



## Revised Notice of Hearing Examiner Decision

12/29/2019

To: Interested Parties and Parties of Record

RE: Project Name: APPEALS ACUP 20-04126 AND SEPA 20-01937  
SILVER VIEW APARTMENTS  
Applicant: SILVER VIEW, LLC  
9506 MICKELBERRY RD NW  
SILVERDALE, WA 98383  
Application: APPEALS ACUP 20-04126 AND SEPA 20-01937  
Permit Number: 20-04126 AND 20-01937

The Kitsap County Hearing Examiner's decision is the appeal is granted. The Revised Mitigated Determination of Non-Significance and the Revised Administrative Conditional Use Permit are remanded for further review consistent with this Decision for **Permit #: APPEALS ACUP 20-04126 AND SEPA 20-01937 SILVER VIEW APARTMENTS.**

**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://spf.kitsapgov.com/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 at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact [Help@Kitsap1.com](mailto:Help@Kitsap1.com) or (360) 337-5777.

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**KITSAP COUNTY HEARING EXAMINER**

**DECISION**

**Appeals ACUP 20-04126 and SEPA 20-01937  
Silver View Apartments**

**December 28, 2020**

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**I. FINDINGS**

**1. Background.** Appeal of two decisions approving a 160-unit apartment building on 5.34 acres of largely vacant land at 9506 NW Mickelberry Road, Silverdale, WA. The two decisions are a Revised Administrative Conditional Use Permit, or CUP, and a Revised Mitigated Determination of Non-Significance, or MDNS.

**2. Parties.**

**Appellants**, represented by Mr. Bricklin and Ms. Clungeon of Bricklin & Newman, LLP, 1424 Fourth Avenue, Ste. 500, Seattle, WA 98101.

- Appellants of Revised Administrative Conditional Use Permit Decision: Dyes Inlet Preservation Council, Robert Best, Christine Best, Deborah Best, Melissa Best, Maynard's Restaurant, Inc., Silver Bay Properties, LLC, Gale Brown, Pat Brown, Richard Friedman, Kirsten Friedman, Peter Spitzer, and Dorie Salem.
- Appellants of Revised MDNS: Robert and Chris Best, Deborah Best, Melissa Best, Rodney Parr, Maynard Meland, Silver Bay Properties, and Maynard's Restaurant, Inc.

**County or DCD**, represented by Ms. Nickel, Kitsap County Sr. Deputy Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366.

**Applicant, Silver View, LLC**, represented by Ms. Purves and Mr. Broughton, of Templeton Horton Weibel & Broughton, PLLC, 3212 NW Byron Street, Ste. 104, Silverdale, WA 98383.

**3. Pre-Hearing Procedures.** A pre-hearing conference was held to establish pre-hearing deadlines, including for filing the record, along with exhibit and witness lists.<sup>1</sup>

**4. Hearing.** The hearing was held over three and a half days, on November 12, 13, 19 and 23. Due to the COVID-19 response, the hearing was conducted through video link, with

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<sup>1</sup> Pre-Hearing Order (September 23, 2020).

the party representatives, witnesses, Examiner Clerk, and Examiner participating remotely. The remote process allowed the parties to present their cases while addressing current restrictions.<sup>2</sup>

**5. Witnesses.** These witnesses provided sworn testimony:

- **Appellants.** Dr. Cooke (wetlands); Mr. Lider, PE (stormwater and drainage); Mr. Mathieu (hydrology); Mr. Adams (architectural design); Mr. Tilghman (traffic); Ms. O’Sullivan (site environmental conditions); Ms. Deborah Best (area conditions and impacts); Mr. Best (area conditions and impacts); Mr. Meland (area conditions and impacts); and, Ms. Salem (area conditions and impacts).
- **DCD.** Mr. Heacock (environmental review); Ms. Vickery (stormwater); Ms. Nelson (stormwater); and, Mr. Smith (code compliance).
- **Applicant.** Mr. Cadwell (project owner); Mr. McCormick (project engineer); Mr. DeCaro (wetlands); and, Mr. Purdy (hydrology).

**6. Exhibits.** These exhibits were admitted.<sup>3</sup>

- **Administrative Record:** DCD 1-59.
- **Applicant.** Applicant 1-2 and Applicant Illustrative Exhibits 1-2
- **Appellant.** Appellant 1-36 and Appellant Illustrative Exhibits 1-4.

**7. Zoning and Comprehensive Plan Designations and Project Surroundings.**

The site is within the County’s Urban Growth Area, the Plan designates it Urban High Intensity Commercial, and it is zoned Regional Center. Before being rezoned to this more intensive zone in 2006, it had been zoned Urban Restrictive.<sup>4</sup> To the north is Regional Center zoning, developed with commercial, office, and retirement community uses. The site’s remaining three sides border Urban Restrictive zoning, with low density, single-family development.<sup>5</sup> The site is subject to the Silverdale Design Standards, Waterfront District.

**8. Review Process.** Once a permit application is deemed complete, but if additional

information is needed, the applicant has 90 days to supply the information and may request two 90-day extensions. If information is not provided within that time frame, the application expires.<sup>6</sup> The project application was deemed complete on March 7, 2018.<sup>7</sup> DCD extended the application review process three times for 90-days, totaling about nine months. Project review was also tolled due to Dept. of Ecology review and site inspection, and for SEPA review, as the MDNS was revised, as was the ACUP.

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<sup>2</sup> See HE Temporary Emergency Rule to Address COVID-19 Situation (April 1, 2020).

<sup>3</sup> See Clerk’s Index of Record for DCD, the Applicant, and Appellants, listing the exhibits.

<sup>4</sup> Testimony, Mr. Cadwell.

<sup>5</sup> Applicant’s Illustrative Exhibits 1 and 2 provide aerial photographs of the area.

<sup>6</sup> KCC 21.04.200.

<sup>7</sup> Exhibit DCD 56 (ACUP), p. 1 of Decision.

The initial ACUP and SEPA decisions were issued in April, 2020. Both were revised, with final decisions made in April on SEPA, and August for the permit.<sup>8</sup> The Appellants do not identify an information request the Applicant failed to respond to. And, neither DCD nor the Applicant treated the application as expired. The record documents a complex set of issues, and extensive public concerns for DCD and the Applicant to address. With the three 90 day extensions and state agency review time, coupled with a lack of evidence that the Applicant failed to provide DCD requested information, there was substantial conformance with County review procedures.

**9. Public Hearing Requirement.** An apartment project proposed within the Regional Center zone requires an administrative CUP.<sup>9</sup> A public hearing is required for this review if a “a component of development located within a commercial zone involves conversion of previously undeveloped land which abuts a residential zone,” and the Director may “refer any proposal ... to the hearing examiner for review and decision.”<sup>10</sup> This referral is discretionary, but the public hearing is required if the exception language is met.

The project is on largely vacant property. An abandoned, former residence is on the site’s west side. The site is underdeveloped, but was formerly farmed, with use by farm animals and as pasture. Development is broadly defined to include “any manmade change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation, or drilling operations and other land-disturbing activities.”<sup>11</sup> As the site includes the former residence and has been subject to extensive land-disturbing activities with the historic farming use, including tilling, it is reasonable to consider it developed. While DCD may require a public hearing before the Hearing Examiner, this is a discretionary decision.

**10. Code Requirements/Parking.** Most standard Title 17 zoning code requirements are met, including height, density, impervious surface coverage, and setbacks. DCD detailed this code compliance in the ACUP and in testimony. However, there are code issues regarding parking, and as addressed further below, Design Standard requirements.

The project provides 262 parking spaces, which is 19% or 58 less than KCC 17.490.030 otherwise requires for apartments (1.5 per unit plus .5 on street or set aside). Up to 25% less than the standard number is authorized if “trip demand reduction programs or public transit availability serves to further reduce parking demand.”<sup>12</sup> The Applicant based its reduction request on placement of “a transit stop/bus shelter pad provided on frontage at Mickelberry Road NW.”<sup>13</sup>

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<sup>8</sup> Exhibits DCD 52 and 56.

<sup>9</sup> KCC 17.410.044.

<sup>10</sup> KCC 17.540.020(D); KCC 17.410.044, FN 57.

<sup>11</sup> KCC 17.110.220.

<sup>12</sup> KCC 17.490.030(A)(1).

<sup>13</sup> Exhibit DCD 56 (Decision), p. 9.

There is transit service within the area,<sup>14</sup> and the Applicant's parking analysis states mitigation for reducing parking is: "1) pay to improve the bus stop on Bucklin Hill Rd including shelter and pad which would be \$8,000, and 2) provide 80 Kitsap Only transit passes for 10 years."<sup>15</sup> The ACUP mitigation references a different location (Mickelberry), and does not include the transit passes. Further confusing the issue, the Revised MDNS requires mitigation for not these locations, but for the Almira Road Transit Stop, five miles away.<sup>16</sup> DCD confirmed this was an error and was language from a different project.<sup>17</sup>

While the code does authorize a parking reduction based on public transit reducing parking demand, the ACUP and record are confusing on the mitigation being provided and the ACUP does not detail how transit will operate to reduce parking demand. Improving transit access may accomplish this objective. But, the ACUP does not detail how, and the actual mitigation imposed requires clarification.

**11. Stormwater.** Infrastructure "viability" is a pre-requisite to ACUP approval and must be addressed in the environmental review. The County Stormwater Manual states, "[p]erforming a comprehensive inventory analysis is an essential first step to site assessment and planning, and must precede site design."<sup>18</sup> This was not disputed.<sup>19</sup> Further detail will be provided during Site Development Activity Permit Review per KCC Title 12 and building permit review, but system viability must be present at the land use review (ACUP and SEPA) stage.

The Appellants' engineer addressed whether stormwater pipe incline would be sufficient for gravity force to carry stormwater away.<sup>20</sup> If the system failed, the result could be pipe blockage, with downstream flooding and property damage, creating material detriment and incompatibility with those properties, along with environmental impacts of probable significance.

With the increased impervious surface, the project will produce a significant amount of stormwater runoff. Creating sufficient gravity flow to carry this water away is a challenge at this site. This is because existing utilities crowd the right-of-way, making trenching downward to create "fall" to force water down the storm pipe difficult, if not infeasible. Basic design details are missing from the engineering plans. The Applicant's witnesses emphasized that later review processes will occur, and the Examiner should rely on that review to assume the system will function. However, while not all details must be resolved now, the design approach must be demonstrably sound.

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<sup>14</sup> Exhibit DCD 11 (Traffic Impact Analysis), p. 9.

<sup>15</sup> Exhibit DCD 31 (Parking Analysis Worksheet), p. 4.

<sup>16</sup> Exhibit DCD 52 (MDNS) ("A transit stop/bus shelter will be provided on the frontage of Almira Drive NE. The pad will be a 6-foot by 14-foot concrete pad located parallel to the planned sidewalk.").

<sup>17</sup> Testimony, Mr. Heacock.

<sup>18</sup> KCSDM Vol. I, § 2.1; Appellant Exhibit 9 (September 23, 2019 email) ("We are trying to avoid a situation where construction in the right of way starts and a conflict is encountered that requires adjustments, as there will not be much play to work to make this design work.").

<sup>19</sup> Testimony, Ms. Vickery (County stormwater reviewer); Testimony, Mr. McCormick (project engineer).

<sup>20</sup> Kitsap County is covered by a NPDES (National Pollutant Elimination Discharge Elimination System), Phase 2 permit, and must comply with the Ecology Stormwater Manual. With this regulatory regime, because pumps fail, they may not be relied on. Initial stormwater engineering designs relied on pumping. This error was corrected in subsequent plans. Exhibit DCD 23, pp. 11-12; Exhibit DCD-38.

The Applicant will be using a cartridge stormwater filtration system for treating stormwater. The location is not depicted on the engineering plans. The Appellants' witness, a licensed engineer, detailed its only possible location. The trunk line is on the north side, with lateral pipes conveying stormwater from the parking lot into that trunk line. Mr. Lider, the Appellants' witness, explained that to capture the parking lot runoff being removed through the site's northwest corner, the cartridge filtration must be at Catch Basin 6 (shown at Exhibit DCD 41, Drawing 3.1). The system must be at the property line (between Catch Basin 6 and just shy of Catch Basin 5, located off-site), as the treatment system is not allowed in the public right-of-way. Location is critical in assessing gravity pull sufficiency to safely convey the stormwater. This is because additional gravity force is required to move the water through the cartridge system.

The Appellants' engineer, Mr. Lider, testified that four feet of fall is required to generate the force to push the stormwater through. At Catch Basin 6 the rim is at 24.75 feet and the invert elevation is 22.29, resulting in just over two feet between the top of the grade and the pipe invert. To function properly, four feet is required. The inlet pipe would have to be 1.8 feet higher to allow loss of pressure.<sup>21</sup> Mr. Lider critiqued the Applicant's witness, who had stated there is 30-50 feet of fall over the site. He stated this is irrelevant. The farther east Catch Basin 6 or the cartridge filtration system is moved, the more untreated stormwater runs off site, which results in code non-compliance.

Four-feet of fall may not be achievable due to underground obstacles. While some obstacles, like the water line, are likely moveable, moving the telephone conduit is expensive and depends on whether the utility purveyor agrees to relocate. Given the resulting service disruption, and no mandate, agreement would be difficult.

Two key factors in pipe design are diameter and slope, which govern how much water can be carried and at what speed. Mr. Lider testified that to follow sound engineering, pipe slopes should be .5%. That is the standard design slope for minimum velocity to keep sediment from precipitating out and plugging the pipe. The project design shows lower sloping.<sup>22</sup> Mr. Lider also testified that the proposed 16 and 18-inch piping is undersized by a factor of two and three, respectively. In completing his calculations, Mr. Lider did not account for the footing drains, which would add water to the pipes. The footing drains convey water out from underneath the buildings so below grade apartments do not have moisture or flooding problems. The likely destination for this stormwater is at the site's northwest corner. These drains are not shown on the Applicant's engineering plans.

The Applicant's engineer largely did not contradict Mr. Lider's testimony, instead explaining that design details would be worked out in subsequent permitting. The County reviewers also did not dispute the challenges Mr. Lider identified. The site is considered grade challenged and includes hurdles for addressing that, such as vault presence to the north, a traffic

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<sup>21</sup> He detailed other concerns, including the lack of invert and RIM elevations for on-site catch basins. If footing drains have to be lower, the flow issues are exacerbated.

<sup>22</sup> Applicant's plans show piping at .34%, and that's before dealing with the cartridge system. Exhibit DCD 47 (Innova Preliminary Drainage Report), p. 14 and Appendix F.

signal pole which may necessitate easements from a bank, and lack of records on underground utilities.<sup>23</sup> The only option provided to the County as a true submittal would be to connect to the trunk coming up Mickelberry underneath the sidewalk, which would likely necessitate the easement, and a signal pole is a significant issue. Ms. Nelson did not know if the plan would work or not, and Ms. Vickery agreed the plans do not show the cartridge filter and four-foot drop.

The Applicant relied on the Western Washington hydrology model. The County Stormwater Design Manual prefers the rational method as it plans for higher runoff rates with a built-in factor of safety.<sup>24</sup> It is a more conservative approach for measuring pipe flow. The drainage report does not reference its use. Even if the system as shown is feasible, there is no margin for error.

The above discussion addressed discharge to the north. There are also issues with the southern discharge point.<sup>25</sup> This runoff will discharge on neighboring properties and run down to the lagoon and Dyes Inlet. Untreated runoff has the potential to significantly affect these resources.<sup>26</sup> Dr. Cooke detailed stormwater impacts on estuary or off-site wetlands and the lagoon, noting concerns about lack of treatment for street runoff, including from heavy metals and petroleum hydrocarbons. Stormwater runoff is an issue susceptible to mitigation, but the impact must be first identified and mitigation determined.

**12. Artesian Aquifer Vulnerability.** The site is underlain by an artesian aquifer. “Artesian” means the aquifer is spring-fed, so subject to constant upward pressure. If a backhoe punctured it during construction, this could affect project constructability and worker safety. Once a puncture is closed, a risk of a permanent up-welling is present. Depending on the degree of the puncture, the water could drain off site and into the neighborhood, creating off site damage, potentially affecting downgradient artesian wells and possibly resulting in a take of state waters (if greater than the 5,000 gallons per day exempt well amount). The Appellants’ hydrogeologist, Mr. Mathieu, testified that he had seen this happen on project sites before, identifying several examples.

“To maintain existing hydrogeologic patterns and important features, on-site hydrologic processes, patterns, and physical features must be understood and documented.”<sup>27</sup> To accomplish this, in assessing risk levels, a key factor is the depth of the confining layer above the aquifer. The Applicant drilled two bore holes, one on the west and one on the east of the site, to assess depth. The Appellants’ hydrogeologist, Mr. Mathieu, testified these two sampling points cannot

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<sup>23</sup> Exhibit Appellant 9 (August 13, 2019, County e-mail noting "If they can get the water to Bucklin with a gravity system its fine. They'll need to verify the utilities to make sure it's actually feasible. It's a big elevation difference so it doesn't seem possible, but the details will be in the plan submittal."); Testimony, Ms. Nelson.

<sup>24</sup> KCSDM, p. 4-1, § 4.2.1.

<sup>25</sup> Testimony, Mr. Lider; Appellant Exhibit 1 (Lider Engineering Review).

<sup>26</sup> Ms. Salem lives directly adjacent to the site near its planned dog park. She has a 1978 well, which is her primary water supply. She is concerned with waste (fecal coliform) and drainage. The last few years she has been getting added drainage (near her mobile home and garage) and on the east side and has had to put in a curtain drain due to water coming in from the southeast corner). With no permanent foundation, she is concerned about wash out.

<sup>27</sup> KCSDM, § 2.1.6; KCC 19.700.730 (hydrogeologic report must include discussion of effects of proposed development on groundwater resource); KCC 19.600.605 (policy for protection of Critical Aquifer Recharge Areas).

provide the data to assess whether the surface layer (confining glacial till) is thick enough to avoid breach or rupture, particularly in the site's western half.<sup>28</sup> He prepared a table identifying ten wells in the vicinity (two were removed based on the Mr. Purdy's testimony).<sup>29</sup> There are several wells in the area with till thickness levels of less than ten feet, and wells with a depth to till bottom from grade also less than ten feet. Such levels are considerably less than that observed at the Applicant's Borehole 2, which suggests till thickness could be less than 16.5 feet. Thickness and depth of the glacial till layer vary in this area. This variability is not surprising, which according to Mr. Mathieu, demonstrates the significant risk in relying on two borings.

This concern is amplified by the site's wet areas, such as at the southwest corner. This signals the potential for the artesian aquifer not being isolated. It would not have been difficult for the Applicant to secure the information to accurately detail site conditions and risk of puncture. According to Mr. Mathieu, this is done all the time. He added that a sufficient analysis would present an integrated picture of what is going on at the site to ensure an adequately informed assessment of artesian aquifer breach. Had the Applicant retained a hydrogeologist to complete this work, then the Appellants would not have had to pull information on wells within the area to provide this risk data.<sup>30</sup>

**13. Shallow Aquifer Recharge.** Groundwater discharge impacts must be adequately evaluated.<sup>31</sup> The project will increase impervious surface, increasing surface runoff and decreasing onsite infiltration. Lost infiltration has the potential to impact onsite and offsite wetlands, down-gradient drinking water wells, non-wetland vegetation reliant on shallow groundwater flow, and the lagoon.<sup>32</sup> There is inadequate analysis on these issues so as to allow for independent evaluation.

**14. Wetlands.** The parties agree the on-site wetland is Category 4, the lowest category, but not on its delineation or on how to maintain the wetland's functions and values. The Applicant's consultant initially determined there were no wetlands, then delineated first a 150, then a 355 square-foot wetland. The Appellants' consultant delineated the wetland at 8,523 square feet. Ecology's position is unclear. Ecology biologist Ms. Hennessey visited the site and wrote up her analysis and delineating it at 3,290 square feet.<sup>33</sup> But rather than adopting this analysis, Ecology stated it concurred with the Applicant. Dr. Cooke did not dispute the approach

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<sup>28</sup> Testimony, Mr. Mathieu.

<sup>29</sup> The Applicant's witness, Mr. Purdy, had critiqued well location noting two errors, which Mr. Mathieu corrected in the updated table. Mr. Purdy also indicated that the Rasmussen well could be anywhere within a specific section. However, located 3,900 feet south, the well is still within project vicinity and according to Mr. Mathieu, is relevant.

<sup>30</sup> Following testimony from the Applicant's witness, on rebuttal, Mr. Mathieu realized that in his analysis he had erred on the Applicant's side by considering clay layers adjacent to and beneath the glacial till confining layer and treating the clay as a confining layer. However, some of the wells have no blue clay beneath, so his analysis should not have included this factor. If the clay layer is removed, there is a greater likelihood that the confining layer is not as thick as the Applicant's bore hole log suggests.

<sup>31</sup> KCSDM § 2.1.4 ("It is important to have early estimations of groundwater discharge from a project site. The site's proximity to receiving waters or its location in areas where there may be perched, static, tidally influenced or hydraulically connected groundwater can have significant impacts on how the project is designed and which requirements may apply.").

<sup>32</sup> Testimony, Mr. Mathieu.

<sup>33</sup> DCD Exhibit 18.

Ms. Hennessey took from Ecology, though she noted the more advantageous time of year she was at the site. However, she saw no science supporting Ecology's final position.

Delineation does present challenges due to the site's disturbed nature. Dr. Cooke acknowledged that it is "very difficult to delineate" the wetlands on this site as it has been farmed and plowed for decades, and used as pasture, so the site is "highly modified."<sup>34</sup> Dr. Cooke testified that the timing of her visit (September 24, 2020) helped with her analysis, as she could better view the wetland grasses when they were green, and vegetation was in bloom, so species determination was easier. She stated that everyone else had been out at a different time, and she would "probably have had same amount of difficulty if she had been out when they were out."<sup>35</sup>

The Applicant's consultants did not have these advantages, as they went out in December and March, when the grasses would not be in flower so would be difficult to identify. Because this is a pasture, the grasses must be identified to tell if the vegetation criteria are met for wetland delineation. Also, soil wetness due to the time of year Dr. Cooke visited the site made it easier to correctly assess soil colors (delineation manuals require soil assessment when wet, though this can be accomplished by spraying the soil). Dr. Cooke disputed that utilizing her soil auger was inappropriate, stating that for certain types of soils mixing can be an issue, but this was not the situation for the soils at this site.

Dr. Cooke noted the potential for wetlands on the site's southwest corner. The Applicant had dismissed the area due to blackberry presence. The species has been viewed as antithetical to wetland presence, but in 2016 USFW updated the approach. Dr. Cooke understands the area becomes "very boggy" so believes wetlands may be present, though the area was not evaluated.

Neither Mr. DeCaro (the Applicant's wetland biologist) nor DCD, through Mr. Heacock, objected to Dr. Cooke's plant typing or hydrology indicators, but did raise limited objections to the hydric soils analysis. The soil auger critique is noted above. Mr. DeCaro also disputed the approach for two sampling points for soil color indicators, stating measuring color with "half-steps" (soils between two color types) is improper. Dr. Cooke detailed how her approach followed typing protocols, citing to wetland typing manuals supporting intermediate figure use.<sup>36</sup>

Both the Applicant and Appellant wetlands consultants are qualified professionals. Mr. DeCaro holds a minor in environmental studies and a bachelors degree in geology. He has considerable restoration experience with conservation districts in King and Snohomish counties and is familiar with wetland delineation procedures. He does not have a wetland sciences certificate or degree. Dr. Cooke has a PhD in soils and a masters degree in botanical taxonomy and has been doing wetland evaluations since 1983.

Dr. Cooke delineated an 8,523 square foot wetland, and her testimony was credible. A smaller delineation could be supportable, such as that taken by Ecology's Ms. Hennessey. No decision is made here on the wetland delineation which must be used, but a new delineation is

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<sup>34</sup> Testimony, Dr. Cooke.

<sup>35</sup> Testimony, Dr. Cooke.

<sup>36</sup> Delineation Manual for Western WA, pp. 41-42 (has intermediate colors though protocol is to not use decimals; Regional Supplement, PDF pp. 42 and 52 (protocol indicates reviewer should not round figures).

needed which is scientifically supportable. And, based on Dr. Cooke's testimony, the boggy area in the southwest should also be evaluated.

The approach to mitigation was disputed. Although buffers are not necessarily required, the code requires that the wetland function and value be identified and protected to utilize this exemption.<sup>37</sup> The wetland report does not detail how this criterion is met. Also, Dr. Cooke's testimony disputed that surrounding and isolating the wetland with a parking lot would protect the wetland. She was concerned that the surrounding impervious paving won't keep it hydrated. According to Dr. Cooke, this will not maintain pre-development conditions as required. Three species were identified to enhance the wetland. Over time, the invasive species will take over and convert the area to land not conducive to species now present. While rain gardens are planned, their locations are not detailed. Dr. Cooke stated it was not clear how the wetland will be regulated to maintain current ecological functions.

Further confusing the matter is an MDNS error which notes the wetland is being filled, which it is not, and there is information inaccurately cut and pasted related to the Kitsap County Mental Health facility.<sup>38</sup> Given it is not detailed how wetland functions will be preserved, this error takes on greater import, so is one which should be corrected through a new threshold determination, rather than an addendum.

**15. Traffic Impacts.** The transportation impact analysis evaluated one intersection proximate to the project, determining that "Mickelberry Road NW & NW Bucklin Hill Road will continue operate with satisfactory delays in the LOS A to LOS C range. Project traffic will have a minimal impact at this intersection."<sup>39</sup> Also, traffic impact fees are being paid to address transportation impacts.<sup>40</sup> However, the transportation impact analysis did not assess other nearby intersections, including Bucklin Hill and Silverdale Way.

Hearing testimony described this intersection as operating at LOS D. As the trip additions would not change the LOS, the code would not require intersection mitigation. The impact level was not measured.<sup>41</sup> Public Works staff may know the impact and is adequately addressed, making this a non-issue. And, the traffic impact analysis does note that Silverdale Way Road improvements are underway ("The roadway is being widened and intersection improvements are being made. The scope of work is from 350 feet south of Byron Street to Anderson Hill Road.")<sup>42</sup> The issue is exacerbated as there are other intersections not assessed (Ridgetop Boulevard/Mickelberry and Bucklin Hill/Tracyton Boulevard).<sup>43</sup>

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<sup>37</sup> KCC 19.200.210(C)(4).

<sup>38</sup> Testimony, Mr. Heacock.

<sup>39</sup> Exhibit DCD 11 (Traffic Impact Analysis), p. 15.

<sup>40</sup> Exhibit DCD 11 (Traffic Impact Analysis), p. 16 ("Low-rise apartments have a fee of \$459.84 per dwelling unit. With 160 dwelling units the total TIF is therefore calculated at  $\$459.84 \times 160 = \$73,574.40$ ."); DCD 56 (ACUP), p. 12 (project will also contribute \$4,833 to the Bucklin Hills/Nels Nelson project study area identified within the County's Traffic Improvement Plan).

<sup>41</sup> Testimony, Ms. Vickery.

<sup>42</sup> Exhibit DCD 11 (Traffic Impact Analysis), p. 6.

<sup>43</sup> Testimony, Mr. Tilghman.

The project on its own, or with various improvements underway, may not result in significant impacts for SEPA purposes, and may be adequately supported by transportation infrastructure for ACUP purposes. But, without documentation in the record, it is impossible to independently assess adequacy.

**16. Silverdale Design Standards.** “[D]evelopment within the Silverdale design district boundaries must be consistent with the Silverdale Design Standards found in Chapter 17.700, Appendix C3.”<sup>44</sup> The project is within the Waterfront District. Key Standards include:

- SDS 1.1.1: The vision for the urban form is “[t]o encourage a compact growth pattern ... while ... preserving marine and mountain vistas.”
- SDS 2.5.2: “Landscaped front yard pattern in Old Town, West Hill Neighborhood, and Waterfront Districts based on the historic Old Town typology.”
- SDS 9.1: “Properties adjacent to Bucklin Hill Road and near Dyes Inlet enjoy partial views of Dyes Inlet and the Clear Creek corridor.”
- SDS 9.3B: “New design will be respectful of existing single family development.”
- SDS 9.4.1(A): “Building orientation for new housing will reflect the existing residential building context.”
- SDS 9.4.3(A): “Parking will be limited to rear or side yards.”
- SDS 9.4.3(D): “Parking will be under building where feasible for multiple unit buildings.”<sup>45</sup>

Similar requirements are imposed through the zoning code for multi-family development.<sup>46</sup> The ACUP does address the Silverdale Design Standards. However, the record does not contain a document with images of surrounding structures, along with diagrams of the adjacent area identifying the area’s “rhythm and pattern” and detailing how the project responds.<sup>47</sup> Typically, such a document would include an inventory of materials and stylistic choices or shading diagrams. Though not required, this is an approach to documenting consistency. At the hearing, limited testimony was provided on how the project is consistent, with testimony in support focusing on the landscaping, and identification of a perimeter six-foot black vinyl-coated chain link fence which may screen the project’s lower portion of project. The Applicant and DCD agreed the fence “does help” in screening, but not in a significant way. And, no testimony suggested the fencing chosen enhances design aesthetics, improving project compatibility with its surroundings.

The Applicant’s design witness has expertise in engineering rather than design, while the Appellants’ witness, Mr. Adams, is an architect. Mr. Adams detailed how the project does not

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<sup>44</sup> KCC 17.420.060(A)(33).

<sup>45</sup> Appellant Exhibit 16 (Design Standards).

<sup>46</sup> KCC 17.470.010 (addressing compatibility concerns and sensitivity to the character of surrounding neighborhoods); KCC 17.470.070 and .090 (open space and parking provisions); KCC 17.540.010 and .040(A)(4).

<sup>47</sup> Testimony, Mr. Adams.

comport with the Design Standards. The Design Standards (and Comprehensive Plan) require the project to be respectful of single-family development.<sup>48</sup>

Mr. Adams testified that an approach to addressing this is including features which pick up on the surrounding styles. The area's Northwest agrarian vernacular includes Pacific NW Craftsman styling, with characteristics such as pitched roofs, and one-story homes plus a dormer. Mr. Adams explained that the four buildings have large blue cornices, over-scaled cornice elements, flat roofs on top with no architectural precedence in the area, no gables, no pitched roofs, and no scaling. The structures are, in his words, a “techy arrangement,” with stairs on the north perspective and steel columns holding up the roof elements. According to Mr. Adams, these “free floating flying roof elements” don't relate to or complement the surrounding area. He concluded there was no attempt to create architecture with any relationship to the existing fabric/existing single-family residences.<sup>49</sup>

Mr. Adams explained that balconies and changes in façade (bumping in and out) provide some façade modulation, though the balconies do contribute to privacy loss. The buildings overall repeat the same gray design, with the bright blue parapet drawing the eyes up, accentuating height and bulk rather than working to blend the buildings with the setting.

Creating the landscaped front yard patterns is a key issue. This involves creating buildings with discernible front yards and which present a street presence to pedestrians. This typically would involve front doors facing the street, with parking at the back. Mr. Adams described the buildings as instead being typical of the modernism seen in the 60's and 70's with large buildings, and repetitive units within “a sea of parking.” The club house back faces the street (Mickelberry), and pedestrian access is not directly from the street, which would be contrary to the Old Town front yard patterns called for.<sup>50</sup> On a site this large, all buildings would not have to front Mickleberry, but within the site, one would expect to see front yard qualities, with parking moved behind the structures.<sup>51</sup> The Guidelines and code call for de-emphasizing parking through its location.<sup>52</sup> In contrast to these provisions, Mr. Adams detailed the prominence of the parking areas.

Mr. Adams also testified to the lack of pedestrian connectivity within the site. Parking is crossed to get to the club house, and the walkway is not connected to open space. The uncontrolled painted walkways on the site's north do not include measures to calm traffic and emphasize the pedestrian.<sup>53</sup> The trail on the south is within what is intended to be a solid screen buffer, and is not handicap accessible.<sup>54</sup> In general, the site is oriented around the automobile, rather than designed for pedestrian activity.

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<sup>48</sup> Comprehensive Plan LU Goal 1 and Policy 1 (establish development standards to ensure compatibility next to existing residential neighborhoods, and p. 1-11 (ensure compatibility between adjacent zones).

<sup>49</sup> Testimony, Mr. Adams; *see also* SDS 9.3(B) and 9.4.1(A).

<sup>50</sup> Testimony, Mr. Adams.

<sup>51</sup> Mr. Adams described University Village Mall in Seattle as an outstanding example of this. While there is an incredible amount of parking, it is woven in to ensure a true pedestrian space. Park Lane in Kirkland is another example with parking provided but with landscaping and paving designed to accentuate foot traffic.

<sup>52</sup> KCC 17.470.090(B)(1) (locate surface parking at rear or side of lot); KCC 17.470.070.

<sup>53</sup> Exhibit DCD 43 (Preliminary Landscape Plan), p. 652 of PDF.

<sup>54</sup> Testimony, Mr. Adams.

The Appellants also identified landscaping as a concern. The site is being cleared, and the design plans do not show frameworks for plants. There are two planters by the clubhouse and a simple line of a planting around buildings. According to witness testimony there was no attempt to incorporate upper story plants/roofboxes, or to retain natural green belt vegetation, and so does not respect the forested area to the east.<sup>55</sup>

View blockage is an issue, particularly for Maynard's Restaurant, with its dining room on the building's side, with windows and deck seating facing the inlet. The project maximizes views for its residents but presents significant view blockage for nearby properties.<sup>56</sup> The apartment buildings are four stories tall with a large blue parapet on top. While complying with height and bulk limits, the four buildings are aligned not across the slope but going down-hill,<sup>57</sup> walling off views to the water.<sup>58</sup> That orientation "maximizes" view blockage across the site. Mr. Adams detailed how waterfront development can be designed to fit into its surroundings, providing examples.<sup>59</sup> The record and testimony do not detail how Mr. Adam's design analysis is incorrect.

## II. CONCLUSIONS OF LAW

**1. Jurisdiction and Standard of Review.** The Hearing Examiner has jurisdiction over SEPA and ACUP appeals. The ACUP appeal is reviewed de novo.<sup>60</sup> The MDNS is afforded substantial weight.<sup>61</sup>

**2. SEPA Review.** DCD did not have the advantage of the detailed engineering and design information compiled before the Examiner in completing its SEPA review. While this evidence does not change the standard of review, it does constitute new information significant enough to change the original impact assessment, and require re-evaluation, and a new threshold determination.<sup>62</sup> Additional information and/or mitigation is needed to adequately address stormwater management, wetlands, aquifer protection, transportation, and project design. The MDNS should be remanded for either further review and re-issuance, or environmental impact statement preparation.

**3. ACUP Criteria.** Approval "may be granted only when" these criteria are met:

1. The proposal is consistent with the Comprehensive Plan;
2. The proposal complies with applicable requirements for the use set forth in this code;

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<sup>55</sup> Testimony, Mr. Adams.

<sup>56</sup> Testimony, Mr. Adams, and Mr. Meland (owner of Maynard's Restaurant).

<sup>57</sup> Appellants' Illustrative Exhibit 4.

<sup>58</sup> Mr. Meland owns a restaurant with water views used by patrons on the restaurants deck. He testified to impacts on his business from loss of views and inadequate parking.

<sup>59</sup> Examples provided included Alderbrook resort (it runs across a gently sloping hill, stepping down to allow for views); a Kirkland project (allowing for views through to waterfront); and the Seattle Harbor steps projects (providing for buildings stepping down the hillside, with stairs opening up water views.).

<sup>60</sup> KCC 21.04.290(C).

<sup>61</sup> KCC 21.04.290(E)(7).

<sup>62</sup> WAC 197-11-340(3)(a)(2).

3. The proposal is not materially detrimental to existing or future uses or property in the immediate vicinity; and
4. The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing character, appearance, quality or development, and physical characteristics of the subject property and the immediate vicinity.<sup>63</sup>

The project as designed, while compliant with the County's traditional zoning requirements (*i.e.*, height, density, lot coverage, and setbacks), did not comply with parking or design standard requirements. Also, without further analysis and mitigation, the project as designed presents issues of material detriment, use compatibility and Comprehensive Plan consistency.<sup>64</sup>

Issues of material detriment, use compatibility, and Plan consistency are present with stormwater engineering and management, artesian aquifer protection, wetland impacts, and design standard consistency, and are potentially present for traffic impacts. Design guideline consistency is a greater issue regarding the use compatibility criterion, while the wetlands issue is more of a concern regarding critical areas code and Plan consistency.

At the hearing, various qualified professionals disputed each other's conclusions. Whether experts agree is not the issue. What is important is that the calculations are made and an explanation is provided on how those calculations were made. Either a pipe has capacity and is supported with the gravity pull necessary to carry stormwater where it needs to go or it does not; either confining glacial till is thick enough to support a development project or it is not; and, either an intersection will function at adopted standards or it won't.

While professionals will disagree on how to make these measurements, they must be made, and the rationale for the measurement articulated. The record does not contain these details. This would be less of an issue with a different site, such as one that is drier, with easier utility design issues, and greater similarity with surrounding uses. But, with this site, the testimony and documents submitted showed additional analysis is needed, or that in certain cases, the project as designed may not be feasible.

As the findings detail, there are issues with stormwater system design, hydrogeological risks, wetland sizing/protections, traffic impacts (including parking), and Design Standard consistency. Stormwater design and hydrogeology are of particular concern, given the safety issues present if the stormwater utility system does not function or the confining aquifer layer is breached. While there will be further review, at this stage, the basic questions do need to be addressed and key issues such as infrastructure viability must be demonstrated. The ACUP and SEPA determination should be remanded to address these issues.

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<sup>63</sup> KCC 17.540.040(A)(1-4).

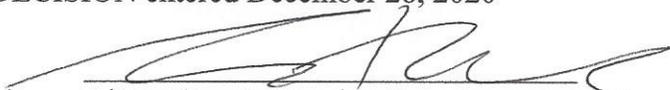
<sup>64</sup> Comprehensive Plan, LU Policy 1 (ensure compatibility with adjacent low-density neighborhoods); LU Policy 3 (address design variations in multifamily building design); LU Policy 14 (encourage urban amenities such as open space, plazas and pedestrian features); *see also* p. 1-7, Environment Policies 2 and 4, and p. 8-104, with language on protecting ecosystems, particularly Dyes Inlet watersheds, water quality, and aquifer recharge areas).

## DECISION

The appeal is granted. The Revised Mitigated Determination of Non-Significance and the Revised Administrative Conditional Use Permit are remanded for further review consistent with this Decision. The permit application has not expired, and whether a public hearing is held is within Department discretion.

Absent a timely appeal or grant of reconsideration, this Decision is final.<sup>65</sup>

DECISION entered December 28, 2020



Kitsap County Hearing Examiner  
Susan Elizabeth Drummond

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<sup>65</sup> Ch. 36.70C RCW (providing requirements for appeal within 21 days to superior court); HE Rule 2.12.1.