



Notice of Hearing Examiner Decision

05/14/2024

To: Interested Parties and Parties of Record

RE: Project Name: AEW Builders Stream Buffer Reduction
 Applicant: Crosby Olsen, AEW Builders, LLC
 2222 Belfair Avenue NE
 Bainbridge Island, WA 98110
 Application: Critical Area Variance (CVAR)
 Permit Number: 22-04853

The Kitsap County Hearing Examiner has **APPROVED** the land use application for **Permit #:22-04853 AEW Builders Stream Buffer Reduction Critical Area Variance (CVAR)**, subject to the conditions outlined in this Notice and included Decision.

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

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://www.kitsap.gov/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>.

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

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

CC: Owner/Applicant: Crosby Olsen – AEW Builders, AEWBuilders@gmail.com
 Engineer: David Bannon, bannoneng1@comcast.net
 Project Manager: Christy Christensen, christy@c3habitat.com
 Health District
 Public Works
 Parks
 Navy
 DSE
 North Kitsap Fire District
 North Kitsap School District
 Puget Sound Energy

Water Purveyor, PUD 1,
Point No Point Treaty Council
Suquamish Tribe
Port Gamble S'Klallam Tribe
Squaxin Island Tribe
Puyallup Tribe
WA Dept of Fish & Wildlife
WA State Dept of Ecology-Wetland Review
Interested Parties: Jeremy Franklin-Ross, majikthys@gmail.com; Rod Malcom –
Suquamish Tribe, rmalcom@suquamish.nsn.us; Sarah Parrington,
sarahpar@centurytel.net; Marla Powers – Port Gamble S'Klallam Tribe,
mpowers@pgst.nsn.us;

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BEFORE THE HEARING EXAMINER FOR KITSAP COUNTY

Phil Olbrechts, Hearing Examiner

RE: AEW Builders LLC Critical Area Variance File No. 22-04853	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION.
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INTRODUCTION

AEW Builders LLC requests approval of a critical areas variance to reduce the buffer to a Type-F Stream from the required 150 feet to 25-45 feet along with a 5-foot reduced building setback from fifteen feet to ten feet for two adjoining residences located on two lots located north of 24135 Madura Road NE in Kingston. The variance is approved subject to conditions.

The proposal drew comment from neighbors, the Suquamish Tribe and the Port Gamble S’Klallam Tribe. Those comments have been addressed in the findings and conclusions below, pages 2-6.

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 Exhibit 28.

EXHIBITS

Exhibits 1-26 listed in the Index to the Record prepared by County staff were admitted during the hearing. The following were also admitted during the hearing:

Exhibit 27: Letter from Rod Malcolm, Suquamish Tribe

Exhibit 28: Hearing transcript.

FINDINGS OF FACT

Procedural:

1. Applicant. Crosby Olsen, AEW Builders, LLC, 2222 Belfair Avenue NE Bainbridge Island, WA 98110.
2. Hearing. The Hearing Examiner conducted a virtual hearing on the application at 9:30 am on April 25, 2024.

Substantive:

3. Site/Proposal Description. AEW Builders LLC requests approval of a critical areas variance to reduce the buffer to a Type-F Stream from the required 150 feet to 25-45 feet with a 5-foot reduced building setback from fifteen feet to ten feet for two adjoining residences located for two lots located north of 24135 Madura Road NE in Kingston. The parcels are lot 43 and 44 of the Taree 3rd Addition, recorded in May of 1970 in Volume 15 of Plats, pages 10-13 and are legal lots of record. According to Kitsap County Assessor's Data, Lot 4 is approximately 0.36 acres and lot 44 is 0.29 acres. The Type-F stream is located along the southeast property line of the two lots. Access to the subject properties will be through a joint use driveway which reduces parking areas and minimizes the stream impacts for both structures. No stream crossings are required. The subject lots were platted in 1970 before Kitsap County's adoption of Type-F stream buffers. The 150-foot buffer encumbers the entirety of Lots 43 and 44.

4. Characteristics of the Area. The properties are bound to the south and northwest by adjacent platted residences, to the west by Madura Road NE, and to the east by South Kingston Road. Properties to the north and south are undeveloped (see Exhibit 19, Mitigation Planting Plan, revised).

5. Adverse Impacts. No significant adverse impacts are anticipated from the proposed variance.

A. No Net Loss. The finding of no significant impacts is primarily based upon the conclusion of the Applicant's habitat management plan, which finds that with recommended mitigation the proposal will result in no net loss of ecological function as follows:

The primary goals of the planting plan are to restore stream buffer that has been overrun with invasive species and to achieve a no net loss to buffer function via enhancement. These goals will be met by utilizing best management practices during the construction period. This is done so that minimal impacts occur in the critical areas during the planting to help increase the success rate for healthy, vigorous

1 *vegetation. Ultimately, by the fifth year following implementation of*
2 *the plantings, the enhanced area should meet these performance*
3 *standards.*

3 The recommendations of the habitat management plan are made conditions of
4 approval. The habitat management plan was written by a biologist and the report
5 thoroughly assesses project impacts. In response to public and tribal comments,
6 the project biologist completed a thorough re-examination of the mitigation plan
7 with a revision to the proposal including reducing the size and location of the
8 driveway and revisions to the drainfield locations. Additional trees and planting
9 were also proposed. The report recommends enhancement of the stream corridor
10 with in-fill of native trees and shrubs, as well as the eradication of invasive
11 Himalayan blackberry and English ivy from the established stream corridor. As
12 quoted above, the report also outlines a five-year monitoring plan.

9 At hearing Marla Powers from the Port Gamble S’Klallam Tribe suggested that a
10 staff recommended condition for buffer signs should be changed from a “should”
11 to a “shall,” that a recommended condition offering the option to build within the
12 buffer upon staff approval should be revised to remove that option and that the
13 habitat management plan conditions be recorded. Staff at hearing agreed that these
14 revisions were appropriate and they have been implemented by this Decision.

13 Marla Powers further questioned how the County could conclude that the proposed
14 development could maintain ecological functions and values when best available
15 science dictates a 200-foot buffer for ecological function and a 100-foot buffer for
16 pollution control. That position doesn’t take into account the fact that the buffer
17 area in question is degraded by invasive species. The standard employed by the
18 Applicant and found acceptable to County staff was no net loss of ecological
19 function. No net loss is an appropriate standard for mitigation since it essentially
20 requires the Applicant to mitigate any damage to ecological function that it creates.
21 There doesn’t appear to be any question that removal of invasive species and
22 replacement with native species will improve ecological function. The Applicant’s
23 consultant, with concurrence of County staff, concluded that the removal is more
24 than necessary to off-set project impacts. There is no evidence to the contrary. The
25 buffer may not function as well as a 200-foot undeveloped buffer, but the
26 preponderance of evidence establishes that it will function better than current
27 conditions.

22 Ms. Powers also questions whether five year monitoring will be sufficient to ensure
23 that invasive species do not repopulate the project site. Given that five year
24 monitoring appears to be standard practice and that County staff have found it to
25 be sufficient, the proposed monitoring is found to be adequate.

25 B. Critical Areas. The proposal is located within two other critical areas in addition
to the Type-F stream. The proposal will not adversely affect these additional
critical areas. The proposal is located within an aquifer recharge area, but as noted

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in the staff report, single-family development is not a listed activity with potential threat to groundwater quality and no further review is required. The site is also located in a moderate erosion hazard area. As noted in the staff report, the requirements for meeting critical area standards for such hazards can be addressed during Site Development Activity Permit (SDAP) review.

6. Minimum Necessary. The requested variance is the minimum necessary to afford relief. If the proposed structure is moved in any direction, it would result in an impact to either a zoning setback, or further critical area buffer encroachment by required residential facilities. The Applicant’s environmental consultant also found that *“the requested buffer reduction is the minimum necessary to establish a setback around the residence while optimizing the stream buffer function.”* County staff agreed with this finding.

The Applicant has demonstrated considerable effort in minimizing impacts. As testified by staff, the planting plan went through three iterations. One of the outcomes of the project revisions was to create a shared driveway between the two adjoining lots to minimize buffer encroachment and impervious surface. The shared driveway further enabled the Applicant to move the proposed homes further from the stream.

The building size proposed by the applicant also helps minimize buffer encroachment. The Applicant proposes a building footprint of 1,700 square feet. County staff testified that the proposed home size is substantially smaller than surrounding homes, many of which are in the 2,300 square foot range.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. KCC 19.300.315(A)(3)(b) provides that fish and wildlife conservation buffer reductions for single-family residences greater than fifty percent shall be pursuant to a Type III variance. As outlined in KCC 21.04.110, the Type III process involves an open record hearing held by the hearing examiner and a final decision issued by the hearing examiner.

Substantive:

- 2. Zoning Designation. The property is currently zoned Urban Low (UL).
- 3. Review Criteria. KCC 19.100.135A governs the criteria for critical area variances. Pertinent criteria are quoted below and applied via corresponding conclusions of law. Per KCC 19.300.315(A)(3)(b), buffer reductions for single-family

1 residences greater than fifty percent shall be pursuant to a variance under Section
2 19.100.135.

3 **KCC 19.100.135A1:** *A variance in the application of the regulations or standards of*
4 *this title to a particular piece of property may be granted by Kitsap County, when it*
5 *can be shown that the application meets all of the following criteria:*

6 *1. Because of special circumstances applicable to the subject property, including size,*
7 *shape, or topography, the strict application of this title is found to deprive the subject*
8 *property of rights and privileges enjoyed by other properties in the vicinity; provided,*
9 *however, the fact that those surrounding properties have been developed under*
10 *regulations in force prior to the adoption of this ordinance shall not be the sole basis*
11 *for the granting of a variance.*

12 4. Criterion met. The criterion is met. The property is subject to special
13 circumstances because it is completely encumbered by a Type F stream buffer. That
14 circumstance deprives the owner of property rights and privileges enjoyed by others in
15 the vicinity because without the variance the Applicants would not be prohibited from
16 building a home or any other critical area nonexempt structure on their property. The
17 construction of a single-family home is a right that would be generally available to any
18 other property of similar size that would not be encumbered by critical area limitations.

19 **KCC 19.100.135A2:** *The special circumstances referred to in subsection (A)(1) of*
20 *this section are not the result of the actions of the current or previous owner.*

21 5. Criterion met. The criterion is met. The circumstances are a natural condition of
22 the property. As noted in the staff report, the lot was created in 1970, before the County
23 had adopted its critical areas ordinance.

24 **KCC 19.100.135A3:** *The granting of the variance will not result in substantial*
25 *detrimental impacts to the critical area, public welfare or injurious to the property or*
26 *improvements in the vicinity and area in which the property is situated or contrary to*
27 *the goals, policies and purpose of this title.*

28 6. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.
29 5. Approval of the variance is consistent with the policies and purposes of Title 19 as
30 identified in KCC 19.100.105 because there will be no net loss of ecological function
31 under the mitigation plan proposed by the Applicants. As outlined in Finding of Fact
32 No. 5, the Port Gamble S’Klallam Tribe argued that the proposal was not as effective
33 as the 200-foot buffer supported by best available science. However, the proposal will
34 improve upon existing conditions. A project that improves ecological function does
35 not qualify as one that results in detrimental impact,

KCC 19.100.135A4: *The granting of the variance is the minimum necessary to*
accommodate the permitted use.

1 7. Criterion met. The criterion is met for the reasons identified in Finding of Fact No.
2 6. At least a couple hearing participants argued that since the two lots are owned by
3 the same developer, they should be combined into one building site to minimize buffer
4 impacts. Such a position is unlikely to pass constitutional challenge. As outlined in
5 detail in the Shirley examiner variance decision, File No. File No. 22-03914 and 22-
6 00285, the courts are fairly unforgiving when regulations deprive a lot owner of all
7 development potential of their lot. *See Lucas v. South Carolina Coastal Commission*,
8 505 U.S. 1003 (1992). Such a permitting condition would have a high potential of
9 creating takings liability. It doesn't appear there's any case law that authorizes a lot
10 combination requirement as a permit condition for reasonably sized lots encumbered
11 by critical areas.

8 **KCC 19.100.135A5:** *No other practicable or reasonable alternative exists. (See*
9 *Definitions, Chapter 19.150.)*

10 8. Criterion met. The criterion is met. KCC 19.150.510 defines Reasonable
11 Alternative as “*an activity that could feasibly attain or approximate a proposal’s*
12 *objectives, but at a lower environmental cost or decreased level of environmental*
13 *degradation*”. As determined in Finding of Fact No. 6, alternative locations would
14 require encroaching into other required setbacks.

13 **KCC 19.100.135A6:** *A mitigation plan (where required) has been submitted and is*
14 *approved for the proposed use of the critical area.*

15 9. Criterion met. The criterion is met by the applicant's mitigation plan, Ex. 19.

16 DECISION

17 Based upon the conclusions of law above, the variance application is approved subject
18 to the following conditions:

19 a. Planning/Zoning

- 20 1. Permit approval subject to conditions in the Hearing's Examiner Decision.
- 21 2. The proposal shall be compliant with the applicable zoning standards of the Urban
22 Low (UL) zoning district.
- 23 3. At the time of SDAP submittal, the site plan shall show all current easements to
24 ensure the project does not encroach on required setbacks or the easement(s) itself.

23 b. Development Engineering

- 24 4. Construction plans and profiles for all roads, storm drainage facilities and
25 appurtenances prepared by the developer's engineer shall be submitted to Kitsap
County for review and acceptance. No construction shall be started prior to said plan
acceptance.

1 5. The information provided demonstrates that, due to the proximity of critical areas,
2 this proposal will require a Site Development Activity Permit (SDAP) from
3 Development Services and Engineering.

4 6. Stormwater quantity control, quality treatment, and erosion and sedimentation
5 control shall be designed in accordance with Kitsap County Code Title 12 effective at
6 the time of development permit application. The submittal documents shall be prepared
7 by a civil engineer licensed in the State of Washington. The fees and submittal
8 requirements shall be in accordance with Kitsap County Ordinances in effect at the
9 time of SDAP application.

10 7. The Washington State Department of Fish and Wildlife may require a Hydraulic
11 Project Approval for the work required near the stream.

12 8. If the project proposal is modified from that shown on the submitted site plan
13 accepted for review November 15, 2022, Development Services and Engineering will
14 require additional review, potentially new conditions, and potentially a revision to this
15 decision.

16 c. Environmental

17 9. The proposal shall follow the recommendations of the Revised Habitat
18 Management Plan (HMP, exhibit 12, dated 8/4/2023) and the Revised Mitigation Plan
19 (exhibit 19, dated 11/01/2023), by C3 Habitat, provided that the conditions in p. 10 of
20 the HMP are amended to change the “should” for buffer signs to “shall” and to remove
21 “*unless permitted by Kitsap County Department of Community Development.*” The
22 conditions of the HMP shall be recorded on the subject properties.

23 10. Recommended noxious weed management shall be performed by hand and
24 mechanical means. The use of chemical herbicides, pesticides and fertilizers is not
25 recommended due to the proximity of the creek.

11. A Hydraulic Project Approval (HPA) may be required for the proposed dispersion
facility. Prior to SDAP approval, the applicant shall submit an approved HPA from the
Washington State Department of Fish and Wildlife (WDFW) or documentation from
WDFW specifying that an HPA is not required.

12 d. Traffic and Roads

13 12. Submit an Application for Concurrency Test (KCPW Form 1601) as required by
14 Chapter 20.04.030, Transportation Concurrency, of the Kitsap County Code. The
15 KCPW 1601 form reserves road capacity for the project.

16 13. The required Site Development Activity Permit application shall include
17 documentation of rights of use of the access easement indicated as providing access to
18 this parcel.

19 14. The required Site Development Activity Permit shall include plans for construction
20 of the road approach between the edge of existing pavement and the right-of-way line
21 at all intersections with county rights-of-way. Approaches shall be designed in
22 accordance with the Kitsap County Road Standards as established in Chapter 11.22 of
23 the Kitsap County Code. Existing approaches may need to be improved to meet current
24 standards.

25 15. Any work within the County right-of-way shall require a Public Works permit and
possibly a maintenance or performance bond. This application to perform work in the

1 right-of-way shall be submitted as part of the SDAP process (or building permit if no
2 SDAP is required). The need for and scope of bonding will be determined at that time.

3 e. Kitsap Public Health District

4 16. An approved Building Site Application (BSA) shall be submitted at the time of
5 building permit application.

6 Dated this 14th day of May, 2024.

7 *Phil Olbrechts*

8 Phil Olbrechts,
9 Kitsap County Hearing Examiner

10 **Appeal Right and Valuation Notices**

11 Pursuant to KCC 21.4.100 and KCC 21.04.110, these variance decisions are final land
12 use decisions of Kitsap County and may be appealed to superior court within 21 days
13 as governed by the Washington State Land Use Petition Act, Chapter 36.70C RCW.

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