BEFORE THE HEARING EXAMINER
FOR THE CITY OF BURLINGTON

In the Matter of the Application of	)	LUP 6-23
	)	
Anna Nelson, on behalf of	)	Gages Crossing
Landed Gentry Development, Inc.	)	Preliminary Plat
	)	
	)	FINDINGS, CONCLUSIONS,
For Approval of a Preliminary Plat	)	AND DECISION

SUMMARY OF DECISION

The request for preliminary approval of a plat to subdivide a 13.36-acre property located at 900 South Pine Street into 89 residential townhouse lots, with associated clearing, grading, stormwater and utility improvements, and street improvements, is **DENIED**. The proposal does not comply with the requirements of the Burlington critical areas ordinance to provide an adequate buffer between the proposed development area and a fish and wildlife habitat conservation area, namely, the portion of Gages Slough that crosses the subject property near its south end.

SUMMARY OF RECORD

Hearing Date:
The Hearing Examiner held an open record hearing on the request on January 18, 2024, using remote access technology.

Testimony:
The following individuals presented testimony under oath at the open record hearing:

Brad Johnson, Community Development Director
Anna Nelson, Applicant Representative
Jon Pickett, Principal Scientist for the Applicant
Brian Gentry, Principal for the Applicant
Gary Sharnbroich, Stormwater Engineer for the Applicant
Kiera Wright
Sarah Trattner
Shannon Peacock

Exhibits:
The following exhibits were admitted into the record during the hearing:

1. Staff Report and Mitigated Determination of Nonsignificance (MDNS), dated December 11, 2023
2. Vicinity Map, undated
3. LOMA (Floodplain) Documentation:
    a. Two LOMA Removal Requests, dated July 6, 2023 and July 10, 2023
    b. Letter of Map Amendment Determination Document (Removal), issued October 6, 2023
    c. Letter of Map Amendment Determination Document (Removal), issued October 19, 2023
4. Zoning and Comprehensive Plan Maps, undated
5. Site Plan, dated July 13, 2023
6. Preliminary Civil Plans, dated July 2023
7. Public Comments, various dates
8. Skagit River System Cooperative Comments, various dates
9. Completeness Determination, issued August 1, 2023
10. Notice of Application, issued August 2, 2023
11. Preliminary Stormwater Report,
    a. Preliminary Stormwater Infiltration Feasibility Assessment, prepared by Geotest, dated September 15, 2022
    b. Preliminary Storm Drainage Report, prepared by Core Design, dated July 19, 2023
12. Letter from Architect and Design Details, undated
13. Preliminary Landscaping Plan, dated July 14, 2022
14. Preliminary Lighting Plan, undated
15. Private Road Sections and Plan, dated July 14, 2023
16. Applicant's Project Description, dated July 19, 2023
17. Initial Wetland Report and Mitigation Plan:
    a. Shoreline, Wetland, and Fish and Wildlife Assessment, prepared by Soundview Consultants, dated July 17, 2023
    b. Conceptual Mitigation Plan, prepared by Soundview Consultants, dated July 17, 2023
18. Staff Correction Letter, dated September 27, 2023
19. Revised Wetland Report:
    a. Shoreline, Wetland, and Fish and Wildlife Assessment, prepared by Soundview Consultants, revised October 19, 2023
    b. Technical Memorandum, prepared by Soundview Consultants, dated October 19, 2023
20. Preliminary Plat, dated July 14, 2023
21. Pedestrian Access Improvements, undated
22. Bored Waterline Plans, undated
23. Land Use Permit Application, dated July 6, 2023
24. Notice of Application – Mailed/Posted, issued August 2, 2023
25. Notice of Application – Published, issued August 4, 2023

26. Large Sign Notice – Posted, issued August 8, 2023
27. Title Report, undated
28. SEPA Checklist, dated July 19, 2023
29. Revised Street Design Information, dated October 24, 2023
30. Traffic Impact Analysis, prepared by Kimley Horn, dated July 2023
31. PUD Water Availability Letter, dated November 29, 2022
32. Notice to Parties of Record – Staff Recommendation, dated December 11, 2023
33. Notice to Parties of Record – Hearing Date – Mailed, undated
34. Notice to Parties of Record – Hearing Date – Published, dated December 20, 2023
35. Infiltration Report, prepared by Geotest, dated August 4, 2023

The following exhibits were entered into the record following the hearing:

36. First City Staff Post-Hearing Memorandum, dated January 18, 2024
37. Gages Crossing Boundary Revision Letter, prepared by Core Design, dated November 20, 2023
38. Typical Landscape Buffer Planting Plan, dated January 12, 2024
39. Storm Drainage Exhibit, prepared by Core Design, undated
40. Email from Kim O'Hara, dated January 18, 2024
41. Second City Staff Post-Hearing Memorandum, dated February 15, 2024
42. Applicant's Post-Hearing Technical Memorandum, dated February 15, 2024
43. Third City Staff Post-Hearing Memorandum, dated February 20, 2024

The Hearing Examiner enters the following findings and conclusions based upon the testimony at the open record hearing and the admitted exhibits:

FINDINGS

Application and Notice

1. Anna Nelson, on behalf of Landed Gentry Development, Inc. (Applicant), requests approval of a preliminary plat to subdivide a 13.36-acre property located at 900 South Pine Street into 89 residential townhouse lots, with associated clearing, grading, stormwater and utility improvements, and street improvements. The proposed subdivision would consist of horizontally attached townhouse buildings of various sizes, ranging from duplexes to six-unit structures. Mini-parks, a stormwater/open space tract, internal circulation roads, and frontage improvements to nearby public streets are all part of the proposal. *Exhibit 1, Staff Report, pages 1–2; Exhibit 5; Exhibit 6; Exhibit 13; Exhibit 15; Exhibit 16*.

2. In addition to the application for approval of the preliminary plat, the Applicant also seeks approval of several land use requests related to the subdivision: a shoreline substantial development permit to construct a bored water line beneath an onsite wetland that is a regulated waterbody under the Shoreline Management Act; critical area approval; and site plan approval. *Exhibit 1, Staff Report, page 3*.

3. The City received the application on July 19, 2023, and determined that the application was complete on August 1, 2023. On August 1, 2023, the City posted notice of the application at City Hall and the public library, and mailed notice to property owners within 600 feet of the subject property. On August 2, 2023, notice of the application was published in the *Skagit Valley Herald* newspaper. On August 8, 2023, notice of the application was posted on the subject property. The notice of application set a comment deadline of August 16, 2023. The notice of application also provided notice that the City intended to issue a Mitigation Determination of Nonsignificance (MDNS), discussed below. On December 13, 2023, notice of the public hearing was published in the same manner as the notice of application. Notice of the public hearing was also mailed or emailed to parties of record who had commented on the proposal. *Exhibit 1, Staff Report, page 4; Exhibit 9; Exhibit 10; Exhibit 43*.

Public Comments

4. The City received comments from Shannon and Daniel Peacock, Mel Foley, Briana G. (last name not given), Kiera Wright, Wilbur Springer, Karen Garrison, Paula Johnson, Renee and Jim Schooler, C. A. Wells (first name not given), Maria Vivanco, Nic Hartman and Mark Hartman, and Mike Merta. Many of these comments were sent not only to City staff but also to the City Council and the mayor, who passed the comments on to staff for review. Commenters raised questions about the cost of the proposed housing and whether the new residents would increase crime or otherwise strain public resources, such as police, fire, roads, and schools. Commenters asked whether there could be stormwater impacts from the new development. Commenters were particularly concerned about the additional traffic that would be added to surface streets in the immediate vicinity, especially East Sharon Avenue and South Pine Street. Commenters objected to the proposal to turn East Sharon Avenue into a one-way street as part of the project's frontage improvements, as this would impact local residents' ability to use the street. One commenter suggested an overpass might be constructed between Gilkey Road and East Gilkey Road. Commenters argued that agricultural lands should not be included in density calculations for purposes of applying the zoning code. Commenters objected that the proposed development was too dense and would adversely affect neighborhood character. One commenter argued that Burlington was being made to carry an unfairly high proportion of new development in Skagit County. Commenters wondered why no septic drain fields had been proposed. Commenters argued that conversion of agricultural fields to residential development would deprive wildlife of habitat and might also affect water quality and wildlife habitat within the nearby Gages Slough. City staff responded to some of the commenters' questions, as did some City Council members and the mayor. *Exhibit 7*.

5. Nora Kammer, on behalf of the Skagit River System Cooperative (SRSC), submitted multiple comments throughout August 2023. Ms. Kammer commented that she believed

Wetland A, an onsite wetland some 66,707 square feet in area,[1] had been miscategorized in the Applicant's then-current wetland assessment. Ms. Kammer believed Wetland A should be recognized as a Category II wetland, not Category III. Ms. Kammer presented a detailed argument based on several responses on the wetland rating form, which she argued made factual errors. Ms. Kammer also expressed concern about hydrologic constriction of, or encroachment upon, Gages Slough. *Exhibit 8*.

State Environmental Policy Act

6. The City Department of Community Development (DCD) acted as lead agency and analyzed the environmental impacts of the proposal as required by the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington (RCW). DCD reviewed the Applicant's environmental checklist and other information on file and determined that, with mitigation measures, the proposal would not have a probable significant adverse impact on the environment. Accordingly, DCD issued a Mitigated Determination of Nonsignificance (MDNS) on December 11, 2023. The MDNS was incorporated into the staff report on the underlying project. As noted above, the City had stated in the notice of application that it would likely issue an MDNS. Once the MDNS was issued, the City provided notice of the MDNS by posting onsite and at City Hall and the library, and by emailing notice to the parties of record. The MDNS was also sent to the City's MDNS notification roster, which includes the Department of Ecology, adjacent governments, and local tribes. No comments specific to the MDNS were received, nor were any appeals of the MDNS filed. *Exhibit 1, Staff Report, pages 20 and 21; Exhibit 43; Testimony of Brad Johnson*.

7. The mitigation measures required by the MDNS are as follows:

> Higher density residential developments near schools, parks, commercial areas, bus lines, and public services can generate significant pedestrian traffic. Absent adequate provisions for pedestrian and transit access and safety residential development can cause a growth in per-capita vehicle travel and greenhouse gas emissions. It is the policy of the City of Burlington (Burlington Comprehensive Plan goals and policies 8.7.3, 8.7.4, 8.7.4.1, 8.7.4.4, 8.7.3.2, 8.4.4.2, 8.4.4.1) to mitigate traffic, safety, public health, and air quality impacts though traffic calming measures, the construction of safe pedestrian connections, and the creation of pedestrian routes to schools, parks, and public amenities. To ensure public health, safety, transportation, and air quality impacts are mitigated to a level of non-significance the following conditions shall apply:

[1] "Wetland A" is the Applicant's name for that portion of Gages Slough that flows through the subject property. The Applicant argues that Gages Slough, which is identified as a Type S water of the state in the mapping system of the Washington State Department of Natural Resources (DNR), is "controlled by a pump station and does not act as a free-flowing stream channel," and therefore should only be considered a wetland, not a protected water. *Exhibit 17A*.

a. Marked pedestrian crossings shall be established at the intersection of South Anacortes Street and East Sharon Avenue and at the intersection of East Sharon Avenue and South Pine Street. Pedestrian crossings shall be marked with suitable pavement markings and signage approved by the City Engineer.

b. A pedestrian crossing equipped with pedestrian activated crossing light (RFB) shall be provided to create a safe crossing of Anacortes Street at its intersection with East Sharon Avenue.

c. Curb extensions and appropriate signage shall be installed at the intersection of East Sharon Avenue and South Anacortes Street to prohibit eastbound traffic from entering East Sharon Avenue and to narrow the north-south pedestrian crossing at this intersection to one lane.

d. Revised civil engineering plans, including a signage and striping plan, shall be submitted to City Engineer reflecting the required pedestrian access and safety improvements. No grading permit shall be issued until the revised civil engineering plans have been approved, and no final plat shall be approved until the required improvements have been constructed or installed and inspected by the City Engineer.

e. Exhibit "21" depicts the location of the pedestrian access improvements and traffic calming measures required to adequately provide access to schools, parks, commercial areas, and transit routes.

To ensure ground and surface water impacts are mitigated to a level of non-significance any existing septic systems or onsite wastewater disposals systems shall be decommissioned in accordance with Skagit County Health Department requirements. No final plat shall be approved until the Skagit County Health Department has verified, in writing, that all septic systems and private wastewater disposal systems have been decommissioned.

Exhibit 1, Staff Report, pages 20 and 21.[2]

Comprehensive Plan and Zoning

[2] The MDNS is incorporated into the staff report itself, not issued as a separate document. *Testimony of Brad Johnson*.

8. The property is mapped Residential Attached (RA) in the City's 2023 Comprehensive Plan map. The 2023 map does not appear to be reflected in the currently adopted Comprehensive Plan, which dates to 2005 and does not include the RA land use designation. No other document in the record explains what goals and policies apply within the RA designation. Community Development Director Brad Johnson testified that the vision of the Comprehensive Plan is for the area surrounding the subject property, and the subject property itself, to undergo gradual residential infill, such as townhomes, small unit buildings, duplexes, and large residential units. Mr. Johnson characterized the proposed townhouse project as consistent with the Comprehensive Plan vision. He acknowledged that the proposed townhouse project would represent a change in the current state of development in the surrounding area. *Exhibit 1, Staff Report, page 2; Testimony of Brad Johnson*.

9. The property is zoned "Residential Attached" (RA-1). City staff determined that horizontally attached multifamily residential development is a use allowed outright in the RA-1 zone. *Burlington Municipal Code (BMC 17.20.050)*. City staff noted the following relevant provisions of the zoning code:
   - The Applicant is proposing to use the optional "cluster development" standards authorized by BMC 17.20.100. Burlington's cluster development standards allow subdivisions to deviate from the normally applicable standards for lot size, width, and depth. The cluster developments standards also allow impervious surface and building coverage limits to be averaged across the entire development site.
   - At least 30 percent of a cluster development's area must be permanently protected as open space and placed in separate dedicated tracts. Wetlands, critical areas, and buffers must be included in the required open space tracts.
   - The maximum permitted density for a cluster development in the RA-1 zone is 38 dwelling units per acre. The maximum permitted density may be averaged across the entire site, per BMC 17.20.100.
   - The RA-1 zone limits building and impervious surface coverage to 70 percent, per BMC 17.20.090.D. For cluster developments, building and impervious surface coverage calculations may be averaged across the entire site.
   - The standard lot width requirement for cluster developments in the RA-1 zone is 30 feet. Lots as narrow as 15 feet may be approved if an "alternative street design plan" is approved, and on-street or off-street visitor and overflow parking is provided within 400 feet of dwellings abutting the alternative street section, per BMC 17.20.100.E.
   - The standard property line setback and building separation requirements for the RA-1 zone are as follows, per BMC 17.20.090.B:
     - Front: 17 feet
     - Street side (as side facing a street other than the front): 10 feet

    - Side: 5 feet (except for the common walls separating horizontally attached dwellings)
    - Rear: 20 feet
    - Building separation: 10 feet (except for the common walls separating horizontally attached dwellings)
- For horizontally attached dwellings, each dwelling shall have frontage on a public or private street and shall have its own exterior entrance. Each unit's primary exterior entrance shall face the street and direct pedestrian access shall be provided, per BMC 17.20.080.I.3.
- A consolidated garbage and recycling area shall be provided and shall be screened from view in accordance with the applicable landscaping standard, per BMC 17.20.080.I.5.
- The maximum building length shall not exceed 180 feet, per BMC 17.20.080.I.6.
- Fences in the RA-1 zone are limited to a maximum height of 3.5 feet between buildings and streets and a maximum height of six feet in all other locations, per BMC 17.70.070.B.
- All new developments are required to comply with the City's outdoor lighting standards, per BMC 17.70.105. These standards require that a lighting plan be submitted. The lighting plan must identify the location and type of all proposed lighting fixtures, illumination levels, lighting spill over onto neighboring properties, and manufacture's specifications for each fixture type, per BMC 17.70.105.A.2. Lighting plans must demonstrate compliance with applicable Washington State Energy Code requirements and all lighting fixtures must be full cutoff designs and "dark sky" rated.
- In the RA-1 zone, the maximum permitted height for outdoor lighting fixtures is 14 feet. The maximum illumination level is five foot-candles. The maximum lighting spillover beyond the site boundary is 0.1 foot-candles for residentially zoned properties or wetland buffers. For all other use categories, including public streets, the maximum permitted spillover is 0.8 foot-candles.
- Low Impact Development (LID) stormwater management features must be incorporated into all development proposals unless demonstrated to be infeasible through an engineering analysis, per BMC 17.70.135.C.
- A landscaping plan is required for this project and must demonstrate compliance with the City's landscaping standards, BMC 17.81.020 and 17.81.050. The landscaping plan must be prepared by a licensed landscape architect, per BMC 17.81.050.B. A minimum of 15 percent of the site must be landscaped, per BMC 17.81.060.C.
- Street frontage landscaping, consisting of a strip at least ten feet wide planted with street trees at intervals of 30 feet, must be provided along all street frontages, per BMC 17.81.070.B.1.

- Landscaping areas must be used, to the maximum extent possible, to treat, store, or infiltrate storm-water runoff, per BMC 17.81.060.E.
- A "type IV" buffer is required between the proposed development and the adjacent BNSF right-of-way, per BMC 17.81.110.C. A type IV buffer requires either (a) a masonry wall and a buffer 15 feet in width, or (b) a solid site obscuring fence and a buffer 30 feet in width. Under both options a hedge must be established using triangulated rows of evergreen trees planted at intervals of 15 feet, combined with a mixture of shrubs, per BMC 17.80.110.B.4.
- On-street parking. At least one on-street parking space shall be provided for every four dwelling units in the development. On-street parking spaces may be grouped together and configured as parallel, angled, or parking pocket designs. On-street parking areas shall be differentiated from adjacent travel lanes using painting, pavement markers, or contrasting paving materials. On-street parking spaces shall be within 400 feet of the dwellings they are associated with, per BMC 17.85.150.F.
- Private streets shall be designed and constructed consistent with the requirements of Title 14 BMC and shall incorporate LID features consistent with the provisions of BMC 17.85.140.E.

Exhibit 1, Staff Report, pages 4 through 12.

10. In response to these requirements, City staff made the following observations:
    - The proposal will result in 89 units of horizontally attached housing. Therefore, the proposed use is permitted outright under Burlington's zoning regulations.
    - The proposed plat identifies nine open space tracts, labeled as tracts A, B, C, D, H, I, K, L, and M. The open spaces tracts have a combined area of 7.70 acres (335,534 square feet), meaning that 58 percent of the 13.36-acre (581,962 square feet) site will be preserved as open space. The area of the proposed open space tracts will significantly exceed minimum open space requirements for a cluster development. In addition, the open space tracts will include wetland areas, wetland buffers, non-structural storm-water management features, and community space. To ensure compliance with municipal code requirements, the final plat shall include restrictive plat notes for the open space tracts (proposed condition "13").
    - The development site has a total area of 13.36 acres and 89 dwellings are proposed, resulting in a total planned density of 6.7 dwellings per acre, which is well below the maximum permitted density. As a condition of approval restrictive plat notes should be included referencing the applicable density limits and permitted building types.
    - The preliminary stormwater report provided with the application indicates the development will include a total of 134,431 square feet of impervious surface coverage (exhibit "11"). This represents approximately 23 percent

of the total site area (581,962 square feet) and is well below the maximum permitted impervious surface coverage. As a condition of approval restrictive plat notes should be included limiting the addition of new buildings or impervious surfaces that exceed the maximum permitted coverage.

- The Applicant has submitted an alternative street design plan, and the preliminary plat indicates that each of the proposed lots will be at least 20 feet wide.
- Each of the proposed units will have frontage on Pine Street or the private internal street system. As shown on the site plan (Exhibit 5) and elevation drawings (Exhibit 12), each unit will have a covered entrance and sidewalks have been provided between each building entrance and the nearest street(s). Except for unit 83, it appears the primary entrance for each unit will face the street. The dimensions of the covered porches are not clearly shown on the plans; however, it appears that most of the porches will be at least six feet deep with an equivalent or greater width. As a condition of approval, unit 83 will need to be redesigned so the primary entrance faces the street and design details will need to be provided for the covered porches (proposed conditions 16 and 17).
- The plans do not depict the consolidated garbage recycling areas. As a condition of approval, the plans will need to be revised to include consolidated waste enclosures for each building group containing more than four units (proposed conditions 16 and 17).
- A lighting plan was provided with the application. The manufacturer's specifications included with the lighting plan indicate the proposed streetlights will be full cutoff designs, but do not specify whether the fixtures are dark sky rated. No information regarding energy code compliance was provided. In addition, the lighting plan does not appear to depict the southern end of the development site (units 78– 84). As a condition of approval, a revised lighting plan should be submitted showing the entire site, demonstrating compliance with the Washington State Energy Code, and including dark sky rated fixtures (proposed condition 11).
- Except with respect to the wetland buffer area lying south of units 78-81, which is not shown on the lighting plan, the proposed lighting will comply with the applicable spillover limits. The light fixtures poles depicted on the plans are 14 feet in height and comply with the maximum height limit. As a condition of approval, a revised lighting plan should be submitted and must demonstrate compliance with the maximum spillover permitted into wetland buffers (proposed condition 11).
- On-street parking will be provided along the north side of the internal loop road and along South Pine Street adjacent to the development. The development contains 89 dwellings, meaning a minimum of 22 on-street

parking spaces must be provided (one space for every four dwellings). The road design details (Exhibit 15) show 23 spaces along the internal loop road. An additional 26 spaces will be provided along South Pine Street. The number of on-street parking spaces provided will exceed the City's minimum requirements.

- The city stormwater engineer has reviewed the preliminary drainage report, stormwater plans, and civil engineering submitted with the application for preliminary compliance with Title 14 BMC. As a condition of approval, final civil engineering and stormwater plans will need to be submitted for review and approval (proposed condition 8). The proposed design will sufficiently address the City's LID requirements.

Exhibit 1, Staff Report, pages 4 through 12.

Existing Site, Surrounding Area, and Proposed Development

11. The subject property is a 13.36-acre site consisting of seven parcels, Nos. P133596, P133597, P72178, P72179, P72181, P62772, and P62771. Two residential homes and several agricultural buildings exist on the property, a legacy of its former use as a chicken farm. The chicken-farming use ceased approximately two years ago. Crop-farming continued until last year but has also ceased. All existing buildings are proposed for demolition. *Exhibit 1, Staff Report, pages 1 and 2; Exhibit 2; Exhibit 6; Exhibit 23 Testimony of Brad Johnson; Testimony of Brian Gentry*.

12. South of the subject property is a chicken farm, and south of that is a picture-framing business. To the west of the property is the BNSF railroad right-of-way. To the north and east are residential areas, zoned RA-1 like the subject property; the residential development is single-family houses, not the multifamily uses that the zoning would allow. *Exhibit 4; Testimony of Brad Johnson*.

13. The proposed development would consist of horizontally attached townhouse buildings of various sizes, ranging from duplexes to six-unit structures. Mini-parks, a stormwater/open space tract, internal circulation roads, and frontage improvements to nearby public streets are all part of the proposal. *Exhibit 5; Exhibit 6*.

Critical Areas: Wetlands

14. There are two wetlands in the vicinity of the subject property: Wetland A and Wetland 1. Both are segments of a larger waterbody, Gages Slough, a locally significant waterbody/wetland adjacent to the Skagit River. Wetland 1 is an off-site wetland, lying west of the BNSF railroad that abuts the subject property to the west. Wetland A is an onsite wetland, running generally southeast-northwest across the southern portion of the subject property. *Exhibit 17A; Exhibit 19A*.

15. Originally, the Applicant's wetland biologists typed both Wetland A and Wetland 1 as Category III wetlands. But, in response to the public comments of SRSC (summarized

above), the Applicant's biologists re-typed Wetland 1 as a Category II wetland. SRSC had earlier commented that Wetland A might also be a Category II, but it did not issue revised comments following the retyping of Wetland 1, even though Wetland A was explicitly not retyped. *Exhibit 8; Exhibit 17A; Exhibit 19A; Exhibit 19B*.

16. The Applicant's wetland biologists delineated a 150-foot buffer around Wetland A, the standard buffer for a Category III wetland. But they did not delineate any buffer for Wetland 1. The rationale for the decision not to delineate a buffer for Wetland 1 was provided at the hearing by Jon Pickett, a member of the Applicant's biologist team. Mr. Pickett testified that Wetland 1 is disconnected from the rest of the Gages Slough wetland by the BNSF railroad, which separates Wetland 1 from the subject property. He believed, therefore, that no buffer was required on the Applicant's side of the railroad. The Applicant submitted a technical memorandum following the hearing (in which the Applicant mapped a 300-foot Category II buffer for Wetland 1, while not conceding the point that Wetland 1 did not require a buffer due to the interruption imposed by the railroad. *Exhibit 17A; Exhibit 19A; Exhibit 19B; Exhibit 42; Testimony of Jon Pickett*.

Critical Areas: Shorelines

17. At the hearing, the question arose of whether Gages Slough was a shoreline regulated under the Shoreline Management Act (SMA), and if so, whether it was subject to a 200-foot shoreline buffer. The Applicant submitted a technical memorandum after the hearing in which the Applicant conceded that Gages Slough (including Wetland A and Wetland 1) was regulated under the SMA. Because Gages Slough is an "associated wetland" to a regulated water, however, namely the Skagit River, only the wetland itself is regulated under the SMA. Development within 200 feet of the wetland is not regulated under the SMA. The Applicant cited Appendix A of the City's Shoreline Master Program, which states:

> Gages Slough is a series of connected wetlands that cross the city and the wetland area itself is subject to the shoreline master program. As allowed by RCW 90.58.030(2)(d)(ii), the city has chosen not to place the wetland buffer into shoreline jurisdiction. The Gages Slough wetland buffer area is established through the city's critical area ordinance and is gradually being restored through implementation of a series of buffer restoration, maintenance and monitoring projects that do not extend into the wetland itself. There may be the need to obtain a shoreline permit for upgrades to the wetlands themselves in the future if it is determined that sediment buildup has an effect on flood hazard mitigation.

Besides this regulatory definition, the Applicant also pointed out that Gages Slough, while mapped as a stream by DNR, does not share an upstream connection to the Skagit River, and the downgradient connection is controlled via a pump, which precludes fish from entering the slough.
Exhibit 42.

Critical Areas: Habitat Conservation Areas

18. At the hearing, the question also arose of whether Wetland A could be a fish and wildlife habitat conservation area (HCA), as that term is defined in the Burlington code:

> The following species and habitats have been designated [as HCAs] on a site-specific basis according to the official Species and Habitats of Local Significance Map:
>
> …
>
> 10. Special Management Areas.
>
> *BMC 14.15.350.D.*
>
> The following Special Management Areas have been designated by this chapter:
>
> …
>
> 2. Gages Slough
>
> *BMC 14.15.436.C.*

Exhibit 42.

19. The Applicant's technical memorandum concurred that Gages Slough, including Wetland A, is regulated as an HCA under this definition. For HCAs, the buffer is calculated using the following Washington State Department of Fish and Wildlife guidelines: T. Rentz, A. Windrope, K. Folkerts, and J. Azerrad, *Riparian Ecosystems, Volume 2: Management Recommendations* (2020) and *Habitat Program*, Washington Department of Fish and Wildlife, Olympia. *BMC 14.15.380.B*. In summary, these guidelines establish riparian buffers based on a particular location's "site potential tree height" (SPTH). *Exhibit 42*.

20. In its post-hearing technical memorandum, the Applicant's biologists applied these guidelines to Wetland A and determined the following:

> According to the WDFW Priority Habitats and Species: Riparian Ecosystems and the Online SPTH Map Tool, red alder (*Alnus rubra*) has a SPTH of 105-feet within the project area and Douglas fir (*Pseudotsuga mensiezii*) has a SPTH of 235-feet within the project area. SPTH of the trees associated with the project area is utilized as a recommended riparian buffer. The recommended 105-foot red alder SPTH riparian buffer is accommodated via the larger wetland buffer associated with Gages Slough.[3] However, a 235-foot riparian buffer would effectively encumber nearly the entire southern parcel where minimal development is already proposed in order to accommodate the 150-foot wetland buffer.

Exhibit 42.

21. The technical memorandum went on to argue that the 235-foot HCA was not required in this instance:

[3] A reference to the 150-foot buffer already provided because Wetland A is a Category III wetland.

> Given that the entirety of the onsite buffer surrounding Gages Slough consists of active agricultural fields, the 150-foot wetland buffer, which will be planted with native trees, shrubs, and groundcover, will provide a tremendous improvement over existing conditions, despite being less than the 235-foot buffer recommended based on the SPTH tool. Furthermore, the 150-foot wetland buffer exceeds the recommended buffer for red alders in this area based on the SPTH tool. Additionally, the project proposes a buffer increase in the southeast corner of the site, which meets or exceeds the proposed 235-foot buffer recommendation for Douglas fir trees. Therefore, the larger riparian buffer associated with Douglas fir trees can be partially accommodated onsite between Gages Slough and South Anacortes Avenue, and the riparian buffer associated with red alder can be accommodated and exceeded through the western portion of the buffer. Ultimately, the proposed site design will result in an improved condition as the intensive land associated with active agriculture will cease and native vegetation will be planted.

Exhibit 42.

22. The technical memorandum also argued that a riparian buffer for Gages Slough might not be necessary at all, because Gages Slough itself already functioned as a riparian buffer for the nearby Skagit River:

> It is most important to recognize, however, that this approach is utilized to recommend buffer widths for riparian areas associated with waterbodies. According to WDFW, riparian areas are
>
> > transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect waterbodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence) The portion of the ecosystem characterized by moist soils and plants adapted to periodically saturated soils is the riparian zone. The width of the riparian ecosystem is typically based on riparian functions (i.e., wood recruitment to the stream in forested regions and the pollution removal function in dryland regions)
>
> (Quinn et al, 2020). As Gages Slough is an associated wetland of the Skagit River, and not an active channel in and of itself, Gages Slough essentially already functions as a riparian area.
>
> …

> Gages Slough is functionally separated from the Skagit River both upstream and downstream, therefore, there is no "active channel" portion of this system. Gages Slough, a wetland and an ecosystem characterized by "transitional between terrestrial and aquatic ecosystems" and "moist soils and plants adapted to periodically saturated soils" functions as the riparian zone shown on either side of the active channel in Figure 1. The adjacent uplands on either side of Gages Slough can be viewed as the "zone of influence" identified in Figure 1, which is already protected through the wetland buffer provisions. The area identified as the "zone of influence" currently consists of active agricultural field. The proposed layout includes the restoration of the buffer along the western side of the slough in order to improve this area.

Exhibit 42.

23. City staff reached out to WDFW for guidance on the question of whether to apply its HCA buffer regulations to Gages Slough. On January 29, 2024, the City contacted WDFW using the email address WDFW has established for local government assistance requests. As of February 15, 2024,[4] the City had not received a response from WDFW. In its second post-hearing memo, City staff determined that Gages Slough is an HCA, citing BMC 14.15.360.B.4 ("Habitat conservation areas are designated by definition in this title and are referenced as follows … Designated species and habitats of local importance including, but not limited to the Gages Slough, Burlington Hill, and Skagit River Corridor special management areas"). City staff also determined that Gages Slough is a stream, such that the riparian buffers in BMC 14.15.380.B would apply. *Exhibit 41*.

24. City staff applied the same SPTH-based buffering methodology as the Applicant's biologist. Ultimately, however, City staff were agnostic about whether a 235-foot buffer should be applied:

> For the reasons discussed below, the City finds that Gages Slough is a [HCA] and that a riparian habitat buffer does apply, but that the resulting buffer may be smaller, and no more restrictive, than the wetland buffer that has already been applied to the site. Regardless, the permit applicant's plans and project documents should be revised to reflect the existence of a riparian buffer, and to address any relevant mitigation criteria.
>
> …
>
> As the City understands this system, WDFW has replaced the previous recommendations, employing fixed buffer widths for different water types, with a "tree height potential" system that uses site specific ecological

[4] The date of the City's post-hearing memo to the Hearing Examiner. *Exhibit 41*.

factors to identify an appropriate buffer width based on the height of the mature tree canopy that would be expected to occur on a site under natural conditions. The online mapping tool referenced above can be used to identify the tree height potential for different sites.

For the site subject to the current permit review, the online tool returns two different results. While most of the site appears to have a tree height potential of 105 feet, another area of the site has a tree height potential of 235 feet (see figures 1 & 2). The WDFW guidance (section 2.3.4 (c) page 26) includes specific instructions for making site specific determinations in urban areas or highly modified environments. Consistent with this guidance and BMC 14.15.060, the City recommends that the permit applicant's environmental consultant evaluate the site and identify the appropriate riparian habitat buffers based on site specific characteristics using the WDFW guidance materials required by BMC 14.15.380.B. Plans and other project documents should be amended to identify the location of the relevant buffers and to address any applicable mitigation requirements.

Exhibit 41.

Stormwater

25. The Applicant submitted a preliminary stormwater system, which the City staff reviewed. As City staff described it:

> [M]ost of the stormwater runoff generated from the development will be managed using a series of landscaped swales and bio-retention cells, and excess runoff will be directed to a landscaped infiltration pond. The stormwater report addresses the City's LID requirements and the requirements of the Department of Ecology's Stormwater Manual for Western Washington. The proposed LID measures and associated engineering analysis have been reviewed by the City's stormwater engineer and sufficiently address the code requirements outlined above. As a condition of approval, a final stormwater design and civil plans will need to be submitted.

Exhibit 1, Staff Report, page 8; Exhibit 6; Exhibit 11.

26. The Applicant's stormwater engineer, Gary Sharnbroich, described the system in more detail during his testimony. As he explained it, there would be rain gardens in the middle of the development, with an infiltration system below them. During periods of overflow, all the infiltration cells were daisy chained to one another until, finally, the overflow went into a pipe system to convey the stormwater southward to an infiltration pond at the south end of the subject property. If the infiltration pond were also to fail, there would be an emergency spillway onto a level spreader near the wetland buffer. It was highly unlikely,

however, that the spillway would ever come into play, given the capacity of the overall system. *Testimony of Gary Sharnbroich*.

Access and Traffic

27. Access to the site is provided by South Pine Street. South Pine Street is not currently improved to City standards and lacks full width paving, curbs, and sidewalks. The nearest arterial street, South Anacortes Street, is located one block, approximately 350 feet, east of the site. From South Pine Street, South Anacortes Street can be accessed by East Sharon Avenue and numerous other cross streets to the north. East Sharon Avenue does not meet current City standards and lacks full width paving, curbs, and sidewalks. As noted above, one of the mitigation measures in the MDNS is to prohibit turns onto East Sharon Avenue, a traffic-calming measure. *Exhibit 1, Staff Report, pages 2 and 10; Exhibit 6*.

28. The proposed internal street system is comprised of a loop road with access to South Pine Street at the north and south ends of the development. Three minor cross streets, labeled as tracts "B," "C," and "D" will also be provided. As shown on the street design plans, the entrances to the loop road will be identified with textured pedestrian crossings and curb bulbs along South Pine Street. Tracts "B," "C," and "D" will be one way street sections with restricted turning radiuses and entrance signage. *Exhibit 1, Staff Report, page 10; Exhibit 6; Testimony of Brad Johnson*.

29. The Applicant submitted a traffic impact analysis (TIA). The TIA concluded that:

> The Development is anticipated to generate 622 new ADTs with approximately 42 new AM peak-hour trips and 49 new PM peak-hour trips. All study intersections will operate at LOS B or better with the Development. This level of service is acceptable based on the City standards and the WSDOT Development Services Manual. The Development will have traffic impact fees of $130,585.00 to the City, adjusted for impact fee credits noted above in Section 8.

Exhibit 30.

Utilities and Services

30. The proposed subdivision would rely mainly on existing utilities. Proposed off-site improvements, however, would include extending a higher-capacity sewer line south along Pine Street. As a condition of final plat approval, a public access and utility easement must encompass the road, sidewalk, utilities, and storm-water infrastructure. All sewer infrastructure shall be included in an easement granting the City of Burlington access for the purpose of inspection, maintenance, repair, and replacement. *Exhibit 1, Staff Report, pages 2, 16, and 25; Exhibit 16; Exhibit 23*.

31. The proposal includes plans to install an underground water supply line by boring beneath Wetland A. The plans provided with the application indicate the bore pits for

this work will not be located within the required wetland buffer. As proposed, the installation of the bored water line will not involve any vegetation or surface disturbances within the wetland or wetland buffer. *Exhibit 1, Staff Report, pages 3 and 4; Exhibit 11*.

Parking

32. City staff noted the code requirement that at least one on-street parking space must be provided for every four dwelling units in the development. On-street parking spaces may be grouped together and configured as parallel, angled, or parking pocket designs. On-street parking areas must be differentiated from adjacent travel lanes using painting, pavement markers, or contrasting paving materials. On-street parking spaces must be within 400 feet of the dwellings they are associated with. *BMC 17.85.150.F; Exhibit 1, Staff Report, page 12*.

33. The Applicant proposed to provide on-street parking along the north side of the internal loop road and along South Pine Street adjacent to the development. The development contains 89 dwellings, meaning a minimum of 22 on-street parking spaces must be provided (one space for every four dwellings). The road design details show 23 spaces along the internal loop road. An additional 26 spaces would be provided along South Pine Street. The number of on-street parking spaces provided will exceed the City's minimum requirements. In addition, each dwelling will include two off-street parking spaces. *Exhibit 1, Staff Report, pages 12 and 17; Exhibit 15*.

Landscaping and Open Spaces

34. City staff noted that a landscaping plan is required for this project and must demonstrate compliance with the City's landscaping standards. *BMC 17.81.020; BMC 17.81.050.* A minimum of 15 percent of the site must be landscaped. *BMC 17.81.060.C.* Landscaping plans must either include a design for an automatic irrigation system or employ a draught tolerant landscaping plan. *BMC 17.81.060.D.2.* Street frontage landscaping, consisting of a strip at least ten feet wide planted with street trees at intervals of 30 feet, must be provided along all street frontages. *BMC 17.81.070.B.1.* Landscaping areas must be used, to the maximum extent possible, to treat, store, or infiltrate storm-water runoff. *BMC 17.81.060.E.* A "type IV" buffer is required between the proposed development and the adjacent BNSF right-of-way. A type IV buffer requires either (a) a masonry wall and a buffer 15 feet in width, or (b) a solid site-obscuring fence and a buffer 30 feet in width. Under both options a hedge must be established using triangulated rows of evergreen trees planted at intervals of 15 feet, combined with a mixture of shrubs. *BMC 17.80.110.B.4. Exhibit 1, Staff Report, page 9*.

35. City staff reviewed the Applicant's preliminary landscaping plan and made the following determinations:
    - 40 percent of the site would be landscaped.
    - An adequate number of street trees will be provided along South Pine Street.

- Most of the internal access streets also include an adequate number of street trees; there are several areas, however, where street trees are missing or are provided at intervals that exceed 30 feet. This is particularly notable along the western side of the main internal access street, where street trees are shown at intervals of 60 feet or more. Street trees are also missing along the southernmost extension of the private street system. As a condition of approval, a revised landscaping plan should be submitted showing an adequate number of street trees.
- According to the landscaping plans, landscaped swales, bioretention areas, and infiltration ponds will be used to manage stormwater.
- The required Type IV landscaped buffer for the BNSF right-of-way is depicted on the landscaping plans.
- A temporary irrigation system will be required for the first year after planting to ensure the landscaping is fully established. As a condition of approval, a more detailed plan should be submitted describing how watering will be provided during the first year. In addition, the landscape architect should inspect the site after the first year to verify that the landscaping is fully established and that any dead or dying landscaping has been removed and replaced.

Exhibit 1, Staff Report, page 9; Exhibit 13.

Design Review

36. Pursuant to BMC 17.20.080.I.8, at a minimum all buildings must incorporate at least three of the following design elements:
    a. Modulations along the front façade at intervals of no more than 30 feet. Each modulation shall step the façade back or forward by at least four feet;
    b. Changes in the roofline at intervals of no more than 30 feet, such as variations in roof pitch, overhangs, projections, or extended eves;
    c. Include at least two dormers with a minimum width of three feet;
    d. Include at least two balconies on front façade. Balconies shall have a minimum depth of 6 feet between the building wall and the balcony railing;
    e. For buildings with more than one floor, reduce the area of the upper floor so that its area is less than that of the first floor. To receive credit for this design element, the front building wall on the upper floor shall be stepped back from the first floor a minimum of two feet. The portion of upper floor stepped back from the first floor shall have a minimum width of eight feet. Uncovered, or covered unenclosed, balconies can be used to receive credit for this design element provided they satisfy the minimum dimensional requirements of this provision;
    f. Use trim with a minimum depth of .75 inches and a minimum width of 3.5 inches to mark rooflines, windows, and doors.

BMC 17.20.080.I.8.

37. The Applicant submitted an architectural analysis showing that criteria a, d, and f would be met: There are modulations along the front façade at intervals of no more than 30 feet with step backs by at least four feet. There are at least two 2nd floor balconies that are a minimum of 6 feet in depth. Every window and door is trimmed with a minimum trim size of 5/4 x 3.5 inches. *Exhibit 12*.

Preliminary Plat

38. County staff reviewed the proposal against the criteria for approval of a preliminary plat, including the criteria for approval when critical areas and buffers are present, and made the following determinations:

- Under BMC 16.10.090, no lot may be created that lacks an adequate building site unencumbered by critical areas or critical area buffers, unless restrictive notes are included on the face of the plat permanently prohibit development off the encumbered lots or tracts. As discussed in the critical area findings, the wetland and wetland buffer areas will be placed in separate tracts and permanently protected from development. Restrictive notes will also be provided for all other special purpose tracts. None of the residential lots will be constrained by critical areas or critical area buffers.
- The zoning code contains specific provisions regulating the development of horizontally attached housing and cluster developments. The purpose of these provisions is to provide adequate light, air, and usable open space. As demonstrated in [the staff] report, the proposed townhouse development complies with all applicable property line setback, building separation, and coverage limits. The proposed cluster development will also provide significant open space areas.
- As a condition of final plat approval, a public access and utility easement must encompass the road, sidewalk, utilities, and storm-water infrastructure. This easement will permit the installation, inspection, maintenance, and replacement of all public utilities; therefore, a public road is not necessary to facilitate the provision of public utilities. The street and stormwater management tracts shown on the plat will address this requirement without the need for a public street system provided the required easement and plat notes are provided.
- The proposal has been reviewed for compliance with the City's alternative private street design standards. The alternative private street design standards require that on-street parking be provided to address overflow conditions. In addition, on-street parking will be provided along South Pine Street. Each dwelling will include two off-street parking spaces.
- The development is bounded by South Pine Street to the east, a regulated wetland to the south, the BNSF right-of-way to the west and partially developed parcels to the north. As such, there is no opportunity to extend

the street system to the south or west. As a condition of approval, the private access street and sidewalk at the north end of the development will need to be stubbed out to the northern site boundary to provide emergency vehicle access and pedestrian circulation in the event adjacent parcel is developed. However, this connection will serve a minor function, primarily for pedestrian, fire, or emergency vehicle access and is not necessary to complete the public street network in the area.

- The lots adjacent to the BNSF right-of-way and Gages Slough lack the street connections required to form complete blocks. However, as noted above, street extensions and complete blocks are not required when critical areas or railroad right-of-way prevents street extensions. The other blocks created by development will fully comply with the applicable length and perimeter limits.
- Currently the portion of Pine Street providing access to the site is not fully improved. It lacks sidewalks, curbs, gutters, and full width paving. This portion of Pine Street is classified as an "access street" (BMC 12.28.080). As such, the improved right-of-way must be consistent with the following standards and previous guidance provided by the City Engineer, per BMC 12.28.150.D &E, 16.40.050.D, and 17.85.120):
    a. Two paved travel lanes, each with a minimum width of 10 feet.
    b. One paved parking lane along the west side of the street with a minimum width of 8 feet.
    c. A continuous sidewalk with a minimum width of 5 feet along the west side of the street from its southern terminus to the Sharon Avenue intersection.
    d. Curbing, full width pavement, and storm-water management improvements.
- Consistent with the requirements of RCW 58.17.110, provisions must be included to ensure safe walking routes to nearby schools. Lucille Umbarger Elementary School is located to the east of the project site along South Skagit Street. The total walking distance between the proposed development and the school is 2,193 feet. A multiuse path currently exists on the east side of South Anacortes Street, along an undeveloped portion of East Sharon Street. Continuous sidewalks and marked crossings exist between the multiuse path and the school. Currently there are no sidewalks along South Pine Street or the portion of East Sharon Avenue connecting Pine Street to Anacortes. Also, there is no marked crossing at the intersection of Sharon Avenue and Anacortes Street. To provide a safe route for students walking to school, and to provide adequate pedestrian access to the site, the following improvements should be required:
    a. A continuous sidewalk along the west side of South Pine Street from its southern terminus to its intersection with Sharon Avenue.

b. A continuous sidewalk along the south side of Sharon Avenue from its intersection with South Pine Street to Anacortes Street.
c. A marked pedestrian crossing at the intersection Sharon Avenue and Anacortes Street to provide a connection between the development and the multiuse path on the east side of South Anacortes Street.

- A marked pedestrian crossing will be needed at the intersection of Sharon Avenue and Anacortes Street and at all intersections between Anacortes Street and the southern terminus of Pine Street, including appropriate pavement markings and signage. Pavement markings, signage, and a pedestrian- activated rectangular flashing beacon will also be needed for the crossing at South Anacortes Street to provide adequate pedestrian access and to create a safe route to school.
- Fiber optic communications conduit and vaults must be provided along all street frontages, per BMC 12.28.09, and public sewer and water connections must be provided to each of the proposed lots, per BMC 16.40.070). The preliminary civil engineering plans submitted with the application show appropriate sewer and water infrastructure but do not appear to include fiber optic conduit and vaults as required by the municipal code. As a condition of approval, the final civil plans must be amended to include fiber optic conduit and vaults.

Exhibit 1, Staff Report, pages 15 through 19.

Testimony

39. Brad Johnson, Community Development Director, clarified that the Hearing Examiner was being asked to issue a preliminary plat approval, a shoreline substantial development permit, a critical areas approval, and a site plan approval, all combined into a single hearing before the Hearing Examiner. Mr. Johnson testified that the proposal was for 89 lots for construction of horizontally attached dwelling units, each of which would be separately sellable on its own lot. The Applicant was taking advantage of cluster development rules, which mean that density, building coverage, setbacks were being considered across the entire property, inclusive of critical area buffers, not just those portions of the property subject to development.

Mr. Johnson clarified that Exhibit 20 and Exhibit 6 label the road tracts differently, but they are the same tracts. The road tracts are labeled B, C, and D in Exhibit 6, but in Exhibit 20, they are labeled E, F, and G.

Mr. Johnson explained that public notice of the application and the SEPA MDNS issuance were consolidated, using the SEPA optional DNS process. This consolidated notice was posted onsite, mailed to property owners within 600 feet, and published in the *Skagit Herald* newspaper, all of which occurred on August 2, 2023. The SEPA MDNS was issued on December 11, 2023. Notice of the MDNS was sent to commenters and the

City's SEPA register, which includes adjoining governments, the Department of Ecology, and local tribes.

Mr. Johnson described surrounding land uses as predominately residential. South of the subject property is a chicken farm, and south of that is a picture-framing business. To the west of the property is the BNSF railroad right-of-way. To the north and east are residential areas, zoned RA-1 like the subject property. The residential development is single-family houses, not the multifamily uses that the zoning would allow.

The vision of the Comprehensive Plan for the area surrounding the subject property, and the subject property itself, is for gradual residential infill, such as townhomes, small unit buildings, duplexes, and large residential units. Mr. Johnson characterized the proposed townhouse project as consistent with the Comprehensive Plan vision. He acknowledged that the proposed townhouse project would represent a change in the current state of development in the surrounding area. Existing use of the property was one or two existing houses, which Mr. Johnson was unsure were occupied. Most of the existing buildings are former agricultural buildings, but he believed agricultural use had ceased for at least the past six years.

Mr. Johnson testified that the stormwater plan was for LID measures, and a detention pond located on Tract H, as shown on Exhibit 20. The pond would lie outside all critical areas and buffers.

Mr. Johnson testified that all wetlands are segments of Gages Slough. Wetland A is the onsite wetland, while Wetland 1 is off-site to the west of the BNSF railway. He cited Figures Nos. 2 and 3 of Exhibit 17A. Mr. Johnson acknowledged that the Applicant's wetland expert and the Skagit River Systems Cooperative had reached different conclusions about the typing of the two wetlands. In response to comments of SRSC, the Applicant had upgraded Wetland 1, the off-site wetland, from a Category III to a Category II, but had not upgraded Wetland A, the onsite wetland. Mr. Johnson characterized this as a case where two different experts could come to two different conclusions. He did not detect any egregious oversights or factual misrepresentations in the Applicant's materials. He found the Applicant's responses to SRSC persuasive. He noted that SRSC had not responded to the Applicant's final analysis, which Mr. Johnson interpreted as a resolution of SRSC's concerns. Because he did not see a continuing scientific dispute, he did not see any reason to send it out for third-party review.

Mr. Johnson explained that fish and wildlife habitat conservation areas are distinct from shoreline regulations. He did not believe Gages Slough, as an associated wetland to the Skagit River, was subject to a 200-foot shoreline buffer. The wetland itself was subject to shoreline regulation but did not have a shoreline buffer. The wetland is not a water of the state, for purposes of the Shoreline Management Act, because there is no open water connection between the wetland and the Skagit River. Mr. Johnson cited the Shoreline

Administrator's Handbook, published by the Department of Ecology, for the process for determining when a wetland is also a water for purposes of the SMA. Mr. Johnson confirmed that the Department of Ecology had not weighed in on this project.

Mr. Johnson agreed that, given Gages Slough is described in the wetland report, Exhibit 17A, as a Type S water, based on DNR mapping, then it might also meet the City's regulatory definition of a habitat conservation area (HCA). He acknowledged that Gages Slough could be both a wetland and an HCA for purposes of the critical areas ordinance. Mr. Johnson believed, however, that Gages Slough was hydrologically disconnected from the river because the slough is controlled by a pump station. Mr. Johnson believed this kind of site-specific analysis should control over DNR's mapping of the slough as a Type S water. In addition to the water typing that might trigger an HCA, Mr. Johnson acknowledged that listed salmonid species could have a primary association with the slough, which might be its own trigger for an HCA. Mr. Johnson doubted any salmonids were present, however, because of the pump station—although he said salmonids could still have a primary association with the slough as a source of nutrients.

Mr. Johnson testified that the City would require impact fees for parks and transportation, but those would be assessed automatically at the building permit phase. He testified that the project would need to meet an open space requirement of 30 percent for a cluster development, but it was allowable to count wetland buffers as part of that open space. Mr. Johnson did believe that the Hearing Examiner would have to make a finding that the proposed subdivision would meet at least three design review criteria. He cited BMC 17.20.080.5.8. *Testimony of Brad Johnson*.

40. Applicant Representative Anna Nelson recommended using the road nomenclature in Exhibit 20. She testified that the Applicant had submitted a transportation analysis in Exhibit 30 that showed that the road system will meet City standards for traffic. She testified that the Applicant would provide transportation impact fee credits as summarized in Exhibit 36.

Ms. Nelson testified that the PUD had capacity for water and sewer. The requested shoreline permit was for a utility line to run under Gages Slough. The Applicant would also provide upgrades to the City's existing water and sewer systems. Ms. Nelson testified that the open spaces would include mini-parks with recreational opportunities for future residents.

Ms. Nelson brought up Exhibit 37, which identified a section of land that the Applicant originally thought was part of the BNSF property but was actually part of the Applicant's property. She cited Exhibit 38 to show that she would provide a 25-foot buffer adjacent to the railway, as required, according to Ms. Nelson, by state law.

Ms. Nelson requested that the preliminary plat approval be for five years, not two years as recommended in the staff report. She also clarified that the Applicant would dedicate the wetland tracts rather than provide easements.

Ms. Nelson pointed out that the Applicant had updated its report, in Exhibits 19A and 19B, to acknowledge that Wetland 1 is a Category II wetland. She cited Exhibit 17D to show that the Applicant plans to replant the wetland buffer. *Testimony of Anna Nelson*.

41. Jon Pickett, Principal Scientist, testified that his company had worked on Exhibits 17 and 19, the wetland report and mitigation plan. Mr. Pickett testified that the difference in the rating of Wetland 1 was based on information received by SRSC and that, even though he agreed that Wetland 1 was a Category II wetland with a 300-foot buffer, the 300-foot buffer was cut off by the BNSF railroad, but he did not provide a citation for the notion that a railroad cuts off a wetland buffer. He also promised to provide a revised map showing a 300-foot buffer for Wetland 1.

Mr. Pickett denied that Gages Slough is a Type S water for purposes of the Shoreline Management Act, by which he meant the slough should not receive a 200-foot shoreline buffer. He pointed out that there is no direct connectivity between the Skagit River and Gages Slough, other than by means of pumps. Mr. Pickett believed that, under the Department of Ecology's guidance for shorelines, a wetland disconnected from a water of the state would not be a water of the state.

Mr. Pickett agreed that a wetland can also be an HCA for purposes of the City's critical areas ordinance. He acknowledged that Wetland A is mapped for salmonids. But he denied that mere mapping of the wetland could confer HCA status. He repeated that there is a disconnection with the Skagit River that would preclude the presence of salmonids, map notwithstanding. Also, onsite biologists had not observed salmonids, and therefore, he testified, the wetland was not an HCA. *Testimony of Jon Pickett*.

42. Brian Gentry testified that he is a principal with the developer. He testified about the history of the subject property. It used to be part of a chicken farming property, which produced eggs. The farm had extended south beyond today's property line. The southern portion had been owned by a different egg producer, which still conducted chicken farming. The barns and other buildings on the subject property were remnants of the farming days, but the use had ceased approximately two years ago. A portion of the property had also been used for crop production, but that had ceased within the past year. Two residential homes currently exist on the property. The city had grown up around the subject property over the years. The Comprehensive Plan had been amended recently to allow more development in this area and at this property.

Mr. Gentry called the Hearing Examiner's attention to Exhibit 5 for purposes of design review. He pointed out that no residential development was exactly adjacent to the

proposed buildings; they were only really adjacent to each other. *Testimony of Brian Gentry*.

43. Gary Sharnbroich, Stormwater Engineer, testified about the proposal's stormwater plan, Exhibit 39. As he explained it, there would be rain gardens in the middle of the development, with an infiltration system below them. During periods of overflow, all the infiltration cells were daisy chained to one another until the overflow went into a pipe system to convey the stormwater southward to an infiltration pond at the south end of the subject property. If the infiltration pond were also to fail, there would be an emergency spillway onto a level spreader near the wetland buffer. He noted, however, that it was highly unlikely the spillway would ever come into play, given the capacity of the overall system. *Testimony of Gary Sharnbroich*.

44. Kiera Wright testified that she is a neighbor to the subject property. She said the proposed development was not affordable housing. She believed the city was being overdeveloped, and the existing neighborhood would be lost. She was concerned about inadequate plumbing and inadequate access. Ms. Wright testified that, as a result of this proposed subdivision, Sharon Avenue would become a one-way street, blocking access. She did not think the proposed road improvements would make enough difference. She opposed the rerouting of Sharon Avenue, which would block access to existing homeowners. She was concerned about boring utility lines under the slough. *Testimony of Kiera Wright*.

45. Sarah Trattner testified that she lives in one of the 10 homes on East Sharon Avenue that would be affected by the change to a one-way street as a result of the proposed subdivision. She also believed this development was too urban for its surroundings and would lead to too much traffic. *Testimony of Sarah Trattner*.

46. Shannon Peacock testified that she resides on East Sharon Avenue, at the corner of Sharon and Pine. She opposed to plan to convert Sharon Avenue to a one-way street. She cited Exhibit 5 as evidence for the plan to covert Sharon Avenue to a one-way street. The language on Exhibit 5 says, "Sharon Avenue proposed to be a one-way to the west." Ms. Peacock believed the proposed conversion to one-way traffic would be to ease traffic for the subdivision, but it would make access more difficult for existing residents. She believed Sharon Avenue was too narrow to be a proper two-way street. Ms. Peacock also worried that any improvements to Sharon Avenue would result in damage to her trees.

    Ms. Peacock believed the onsite wetland could potentially be a Category II wetland, and she thought that review by DNR or some other third party would be helpful. *Testimony of Shannon Peacock*.

47. In response to the Applicant and public testimony, Mr. Johnson agreed with the analysis of Mr. Gentry that the proposed townhouses would not be adjacent to existing residences but rather would be adjacent to one another.

Mr. Johnson confirmed that East Sharon Avenue is proposed for conversion to a one-way street to accommodate the proposed subdivision. He cited MDNS condition 2, which requires East Sharon Avenue to be a one-way street for reasons of public safety and improved traffic flow (which would, in turn, improve air quality), and particularly to make pedestrian crossings safer. A pedestrian path to school runs across East Sharon Avenue. East Sharon Avenue is too narrow to be made a standard two-way street. Properly speaking, East Sharon Avenue would not be a one-way street; rather, eastbound traffic would be prohibited from turning onto East Sharon Avenue. Local traffic could still travel two ways.

With regard to the question of whether Gages Slough is an HCA, Mr. Johnson pointed to BMC 14.15.380.B, which clarifies that site assessments shall control over mapped boundaries and locations. He agreed to try to reach out to the Departments of Ecology and Fish and Wildlife for those agencies' comments on whether Gages Slough might be an HCA. At the time of the hearing, however, Mr. Johnson considered it an open question whether the slough was an HCA. Mr. Johnson interpreted the code to require all wetlands to be shown, including the 300-foot buffer of Wetland 1. He could not find any code provision to support the notion that the railroad cuts off the 300-foot buffer of Wetland 1. *Testimony of Brad Johnson*.

48. Mr. Gentry returned to the stand to testify that he grew up in Burlington and highly valued Gages Slough, where he had played as a small child. He saw the dedication of the wetland tracts in perpetuity as a benefit to the community. He agreed that it was appropriate to obtain agency input on the Applicant's plans, although he did not want the record left open indefinitely.

Mr. Gentry added that the City requested the traffic modification on East Sharon Avenue. He did not oppose that condition, or any other, but he wanted to emphasize that the idea did not come from the Applicant. He clarified, too, that all improvements would occur within the existing right-of-way and would not adversely affect neighbors. *Testimony of Brian Gentry*.

49. Anna Nelson returned to the stand to clarify that frontage improvements would not damage any neighbors' privately owned trees. *Testimony of Anna Nelson*.

Staff Recommendation

50. City staff reviewed the application and recommended that the proposed subdivision, shoreline substantial development permit, critical areas review, and site plan review be approved, with conditions. The Applicant did not object to any of the proposed

conditions. *Exhibit 1, Staff Report, pages 21 through 27; Testimony of Brad Johnson; Testimony of Anna Nelson; Testimony of Brian Gentry*.

Post-Hearing Changes

51. Following the hearing, City staff issued a memo seeking to revise the MDNS condition prohibiting turns onto East Sharon Avenue, which many of the public commenters had identified as creating a one-way street. City staff determined that the condition was not necessary for public safety and could be waived pursuant to a SEPA addendum. *Exhibit 41*.

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide applications for preliminary plat applications. *BMC 14A.05.060.C.5; BMC 16.10.080.B; chapter 17.120 BMC*. The Hearing Examiner also has jurisdiction to decide the shoreline permit, critical areas review, and site plan review applications, because those applications are grouped with the preliminary plat application. *BMC 16.10.050.C; BMC 14A.05.060*.

Criteria for Review

The hearing examiner may approve, approve with conditions, or deny a proposed subdivision as follows:

1. If the proposed subdivision complies with all applicable municipal code requirements it shall be approved; or

2. If, in the hearing examiner's opinion, the proposed subdivision can be made to comply with all applicable municipal code requirements through the application of reasonable conditions of approval, it shall be approved; or

3. If the proposed subdivision does not comply with all applicable municipal code requirements, or if in the hearing examiner's opinion, it cannot be made to comply through the application of reasonable conditions of approval, it shall be denied.

4. The hearing examiner's decision shall be in writing and shall be supported by written findings of fact.

BMC 16.10.080.B.

The following standards shall apply to all preliminary plat applications when critical areas, critical area buffers, or natural hazards are present within, or adjacent to, the proposed plat:

A. No lot shall be created through a subdivision or short subdivision which lacks an adequate building site outside of critical areas and critical area buffers, unless

restrictive notes are included on the face of the plat permanently prohibiting development of the lot;

B. No lot shall be created through a subdivision or short subdivision which lacks an adequate building site outside the floodway or special flood risk area, unless restrictive notes are included on the face of the plat permanently prohibiting development of the lot, or restricting the use of the lot to flood control structures and improvements;

C. No lot shall be created through a subdivision or short subdivision which lacks an adequate building site unencumbered by natural hazards or natural hazard buffers unless the hazards can be mitigated to an acceptable level through the construction of protective improvements or other means consistent with provisions of chapter 14.15 BMC;

D. Under no circumstances shall a lot be created through a subdivision or short subdivision that necessitates subsequent critical area variances or reasonable use determinations. Restrictive notes shall be included on the face of all plats containing critical areas, critical area buffers, or natural hazards identifying the applicable development regulations and stating that no critical area variances or reasonable use determinations will be granted within the plat boundaries;

E. Critical areas and critical area buffers shall be identified on the face of the plat and placed within protective tracts or easements as required by chapter 14.15 BMC;

F. Natural hazards and any associated setbacks, restrictions, or buffers required by chapter 14.15 BMC shall be shown on the face of the plat;

G. Land within a floodway or special flood risk zone shall be placed within a separate tract or easement if required by chapter 14.15 BMC;

H. Plats shall be subject to any other applicable requirements identified in chapter 14.15 BMC shall be addressed.

BMC 16.10.090.

Additionally, RCW 58.17.110(2) requires that a proposed subdivision shall not be approved unless the Hearing Examiner finds that:

(a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that

assure safe walking conditions for students who only walk to and from school; and

(b) the public use and interest will be served by the platting of such subdivision and dedication.

The criteria for review adopted by the Burlington City Council are designed to implement the requirement of chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040*.

Conclusions Based on Findings

1. **The proposal complies with most of the municipal code requirements, excluding the critical areas ordinance**. The Hearing Examiner agrees with the majority of City staff's analysis. The City provided reasonable notice of the proposal. Numerous public comments were received. The City Department of Community Development acted as lead agency, reviewing the proposal under SEPA, and determined that, with mitigation measures, the proposal would not have any probable significant adverse environmental impacts. The MDNS was not appealed.

   The MDNS would require the Applicant to provide numerous onsite and off-site improvements aimed at protecting pedestrian safety. The prohibition of turns onto East Sharon Avenue was one of the MDNS conditions, and a significant source of dismay to the neighbors who use East Sharon Avenue to access their own homes. Following the hearing, the City determined that the prohibition of turns onto East Sharon Avenue could be waived, thereby alleviating what the Hearing Examiner concludes would be the single largest impact this proposal would impose on its neighbors.

   The issues relating to traffic and parking appear to be adequately addressed through the proposed conditions of approval and the site design itself, which exceeds minimum parking requirements. The Hearing Examiner is sympathetic to the argument that this subdivision would change the existing neighborhood character, which is rural residential and agricultural, but the Hearing Examiner accepts the analysis of Brad Johnson that the City intentionally sought, through its Comprehensive Plan, to focus development in this area, as the city has grown up around what was once farmland. Farming activity has ceased on the property, so the proposed used is not inconsistent with current uses.

   The Hearing Examiner is satisfied that the proposed stormwater system, as described by Gary Sharnbroich, not only meets but exceeds the standards required of it. It appears capable of handling not only expected flooding conditions, but flooding conditions even greater than those expected.

The Hearing Examiner agreed with City staff's analysis with regard to lot size, lot coverage, impervious surface coverage, setbacks, access, density, open space, building length, design review, off-site improvements, schools, pedestrian routes, utilities, and services, including the recommended conditions of approval related thereto. The Hearing Examiner agrees with City staff that more information is required to be depicted on site plans or other documents regarding the landscaping, lighting, garbage and recycling area, and utility easements. There is no reason to suppose the required standards cannot be met, however, so it would be appropriate to condition approval on meeting the standards.

The conclusions described above are also sufficient to conclude that the proposed subdivision would comply with RCW 58.17.110(2)(a), in that the subdivision makes adequate provision for public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and all other relevant facts, including sidewalks and other planning features, that assure safe walking conditions for students who walk to and from school. *Findings 1–51*.

2. **The proposal does not comply with the critical areas ordinance, because it does not provide the required 235-foot buffer around Wetland A, a fish and wildlife habitat conservation area**. The Hearing Examiner concludes that the proposal is compliant with most, but not all, of the critical areas ordinance. The Hearing Examiner accepts the typing and delineation of Wetland A and Wetland 1. The Applicant's post-hearing memorandum, Exhibit 42, depicted the 300-foot buffer surrounding the off-site Wetland 1. Accommodating the 300-foot buffer would not require any changes to the proposal. The evidence supports a conclusion that Wetland A, the onsite wetland, is properly typed as a Category III wetland, with a 150-foot standard buffer. The Skagit River System Cooperative, which raised the possibility that Wetland A could also be a Category II wetland, did not respond to the Applicant's most recent typing of Wetland A. By a preponderance of the evidence, therefore, the Hearing Examiner concludes it is a Category III.

   The Hearing Examiner also accepts the Applicant and City's post-hearing analyses, in Exhibits 41 and 42, that Gages Slough, while it is a regulated waterbody under the Shoreline Management Act, does not benefit from a 200-foot shoreline buffer as a "shoreland" under RCW 90.58.030(2)(d). Gages Slough is properly characterized as a wetland "associated" to the Skagit River. *See RCW 90.58.030(2)(d)* (distinguishing regulated waterbodies that have a 200-foot shoreland from "all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter"). The City notes, in its post-hearing memo, that the City could have provided additional buffering for Gages Slough as an associated wetland but explicitly declined to do so in the City's Shoreline Master Program. Therefore, the Hearing

Examiner concludes that a 200-foot buffer around Wetland A is not a requirement of the Shoreline Management Act.

In addition to being a wetland, Wetland A is also a fish and wildlife habitat conservation area (HCA), as the City and Applicant each acknowledged in their post-hearing memos. Gages Slough is defined as such in the code, and no party disputes that characterization as it applies to Wetland A. As an HCA, Wetland A is subject to a buffer to be determined according to the WDFW-endorsed methodology set forth in BMC 14.15.380.B. The City and the Applicant, in applying that methodology, each determined that the appropriate standard buffer would be 235 feet, based on the site-potential tree height for a Douglas fir at the location of Wetland A. The only buffer provided, however, is the 150-foot standard buffer for Wetland A as a Category III wetland.

The critical areas ordinance does provide a process to reduce the standard buffer of an HCA. The process is as follows (with emphasis added in bold):

> Once buffers are established, they **shall not be altered except as allowed below**. Riparian buffer not currently meeting the minimum standards shall be restored; provided, that such restoration does not conflict with other provisions of this chapter. In implementing buffer widths other than the standard riparian buffers identified above, the director **shall provide opportunity for review and comment from appropriate federal, state or tribal natural resource agencies** to ensure the use of best available science. These comments shall be included in the public record along with the basis and rationale for requirement or approval of any such nonstandard buffers.
>
> 1. Increasing Buffer Widths. The city may increase the standard buffer widths on a case-by-case basis, or to establish nonriparian buffer widths, when such buffers are necessary to protect priority fish or wildlife (e.g., great blue heron nesting colonies, osprey or cavity nesting ducks) using the HCA. **This determination shall be supported by appropriate documentation from the Departments of Ecology and Fish and Wildlife**, showing that the increased buffer width is reasonably related to the protection of the fish and/or wildlife using the HCA.
>
> 2. Decreasing Buffer Widths. Decreasing standard buffers will be allowed only if the applicant demonstrates that all of the following criteria are met:
>   a. A decrease is necessary to accomplish the purposes of the proposal and **no reasonable alternative is available**; and
>   b. **Decreasing width will not adversely affect the fish and wildlife habitat functions and values**; and

c. If a portion of a buffer is to be reduced, the remaining buffer area will be enhanced, using native vegetation, artificial habitat features, vegetative screening and/or barrier fencing as appropriate to improve the functional attributes of the buffer and to provide equivalent or better protection for fish and wildlife habitat functions and values; and

d. The buffer width shall not be reduced below 25 percent of the standard buffer width unless no other feasible options exist and that no net loss of HCA riparian functional values will result, based on a functional assessment provided by the applicant utilizing a methodology approved by the city.

BMC 14.15.380.B.

The Hearing Examiner concludes that the above-cited procedure for reducing the standard width of an HCA buffer has not been followed here. First, the proposed reduction of the buffer from the standard 235 feet to the proposed 150 feet was not submitted to "appropriate federal, state or tribal natural resource agencies" as required by BMC 14.15.380.B. At most, according to the City's memo, the City reached out to WDFW by email on January 29, 2024, to ask about the applicability of the HCA buffer in BMC 14.15.380.B. WDFW never responded. The Hearing Examiner does not agree that WDFW is the only "appropriate" agency to ask. Mr. Johnson agreed at the hearing to reach out to both the Department of Ecology and WDFW, not just WDFW. Ecology is an appropriate agency to contact not only because of its general subject-matter expertise with regard to wetlands, waters, and habitat, but also because Ecology is identified by name in BMC 14.15.380.B.1 as one of the agencies to be contacted in the case of *expanding* an HCA buffer. Granted, the proposal here is to *reduce* an HCA buffer, but Ecology should still have been consulted, given the importance of Gages Slough as compared to a more run-of-the-mill HCA. In addition, the record does not show any attempt to obtain feedback on the proposed HCA reduction from federal or tribal agencies, as required by BMC 14.15.380.B. The notice these agencies received of the project only identified Wetland A as a Category III wetland with a proposed standard buffer. The notice did not identify Wetland A as an HCA with a proposed reduced buffer, because the characterization of Wetland A as an HCA only arose following the hearing, after public notice was complete. The agencies' silence with regard to a proposal involving a standard wetland buffer cannot be taken as assent to a proposal involving a reduced HCA buffer, because the HCA is subject to a higher level of protection than the wetland. In addition, the City did not solicit the feedback of the Skagit River System Cooperative (SRSC), a tribal natural resources contractor for several tribes, even though Mr. Johnson characterized SRSC as "experts" when it came to Gages Slough. These recognized tribal experts should have been asked to review a proposed reduction in the HCA buffer—not just the proposed standard buffer of a wetland.

Besides this procedural defect in failing to solicit comments from appropriate agencies, the Hearing Examiner is not satisfied that the proposed reduction complies with criteria in BMC 14.15.380.B.2.a and .B.2.b. Under criterion BMC 14.15.380.B.2.a, the reduction may only be approved if "no reasonable alternative is available." The Applicant's post-hearing memo, in which the Applicant acknowledges for the first time that an HCA buffer is required under the code, does not even attempt to argue that there is no reasonable alternative available except to reduce the buffer. It appears to the Hearing Examiner that a reasonable alternative is available: retain the buffer and develop fewer units, or smaller units, or units located in other parts of the project. The Applicant's decision to develop 89 units was not driven by any kind of code requirement, such as a minimum density requirement. Therefore, it is not unreasonable to reduce the number of units, or otherwise reconfigure the units, if that is what is necessary to accommodate the buffer. It is not the case that a 235-foot buffer would preclude all reasonable development of the property.

In addition, the Hearing Examiner is not satisfied that criterion BMC 14.15.380.B.2.b is met. That criterion requires a finding that "decreasing width [of the buffer] will not adversely affect the fish and wildlife habitat functions and values." The Applicant's post-hearing analysis on this point compares the proposed 150-foot buffer against existing conditions. Not surprisingly, given the former agricultural use of the subject property, the Applicant determines that a 150-foot buffer, with associated restoration plan, would be preferable to existing conditions. But the Applicant is making is the wrong comparison. The correct comparison, under BMC 14.15.380.B.2.b, would be to compare the proposed 150-foot buffer against the standard 235-foot buffer. Only then could a determination be made addressing whether reducing the buffer would still protect fish and wildlife habitat functions and values. That analysis is missing.

Because the Hearing Examiner cannot conclude that the proposal meets the requirements in BMC 14.15.380.B for the reduction of an HCA buffer, the Hearing Examiner cannot conclude that the proposal complies with all sections of the municipal code. Nor does this appear to be the kind of relatively minor issue that could be rectified through conditioning. The Hearing Examiner is unwilling to write a condition that approves the subdivision subject to a recommendation by appropriate state, federal, and tribal agencies that the HCA buffer may be reduced, because such a condition could place undue pressure on those agencies not to rock the boat of an already approved subdivision. The agencies should be given a chance to comment on a proposal, not on a land use decision that has already been made. For the same reason, it would not be appropriate to approve the subdivision contingent on a finding by the Applicant's biologist that reducing the HCA will not adversely affect habitat. Again, such a condition would place an undue pressure on the biologist to affirm a decision that has already been made rather than provide an objective analysis of the facts prior to a decision being made. It would also deprive the Hearing Examiner of the opportunity to establish further conditions of

approval related to a buffer reduction, should those conditions prove necessary and appropriate.

Nor is the Hearing Examiner willing to approve the subdivision contingent on a revised site plan that accommodates a 235-foot HCA buffer around Wetland A. Unlike the case of Wetland 1, where the 300-foot Category II wetland buffer, originally missing from the site plans, could be added to the site plans without affecting the proposed development, the addition of a 235-foot buffer for Wetland A would, in the words of the Applicant's post-hearing memo, "effectively encumber nearly the entire southern parcel." The southern parcel is home to multiple dwelling units, part of an access road, a stormwater tract, and an open space tract. A buffer across this parcel cannot easily be accommodated without major changes to the proposed plat. This is too large an issue to be accommodated through conditioning. Therefore, because the proposal does not comply with the critical areas ordinance and cannot be brought into compliance through conditioning, the Hearing Examiner concludes that it must be denied, per BMC 16.10.080.B.3. The failure to comply with the critical areas ordinance is also grounds to deny the proposal under RCW 58.17.110(2)(b), because it is not in the public interest to approve a subdivision that does not comply with the local critical areas code. *Findings 5; 14–29; 39–50*.

3. **The Hearing Examiner will separate the shoreline substantial development permit application and site plan review application and will not rule on them here**. The shoreline permit for the bored water line and the site plan review are both integral parts of the overall project. The Hearing Examiner believes it would only lead to procedural confusion if he were to issue a decision approving either of those applications while at the same time denying the preliminary plat. Nevertheless, the Hearing Examiner will not deny those applications because it is likely they could both have been approved if the preliminary plat had been approved. BMC 14A.05.060 provides that "Projects requiring more than one type of decision should, whenever possible, be consolidated under the higher classification." Here, where the central component of the project is the preliminary plat, which is hereby denied, it no longer makes sense to consolidate the other applications into the same hearing. Approval of the shoreline permit would result in a water line to nowhere, a clearly unreasonable outcome, while approval of the site plan would result in a site plan that could not reasonably be built, because there would be no lots. Therefore, the Hearing Examiner will separate the shoreline permit application and site plan review application from this preliminary plat decision, and will not rule on either of those permit applications, and will leave it to the Applicant whether to pursue those permit applications on a separate track. Should the Applicant decide to abandon those applications in the wake of this decision, the Hearing Examiner expects the City to refund any application fees associated with the abandoned applications. *Finding 2*.

DECISION

Based upon the preceding findings and conclusions, the request to subdivide a 13.36-acre property located at 900 South Pine Street into 89 residential townhouse lots, with associated clearing, grading, stormwater and utility improvements, and street improvements, is **DENIED**.

DECIDED this 29th day of February 2024.

ALEX SIDLES
Hearing Examiner