

**BEFORE the HEARING EXAMINER for the  
CITY of SAMMAMISH**

<b>DECISION</b>
-----------------

FILE NO.: PSUB2016-00026

APPELLANTS: Larry & Nancy LeSueur  
21720 SE 8<sup>th</sup> Street  
Sammamish, WA 98074  
lplesueur@hotmail.com/nalesueur@hotmail.com

Jason & Nicole Williams  
C/o Michael Spence  
Helsell Fetterman, LLP  
1001 4<sup>th</sup> Avenue, Suite 4200  
Seattle, WA 98154  
mspence@helsell.com

RESPONDENT: City of Sammamish  
C/o Robert F. Noe  
Kenyon Disend, PLLC  
11 Front Street South  
Issaquah, WA 98027-3820  
bob@kenyondisend.com

**RECEIVED**

**APR 19 2017**

APPLICANT: Toll Brothers  
C/o Brent Carson  
Van Ness Feldman, LLP  
719 Second Avenue, Suite 1150  
Seattle, WA 98104  
brc@vnf.com

**CITY OF SAMMAMISH**

TYPE OF CASE: Consolidated: 1) Preliminary subdivision (*Carrier*); and 2) Appeals  
(2) from the State Environmental Policy Act threshold Determination  
of Nonsignificance issued for the *Carrier* application

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: RETURN preliminary subdivision application for modification or  
correction; REMAND SEPA threshold determination

DATE OF DECISION: April 17, 2017

## INTRODUCTION <sup>1</sup>

Toll Brothers (“Toll”) seeks preliminary approval of *Carrier*, a 35-lot single-family residential subdivision of a 14.1 acre site, owned by Carlson and Carrier, which is zoned R-6. (Exhibits 4; 6; 29 <sup>2</sup>)

Toll filed a Base Land Use Application on January 29, 2016. (Exhibits 1; 4) The Sammamish Department of Community Development (the “Department”) deemed the application to be complete on February 2, 2016. (Exhibit 11)

On February 7, 2017, Larry & Nancy LeSueur (“LeSueur”) and Jason & Nicole Williams (“Williams”) each filed a timely appeal from the State Environmental Policy Act (“SEPA”) threshold Determination of Nonsignificance (“DNS”) issued by the Department for the *Carrier* application. <sup>3</sup> (Exhibits 9001; 9002) On February 13, 2017, Toll filed a Motion to Dismiss both SEPA appeals. (Exhibit 9006) On February 16, 2017, the Examiner denied Toll’s Motion. (Exhibit 9011)

The subject property occupies the northeast quadrant of the 214<sup>th</sup> Avenue SE/SE 8<sup>th</sup> Street intersection, near Big Rock Park. (Exhibit 6)

The Sammamish Hearing Examiner (“Examiner”) viewed the subject property on March 16, 2017.

The Examiner held an open record hearing on March 16, 20, and 21, 2017. The Department gave notice of the hearing as required by the Sammamish Municipal Code (“SMC”). <sup>4</sup> (Exhibit 42.C)

Subsection 20.05.100(1) SMC requires that decisions on preliminary subdivisions be issued within 120 net review days after the application is found to be complete. The open record hearing was held after the 120<sup>th</sup> net review day. (Testimony) The SMC provides two potential remedies for an untimely decision: A time extension mutually agreed upon by the City and the applicant [SMC 20.05.100(2)] or written notice from the Department explaining why the deadline was not met [SMC 20.05.100(4)]. The Department provided a written explanation. (Exhibit 32)

---

<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.  
<sup>2</sup> Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The principal parties used the “Bates” numbering system on all their pre-filed exhibits, but not on those submitted during the hearing. Where available, the Examiner will use the Bates number (omitting leading zeros), separated from the exhibit number by a “:” to cite specific exhibit pages (e.g.: Exhibit 29:977).

<sup>3</sup> Solely to simplify grammatical construction, the appellants will be referred to collectively as the “Appellants” and, where necessary, separately in singular form: “LeSueur” or “Williams.” No disrespect is intended.

<sup>4</sup> Continuations were announced on the record at the end of each day and did not require further notice.



Pursuant to former Hearing Examiner Rule of Procedure 224 each principal party pre-filed exhibits, all of which were entered into the hearing record. Numerous additional exhibits were entered into the hearing record during the hearing. The Deputy City Clerk maintains the official copy of all entered exhibits together with index lists of all exhibits. The record consists of:

Exhibits 1 – 44:	Respondent City's exhibits
Exhibits 1001 – 1031:	Appellants' exhibits
Exhibits 2001 – 2018:	Applicant Toll's exhibits
Exhibits 9001 – 9022:	Administrative exhibits (includes documents submitted by the public during the hearing)

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

### FINDINGS OF FACT

1. Toll proposes to subdivide the subject property into 35 lots for single-family residential development together with a 7.33 acre critical area protection tract (Proposed Tract D), a 0.75 acre tree retention tract (Proposed Tract H), two combination storm water control/recreation tracts (Proposed Tracts C and G), three short access/utilities tracts (Proposed Tracts A, B, and E), and a narrow pedestrian access tract (Proposed Tract F). Frontage improvements to 214<sup>th</sup> Avenue SE and SE 8<sup>th</sup> Street are proposed as required by the SMC and applicable Public Works Standards. Proposed Tract D will serve to protect two streams (Streams A and B) and two wetlands (Wetlands A and B); Stream B and Wetland B essentially divide the subject property into a west half and an east half. Twenty lots are proposed for the area east of Proposed Tract D (Proposed Lots 1 – 20) with the remaining 15 lots in the area west of Proposed Tract D (Proposed Lots 21 – 35). Sewer and water service for the lots east of Proposed Tract D is proposed to be extended beneath and through Stream B and Wetland B in the northern portion of Proposed Tract D. Toll's preferred method to install those utilities is by open trenching, parts of which would be over 25 feet deep. (Exhibits 4; 22; 29; 2001; and testimony)
2. Sammamish's SEPA Responsible Official issued a threshold DNS for *Carrier* on January 17, 2017. (Exhibit 1:1)
3. On February 7, 2017, LeSueur and Williams timely filed their appeals from the SEPA DNS. (Exhibits 9001; 9002) LeSueur and Williams supplemented their appeals, as required by the Examiner, with statements filed on February 27, 2017. (Exhibits 9011 - 9014) LeSueur and Williams essentially argue that the Department lacked sufficient information to conclude that installing sewer and water utilities through Proposed Tract D by open trenching would not significantly impact Stream B and Wetland B, that the Department mis-classified Stream B and Wetland B, that the proposed utility plan would not properly facilitate development of properties to the east of the

subject property, and that the development would create adverse traffic impacts on SE 8<sup>th</sup> Street and 218<sup>th</sup> Avenue SE. (Exhibits 9013; 9014)

4. The subject property consists of two abutting parcels. The western two-thirds (approximately 10 acres) is Tax Parcel 1240700035 ("Parcel 0035"); the eastern third (approximately 5 acres) is Tax Parcel 1240700086 ("Parcel 0086"). Parcel 0035 was owned at one time by the French family; it is now owned by the Carlson family. Parcel 0086 is owned by the Carrier family. (Exhibit 4:48; and testimony) Taken together, the two parcels form a large rectangle with approximately 970 feet of frontage on the north side of SE 8<sup>th</sup> Street and approximately 635 feet of frontage on the east side of 214<sup>th</sup> Avenue SE. (Exhibit 29)
5. LeSueur lives on the one-acre parcel which abuts the east boundary of the subject property with frontage on SE 8<sup>th</sup> Street. (Exhibit 1016, p. 3; and testimony) Williams lives on an acreage parcel two lots north of LeSueur with frontage on 218<sup>th</sup> Avenue SE. (Exhibit 1020; and testimony)

The subject property is bordered on the north by a single-family residential development known as *Bellaser*. *Bellaser* contains 18 residential lots, a storm water detention pond (Tract A) and a critical areas protection tract (Tract B). Based on dates contained on Exhibit 2006:80, it appears that physical development of *Bellaser* was completed in or around 2006. (Exhibit 2006:80) *Bellaser* is not a recently approved subdivision, however. Rather, it is a portion of an old, unrecorded subdivision (*Burke & Farrar's Kirkland Addition No. 18*) which was apparently altered through the boundary line adjustment process (Sammamish BLA2000-022) to become what it is today.<sup>5</sup> (Parcels 0035 and 0086 are also parts of the same unrecorded plat. (Exhibit 29:977))

6. The subject property is on the southern/southwestern face of a large, broad, sloping hillside. The elevation change from the northeast corner to the southwest corner is about 64 feet, with much of that drop occurring within about 150 feet of the northeast corner. Parcel 0086 is predominantly open pasture, most recently used for horses, with a small wooded area in its northeast corner and along its SE 8<sup>th</sup> Street frontage.<sup>6</sup> Parcel 0035 is almost completely wooded; a single-family residence is nestled in the trees near its southwest corner. (Exhibits 20:513<sup>7</sup>; 25:841 and :859; 2001:4; 29)
7. The subject property contains two streams and two wetlands. Wetland A is located near the western edge of Parcel 0086. Stream A appears to be a dug channel extending from the south end of Wetland

---

<sup>5</sup> The undersigned became the City's Pro Tem Hearing Examiner in 2002 and heard a number of cases in the years that followed; the undersigned became the City's regular Examiner in 2008. The undersigned found no record of a project called *Bellaser* in his data base and went on-line to King County ParcelViewer2 to try and determine when the "subdivision" was recorded. It was through that process that the undersigned learned that none of the lots in *Bellaser* are lots in a recorded plat. Rather, every lot's legal description refers to the 2000 BLA and the unrecorded plat. [Official notice]

<sup>6</sup> The small horse sheds visible in the aerial photographs and in Photo 7 on Exhibit 25:858 were recently removed by LeSueur, their owner. (Testimony)

<sup>7</sup> The "Site" flagged on this graphic is the *Bellaser* property; the *Carrier* site is immediately south of *Bellaser*. The graphic does clearly depict the south/southwest aspect of the area's slope.



A southerly to SE 8<sup>th</sup> Street. Stream A then crosses beneath SE 8<sup>th</sup> Street and eventually joins Stream B. The characterization of Wetland A and Stream A are not in contention in this proceeding.<sup>8</sup> Wetland A is a Category III<sup>9</sup> wetland with a Habitat score of 15. Stream A is a Type Ns, seasonal, non-fish bearing, stream. (Exhibits 22; 29; and testimony)

Wetland B and Stream B are the focus of the SEPA appeals. Wetland B begins in *Bellaser* Tract B and extends southerly through Parcel 0035 more or less to the northern edge of SE 8<sup>th</sup> Street. Stream B rises somewhere near the northern end of Wetland B and meanders southerly through the wetland to the north side of SE 8<sup>th</sup> Street. Stream B then flows west in a grass-lined roadside ditch, crosses beneath 214<sup>th</sup> Avenue and then beneath SE 8<sup>th</sup> Street, meanders southerly through ponds and wetlands, is joined by Stream A, and joins Ebright Creek just south of SE 13<sup>th</sup> Place. (Exhibits 20:289; 2008:211; 9020 ) Wetland B is a Category II wetland with a Habitat score of 6 and Stream B is a Type Np, perennial, non-fish bearing stream. (See the Appendix hereto for a detailed explanation of the wetland and stream classification issues in this case. The Appendix is incorporated herein by reference as if set forth in full.)

8. Under the SMC, a Category II wetland with a Habitat score of 6 requires a 100-foot wide buffer. [SMC 21A.50.290(2); see the Appendix hereto for a detailed explanation of the conversion of the legally required wetland rating results to the buffer requirements in the former version of SMC 21A.50.290(2) to which this application is vested] Toll designed *Carrier* based on the 75 foot wide buffer required for a Category III wetland. The proposed design does not comply with the SMC's buffer requirements for a Category II wetland.
9. Based upon the preponderance of the evidence in this record, the Examiner has concluded that Stream B is a Type Np stream. (See the Appendix hereto for a detailed explanation of the stream classification issues in this case. The Appendix is incorporated herein by reference as if set forth in full.) Subsection 21A.50.330(1) SMC requires a 75-foot wide buffer for Type Np streams. Given that the required wetland buffer is 25 feet wider than the required stream buffer and that the stream is entirely located within the wetland as it passes through Parcel 0035, its required buffer does not pose an impediment to application approval.

Subsection 21A.50.340(7)(f) requires that underground crossings of all streams except Type Ns streams must be done by lateral drilling/boring. A special exception exists for Type Ns streams: "Crossing of Type Ns streams when dry may be made with open cuts."<sup>10</sup> By specifically allowing

---

<sup>8</sup> LeSueur at one time suggested that Wetland A extended further east than delineated by Toll, but has since abandoned that argument. (Exhibit 13.6)

<sup>9</sup> The Washington State Department of Ecology ("Ecology") uses capitalized Roman numerals for wetland categories (Category I, II, etc.). (Exhibit 1017.C, p. 1) The current SMC uses both Arabic numerals (Category 1, 2, etc.) [SMC 21A.50.290(1) and capitalized Roman numerals [SMC 21A.50.290(2)] for wetland categories. (Exhibit 2011.C, pp. 37 and 38 of 64) The Examiner will use capitalized Roman numerals.

<sup>10</sup> Toll argued that SMC 21A.50.340(1) allowed virtually any alteration to a stream so long as it is properly mitigated. (Exhibit 2011) Toll made a similar argument with respect to SMC 21A.50.300(1) and wetlands. Those arguments are not persuasive. If that were true, then Subsections 340(4) – (13) would be completely superfluous (as would Subsections

open trench crossing of one certain type of stream under a specific condition, the provision acts to prohibit open trench crossing of any other type of stream. This restriction does not inherently prevent approval of *Carrier* as designed (because it doesn't inherently require any design change), but it may make Toll reconsider the design (because Toll has testified that boring is not practical).<sup>11</sup>

10. Since the preliminary subdivision as proposed cannot be approved and will have to be redesigned to some as yet unknown extent, exposition of facts regarding other issues raised in the appeals or of other matters associated with preliminary subdivision consideration would serve no purpose.
11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK<sup>12</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

#### *SEPA Appeal*

The Examiner is charged with adjudicating administrative SEPA appeals "pursuant to the provisions of SMC 20.10.070". [SMC 20.15.130(1)]

#### *Preliminary Subdivision*

A preliminary subdivision is a Type 3 land use application. [SMC 20.05.020, Exhibit A] A Type 3 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.05.020, 20.10.240, 20.10.250, and 20.10.260]

The Examiner's decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the Examiner finds necessary to make the application or appeal compatible with the

---

300(4) – (12)). Those subsections establish special terms, conditions, requirements, and limitations for certain types of alterations to streams, wetlands, and/or their buffers. The Examiner finds the basic assertion (that Subsection (1) allows virtually any alteration if properly mitigated) to be invalid in light of Subsection 340(7)'s prohibition against open trenching of all but Type Ns streams and Subsection 300(5)'s restriction of sewer utility corridors to only wetland buffers. Toll's interpretation completely ignores the restrictions contained within the other subsections of SMC 21A.50.340 and .300. If those restrictions prohibit a proposal, then SMC 21A.50.070, Exceptions, provides a possible avenue of relief.

<sup>11</sup> If Stream B were a Type Ns instead of a Type Np, open trench utility construction would be allowed during the time when the stream bed was dry. But changing Stream B back to Type Ns would alter the classification of Wetland B under the 2004 wetland rating system from Category III to Category II, thus increasing the required buffer width. Toll would not gain much even if it prevailed in such a challenge. (See the Appendix hereto.)

<sup>12</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.



environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.

[SMC 20.10.070(2)]

#### Review Criteria

##### *SEPA Appeal*

SEPA requires that a determination be made as to whether a project would result in “a probable significant, adverse environmental impact” and requires that a “detailed statement” be prepared in conjunction with “major actions significantly affecting the quality of the environment”. [RCW 43.21C.031 and RCW 43.21C.030(c), respectively] The process of determining whether a project would result in such an impact is referred to as the “threshold determination” process. The person making the determination is called the “responsible official”.

The State rules define “probable” as something which is “likely or reasonably likely to occur” as opposed to events “that merely have a possibility of occurring, but are remote or speculative.” [WAC 197-11-782] The term “significant” “as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” [WAC 197-11-794, both definitions adopted by reference at SMC 20.15.010(1)]

##### *Preliminary Subdivision*

Section 20.10.200 SMC sets forth requirements applicable to all Examiner Decisions:

When the examiner renders a decision . . . , he or she shall make and enter findings of fact and conclusions from the record that support the decision, said findings and conclusions shall set forth and demonstrate the manner in which the decision . . . is consistent with, carries out, and helps implement applicable state laws and regulations and the regulations, policies, objectives, and goals of the interim comprehensive plan, the development code, and other official laws, policies, and objectives of the City of Sammamish, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public.

Additional review criteria for preliminary subdivisions are set forth at SMC 20.10.220:

When the examiner makes a decision regarding an application for a proposed preliminary plat, the decision shall include additional findings as to whether:

(1) 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 school grounds 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

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

### Vested Rights

Sammamish has enacted a vested rights provision.

Applications for Type 1, 2, 3 and 4 land use decisions, except those that seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[SMC 20.05.070(1)] Therefore, this application is vested to the development regulations as they existed on February 2, 2016.

### Standard of Review

#### *SEPA Appeal*

The clearly erroneous standard is the appropriate test to apply in an appeal of a SEPA threshold determination: the action of the responsible official is not disturbed unless, after reviewing all the evidence in the record, the appellate decision maker is left with the definite conviction that a mistake has been made. [*Leavitt v. Jefferson Cy.*, 74 Wn. App. 668, 680 (1994)]

The appellant has the burden of proof. State law requires that “[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a ‘detailed statement’, the decision of the governmental agency shall be accorded substantial weight.” [RCW 43.21C.090] That requirement is echoed in both state rule [WAC 197-11-680(3)(a)(viii)] and municipal code [SMC 20.15.130(1)(b)].

#### *Preliminary Subdivision*

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [City of Sammamish Hearing Examiner Rule of Procedure 316(a)]

### Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

## **CONCLUSIONS OF LAW**



1. Based on the preponderance of the evidence, the Examiner concludes that the wrong wetland rating system was used resulting in the incorrect classification of Wetland B. The correct classification of Wetland B (Category II) requires a buffer 25 feet wider (100 feet v. 75 feet) than that around which the proposed subdivision has been designed. The proposed subdivision cannot be approved as presented.

However, there is nothing in the record to suggest that a subdivision of some design and magnitude could not be approved for the subject property. Therefore, denial of the proposed preliminary subdivision would not be appropriate.

Subsection 58.17.140(1) RCW provides that preliminary subdivision applications “shall be approved, disapproved, or returned to the applicant for modification or correction”. A return to the applicant for modification is the appropriate action under the circumstances here present.

2. The SEPA threshold determination was based, at least in part, upon an incorrect classification of Wetland B. Thus, at least part of the basis upon which the determination was made was incorrect. However, the SEPA appeals are essentially moot since the threshold determination will have to be revisited when Toll presents a revised proposal complying with wetland buffer requirements. Therefore, the appropriate action with regard to the SEPA appeals is to remand the matter to the Department for later action when a revised proposal is presented.
3. Unless convincing evidence can be gathered and presented to overcome the present evidence and prove that Stream B is a Type Ns stream, any new development proposal cannot include an open trench utility crossing of the Stream B corridor (unless an application is filed under one of the provisions within SMC 21A.50.070 and approved).
4. Toll (and to some extent the Department) argued that consideration of a public agency and utility exception (“PAUE”) under SMC 21A.50.070(1) is inherent in any preliminary subdivision proposing a utility installation that cannot comply with the environmentally critical areas regulations in Chapter 21A.50 SMC. They are incorrect.

The procedural provisions associated with PAUEs are contained in SMC 21A.50.070(1):

(1) Public Agency and Utility Exception. If the application of this chapter would prohibit an activity or a development proposal by a public agency or utility, the agency or utility may apply for an exception pursuant to this section:

(a) The public agency or utility shall apply to the department and shall make available to the department other related project documents such as permit applications to other agencies, special studies and SEPA documents.

...

[Emphasis added] Toll's interpretation ignores the clear and unambiguous wording of SMC 21A.50.070(1). The PAUE provision is for a "proposal by a public agency or utility," not for a private proposal. "[T]he agency or utility may apply" for a PAUE, not a private party. And to reinforce that statement, Subsection (1)(a) starts by saying that "[t]he public agency or utility shall apply" for a PAUE. Every one of those three provisions would have to be ignored for Toll's interpretation to be accepted. The PAUE process is specifically and solely for public agencies and public utilities, not for private parties. A PAUE application must be for an agency project and "the agency" must be the PAUE applicant. No interpretation that ignores clear and unambiguous requirements of the code can be accepted. A PAUE application is not inherent in a preliminary subdivision application.

As applied here, if Toll's utility service proposal cannot meet Chapter 21A.50 SMC requirements, then it's up to the utility purveyor to decide if it wants to sponsor the project, in which case the utility is the applicant and must apply for a PAUE. If the utility does not wish to sponsor the installation, then Toll could revise its utility service plan to comply with Chapter 21A.50 SMC or apply for a reasonable use exception ("RUE") under SMC 21A.50.070(2).

5. In a similar fashion, the RUE provisions in SMC 21A.50.070(2) are not inherent in a preliminary subdivision application. "If the application of [Chapter 21A.50 SMC] would deny all reasonable use of the property, the applicant may apply for an exception pursuant to this subsection". [SMC 21A.50.070(2)] Here, again, an application must be made – this time by a private applicant as opposed to by a public agency or utility. Thus, this relief mechanism is available to private applicants, but only by filing an application for it.
6. In reaching Conclusions of Law 4 and 5, above, the Examiner has not performed any evaluation of compliance of a hypothetical PAUE or RUE application with the established approval criteria. Any such evaluation would be manifestly premature given that no application for either has been filed. Conclusions of Law 4 and 5 merely set forth the available processes.
7. The Appendix hereto is incorporated herein by reference as if set forth in full.
8. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.




### DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner:

- A. **RETURNS TO THE APPLICANT FOR MODIFICATION OR CORRECTION** the proposed preliminary subdivision of *Carrier*; and
- B. **REMANDS** to the Department of Community Development the SEPA threshold determination for later action if and when a revised preliminary subdivision application is submitted.

Decision issued April 17, 2017.

  
\_\_\_\_\_  
John E. Galt  
Hearing Examiner

### HEARING PARTICIPANTS <sup>13</sup>

Brent Carson, unsworn counsel  
Michael Spence, unsworn counsel  
Doug McIntyre  
Will Stockman  
Steve Tyzzar  
Kris Lepine  
Ryan Kahlo  
David Pyle  
Jeff Schramm

Robert Noe, unsworn counsel  
Bryan Telegin, unsworn counsel  
Jeffrey Peterson  
Scott Weedman  
Larry LeSueur  
Scott Brainard  
Jason Williams  
Brett Pudists  
Scott Carlson

---

<sup>13</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.

### **NOTICE of RIGHT of RECONSIDERATION**

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, 801 228<sup>th</sup> Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

### **NOTICE of RIGHT of JUDICIAL REVIEW**

This Decision is final and conclusive subject to the right of review in Superior Court in accordance with the procedures of Chapter 36.70C RCW, the Land Use Petition Act. See Chapter 36.70C RCW and SMC 20.10.250 for additional information and requirements regarding judicial review.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."



**APPENDIX:  
CATEGORIZATION of STREAM B and WETLAND B <sup>14</sup>**

**Expert Witness Credibility**

Witness credibility is an awkward, but necessary, consideration when conflicting expert and lay testimony occurs in a hearing. The Examiner usually makes credibility judgments without specifically detailing the reasons for those judgments. But in this case, that does not seem sufficient. Thus, the following paragraphs.

Each of the three wetland experts who testified is a “qualified professional” as that term is defined in SMC 21A.15.942: Toll retained Scott Brainard of Wetland Resources, Inc. (“WRI”), a certified Professional Wetland Scientist with an undergraduate degree in Environmental Science and about 23 years of experience in the local area; the City retained Ryan Kahlo of The Watershed Company (“TWC”), a certified Professional Wetland Scientist with about 9 years of experience in the local area; the Appellants retained Kris Lepine of Herrera, a certified Professional Wetland Scientist with an undergraduate degree in Environmental Science and about 19 years of experience in the local area. (Exhibits 1015.B; 2010.C; 2015; and testimony)

Each provided seemingly reasonable, rational testimony about the on-site wetlands and streams. But that testimony differed rather markedly, especially with respect to the classification of Stream B and Wetland B. The classification of Stream B has a tremendous effect on Toll’s proposal to install utility lines beneath Stream B using open trenching techniques; the classification of Wetland B has a tremendous effect on the proposal’s design because of the width of required buffers. As Ecology states in its 2004 edition of the Washington State Wetland Rating System for Western Washington, “The variability in [wetland rating] scores among those trained [by Ecology] is about 10% (+ or – 5 points).” (Exhibit 2011.D, p. 12, Comment 3) A 5 point spread can be the difference between a Category III 75 foot buffer and a Category II 100 foot buffer. If the possibility for rating disagreement is that important, it is imperative to try to understand what factors may influence each expert’s rating and testimony.

WRI was retained by Toll to help it obtain approval of the *Carrier* application. Thus, where “wiggle room” exists in the rating process, one would expect that WRI would tend to see things in a light most favorable to the approval of Toll’s application.

Herrera was retained by the Appellants to review WRI’s work and find flaws, if any. Herrera’s clients oppose aspects of the Toll proposal, including installing utility lines beneath Stream B and Wetland B. Thus, where “wiggle room” exists, one would expect that Herrera would tend to see things in a light most favorable to the Appellants and against approval of the proposal.

TWC was retained by the City to provide third-party peer review of Toll’s submittals. One would think that TWC would have a perfectly neutral, completely objective view of the situation. Were that to be true, the Examiner could ignore the testimony of the other two experts and rely solely on that provided by TWC. But

---

<sup>14</sup> Any statement in this Appendix deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

that ignores the reality that Kahlo has the least experience of the three experts as well as the possibility that the City may lean pro-development or pro-environmental preservation.

Thus, the Examiner does not feel at all comfortable accepting at face value the testimony of any of the three stream and wetland experts. The Examiner does not have a degree in environmental science (just undergraduate and graduate degrees in geography and geography/urban studies plus more than 38 years experience as a hearing examiner listening to expert testimony), but the Examiner is comfortable weighing the competing testimony and evidence from the three experts and reaching his own conclusions.

Toll would have the Examiner essentially ignore the views of Herrera for the simple reason that Lepine did not conduct any field work on the *Carrier* site. There is one basic reason why Herrera did no field work: It had no authorization to enter onto the property. Appellants almost always have to argue with one hand tied behind their backs: They have no permission to actually do any field work on the proposed development site. That of necessity means that an appellant's consultant is essentially put in the position of utilizing and reacting to work done by others, without being able to field check any of it. The Examiner understands that limitation. But that limitation does not mean that Herrera's observations must be discounted.

### **Lay Witness Credibility**

Several people provided somewhat conflicting testimony about the condition of Stream B. LeSueur said a headwaters pond on the *Bellaser* property and the trout pond on the subject property had water year-round. Carlson, the adult grandson of the French family that used to own Parcel 0035, said he had seen Stream B dry frequently during summer months when he used to play on the property as a child. Stockman, who resides on the south side of SE 8<sup>th</sup> Street on a parcel which is bisected by Stream B, presented photographs taken in March, 2017, showing flowing conditions from the stream's headwaters to and through a pond located on his property. (Exhibit 9020)

The credibility to be accorded these statements must recognize that LeSueur for many years boarded horses on the *Carrier* property and walked the Carlson property, so he had first-hand observation opportunities. He also is one of the Appellants so he would be inclined to view matters in a light most favorable to the Appellants' viewpoint. As a relative of the current owner of the Carlson property, Carlson would be expected to view things in a light most favorable to successful development of the property. Stockman's pictures speak for themselves, but were taken during the wet season, not the dry season.

Appellant Williams testified that, as a general contractor of high-end homes, he has overseen installation of utilities using both horizontal boring and open-trench methods. Williams' testimony was criticized because he is not an engineer. The Examiner concludes that Williams' contracting experience provided him with a sufficient basis for the opinions he presented. The Examiner does recognize that as one of the Appellants he would be inclined to view matters in a light most favorable to the Appellants' viewpoint.



## Stream B Typing

Although the wetland rating system does not explicitly award points based upon the formal type of a stream which passes through it, several of the rating questions depend on whether outflows from the wetland are intermittent or perennial. Thus, for all intents and purposes, Stream B must be typed before Wetland B can be rated since the outflow from Wetland B is Stream B.

Stream B's headwaters are in *Bellasera* immediately north of the subject property. Stream B meanders southerly to flow into Ebright Creek a short distance south of SE 13<sup>th</sup> Place. Along its route it passes through at least two ponds. One of those ponds lies within the subject property and was dug by the French family many years ago. That pond is referred to in the record as the "trout pond." (Exhibits 39:1060; 1024, Photographs 16, 18, 19, 21, and 22<sup>15</sup>; 1029, unnumbered p. 1; 9020)

All parties agree that Stream B is either a Type Np or a Type Ns stream. The SMC provides guidance by which to distinguish between those stream types:

"Streams" means those areas in the City where surface waters produce a defined channel or bed, not including irrigation ditches, canals, storm or storm water runoff conveyance devices or other entirely artificial watercourses, unless they are used by salmonids or are used to convey streams naturally occurring prior to construction of such watercourses. For the purpose of this definition, a defined channel or bed is an area that demonstrates clear evidence of the passage of water and includes, but is not limited to, bedrock channels, gravel beds, sand and silt beds, and defined-channel swales. The channel or bed need not contain water year-round. For the purpose of defining the following categories of streams, normal rainfall is rainfall that is at or near the mean of the accumulated annual rainfall record, based upon the water year for King County as recorded at the Seattle-Tacoma International Airport.

(1) Streams shall be classified according to the following criteria:

...

(c) Type Np streams which are perennial during a year of normal rainfall and do not have the potential to be used by salmonids. Type Np streams include the intermittent dry portions of the perennial channel below the uppermost point of perennial flow. If the uppermost point of perennial flow cannot be identified with simple, nontechnical observations, then the point of perennial flow should be determined using the best professional judgment of a qualified professional.

(d) Type Ns streams which are seasonal or ephemeral during a year of normal rainfall and do not have the potential to be used by salmonids.

---

<sup>15</sup> Each picture in Exhibit 1024 has a unique filename (e.g.: SE 8<sup>th</sup> Ditch001.JPG). The filenames are identical except for the three digit number which precedes the "jpg" file extension. For simplicity, the Examiner will cite the photographs solely by those three digits.

[SMC 21A.15.1240, emphasis added]

WRI “performed a site reconnaissance on February 25, 2015”. (Exhibit 23.7:765, ¶ 1) WRI next visited the site on June 22 and 24, 2015, accompanied by a representative of the Washington State Department of Fish and Wildlife (“WDFW”). WDFW took a series of photographs during the site visit. Each photograph contains date and time data allowing one to determine the sequence in which the photographs were taken. (Exhibit 1024) The site visit started along SE 8<sup>th</sup> Street and proceeded northerly from there along the course of Stream B. The first photograph was taken at 2:27 p.m.; the last photograph along SE 8<sup>th</sup> before turning north onto the subject property was taken at 2:28 p.m. (Photographs 001 – 006) Seven photographs were taken over the next five minutes leading to the trout pond outlet. (Photographs 007 – 013) A dry stream bed is visible in Photographs 8 – 10; a damp stream bed is visible in Photographs 011 – 013. Photograph 014, taken at the same time as Photograph 013 and before a photograph of the trout pond was taken, is presumably looking downstream from the trout pond outlet. Photographs 015, 016, 018, and 019, all taken between 2:34 and 2:35 p.m., appear to be photographs of the trout pond. Photographs 021 and 022, taken between 2:37 and 2:38 p.m. apparently depict a different pond – two minutes walk further up the stream.<sup>16</sup> Photographs 023 and 024, taken at 2:39 p.m., show an area containing water that is apparently north of the apparent second pond. Photograph 025 was taken one minute later and depicts a wooded area. The next photograph in the series was taken two minutes later and depicts a person walking more or less southeasterly near the west center of the field on Parcel 0086, in or near Wetland A. The remaining photographs in Exhibit 1024 depict Wetland A and its outlet.

The parties dispute where Photographs 023 and 024 were taken and what they depict. On March 19, 2017, LeSueur went to a location which he described as about 60 feet north of the pond and took two pictures which he believes depict the same area as shown in Photographs 023 and 024. (Exhibit 1029) Toll sent a representative to the site on or about March 20, 2017, who took a photograph of the same area as depicted in Photograph 024. (Exhibit 1017) Toll’s representative testified that he was standing at the edge of the pond looking north when he took his photograph. After carefully examining the photographs, the Examiner believes that Photographs 23, 24, 1029, and 1017 depict the same location. LeSueur believes Photographs 023 and 024 and his March 19<sup>th</sup> photographs depict water flowing in the stream upstream of the pond. Toll believes the photographs depict an arm of the pond, not a segment of the stream. (Testimony)

WRI issued a report of its February, 2015, reconnaissance on July 31, 2015. (Exhibit 23.7) That report does not mention the June 22 or 24, 2015, site visits (even though it was issued a month after those visits). The reconnaissance report states that Stream B “is also intermittent and does not provide habitat for salmonids.” (Exhibit 23.7:766, ¶ 5) Exhibit 23.7 provides no substantiating evidence for the statement that Stream B is intermittent (seasonal). WRI provided no photographs of Stream B other than those showing conditions along the north edge of SE 8<sup>th</sup> Street. In particular, WRI provided no photographs of the area between the pond (or ponds) and the north property line.

After carefully examining the photographs available in this record and considering the relationship of the sequence and times that the WDFW photographs were taken, the Examiner concludes that Photographs 015,

<sup>16</sup> Exhibit 21:547 depicts two distinct ponds in close proximity to one another within Wetland B.



016, 018, and 019 depict the south end of the trout pond or the southerly of what may be two ponds on the property, that Photographs 021 and 022 depict the north end of the trout pond or what may be the northerly of two ponds on the property, and that Photographs 023 and 024 depict the stream bed just north of the northerly pond.<sup>17</sup> Whether Photograph 023 depicts flowing water cannot be determined; none of the other photographs of the stream bed taken on June 24, 2015, depict flowing water. Stream B was definitely flowing at that same location on March 19, 2017.

On July 27, 2015, TWC was performing field work along Stream B essentially between SE 8<sup>th</sup> Street and SE 13<sup>th</sup> Place for another project. It photographed a dry steam bed mid-way between those two streets and on both sides of SE 13<sup>th</sup> Place. (Exhibit 39: 1060 – 1062)

TWC visited the subject property on September 17, 2015, to peer review WRI's reconnaissance report. TWC reported that "Stream B was flowing at the time of my late summer inspection. Therefore, Stream B is a permanently-flowing stream (Type Np)." (Exhibit 38:1055) The record does not disclose in what part of the stream TWC observed flow.

On October 26, 2015, WRI accepted without question TWC's position that Stream B should be classified as Type Np. (Exhibit 23.5) Stream B was described as a Type Np stream in WRI's Critical Areas Study ("CAS") and Revision 1 to the CAS, dated January 28, 2016, and September 28, 2016, respectively. (Exhibits 1001; 1002) WRI testified that it acquiesced to TWC's stream type simply as a matter of "choosing its battles." (Testimony)

However, in the December 12, 2016, 2<sup>nd</sup> revision to the CAS, WRI changed Stream B back to Type Ns: "During the peer review process, the classification of Stream B was changed from Type Ns to Type Np. Since that time WRI has conducted several additional site visits and has observed this stream to be dry for a significant portion of the year. Therefore, the original classification of Stream B as a Type Ns stream is correct." (Exhibit 1003:192, ¶ 2) The January 10, 2017, 3<sup>rd</sup> Revision to the CAS maintained the Type Ns classification for Stream B. (Exhibit 22) WRI wrote "Since that time [October, 2015] WRI has conducted several additional site visits and has observed this stream to be dry for a significant portion of the year." (Exhibit 22:571, ¶ 2) TWC accepted WRI's change from Type Np to Type Ns based on WRI's representation of personal observations and on the July, 2015, off-site field work it had done further downstream. (Exhibit 39:1058, P 3)

In fact, WRI did not visit Stream B on numerous occasions after October, 2015. In fact, WRI visited the site again only once after October, 2015: On September 21, 2016 when Ecology field-verified the boundaries of the two wetlands with particular emphasis on the eastern boundary of Wetland A. (Exhibit 22:571, ¶ 4; 2006:78; and testimony)

---

<sup>17</sup> The tree inventory report prepared by Toll's arborist states that "[t]here is also a series of small ponds in the middle of the western parcel." (Exhibit 21:542, ¶ 1) Thus, there is some expert support in the record for the notion that Parcel 0035 contains more than one pond.

HEARING EXAMINER DECISION

RE: PSUB2016-00026 (*Carrier*)

April 17, 2017

Page 18 of 27

WRI's statements in the 2<sup>nd</sup> and 3<sup>rd</sup> Revisions of the CAS that it had observed Stream B "to be dry for a significant portion of the year" were a gross exaggeration and not at all truthful. Thus, the Examiner must conclude that WRI's classification of Stream B as a Type Ns stream cannot be relied upon.

The clause "normal rainfall is rainfall that is at or near the mean of the accumulated annual rainfall record" in SMC 21A.15.1240, quoted in full above, is not inherently unambiguous. First, the clause "at or near" is not scientifically precise. If the City Council had intended that the rainfall had to be within one standard deviation of the mean, it could and should have said so. That it did not is telling: It apparently had no desire for such specificity. "At or near" is thus left to the judgment of the user.

Second, the clause does not specify "water year" (October 1 through September 30) or calendar year. The normal and customary meaning of "annual" without some modifier would logically be interpreted as calendar year. But in the context of measuring rainfall, it could equally well mean water year.

Third, "accumulated annual rainfall record" requires some discernment. If the City Council had wanted the user to compare a given month with the historical average of that same month over the years, it would not have included "accumulated" in the sentence. The Examiner concludes that "accumulated annual rainfall record" means the average rainfall registered over the years from January through the month in which the observation is being made (or from October through the month in which the measurement is being made if water year is the standard). In other words, if one is doing field work in June, then the "accumulated annual rainfall record" to which the current year's rainfall is to be compared is the historical yearly average of rainfall from January through June (or from October through June if water year is the standard). Nothing in the SMC's language supports the notion that one is to compare the current month's rainfall total with the historical average for that month alone. Thus, month by month comparisons alone do not allow one to determine "normal rainfall".

Exhibit 1026 depicts "Cumulative Annual Precipitation" on a month-by-month basis for three water years as measured at SeaTac Airport, the location required by the SMC. Mid-May through September of 2015 were dryer than the average cumulative annual precipitation through those months of the water year. But they still fell within one standard deviation of the mean. Water year 2016 was substantially above average (more than one standard deviation) for essentially the entire year.

Exhibit 2014 depicts "Cumulative Annual Precipitation" on a calendar year basis as measured at SeaTac Airport for two specific dates: June 23, 2015, and September 21, 2016. As of June 23, 2015, cumulative rainfall for the year was 2.51 inches less than average or 86% of average. As of September 21, 2016, cumulative rainfall for that year was 3.22 inches more than average or 115% of average.

The monthly rainfall totals in the months immediately before WRI's June, 2015 and September, 2016 observations of Stream B are also instructive, although not determinative. At SeaTac Airport, rainfall in May and June, 2015, was just 33% and 15% of the historic mean for those months; in August and September, 2016, rainfall was 16% and 58% of the historic mean for those months. (Exhibit 2012) In Sammamish itself, rainfall for the month of June, 2015 was just 9.5% of the historic average for that month for that location:



0.21 inches fell on June 2<sup>nd</sup>, with no precipitation between then and June 22<sup>nd</sup> and 24<sup>th</sup>. (Exhibits 1013; 2002:19) At nearby Snoqualmie Falls, rainfall in May and June, 2015, was just 29% and 18% of the historic mean for those months; in July, August, and September, 2016, rainfall was 220%, 27%, and 72% of the historic mean for those months. (Exhibit 1014:352 (yearly averages), :356 (cited months))

Thus, WRI's June, 2015, Stream B observations and TWC's July, 2015, off-site downstream observations were made in a significantly dryer-than-normal period of a dryer-than-normal year while WRI's September, 2016 site visit was made in a wetter-than-normal year (although the month before the September observation was quite dry). There is no evidence that WRI observed any portion of Stream B during that September, 2016 visit. The fact that the Summer, 2015 observations were made during a substantially dryer-than-normal year (either water year or calendar year) and after very dry months explains why water was not flowing through the observed portions of Stream B on the subject property. The photographs in the record show at least a moist stream bed downstream of the trout pond and upstream of the apparent northern pond. (Exhibit 1024) Given the available evidence, it is more likely than not that Stream B is Type Np.

Section 21A.15.1240 SMC contains another element that is applicable in this case: "If the uppermost point of perennial flow cannot be identified with simple, nontechnical observations, then the point of perennial flow should be determined using the best professional judgment of a qualified professional." With the conflicting expert and lay reports of water flowing in parts of Stream B, this provision comes into play. WRI suggested that the Forest Practices Board's Forest and Fish Report appendix to its manual provides appropriate guidance. For the reasons set forth in Exhibit 2005 and in testimony, the Examiner concurs.

According to that document, perennial streams are those "which do not go dry at any time during a year of normal rainfall." (Exhibit 2005:58) If the point of initiation of perennial flow cannot readily be observed, then "Type N waters will be 'perennial streams' if they have a basin size in excess of ... 52 acres [in this area of the state]". (Exhibit 2005:59) WRI calculated the area of Stream B's basin lying upstream of SE 8<sup>th</sup> Street to be 26.5 acres. (Exhibit 2005:73) Thus, WRI concluded that Stream B is a Type Ns stream. (Exhibit 2005:37)

WRI's calculation is flawed. It did not measure Stream B's basin. Rather, it measured an arbitrary portion of the basin: Only that portion tributary to the stream above SE 8<sup>th</sup> Street, the portion on the subject property. But SE 8<sup>th</sup> Street is not the bottom of Stream B's basin; Stream B's junction with Ebright Creek is the bottom of its basin. Nor is SE 8<sup>th</sup> Street a dividing point between uniquely different segments of Stream B. SE 8<sup>th</sup> Street is simply the southern edge of the subject property. Stream B ends at its junction with Ebright Creek, a short distance south of SE 13<sup>th</sup> Place. The Forest Practice Board's guidance calls for determining the entire area of the stream's basin, not the area of some portion of the stream's basin. The Stream B basin must be calculated as the entire area tributary to the stream, not just that portion tributary to the the part of the stream located on the subject property. The entire Stream B basin is intuitively larger than 52 acres given

Exhibit 2005:73.<sup>18</sup> Therefore if the Forest Practice's Board guidance is used, Stream B is more likely than not a Type Np stream.

The Examiner concludes, based upon an impartial evaluation of the somewhat limited available evidence, that it is more likely than not that Stream B is a Type Np, perennial, stream. The Examiner would consider additional, documented observations should such be produced in the future.

### **Wetland B Rating**

Subsection 21A.50.290(1) SMC specifies the methodology which must be used to rate wetlands within the City. That section was amended by Ordinance No. O2016-410 effective March 1, 2017. The following quote shows the amendments (deletions by ~~striketrough~~ and additions by underline). *Carrier* is vested to the old wording.

Wetlands shall be rated according to the Washington State Wetland Rating System for Western Washington (Department of Ecology, 2014 ~~2004~~, or as may be amended or revised by the Department from time to time).

Ecology's Washington State Wetland Rating System for Western Washington ("Wetland Rating Manual") was promulgated by Ecology in 2004 and amended in 2006 and 2008 ("2004 Edition"). (Exhibit 22:619; 2011.D) Ecology issued a "2014 Update" in October, 2014, with an effective date of January, 2015. (Exhibit 1017.B, Title page) "We [Ecology] are calling this version an update of the 2004 edition rather than a revision because the changes made are not as significant as those made between the 1993 and the 2004 versions." (Exhibit 1017.B, p. iii, ¶ 3) One of the major changes in the 2014 Update is that "[t]he range of possible scores for a wetland category based on function was reduced to 9 – 27 (from 1 – 100) to better reflect the accuracy of the method ...." (Exhibit 1017.B, p. 2) Ecology developed and disseminated a conversion table by which to convert 2014 Update scores to their corresponding 2004 Edition scores. (Exhibit 1017.D)

The Department testified that it viewed the 2014 Update as a wholly new Wetland Rating Manual. That characterization is completely at odds with Ecology's view of its own document. Ecology's view is accorded the greater deference as Ecology is the author of the document.

On at least two occasions in 2015 the Department advised WRI that it should continue to use the 2004 Edition until the City adopted code amendments. The Department explained that the differing functional scores used in the 2014 Update would cause problems with certain provisions within the SMC. (Exhibits 2011.A; 2011.B)

---

<sup>18</sup> It could be argued that Stream B ends at its confluence with Stream A. That point is somewhere south of SE 8<sup>th</sup> Street. The area of Stream B's basin upstream of that confluence cannot readily be approximated from the available evidence. Suffice it to say, it would be larger than 26.5 acres.



The Appellants argue that the plain language of former SMC 21A.50.290(1) required that the 2014 Update be used as of January 1, 2015. The Appellants are correct. The “or as may be amended” language obligated the City to use the 2014 Update when it became effective, just as the City used Ecology’s 2006 and 2008 updates to the 2004 Edition without first revising the SMC.

The Department of Community Development <sup>19</sup> argued that the “as may be amended or revised by the Department from time to time” clause referred to it and required that the code be amended before any new version of the Wetland Rating Manual could be employed in the City. (Testimony) There are at least three significant flaws with this argument. First, the plain language of the SMC says that the “Department” may amend or revise the Wetland Rating Manual. The Department of Community Development has no authority to amend or revise the Department of Ecology’s Wetland Rating Manual. Therefore, the stand-alone use of the word “Department” could not logically refer to the Department of Community Development.

Second, if that clause is interpreted to mean that the Department of Community Development must amend or revise the SMC before an amended Wetland Rating Manual may be employed, that interpretation would fail because the Department of Community Development has no authority to amend or revise the SMC: Only the City Council can do that.

Third, contrary to the argument put forth by the Department of Community Development during the hearing, the word “Department” in SMC 21A.50.290(1) does not refer to the Department of Community Development in the first place. The Department of Community Development is correct that SMC 21A.15.280 defines “‘Department’” [to mean] the City’s department of community development.” But note the lack of capitalization in the name of the department in that definition: None of the words are capitalized. (The word “City” is routinely capitalized throughout the SMC, but other titles are not. For example, see Chapter 20.10 SMC where the position title “Hearing Examiner” is never capitalized other than in the chapter title.) The word “department” appears at least 18 times in Title 21A – always in lower case. The capitalized word “Department” appears in Title 21A SMC only in the parenthetical phrase in SMC 21A.50.290(1). Unlike the Examiner, who always capitalizes “Department” when referring to the Department of Community Development in his decisions, the SMC never capitalizes it. The capitalized word “Department” in the parenthetical phrase refers back to the Department of Ecology in the same parenthetical phrase, not to the City’s Department of Community Development.

According to former SMC 21A.50.290(1), the City should have been requiring use of the 2014 Update effective January 1, 2015, just as it automatically started using the 2006 and 2008 updates of the 2004 Edition when they became effective. Toll’s application was filed more than one year after the effective date of the 2014 Update; WRI performed its initial field reconnaissance one month after the 2014 Update became effective. Toll’s application was subject to the 2014 Update. The wrong wetland rating forms were used. Until the City could revise its code, the function conversion table generated by Ecology (Exhibit 1017.D) should have been used to convert function totals under the 2014 Update to function totals under the 2004 version for purposes of determining compliance with the SMC.

---

<sup>19</sup> The Examiner will use the full departmental name in this portion of the Appendix to clearly distinguish the City’s Department of Community Development from the state’s Department of Ecology.

We will first evaluate the Wetland B rating under the old 2004 Edition that was used by WRI and the City and then look at whether use of the 2014 Update would make a significant difference.

Rating a wetland under the Wetland Rating Manual is part objective science and part subjective science. Ecology recognizes that reality. (See p. 12, above, ¶ 3.)

A wetland under former SMC 21A.50.290(1)(b) and(1)(c) was Category II if its total function score was 51 – 69 or Category III if its total function score was 30 - 50. A Category II wetland with a Habitat score of 20 – 28 required a 100 foot wide buffer; a Category III wetland with a similar Habitat score required a 75 foot wide buffer. [former SMC 21A.50.290(2)]

The table which follows shows how the rating scores have varied since the project began. The primary source of divergence has been the question of whether Stream B is an intermittent or a permanently flowing stream. The answer to that question essentially determines the answer to several of the wetland rating form questions. The answer to that question also has a profound effect on whether open trenching can be used to install utility lines through Wetland B and through Stream B.

**Selected Wetland B Rating Changes  
(2004 Edition of Ecology Rating Form)**

Functions	7-31-2015 # WRI 23.7	9-23-2015 TWC 38	10-26-2015 WRI 23.5	11-6-2015 TWC 23.4	1-28-2016 WRI 1001
Water Quality					
D 1.1	2	2	1	1	1
D 1.2	0	0	0	0	0
D 1.3	3	3	3	3	3
D 1.4	2	0	2	0	0
D 1 Total	7	5	6	4	4
D 2 Multiplier	2	2	2	2	2
Water Quality Total	14	10	12	8	8
Hydrologic					
D 3.1	2	2	0	0	0
D 3.2	5	5	5	5	5
D 3.3	3	5	3	5	5
D 3 Total	10	12	8	10	10
D 4 Multiplier	2	2	2	2	2
Hydrologic Total	20	24	16	20	20
Habitat					
H 1.1	1	1	1	1	1
H 1.2	2	3	2	1	2



HEARING EXAMINER DECISION

RE: PSUB2016-00026 (*Carrier*)

April 17, 2017

Page 23 of 27

H 1.3	1	2	2	2	2
H 1.4	0	2	1	2	2
H 1.5	3	4	4	4	4
H 1 Total	7	12	10	10	11
H 2.1	3	3	3	3	3
H 2.2	1	1	1	1	1
H 2.3	4	4	4	4	4
H 2.4	3	3	3	3	3
H 2 Total	11	11	11	11	11
Habitat Total	18	23	21	21 *	22
Summary Totals					
Water Quality	14	10	12	8	8
Hydrologic	20	24	16	20	20
Habitat	18	23	21	21	22
Total Score	52	57	49	49 *	50

# Date of report

Author

Exhibit number

\* Exhibit 23.4 lists 22 points for Habitat and 50 points for Total, but its figures do not add up to those numbers.

Wetland B was considered a Category II wetland with a Habitat Function score of 18 (WRI) or 23 (TWC) until October, 2015 when WRI changed the classification of Stream B from Type Ns to Type Np. (Exhibit 23.5) That change: Reduced D 1.1 by 1 point because the wetland outlet was unconstricted which in turn reduced the Water Quality Function total by 2 points because of the multiplier in D 2; reduced D 3.1 by 2 points because of the unconstricted wetland outlet which in turn reduced the Hydrologic Function total by 4 points because of the multiplier in D 4; increased H 1.3 by 1 point to recognize overhanging stream vegetation; increased H 1.4 by 1 point to recognize greater interspersions of vegetation classes in the wetland; and increased H 1.5 by 1 point to recognize additional habitat features. Those changes accounted for WRI's change from 52 to 49 total points. The result was Wetland B went from a Category II to a Category III wetland.

### Wetland Classifications

Exhibit	Author	Date	Wetland A			Wetland B		
			Cat.-Buf. #	H.P. *	Total P. \$	Cat.-Buf. #	H.P. *	Total P. \$
23.7:784-798	WRI	2015-07-31	III-50'	14	42	II-75'	18	52
38:1053-1056	TWC	2015-09-23	III-50'	15	-	II-100'	23	57
23.6	City	2015-09-25	III-50'	15	-	II-100'	23	-
23.5	WRI	2015-10-26	-	15	43	III-75'	21	49

23.4	TWC	2015-11-06	-	-	-	III-75'	22	50
1001	WRI	2016-01-28	III-50'	15	43	III-75'	22	50
23.2	TWC	2016-03-07	-	-	-	-	-	-
1002	WRI	2016-09-28	III-50'	15	43	III-75'	22	50
23.1	TWC	2016-11-17	-	-	-	-	-	-
1003	WRI	2016-12-12	III-50'	15	43	III-75'	22	50
22	WRI	2017-01-10	III-50'	15	43	III-75'	22	50
2015	WRI	2017-03-21	-	-	-	III-75'	-	40

# Cat.-Buf. = Category-Buffer Width  
\* H.P. = Habitat Points  
\$ Total P. = Total Points

Given the Examiner's conclusion that Stream B is more likely than not Type Np, the rating form items that correlate with that stream type (D 1.1 and D 3.1) are critical. Assuming Stream B is a Type Np stream, the point value for D 1.1 would be 1 and for D 3.1 would be 0. If Stream B were a Type Ns stream, the point value for D 1.1 would be 2 and for D 3.1 would be 2. Given that those answers are subject to a 2X multiplier, the point swing would be 6, pushing Wetland B into Category II. Curiously, when WRI changed Stream B from Type Np to Type Ns in October, 2015 it did not make the corollary changes to its Wetland B rating form. Had it done so, it would have had to rate Wetland B a Category II wetland requiring a buffer one-third wider than proposed by Toll. But, given the available evidence that Stream B is more likely than not Type Np, not Type Ns, that error is harmless and Wetland B is a Category III wetland requiring a 75 foot wide buffer under the 2004 Edition Wetland Rating Manual.

Using the 2014 Update, however, changes the bottom line. Parts of the 2014 rating form are essentially the same as the 2004 rating form: Section D 1 is the same in both; Section D 4 is the same as former Section D 3. Other parts are different: *E.g.*, Section D 2 awards points, but does not create a multiplier as it did in the 2004 form; the manner of tallying point values is also quite different.

Herrera completed the 2014 rating form for two assumed conditions: Stream B as Type Np and Stream B as Type Ns. Herrera used the answers from WRI's 2004 rating forms where the questions were the same or nearly the same. In both cases Herrera calculated a 2014 Update total score of 20 with a Habitat score of 6. Under the 2014 Update, a total score of 20 is a Category II wetland. (Exhibit 1018) Thus, under the 2014 Update rating system, Wetland B is a Category II wetland whether Stream B is Type Ns or Type Np. Using Ecology's conversion table, a 2014 Update total score of 20 – 22 is the equivalent of a 2004 rating form score of 51 – 69 and a 2014 Update Habitat score of 5 – 7 is the equivalent of a 2004 rating form score of 20 – 28. (Exhibit 1017.D) Under former SMC 21A.50.290 a total score of 51 – 69 was a Category II wetland and a Category II wetland with a Habitat score of 20 – 28 required a 100 foot buffer. The conversion is simple and straightforward.

The Examiner has reviewed Herrera's 2014 rating forms and concludes that only one element in the form could potentially change the ultimate rating. Section D 4.2 (2004 Edition Section D 3.2) addresses depth of



storage during wet periods. If a wetland is considered a “headwater” wetland it receives 3 points on that item. If a wetland is not a headwater wetland and exhibits virtually no ponding at its outlet, it receives 0 points. (Exhibit 1018, Form p. 6) Since the outlet of Wetland B is essentially just north of SE 8<sup>th</sup> Street<sup>20</sup> and there is no ponding at that location (Exhibit 22), this question presents the opportunity for a 3 point swing.

Herrera rated Wetland B as a headwater wetland (as had WRI in all of its reports). Herrera’s total points for Section D 4 were 8. (Exhibit 1018, Form p. 6) If Wetland B were not a headwater wetland, the total for Section D 4 would be 5 points which equates to a “Low” rating under the 2014 Update. With that change, the Hydrologic summary on page 1 of the 2014 form would change from M-H-M to L-H-M and the number of points associated with those ratings would change from 7 to 6, dropping the total points from 20 to 19 and changing Wetland B from Category II to Category III. Using Ecology’s conversion tables, a 2014 Update total score of 16 - 19 is the equivalent of a 2004 rating form score of 30 - 50 and a 2015 Update Habitat score of 5 - 7 is the equivalent of a 2004 rating form score of 20 - 28. (Exhibit 1017.D) Under former SMC 21A.50.290 a total score of 30 - 50 was a Category III wetland and a Category III wetland with a Habitat score of 20 - 28 required a 75 foot buffer.

The question of whether Wetland B is a headwater wetland is thus critical to the *Carrier* application. The parties now vigorously dispute whether Wetland B is a headwater wetland. But it was not until the second hearing day that Toll and WRI first argued that Wetland B was not a headwater wetland. (Exhibits 2011; 2011.E; 2015, unnumbered p. 4; and testimony) WRI had considered it a headwater wetland in every one of its issued reports. (Exhibits 23.7:789; 23.5:751; 1001:49; 1002:137; 1003:257; 22:640)

All parties agree that Wetland B is a depressional wetland. According to the 2014 Update, a headwater wetland is a wetland “found in the headwaters of streams”. (Exhibit 1028, p. 54) “If the wetland has a permanent or seasonal outflow through a defined channel but NO inflow from a permanent or seasonal channel, it is a headwater wetland for the purposes of this rating.” (Exhibit 1028, p. 55; capitalization in original) The 2014 Update continues on with a cautionary note:

One exception to this criterion is wetlands whose water regime is dominated by groundwater coming from water storage facilities. Depressional wetlands at the base of irrigation reservoirs, dams, or the edge of irrigation canals are not headwater wetlands, even if they have surface water that flows out of them without an inflow.

(*Ibid.*)

Wetland B extends offsite onto the *Bellasera* site. (Exhibits 29:978; 1012:342, :343, and :347 - :350; 2006:80) The northern edge of Wetland B is located within Tract B of *Bellasera*. Wetland B existed before *Bellasera* was developed. It was considered a Class 2 wetland when *Bellasera*’s storm water management

---

<sup>20</sup> Wetland B’s outlet is not the trout pond’s outlet. Wetland B surrounds the trout pond and extends much further south than the downstream end of the trout pond. (Exhibit 29, Sheet 2)

plan was prepared in 2000 and when *Bellasera*'s "As-Built" were prepared in 2006.<sup>21</sup> Wetland B was provided with a 50 foot wide buffer. (Exhibits 20:499, :506, :509, and :524; 2006:80) The development of *Bellasera* involved extensive cuts into the slope along the north and northeast sides of the development. Cuts up to about 46 feet were made with single- and double-tier rockery walls installed to retain the cut banks. All rockery footing drains were required to connect to the development's storm water collection system. Rockery, roof, and foundation drain water as well as street runoff is conveyed to a two-cell detention pond in Tract A, immediately adjacent to and upslope from Tract B. Storm water exits the west end of the detention ponds through a "bubble-up" system located near the north edge of Tract B on the *Bellasera* site.<sup>22</sup> (Exhibits 2006.B; 2011.F) The detention pond's bottom was constructed at elevation 394; its operational outlet was constructed at elevation 396 with a secondary discharge constructed at elevation 398. (Exhibits 20:523, :524; 2006.B<sup>23</sup>) The ground elevation at the point where Wetland B crosses the boundary between the *Carrier* site and *Bellasera* is approximately 400. (Exhibit 29:978, :981, and :982)

Before development of *Bellasera*, runoff from the undeveloped site sheet flowed into Wetland B; there is no indication in the record of any stream ever flowing into Wetland B. (Exhibit 20:511) The entire area is generally underlain by glacial till soils to a depth of about 120 feet. (Exhibit 14:204) Soils on the *Bellasera* site are glacial till soils. (Exhibit 20:520) Soils on the *Carrier* site are likewise glacial till soils: Two to five feet of weathered till overlying dense, unweathered till to the depth explored. (Exhibits 24.1; 24.2:810 and :823 - :826) Shallow groundwater seepage associated with water perched above dense, unweathered glacial till is typical and was observed on the *Carrier* site. (*Ibid.*)

If *Bellasera* were not present, the Examiner doubts that any of the parties would dispute that Wetland B is a headwater wetland for Stream B. But because *Bellasera*'s detention pond discharges at the outer edge of Wetland B's 50 foot wide buffer on the *Bellasera* site, Toll argues that Wetland B is not a headwater wetland. The thrust of the argument is that the detention pond is a "water storage facility" akin to an irrigation facility.

The Examiner does not agree. The water which discharges from the "bubble-up" structure is water that has fallen on the *Bellasera* site or that would have flowed through near-surface soil layers had it not been intercepted by the extensive bank cutting and rockery drains. It is not water imported to this area from

<sup>21</sup> When Sammamish became an incorporated City in August, 1999, it adopted the Interim Sammamish Development Code ("ISDC") which was essentially identical to the King County Code of the day. [Ordinance No. O1999-29] Under the ISDC, wetlands were divided into "Classes" based upon either the 1983 King County Wetlands Inventory or size and characteristics. [ISDC 21A.06.1415] Environmentally Sensitive Areas regulations were contained in Chapter 21A.24 ISDC. The SMC was adopted in 2003, at which time Chapter 21A.24 ISDC became Chapter 21A.50 SMC. [Ordinance No. O2003-131] The term "Class" remained in use until January 3, 2006, when it was replaced by "Category." Use of Ecology's Wetland Rating System became part of the code at that time, too. [Ordinance No. O2005-193] *Bellasera*'s history is unique enough that it is impossible to say exactly when approvals were issued without having access to source file documents (which are not part of this record). All that can be said is that Wetland B was considered a Class/Category 2/II wetland during the *Bellasera* development process.

<sup>22</sup> Exhibit 2011.F is a March, 2017 close-up photograph of the "bubble-up" structure. The "bubble-up" structure can also be seen in the Exhibit 1012:350 aerial photograph (if you know what you're looking for and where to look): It is the white dot at the west end of the south side of the detention pond's southern berm.

<sup>23</sup> The description of the *Bellasera* drainage system in this paragraph is based solely on information on Exhibit 2006:80.



elsewhere. Further, a stormwater detention pond is not the equivalent of an irrigation facility. In fact, detention ponds are typically constructed to prevent seepage of detained water into the surrounding ground. (Whether the *Bellasera* pond was so constructed is not apparent from the limited documents in the record.)

Wetland B is the headwater wetland for Stream B. Thus, Herrera's wetland scoring using the 2014 Update form appears to be accurate. Given Wetland B's headwater status and the conclusion that flows through Stream B qualify as perennial, Wetland B is a Category II wetland under the 2014 Update rating system, the rating system that must be used.