' rebuttal list and links to webpages that had maps of the entire state of Washington or the entire United States. Tr. 236. By a November 10, 2025 Examiner email, the Appellants were given a second opportunity to present their web-linked documents by citing to pdf generated versions in their closing briefs.

Despite the third opportunity to present their exhibits and weblinked exhibits for admission in their closing brief and their second opportunity to admit web-based documents, the Appellants made no admittable reference to their rebuttal list in their closing argument. Although the Appellants didn't cite to their rebuttal list in their closing brief, they did submit 14 separate exhibits concurrently with the closing brief that weren't cited in the closing brief. The Appellants were thus given a fourth opportunity to present their rebuttal list exhibits for admission by citing to the exhibits in their reply briefs so long as the exhibits were limited to reply argument and listed in their rebuttal exhibit list. The Appellants were also authorized to alternatively present for admission the exhibits they provided concurrently with their closing brief with a 25 word or less explanation as to relevancy for each document. The concurrently presented exhibits were only admissible so long as they were listed in the Appellants rebuttal list.

In their reply brief and accompanying relevancy explanation the Appellants didn't present any exhibits identified in their rebuttal exhibit list. Instead they presented an entirely new set of exhibits . The City and Applicant raised no new evidence in their closing brief so there was no basis to introduce new evidence that wasn't included in the Appellants' rebuttal list. No new exhibits were admitted from the reply briefing and associated relevancy explanations as a result.

Substantive:

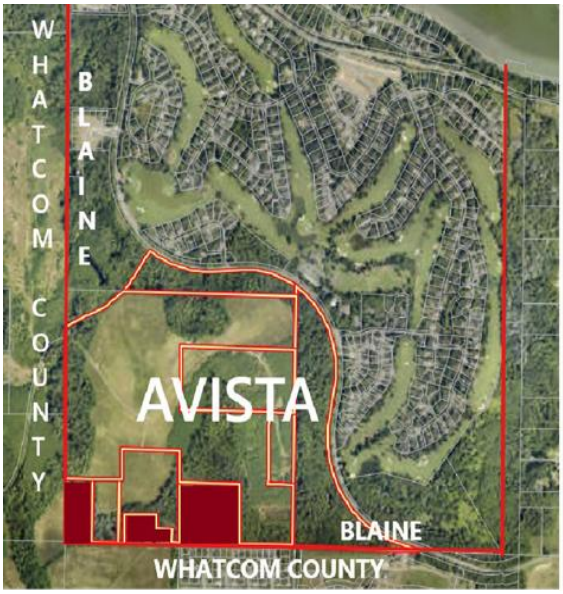
4. Proposal/Site Description. Semiahmoo Highlands, LLC has applied for planned unit development (PUD) for the development of 181 acres into up to 490 residential units along with some minor commercial development and other associated uses. The PUD proposes five phases of development over the 181-acre project site. Consolidated with the PUD application is a preliminary plat application for Phase 1 of the PUD. The Phase I preliminary plat takes up 33.51 acres and proposes 79 lots and 1.9 acres of neighborhood retail development. The public hearing on the permit applications included an appeal of the project's SEPA MDNS by Otto Pointer (alias) and the Blaine Water Commission. The project site is located on the west side of Semiahmoo Parkway bounded on the south and west by the Blaine City Limits.

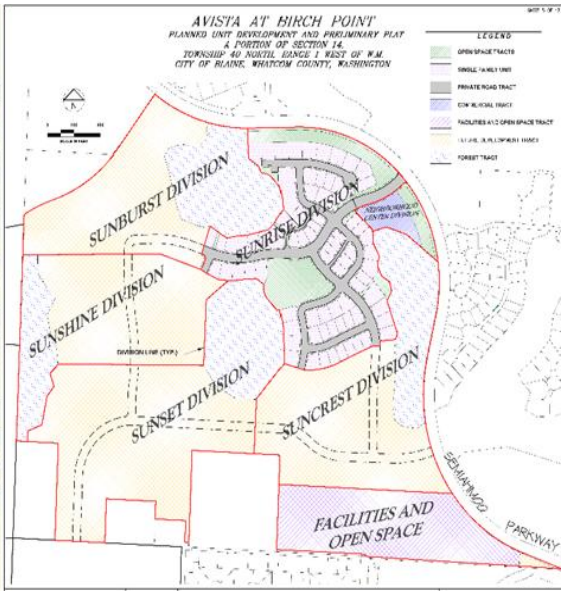
The Avista project is a phased residential development with neighborhood commercial and supporting community services, including self-storage, aging-in-place, and HOA maintenance and storage facilities. The project has been designed with a mix of residential unit types, large open space tracts with an extensive trail system, and significantly increased buffers to Semiahmoo Parkway. The application materials include a preliminary plat for Phase One, described below, and a Planned Unit Development (PUD) application with design concepts that include unit clustering, open space connectivity, and the preservation of wetlands.

The PUD process is a two-step decision process. The initial application requires City Council approval following a public hearing and recommendation from the City Hearing Examiner, and then a final PUD Master Plan approval within 180-Days of a City decision1. The initial PUD Master plan includes the basic design elements along with additional detail as necessary to clearly convey the intent of the developer. The final PUD Master Plan shall include all requirements of the approval of the City, including any such recommendations from the Hearing Examiner, as adopted by City Council. The master plan shall incorporate the conditions of project approval and the contents of the CC&Rs, and the master plan becomes the guiding document for development of the overall site, individual phases, building sites and structures, and public and private open space.

This two-step PUD process is vital for considering the Avista Project, where greater detail is provided for Phase 1, which includes a preliminary plat application, and less detail is provided for future phases but clearly conveys the intent of the developer. Once a decision is made on the initial applications, and specific land uses and building types are authorized, the Applicant then updates the master plan with final details.

The Avista site is composed of seven contiguous parcels on the south side of Semiahmoo Parkway. The Blaine City limits bound portions of the west and south boundaries.





Phase one of the Avista PUD is the 33.51-acre Sunrise Division, which includes 79 detached single-family lots and 6.72 acres of open space including 3.15-acre private Avista community Nexus Park. The primary Avista Project entry off Semiahmoo Parkway will create an intersection with the Semiahmoo Resort Golf Course entrance that will lead residents and visitors past the Neighborhood Center to Nexus Park, a broad, open field set against the 9.07-acre Osoberry Forest backdrop in the center of the Avista Project. A second emergency access route will be constructed for Phase 1.

The PUD establishes the five project phases, open space tracts and the Phase One Sunrise Division. See Avista Preliminary Plat for fine details, Ex. C7. The Avista Preliminary Plat for Phase One includes all required elements for the Sunrise Division, but does not depict lot configurations, commercial parcels, stormwater facilities, delineated critical areas, open space, park tracts or parcel configurations proposed for the future PUD phases.

4. SEPA and Appeals. The City issued a SEPA determination of Mitigated Non-significance (MDNS) on June 25, 2025. Two appeals to the MDNS were filed on July 9, 2025[7]. One appeal was filed by Whatcom County. The other was jointly filed by Otto Pointer[8] and the Blaine Water Coalition.

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[7] Whatcom County in fact didn't file its appeal fee on July 9, 2025. The appeal fee was submitted the next morning. The City moved to dismiss that appeal on that basis. That motion was denied.

[8] Otto Pointer is an alias. The City and Applicant filed motions for dismissal for lack of standing on July 8, 2025 and July 15, 2025. As to Mr. Pointer, the standing arguments were limited to the fact that Mr. Pointer was using an alias. The motions as they pertained to alias were denied in a September 4, 2025

The City and Whatcom County resolved their SEPA issues with a mitigation agreement. The County filed a motion to withdraw their appeal on October 22, 2025. That motion was granted by order issued November 4, 2025.

Section IV of the BWC appeal entitled "Statement of Issues Presented," alleged a failure to assess required cumulative impacts and to properly assess impacts to water quality, flooding and critical aquifer areas. Section V "Grounds for Appeal" added failure to properly set wetland buffers.

5. Surrounding Area. Much of the land to the north, east, and south of the Avista site has been or is proposed for development with single-family and multi-unit residential subdivisions. The Semiahmoo Resort and Golf Course and its surrounding neighborhoods is on the opposite side of Semiahmoo Parkway. Two abutting unincorporated Whatcom County properties to the west of the Avista site are under the same ownership (Ocean View Farms LLC) as the Avista Project parcels.

Unincorporated Whatcom County adjoins the Avista project to the south. At this location the 171-lot Birch Bay View subdivision is fully built out with single-family residences. A 40-acre parcel west of Birch Bay View is owned by Ocean View Farms LLC (Avista property owner), and the Avista application materials reference this property as a possible future expansion. To the south and southeast, the Horizon at Semiahmoo subdivision is under construction.

6. Adverse Impacts. As conditioned, the proposal is not found to create significant impacts. Pertinent potential impacts are more specifically addressed as follows:

A. Section 303d Waters. The SEPA Appellants have not established any adverse impacts to Clean Water Act Section 303d waters (waters identified as impaired or threatened due to water quality issues). A outlined in FOF 7A, the City's stormwater standards already impose comprehensive water quality standards that integrate all known, available, and reasonable methods of water quality treatment. The Appellants have not identified any pollutants that would bypass this treatment to further jeopardize the impaired condition of these waters.

At the outset, it should be recognized that the Examiner likely has no jurisdiction to directly address Clean Water Act violations in this permit review. The Clean Water Act is a federal statute. The Examiner's

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Order with the condition that Mr. Pointer took some specified measures that made him accountable for his participation.

jurisdiction is limited to applying City adopted standards. However, Section 303d designations do reveal impaired water conditions that can be exacerbated by a development project. Such impacts are arguably within the ambit of SEPA review. The contrary argument would be that impacts are adequately mitigated by enforcement of the Clean Water Act with the agencies empowered to do so. In any event, the Appellants have presented no evidence that the proposal would exacerbate the poor water quality of any impaired water body. The SEPA responsible official determined that no added water quality protection measures are necessary beyond those imposed by the City's stormwater regulations. That determination is due substantial weight.

B. Aquifer. As determined in COL No. 3, the Examiner has no jurisdiction to address aquifer compliance issues with the City's Critical Areas Ordinance. However, the parties did not object to evidence presented on aquifers on that basis. To prevent a remand on this issue should a court find CAO compliance still subject to review, findings on the aquifer are provided below

The weakest point of the City's defense is its CARA determination. The City's closing brief asserts that the City's CAO "*requires a detailed study only where a proposal is within a City designated aquifer recharge area*." City Closing Brief, p. 10. That is certainly correct. However, the record is far from clear that the project area is not in a designated aquifer recharge area. BMC 17.82.490D provides that designated aquifer recharge areas include areas overlying unprotected aquifers used as a source of potable water.

It is uncontested that Whatcom County critical area maps show the project site encumbered with a Critical Aquifer Recharge Area while the maps of the City do not. BMC 17.82.060E provides that "*critical area maps shall be utilized as a source of generalized information and shall not be used to determine the absolute presence, absence, or boundaries of a critical area or as substitute for site-specific assessment*."

The critical area maps of both the City and County do not appear to have been specifically adopted by ordinance or resolution. As such judicial notice cannot be taken of them. The County's CARA map is included in Ex. A68, pdf p. 3. It depicts the project area as being mostly encumbered with high aquifer susceptibility areas and some moderate susceptibility areas in the southeast portion. The City's map does not appear to be in the record.

The SEPA parties differ as to the accuracy of the CARA maps. Mr. Pointer in his closing brief, p. 5, asserts that the City's CARA map traces back to a "1996 Golder report" (not in evidence) that didn't study the Sumas-Blaine aquifer beneath the project site. The brief further asserts that the County's map is based on "work" that did evaluate the underlying aquifer and concluded that it had high susceptibility. Mr. Pointer is not an engineer, geologist or hydrogeologist. He has no training or expertise to question the best available science basis of the County or City maps. He provided no documentation to support his opinions regarding the CARA maps, including the studies upon which they were based.

The Applicant's civil engineer, Craig Parkinson, testified that the County map is inaccurate. Mr. Parkinson consulted with someone from the County who told him that the County didn't consider its CARA map to be accurate and confirmed that the map designated the aquifer as surficial at the project site. Mr. Parkinson searched well records and only found one well near the site. The well is just over 200 feet deep with low three gallon per minute capacity. Mr. Parkinson interpreted this to mean that there's limited groundwater capacity and it's likely not influenced very heavily from surface water or surficial groundwater because of an impervious layer. He noted that the Applicant's geotechnical report found an impermeable layer at about four foot depth across the project site based upon 14 test pits across the Avista project site. Tr. 61-62. Mr. Parkinson is a licensed Professional Engineer with 35 years experience working on land use projects. Ex. S1.

Mr. Wenger testified that the City's critical area maps are indicator maps that provide initial guidance as to the potential presence of critical areas. Mr. Wenger did not believe that the contradictory information of the County maps served as grounds for additional investigation. Tr. 299.

A more robust defense of the City's CARA map by the City would certainly have been merited here. The fact that there's a conflicting county CARA map should have put the City on notice that there may be differences of qualified opinion on the presence of a CARA. At the least, the City should have been able to give a best available science explanation as to why its map should be considered more accurate than the County map.

On balance, the City's determination of no regulatory protected CARA is supported by substantial and preponderance of evidence when coupled with the substantial weight to be given to the findings of the SEPA responsible official. Substantial weight must be given to the SEPA Responsible Official's determination that the City's CARA map serves as a reliable indicator of the presence of a regulatory protected CARA. The presence of

impermeable layers at the project site coupled with Mr. Parkinson's testimony supports the finding that any aquifer present at the site would not qualify as a regulated aquifer under BMC 17.82.490D, which requires drinking water aquifers to be unprotected. The only credible countervailing evidence is the County's CARA map that Mr. Parkinson's hearsay testimony provides is unreliable.

C. Wetlands. As determined in COL No. 3, the Examiner has no jurisdiction to address compliance issues with the City's Critical Areas Ordinance. However, the parties did not object to evidence presented on wetlands on that basis. To prevent a remand on this issue should a court find CAO compliance still subject to SEPA review, findings on the wetlands are provided below. The proposal is not found to create any significant adverse impacts to wetlands because the Applicant's wetland delineations and classifications conform to the City's critical area regulations.

i. ***Applicant Delineation/Classification.*** The Applicant prepared wetland delineation report that classified and delineated the on-site wetlands, Ex. C18 and C225. The Applicant's wetland analysis was subject to peer review by Perteet. Perteet's report agreed with the Applicant's review and found it to conform to the City's critical area regulations. Ex. C211.

The Applicant's wetland report found four Category III wetlands subject to 75-foot buffers and one Category IV buffer with a 50-foot buffer.

ii. DOE Comment. SEPA Appellants relied heavily upon comments from DOE that expressed a couple concerns about the Applicant's wetlands determination. See Ex. C69. One concern was that it appeared some proposed trails were crossing into the wetlands of the site. The other was that as DOE believed there may be more wetlands than designated in the Applicant's wetland report due to the observance of saturated soil conditions in aerial photographs.

The staff report responds that the trails observed by DOE were not depicted in the PUD site plan and construction drawings recommended for approval. The trail crossings were instead erroneously identified in a civil drawing depicting utility infrastructure. To remove any confusion on the issue, Condition No. 94 prohibits any proposed wetland trail crossings.

As to the potential presence of additional wetlands, that DOE determination was only attributed by DOE to a review of aerial photographs. The DOE comments on this issue are due very little weight because they were not

present at the hearing for cross examination. The DOE letter also identified the documentation reviewed for its determination. That documentation didn't include the peer review by Perteet that confirmed conformance to the City's wetland standards. DOEs recommendation regarding its concern over more wetlands was to have further evaluation conducted.

Perteet essentially conducted the additional investigation recommended by DOE with its peer review. The Perteet review is the further evaluation recommended by DOE. Given (1)that DOE was not present for cross-examination; (2) that DOEs site observations were limited to aerial photographs; and (3) that the Applicant's wetland delineation was peer reviewed as requested by DOE, substantial and preponderance of evidence establishes the Applicant's wetland delineations as accurate.

iii. Army Corps Comment. The Army Corps of Engineers also submitted a comment noting that the drainage ditches proposed to be filled by the Applicant may qualify as waters of the United States that would require an Army Corps permit. Perteet's peer review confirmed that Applicant's wetland report findings that the drainage ditches are artificial watercourse created out of non-wetland areas as defined by BMC 17.82.540. The Army Corps letter did not indicate whether the Army Corps had investigated the history of the ditches to determine whether they were artificial. The Army Corps was also not present for cross examination at the hearing so its comments like those of DOE are given little weight.

BMC 17.82.100(6) exempts artificial watercourses from critical area review. Given the peer-reviewed findings that the drainage ditches qualify as artificial and no evidence to the contrary, the filling of the ditches is found exempt from City critical areas review. If Army Corp regulations still require an Army Corps permit, that's a federal compliance issue outside the scope of this review. This permit review doesn't enforce federal regulations except as integrated into state or local law.

iv. Stormwater Impacts. The Appellants have correctly identified that the proposed drainage system moderately fails to meet stormwater manual hydroperiod requirements. A condition of approval requires the conveyance system to be redesigned as necessary to conform to the hydroperiod requirements.

Appendix C, p. 189 of the Manual requires wetland hydrology shall not be increased or decreased by more than 20%. The Manual requires hydroperiod modelling for a 365-day period with stormwater volumes averaged on a daily basis. P. 189 provides that "*[n]o day can exceed 20%*

change in volume." The modelling conducted in the Applicant's stormwater report includes the required modelling with two days exceeding the 20% variance for Wetland B. The report concludes as follows:

> *....The results of the daily Wetland Input Volume Analysis are provided in the WWHM analysis included in Appendix C. These daily values are also within the acceptable DOE Manual tolerance and are identified as "Pass" except for two days (November 2 and 3). These two values, at 124.8 and 127.5, are only slightly greater than the 120.00 threshold value.*
>
> *Based on the variability of the actual site conditions with the model input parameters (i.e., the actual permeability of the in-situ existing and developed site soils v. the model assumed values, the variability in the water consumption and evapotranspiration rates in a mature v. secondary growth forested area and densely v. sparely vegetated pasture, etc.) the fact that only two days did not meet the threshold requirement, and then just slightly, does not appear to be significant. The proposed changes in the developed condition will therefore have an acceptable Wetland Input Volume response and meets the DOE Manual criteria for providing Wetland Hydroperiod Protection.*

Ex. C21, p. 21.

The Manual does not allow for any minor deviation from its 20% variability cap. The fact that the proposed stormwater controls are operating so close to the tolerance edge as to sometimes exceed it shows that more work needs to be done to bring the controls safely within tolerance levels.

Recommended Condition No. 26 of the staff report has been revised by the City in their closing brief to specifically require conformance to Manual hydroperiod standards for all "future preliminary plat applications." Condition No. 26 has been further revised by the Examiner to include Phase I in the requirements for hydroperiod conformance.

v. Buffer – Polluted Waters. Appellants claim that the buffer for Wetland C was incorrectly calculated. This was apparently based upon the findings of the Appellants' sole hearing expert, Oliver Grah[9]. The buffer is

[9] The Appellants' witness list identifies Mr. Grah as an environmental civil engineer. Mr. Grah acknowledged at the hearing that he is not a licensed engineer. Tr. 186. However, Mr. Grah has a master's degree in water science and has served as the senior planner, supervisor and natural resources

found to be correctly calculated as set by the Applicant's biologist and confirmed by another biologist in peer review. The Appellants' buffer argument was incorrectly based upon factors that only apply to depressional and flats wetlands. Wetland C is a slope wetland.

Wetland buffers are set by BMC 17.82.340B. Buffer width for each class of wetland is set by its habitat function score. Habitat function scores in turn are set by the most recent edition of the Washington State Department of Ecology's Washington State Wetlands Rating System for Western Washington. BMC 17.82.310. In applying BMC 17.82.340B it must be recognized that that habitat scores set in that section are based upon an older version of the Rating System. The current, 2014, rating system uses different values for habitat scores. The DOE website includes a table that translates the 2004 habitat scores into the 2014 scores.

The Applicant's wetland report assigns a habitat function score of 7 to Wetland C. A habitat function score of 7 is equivalent to a score of 20-28 under the 2004 rating system. The Appellants assert that the score is 9[10], which is equivalent to a score of 29-36 under the 2004 rating system. BMC 17.82.340B requires a 75-foot buffer for Class III wetlands under the Applicant's 20-28 score and a 225-foot buffer for Class III wetlands under the Appellant 29-36 score.

The Appellants assert that the Applicant's 7 score is two points too low because it fails to add one point for the fact that the wetland is hydrated from a pollution generating surface, i.e. a golf course and a second point because the wetland discharges into a Clean Water Act impaired 303d water.

In their closing brief the Appellants initially erroneously identified these two added points as being required by Sections H1.1 and H.1.3 of the wetland ratings forms of the Rating System. The Applicant's correctly responded that these two sections only add points for plant structure community and plant richness. Those factors have nothing to do with pollution generating surfaces or polluted receiving waters.

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manager for Whatcom County. His responsibilities focused upon CAO and clearing and grading regulations. He has taught courses in wetland delineation. Tr. 189.

[10] The appellants actually argue the score is 8 because they incorrectly reference the Applicant's score as 6. The 2004 score for 8 or 9 is the same, i.e. 29-36. The Appellants' erroneous reference to the Applicant's habitat management score makes no difference in the resulting buffer requirement.

In reply the Appellants then asserted that the two added points are required by Section D of the rating form. Section D does add two points for the pollution factors identified by the Appellants. However, as identified on the form itself and Section 5.2 of the Rating System, Section D only applies to depressional and flats wetlands. Wetland C is neither. It is a sloped wetland. The Ratings System does not require two additional habitat function points for sloped wetlands due to the pollution factors identified by the Applicant. The Applicant's habitat function score is thus correct as is the resulting 75-foot buffer.

v. Wetland Data Point – Missing Hydrology. The Appellants closing brief also makes a highly illogical claim that an area not found to be a wetland in the Applicant's wetlands report was erroneous because it didn't find the hydrology necessary to establish a wetland area. The Applicant's wetland forms correctly concluded that an area without wetland hydrology does not qualify as a wetland area.

An area qualifies as part of a wetland if it contains three wetland indicators, specifically (1) wetland vegetation; (2) hydric soils; and (3) wetland hydrology. See p. 9-10, 1987 Army Corps of Engineer Manual; BMC 17.82.300. The City's wetland regulations include detailed standards for identifying how areas qualify for these three indicators and forms that must be filled out to apply these standards. The forms require the evaluator to check off boxes that correspond to site characteristics that qualify as wetland hydrology.

The delineation form for test pit SP-64 left the hydrology blanks all blank because no hydrology characteristics were present. On this basis, the SP-64 area was found not to qualify as wetland. The closing brief concludes that *"[a] boundary point like SP-64, with no recorded hydrology parameter, cannot satisfy the three-parameter requirement*." P. 20. Of course, that's just the point. If a sample point doesn't have wetland hydrology, hydric soils and vegetation, then there's no wetland. That was the correct conclusion of the wetland report.

The Appellants based part of their SP-64 argument on the assertion that SP-64 was "hydrologically connected" to SP 63. SP-63 does have wetland hydrology. That point is identified in the middle of Wetland C in Figure 3 of the wetland delineation while SP-64 is shown on the upland edge. The Appellants haven't done a site visit and there's no information in the record that would suggest that the two points are hydrologically connected beyond just being close to each other. Perhaps the Appellants believe that all points on the boundaries of wetlands have wetland hydrology but fail to qualify as

wetlands due to lack of hydric soils or wetland vegetation. If that's the reason, they didn't supply that information or any evidence to support it. As presented, the Appellants have not identified any deficiency in the evaluation of SP-64.

vi. Disturbed Soils. A final assertion by the Appellants is that the Applicant failed to take into consideration disturbed soil conditions when assessing the presence of wetlands. The Applicant correctly found that disturbed soil methodology was not necessary to classify and delineate the wetlands of the project site.

Recently disturbed soils can eliminate the indicators of wetland hydrology, hydric soils and/or wetland vegetation necessary to evaluate the presence of wetlands. Chapter 5 of the Western Supplement to the Wetland Delineation Manual provides alternative techniques for assessing the presence of wetland indicators due to soil disturbance.

The author of the Applicant's wetland study, William Cantrell, testified that the project site had been stable for over 20 years and that there was no difficulty in assessing the presence of wetlands. Tr. 325. The peer reviewers of the report, who did a site visit, also found no need to resort to the Chapter 5 procedures for assessing disturbed soils.

The Appellants presented no evidence as to why the soils should be considered disturbed enough to qualify for Chapter 5 assessment methodology. The only thing Mr. Grah could point to was the DOE comment that aerial photographs suggested some saturated soil conditions and acknowledgment by the Applicant's wetland expert that the soils had been disturbed more than 20 years ago. Mr. Grah presented no aerials demonstrating the timeline and extent of disturbance, identified no document research of his own addressing what site disturbance had occurred, no explanation as to how those site disturbances could mask or eliminate wetland indicators and no evidence of potentially more wetland other than the DOE comment supporting the position that more wetlands could be present. The Applicant's wetlands biologist and the peer reviewer both conducted site visits and the Applicant's biologist also did his own research on the historical disturbance of the site. The balance of evidence was on the side of the Applicant, even without any deference due the findings of the SEPA responsible official.

D. Natural Features. Natural features are adequately maintained. The PUD preserves the wetland and wetland buffers on the site. The site is partially forested, containing stands of mature trees. Perimeter buffers and forested open

space will be retained. To retain and protect trees with a high retention value to the maximum extent possible, Condition 53 requires the Applicant is required to work with a certified arborist or similarly qualified professional to inventory significant trees (evergreen or deciduous, six inches in diameter or greater, measured four feet above existing grade) within the designated natural open space areas and perimeter buffers, assess the health of trees, and provide recommendations for management practices.

7. Adequacy of Infrastructure and Public Services. The proposal provides for adequate and appropriate infrastructure as follows:

A. Drainage: The proposal provides for adequate and appropriate drainage facilities because they have been designed in accordance with the City's stormwater standards by the Applicant's engineer, Mr. Parkinson. Mr. Parkinson's stormwater report, Ex. 21, provides detailed explanation, data and computer modeling establishing conformance to the City's stormwater regulation. That conformance was verified by the City's on-staff civil engineer as well as independently peer reviewed by another engineer from Pacific Engineering. Tr. 23, 253, 261.

i. Background. The proposal is vested to the 2019 version of the Department of Ecology Stormwater Management Manual for Western Washington . The Manual incorporates stringent water quality control measures as required by the Washington State Department of Ecology that incorporates all known, available and reasonable methods of stormwater prevention, control and treatment (AKART) that applied at the time the manual was released in 2019. *See* RCW 90.52.040 and RCW 90.48.010. Those standards include requiring that off-site flows generated by the proposal do not exceed forested predeveloped conditions of the project site. They also include stringent requirements designed to protect water quality.

The flow controls proposed by the Applicant include a road catch basin and conveyance system that will convey the collected runoff to a combined stormwater treatment wetland and detention pond located in the southeast corner of the project site (Tract E). Computer modelling was used to estimate off-site flow rates generated by the proposed development. The stormwater report, prepared by a civil engineer, concluded as follows:

> *The proposed project's stormwater management will meet the current DOE Manual requirements, which includes detaining the developed site's runoff to a forested condition. The detained runoff flow rate at a forest condition rate is anticipated to be less than the current flow rate due to extensive areas currently used as*

pasture/hay fields. This detained runoff is therefore anticipated to have a negligible effect on the downstream stormwater conveyance system.

Ex. 19, p. 5-6.

ii. 809% Exceedance. Appellants identify data points from the computer modelling of the Applicant's Ex. C21 stormwater report that they claim to violate flow rate standards. Most notably, the Appellants open their closing brief argument by identifying data points that shows flows exceeding predeveloped flow rates by 809% and 4,551%. The data used by the Appellants doesn't apply to Avista flow rates. The data is background information used to show the flow rates from future development conditions of the entire basin flowing into Roger's Slough stormwater facilities.

The flow data used by the Appellants was taken from Appendix B of the Applicant's stormwater report. Appendix B is entitled "Background Documents." One of the three studies included in Appendix B contains the flow rates cited by the Appellants, specifically a 2011 report entitled Roger's Slough Preliminary Design Concepts. That report assesses the impact of future development of the drainage basin that contributes stormwater to Roger's Slough stormwater facilities. The report identifies a flood control gate that serves as the major flood control facility of the basin. The report uses the modelling referenced by the Appellants to estimate how the gate will function under future development conditions. The report found that the gate currently functions within capacity but that this capacity will be exceeded in the future due to flow exceedances such as the 809% and 4,551% referenced by the SEPA Appellants.

Drainage from the Avista site will ultimately pass through the Roger's Slough facilities. However, the proposal won't be increasing the flow rates through those facilities. As previously noted, flow rates are likely to be less as a result of the flow controls included in the proposal. As a result, the proposal will actually likely help prevent the exceedances estimated in the background document from occurring. As a matter of constitutional law, a development project can only be required to proportionately mitigate impacts that it creates. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). In this case, the proposal will likely be improving upon

the flow rates currently generated by the project site. Phase I[11] won't be increasing the flooding problems in Roger's Slough as regulated by the City's Stormwater Manual. As such, there's no basis for requiring additional mitigation.

In contrast to the flow rates affecting off-site stormwater facilities, the Appellants have established the flow rates modestly exceed the flow rates authorized as input to Wetland C. That issue is separately addressed under FOF No. 6C above.

iii. Cumulative Impacts. No significant adverse cumulative stormwater impacts are found associated with the proposal. The proposal will likely be reducing off-site flows and will use AKART standards to prevent off-site contamination. In this regard, even in combination with other projects, the proposal will not contribute to any increase in cumulative adverse impacts.

The Appellants assert that off-site flow rates should be assessed cumulatively with flows generated by other development in the area. The Appellants cited to the Birch Point Sub-watershed Drainage Study, Ex. C210, which identifies an 8.8 cfs capacity deficit and an 81.3% increase in the 25-year peak flow in the project area.

The Ex. C210 Study certainly does establish a reasonable likelihood of increased stormwater flows. However, the report acknowledges that these increases would be attributable to projects that fail to implement adequate stormwater flow control. Section 4.1 of the report concludes that "*[s]tormwater runoff will increase with future development* ***if*** *stormwater controls are not properly implemented*." (emphasis added). Section 4.2.2 provides that *"[f]uture conditions peak flows entering the wetland from upland areas (S-1) will be higher than existing conditions* ***if flow control is not provided with future development***." (emphasis added).

The Ex. C210 study doesn't explicitly identify whether it considers DOE Stormwater Manual regulations to provide for adequate stormwater controls. As previously identified, the City has adopted the DOE Stormwater Manual. The DOE Stormwater Manual is what is required for areas subject to Whatcom County's National Pollutant Discharge Elimination System (NPDES) Phase II permit coverage area. The Ex. C210 study suggests that it considers the Manual to be sufficient in Section 3.1 as follows:

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[11] In its plat applications for other Avista phases, the Applicant will be required to establish no increase in flow rates over predeveloped conditions for the future phases as well.

> *In 2013, the Birch Bay Urban Growth Area (UGA), which includes portions of the Birch Point study area, was added to Whatcom County's National Pollutant Discharge Elimination System (NPDES) Phase II permit coverage area. Coverage under this permit requires the County to implement minimum standards for maintenance of the existing stormwater system. Flow control and water quality treatment for new development will be required to meet more stringent minimum technical requirements specified in the* [DOE] *Stormwater Manual for Western Washington. However, a significant portion of the Birch Point subwatershed is outside the NPDES boundary and could potentially develop without flow control.* ***For these areas, an increase in peak stormwater runoff rates may occur with redevelopment*** *so the future developed land use condition is included as part of this analysis.*

(emphasis added).

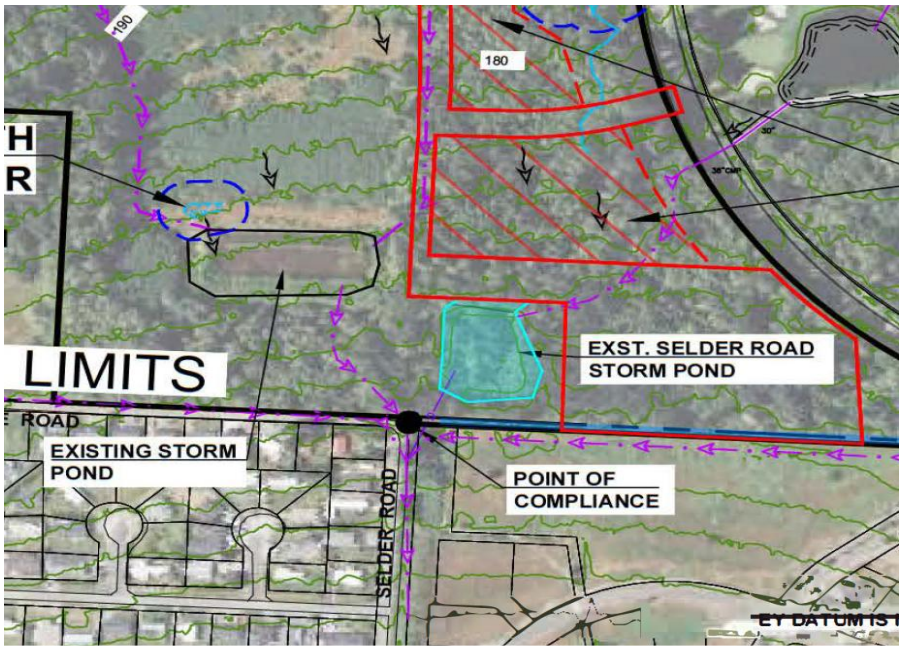
If the proposal won't be increasing off-site flows, there's no need for a cumulative impact analysis on off-site flow rates. The Applicant can't be required to fix problems caused by other development and the proposal won't be contributing to those problems. The Applicant's civil engineer testified that off-site flow rates will not be made any worse by the proposal. Tr. 420. As previously noted, the off-site flow rates will likely be less as a result of the proposal. Substantial weight must be given to the findings of the SEPA responsible official, which includes finding that stormwater impacts are code compliant and don't increase off-site flow rates. The Appellants have provided no evidence that the AKART standards integrated into the DOE manual are insufficient to prevent increases in off-site flows or that the Applicant has failed to meet those standards. The Applicant has established that the proposal will not increase off-site flow rates within the parameters set by the DOE manual. There is no basis to conclude otherwise.

Appellants have also failed to identify how the City's AKART stormwater regulations fail to prevent cumulative water quality standards. The stormwater AKART water quality standards are derived from the expertise of DOE and the engineers and scientists that help DOE put those standards together. Mr. Pointer only puts up his lay opinion as to the adequacy of those standards. Mr. Pointer asserts that the DOE regulations don't treat for 6PPD-quinone and that this chemical is toxic to fish. That could very well be the case. However, Mr. Pointer presented no studies, expert testimony or any other evidence other than his own lay opinion based upon studies that haven't been admitted into the record. In the absence of any evidence supporting Mr. Pointer's opinion in this administrative record, Mr. Pointer's lay and unsubstantiated opinion on

cumulative water quality impacts is not found sufficient to overcome the AKART expertise on water quality integrated into the City's stormwater regulations coupled with the substantial weight due to the SEPA responsible official.

iv. Existing Stormwater Ponds. The Appellants assert that a couple existing on-site detention ponds must be brought up to current standards for the proposal. However, none of these ponds will be used by the development. As previously noted, the Applicant can only be legally required to mitigate the impacts it creates. It cannot be required to remedy existing problems.

The two existing on-site ponds at issue are in the southeast corner of the project site as depicted in Figure 1 of the Ex. C21 stormwater report. Figure 1 has been cropped below to show the two ponds as located just north of the northern terminus of Selder Road at the southeast boundary of the project site. The pond overlayed in blue will be referenced as the Selder Pond. The pond to its northwest outlined in black will be reference as the 30,000 square foot pond.



Excerpt of Figure 1 of the Ex. C21 stormwater report.

As explained in Section 3.3 of the Ex. C21 stormwater report. The pond currently receives runoff from the golf course, some residential areas inside the Semiahmoo Residents Association (SRA), Semiahmoo Parkway, and eastern

side of the proposed Avista development[12]. The Avista development is proposing to ultimately develop approximately 10.1 acres of the 22.6 acres currently draining into the Selder Pond. Runoff from this developed area will be diverted to the proposed (not currently existing) Avista Sunrise Development pond. The proposed pond will treat the stormwater for water quality and then reduce flow rates to a forest condition before discharging downstream of the Selder Pond. Ultimately, the diversion to the proposed pond will result in less flows to the Selder Pond.

The 30,000 square foot pond will also not be taking any run-off from the first phase of the Avista development. The pond will be used for future phases. Condition No. 25[13] requires the pond to meet DOE Stormwater Manual design standards for future phases. That issue will be addressed when preliminary plat applications are submitted that propose to use the 30,000 square foot pond.

The Appellants have presented no evidence that the first Avista phase will be draining into either of the two on-site detention ponds. Instead they assert without any legal authority or explanation that the ponds should be brought up to current standards and that they should be maintained. It is uncontested that the ponds may not meet current design standards. Since the development won't be using the ponds or impairing the function (other than actually reducing flows to the Selder pond), the first phase of development is not exacerbating any adverse impacts created by these ponds and thus has no duty to mitigate those impacts.

v. Baseline. The proper baseline was used to assess stormwater impacts.

The Appellants assert that the City used the wrong baseline for assessing stormwater impacts. The proper baseline for assessing SEPA impacts is the current condition of the existing environment. *King Cnty. v. Friends of Sammamish Valley*, 3 Wash. 3d 793, 822, 556 P.3d 132, 147 (2024). The pertinent baseline for stormwater impacts is off-site stormwater flows generated

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[12] See Section 3.3 of the Ex. C21 stormwater report.

[13] The Appellants assert in their closing brief that the Condition No. 25 is an unpermitted vague promise of future compliance. See p. 6. Far from it, Condition No. 25 relies upon the detailed requirements of the City's Stormwater Manual and makes the simple clarification that the stormwater facilities meet those standards. As with this phase, the Applicant will be required to prepare a detailed stormwater report for each subsequent phases of development. If any existing stormwater facilities are used for that particular phase, the Applicant will have to ensure that the design of the facilities meets the design standards to which that phase vests.

by the Phase 1 development area. The Appellants assert that the two ponds discussed above should have been included in the baseline The current condition of the environment as related to that baseline is two ponds that likely don't meet current design standards and are not subject to any maintenance requirements. Phase 1 development won't be using these ponds or in any way impairing their function. Since Phase 1 won't be using the ponds, it will not be changing the baseline of the off-site flows they're generating except to improve upon the Selden Pond baseline by reducing flows to it. Since the proposal won't be increasing off-site flow rates from either pond, there's no adverse change in base line and no corresponding duty to mitigate.

The Appellants also assert in their reply brief that the impacts of a stormwater pond located offsite to the north of the project site was erroneously not included in the baseline. The proposed development doesn't divert any water into that off-site pond -- the off-site pond is located upstream from the development site. The Applicant's civil engineer testified that the flows from the north pond don't flow into the Phase 1 development area but rather flow to the west instead. Tr. 374. His conclusions are supported by the flow directions depicted in Figure 1 of the Ex. C21 stormwater report. Mr. Pointer alleged in his cross-examination that the north pond has flooded into the east portion of the site. Tr. 277. Even if that's the case, there's nothing to suggest that this type of flood event would result in the proposal exceeding the current baseline of off-site flows generated by the Phase I development site in violation of the Stormwater Manual flow control standards .

vi. Climate Change. The Appellants assert that the hydrological modelling fails to use current precipitation data that reflects the impacts of climate change. However, the Applicant's data is that required by DOE. The Applicant could not use more current data short of creating its own computer model and having that model approved by DOE.

The Stormwater Manual requires the Applicant to demonstrate via stormwater modelling that its stormwater system can meet Manual standards. Section III-2.1 limits the modelling to modeling programs approved by DOE. Section III-2.2 of the Manual references the DOE stormwater website as listing the currently approved stormwater modeling programs. The Applicant's stormwater report applied the 2012 edition of the Western Washington Hydrology Model. That model was developed in coordination with DOE to model stormwater flow and infiltration rates. The 2012 edition of the model as applied in the Ex. C21 stormwater report uses precipitation data from 1948 through 2009.

The Appellants assert that more recent data is necessary to accurately predict new weather patterns caused by climate change. The Appellants cite statistics

in their closing brief showing an increase in precipitation over historical patterns. This information is not admitted into the record because it's based upon studies that weren't included in the Appellants' exhibit list. However, even if such information could be considered, models using more recent data have not yet been approved by DOE. As previously noted, only DOE approved modelling can be used to model stormwater hydrology. The DOE website in its "Summary of WWHM2012 Updates" notes that the most recent version uses precipitation data through 2009 for the Blaine area.

No information at the DOE website could be found on any hydrology manual that has more updated precipitation information than 2009 for the Blaine area. The Appellants have identified no such manual. The DOE website authorizes the submission of new models for approval. Given that DOE only has the resources to update the WWHM model every few years, it would be unreasonable to expect a developer to make their own model. The record shows that the Applicant has employed the most recent precipitation data reasonably available and authorized for its project. Nothing further can be required under the Stormwater Manual.

vii. Infiltration. The Appellants challenged the conclusions of the Applicant's geotechnical engineer that infiltration was not a feasible stormwater control measure. The Applicant's geotechnical report applied the feasibility criteria of the geotechnical report to come to this conclusion. Mr. Pointer asserted in his closing brief without attribution that the infiltration conclusions were based upon soggy lawns and homeowner preferences. There was no reference to soggy lawns or homeowner preferences in the geotechnical report. The geotechnical conclusions were based upon low permeability soils and high perched groundwater that could not meet the 3-foot vertical separation requirements of the Stormwater Manual. Given these factors, the Applicant's engineer is found to have correctly determined in his Ex. C21 stormwater report that infiltration is not feasible for the project site.

B. Transportation: The proposal provides for adequate and appropriate transportation facilities.

Impacts on transportation infrastructure were assessed in the Applicant's traffic impact analysis, Ex. C25. The analysis found that the Avista subdivision is estimated to generate over 419 peak-hour trips as determined in the submitted traffic impact analysis. The City's adopted intersection level of service (LOS) is D. Impacts to the City's road network were found to meet this congestion standard with planned City improvements. However, impacts to the unincorporated county network did need some proportionate share mitigation from the Applicant. The analysis recommended Applicant payment of

$295,118.98 for improvements for two County intersections. Whatcom County found this amount insufficient and filed its SEPA appeal on that basis. The settlement agreement between the parties that led to withdrawal of the appeal increase the required payment to $678,000 for three intersections.

The pending SEPA appeal and October 22 notification of Whatcom County's intent to withdraw their SEPA appeal based on the voluntary mitigation agreement precluded issuing a Certificate of Traffic Concurrency prior to the cutoff date of exhibit submittals to the Hearing Examiner. The proposed mitigation elements will be incorporated into a Certificate of Traffic Concurrency issued after the hearing.

The proposal will also be subject to traffic impact fees under Chapter 3.80 BMC. Those fees are designed to require payment for proportionate demand upon the City's park system. Those fees become due during building permit review.

The City's 2009 Non-Motorized Transportation Plan calls for a multimodal trail and on-street bike lane along Semiahmoo Parkway. The project is not constructing any portion of the Parkway. As such, on-street bike lanes along Semiahmoo Parkway will be addressed uniformly by the City during a future roadway capital project for safety reasons. A separated, 10-foot paved trail exists today for bicycles and pedestrians. The City's rationale is that requiring the developer to widen Semiahmoo Parkway drive surface to add a bicycle lane along the Project frontage would create abrupt and unsafe conditions, essentially due to a bicycle lane beginning and ending at the Project.

BMC17.124 proscribes two spaces per residential unit. The Avista Master Plan calls for four parking spaces per residence (two in garage plus two in driveway). Parking adequacy will be reviewed during the permitting process for each lot as well as for all other proposed development.

C. Parks and Open Space: The proposal provides for adequate parks and open space. The Park and Open Space plan depicts a one-acre community park.

Phase I offers 6.72 acres (20%) of open space, which includes the 3.15-acre Nexus Park[14]. Additional open space amenities include two small neighborhood parks, and a public plaza. A one-hundred-foot buffer (80-foot open space buffer volunteered by the Applicant and a 20-foot required PUD buffer) is proposed along Semiahmoo Parkway. The draft open space plan included on page 23 of

[14] Other parts of the staff report limit references of parks in the first phase as a one-acre part. See, e.g. p. 46 Either way, the proposal provides for ample open space.

the Avista Master Plan, Ex. C11, lists percentages totaling 35.33 acres (19.5%) of community open space across the entire 181-acre site, but does not depict locations of the majority of the required open space. Condition No. 43 requires the master plan to clearly depict all usable open space areas.

The recommendations of the staff report also assure adequate open space between proposed buildings and to serve as buffering along the project perimeter. The Applicant had proposed variable setbacks between buildings along with creation of an architectural committee to authorize even further reduced setbacks. The staff recommendation, adopted by this recommendation, set static setbacks that ensure adequate passage of light and air as required by PUD regulations. The Applicant's 100-foot perimeter buffer provides excellent buffering to surrounding uses.

The proposal will also be subject to park impact fees under Chapter 3.80 BMC. Those fees are designed to require payment for proportionate demand upon the City's park system. Those fees become due during building permit review.

D. Water and Sewer: The proposal appears to provide for adequate and appropriate sewer and water. Public works has recommended several conditions adopted by this recommendation designed to provide for adequate water and sewer infrastructure consistent with City public works standards. Public works determined in Ex. C52 that as described in the 2021 Comprehensive Water System Plan and based on supply calculations since issuance of the plan, the City has adequate installed source of supply.

E. Schools and Walking Conditions to Schools: As conditioned, the subject site is served by adequate and appropriate school facilities and safe walking conditions to and from school.

The Blaine School District will be serving the project site. Consideration of school bus stop locations and safe walking conditions to school was not provided. The nearest public school is located almost six miles from the Avista Property. Condition 35 requires the Applicant to consult with the Blaine School District to determine the best placement for school bus stops. This includes an assessment of the walking conditions to identify school bus stops. To the extent proportionate to project impacts, the Applicant shall install improvements as necessary to assure safe walking conditions to school bus stops as part of their construction drawings and shall be included in approved civil plans.

F. Public Services. The proposal provides for adequate public services. The City Public Works Department has reviewed the Avista Project for public services

availability and submitted a list of recommendations, Ex. C52, that are included as recommended conditions of approval.

8. Superior Design. The proposed PUD design is superior and more creative than would be offered under preliminary plat review. The design includes a community park, private open spaces and transition buffer areas, an integrated pedestrian circulation plan providing internal circulation and transportation options to the east-west and north-south, varied lot sizes to add visual interest, and recreation facilities. Conceptual architectural renderings have been provided that indicate the style of homes and construction. As an integrated whole, the staff report (based upon expert planner opinion) concludes that the project shows more creativity and integrated design than would be seen in a typical single-family residential development created under the subdivision regulations alone.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. BMC 2.58.070.B.1 and B2 authorizes the hearing examiner to conduct an open record hearing and make recommendations to the city council for PUD and preliminary plat applications.

Substantive:

2. Zoning. The project area is zoned Residential Planned Recreation (RPR).

3. CAO Determination. The City's Ex. C26 CAO Determination cannot be collaterally challenged in this proceeding. As pertinent, its findings of consistency with Wetland and Critical Aquifer Recharge regulations cannot be revisited. The Examiner would only have jurisdiction over that issue if the determination had been timely appealed.

BMC 17.82.065C authorizes CAO determination applications to be filed without an accompanying development permit application. The Applicant submitted their application and acquired approval prior to their preliminary plat and PUD applications. The application was approved July 6, 2023. The Applicant filed its plat and PUD applications on April 8, 2024. The CAO determination found that the application "*meets the critical area standards established in BMC Chapter 17.82*." The standards in Chapter 17.82 include protection of CARAs and wetlands. *See* BMC 17.82.490-17.82.510; BMC 17.82.300-17.82.360.

The findings of CAO consistency with the City's CAO determination cannot be collaterally challenged during plat and PUD review absent a timely filed administrative appeal of the determination. The Washington State Supreme Court has ruled multiple

times that final land use decisions cannot be collaterally challenged in subsequent permit review. *Habitat Watch v. Skagit Cnty*., 155 Wn.2d 397, 120 P.3d 56 (2005) (challenge to grading permit amounted to untimely collateral attack of earlier special use permit, where authorization for grading permit came from special use permit, whose appeal period had passed, and where sole basis for challenging grading permit was that extensions of special use permit were improper); *Chelan Cnty. v. Nykreim*,146 Wn.2d 904, 52 P.3d 1(2002); *Wenatchee Sportsmen Ass'n. v. Chelan Cnty*., 141 Wn.2d 169, 4 P.3d 123 (2000) (challenge to county's approval of plat application based on challenge to density of plat was untimely collateral attack where petitioner had not challenged rezone decision establishing allowed density for project two years earlier); see *also BD Lawson Partners, LP v. City of Black Diamond*, 165 Wn. App. 677, 690, 269 P.3d 300 (2011).

The Appellants understandably question how they could be required to appeal a permit when they receive no notice of it. That due process argument was addressed in *Durland v. San Juan Cnty*., 182 Wash. 2d 55, 340 P.3d 191 (2014). In *Durland*, the San Juan County Hearing Examiner dismissed an appeal of a building permit because it failed to conform to the 21 day appeal deadline for building permit appeals to the hearing examiner. Durland appealed on due process grounds, arguing it was inequitable to require an appellant to comply with appeal deadlines for permits issued without public notice. The Supreme Court upheld the Examiner's dismissal, summarizing its holding

> *In this consolidated case, petitioners brought an untimely challenge to San Juan County's issuance of a garage-addition building permit. Petitioners did not receive notice of the permit application and grant until the administrative appeals period had expired. Thus, petitioners claim that our court's interpretation of the Land Use Petition Act (LUPA), chapter 36.70C RCW, required them to do the impossible: to appeal a decision without actual or constructive notice of it. While this result may seem harsh and unfair, to grant relief on these facts would be contrary to the statutory scheme enacted by the legislature as well as our prior holdings. Indeed, we have acknowledged a strong public policy supporting administrative deadlines and have further explained that "[I]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner." Chelan County v. Nykreim, 146 Wash.2d 904, 933, This court has faced numerous challenges to statutory time limits for appealing land use decisions and has repeatedly concluded that the rules must provide certainty, predictability, and finality for land owners and the government….* …

182 Wash. 2d at 59–60.

Durland's holding in part was based upon the fact that Mr. Durland had no protected property interest at stake in his appeal. Durland appealed the building permit because it authorized a building height next to his home that he believed to violate County height standards. The Court found no protected private property interest because the County's height standards referenced protection of public views but not private views. 182 Wash. 2d at 74.

The intent section of the City's CAO doesn't indicate whether its protections are directed at the public generally or persons in particular. Safe drinking water is certainly a more significant consideration than view impacts, but the degree of impact didn't appear to be a relevant consideration in the Durland's analysis of public verses private entitlement. The only indication on the entitlement nature of the regulations is BMC 17.82.010C6, which provides that one of 17.82's objectives is to protect the "public" from natural hazards such as flooding. Absent any clearer indication of any protection of private interests, the notice procedure itself for CAO Determination process is determinative. The City Council didn't find the private interests of potentially affected residents to be significant enough to merit any notice requirement for issuance of a CAO determination. That is a fairly strong indication of the legislative intent for the City Council on protecting private interests in the City's aquifer and wetlands.

One case contrary to the holding in *Durland* is *Gardner v. Pierce Cnty. Bd. of Comm'rs*, 27 Wn. App. 241, 617 P.2d 743 (1980). In *Garland* the Supreme Court didn't hold an appellant to an appeal deadline for a negative declaration of negative environmental impact (apparently a precursor to the DOE's adoption SEPA rules governing mitigated determinations of non-significance). The Court ruled that "*[t]o require petitioner to file an appeal 10 days before the hearing under these circumstances* [without prior notice] *would be unreasonable and violative of due process*." 27 Wash. App. At 243.

The holding of *Gardner* is directly at odds with the holding of *Durland*. *Gardner* involved a 29.2-acre preliminary plat. In this regard the impacts of the subdivision were more analogous to the impacts of the subject proposal than the singe-family home at issue in *Durland*. Due process is a highly subjective legal standard and a court could conceivably find a distinction between the interests implicated in the construction of a single-family home verses those in a multi-unit plat. However, the more compelling position to take is that *Gardner* has been effectively overruled by the long line of cases that have "repeatedly concluded" (as identified in the *Durland* quote above) that appeal deadlines must be enforced. Those cases commenced with Nykriem in 2002, more than 20 years after the *Gardner* decision. Modern case law strongly dictates finality in the City's CAO Declaration. Its findings of CAO consistency on CARAs and wetlands can not be collaterally attacked in this proceeding.

It is acknowledged that finality case law is ultimately based upon strong finality legislation applicable to judicial land use appeals. RCW 36.70C.040(2) provides that "*[a] land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons…*" The City's appeal filing requirements are not as strongly worded. They simply require that appeals be filed "*within 14 days of the issuance of the formal written decision*." See BMC 17.06.180A2. Although the City's wording may not be as strong for finality as RCW36.70C.040(2), the policy reasons for finality repeatedly referenced in the judicial finality cases is just as strong. Further, authorizing collateral attacks would render the 14-day appeal deadline meaningless for projects involving permits with public hearings. Given these factors, the most compelling interpretation is that the City's administrative appeal deadlines invoke finality in the same manner as the 21-day judicial appeal deadline imposed by RCW 36.70C.040(2).

Although CAO compliance is beyond examiner jurisdiction, the argument could be made that SEPA policies can serve as an alternative means of protecting aquifers and wetlands that can be applied in addition to any CAO Determination review. A pertinent case on this issue is *Quality Rock v. Thurston County*, 139 Wn. App. 125 (2007). *Quality Rock* addressed the impact of a SEPA review on the ability of Thurston County to impose further mitigation under a special use permit on a proposed gravel pit expansion. Groundwater located at the gravel pit recharged the nearby Black River. A MDNS was issued for the project without any mitigation measures addressing recharge impacts to the Black River. The hearing examiner approved the special use permit without any mitigation for Black River impacts. On appeal, the Thurston County Board of Commissioners denied the special use permit, finding that the location for the gravel pit was not appropriate given its potential impacts to the Black River.

The *Quality Rock* Applicant appealed the denial to superior court, arguing in part that under principles of judicial finality the County could not find the location inappropriate under special use permit criteria because the MDNS had to be based upon a finding that the proposal would create no probable significant adverse environmental impacts. The Court of Appeals disagreed, noting that one of the criteria for special use permit approval was that the proposed use would not result in substantial or undue adverse affects to the natural environment. 139 Wn. App. At 141. Notably, the court found it significant that the County issued the MDNS without access to most of the Black River information that the hearing examiner and Board of Commissioners based their decision upon. The environmental checklist didn't even identify the Black River as a surface water body in the project vicinity.

The *Quality Rock* decision is somewhat difficult to reconcile with the *Habitat Watch* case, which expressly states that one permit review cannot be used to "collaterally challenge" another final land sue decision that wasn't timely appealed. *Habitat Watch*,

155 Wash. 2d at 410. It is significant that, as in *Quality Rock*, the CAO Determination doesn't expressly address the CARA issue "collaterally" reviewed by the Appellants in their SEPA appeal. However, *Quality Rock* did deal with the more specific criteria of a special use permit used to "collaterally" review an issue that could have been reviewed in the broader criteria of SEPA. This case is reversed with the collateral review following the much more specific criteria of the CAO review.

Reconciling *Quality Rock* with *Habitat Watch*, the specific CAO Determination that the proposal complies CAO regulations is determinative of CAO compliance. Although the Determination doesn't mention aquifers, it is reasonable to presume that as a matter of standard course City planning staff noted that the City's CAO map doesn't identify the project area as within a CARA and thus no mitigation is necessary. Given that the City's CAO CARA standards are more specific than any other SEPA policies addressing the same issue, the CAO CARA standards are also found to supersede rather than compliment any more broad based SEPA policies. SEPA policies that addressed aquifer issues that the CAO wasn't designed to address could still be applicable. However, no such policies are evident given that the CAO CARA regulations broadly require that CARA studies within designated CARAs shall identify the mitigation measures "*necessary to reduce potential impacts to groundwater resources*."

4. Permit Review Criteria: The PUD application is required for development within the RPR zone[15]. Planned unit development amendments are subject to the review criteria imposed by BMC 17.68.080. Preliminary Plat criteria are set by BMC 17.60.150. Relevant review criteria are quoted below and applied via accompanying conclusions of law.

Preliminary Plat

17.60.150 *Preliminary plat criteria for approval.*
The city council shall make the following findings upon approving a preliminary plat:

BMC 17.60.150A. *The preliminary plat is generally consistent with the goals and policies of the comprehensive plan;*

5. Criterion met. The criterion is met. The proposal is consistent with the Comprehensive Plan for the reasons identified at page 15 of the staff report.

[15] BMC 17.38.010 requires that "*[d]evelopments under this chapter shall be subject to the procedures for application and approval described in Chapter 17.68 BMC* [PUD Chapter]."

BMC 17.60.150B. *The preliminary plat is consistent with the applicable zoning, critical areas, shoreline, Growth Management Act goals and policies, and State Environmental Policy Act regulations;*

6. Criterion met. The criterion is met. The proposal is consistent with the City's Zoning Code for the reasons identified at pages 17-24 of the staff report, is consistent with the City's CAO as outlined in Finding of Fact 6B and doesn't involve any shorelines subject to the shoreline management act. The proposal is consistent with the Growth Management Act because it provides for urban densities in an urban growth area while protecting critical areas under its CAO. The proposal is consistent with SEPA because the City has issued an MDNS that conforms to SEPA standards as determined in this recommendation.

The staff report identifies that a departure should be approved to avoid conformance problems with BMC 17.38.055A1. That provision requires housing architecture to be "aesthetically" consistent and compatible with other homes in the district. The Applicant has requested that this provision be waived because the age of other home designs in the district don't meet modern aesthetics and the subjective nature of assessing compatibility.

The staff report correctly identifies that BMC 17.38.055A1 is difficult to enforce because of its subjective terms. As noted in the staff report, RCW 36.70A.630 requires design standards to be based upon "clear and objective development regulations." However, RCW 36.70A.630(5), adopted in 2023, only requires its requirements to be integrated into city code by the time the next periodic update becomes due. RCW 36.70A.130(5)(b) required Blaine to have its next update completed by December 31, 2025. Blaine is still in that update process. However, even if RCW 36.70A.630 doesn't yet apply, case law provides that an ordinance violates due process if its terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Anderson v. City of Issaquah*, 70 Wash. App. 64, 75, 851 P.2d 744, 751 (1993). With or without RCW 36.70A.130, BMC 17.38.055A1 can only be used to restrict design in a manner that reasonable minds would agree are required.

Unfortunately, there doesn't appear to be any authorized "PUD Departure" process for BMC 17.38.055A1. There is nothing in the RPR zoning district or the PUD standards that authorizes any waiver of the BMC 17.38.055A1 aesthetic standard. The purpose clause of the RPR district and PUD chapter both emphasize that the zoning district and PUD standards are designed to provide for flexibility in design. See BMC 17.68.010 and BMC 17.38.010A. That flexibility, however, is expressly addressed in numerous PUD and RPR standards. BMC 17.38.060, for example, expressly doesn't set any standards for setbacks, land coverage, heigh limit or lot width. All of those standards are open for consideration and final approval in the master plan review process.

An intent or purpose section by itself is not a development regulation that authorizes or restricts land use. *See Indian Trail Prop. Owner's Ass'n v. City of Spokane*, 76 Wash. App. 430, 438, 886 P.2d 209, 215 (1994)(upholding hearing examiner decision that declined to apply zoning code provision because it was only a purpose clause). The staff report identifies no authorization in the BMC to waive BMC 17.38.055A1. The proposal must either establish compliance with BMC 17.38.055A1 or acquire a variance.

Ultimately, the proposal is found to comply with BMC 17.38.055A1 because the bulk and dimensional standards applicable to the proposal are consistent with that of other homes in the district. The Examiner has no authority to invalidate BMC 17.38.055A1 as unconstitutional or inconsistent with RCW 36.70A.630. However, the Examiner can interpret BMC 17.38.055A1 in a manner that is consistent with those external requirements. Building height is construed as an architectural feature under BMC 17.38.055A1. The height authorized by this recommendation for single-family homes is 35 feet. As noted in page 23 of the staff report, a 35-foot height limit is typical of the City's residential districts, which presumably includes the RPR district. Subject to similar height standards as the other homes in the RPR district, the proposed homes are found to comply with BMC 17.38.055A1 given the restricted enforceability of that provision.

BMC 17.60.150C. *The application complies with lot and plat design standards as required under Chapter 17.74 BMC, Subdivision Design Requirements, unless specifically varied through the process outlined in Chapter 17.62 BMC, Plat Variance, or Chapter 17.68 BMC, Planned Unit Development (PUD);*

7. Criterion met. The criterion is met. Chapter 17.74 addresses subdivision design standards. With the exception of the departures identified below, the City's Public Works Department has found the proposal consistent with the City's street design standards in Ex. C52 and there is no evidence to the contrary.

The staff report identifies two recommended unauthorized "PUD departures" from subdivision design standards. These are composed of the following: (1) waiving BMC 17.74.080.C requirement for wooden light poles; and (2) waiving sidewalk standards as depicted in Ex. C9. There is no provision in the PUD standards that authorizes waiver of the light pole and sidewalk standards. As outlined in COL No. 5, there is thus no authority to waive those standards under the PUD process. However, the introduction to BMC 17.74.80 authorizes the community development and public works directors to "together" authorize alternatives "when determined to better serve public health, safety and welfare." Condition 95 requires the light pole and sidewalk departures such to only be allowed via authorized deviation process as opposed to nonexistent PUD departures.

The remaining street standard departure identified in the staff report is expressly authorized as a "PUD departure." The Applicant has requested a reduction in required right of way width. The staff report recommends approval. BMC 17.74.080(2)a allows reductions in right of way width at the discretion of the public works director via "*[s]tandards established through the planned unit development process*."[16] Given the recommendation of City staff, which presumably includes the Public Works Director, the requested reductions in right of way width are approved.

BMC 17.60.150D. *That the subdivision and related dedication will serve the public interest, and not be detrimental to the public health, safety and general welfare;*

8. Criterion met. The criterion is met since the proposal will provide additional housing in an urban growth area while not creating any adverse impacts as determined in Finding of Fact No. 6.

BMC 17.60.150E. *Appropriate provisions are made for, but not limited to, open spaces and drainage ways; roads, streets, alleys and transit stops; potable water supply, sanitary sewer, electricity and franchise utilities; parks and recreation; sidewalks and other pedestrian corridors; and facilities that preserve the quality of the neighborhood;*

9. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 7.

As in prior PUD reviews, BWC asserts that the City must use the 2024 DOE stormwater manual as opposed to the vested 2019 DOE manual. The City is legally required to use the 2019 manual. RCW 58.17.033 vests (grandfathers) preliminary plat applications to the development standards in effect at the time a complete application is filed. The 2019 manual was in effect when the proposal vested.

Stormwater manuals in communities where the DOE manuals are mandatory are not subject to vesting under the court opinion of *Snohomish Cnty. v. Pollution Control Hearings Bd.*, 187 Wash. 2d 346 (2016). However, adoption of the DOE manual is not mandated for Blaine. Consequently, its stormwater regulations are still subject to vesting.

Adoption of the DOE Stormwater Manual is only required for cities and counties in Western Washington that are subject to the National Pollutant Discharge Elimination System (NPDES) Western Washington Phase I Municipal Stormwater Permit for

[16] This section could also apply to the reduced sidewalk request since sidewalks are presumably included in the cross-sections subject to BMC 17.74.080B2. However, the staff report framed the sidewalk departure request as a deviation from BMC 17.74.080E, which doesn't expressly provide for PUD departures.

adoption of the manual. Blaine is not subject to that requirement. Id, Section S1D2ai; https://ecology.wa.gov/regulations-permits/permits-certifications/stormwater-general-permits/municipal-stormwater-general-permits#municoverage. Some confusion may be caused by the fact that Whatcom County is required to adopt the manual while Blaine is not. Id.

The *Snohomish County* case doesn't apply to Blaine because it has no obligation under the NPDES permit to adopt the DOE Stormwater Manual. The *Snohomish County* court was faced with reconciling timing requirements of the NPDES permit that were contrary to the vesting requirements of RCW 58.17.033. The NPDES permit under review required specified stormwater regulations to go into effect by July 1, 2015 for specified jurisdictions such as Snohomish County. The NPDES permit provided that the new regulations would apply to all developments approved prior to July 1, 2015 if those developments hadn't yet commenced construction. As an example, if a developer vested under RCW 58.17.033 to a 2005 version of the DOE Stormwater Manual in 2014, the NPDES permit still required enforcement of new required stormwater regulations adopted in 2015 if construction hadn't yet commenced.

The *Snohomish County* court ruled that the NPDES timing requirement was not subject to RCW 58.17.033 vesting. RCW 58.17.033 only requires vesting for "land use controls." The *Snohomish County* court ruled that the NPDES permit requirement was not a "land use control" as contemplated by the state legislature because it was a state mandate as opposed to a local regulation adopted under municipal discretion 187 Wn.2d at 362.

In contrast to jurisdictions such as Snohomish County, Blaine is not subject to the NPDES mandate. As previously noted, Blaine isn't required by state law to adopt any version of the DOE Stormwater Manual. As such, the Stormwater Manual as adopted by Blaine is still a regulation it has adopted as an exercise of is municipal discretion. It thus still qualifies as a "land use control" subject to vesting under RCW 58.17.033. Even if the City wanted to, it could not impose the 2024 DOE Stormwater Manual upon cities that vested to the 2019 DOE Stormwater Manual.

Many cities that aren't subject to the NPDES mandate don't even bother to adopt the most recent version of the Stormwater Manual. Port Townsend, for example, has adopted the 2005 Stormwater Manual. *See* PTMC 13.32.010. Even if the City could impose the 2024 edition, the Appellants have identified nothing in the latest edition that would better protect surrounding properties from flooding impacts. The Applicant's engineer testified that the 2024 edition had no provisions that improved upon the off-site flow restrictions of the 2019 edition. Tr. 419. The Appellants have yet to identify any difference.

BMC 17.60.150F. *That all applicable requirements of Chapter 58.17 RCW et seq., not included above, have been met.*

10. Criterion met. The criterion is met. The most notable difference between City standards and Chapter 58.17 RCW is that the City standards don't expressly require safe walking conditions to and from school as required by RCW 58.17.110. This standard has been met by adding a condition requiring a safe walking condition assessment and mitigation as outlined in Finding of Fact No. 7E.

PUD

BMC 17.68.080 Criteria for approval.

The city may approve a PUD application only if it finds that the following requirements have been met:

BMC 17.68.080A. Design: *The PUD represents a more creative approach to the unified planning of development and incorporates a higher standard of integrated design and amenity than could be achieved under otherwise applicable zoning district and subdivision regulations, and solely on this basis modifications to the use and design standards established by such regulations are warranted.*

11. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 8.

BMC 17.68.080.B Meets PUD Requirements: *The PUD meets the requirements for a PUD set forth in this chapter.*

12. Criterion met. The criterion is met. Staff has reviewed the proposed application and the review process and affirmatively found that the proposal meets all applicable PUD procedural requirements. Conformance to the PUD review criteria is assessed and found compliant in this recommendation.

BMC 17.68.080.C. Consistent with Comprehensive Plan: *The PUD is generally consistent with the objectives of the city comprehensive plan as viewed in light of any changed conditions since its adoption.*

13. Criterion met. The criterion is met for the reasons identified in Conclusion of Law No. 5.

BMC 17.68.080.D. Public Welfare: *The PUD will not be detrimental to the public health, safety, morals, or general welfare.*

14. Criterion met. The criterion is met because the proposal will not create significant adverse impacts as determined in Finding of Fact No. 6.

BMC 17.68.080.E. Compatible with Environs: *Neither the PUD nor any portion thereof will be injurious to the use and enjoyment of other properties in its vicinity, substantially impair property values or environmental quality in the neighborhood, nor impede the orderly development of surrounding property.*

15. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 6.

BMC 17.68.080.F. Natural Features: *The design of the PUD is as consistent as practical with the preservation of natural features of the site such as stands of mature trees, steep slopes, natural drainage ways, wetlands, or other areas of sensitive or valuable environmental character.*

16. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 6D.

BMC 17.68.080.G. Circulation: *Streets, sidewalks, pedestrian ways, bicycle paths, off-street parking, and off-street loading as appropriate to the planned land uses are provided. They are adequate in location, size, capacity, and design to ensure safe and efficient circulation of pedestrians, automobiles, trucks, bicycles, fire trucks, garbage trucks, and snow plows as appropriate without blocking traffic, creating unnecessary pedestrian-vehicular conflict, creating unnecessary through traffic within the PUD, or unduly interfering with the safety or capacity of adjacent streets.*

17. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 7B. As noted in Finding 7B, Public Works staff has found the proposal consistent with the City's street design standards. Those standards assure safe and efficient circulation.

BMC 17.68.080.H. Open Space and Landscaping: *The quality and quantity of public and common open spaces and landscaping provided are consistent with the higher standards of design and amenity required of a PUD. The size, shape, and location of a substantial portion of total public and common open space provided in residential areas render it usable for recreation purposes.*

> *1. Open space between all buildings is adequate to allow for light and air, for access by fire-fighting equipment, and for privacy where walls have windows, terraces, or adjacent patios. Open space along the perimeter of the development is sufficient to protect existing and permitted future uses of adjacent property from adverse effects from the development.*

18. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 7C. The City's fire code standards as set by its adopted International Fire code requires separation between the proposed single-family homes that assures fire safety and adequate fire access.

BMC 17.68.080.I. Covenants: *Where individual parcels or condominiums are to be later sold, adequate provision has been made in the form of deed restrictions, homeowners or condominium associations and bylaws or CC&Rs all in a form approved by the city, for the preservation and maintenance of any open spaces, thoroughfares, utilities, water retention or detention areas, and other common elements not to be dedicated to the city or another public body, including such control of the use and exterior design of individual structures, if any, as is necessary for continuing conformance to the PUD plan. Such a provision must be binding on all future ownership.*

19. Criterion met. Draft CC&Rs have been submitted, Ex. C12. The CC&Rs propose measures to preserve and maintain the Avista development.

BMC 17.68.080.J. Public Services: *The land uses, intensities, and phasing of the PUD are consistent with the anticipated ability of the city, the school districts, and other public bodies to provide and economically support police and fire protection, water supply, sewage disposal, schools, and other public facilities and services without placing undue burden on existing residents and businesses.*

20. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 7F.

BMC 17.68.080.K. *Phasing. Each development phase of the PUD shall, together with any phases that preceded it, exist as an independent unit that meets all of the foregoing criteria and all other applicable regulations herein even if no subsequent phase should ever be completed. The provision and improvement of public or common area improvements, open spaces, and amenities, or the provision of financial sureties guaranteeing their improvement, is phased generally proportionate to the phasing of the number of dwelling units or amount of non-residential floor area.*

21. Criterion met. According to the staff report, the initial phase under consideration will stand alone as an independent subdivision. Condition 40 requires that each phase stand alone. Public and common area improvements, open spaces, and amenities will be phased proportionally.

SEPA APPEAL

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

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

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

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

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

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

The Avista project will not generate any probable, significant adverse impacts for the reasons identified in FOF No. 6 and 7. In assessing impacts, the City's SEPA Staff Report identified reliance upon City development standards as contemplated by WAC 197-11-158 by identifying reliance upon evaluations of impacts by qualified professionals who in turn based their assessments on City development standards for mitigating impacts of the project that included stormwater, traffic and wetlands. Ex. C230, Pg. 15-22.

22. SEPA Review Sufficient. The second most important inquiry in a SEPA appeal is whether environmental impacts have been adequately assessed.

Washington courts have stressed that, for a threshold determination to meet the procedural requirements of SEPA, the record "*must indicate that the agency has taken a searching, realistic look at the potential hazards and, with reasoned thought and analysis, candidly and methodically addressed those concerns*." *Conservation Nw. v. Okanogan Cnty*., 194

Wn. App. 1034, 2016 WL 3453666 at *31 (quoting Found. on Econ. Trends v. Weinberger, 610 F. Supp. 829, 841 (D.D.C May 31, 1985)). SEPA determinations must be "'*rational and well-documented*.'" *Columbia Riverkeeper v. Port of Vancouver*, 188 Wn.2d 80, 92, 392 P.3d 1025 (2017) (quoting 24 Wash. Practice: Environmental Law and Practice § 17.1, at 192). The threshold determination must be based on "*complete disclosure of environmental consequences*." *Alpine Lakes Prot. Soc'y v. Dep't of Nat. Res*., 102 Wn. App. 1, 15–16 (1999) (citing *King Cnty. v. Wash. State Boundary Review Bd*., 122 Wn.2d 648, 663, 860 P.2d 1024 (1993)). "*SEPA demands a 'thoughtful decision-making process' where government agencies 'conscientiously and systematically consider environmental values and consequences*." *Wild Fish Conservancy v. Wash. Dep't of Fish & Wildlife*, 198 Wn.2d 846, 873, 502 P.3d 359 (2022) (quoting ASARCO, Inc. v. Air Quality Coal., 92 Wn.2d 685, 700 (1979) and Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis § 3.01[2] at 3–4 (2021)).

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

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

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

Moss, 109 Wn. App. At 25.

In this case all impacts were evaluated and addressed by highly qualified professionals with stormwater, wetland, traffic and utility impacts subject to the added protection of third-party peer review. See Ex. C230, p. 16. No one could reasonably question the level of analysis for any of the impacts evaluated except for arguably the pre-hearing CARA analysis. As noted in COL No. 3, CARA compliance issues are likely beyond the scope of this review.

If CARA compliance is within the scope, the expert testimony of the Applicant's civil engineer, based upon the geotechnical report as outlined in Finding of Fact 7A, marginally meets the level of review required by the judicial standards above.

23. SEPA MDNS Upheld. The SEPA MDNS under appeal is upheld because it mitigates all probable significant adverse impacts as concluded in COL No. 21 and is based upon an adequate level of review as concluded in COL No. 22.

RECOMMENDATION

The PUD, Phase I preliminary plat application, and requested right of way reductions identified at page 43 of the staff report for the Avista Subdivision meets all applicable permit criteria as identified in the Conclusions of Law above and therefore should be approved subject to the following conditions[17] below. The SEPA appeal should be denied and the MDNS upheld for the reasons identified in the findings and conclusions above.

GENERAL CONDITIONS

1. Approval is granted for the Avista Planned Unit Development and Preliminary Plat for Phase One, the Sunrise Division, containing no more than 79 residential lots and 1.9 acres of neighborhood retail commercial. Revisions to the preliminary plat are permitted for plat design, roadway, and critical area modifications to allow conformity to the conditions of approval.
2. This application is subject to the applicable requirements contained in the Blaine Municipal Code, Public Works Design and Engineering Standards, and Building and Fire Codes. It is the responsibility of the Applicant to ensure compliance with the various provisions contained in these standards and codes.
3. SEPA mitigation measures, as identified in the project SEPA checklist and SEPA Mitigated Determination of Non-Significance (Exhibit C50), shall be reflected in the project design and civil construction plans, and are hereby made conditions of this approval. The SEPA MDNS may be modified, or a new SEPA review conducted, as a result of the SEPA appeal.
4. Critical Area protective measures, as identified in the Critical Area Determination conditions of approval (Exhibit C26) shall be reflected in the project design, civil construction plans, and revised preliminary plat, and are hereby made conditions of this approval. This includes the following:
    a. The Applicant shall have the wetland flags surveyed by a professional licensed surveyor, and the survey showing the wetland boundaries and

[17] Examiner revisions to staff recommended conditions are identified in track change.

buffers required by BMC 17.82.340 shall be submitted with any proposed development permit on the site.

5. All work shall be accomplished consistent with all other federal, state, or local statutes, ordinances, or regulations applicable to this project, and obtaining other required state and federal permit authorizations. These may include, but are not limited to: Joint Aquatics Resource Permit Application (JARPA) authorization, Forest Practices Permit (FPA), Hydraulic Project Approval (HPA), US Army Corps of Engineers Section 10 permit approval, and obtaining a Construction Stormwater General Permit (CSWGP) from the Department of Ecology, as necessary.
6. Responsibility for meeting other agency requirements shall be solely the Applicant's. The Applicant shall provide a copy of all state and federal required authorizations to the City of Blaine prior to the authorization of a land disturbance permit for any Avista site improvements. If no such permits are required from outside agencies, the Applicant shall provide the CDS Department with a letter stating such permits are not required prior to land disturbance permit issuance for each Phase.
7. Project activities shall comply with Inadvertent Discovery of Archaeological Resources and Inadvertent Discovery of Human Skeletal Remains on Non-Federal and Non-Tribal Land in the State of Washington (RCWs 68.50.645, 27.44.055, and 68.60.055) policies and procedures. Specific inadvertent discovery language is included as a condition of approval in the SEPA MDNS issued for this proposal.

PUBLIC WORKS CONDITIONS

WATER MAINS

8. The proposed development shall include the installation of the water main extension, as shown on the preliminary design drawings with water service extended to each lot in the final plat.
9. The water system design shall conform to the City of Blaine's Development Guidelines and Public Works Standards, the City of Blaine Water System Plan, the Washington State Department of Health (DOH) requirements, the American Public Works Association (APWA) standards, the Washington State Department of Transportation (WSDOT) Standard Specifications for Road, Bridge, and Municipal Construction and the American Water Works Association Standard (AWWA) standards.
10. Pursuant to the City of Blaine's Development Guidelines and Public Works Standard, 4.09.000, all water system connections to serve buildings or properties with domestic potable water, fire sprinkler systems, or irrigation systems shall comply with the minimum backflow requirements as established by the Department of Health (DOH) and the City of Blaine.

WATER SYSTEM

11. If a water main extension is warranted, it will require a licensed Washington State Professional Engineer for plan design. Design shall conform to the Development

Guidelines, City of Blaine Water System Plan, Washington State Department of Health, and the American Water Works Association Standards.

12. Prior to final plat approval, provide a separate water service from the water main to the meter for each unit.
13. In designing and planning for any water system extension or connection, it is the developer's responsibility to determine that adequate water for both domestic use and fire protection is attainable. The developer must show, in the proposed civil plans, how water will be supplied and whether adequate water pressure will be attained in case of fire. An analysis of the system may be required at the discretion of the Public Works Director.
14. Adequate fire hydrant spacing will need to be determined. Hydrants shall be placed as per BMC 13.20.090, BMC 13.20.100 & BMC 13.20.110.

SANITARY SEWER SYSTEM

15. Prior to final plat approval, a sewage system shall be completed with service extended to each lot in the final plat. The sewage system is expected to include a combined lift station to serve the Inverness subdivision constructed by the developer under a City approved Public Facilities Construction Agreement or may be constructed by the City. The City and Applicant will enter into a reimbursement agreement (if constructed by the developer) or a cost-sharing agreement (if constructed by the City) in a form approved by the City related to a combined lift station that is consistent with the City's General Sewer Plan prepared by CH2M Hill, 2004, and the Capital Improvement Plan for Wastewater Utility, 2024. The reimbursement agreement will provide for reimbursement to the developer for built capacity that exceeds the capacity needs of the development and that is designed to serve an area beyond the development itself or, if the City constructs the combined lift station, the cost-sharing agreement will provide for payment from the developer in an amount proportional to the impact and requirements of the Project. At the sole discretion of the City, this mitigation measure may be satisfied by the Developer's construction of an alternative lift station that will serve only the development, provided however that this alternative would require amendment of the City's General Sewer Plan prepared by CH2M Hill, 2004, and the Capital Improvement Plan for Wastewater Utility, 2024. In any case, the lift station will be (i) constructed in accordance with City standards and a design approved by the City Public Works Director; (ii) subject to a City Public Facilities Construction Agreement; and (iii) subject to acceptance by the City Public Works Director upon completion. This condition is a mitigation measure in the MDNS, and will be incorporated as a condition approval for any approved preliminary plat for the Project, may be further refined as a condition of preliminary plat approval as needed to address probable impacts, and shall be read consistently with RCW 82.02.020.
16. The sanitary sewer system design shall conform to the City of Blaine's Development Guidelines and Public Works Standards, the City of Blaine Comprehensive Sanitary Sewer Plan, the requirements of the Washington State

Department of Ecology (DOE), and the Washington State Department of Health (DOH).

17. Prior to final approval, a separate side sewer stub shall be provided from the sewer main for each lot.

ELECTRICAL SYSTEM

18. City records indicate single-and three-phase electrical circuits located in Semiahmoo Parkway. The proposed development shall include the installation of the electrical circuit extension.
19. The electrical system, from design to completion, shall conform to Blaine Municipal Code (BMC) 13.16, Electricity.
20. Pursuant to BMC13.16.240, Public Works shall designate the type, size, and location of metering equipment; all meters and load-control devices shall be located on outside of buildings without obstruction.
21. Pursuant to BMC 13.16.270, any extension within the City limits shall be installed underground.
22. The specific dimensions and designs of approvable light poles shall be approved by the Public Works director prior to their installation, with the approved light pole designs included in the final PUD master plan.

STORMWATER SYSTEM

23. A Final Stormwater Design Report is required prior to issuing the land disturbance permit for subdivision improvements. The Final Stormwater Design Report and associated stormwater site plan must respond to all relevant conditions of the preliminary plat and PUD approval.
24. The stormwater system design for Phase One, the Sunrise Division, shall conform to the Washington State Department of Ecology's Stormwater Management Manual for Western Washington (SWMMWW) 2019 version, the City of Blaine's Development Guidelines and Public Works Standards, and the current Uniform Plumbing Code.
25. Applicant shall obtain after-the-fact design approval for existing constructed storm facilities, located northwest of the intersection of Selder and Bayvue Roads, by providing a copy of the approved design by GeoEngineers, or redesign and make improvements to bring the storm facilities into compliance with current standards at the time development affects these facilities. This would require the Applicant to include a preliminary design for each phase of the Project showing how storm facilities would be brought into compliance with the adopted Stormwater Management Manual for Western Washington, current edition. This condition does not apply to "Selder Pond" the historic drainage feature located generally northeast of the intersection of Selder Road and Bayvue Road so long as Selder Pond is not used as a stormwater facility serving the Avista Project.
26. All future preliminary plat applications shall include a preliminary stormwater design report, including hydrologic modeling demonstrating that wetland hydroperiods will be maintained to a degree as to have no significant adverse

impact to the wetlands function and values, consistent with the current adopted edition of the Stormwater Management Manual for Western Washington for review and approval by the City, as part of the preliminary plat application review process. The stormwater design for Phase I shall be redesigned as necessary to prevent any exceedances of the 120% limit on Wetland C hydroperiods as outlined in Section 6Ciii of this recommendation.

27. Prior to final plat approval, temporary and permanent storm water control shall be provided in accordance with the applicable SWMMWW.
28. Each lot shall have a separate storm drain connection for conveyance. Runoff from pollution-generating hard surfaces (PGHS) will be routed to approved stormwater features . An alternative may be approved by the Public Works Director based on an alternative plan determined to be consistent with the applicable SWMMWW.
29. All on-site storm drainage shall be privately owned and maintained.
30. Prior to commencing land disturbance activity, the Applicant shall submit a Construction Stormwater Pollution Prevention Plan (SWPPP) to the City for review and approval by the City. The final approved SWPPP shall demonstrate, in detail, how Applicant will manage the site during the time that land disturbing activity is taking place, including: measures to protect disturbed areas, control and direct storm water runoff through construction areas, and provide water quality treatment for runoff from the site. Best Management Practices (BMPs) associated with the SWPPP shall comply with the current adopted edition of the Washington State Department of Ecology's Stormwater Management Manual for Western Washington.

TRANSPORTATION SYSTEM

31. Private street cross-sections are proposed for the Avista subdivision interior that deviate from the Public Works private road standards. The design for internal streets, including non-motorized facilities, shall conform to the minimum design requirements listed below:

Street Sections	Right-of-Way Width	Street Width
Entry Street A	70'	40' (w/median)
Entry Street B	70'	28'
Main Street	60'	28'
Minor Street	50'	28'
Lane	20'	20'

Rolled curbs on all private Avista streets except lanes; single-side sidewalks.

32. Except as noted in the private streets variations listed in condition #31, the transportation system shall conform with Blaine Municipal Codes 17.60, 17.68, and 17.74 governing Long Subdivisions – Preliminary and Final Plats, Planned Unit

Developments (PUDs), and Subdivision Design Standards, and the City of Blaine Non-Motorized Transportation Plan.

33. All proposed onsite and offsite pedestrian facilities shall be ADA compliant to the minimum provisions of adopted accessibility standards.
34. Driveway intersections shall not have any visual obstructions within the sight distance triangle.
35. The Applicant shall consult with the Blaine School District to determine locations for school bus stops to serve the Avista development. Improvements shall provide safe walking conditions to the school bus stops as consistent with constitutional nexus and proportionality requirements. All school bus stops shall be included in the approved civil plans for each phase and constructed prior to final plat approval for that phase.
36. Two public access trails shall be developed through the Avista property as depicted in the Blaine Non-Motorized Plan: the Birch Point Trail leading from Semiahmoo Parkway to the UGA boundary (Birch Point Road) along the northwest boundary of the site, and the Cedar Grove Trail from a Whatcom County terminus with the Birch Point Trail leading to the existing Millennium Trail along Semiahmoo Parkway. A comparable alternative route may be approved by the CDS Director.
37. The public shall be granted a public trails easement across the Birch Point Trail, the Cedar Grove Trail, and any other public trail that transects the Avista property. Reference to the public trails easement shall be memorialized on the recorded plat.
38. The trail license restriction shall be removed from the Avista CC&Rs.

PLANNING CONDITIONS

39. The PUD approval shall be valid for eleven years from the day it is approved by the city council and shall only expire pursuant to BMC 17.68.210.
40. The 181-acre Avista PUD shall be designed such that each phase can stand alone so that if subsequent phases are not constructed, the completed portion of the project constitutes a coherent development logically interconnected with surrounding areas, and that certain project elements such as open space and recreational amenities be provided for each phase of development in rough proportion to the size of the particular phase within the whole project. In certain circumstances, infrastructure improvements shown for a later phase may be required to be constructed with an earlier phase, or appropriate securities provided to ensure that construction occurs even if the later phase never takes place.
41. The following are the only approved uses: Single family detached and attached housing; Multifamily housing; Age-in-place housing (Continuing Care Retirement Community) in the Sunburst Neighborhood; Neighborhood retail commercial (Phase 1 only); Homeowners Association maintenance and storage facility space (Homeowners Association member self-storage space).
42. A final revised master plan is required that fully depicts all phases of Avista in sufficient detail to clearly convey the intent of the developer across the entire 181-acre site as the guiding document for development of the overall site, individual

phases, architectural styles, building sites and structures, and public and private open space. The master plan shall clearly depict all usable open space.

43. The master plan shall specify all proposed amenities and locations across all five phases of development that provide at minimum 24 minor amenities and 12 major amenities and their proposed locations.
44. The Master Plan shall include a detailed buildout schedule that meets the requirements of BMC 17.68.080.K.
45. A revised master plan shall be submitted for review and approval by the CDS Director subsequent to PUD approval by the city council. Such submittal shall

occur within 180 calendar days of the issuance of the final decision. An extension is possible pursuant to BMC 17.68.090.

46. The revised master plan shall include:

- a minimum lot width of 50 feet, with no minimum lot width required for zero-lot-line attached dwellings.
- no use of 'nominal' in lot width designations.
- no discretionary variance authority.
- a single maximum impervious lot coverage percentage of 55% for all lots.
- Inclusion of architectural details for multi-family and commercial buildings.
- conceptual architectural renderings of single-family residences, and conceptual architectural renderings of greater detail for multiple-family residential, mixed-use and commercial structures required by BMC 17.68.050.B.1.d.
- Defined maximum height limits:

35 feet for single-family dwellings,
55 feet for multi-family buildings, four stories or fewer.
30 feet for neighborhood retail commercial (Sunrise Division, Phase One)
30 feet for Avista HOA maintenance and storage facilities and member self-storage (Suncrest Division, Phase X)
55 feet for Continuing Care Retirement Community (Sunburst Division)

- Defined setbacks:

Front Yards:
20-foot for structures
25-foot for attached garages.
Side Yards:
6-foot for all single-family dwellings, attached and detached (does not apply to common wall side)
16-foot for all multifamily.
Rear yards:
10-foot for all single-family dwellings, attached and detached
20-foot for all multifamily.

47. No more than 1.9 acres of neighborhood retail commercial uses are authorized in phase one.
48. The master plan shall be revised to reflect where neighborhood retail commercial uses not exceeding 10 acres in size would be permitted across the entire 181-acre PUD.
49. Subdivision design review of future phase preliminary plats is deferred to the time applications are submitted and reviewed for subsequent phases of this proposal.
50. A one-acre public park is proposed by the Applicant in the area near the northwest corner of the Avista development. A one-acre public park tract may be dedicated to the City near the northwest corner of the Avista development. Said public park shall provide a perimeter buffer and screening consistent with the SEPA MDNS conditions of approval. This public park may be counted as a major amenity for the Sunburst Division phase if developed, constructed and maintained by the

Applicant. If the park is not constructed by the Applicant, it shall not be counted as a major amenity.

51. A detailed landscaping plan shall be submitted consistent with the requirements of BMC 17.126 prior to land disturbance permit issuance for subdivision site improvements, identifying the type, size, spacing and maintenance schedule for all landscaping proposed within the required buffer areas and the overall site.
52. The landscape plan shall include denser screening along the frontage of Semiahmoo Parkway consistent with the SEPA determination, and naturalized groupings of three to five trees together with native and ornamental shrubs along all internal roadways.
53. To retain and protect trees with a high retention value to the maximum extent possible, the Applicant shall retain a certified arborist or similarly qualified professional to inventory and retain significant trees (evergreen or deciduous, six inches in diameter or greater, measured four feet above existing grade) within the designated perimeter buffers.
54. A defined lot coverage amount shall be established for all residential lots in the final PUD Master Plan as adopted by City Council.
55. Architectural review of all building plans shall be the responsibility of the HOA/Declarant.
56. Required residential parking shall be provided on the lot they intend to serve, consisting of a parking strip, driveway, garage, or combination.
57. The preliminary Covenants, Conditions and Restrictions shall be revised for consistency with the final decision, and provide further detail on architectural controls prior to and after the formation of the HOA, and incorporate a landscape and lighting plan. The final CC&R's shall be reviewed and approved by the City prior to recordation.
58. Maintenance responsibilities for PUD buffer tract landscaping shall be clearly identified in the final CC&Rs.
59. Maintenance of any trail corridors or improvements retained in private ownership shall be the responsibility of the Homeowner's Association. A provision for the maintenance of the trail corridor and other improvements retained by the HOA must be provided in the covenants of the development and referenced on the face of the final recorded plat.
60. All private sidewalks, walkways, curbs, gutters, stormwater drainage facilities, utilities, and all other common areas and open space areas shall be conveyed to an owner's association within 120 days after recording the final subdivision plat.
61. The owner's association shall be empowered to collect dues and assessments and to enforce covenants, conditions, and restrictions and any rules and regulations deemed necessary for the governing of development and use of each lot and common areas within the PUD.
62. The final plat documents shall reference any restrictive covenants regarding private streets and shall include an acknowledgment statement indicating city policy to

refuse consideration of private streets for dedication unless and until said private streets are improved to meet current minimum city standards.

63. Prior to final plat approval the wetlands and their buffers shall be placed in Native Growth Protection Areas with applicable development limitations stated on the face of the final recorded plat. Native Growth Protection Area signage shall be installed consistent with the BMC 17.82.280.
64. All PUD buffer restrictions shall be clearly noted on the final plat or other legal document to advise potential lot purchasers/residents of said buffer restrictions.
65. The Applicant is responsible for payment of applicable park, traffic, and fire impact fees at the time of building permit issuance to help pay for new or expanded public facilities that will directly address the increased demand for services created by that development.
66. A homeowner's association shall be created prior to final plat approval. Prior to final plat approval, preliminary by-laws shall be submitted to the City of Blaine CDS department for review and approval as consistent with BMC 17.68.170.
67. The Applicant shall prepare and acquire staff approval of a safe school walking conditions report consistent with RCW 58.17.110(2)(a) prior to final plat approval. The Applicant shall consult with the Blaine School District to determine locations for school bus stops to serve the Avista development. To the extent proportionate to project impacts, the Applicant shall install improvements as necessary to assure safe walking conditions to the school bus stops. All school bus stops shall be included in the approved civil plans for each phase and constructed prior to final plat approval for that phase.
68. The Avista Project shall be designed to provide an additional open space buffer, ranging from 0-20 feet, around all wetlands outlined in the approved Critical Areas Wetland Delineation and Wildlife Assessment report between the wetland buffer and lots as depicted in Sheet 15 of Exhibit C7 as further illustrated by the green highlighting in attached Figure 1, which provides additional open space buffer of 1.14 acres to protect the wetlands. The buffer shall remain unfenced with the exception of wetland and stormwater facility protective fencing. Trails, directional signage and below-grade stormwater facilities may be permitted in the conservation easement. A conservation easement for this additional open space consistent with this condition , shall be memorialized on the face of the plat, and future plats. The final conservation easement language and buffer shall be reviewed by the Critical Areas Administrator prior to approval of construction plans for each Phase.
69. The Avista Project shall maintain a 20-foot PUD buffer and an 80-foot Neighborhood buffer, for a combined 100-foot buffer from Semiahmoo Parkway. The buffer may be enhanced based on the final landscape plan and consistent with the SEPA determination.

PRELIMINARY PLAT CONDITIONS

70. Revise the preliminary plat and PUD plans to reflect the conditions of approval that require a physical change to the plans. Call the CDS Director if there are questions about these revisions.
71. The Applicant shall submit a revised preliminary plat that is consistent with all applicable conditions of this approval to the Community Development Services Department. The revised preliminary plat shall be submitted to the CDS director for review of compliance with the approved development, as conditioned.
72. A survey prepared by a licensed surveyor showing the precise, delineated wetland boundaries of all wetlands identified in the critical area report and their required buffers shall be submitted as a supplemental plan sheet in the revised preliminary plat plan set.

(covered by Condition 26)

CIVIL INFRASTRUCTURE/LAND DISTURBANCE CONDITIONS

Prior to issuance of a permit authorizing construction of civil infrastructure the following is required:

73. A complete set of civil engineering plans for the development shall be prepared by a licensed Washington State Professional Engineer and submitted for all required publicly served utilities (i.e., sewer, water, storm water, & power), streets and sidewalks rights-of-way and easements, and any required analysis and reports for the site, with a Land Disturbance Permit Application and approved prior to start of any construction activity. Submittals shall include a comprehensive stormwater management plan and an erosion and sediment control plan.
74. Design will conform to the City of Blaine Public Works Development Guidelines, City of Blaine Comprehensive Plan, City Traffic improvement Plan, City of Blaine Water System Plan, Washington State department of Health, American Water Works Associations Standards, Western Washington Stormwater Management Manual, and all other related governing design and standards documents, unless deviations are approved as part the Project decision. This is not an exhaustive list. It is the responsibility of the Applicant to ensure compliance with the various provisions contained in these standards and codes.
75. (Combined with Condition 67)Conditions identified through the submittal and review of civil engineering plans may warrant revisions or modifications to the utility plan reviewed during the long subdivision process.
76. A Public Facilities Construction Agreement (PFCA) will be required for any proponent-constructed public facility improvements.
77. Any work or obstructions within the City's right-of-way will require a Right-of-Way Excavation Permit and/or an Obstruction Permit from the City. The Applicant is responsible for coordinating permits with all other agencies. The Applicant shall post a performance bond for any work in the City right-of-way and/or on City utilities and infrastructure to the satisfaction of the Public Works Director prior to issuance of permit(s) for said work. Once the project is accepted, the bond will be

transitioned to a maintenance bond for the duration of the two-year maintenance period.

78. Existing utility information shall be field verified by Applicant's contractors.
79. Applicant is responsible for sizing all their utilities to meet the needs of their development.
80. Approval of a Land Disturbance Permit Application with a comprehensive stormwater management plan and an erosion and sediment control plan is required prior to any construction activity.
81. Limits of clearing shall be depicted and are limited to the buildable area within the respective phase, together with any areas determined by the City to be needed for staging, construction or access to each phase.
82. All easements and rights of way shall be dedicated prior to, or concurrent with, recording a Final Plat.

FINAL PLAT APPROVAL AND IMPACT FEES CONDITIONS

Prior to recording of the phase one final plat, the following is required:

83. The final plat shall be consistent with all applicable conditions of approval in this decision.
84. Provide confirmation of the formation and recordation of the Avista Homeowner's Association.
85. Confirm the recordation of the public trails access easement.
86. Include reference to the public trails easement on the final plat.
87. Dedicate a one-acre community park consistent with Condition 50, near the northwest corner of the Avista site, to the public and depict its location consistent with the PUD buffer and landscape requirements. An alternative ownership and maintenance plan may be approved by the CDS Director.
88. All private streets, sidewalks, walkways, curbs, gutters, stormwater drainage facilities, utilities, and all other common areas and open space areas shall be conveyed to the owner's association.
89. Submit revised Covenants, Conditions and Restrictions (CC&Rs) for review and approval by the City consistent with BMC 17.68.080.I, .160.E, .170 and .180.
90. Submit final plat application materials consistent with BMC 17.60.210.
91. Submit as-built drawings consistent with BMC 17.60.270.
92. The Applicant shall post a maintenance bond for any public infrastructure to the satisfaction of the Public Works Director prior to acceptance of public infrastructure by the City.
93. Impact fees (parks, traffic, and fire) required under Chapter 3.80 shall be paid for each lot at the time of Building Permit issuance. SEPA Mitigation Fees required under SEPA Mitigation Measure 6 established in Exhibit C50 shall be paid pursuant

to the Voluntary Mitigation Agreement referenced in Exhibit C232, Exhibit A. A note to this effect shall be shown on the face of the Final Plat.

Examiner Added conditions

94. No proposed trail may cross into any regulated wetland absent a code authorized waiver. No final civil drawings showing wetland trail crossings shall be approved unless authorized by code.

95. The light pole and sidewalk deviation requests identified in Conclusion of Law No. 6 above shall be separately approved as authorized by City code. These separate authorization process to the extent applicable are anticipated to include the approval by public works and the community development director as authorized for some deviations by the introductory language to BMC 17.74.080, or through the deviations authorized by the City's public works standards.

Dated this 5th day of January 2026.

Phil Olbrechts
Hearing Examiner
City of Blaine

BEFORE THE HEARING EXAMINER FOR MASON COUNTY

Phil Olbrechts, Hearing Examiner

RE: James and Robin Oakes Chapter 16.21 MCC-- Performance Short Subdivision Review File No. LRG2023-00008	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION**

INTRODUCTION

The Applicants seek to increase density under performance subdivision review to increase the number of lots for their proposed 31.70-acre subdivision from three lots as allowed in the RR10 zoning district to six lots for property accessed from the north side of Brockdale Road located approximately 0.44 miles from SR 101. The proposed density increase is approved.

ORAL TESTIMONY

Luke Viscusi, Associate Planner, summarized the staff report. No one else testified.

EXHIBITS

Exhibits 1-8 as identified on the first page of the December 1, 2025 staff report were entered into the record during the December 10, 2025 meeting.

FINDINGS OF FACT

Procedural:

1. Applicant. The applicants are James & Robin Oakes.

2. Public Review. The hearing examiner conducted a public meeting via Zoom on the application on December 10, 2025 at 1:00 p.m.

Substantive:

3. Site/Proposal Description. The Applicants seek to increase density under performance subdivision review to increase the number of lots for their proposed 31.70-acre subdivision from three lots as allowed in the RR10 zoning district to six lots for property accessed from the north side of Brockdale Road located approximately 0.44 miles from SR 101, Mason County tax parcel # 42126-14-00000.

The four lots will range from 5.02 acres to 5.68 acres. The applicant is proposing to set aside 16.94 acres across the six lots as various permanent open spaces, which consists of Primary Conservation Areas, Secondary Conservation Areas, Designated Open Space, and Active Recreation Areas (see Exhibit 3). The proposal would allow each lot to have access to E Brockdale Rd via the proposed access road. There is an existing easement connecting the site to E Brockdale Rd, as shown on the Performance Subdivision Diagram (Exhibit 4). The proposed access road traverses up the hillside (Primary Conservation Area) in the southern portion of the site. The developable portions of the lots are on a plateau, but are not visible from E Brockdale Rd. The part of the site with the highest elevation has been set aside as Designated Open Space, so no future development would occur on a hilltop.

The southern boundary of the site includes a ravine and a un-typed (non-regulatory) watercourse. This means the site is visible (up-hill) from E Brockdale Rd. However, the vegetation on the banks of the ravine, as well as the angle of the slope, create a visual buffer between the road and the interior of the site (see Exhibit 7). The western, northern, and eastern boundaries of the site also include dense vegetation and stands of trees which creates a visual buffer between the interior of the site and the adjacent properties (see Exhibit 7). Aside from the slopes on the southern portion of the site and a ridge which cuts through the northern portion of the site, the rest of the site is very flat.

The site is undeveloped. A majority of the site was logged between 2006 and 2009, so much of the site consists of medium sized trees, shrubs, and invasive vegetation (i.e.. scotch broom, bull thistle, etc.). No rare or important site features were observed on the site by County staff. However, the permanent open space designated by this project preserves much of the existing mature trees, which likely provide habitat (seen Exhibit 4).

4. Characteristics of Area. South and east of the property, there are single-family residential properties ranging between 1 and 20 acres. North of the property are lots with the potential for single-family residences that are all over 10 acres. East of the property is forestland owned by Hunter Farms. None of the adjacent parcels have designated open space.

5. Open Space. The project will provide adequate primary and secondary conservation areas as well as designated active and passive open spaces.

A. Primary Conservation Areas. Primary conservation areas are wetlands, water bodies, floodway, slopes of 25% or greater and any area defined as a critical area. The definition of critical areas includes landslide hazard areas, also known as geologically hazardous areas (MCC 8.52.030). Geologically hazardous areas are those with slopes greater than 15% that also contain hillsides intersecting geological contacts and springs or groundwater seepage or any slope of 40% or greater with a vertical relief of 10 or more feet (except for areas of consolidated rock) (MCC 8.52.140(1)(A)(v) and (vi)).

As shown on the Draft Survey (Exhibit 3), the Primary Conservation Area is 2.17 acres. Subtracting the Primary Conservation Area from the 31.70-acre site leaves a net buildable area of 29.53 acres.

B. Secondary Conservation Areas. The project will provide adequate secondary conservation areas and designated open space including active recreational space.

i. Mandatory Secondary Conservation Areas. Secondary conservation areas are the upland buffers around critical areas, prime agricultural land, natural meadows, slopes of 15% or greater (without the greater specificity of MCC 8.52.140(1)(A)(v)), ridge lines, areas abutting designated open space, flood plains and sites of historic, cultural or archeological significance.

The proposal includes 1.74 acres of Secondary Conservation Area, which is the upper ridgeline from elevation 320 down to elevation 305 with an additional building setback of 15 feet.

ii. Total Required Open Space. Performance subdivisions are required to provide open space equal to 50% of the net buildable area. After subtracting the Primary Conservation Area, the net buildable area of the site is 29.53 acres, which is noted on the Draft Survey (Exhibit 3). Consequently at least 14.765 acres must be set aside as open space. Including the 1.74 acres of Secondary Conservation Area, the proposal has 14.77 acres set aside as permanent open space.

iii. Active Recreational Space. The Applicant is required to demonstrate that 25% of the minimum required open space is suitable for active recreational open space. 25% of the required 14.765 of open space is 3.69 acres. 3.69 acres is designated as "Active Recreation Area," as shown on the Draft Survey (Exhibit 3). The northern boundary of the Active Recreation Area is approximately 110 feet south of where any structures could be located on Lots 2, 3, and 4, which would provide sufficient separation between the residents of the lots and anyone using the Active Recreation Area. The Active Recreation Area is bounded by the proposed access road to the west, the top of slope to the south, and the neighboring property to the east. The Photos of Existing Site (Exhibit 7, Pages 9 - 10) includes photos taken in the Active Recreation Area. Since the site was logged between 2006 and 2009, the Active Recreation Area does not have dense, woody vegetation. It is currently comprised of young trees, shrubs, and invasives. The Active Recreation Area is accessible to residents of Lots 1, 5, and 6 via the proposed access road.

iv. Scenic Views and Vistas. The Photos of Existing Site (Exhibit 7) show that the addition of residences shouldn't interrupt scenic views or vistas. The applicant has dedicated the area north of the ridge line as Designation Open Space (see Exhibit 3). Since the slopes of the ridge line and everything uphill from that are dedicated as permanent open space, no structures will interrupt scenic views or vistas.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. MCC 16.21.020 provides that the hearing examiner will review and approve the preliminary sketch for a performance subdivision.

Substantive:

2. Zoning Designation. The property is zoned Rural Residential 10.

3. Review Criteria and Application. Any applicant for subdivision approval (or short subdivision approval, see MMC 16.08.135) who seeks an increase in authorized density must first submit an application for performance subdivision review to establish whether the proposed subdivision qualifies for increased density under Chapter 16.21 MCC. In the RR-10 zone the maximum density absent a performance subdivision is 1 du/10 acres with a minimum lot size of 20,000 square feet. *See* MCC 17.04.233(a). The Applicants seek to increase the authorized density from 1 du/10 acres to 1 du/5 acres, a 100% increase in density. The provisions in Chapter 16.21 MCC necessary to acquire this density bonus are quoted below in italics and applied through corresponding conclusions of law.

MCC 16.21.035: *No lot for which the construction of a residential dwelling is proposed shall be less than twenty thousand square feet in gross land area.*

4. Criterion met. The smallest proposed lot is 5.02 acres in size.

MCC 16.21.040: *Primary conservation areas. Primary conservation areas shall be clearly identified, and shall be set aside as permanent open space. Primary conservation areas shall be included in the calculation of both standard and maximum density allowed, but they shall not be used in calculating the percentage of permanent open space required.*

4. Criterion met. This criterion is satisfied. The Applicants have identified a 2.17-acre primary conservation area which will be set aside as permanent open space.

As described in Finding of Fact No. 5A, the net buildable area less the primary conservation area is 29.53 acres.

MCC 16.21.050: *Secondary conservation areas shall be identified and shall, to the greatest extent possible, be avoided as development areas. The minimum threshold for qualification as a performance subdivision is that at least fifty percent of the buildable area of the property be set aside as permanent open space. Buildable area excludes primary conservation areas, but includes secondary conservation areas. At least twenty-five percent of the minimum required open space shall be suitable for active recreation purposes, but no more than fifty percent shall be utilized for that purpose, in order to preserve a reasonable proportion of natural areas on the site. Upon reaching this threshold, the Applicant shall be entitled to a density bonus equal to fifty percent of the difference between the standard residential density and the maximum residential density allowed within the particular development area.*

5. Criterion met and 50% density bonus authorized. As described in Finding of Fact No. 5B, the Applicant has provided for secondary conservation areas. As determined in Finding of Fact No. 5B, the proposal provides for 50% total open space as required and 25% of that open space is designated for active recreational use

MCC 16.21.060: *Additional open space criteria. The design of an open space area should encourage the following:*

6. Criterion met and 25% density bonus authorized. As discussed in Conclusions of Law 7-11, all the criteria of MCC 16.21.060 are met.

MCC 16.21.060(a): *Interconnection with designated open space on abutting properties;*

7. Criterion met. None of the adjacent parcels have designated open space. However, since the proposal is bounded by Designated Open Space on all four sides (see Exhibit 3), if there were ever to be any dedicated open space on any adjacent parcels, the open space would likely be contiguous and interconnected.

MCC 16.21.060(b)*: The preservation of important site features, such as rare or unusual stands of trees, unique geological features, or important wildlife habitat;*

8. Criterion met. No rare or important site features were observed on the site by County staff. However, the permanent open space designated by this project preserves much of the existing mature trees, which likely provide habitat (seen Exhibit 4).

MCC 16.21.060(c): *Direct access from as many lots as possible within the development;*

9. Criterion met. All resulting lots have direct access to the Designated Open Spaces of this proposal, as shown on the Draft Survey (Exhibit 3). Lots 1, 5, and 6 will be able to access the Active Recreation Area via the proposed access road.

MCC 16.21.060(d): *Minimizing the fragmentation of the open space areas. To the greatest extent possible, the designated open space should be located in large, undivided areas;*

10. Criterion met. The designated open spaces are undivided to the greatest extent possible. There is one area where there is a break in the contiguous open space, which can be seen on the Performance Subdivision Diagram (Exhibit 4). The break is to accommodate the access easement. On the western boundary of the proposal, the Designated Open Space thins down to 50 feet wide. On the eastern boundary of the proposal, the Designated Open Space thins down to 25-feet wide. Other than those thinner areas, the open spaces is in large, undivided areas.

MCC 16.21.060(e): *A curvilinear roadway design which minimizes the visual impact of houses as may be seen from the exterior of the site.*

11. Criterion met. The internal road for the lots is partially curvilinear. Due to the slope in the southern portion of the site, combined with the dedicated open space, the sightlines are such that the future residences on all lots will not be viewable from E Brockdale Rd. This can be seen in the Photos of Existing Site (Exhibit 7, Pages 1 - 3).

MCC 16.21.070: *Site design standards. The siting of house lots should avoid the following:*

a. *Interruption of scenic views and vistas;*
b. *Construction on hill tops or ridge lines;*
c. *Direct access or frontage on existing public ways;*
d. *A "linear" configuration of open space (except when following a linear site feature, such as a river, creek or stream).*

Compliance with the provisions set forth in this section shall entitle the Applicant to a residential density bonus equal to twenty-five percent of the difference between the standard residential density and the maximum residential density allowed within the particular development area.

12. Criterion met and 25% density bonus authorized.

The Photos of Existing Site (Exhibit 7) show that the addition of residences shouldn't interrupt scenic views or vistas. Per Conditions # 2 and 3 of the Findings of Fact, Conclusions of Law and Final Decision (Exhibit 2), the applicant has dedicated the area north of the ridge line as Designation Open Space (see Exhibit 3). Since the slopes of the ridge line and everything uphill from that are dedicated as permanent open space, no structures will interrupt scenic views or vistas.

The developable areas of the lots are mostly flat, and while the entirety of the site is on a hill, the vegetation on the perimeter of the site will be preserved as dedicated open space. This can be seen in the Photos of Existing Site (Exhibit 7). Per Conditions # 2 and 3 of the Findings of Fact, Conclusions of Law and Final Decision (Exhibit 2), the applicant has dedicated the area north of the ridge line as Designation Open Space (see Exhibit 4). Thus, no construction on hill tops or ridge line will occur due to this proposal.

All lots are accessed through an easement over tax parcel 42126-41-00000, so not lots within this proposal will have direct access or frontage on an existing public way.

The design of the open space is largely non-linear. As seen on the Draft Survey (Exhibit 3), the dedicated open space completely bounds the parcel along its western, northern, and eastern boundaries, with the only break being for the access road through the southern boundary. Areas of the open space that are seemingly "linear" occur to protect areas within 300 feet of slopes greater than 40% or to create a buffer around the perimeter of the site.

MCC 16.21.090 *: The applicant shall provide a mechanism to assure that any required open space is permanently protected and maintained.*

13. Criterion met. Restrictions for protecting and maintaining the open space will be recorded on the face of the survey.

MCC 16.21.100 : *(a) The open space may be conveyed by fee simple instrument to an owner's association, to the county (subject to county approval), or to an entity (for example, a land trust) acceptable to the county who has demonstrated capacity to provide for the long-term protection and maintenance of the property. (b) The open space may be kept by the Applicant, and used for any of the purposes set forth in Section 16.21.120.*

14. Criterion met. The open space will be kept by the applicant and future property owners as of now. The applicant has been made aware of the use restrictions in MCC 16.21.120.

MCC 16.21.110: *Any conveyance of the required open space shall include an endowment of funds equal to at least twenty times the annual estimated maintenance cost, in order to assure that the property will be maintained. The requirement for an endowment may be waived upon conveyance to an owner's association, provided that the bylaws of such association shall require regular payments from members to defray maintenance costs. The bylaws shall also include provisions for the recovery of funds in the event of default.*

15. Criterion met. No common amenities or infrastructure are being proposed or are required for the open space area. Therefore, the endowment requirement of this section should be waived.

MCC 16.21.120: *(a) The primary uses of open space set aside pursuant to this section are active and passive recreation, protection and preservation of critical areas, and preservation of other natural elements of importance to the community, and to the residents of the development. Other uses permitted within open space areas are forestry and agriculture, provided that these uses do not occur within any required buffer yard. (b) Open space set aside pursuant to this chapter may be designated by the Applicant as "future development area." Such designated area shall be kept and maintained as open space, until such time as the land may be designated for development at urban densities. At any time after such change in land use designation occurs, the "future development area" land may be developed in accordance with the regulations in effect at that time. Such development shall require a new, separate application. Primary resource areas and buffer yards shall not be designated as "future development areas."*

16. Criterion met. The open space set aside by the Applicants are dedicated to critical areas and active recreation, which is consistent with the uses authorized above.

Additional Review Criteria

MMC 15.09.050 Type III review

(1) The development does not conflict with the comprehensive plan and meets the requirements and intent of the Mason County Code, especially Titles 6, 8, and 16.

17. Criterion met. The proposal is consistent with the Mason County Comprehensive Plan in that it allows single family development in an unincorporated area while preserving rural character. The proposal is located on property that is zoned as Rural Residential 10 and the Applicant has so far complied with the requirement for a preliminary performance subdivision review under Title 16 Subdivisions of the Mason County Code. At this point in the process, application of Title 6--Sanitation does not apply. A Determination of Non-Significance (DNS) was issued on February 13, 2025 (Exhibit 5). The SEPA comment period ended on February 27, 2025. Three comments were received (Exhibit 5).

(2) The development does not impact the public health, safety and welfare and is in the public interest.

18. Criterion met. The preliminary sketch of the proposed performance subdivision meets the criteria for conservation areas and open space. From the standpoint of density and open space, which is the only focus of performance subdivision review, the project has no adverse impacts on public health, safety and welfare and is in the public interest by creating open space and preserving rural character.

(3) The development does not lower the level of service of transportation and/or neighborhood park facilities below the minimum standards established within the comprehensive plan. If the development results in a level of service lower than those set forth in the comprehensive plan, the development may be approved if improvements or strategies to raise the level of service above the minimum standard are made concurrent with the development. For the purpose of this section, "concurrent with the development" is defined as the required improvements or strategies in place at the time of occupancy, or a financial commitment is in place to complete the improvements or strategies within six years of approval of the development.

19. Criterion met. Adequacy of roads and parks will be addressed during later the later stages of subdivision review.

DECISION

The Applicants are entitled to a 100% density bonus MCC 16.21.050 (50%), MCC 16.21.060 (25%) and MCC 16.21.070 (25%). The Applicant's request for three additional lots as configured in Ex. 3 is approved.

Dated this 26th day of December 2025.

Phil A. Olbrechts
Mason County Hearing Examiner

Appeal Right and Valuation Notices

This land use decision is final and subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short, and procedures strictly construed. Anyone wishing to file a judicial appeal of this decision should consult with an attorney to ensure that all procedural requirements are satisfied.

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

City of Kenmore, Washington
Hearing Examiner Rules

1. EXPEDITIOUS PROCEEDINGS

The Hearing Examiner and all parties shall make every reasonable effort to avoid delay at each stage of every proceeding consistent with fairness to all parties.

2. COMPUTATION OF TIME

(a) In computing any period of time prescribed or allowed by these Rules of Procedure ("Rules"), the day of the act, event, or default from which the designated period of time begins to run shall not be included.

(b) The last day of the period so computed shall be included, terminating at 5:00 p.m., unless the last day of the period is a Saturday, Sunday or legal holiday as defined in RCW 1.16.050, in which event the period shall run until 5:00 p.m. of the next day which is not a Saturday, Sunday or legal holiday.

(c) When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays or legal holidays shall be excluded from the computation.

(d) "Working" days as referenced in these Rules exclude weekends and legal holidays.

3. DEFINITIONS

(a) "Code" or "KMC" means the Kenmore Municipal Code.

(b) "Council" means the Kenmore City Council.

(c) "Examiner" or "Hearing Examiner" means the City of Kenmore Hearing Examiner.

(d) "Interested Person" means any individual, partnership, corporation, association, or public or private organization of any character significantly affected by a proceeding before the Hearing Examiner or identified by the ordinance or Code under which the proceeding is brought as having a right to participate.

(e) "Party" means:

(1) For an open record hearing on a permit application:
- (i) the applicant;
- (ii) the City;

(iii) a person who testifies at the hearing or who submits written testimony for consideration at the hearing; and

(2) For any open record appeal of an administrative decision:
(i) the applicant;
(ii) the appellant;
(iii) the City; and
(iv) any intervenors allowed by the hearing examiner to join as a party.

4. QUALIFICATIONS, DUTIES AND JURISDICTION OF THE HEARING EXAMINER

(a) Hearing Examiner Qualifications**:** Hearings shall be presided over by a duly qualified Hearing Examiner or deputy Hearing Examiner appointed/contracted by the City Council.

(b) Hearing Examiner Duties**:** The Hearing Examiner shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. The Hearing Examiner shall have all powers necessary to that end, including the following:

(1) To administer oaths and affirmations;

(2) To issue subpoenas to compel witnesses to appear at the hearing;

(3) To rule upon offers of proof and to admit evidence;

(4) To regulate the course of the hearings and the conduct of the participants;

(5) To consider and rule upon procedural and other motions appropriate to the proceedings;

(6) To make and file orders, recommendations and decisions; and

(7) To hold prehearing or other conferences.

(c) Hearing Examiner Jurisdiction: The Hearing Examiner shall have the authority to conduct hearings, prepare a record, enter written findings and conclusions, and issue decisions or recommendations for any matter or appeal for which the KMC, other ordinance, or the City Council designates the Hearing Examiner to be the Hearing Body.

On appeals, the Hearing Examiner shall have the authority to vacate, affirm or modify the underlying appealed from decision.

(d) Hearing Examiner Independence: In the performance of these duties, the Hearing Examiner shall not be responsible to, or subject to the supervision or direction of, any elected official or any officer, employee or agent of any municipal department.

(e) Disqualification:

(1) The Examiner on his or her own initiative may enter an order of disqualification in the event of personal bias or prejudice, or to preserve the appearance of fairness.

(2) A party may file a declaration (a statement in writing and under penalty of perjury) stating facts supporting the belief that such party cannot have a fair and impartial hearing by reason of the personal bias, prejudice, or appearance of unfairness of the Hearing Examiner.

The declaration shall be filed not less than ten (10) working days before the hearing unless good cause is shown, and in any case before the Hearing Examiner makes any discretionary ruling; provided a declaration seeking disqualification on appearance of fairness grounds may be filed at any time, but must be filed promptly after the basis for disqualification is known or should have been known to the party seeking such disqualification.

The Hearing Examiner shall rule on the declaration prior to making any other ruling and prior to proceeding with the hearing.

5. EX PARTE COMMUNICATION

(a) For purposes of this rule, "ex parte communication" means a written or oral communication concerning the pending matter with the Hearing Examiner outside of a public hearing and not included in the public record.

(b) Pursuant to Chapter 42.36 RCW, as is currently exists or is hereby amended, no interested person (nor his/her agent, employee or representative) shall communicate ex parte directly or indirectly with the Hearing Examiner concerning the merits or facts of any matter being heard before the Hearing Examiner, or any factually related matter. This rule shall not prohibit ex parte communications about schedules and other procedural topics.

(c) The Hearing Examiner shall not communicate ex parte directly or indirectly with any interested person (nor his/her agent, employee or representative) regarding the merits or facts of any matter being heard before the Hearing Examiner except about procedural topics as identified above.

(d) If a substantial, prohibited ex parte communication is made to or by the Hearing Examiner, such communication shall be publicly disclosed at the next following and each

succeeding public hearing regarding the pending matter or, if there is no further such hearing, disclosure shall be made in writing to all parties of record within five (5) working days of the date of the improper communication. Parties shall have the opportunity to make objections to the ex parte communication within ten (10) working days of such disclosure.

6. RIGHTS OF A PARTY

Every party in any proceeding before the Hearing Examiner shall have a right to the following:

(a) Due notice.
(b) Presentation of evidence.
(c) Objection.
(d) Motion.
(e) Argument.
(h) Any other rights essential to a fair hearing.

7. PREHEARING AND OTHER CONFERENCES

(a) The Examiner may, on his or her own order, or at the request of a party, hold a conference prior to the hearing to consider:

(1) Identification, clarification, and simplification of the issues;

(2) Disclosure of witnesses to be called and exhibits to be presented;

(3) Motions;

(4) Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.

(b) Prehearing conferences may be held by telephone conference call.

(d) All parties shall be represented at any prehearing conference unless they waive the right to be present or represented, and are granted permission by the Hearing Examiner not to attend.

(e) Following the prehearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference. The prehearing order shall supersede any conflicting Hearing Examiner Rules.

8. APPEALS BEFORE THE HEARING EXAMINER

(a) <u>Filing Requirements for Filing of the Appeal</u>

Fee and content requirements are set by Code. Any applicable Code deadlines for filing an appeal or serving the appeal at specified places or upon specified persons shall be considered jurisdictional. The failure of a party to comply with a jurisdictional requirement shall be grounds for dismissal of the appeal upon motion by a party or sua sponte by the examiner at any time prior to the issuance of a final decision.

(d) Clarification of the Appeal Statement

If the Hearing Examiner determines that the appeal is vague or ambiguous or does not sufficiently set forth the exceptions and objections with regard to the appealed matter, the Hearing Examiner may require that the appellant amend the appeal.

Within ten (10) calendar days of notice to amend, or a shorter time period as found to be equitable by the Hearing Examiner, the appellant shall file a written clarification of the appeal as required by the Hearing Examiner. If the appeal is not amended by 5:00 p.m. of the last day of that time period, it shall be dismissed by the Hearing Examiner.

(e) Dismissal of Appeals

The Hearing Examiner shall dismiss an appeal without hearing when it is determined by the Hearing Examiner without merit on its face, frivolous, or brought merely to secure a delay.

(f) Parties to the Appeal

The parties to the appeal are the City, appellant(s) and the applicant. If multiple appellants or a group of appellants file an identical appeal, the Hearing Examiner may request that a representative be appointed to receive notices and copies of documents. The appointed representative will receive copies of documents and notices for the group.

(g) Intervention

An interested person may petition the Examiner to intervene as a party. The petition shall be filed at least ten (10) working days prior to the appeal hearing and shall set forth reasons why the petitioner should be allowed to participate. The petition shall be considered at or before the beginning of the hearing and intervention shall be allowed only if the Examiner so orders, and upon such terms and conditions as the Examiner determines to be appropriate.

The parties shall have the opportunity for reply or objection. Any reply or objection must be filed at least three (3) working days prior to the appeal hearing.

(h) Withdrawal of the Appeal

The appellant may withdraw an appeal at any time prior to the close of the record.

(i) Staff Report

Where required under the Code, the Department of Development Services shall file a written staff report with the Hearing Examiner, within the timeframe prescribed by the Code, summarizing its case and making a recommendation for a remedy. A copy of this report shall be mailed simultaneously to the appellant. The staff report shall be completed pursuant to the Code.

(j) Format of Appeal Hearing

The format for an appeal hearing will be informal, yet designed in such a way that the evidence and facts relevant to the proceeding will become readily and efficiently available to the Hearing Examiner. Any appeal hearing shall include, but need not be limited to, the following elements:

(1) A brief introductory statement by the Hearing Examiner.

(2) Presentation by the City including any relevant testimony the City wishes to present.

(3) Cross examination of City witnesses by the appellant, if needed.

(4) Presentation by the appellant, including any relevant testimony the appellant wishes to present.

(5) Cross examination of appellant witnesses by the City, if needed.

(6) Presentation of rebuttal witnesses, if needed.

(7) Questions by the Hearing Examiner.

(8) Concluding remarks or summations and rebuttal thereto as necessary.

(k) Participation by Non-Party

Appeal hearings are open to the public, but testimony is generally not allowed from a person who is not a party to an appeal hearing unless called as a witness by a party. The Hearing Examiner at his or her discretion may call or allow a non-party witness to testify upon a determination that such testimony will be relevant and not repetitive.

9. PRE-DECISION HEARING ON APPLICATIONS

(a) Departmental Staff Report on Application

Pursuant to the Code, the involved City department(s) shall distribute a staff report to the Hearing Examiner, the applicant, and any other required parties prior to the date of the public hearing and, at the same time, copies shall be made available to the public at the City Clerk's Office.

(b) Format of Hearing

The format for a pre-decision hearing will be public and informal, but organized so that the testimony and evidence can be presented quickly and efficiently. A pre-decision hearing shall include, but need not be limited to, the following elements:

(1) A brief introductory statement by the Hearing Examiner.

(2) A presentation by the City, which may include reference to visual aids such as maps, and a summary of the recommendation of city staff.

(3) Testimony by the applicant**.**

(4) Testimony from interested persons.

(5) Rebuttal by the City.

(6) Rebuttal by the applicant.

(6) Closing remarks, if needed.

The examiner may ask questions at any time of any party prior to close of the hearing.

(c) Content of the Record

The record of a hearing conducted by the Hearing Examiner shall include, but need not be limited to, the following:

(1) The application.

(2) The departmental staff reports.

(3) All other evidence received or considered including all exhibits and other materials filed.

(4) A recommendation or decision containing findings and conclusions including a statement of matters officially noticed by the Hearing Examiner.

(5) Electronic recordings of the proceedings.

(6) An affidavit or certificate of written notice given of the hearing.

10. EVIDENCE

(a) Burden of Proof

(1) Where applicable ordinance(s) so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(2) Where the applicable ordinance(s) provide that the appellant has the burden, appellant(s) must show by the applicable standard of proof that the City's decision or action is not in compliance with ordinance(s) authorizing that decision or action.

(3) Where the applicable ordinance(s) do not provide that the appellant has the burden, the City shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(4) Unless otherwise provided by applicable ordinance(s), statue, or case law, the standard of proof is a preponderance of the evidence.

(b) Admissibility

The hearing generally will not be conducted according to technical rules relating to evidence and procedure. Any evidence that is relevant, material, and reliable may be admitted if in the Hearing Examiner's judgment it possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

(c) Copies

Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(d) Official Notice

The Hearing Examiner may take official notice of generally accepted and recognized facts and law, including but not limited to City ordinances, resolutions, court decisions, and prior Hearing Examiner decisions. The Examiner may also take notice of technical or scientific facts generally accepted as such within the relevant scientific or technical community.

11. RECORDING

All proceedings before the Hearing Examiner shall be electronically recorded including but not limited to prehearing conferences, appeal hearings, and pre-decision hearings. The recordings of hearings shall be part of the official case record.

12. OATH OR AFFIRMATION

All testimony shall be taken under oath or affirmation but failure to administer the oath shall not be grounds for invalidation of the proceedings unless invalidation is required by other law.

13. CROSS-EXAMINATION

Cross-examination of expert witnesses and appeal parties and witnesses shall be permitted as necessary for full disclosure of the facts and as required by law.

14. LIMIT ON TESTIMONY

The Examiner may impose reasonable limitations on the number of witnesses heard, and on the nature and length of their testimony, in order to expedite the proceeding and avoid continuation of the hearing. Notice shall be given as early as practical when time limitations are to be imposed. If a party is unable to present his or her arguments and testimony within the allotted time, the record may be kept open and an opportunity may be granted to submit written materials after the close of the hearing.

15. MOTIONS

Any application to the Hearing Examiner for an order shall be by motion which, unless made during a public hearing, shall be in writing. The motion shall state explicitly the reasons for the request, and shall state the specific relief or order sought.

Motions in advance of the hearing shall be received by the Hearing Examiner and all parties of record at least five (5) working days before the date of the hearing. Written replies to such a motion shall be received by the Hearing Examiner and all parties of record before the time set for the hearing.

The Hearing Examiner may issue an order based on the written motion and any replies, without oral arguments, or may call for oral arguments before ruling on the motion.

16. CONSOLIDATION OF HEARINGS

When practical and consistent with ordinance requirements, the Hearing Examiner will consolidate land use matters for hearing. Any party may bring to the attention of the Hearing Examiner the need for consolidation.

17. SITE VIEW

The Hearing Examiner may view a site before or after a hearing. Failure to view a site will not invalidate the Hearing Examiner's decision.

18. CONTINUING OR REOPENING HEARING

(a) Prior to a scheduled hearing, the Examiner may continue the hearing for good cause as determined by the Hearing Examiner. Written notice of the new date, time, and place of the continued hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the KMC. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen proceedings for good cause and may permit or require written briefs or oral argument as consistent with state law. If a matter is reopened after conclusion of the hearing, written notice of the date, time, and place of the reopened hearing shall be provided to each party and person(s) entitled to receive notice pursuant to the KMC. Such notice shall be provided not less than ten (10) prior to the reopened hearing

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required.

19. LEAVING THE RECORD OPEN

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument, additional evidence, or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as otherwise provided in these rules, , information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner in making the decision or recommendation.

20. RECOMMENDATION OR DECISION

The Hearing Examiner shall issue a written recommendation or decision within ten (10) working days of the closure of the record, unless the time period is extended as authorized by law or mutual agreement of the parties.
Copies of the recommendation or decision shall be mailed to all parties of record, and to any other person pursuant to the Code.

21. CONTENT OF RECOMMENDATION OR DECISION

The Hearing Examiner's recommendation or decision shall contain findings of fact, conclusions based thereon, and a recommendation or decision consistent with those conclusions. In addition, the Hearing Examiner's recommendation or decision may include conditions necessary to mitigate any impacts of the proposal and a brief statement of appeal rights of the parties.

22. CLARIFICATION OF A DECISION OR RECOMMENDATION OF THE EXAMINER

A party may file a written request for clarification of the decision or recommendation. Alternatively, the Hearing Examiner may issue a clarification upon his or her own motion. A clarification may not materially alter the outcome of the decision or recommendation. A request for clarification does not stop the running of the time for filing appeals, whether to the City Council or Superior Court.

The written request for clarification must be received by the City Clerk and by all parties within five (5) working days after the date of issuance of the Hearing Examiner's decision or recommendation.

The Hearing Examiner, in his or her discretion, shall determine what further action is proper, and within five (5) working days after filing of the request shall issue that determination in writing to all parties of record.

23. RECONSIDERATION

(a) A party may file a written motion for reconsideration with the City Clerk within five (5) calendar days of the date of the Hearing Examiner's decision. The timely filing of a motion for reconsideration shall stay the Hearing Examiner's decision until such time as the motion has been disposed of by the Hearing Examiner. No party may file a motion to reconsider on a decision issued after reconsideration.

(b) The grounds for seeking reconsideration shall be limited to the following:

1. The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

2. The Hearing Examiner's decision is an erroneous interpretation of the law;

3. The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;

4. The Hearing Examiner's decision is a clearly erroneous application of the law to the facts; or

5. The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;

(c) The motion for reconsideration must:

1. Contain the name, mailing address and daytime telephone number of the moving party, together with the signature of the moving party;

2. Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;

3. State the specific grounds upon which relief is requested;

4. Describe the specific relief requested; and

5. Where applicable, identify the specific nature of any new evidence. Such new evidence shall be considered only if the additional evidence relates to: (i) the grounds for disqualification of the Hearing Examiner when such grounds were unknown by the moving party at the time the record was created; or (ii) matters that were improperly excluded from the record after being offered by a party.

(d) The Hearing Examiner shall issue a decision on the motion as follows:

1. Deny the motion in writing; or

2. Issue an amended decision; or

3. Accept the motion and set the matter for closed record review with no or limited new evidence or information allowed to be submitted and only written reconsideration arguments allowed. Any written arguments must be filed within 10 calendar days from notice of the Hearing Examiner.

24. TERMINATION OF JURISDICTION

The jurisdiction of the Hearing Examiner in a matter shall terminate upon the issuance of his or her final action in that matter. The Hearing Examiner's final action is the issuance of a recommendation or decision unless a request for reconsideration or clarification is timely filed. If a request for reconsideration or clarification is timely filed, the final action of the Hearing Examiner is his or her determination on the reconsideration or clarification request.

Upon termination of the Hearing Examiner's jurisdiction, matters which require City Council action are under the jurisdiction of the City Council. The City Council may, however, revive the jurisdiction of the Hearing Examiner and remand a matter for clarification of specific issues, or to consider facts not available at the time of the original hearing. Remand hearings shall be processed in the same manner as the original proceeding before the Hearing Examiner, using the same procedures for posting, public

notice and the forwarding of the Hearing Examiner's recommendation to the City Council.

25. DISPOSITION OF CASE RECORD

The official case record and other related materials shall be forwarded to the City Clerk for storage after a matter has been finally acted upon by the City Council or by the Hearing Examiner. Tape recordings of all proceedings before the Hearing Examiner shall be maintained in the City Clerk's Office for the period required by law.

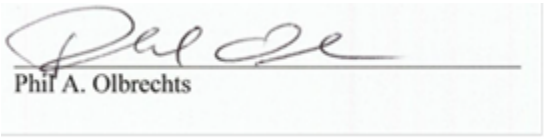
Case records of matters before the Hearing Examiner are public records and available for review.

26. FILING

(a) Documents shall be deemed filed with the Hearing Examiner, City Clerk and City on receipt at the Kenmore City Clerk's Office, located at 18120 68th AVE NE.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be regarded as complete upon deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet, or at the time personally delivered, or transmitted by fax. On a case by case basis the Hearing Examiner may authorize service by email to specified email addresses in lieu of fax or mail.

DATED this 24th day of January, 2017.



Hearing Examiner for City of Kenmore

Exhibit "A"
SOQ SIGNATURE SHEET

Solicitation Name: Hearing Examiner and Pro Tem Hearing Examiner

Legal Name: Phil Olbrechts

Business Name: Olbrechts and Associates, PLLC

Address: 720 N. 10th St., A #297, Renton, WA 98057

Unified Business Identifier (UBI) No.: 6030601020010001

M/W/DBE Certification No. (If Applicable): _____

For questions regarding this Statement of Qualifications, the City RFQ Coordinator should contact the following individual:

Name: Phil Olbrechts

Telephone No.: 206-650-7268

Email Address: olbrechtslaw@gmail.com

Signature of Authorized Official

The Consultant is hereby advised that by signature of this Statement of Qualifications, they are deemed to have acknowledged all requirements and signed all certificates contained herein.

Signature: Phil Olbrechts

Name of Person Signing: Phil Olbrechts

Title: Managing Member

Date: January 30, 2026

Email Address: olbrechtslaw@gmail.com

Exhibit "B"

STATEMENT OF COMPLIANCE WITH NONDISCRIMINATION REQUIREMENT
AND
EQUAL BENEFITS DECLARATION

The Olympia City Council mandates compliance with the City's *Nondiscrimination in Delivery of City Services or Resources* ordinance (OMC 1.24) and *Employee Benefits* ordinance (OMC 3.18) for all services provided by City employees or through contracts with other entities. All contract agencies or vendors and their employees must understand and fully carry out the City's nondiscrimination policy. Accordingly, each City agreement or contract for services contains language that requires an agency or vendor to agree that it shall not unlawfully discriminate against an employee or client based on any legally protected status. This includes but is not limited to: race, creed, religion, color, national origin, age, sex, marital status, veteran status, sexual orientation, gender identity, genetic information, or the presence of any disability and any other status protected from discrimination by state or federal law. Unlawful discrimination includes transphobic discrimination or harassment, including transgender exclusion policies or practices in employee benefits.

Listed below are methods to ensure that this policy is communicated to your employees, if applicable.

- Nondiscrimination provisions are posted on printed material with broad distribution (newsletters, brochures, etc.).
- Nondiscrimination provisions are posted on applications for service.
- Nondiscrimination provisions are posted on the agency's web site.
- Nondiscrimination provisions are included in human resource materials provided to job applicants and new employees.
- Nondiscrimination provisions are shared during meetings.

Failure to implement at least two of the measures specified above or to comply with the City of Olympia's nondiscrimination ordinance constitutes a breach of contract.

By signing this statement, I acknowledge compliance with the City of Olympia's Nondiscrimination ordinance by the use of at least two of the measures specified above.

If this contract is valued at $50,000 or more, I affirm that Consultant listed below complies with the City of Olympia Equal Benefits Ordinance (OMC 3.18) and shall, prior to contracting with the City, have policies in place prohibiting discrimination in the provision of employee benefits.

Should I operate as a sole proprietor, I agree not to discriminate against any client, or any future employees, based on any status protected from discrimination by state or federal law.

Phil Olbrechts	January 30, 2026
Signature	Date
Phil Olbrechts	Olbrechts and Associates, PLLC
Printed Name of Signatory	Consultant Name