The Honorable Richard Okrent
Hearing: June 14, 2024

SUPERIOR COURT OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

DAVID TYLER,

Petitioner/Plaintiff,

v.

CITY OF MUKILTEO,

Respondent/Defendant,

and.

JAKE DRAKE OF THE BLUELINE GROUP, LLC ON BEHALF OF SEA-PAC HOMES, LLC, AND SUBSEQUENTLY, ATWELL, applicant, SEATTLE PACIFIC HOMES INC. owner and taxpayer for the property, ERICH VOLKSTORF, SYLVIA KAWABATA, EMMI BRANT-ZAWADZKI, JON BOYCE, MARILYN STRAND,

Additional Parties.

No. 24-2-00724-31

PETITIONER'S BRIEF

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I. INTRODUCTION

This appeal by David Tyler under the Land Use Petition Act ("LUPA") challenges the City of Mukilteo's approval of a subdivision and the City's issuance of a Determination of Nonsignificance ("DNS) for the subdivision under the State Environmental Policy Act ("SEPA").

The City's Hearing Examiner approved the subdivision (the "Decision") and denied Mr. Tyler's administrative appeal of the DNS (the "SEPA Decision") after a two-day hearing in December 2023.

This brief demonstrates that the Decision must be reversed because the subdivision violates multiple provisions of the Mukilteo Municipal Code ("MMC") and is not in the public interest. This brief also demonstrates that the SEPA Decision must be reversed, and a new threshold determination made, because the City failed to identify and analyze the subdivision's adverse environmental impacts before the City issued the DNS and approved the subdivision. As demonstrated below, the City flouted the most fundamental procedural requirements of SEPA.

The proposed subdivision is far from typical. It requires massive regrading and filling of most of a 2.43-acre site and construction of retaining walls hundreds of feet in length to hold the imported fill. The combined height of these walls will be 20 feet, and they, and the houses built on the fill they hold back, will loom over the single-family homes to the west. The City's Zoning Code prohibits the construction of these retaining walls in the rear yard setback where the City approved them.

The grading and filling proposed for the subdivision also is prohibited because it violates the City's Grading and Excavation Code, which requires consistency with the City's natural topography and retention of a portion of the native vegetation and slopes on the site.

The proposed grading and fill also is prohibited because the stormwater system it requires, which reverses the natural flow of stormwater and directs emergency overflow onto an

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adjoining property, violates the City's Development Standards for such stormwater systems. This is an issue that the Hearing Examiner did not acknowledge, let alone address, in his Decision.

Nothing about the site requires the proposed retaining walls and fill, or the clearing and grading, or the reversal of the natural drainage. The applicant can obtain the same number of lots by respecting the natural topography of the site and creating lots and homesites similar to those in the neighborhood.

State law prohibits approval of a subdivision that is not in the public interest, just as SEPA prohibits decisions that are uninformed by analysis of adverse environmental impacts. Both the Decision and the SEPA Decision must be reversed for all the reasons set forth below.

II. STATEMENT OF THE CASE

1. The proposed subdivision.

Seapac Homes (Applicant) applied to the City of Mukilteo (City) for preliminary plat approval in October 2021. The proposed Harbor Grove subdivision is a proposal to subdivide 2.43 acres of land into seven (7) residential lots (AR 2142). The subject property is located at 9110 53rd Avenue West in Mukilteo in Snohomish County, WA. The property is zoned RD-12.5, Single-Family, with 12,500 square foot minimum lot size (AR 0003). The application includes engineering design drawings, an environmental checklist, drainage studies, geotechnical studies and other documents.

The Project design includes the following elements: clearing and regrading of the site; installation of approximately 500 lineal feet of retaining walls with a maximum combined wall height of 20 feet; approximately 5,400 yards of imported fill dirt; a storm drainage system that includes a detention vault, collection system, and force main pumping system; and installation of a private road and various utility improvements (AR 0021, AR 0088-0109).

Petitioner David Tyler lives on a residential lot located immediately adjacent to and west of the Project site within the Rugosa Ridge subdivision. Mr. Tyler's property is located

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downslope and below the Project site, as are three other properties in Rugosa Ridge. Moving from east to west, the site drops from a high elevation of approximately 410 feet, to a low point of approximately 378 feet on the western boundary of the site (AR 0096). The existing, natural drainage pattern on the western portion of the site flows in a westerly direction toward properties in Rugosa Ridge (AR 1977). The steepest portions of the Project site are located near the abutting properties to the south and west and exceed 35 percent in some areas (AR 0096 and AR 1955). (Day One Testimony, page 281, Line 11).

The design of the Project involves substantial regrading of the property, resulting in a flat site that redirects surface water to flow from west to east, rather than from east to west as in the current condition. The proposal includes raising the elevation of the western portion of the site by up to 20 feet above the existing ground level (AR 0096 and 1953). The retaining walls would support the fill dirt and be located within the 25-foot rear setback for structures in the RD-12.5 zone (AR 0091). The retaining walls and stormwater pump and conveyance system would be located immediately adjacent to neighboring properties in the Rugosa Ridge subdivision, to the west of the Project site.

2. Review Process.

Under Mukilteo Municipal Code (MMC) 17.13.030, applications for preliminary plats, or subdivisions, are a land use action requiring "major review." For such applications, the Hearing Examiner is the review authority (17.13.060.C).

Pursuant to MMC 17.84.070.F, the Planning Department reviewed the proposal under the Washington State Environmental Policy Act (SEPA). The project review included two public comment periods during which approximately fifty individual comments were submitted.

On August 30, 2023, the City issued a Determination of Non-Significance (DNS) under SEPA (AR 0015). This was a determination that the project would not have any adverse impacts on the natural or built environment, including the neighboring properties. The DNS commenced

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a 14-day public comment period, which ended on September 13, 2023. Following the comment period there was a 14-day appeal period.

In response to the DNS, Petitioner submitted written comments on the DNS and Project on September 12, 2023 (AR 0090).

The City did not revise or reissue the DNS in response to public comments received and the appeal period commenced on September 14, 2023.

On September 27, 2023, Petitioner and others submitted an appeal of the City's DNS.

On December 18-19, 2023, the Hearing Examiner conducted an open record pre-decisional public hearing on the preliminary plat application and an appeal hearing on the SEPA DNS.

On January 5, 2024 the Hearing Examiner issued two decisions: he approved the Preliminary Plat (the "Decision") and denied the SEPA appeal (the "SEPA Decision") (AR 2142 and 2092). This timely LUPA appeal followed.

III. ISSUES

Should the Decision approving the subdivision be reversed?

Yes, because the Decision approves violations of the City's Zoning Code, its Grading and Excavation Code, and its Development Standards; and because the subdivision is not in the public interest.

Should the SEPA decision be reversed?

Yes, because the City failed to meet its burden to demonstrate *prima facia* compliance with SEPA's procedural requirements.

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IV. ARGUMENT

A. The Hearing Examiner's Decision to approve the preliminary plat is not supported by substantial error, constitutes an error of law, and is a clearly erroneous application of law to fact.

1. The proposed retaining walls violate the setback requirements of the zoning code.

The RD 12.5 zone in which the plat is proposed prohibits "structures" within 25 feet of the rear (and front) lot lines. MMC 17.20.020, Table 2. Retaining walls are structures as defined in MMC 17.08.020:

> "Structure" means a combination of materials constructed or erected on the ground or water, or attached to something having a location on the ground or water. . . .

The Decision violates the Zoning Code by approving the placement of two retaining walls, with a combined height of as much as 20 feet, within the required 25-foot setback. AR 1954. But a "setback" is a place where the structures are prohibited, as stated in the definition in MMC 17.08:

> "Setback" or "yard requirements" means the required open space distance that buildings, uses or structures must be removed from their lot lines.

The Hearing Examiner purports to justify his clear violation of the *Zoning Code* by citing MMC 15.16.140, a section of the *Grading and Excavation Code* that does not regulate structures, only the "tops" and "toes" of fill slopes. And in doing so the Hearing Examiner even cites the wrong section of the Zoning Code and the wrong setback standard: on pages 39 and 40 of his Decision, AR 2180-81, he asserts that MCC 15.16.140 of the Building Code implicitly amends the setback requirement for structures in Table 1 of MCC 17.20.015 of the Zoning Code, when the setback requirement at issue is in Table 2 of MCC 17.20.020, not Table 1 of 17.20.015.

Nothing in Title 15 of the MMC, entitled Buildings and Construction, purports to amend the Zoning Code, which is Title 17. These titles and codes serve different purposes, with the building and construction codes addressing *how* structures can be built, and with the zoning code addressing, among other things, *where* structures can be built, the maximum height of structures,

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and the uses to which structures can be put. The Hearing Examiner simply exceeded his authority and violated multiple canons of statutory construction by construing a section in one code to silently amend a section in another code that addresses a different issue.

The Decision thus fails to give effect to the mandatory requirement of the Zoning Code, where MMC 17.20.020, Table 2, imposes an absolute 25-foot setback for structures, with a few specific exceptions for other kinds of structures, but not for retaining walls. The Decision effectively amends the code by reading this language out of it, but only the City Council can amend the code by means of a legislative process, not a hearing examiner making a decision in a quasi-judicial process. *Washington State Dep't of Transp. v. City of Seattle*, 192 Wn. App. 824, 837, 368 P.3d 251, 257 (2016) (When interpreting a statute, "we 'must not add words where the legislature has chosen not to include them.'")

There is no conflict between MMC 17.20.020, Table 2, which regulates setbacks for structures, and MMC 15.16.140, which regulates setbacks for the tops of cut slopes and the toes of fill slopes. A structure is not a graded slope, and a slope, by definition, is an inclination from a horizontal or vertical plane, not a wall. The Zoning Code addresses apples (setbacks for retaining walls) and the Grading Code addresses oranges (setbacks for graded slopes). There is no conflict because the different codes address different issues, and both codes must be given effect. *See, City of Gig Harbor v. N. Pac. Design, Inc.*, 149 Wn. App. 159, 183, 201 P.3d 1096, 1107 (2009) (Because the former municipal code provided separate definitions for both "yard" and "setback," we must give effect to both terms. *See City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). The Hearing Examiner failed to do this, however, when he ignored the municipal code's plain language meaning and, instead, used these terms interchangeably. This failure is an error of law, which requires our reversal.)

The Hearing Examiner asserts that the Grading Code implicitly amends the Zoning Code because MCC 15.16.140.C.2 refers to "retaining or slough walls." This language does not create

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a conflict for multiple reasons, and the Hearing Examiner's reading of this subsection perverts the meaning and purpose of MCC 15.16.140.C, which reads in its entirety (emphasis added):

> C. Toe of Fill Slope. The toe of fill slope shall be made not nearer to the site boundary line than one-half the height of the slope with a minimum of two feet and a maximum of twenty feet. Where a fill slope is to be located near the site boundary and the adjacent off-site property is developed, *special precautions shall be incorporated* in the work as the permit authority deems necessary *to protect the adjoining property from damage as a result of such grading*. These precautions may include but are not limited to:
>
> 1. *Additional* setbacks;
>
> 2. *Provision for retaining or slough walls*;
>
> 3. Mechanical or chemical treatment of the fill slope surface to minimize erosion;
>
> 4. Provisions for the control of surface waters.

This language creates administrative discretion to require *additional* protection of neighboring properties from a graded slope, not to implicitly repeal the protection legislatively afforded by the mandatory setbacks of the Zoning Code. The applicant does not propose a graded slope on its property, so there is no need for additional protection from a non-existent graded slope. But the Hearing Examiner nonetheless applies this non-applicable language to authorize affirmative *harm* to adjoining properties, not additional protection, by approving retaining walls with a combined height of 20 feet that will overshadow the adjoining residential properties and hold back sufficient fill for houses to be constructed as much as another 30 feet above the elevation of the fill.[1]

There also is no conflict between the Grading and Zoning codes because there are zones in the City where no setbacks are required: the WMU, DB, and CB zones, as demonstrated by the same Table 2 of 17.20.020 that imposes the 25-foot setback at issue in this appeal. The existence of a setback in the RD 12.5 zone simply means that the discretionary additional protection from fill slopes authorized by MCC 15.16.140.C.2 is not available in the RD 12.5

[1] MMC 17.20.020, Table 2: Structure Bulk Matrix.

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zone, it does not mean that the discretionary additional protection authorized by MCC 15.16.140.C.2 renders meaningless the mandatory setbacks in the Zoning Code.

The Decision not only interprets the discretionary additional protection afforded by one code to repeal the mandatory protections afforded by a different code, the Decision leads to absurd results. MMC 17.20.080.A.2.a limits the height of fences and freestanding walls, which are permitted structures in rear yard setbacks, to six feet; but the Hearing Examiner's Decision means that walls that are not free standing, and retain fill, have no height limit whatsoever in setbacks where they are not even permitted by the Zoning Code.

The Hearing Examiner decided not only that retaining walls are structures that are permitted in setbacks where the Zoning Code prohibits them, he also decided that retaining walls can exceed the six-foot height limit for free-standing walls that are permitted in setbacks, and can even exceed the 30-foot height limit for buildings in the RD 12.5 zone. This is beyond absurd, and "[s]tatutes must be construed to avoid ... absurd results." *BSRE Point Wells, LP v. Snohomish Cnty.*, 25 Wn. App. 2d 1006 (2022).

The Staff Report to the Hearing Examiner recommends approval of the plat but does not even address, let alone attempt to explain, how massive retaining walls with no height limits can be constructed within the setback required by the Zoning Code. At the hearing, staff attempted to demonstrate that it has permitted retaining walls in other setbacks and can do so here. The documents staff submitted are inconclusive and do not describe anything like the retaining walls in this case, and staff's past erroneous interpretations of unambiguous regulations do not justify error by the Hearing Examiner in this case. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 1014 (2000) ("Nor does the City's six-year history of erroneously interpreting its zoning code and interim critical areas regulations change our analysis. Misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment."); See *also*, *Dykstra v. Skagit County*, 97 Wn.App.

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670, 677, 985 P.2d 424 (1999) ("local government entity's prior erroneous enforcement of a land use regulation does not foreclose proper exercise of authority in subsequent cases.")

Only ambiguous regulations may be interpreted, *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992), and the Code's prohibition on structures in setbacks is not ambiguous: the Code states a blanket prohibition of all structures except those it specifically excepts, and the exceptions include free-standing walls of six feet or less but not retaining walls of unlimited height.

The Hearing Examiner acknowledged that he came up with his justification for the retaining walls – that the Grading Code implicitly amends the Zoning Code – based on the testimony at the hearing of Thomas Colleran, the applicant's Project Manager, AR 2180. This belated justification is simply a failed attempt to defend the indefensible. The Decision must be reversed because it is an egregious error of law and a clearly erroneous application of law to fact. A Decision that authorizes massive retaining walls where they are prohibited and thereby harms adjoining properties is worse than clearly erroneous, it is arbitrary and capricious.

2. The Decision violates the Clearing and Grading Code itself.

In addition to authorizing massive retaining walls within the rear yard setback where the Zoning Code prohibits such structures, the Hearing Examiner's Decision authorizes clearing of the site behind the retaining walls, and massive grading of the site, in violation of MMC 15.16.050 of the Grading and Excavation Code itself. A copy of this code section together with a copy of MMC 15.16.140, is attached to this brief for the Court's convenience as Exhibit A.

Subsection C of MMC 15.16.050 states the limits on clearing of "native vegetation/groundcover," and such limits depend on site slopes:

> C. Clearing.
>
> 1. All clearing of vegetation shall conform to the specifications of this table, except as noted elsewhere in this subsection:

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Table 1: Clearing Matrix 2a		
Grade of Site or Slope (%)	Maximum Native Vegetation/Groundcover Removal (%)	Minimum Required Significant Tree Retention (%)
> 35% 2b		See notes.
> 25%—≤ 35%	45%	55%
> 15%—≤ 25%	60%	40%
≤ 15%	75%	25%

The Department failed to determine either the grades on the site or the extent of native vegetation/groundcover, and in willful ignorance of these facts decided that the Applicant can regrade the site and remove the native vegetation.

The Hearing Examiner's Decision agrees, and it is inconsistent with both the intent and requirements of MMC 15.16.050. The first sentence of this section states its intent (emphasis added):

> It is the intent of this section to promote practices ***consistent with the city's natural topographic, vegetational, and hydrologic features***,

Subsection A.7.a then states the Decision Criteria, all of which are violated by the Hearing Examiner's Decision:

> a. Decision Criteria. ***The permit authority may approve*** or approve with modifications an application submitted under this subsection ***only if***:
>
> i. ***The proposal is in accord with the*** comprehensive plan, comprehensive stormwater plan, ***zoning code***, stormwater management code and other city codes and adopted standards,
>
> ii. ***The approval*** of the proposal ***will not*** pose a threat to or ***be detrimental*** to the public health, safety and welfare, and
>
> iii. ***The applicant has demonstrated that approval of the proposal is necessary for the reasonable development*** or maintenance ***of the property***;

None of the three Decision Criteria are met by the Hearing Examiner's Decision:

i. The prior section of this brief demonstrates that the subdivision and its retaining walls are not in accord with the Zoning Code.

ii. The approval is detrimental to the public health, safety, and welfare as demonstrated by the Statement of the Case above and section A.4 below of this brief.

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iii. The applicant has not demonstrated, or even attempted to demonstrate, that clearing and grading of the site is necessary for the reasonable development of the property.

The Decision contains ***no*** analysis of these criteria, and therefore makes no attempt to demonstrate compliance with MMC 15.16.050.

The Clearing Matrix in Table 1 refers to "Grade of Site or Slope" and authorizes the maximum percentage of removal of "Native Vegetation/Ground Cover" based on this "Grade of Site or Slope." The Code does not specify when the site grade or the slope grade or both should be used to review a proposal, so presumably the Department and the Hearing Examiner have discretion to determine which to use in a particular situation. Such discretion, however, must be exercised to achieve the intent of MMC 15.16.050 to "promote practices consistent with the city's natural topographic . . . features," and such discretion also must comply with the Decision Criteria. Instead, this Decision authorizes destruction of the natural topography of the site and violates the Decision Criteria. The Decision is an abuse of discretion that promotes the Applicant's interest to the detriment of the public interest.

The Hearing Examiner made the Decision in ignorance of the facts needed to exercise discretion in the first place. The Applicant did not identify either the natural topography nor the extent of native vegetation on the site, and the Department's Director testified at the hearing that he did not require the Applicant to identify the native vegetation on the site because he believed there is none:

> But because it isn't a green field site, that analysis wasn't done because at current, there is no native vegetation.

Day Two transcript – page 12, Lines 8-15. The facts are otherwise, as the Hearing Examiner acknowledged in his Conclusion (AR 2182):

> The Hearing Examiner agrees that it is not clear exactly what percentage of the existing, predeveloped site is covered in native vegetation. Scott Kindred's site visit photos were inconclusive at best, in that they showed some native vegetation, some nonnative vegetation, and much vegetation that no witness could identify. Nowhere was there a comprehensive survey of existing native vegetation, but it was clear that Mr. Galuska was wrong to assume, as he testified he did, that no

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native vegetation exists simply because the property was formerly developed with a house and yard.

Despite acknowledged existence of native vegetation on the site, the Hearing Examiner decided that it can be "temporarily removed:"

> Reading MMC 15.16.050 as a whole, the Hearing Examiner concludes that native vegetation may be temporarily removed so long as it is replaced. The Hearing Examiner especially relies on Table Note 2.b.iii, which allows clearing and grading of vegetation on slopes in excess of 35 percent, provided that trees are not removed (unless hazardous) and provided that a revegetation plan is provided (among other requirements.) Slopes steeper than 35 percent enjoy the highest degree of vegetation retention required under MMC 15.16.050, Table 1. If even those highly protected slopes can be cleared, graded and revegetated, then it stands to reason that lesser-protected slopes can be, as well."

This conclusion renders meaningless the clearing limits in Table 1 because it allows all native vegetation, including significant trees, to be removed and the entire site regraded. The existing sloped areas would be replaced by yards and building sites that are graded flat, not by native vegetation. While Table Note 2.b.iii can allow for limited clearing on slopes greater than 35 percent, it does not replace the requirements of Table 1—it provides *additional* protections for the steeper areas of the site and requires further studies. And while the Hearing Examiner states that slopes greater than 35 percent are afforded the "highest degree of vegetation retention," the Decision gives them no protection whatsoever. The effect of the Decision is to allow more intensive clearing and grading activities on the steepest portions of the site, causing affirmative harm to the site's topography and vegetation and the surrounding properties. It achieves exactly the opposite of the stated purpose of the of the regulation.

The Hearing Examiner stated that he accepted the Applicant's suggestion to allow clearing of 80 percent of vegetation on the site (AR 2182), but he went even further to authorize clearing of *all* native vegetation by authorizing its replanting:

> Given that the exact quantum of existing native vegetation is not known, and given that at least some nonnative vegetation is known to be present, the Hearing Examiner accepts the Applicant's suggestion that 20 percent of the total project area be retained or replanted in native vegetation as a condition of approval.

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By allowing *replanting* of native vegetation, the Decision again allows the entire site to be cleared of native vegetation, even though Table I imposes limits on the *removal* of native vegetation, and even though the Applicant itself proposed to preserve a token percentage of the site in native vegetation, in the northeast corner where grading is not proposed (AR 1959-60).

Table 1 authorizes removal of a maximum 75% of the native vegetation, and then only when slopes are 15% or less. Even if one ignores the undisputed evidence, provided by Mr. Tyler, that there are slopes on the site that are greater than 35 percent and require retention of much more native vegetation, the Decision still violates the minimum requirement of this Table because under any set of facts the Table requires a minimum of 25 percent of the existing native vegetation to be retained and not removed.

The Applicant's "suggestion" at the hearing, which the Hearing Examiner adopted, not only violates the Decision Criteria of MMC 15.16.050, it also violates Table 1, which limits the "Maximum Native Vegetation/Groundcover Removal" by percentage, depending on the grade of the slope or site. A decision cannot be made in compliance with this requirement without first identifying the percentage of native vegetation on the site, and on the slopes on the site, and the Decision acknowledges that the Applicant has not provided this information.

The Decision again violates MMC 15.16.050 by ignoring and authorizing the destruction of the many natural slopes on the site that are greater than 15 percent. The Applicant and the Department failed to present evidence about the slopes on the site that comprise its natural topography, and it is Mr. Tyler who presented detailed evidence about these slopes: AR 1955, AR 1005 – 1006, and AR 1074 – 1079.

The first sentence of MMC 15.16.050 states that it is the intent of this section of the Code to protect such natural topography. The steepest slopes on the site, between 30 and 40 percent, are on the western portion of the site where they abut the lower-elevation properties to the west, and where the Decision authorizes both the retaining walls and the filling of the slopes behind the walls to raise the natural topography by up to 20 feet.

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The only way to comply with the intent of MMC 15.16.050, with the Decision Criteria of this section, and with the maximum limits on removal of native vegetation in the Clearing Matrix in Table 1, is to recognize the existence of the slopes on the site that are greater than 15 percent and to limit removal of native vegetation accordingly. The Clearing Matrix requires that no more than 45 percent of the native vegetation be removed on slopes between 25 and 35 percent, and that ***no*** native vegetation be removed from slopes greater than 35 percent without further studies. And of course a slope from which native vegetation cannot be removed also cannot be regraded into oblivion as the Decision authorizes.

Instead of complying with the intent of MMC 15.16.050, with the Decision Criteria of this section, and with the with the maximum limits on removal of native vegetation in the Clearing Matrix in Table 1, the Decision authorizes destruction of the natural topography of the site and removal of all the native vegetation, and does so by means of a process that is laughably inconsistent with MMC 15.16.050.

The Application asserts that the average slope of the property is 4.0 percent. AR 0103, AR 1955. At the hearing the Hearing Examiner directed the City's Brian Wirt to recalculate the slope between the highest and lowest points on the property, and Mr. Wirt testified that this calculation resulted in a slope of 5.8 percent. AR 2160; transcript Day One, page 283, Line 23; page 284, Line 1. On the second day of the hearing the Applicant's representative TC Colleran, testified that this same slope is 12.8 percent. Day 2 testimony, page 38, lines 12 – 187; Decision, AR 2172. These percentages are based on oral testimony at the hearing and cannot be verified, but even assuming one of them is accurate, nothing in MMC 15.16.050 authorizes either the Applicant's original methodology or the revised methodology used at the hearing at the direction of the Hearing Examiner. The highest and lowest points on a site could be anywhere, and not a part of the steepest or most sensitive portions of the site. Calculating the percentage of such an arbitrary slope tells us nothing meaningful about whether this subdivision will be consistent with the "city's natural topographic . . . features" even though the explicit intent of MMC 15.16.050 is

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to achieve such consistency. In contrast, Mr. Tyler's exhibits conclusively demonstrate that the proposed subdivision is inconsistent with the site's natural topographic features.

The burden is on the Applicant to prove compliance with the Requirements of MMC 15.16.050, and the Hearing Examiner's Decision itself demonstrates that the proposed regrading of the site and removal of vegetation does not comply with these Requirements. The Decision is an error of law, is not supported by substantial evidence, and is a clearly erroneous application of law to fact.

3. The Decision approves multiple violations of City's Development Standards while failing to even address these Standards.

On December 5, 2016 the City Council approved Resolution No. 2016-19 (certified copy attached to this brief as Exhibit B) in which the Council adopted "minimum engineering development standards for project development in the City."[2] The Decision approves multiple violations of these Development Standards with regard to stormwater, and the pages with the standards that are violated is attached as Exhibit C.

The proposed stormwater drainage system includes a surface system to collect stormwater runoff from buildings and paved surfaces, and a subsurface system to collect underground water that flows in a westerly direction toward the adjacent properties, AR 0098. The subsurface system (AR 1979, AR 1980) requires a pump and piping to convey water from near the west property line uphill and into the main system, which ultimately releases stormwater to the existing drainage system in 53rd Ave W. The pump system is a pressurized system that requires electricity to operate the pump. The pump and piping would be located at the base of the large retaining walls on the western boundary of the site.

The Decision approves the violation of Development Standard 3.4, subsection 3 which states in pertinent part:

[2] This Court may take judicial notice of this certified public record. ER 1005. The complete Development Standards themselves are available on-line at https://mukilteowa.gov/departments/public-works/development-services/

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> 3. Emergency overflow provisions shall be installed in such a manner as to direct waters away from all structures without causing failure of those structures. The impact of a system failure should be analyzed both in terms of on-site and off-site effects. The impacts may be to adjacent properties or to elements of the public drainage system or other private systems.

As demonstrated by AR 1983, the emergency overflow from the pump is directed at the abutting property and at the house on that property, in direct violation of this requirement. This standard requires that stormwater overflows be directed away from structures on adjacent properties rather than toward them.

The Decision also fails to address Development Standard 3.4, subsections 6 & 7 which state:

> 6. The frequency and difficulty of future maintenance should be minimized by thorough consideration of possible failures in the system during design and what would be required to correct the problem. Design adjustments to ease maintenance should be a major consideration.
>
> 7. Offsite improvements may be required if on-site controls are insufficient to mitigate impacts due to flooding, erosion, sedimentation, pollution, or habitat degradation.

No off-site improvements have been proposed or provided to prevent structure damage from an inevitable failure of the mechanical stormwater pump system.

The Decision approves the violation of Development Standard 3.14.17 which states:

> **3.4.17 Stormwater Facility Access and Maintenance**
>
> 1. All stormwater facilities shall be accessible to maintenance vehicles. If the facility is not located in or adjacent to an existing access, an improved roadway surface shall be provided.

As demonstrated by Exhibits 33 and 101 (AR 1008 and 1988), the pump that is a required part of the proposed stormwater system is not accessible to maintenance vehicles. It can only be reached by walking approximately 400 feet from the proposed street within the proposed subdivision through private yard areas and a drainage swale.

Mr. Tyler submitted substantial evidence to the Department and the Hearing Examiner that demonstrates that the proposed subdivision does not and cannot comply with the

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Development Standards (AR 1006-1008, AR 1056-1059, AR 1982-1984, AR 1995). Neither the Applicant nor the Department submitted any evidence to rebut Mr. Tyler's evidence, and the Hearing Examiner chose to ignore the Development Standards rather than attempt to explain how the proposed subdivision complies with them. The Decision is not supported by substantial evidence and is a clearly erroneous application of law of fact.

4. The subdivision is not in the public interest.

RCW 58.17.110(2) requires that a subdivision be approved only if the local government affirmatively makes findings that the public use and interest will be served (emphasis added):

> (2) A proposed subdivision and dedication ***shall not be approved unless*** the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare . . . ; and (b) the public use and interest will be served by the platting of such subdivision and dedication.

In response to this State requirement the Decision summarily states (AR 2185):

> With conditions, as detailed in full below, the proposed (sic) would satisfy all local and state requirements. *Findings 1-80*.

The Hearing Examiner simply adopted all his findings. He did not acknowledge the specific requirements of RCW 58.17.110 or identify those findings that show how those "local and state requirements" are allegedly satisfied.

Substantial evidence demonstrates that this proposed subdivision is not in the public use and interest. The most obvious reason is that the proposed subdivision would violate multiple requirements of the City's Code and its Development Standards, as explained above. An illegal subdivision cannot be in the public use and interest.

Substantial factual evidence also demonstrates that this subdivision is not in the public use and interest. The proposed retaining wall and fill, and the engineered stormwater system it requires, serve only the Applicant's interest by dramatically raising the elevation of the building sites. This increase in benefit and value to the Applicant comes at a high cost to the subdivision's neighbors in this single-family neighborhood.

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Many of the houses in this neighborhood preserve existing native vegetation (AR 2003). The Rugosa Ridge development to the west of the proposed subdivision, immediately below the proposed retaining walls, is a 10-lot subdivision that was built in the early 2010s. Although Rugosa Ridge has westward sloping topography similar to the project site, it was built without large retaining walls and without major engineering changes to the topography. There are no retraining walls that span hundreds of feet across multiple lots. Rugosa Ridge was graded on a lot-by-lot basis, where the building sites are created individually without the use of large retaining walls (AR 1001-1002).

MMC 15.16.050A.a, discussed above, requires an applicant for a clearing and grading permit to make three demonstrations that this Applicant failed to make: (i) that the proposal is in accord with the Zoning Code; (ii) that approval of the proposal will not "be detrimental to the public health, safety, and welfare;" and (iii) "that approval of the proposal is necessary for the reasonable development or maintenance of the property." The Applicant did not make these required demonstrations and both the Department and the Hearing Examiner ignored this failure.

In contrast, Mr. Tyler submitted substantial evidence that affirmatively demonstrates the unnecessary harm that the proposed subdivision would create. The proposed retaining walls are the most obvious example. Even if these retaining walls were necessary for reasonable development of the property, which they are not, and even if they were permitted within the setback, which they are not, they would still not be in the public interest because of the untoward effect they would have on the single-family homes to the west.

The total increase in height, from the bottom of the drainage swale to the building sites on lots 6 – 7, would be up to 28 vertical feet (AR 1989). The retaining walls themselves would be up to 20 feet in height and hundreds of feet in length. They would have a visual and shadowing effect similar to that of a large warehouse close to multiple single-family residences.

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The Applicant submitted no information about the appearance of the retaining walls, and the Department conducted no analysis, which belies the Planning Director's opinion that the retaining walls would be more aesthetically pleasing than a rockery. (AR 2184).

The Department also failed to evaluate the shadow impacts of the retaining walls on adjoining property, which the Planning Director acknowledged (Day 2 Testimony, page 26, lines 1-4):

> I don't see that there would be a great impact on sunlight. There's no real analysis in the record for that. That's honestly just kind of eyeballing it.

In contrast, Mr. Tyler used the Applicant's own plans to demonstrate the multiple adverse impacts that would be created by these retaining walls within in the setback, and by the increase in elevation they would create for the building sites within the proposed subdivision: See AR 0998; AR 1012-1013; and in particular AR 1949 – 2004, which is a portion of the PowerPoint that Mr. Tyler prepared to specifically demonstrate these impacts. The shadow impacts are illustrated on AR 1968 – 74.

The Hearing Examiner's Decision fails to cite any specific finding or evidence that demonstrates that the proposed subdivision would be in the public use and interest, and the substantial evidence in the record demonstrates that this proposed subdivision is only in the Applicant's interest, not the public's.

B. The City failed to meet its burden to demonstrate *prima facie* compliance with SEPA's procedural requirements.

The Department's SEPA review of the Harbor Grove subdivision fails to comply with SEPA's most fundamental requirements. For fifty years, since Division I decided *Juanita Bay Valley Cmty. Ass'n v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140, 1149 (1973), SEPA has required a lead agency to actually consider the environmental impacts of a proposal, and to demonstrate that it has done so by proving *prima facie* compliance with SEPA's procedural requirements ***before*** it makes a threshold determination:

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> Moreover, we hold that RCW 43.21C.030(c) necessarily requires the *consideration* of environmental factors by the appropriate governing body in the course of all state and local government actions **before** it may be determined whether or not an Environmental Impact Statement must be prepared. . . . before a court may uphold such a decision, the appropriate governing body must be able to demonstrate that environmental factors were considered in a manner sufficient to amount to **prima facie compliance** with the procedural requirements of SEPA. *See Hanly v. Mitchell,* 460 F.2d 640 (2d Cir. 1972).
>
> . . . If, in the event of such review, **the City can affirmatively demonstrate prima facie compliance** with the procedural requirements of SEPA, then the burden will fall upon the appellant, if the City's decision is adverse to appellant, or upon another proper party to prove the City's decision was invalid.

Juanita Bay Valley Cmty. Ass'n v. Kirkland, 9 Wn. App. 59, 73-74, 510 P.2d 1140, 1149-50 (1973) (italics in original; bold added).

Three years later the Washington Supreme Court adopted this *prima facie* test in its first SEPA decision:

> In the absence of a record sufficient "to demonstrate that environmental factors were considered in a manner sufficient to amount to ***prima facie compliance*** with the procedural requirements of SEPA," *Juanita Bay Valley Community Ass'n v. Kirkland, supra*, a "negative threshold determination" *could* not be sustained upon review even under the "arbitrary or capricious" standard because the determination would lack sufficient support ***in the record***.

Norway Hill Pres. & Prot. Ass'n v. King Cty. Council, 87 Wn.2d 267, 276, 552 P.2d 674, 679 (1976) (emphasis added).

In 2002 the Supreme Court affirmed this requirement in its most recent SEPA decision:

> When reviewing a SEPA action, "the court is required to consider the public policy and environmental values of SEPA as well." *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977). A review of the record must show that "'environmental factors were considered in a manner sufficient to amount to ***prima facie compliance*** with the procedural requirements of SEPA.'" *Chuckanut Conservancy v. Dep't of Nat. Res.*, 156 Wn. App. 274, 286-87, 232 P.3d 1154 (2010) (quoting *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)).

Wild Fish Conservancy v. Dep't of Fish & Wildlife, 198 Wn.2d 846, 866-67, 502 P.3d 359, 370 (2022) (emphasis added).

The Court of Appeals also affirmed this requirement in a recent SEPA decision:

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> If a governmental body makes a threshold determination of "no significant impact" under SEPA, "it must then demonstrate that environmental factors were considered in a manner sufficient to be a prima facie compliance with the procedural dictates of SEPA." *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54 (1978). And before a court may uphold a determination of "no significant impact," "it must be presented with a ***record sufficient to demonstrate*** that actual consideration was given to the environmental impact of the proposed action or recommendation." *Id.*

Klickitat Land Pres. Fund v. Klickitat Cty., Under Canvas, Inc., No. 38927-8-III, 2023 Wash. App. LEXIS 1946, at *38-39 (Ct. App. Oct. 11, 2023) (emphasis added). The fundamental requirements of SEPA, with which the City must demonstrate compliance, are expressed in the SEPA rules:

- WAC 197-11-030(2) requires the Department, "to the fullest extent possible," to prepare environmental documents that "are supported by evidence that the necessary environmental analyses have been made."
- WAC 197-11-650 requires the Department's environmental documents to be high-quality documents that are used "in making decisions."
- WAC 197-11-655(2) requires that "Relevant environmental documents, comments, and responses shall accompany proposals through existing agency review processes, as determined by agency practice and procedure, so that agency officials use them in making decisions."

In order to demonstrate *prima facie* compliance with these and similar procedural requirements, the Department had to present evidence that proved (a) that ***before*** it made its threshold determination, it conducted an environmental analysis of the proposed subdivision that was sufficient to enable it to prepare high-quality environmental documents; (b) that in fact it did prepare such environmental documents; (c) that it used such environmental documents in making its threshold determination; and (d) that such environmental documents accompanied its recommendation to the Hearing Examiner to inform his decision on the subdivision. The

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evidence in the record affirmatively demonstrates that the Department did not do any of these things.

The checklist that the Department reviewed (AR 0019) does not begin to accurately describe the proposal or identify its adverse impacts. There is no:

- Description of the height and length of the retaining walls.
- Information showing the appearance of the retaining walls.
- Slope and vegetation data, including the native vegetation inventory necessary to show compliance with MMC 15.16.050 of the Grading and Clearing Code (discussed in section A.2 above).
- Description of grading activity, including the depth of fills along the exterior boundaries of the site and changes in site elevation.
- Identification and description of the stormwater pump system that changes the natural flow of the drainage.
- Detailed discussion or analysis of the impacts of the proposal under the various elements of the environment, including Earth, Water Plants and Animals, Land Use, Aesthetics, etc.

The threshold determination that the Department issued (AR 0015) in response to the inadequate SEPA checklist is also inadequate because it is missing:

- Any response whatsoever to the 50-plus public comments received.
- Any impact analysis whatsoever, including any analysis of impacts raised under SEPA Elements Earth, Water, Plants and Animals, Land and Shoreline Use, or Aesthetics.
- Any description of Mitigation Measures.

In addition, the threshold determination on its face fails to comply with SEPA's procedural requirements and affirmatively demonstrates the Department's indifference to SEPA's procedural requirements:

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- The threshold determination purports to be a Determination of Nonsignificance (DNS), but the first page cites WAC 197-11-350, which is the section of the SEPA rules that authorize a fundamentally different Mitigated Determination of Nonsignificance (MDNS). The first page also uses language that is appropriate only for a MDNS when it states that the applicant has conditioned the proposed subdivision "to include necessary mitigation measures to avoid, minimize or compensate for probable significant impacts." In fact, the Department imposed ***no*** SEPA conditions to mitigate impacts, significant or otherwise.
- The SEPA responsible official contradicted his own DNS, and demonstrated the DNS's failure to comply with SEPA's procedural requirements, by testifying at the hearing that he did not impose SEPA conditions to mitigate impacts because such impacts would be entirely mitigated by the City's development regulations. (Day Two Testimony, page 107, Lines 19-23)
- Not only is this testimony contradicted by substantial evidence in the record about the impacts, as demonstrated above, this testimony is an admission of yet another failure to comply with SEPA's procedural requirements. WAC 197-11-158 requires that, in order for an agency to determine that no SEPA mitigation is required because all probable adverse environmental impacts have been mitigated by development regulations, the agency first must identify the proposal's specific adverse impacts, determine that those impacts also have been identified in the development regulations, and place the following language in the threshold determination: "The lead agency has determined that the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158. Our agency will not

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require any additional mitigation measures under SEPA." The Department did none of these things, as its own DNS demonstrates on its face. ***This failure alone is sufficient to demonstrate the Department's failure to comply with SEPA's procedural requirements***.

The Hearing Examiner's decision basically upholds the DNS because the Planning Director testified at the hearing, long after he issued the DNS, that he had thought about the impacts and mitigation. But SEPA requires that adverse impacts be identified and analyzed in the Department's environmental documents *before* the Planning Director issued his threshold determination or made his recommendation on the plat, and *before* the Hearing Examiner made his decision on the plat. And SEPA required that the decision not to impose mitigation be documented as required by WAC 197-11-158. The SEPA rules cited above (WAC 197-11-030(2)(c); WAC 197-11-650; and WAC 197-11-655(2), as well as WAC 197-11-158) all make this clear.

Juanita Bay Valley Cmty. Ass'n v. Kirkland, issued in 1973, put cities and counties on notice that SEPA requires them to "affirmatively demonstrate prima facie compliance with the procedural requirements of SEPA." *Id*, 9 Wn. App. 59 at 73-74. That did not happen here. The Hearing Examiner's SEPA Decision is not supported by substantial evidence and is a clearly erroneous application of law to the facts in the record.

V. CONCLUSION

For the reasons set forth above, the Decision approving the subdivision must be reversed, and the SEPA Decision must be reversed and remanded to the Department with directions to comply with SEPA when reviewing a future application to subdivide the subject property.

DATED this 25th day of April, 2024.

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Attorneys for Petitioner

Exhibit A

15.16.050 Requirements.

It is the intent of this section to promote practices consistent with the city's natural topographic, vegetational, and hydrologic features, and to control substantial land alterations of a speculative nature. In considering whether to issue a permit, and in considering whether and what type of conditions should be imposed, the permit authority shall apply the following standards and criteria:

A. General. A clearing and grading permit shall be issued only in conjunction with one or more of the following:

1. A valid building permit;

2. Utility extension;

3. A valid permit(s) to build a property access road;

4. Approved permit for street, water, storm and sanitary sewer construction for a preliminary plat;

5. Approved short plat;

6. Special permission of the permit authority for site work less than or equal to five hundred cubic yards based on a demonstration that extenuating circumstances are present and that the project is consistent with the grading and drainage plan with landscaping, soil stabilization and surface groundcover elements including continuous maintenance;

7. For site work over five hundred cubic yards, the purpose of which is not to achieve approval or development under subsections (A)(1) through (5) of this section.

a. Decision Criteria. The permit authority may approve or approve with modifications an application submitted under this subsection only if:

i. The proposal is in accord with the comprehensive plan, comprehensive stormwater plan, zoning code, stormwater management code and other city codes and adopted standards,

ii. The approval of the proposal will not pose a threat to or be detrimental to the public health, safety and welfare, and

iii. The applicant has demonstrated that approval of the proposal is necessary for the reasonable development or maintenance of the property;

b. Time Limits May Be Imposed. For any permit authorized under this subsection the permit authority may impose a time limit within which the proposed site work must be completed, generally not to exceed one year.

B. Hazards. Whenever the permit authority determines that any existing excavation or embankment or fill on private property has become a hazard to life and limb, or endangers property, or adversely affects the safety, use or stability of a public way or drainage channel, the owner of the property upon which the excavation or fill is located, or other person or agent in control of the property, upon receipt of notice in writing from the permit authority, shall within the period specified therein repair or eliminate such excavation or embankment so as to eliminate the hazard and be in conformance with the requirements of this code.

C. Clearing.

1. All clearing of vegetation shall conform to the specifications of this table, except as noted elsewhere in this subsection:

Table 1: Clearing Matrix [2a]		
Grade of Site or Slope (%)	Maximum Native Vegetation/Groundcover Removal (%)	Minimum Required Significant Tree Retention (%)
> 35% [2b]		See notes.

Table 1: Clearing Matrix [2a]		
> 25%—≤ 35%	45%	55%
> 15%—≤ 25%	60%	40%
≤ 15%	75%	25%

2. Table Notes.

a. Clearing shall not affect critical root zone around retained trees. Fencing shall be used as protection, as found in the development standards. Storage and staging of heavy machinery and parking are not allowed on critical root zones.

b. Applications for clearing and grading on slopes in excess of thirty-five percent shall be accepted in those cases where tree removal is limited to pruning (provided survival is assured). Clearing or grading on slopes in excess of thirty-five percent may be allowed upon prior review and approval by the permit authority, to the extent permitted by this subsection (C)(2)(b). In addition to any other information that may be required, the applicant shall provide the following:

i. Slope Report. The slope report shall be prepared by a qualified professional. The required slope report shall contain the following information, including recommended methods for mitigating identified impacts and a description of how these mitigating measures may impact adjacent property:

(a) Soils Report. Investigation and report shall be prepared by or under the supervision of a civil engineer with a soil/geotechnical expertise, licensed by the state of Washington and acceptable to the city. This report shall include data regarding the nature, distribution and strength of existing soils and the characteristics of the underlying geology, infiltration rates, conclusions and recommendations for grading procedures, design criteria for corrective measures and opinions and recommendations covering the carrying capabilities of the site. The applicant shall indicate location of soils that should remain undisturbed or used for stormwater management purposes during the time of construction;

(b) Hydrology Report. The investigation and report shall be prepared by a qualified professional hydrologist acceptable to the city. This report shall include an adequate description of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development and options and recommendations covering the carrying capabilities of the sites to be developed.

ii. Grading Plan. The grading plan shall be prepared by a qualified professional. The report shall include a schedule showing when each stage of the project will be completed, including the total area of soil surface which is to be disturbed during each stage and the estimated starting and completion dates; the schedule shall be drawn up to limit to the shortest possible period the time that soil is exposed and unprotected. In no event should the existing vegetative groundcover be destroyed, removed or disturbed more than fifteen days prior to development.

iii. Revegetation Plan. A revegetation report shall be provided which shall be prepared by or under the supervision of a landscape architect licensed by the state of Washington who is acceptable to the city and shall include the following:

(a) Measures to be taken for slope stabilization and erosion control;

(b) Measures to be taken for protection and replacement of the native vegetative cover;

(c) A schedule showing when each stage of the project will be revegetated with estimated starting and completion dates and such other information as may be required by the city.

iv. The city may retain a qualified licensed professional in any of the above specialties, licensed to practice in the state of Washington, at the expense of the applicant, to review and confirm the applicant’s reports, studies, and

plans. (Ord. 1448 § 3 (Exh. C), 2021; Ord. 1390 § 2 (Exh. B) (part), 2016: Ord. 1308 § 3, 2012; Ord. 665 § 1, 1990; Ord. 602 § 5, 1988)

15.16.140 Setbacks.

A. General. Cut and fill slopes shall be set back from site boundaries in accordance with this section. Setback dimensions shall be horizontal distances measured perpendicular to the site boundary. Setback dimensions shall be shown in accordance with Appendix J of the International Building Code as adopted in Section 15.04.040.

B. Top of Cut Slope. The top of cut slopes shall be made not nearer to a site boundary line than one fifth of the vertical height of cut with a minimum of two feet and a maximum of ten feet. The setback may need to be increased for any required interceptor drains.

C. Toe of Fill Slope. The toe of fill slope shall be made not nearer to the site boundary line than one-half the height of the slope with a minimum of two feet and a maximum of twenty feet. Where a fill slope is to be located near the site boundary and the adjacent off-site property is developed, special precautions shall be incorporated in the work as the permit authority deems necessary to protect the adjoining property from damage as a result of such grading. These precautions may include but are not limited to:

1. Additional setbacks;

2. Provision for retaining or slough walls;

3. Mechanical or chemical treatment of the fill slope surface to minimize erosion;

4. Provisions for the control of surface waters.

D. Modification of Slope Location. The permit authority may approve alternate setbacks. The permit authority may require an investigation and recommendation by a qualified engineer or engineering geologist to demonstrate that the intent of this section has been satisfied. (Ord. 1448 § 3 (Exh. C), 2021; Ord. 1390 § 2 (Exh. B) (part), 2016: Ord. 1173 § 6 (part), 2007; Ord. 602 § 13, 1988)

Exhibit B

CITY OF MUKILTEO
MUKILTEO, WASHINGTON

RESOLUTION 2016-19

A RESOLUTION OF THE CITY OF MUKILTEO, WASHINGTON, ADOPTING THE 2017 DEVELOPMENT STANDARDS, EFFECTIVE DECEMBER 31, 2016.

WHEREAS, Title 35A RCW authorizes the City to adopt regulations related to development in the City of Mukilteo; and

WHEREAS, the City's Development Standards, last revised under Amending Resolution 2009-15, specify the minimum engineering development standards for project development in the City of Mukilteo; and

WHEREAS, the City operates under its National Pollution Discharge Elimination (NPDES) Municipal Stormwater Permit requirements; and

WHEREAS, the City's NPDES Permit requires the City to adopt Low Impact Development (LID) techniques and Best Management Practices (BMPs) as the City's standard in order to minimize impervious surfaces, reduce loss of native vegetation, and protect land and water resources; and

WHEREAS, the Mukilteo City Council desires to revise the Development Standards to conform with the amendments to the Mukilteo Municipal Code regarding LID principles and practices as enacted under Ordinance 2016-39, which take effect on December 31, 2016; and

WHEREAS, the Mukilteo City Council further desires to revise the Development Standards to update administrative procedures, street standards, and Americans with Disabilities Act requirements, and to provide standards relating to clearing and grading and landscape installation; and

WHEREAS the Mukilteo City Council further desires to revise the Development Standards to reflect the City's adoption of the *2012 Stormwater Management Manual for Western Washington*; and

WHEREAS, City staff additionally recommend reformatting of the Development Standards for continuity and ease-of-use;

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF MUKILTEO, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

The Mukilteo City Council hereby approves and adopts the 2017 Development Standards for the City of Mukilteo, a copy of which is attached hereto as Exhibit A and incorporated herein by this reference, superseding and replacing the Development Standards last amended under Amending Resolution 2009-15, to be effective December 31, 2016.

RESOLVED by the City Council and APPROVED by the Mayor this 5th day of December, 2016.

APPROVED:

MAYOR, JENNIFER GREGERSON

ATTEST/AUTHENTICATED:

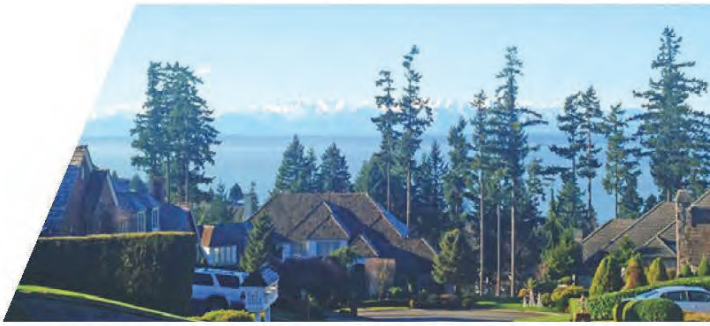
CITY CLERK, JANET KEEFE

FILED WITH THE CITY CLERK: **12-05-16**
PASSED BY THE CITY COUNCIL: **12-5-16**
RESOLUTION NO. **2016-19**

CERTIFIED TO BE A TRUE &
EXACT COPY OF ORIGINAL
City Clerk

Exhibit C

CITY OF MUKILTEO



CITY OF MUKILTEO, WASHINGTON

2017 Development Standards

City of Mukilteo
11930 Cyrus Way
Mukilteo, WA 98275
(425) 263-8000
Fax (425) 212-2068

3.4 General Requirements

1. All stormwater flow calculations to meet flow control and water quality requirements shall be analyzed using the hydrograph methods and routing procedures approved by the Department of Ecology, or as approved by the Public Works Director or Designee.

2. All storm drainage elements shall be designed to meet all applicable structural and design loads.

3. Emergency overflow provisions shall be installed in such a manner as to direct waters away from all structures without causing failure of those structures. The impact of a system failure should be analyzed both in terms of on-site and off-site effects. The impacts may be to adjacent properties or to elements of the public drainage system or other private systems. Retention/detention and infiltration facility design must take into account overflows which may result from:

    a. Higher-intensity or longer-duration storms than the design storm;

    b. Plugged orifices;

    c. Inadequate storage due to sediment buildup;

    d. Debris blockage; and

    e. Other reasons causing system failure.

4. All aspects of public health and safety shall be considered in the stormwater design. Protective measures are often necessary and shall be required whenever deemed appropriate by the Public Works Director or Designee. The protective measures themselves shall be designed so as not to constitute hazards or nuisances.

5. The designer shall consider system reliability in terms of layout, specification of materials, methods of installation and the influence of other activities in the area both during and after construction.

6. The frequency and difficulty of future maintenance should be minimized by thorough consideration of possible failures in the system during design and what would be required to correct the problem. Design adjustments to ease maintenance should be a major consideration.

7. Offsite improvements may be required if on-site controls are insufficient to mitigate impacts due to flooding, erosion, sedimentation, pollution, or habitat degradation.

8. Developer shall meet all applicable federal, state, and local water quality standards prior to discharge to any wetland, stream, river, or lake.

9. The visual impact and other potential problems (mosquito breeding, smell, etc.) should be considered. Concerns will vary with the site environment, but aesthetics should always be of concern to the designer.

3.4.15 Regional Ponds

Several regional ponds were designed as part of historic development master plans in Mukilteo. No existing regional ponds have capacity to receive any drainage associated with new development or redevelopment.

If a new project is proposed in an area that drains to one of these regional ponds, and the project is proposing to meet its stormwater detention requirements by use of the pond, the project applicant shall be required to show how the regional pond and the stormwater modeling is vested by citing the vesting document and page number. Drainage reports, developer agreements, or other non-recorded documents are not evidence of vesting. Further, any project proposing to use a regional pond for detention shall be required to show that there is capacity in the pond for the proposed use. The modeling method to use shall be the currently accepted model, as approved in the Ecology Manual.

All redevelopment projects shall be required to meet the stormwater requirements of the adopted Ecology Manual and these Development Standards.

3.4.16 Pond Fencing

Detention ponds with side slopes steeper than 3:1 or with a maximum water depth of greater than 3 feet shall require a vinyl coated chain link perimeter and fence. Side slope averaging shall not be allowed.

During construction of drainage facilities and prior to installation of permanent perimeter fence, contractor shall ensure temporary fencing is in place around open cut facilities while construction activities are underway on said facility and/or at the end of each day until placement of the permanent fencing is in place.

3.4.17 Stormwater Facility Access and Maintenance

1. All stormwater facilities shall be accessible to maintenance vehicles. If the facility is not located in or adjacent to an existing access, an improved roadway surface shall be provided.

2. Access roads shall be designed with 40 foot inside radius on curves, grades flatter than 15 percent, and at least 10 feet wide. The access must be designed to carry H20 loading. The approved surfaces include hot mix asphalt (HMA), cement concrete, structurally stabilized vegetated surface, or crushed surfacing.

3. The City may require the maintenance access be located in a separate tract.

3.4.18 Easements

1. If a drainage easement is to run along a lot line within a subdivision, the easement may straddle the lot line provided the drainage facilities can be located entirely within one lot.


CITY OF
MUKILTEO

DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on April 25, 2024, I caused to be served the foregoing document on the following parties in the manner referenced below:

- PETITIONER'S BRIEF

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☐ via hand delivery
☐ via first class mail, postage prepaid
☒ via e-mail
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☐ via hand delivery
☐ via first class mail, postage prepaid
☒ via e-mail
☒ via ECF (if opted in)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

DATED this 25th day of April, 2024, at Seattle, Washington.

s/Nikea Smedley
Nikea Smedley, Legal Practice Assistant

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