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BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH

CITY OF SAMMAMISH

DECISION

FILE NUMBER: SSDP2016-00415

APPLICANT: King County Department of Natural Resources and Parks
Parks and Recreation Division
201 South Jackson Street, Suite 700
Seattle, WA 98104-3855

TYPE OF CASE: Shoreline Substantial Development Permit to upgrade 3.5 miles of the Interim East Lake Sammamish Trail

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: DENY WITHOUT PREJUDICE

DATE OF DECISION: January 5, 2018

INTRODUCTION¹

King County Department of Natural Resources and Parks, Parks and Recreation Division (“King County” or “County”) seeks approval of a Shoreline Management Act (“SMA”) Substantial Development Permit (“SSDP”) to upgrade 3.5 miles of the Interim East Lake Sammamish Trail (South Sammamish Segment B or Segment 2B, referred to herein as simply “Segment B”) to Master Plan Trail standard.

King County filed a Base Land Use Application on October 19, 2016. (Exhibits 3 – 6; 11; 15²) The Sammamish Department of Community Development (“Department”) deemed the application to be complete as of November 30, 2016. (Exhibits 22; 26) The Department issued a Notice of Application on December 28, 2016. (Exhibits 23 - 25)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² 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 pages in Exhibits 1 – 69 are each marked with a sequential “Bates” page number from 000001 to 005890. Citations to individual pages within those exhibits will follow the form “Exhibit X:Bn” where X is the exhibit number and n is the Bates page number without leading zeros. Exhibits 70.1 – 70.11 were submitted by King County which marked each page with a sequential Bates number from 001 to 1723. Citations to individual pages within those exhibits will follow the form “Exhibit X:KCBn” where X is the exhibit number and n is the Bates page number without leading zeros.

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The East Lake Sammamish Trail (“ELST”) is located between the eastern shore of Lake Sammamish and the East Lake Sammamish Parkway NE/SE (“Parkway”), roughly paralleling both. Segment B extends northerly from SE 33rd Street for 3.5 miles to a point in the vicinity of the Parkway NE/NE Inglewood Hill Road intersection.

The Sammamish Hearing Examiner (“Examiner”) viewed the subject property on October 29, 2017.

The Examiner held an open record hearing on November 3, 2017. The Department gave notice of the hearing as required by the Sammamish Municipal Code (“SMC”). (Exhibit 2) The hearing was continued to November 6, 7, and 20, 2017; notice of each continuance was announced on the record at the close of the day’s proceedings.

Subsection 20.05.100(1) SMC requires that decisions on SSDPs be issued within 120 net review days after the application is found to be complete. The open record hearing was held after the 120th net review day. 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 formal notice of its inability to meet the 120-day requirement. (Exhibits 30 - 35)

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

- Exhibits 1 - 67: As enumerated in Exhibit 1, the Departmental Staff Report ³
- Exhibit 68: King County response to public comments
- Exhibit 69: King County notice of availability of response to public comments
- Exhibit 70: King County’s Submittal of Exhibits, filed October 19, 2017, consisting of Exhibits 70.1 – 70.11 as enumerated in the cover document accompanying the submittal
- Exhibit 71: Memorandum, King County to Hearing Examiner, November 3, 2017
- Exhibit 72: King County Parks Regional Trails Map 2017
- Exhibit 73: King County Regional Trails Plan, 1992
- Exhibit 74: King County Regional Trail Inventory and Implementation Guidelines, 2004
- Exhibit 75: Comment letter, Warren and Vicki Beres, November 3, 2017
- Exhibit 76: Comment e-mail, Albert Meerscheidt, November 3, 2017
- Exhibit 77: Comment memorandum, Bernice Tannenbaum
- Exhibit 78: Joint Written Testimony – Gottschalk and Greve
- Exhibit 79: Comment letter, Arul Menezes, October 16, 2017
- Exhibit 80: Comment e-mail, Gary Smith, November 3, 2017
- Exhibit 81: Comment e-mail, Lizette Hedberg, November 2, 2017
- Exhibit 82: Comment e-mail, Aaron Knopf, November 2, 2017

³ Exhibit 41 is incorrectly identified in Exhibit 1 as “Sammamish Plateau Water Notes – March 27, 2017”. Exhibit 41 is apparently (based upon the first full sentence in the document) a set of review notes from the City’s Parks Department dated March 27, 2017.

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- Exhibit 83: Comment letter, H. Troy Romero on behalf of the Baisch, Harrell, Thompson, Parrott, Abernathy, and Crow families, November 2, 2017
- Exhibit 84: Comment e-mail, Emily Repperger, November 2, 2017
- Exhibit 85: Comment e-mail, Hanne Thiede, November 2, 2017
- Exhibit 86: Comment e-mail, Bob McNeal, November 2, 2017
- Exhibit 87: Comment e-mail, James Kinsella, November 2, 2017
- Exhibit 88: Comment letter, Craig Simmons on behalf of Pell Kessden, November 2, 2017
- Exhibit 89: Comment statement, Steve Oien, November 2, 2017
- Exhibit 90: Comment letter, H. Troy Romero on behalf of the Brown, Huarte, Hutton, Large, McNabb, Miller, Morel, Neighbors, Schumacher, Stewart, Menezes/Vanderwende, and Conger families, November 2, 2017
- Exhibit 91: Comment e-mail, Tom Sanko, November 3, 2017
- Exhibit 92: Comment e-mail, Kerry Monterey, November 3, 2017
- Exhibit 93: Comment statement, Shelly Bowman, November 3, 2017
- Exhibit 94: Comment letter, Mark Cross, November 3, 2017
- Exhibit 95: Hearing Statement Document, Ted & Elaine Davis, November 3, 2017
- Exhibit 96: Written testimony, April Peck, November 3, 2017
- Exhibit 97: Written testimony, Susan Brockway, November 3, 2017
- Exhibit 98: Written testimony, Tom Hornish, November 3, 2017
- Exhibit 99: Written testimony, Mary Wictor
- Exhibit 100: Written testimony, Charles Meyer, November 3, 2017
- Exhibit 101: Comment letter, A. William Way, November 3, 2017
- Exhibit 102: Written testimony, William Cormier, November 3, 2017
- Exhibit 103: Written testimony, Colin Elder, November 3, 2017
- Exhibit 104: Written testimony, Saeed Abtahi, November 3, 2017
- Exhibit 105: Written testimony, Reid Brockway, November 3, 2017
- Exhibit 106: Comment letter, Eugene Morel, November 6, 2017
- Exhibit 107: CV, William Schultheiss
- Exhibit 108: AASHTO Guide for the Development of Bicycle Facilities, 4th Ed., Chapter 3 Excerpts
- Exhibit 109: Memorandum, Wm. Schultheiss to Barbara Flemming (King County), November 3, 2017
- Exhibit 110: City Staff PowerPoint presentation
- Exhibit 111: Written statement, Mike Young, November 6, 2017
- Exhibit 112: Written comment, Mary Wictor, November 7, 2017
- Exhibit 113: Memorandum, Wm. Schultheiss to Barbara Flemming (King County), November 16, 2017
- Exhibit 114: CV, Charles D. Alexander
- Exhibit 115: Charles D. Alexander PowerPoint presentation
- Exhibit 116: Regional Data Profile: Population and Households, PSRC, July 6, 2017
- Exhibit 117: NCHRP 770 excerpt, Direct Demand Models

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- Exhibit 118: Memorandum, Schultheiss to Bailey, June 20, 2017: East Lake Sammamish Trail Demand Analyses (Duplicate of Exhibit 59)
- Exhibit 119: AASHTO Green Book excerpt: pp. 2-46 and 2-47
- Exhibit 120: Pedestrian and Bicycle Information Center Webinar, August 10, 2012, excerpts from transcript
- Exhibit 121: AASHTO Guide for the Development of Bicycle Facilities, 4th Ed., Chapter 1 Excerpts
- Exhibit 122: Washington State Department of Transportation Secretary's Executive Order Number E 1028.02, March 17, 2011
- Exhibit 123: Shared-use Path Level of Service Calculator, excerpts (pp. 13 – 15, 27, and 28); and three pages of LOS calculations prepared by Charles Alexander
- Exhibit 124: Charles Alexander's script which accompanied Exhibit 115
- Exhibit 125: Comment letter, Mark Cross, November 15, 2017
- Exhibit 126: Comment letter, Bill Greve, November 18, 2017
- Exhibit 127: Written comment, Charles O. Meyer, November 20, 2017
- Exhibit 128: Written comment, Joanne T. Pietromonaco, November 20, 2017
- Exhibit 129: Written comment, Ada McKee, November 20, 2017

By prior arrangement, the Examiner held the hearing record open after the close of oral testimony on November 20, 2017, for three specific items: Written rebuttal from King County to Charles D. Alexander's presentation to be filed not later than December 1, 2017; and written closing statements from the City and King County (who agreed to file their closings concurrently) to be filed not later than December 22, 2017. The following exhibits were entered pursuant to that arrangement:

- Exhibit 130: Memorandum from Bill Schultheiss, dated November 30, 2017; filed December 1, 2017, at 1:31 p.m.
- Exhibit 131: City closing statement, filed December 22, 2017, at 2:56 p.m.
- Exhibit 132: King County closing statement, filed December 22, 2017, at 4:18 p.m.

The hearing record closed on December 22, 2017, with receipt of Exhibit 132.

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

A. Overview

- A.1. The record in this proceeding is voluminous, approaching 8,000 pages: 26 pages of application documents; 1,074 pages of SEPA documents, 283 plan sheets, 1,343 pages of critical areas studies, 718 pages of ownership documents, 153 pages of public notice materials, 454 pages of drainage

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reports, over 70 pages of published manuals and excerpts, and over 3,200 pages of public comments with City and King County responses thereto. Record citations in this Decision will be limited to only the most salient documents.

- A.2. The ELST,⁴ an overall 11-mile trail linking Issaquah and Redmond, lies between and generally parallels the east shore of Lake Sammamish and the Parkway.⁵ Segment B extends from SE 33rd Street on the south to the vicinity of the Parkway NE/NE Inglewood Hill Road intersection on the north. Terrain in the area generally slopes down towards the lake shoreline from high ground east of the Parkway. In some areas the slope between the Parkway and the ELST is fairly steep; in others it is more gentle. The ELST generally runs cross-slope with high ground to its east and lower ground to its west. (Exhibits 7; 12:B288; 16:B717) The land over which the ELST crosses is zoned R-4. (Exhibit 1:B4, § II.3)
- A.3. King County proposes to widen and pave Segment B of the ELST to 12 feet of travel surface plus a two-foot shoulder and one-foot clear zone on each side, resulting in an 18-foot cross-section. The proposal includes construction of retaining walls, rest stops (some with benches and/or picnic tables), drainage facilities, replacement of some culverts with fish passage culverts, improvements to other culverts, tree removal and replanting, landscaping and fencing, and access and traffic control facilities. (Exhibit 7 *et al.*)
- A.4. Lake Sammamish is designated as a Shoreline of Statewide Significance (“SSS”) under the SMA. [SMC 25.02.020(84); 25.05.030] The outer extent of the SMA’s jurisdictional area is generally 200 feet from the Lake Sammamish ordinary high water mark (“OHWM”).⁶ [SMC 25.02.020(77)]
- A.5. The project will extend from ELST Station 283+00⁷ to ELST Station 468+00, a distance of 3.50 miles. Approximately 2.27 miles of the project lies within 200 feet of the OHWM of Lake Sammamish. The following table lists, from north to south, the sections that are within and beyond the 200 foot line.

Segments within 200 feet of OHWM		Segments beyond 200 feet of OHWM	
Stations	Distance (ft.)	Stations	Distance (ft.)
442+80 – 468+00	2,520	436+50 – 442+80	630
430+30 – 436+50	620	377+50 – 430+30	5,280
337+60 – 377+50	3,990	337+30 – 337+60	30
325+25 – 337+30	1,205	321+00 – 325+25	425

⁴ This Decision employs the following naming convention: Interim Trail means the trail as it exists currently; Master Plan Trail means the trail as proposed to be widened under the current permit; and ELST means the trail in general without distinction between the Interim or the Master Plan version.

⁵ This decision employs the following directional convention: The Lake Sammamish shoreline, the ELST, and the Parkway are all presumed to lie generally in a north-south alignment.

⁶ The jurisdictional area may be greater where associated wetlands are involved.

⁷ The Station numbers used herein are the B-Line, B1-Line, C-Line, and D-Line numbers as shown on Exhibit 7.

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284+50 – 321+00	3,650	283+00 – 284+50	150
Totals	11,985 ft. = 2.27 mi.		6,515 ft. = 1.23 mi.

Source: Exhibit 7. Segment ends determined by the Examiner based upon the stationing and the points where the 200 feet from OHWM line crosses the ELST centerline.

- A.6. Each jurisdiction containing shorelines regulated under the SMA is required to adopt a Shoreline Master Program (“SMP”). [RCW 90.58.080] The City amended its SMP by Ordinance No. O2011-308 which became effective on August 31, 2011, after approval by the Washington State Department of Ecology (“Ecology”) as required by RCW 90.58.090. The City further amended its SMP by Ordinance No. O2016-410 (Exhibit 17) which became effective after Ecology approval on March 1, 2017. (Exhibit 35)
- A.7. The SMP includes the following restriction as to its applicability: “These regulations shall only apply within the shoreline jurisdiction, and shall not apply to portions of lots extending further landward than the landward extent of shoreline jurisdiction, as specified by Chapter 25.05 SMC.” [SMC 25.06.005] Therefore, the SMP applies to only 2.27 miles of the 3.5 miles comprising Segment B and those 2.27 miles are not contiguous.⁸
- A.8. The SMA jurisdictional area through which Segment B passes is designated Lake Sammamish Shoreline Residential by the SMP. (Exhibit 1:B4, § II.4)
- A.9. An SSDP is required because the fair market value of the proposed improvements exceeds the SSDP threshold. (Exhibit 1: B5, §II.6) An SSDP may be approved “only when the development proposed is consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and [the City’s SMP].” [SMC 25.08.020(2)] The policies of Chapter 90.58 RCW are incorporated into the SMP at SMC 25.05.030. The SMP incorporates certain sections of the SMC by reference:

SMC Title 13 (Surface Water Management, adopted by Ord. 2011-304 on May 16, 2011), SMC 21.10.120 (Historic resources – Review process, adopted by Ord. 2008-240 on Dec. 16, 2008) and sections of the City’s critical areas ordinance as described within SMC 25.01.070 (adopted by Ord. 2005-193 on December 20, 2005, and revised by Ord. 2009-264 on October 6, 2009, Ord. 2009-274 on December 1, 2009, and Ord. O2013-350 on July 9, 2013).

⁸ In 1973 the Washington State Court of Appeals held that a project having an interrelated effect on both uplands (non-shoreline jurisdictional areas) and shorelines could not be segmented for purposes of complying with the SMA. [*Merkel v. Port of Brownsville*, 8 Wn. App. 844 (Div. II), 509 P.2d 390 (1973)] The principle set forth in *Merkel* conflicts with that portion of SMC 25.06.005 quoted above. The Examiner must follow the SMP as contained in the adopted City code. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] In addition, Ecology is presumably aware of the *Merkel* decision and Ecology approved the City’s SMP.

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- A.10. The ELST is located within the former Burlington Northern-Santa Fe (“BNSF”) railroad right-of-way between Issaquah and Redmond. King County acquired the “rail-banked” BNSF right-of-way in 1998 for development into a trail. The right-of-way is generally between 100 – 200 feet wide (some sections are narrower) and was acquired by the railroad through a variety of means dating back to the late 1800s. In some places the right-of-way extends into Lake Sammamish. (*E.g.* Exhibit 7:B47 – 50, Stations 327+00 – 335+00 and 339+00 – 342+50) For virtually the entire length of the right-of-way there are houses or shore-front recreational facilities between and/or within the right-of-way and the lake. The right-of-way passes through or abuts approximately 325 private ownership parcels. (Exhibit 7; and testimony)
- A.11. Ownership rights to the ELST right-of-way are the subject of current litigation between various property owners along the right-of-way and King County in both state and federal courts. To date, King County has prevailed in each challenge to its ownership of the right-of-way. A federal decision is currently under appeal before the 10th Circuit Court of Appeals. As of the date of issuance of this Decision, the Examiner is not aware of any stays issued by any of the involved courts. King County submitted numerous title documents to the City, based upon which the City Attorney determined that King County had the right to apply for the requested SSDP. (Exhibits 20; 21; 26; 67)
- A.12. The ELST is a link in the County’s regional trail system. The ELST extends from Lake Sammamish State Park in Issaquah to Marymoor Park in Redmond, both of which are very popular parks. A Sound Transit light rail station will eventually be located near it’s northern terminus in Redmond. The ELST provides a connection to the Sammamish River Trail and on to the Burke-Gilman Trail, terminating in Seattle. (Exhibit 70.9:KCB920, 921, and 946 - 949; 72; and testimony)

The ELST has been an element of the County’s Regional Trails Plan since at least 1992. (Exhibit 73) The 1992 Regional Trails Plan states that the ELST was envisioned to provide a 12-foot paved surface with 2-foot shoulders on each side plus a parallel soft-surface equestrian trail for its entire length. (Exhibit 73, p. 23) The County’s 2004 Regional Trail Inventory and Implementation Guidelines states that the ELST is to provide a 12-foot paved surface with 2-foot shoulders on each side plus a parallel soft-surface equestrian trail “along a[s] much of the route as feasible.” (Exhibit 74, p. 42)

- A.13. King County issued a Final Environmental Impact Statement (“FEIS”) pursuant to the State Environmental Policy Act (“SEPA”) for an Interim Trail in 2000. (Exhibit 70.9:KCB952) The FEIS was issued under SEPA’s phased review procedures: A separate EIS was later prepared for the ELST Master Plan Trail. That FEIS was issued in June, 2009. (Exhibits 70.9 – 70.11)

Because Federal funds are involved in the development of the ELST, a Record of Decision (“ROD”), issued pursuant to Federal regulatory procedures, was issued on August 4, 2010. In addition to documenting the chosen final ELST alignment, the ROD lists mitigation measures which King County committed to employ in development of the ELST. Those measures address surface runoff

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and erosion, geologic issues, fisheries, wetlands and vegetation, wildlife, safety, traffic and parking, views, neighborhood concerns, and cultural resources. (Exhibit 9)

- A.14. The Interim Trail is a crushed rock/gravel-surfaced trail whose width varies between 8 and 12 feet. It is constructed on the former railroad roadbed. (Exhibits 12:B239; 16:B715; 70.9:KCB983) The centerline of the Interim Trail essentially follows the centerline of the former railroad roadbed. (Exhibit 7:B42 – 62⁹) The final segment of the Interim Trail opened for use in April, 2006. [Official notice]
- A.15. The preferred alternative in the 2009 FEIS was called the “Corridor Alternative.” (Exhibit 70.9:KCB908) The Corridor Alternative envisioned a 12-foot wide paved trail with 2-foot gravel shoulders, separated from a 4-foot equestrian/pedestrian soft-surface path by a 3-foot median. The total cross-sectional width of the Corridor Alternative trail, including all clear zones, was 27 feet. (Exhibit 70.9:KCB971 & 972)
- A.16. The Corridor Alternative has been reduced in scope and is now called the Master Plan Trail. The fundamental change is elimination of the separate, soft-surface equestrian/pedestrian trail. The Master Plan Trail cross-section is now 18 feet wide: A 12-foot paved surface plus a 2-foot gravel shoulder and 1-foot clear zone on each side. (This is also King County’s adopted Regional Trail Standard. (Exhibit 70.5)) The clear zones are eliminated in some areas, resulting in a 16-foot or 17-foot cross-sectional width in those areas. (Exhibit 7:B63 – 65)

The Master Plan Trail as depicted in Exhibit 7 is the project for which King County seeks SSDP approval.

- A.17. The Issaquah and Redmond segments of the ELST Master Plan Trail were completed in 2013 and 2011, respectively. Upgrading of the North Sammamish Segment to Master Plan Trail standard was completed in June, 2015. South Sammamish Segment 2A (“Segment A”) is currently being upgraded to Master Plan Trail standard. All of those segments were constructed to the adopted Regional Trail Standard (12-foot paved surface with 2-foot shoulder and 1-foot clear zone on each side) with the exception of three short (about 30 feet each) stretches where the trail crossed a bridge: One in the North Sammamish Segment, and two in the Issaquah Segment. (Testimony)

After Segment B is upgraded, the only remaining portion of the ELST left to be upgraded to Master Plan Trail standard is an approximate 400 – 500 foot long segment between the north end of Segment B and the south end of the North Sammamish Segment. That segment is commonly referred to as the ELST Inglewood Hill Parking Lot Segment. That remaining piece is the subject of SSDP application SSDP2016-00414 and is scheduled for an open record hearing in January, 2018. (Exhibit 1:B5, § II.9; testimony; and official notice) The final element of the ELST will be construction of a parking lot at SE 33rd Street. (Testimony)

⁹ The B-Line, B1-Line, C-Line, and D-Line depicted on the cited plan sheets is the centerline of the proposed Master Plan Trail, not the centerline of the Interim Trail. The centerline of the Interim Trail is labeled on those plan sheets as RR C/L.

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A.18. The Findings of Fact in this Decision are divided into four topical areas: Overview, Proposal, City Recommendations, and Public Participation. The Findings of Fact in this Decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.

A.19. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

B. Proposal

B.1. King County seeks approval of the SSDP based upon Revised 60% Review Submittal project plans ("60% Plans"). (Exhibit 7) The 60% Plans are not final project plans. King County is refining them as it goes along. For example, center-line alignment may shift east or west by a few feet as more detailed engineering and discussions with abutting property owners occur. King County believes the 60% Plans are appropriate for the SSDP process as they allow the County to revise the project plans in response to public comment. (Testimony)

Sammamish Plateau Water ("SPW"¹⁰) has identified 66 water or sewer line crossings through the ELST corridor (including approximately 10 water mains and approximately 26 sewer mains), none of which are depicted on the 60% Plans. (Exhibits 14:B706; 39:B5330 – 5337; 40:B5338 – 5384) King County's response to SPW's information is that SPW's "comment is not relevant to the City's review of the [SSDP] application as it addresses matters outside the scope of the [SMA] and the City of Sammamish [SMP]. The County will separately establish compliance with the requirements related to this comment as part of the relevant permit review." (Exhibit 52:B5506 – 5511)

King County refers to its next plan set as the 90% Plans. It intends to produce them after issuance of the requested SSDP and believes that changes that might be depicted therein would not necessitate any formal revisions to the SSDP. (Testimony)

B.2. The 3.5 miles of Segment B pass beside 37 wetlands, cross 32 water courses of which 17 are regulated streams, and pass through or beside approximately 325 parcels, most of which are developed with single-family residences or private recreational developments. (Exhibits 7; 12:B326; 16:B724 and 779; and testimony)

B.3. Twenty-five of the 37 wetlands lie on the east, upslope side of the ELST; the remaining 12 lie downslope to the west. Most of the wetlands are very small; the largest (Wetland 24B on the west side of the ELST) covers 1.75 acres. Only two other wetlands (Wetlands 24A and 26A on the east side of the ELST) exceed 0.5 acres in area. Many cover less than 0.05 acres. All 37 wetlands are Category III or IV, the lowest wetland category ratings. All 37 wetlands have quite low scores for potential to provide habitat. The maximum theoretical habitat score under the applicable rating system is 36. (See Exhibit 16:B1272 – 1274) Only one wetland (Wetland 21AC on the west side of

¹⁰ SPW is a special purpose district which was formerly known as Sammamish Plateau Water and Sewer District. (Official notice)

the ELST) has a habitat score above 20; 33 of the wetlands have a habitat score of 18 or below.¹¹
 (Exhibit 16:B724 - 779)

The table below shows the 37 wetlands arrayed from north to south.

Wetland Summary

West Side of Trail – From North to South						East Side of Trail – From North to South						
Perm. Impact (Acres)	Area (Ac.)	Hab.	Cat.	Stations	ID	ID	Stations	Cat.	Hab.	Area (Ac.)	Perm. Impact (Acres)	
						30B	461+00-463+50	III	14	0.20		
0.01	0.03	5	IV	457+25-458+25	29B	29D	457+75-460+50	IV	12	0.08	0.01	
						28C	455+50-456+25	IV	13	0.02	0.02	
	0.06	15	III	452+75-454+00	29C	28D	453+00-453+25	IV	9	0.01	0.01	
						28A	448+75-450+50	IV	13	0.08	0.01	
						28E	445+50-446+50	III	8	0.02		
						28B	436+75-437+50	IV	6	0.02		
	0.13	14	III	431+75-432+75	26D							
	0.02	8	IV	425+25-425+50	26B							
0.01	0.03	11	IV	423+25-424+25	26C							
						26A	421+25-431+50	III	19	0.91	0.01	
						25F	411+25-412+00	III	12	0.06		
						25C	408+50-411+00	III	14	0.25		
						25B	403+50-407+75	III	18	0.33		
						25A	400+00-403+00	III	14	0.25		
						24C	385+50-389+25	III	14	0.16		
0.05	1.75	19	III	379+25-384+75	24B	24A	379+25-385+25	III	18	0.60		
						23C	377+25-378+50	III	14	0.09		
0.01	0.05	10	III	374+00-374+75	23B							
						23A	373+50-374+25	IV	7	0.03		
						22CD	368+00-370+50	IV	9	0.06		
0.01	0.01	9	IV	365+25-366+75	22E	22AB	361+00-367+00	III	20	0.46		
	0.40	23	III	355+50-359+25	21AC	21D	357+50-359+25	IV	10	0.15		
						21B	355+50-356+75	III	15	0.08		
						20A	352+75-355+25	III	11	0.05	0.05	
	0.36	11	III	347+50-349+75	19B	19A	347+50-348+25	IV	7	0.01	0.01	
						18C	330+75-331+75	III	8	0.02		
0.05	0.05	10	IV	320+75-324+75	15E	15D	320+75-325+75	IV	11	0.05		
	0.10	16	III	317+00-318+25	15A	15BC	315+50-319+25	IV	13	0.15		

The vertical shaded column represents the Trail; the horizontal shaded rows represent wetlands which will be eliminated by the project.

Source: Exhibit 7:B87 – 125, 168 – 188; Exhibit 16:B725, 727 – 733, 735 – 779, 791, 792

¹¹ Wetland delineation fieldwork was done between 1999 and 2014. (Exhibit 16:B718) Therefore, the applicable wetland rating system for this application is Ecology’s 2004 system as amended in 2008. King County’s consultant used that system to rate the 37 wetlands. (Exhibit 16:B962 – 1323)

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- B.4. King County has attempted to avoid and minimize wetland and stream impacts by following the existing Interim Trail alignment, eliminating the parallel equestrian trail aspect of the FEIS Corridor Alternative, using what it believes is the narrowest safe cross-section width (18 feet), using retaining walls instead of earthen side slopes, shifting the alignment to avoid wetlands, and split rail fencing portions of the trail abutting wetlands to reduce the potential for human intrusion. (Exhibits 16:B801; 55) Elimination of the equestrian trail component has avoided approximately 0.66 acres of direct wetland impact. (Testimony)
- B.5. All of the regulated wetlands require 50 foot buffers under Chapter 21A.50 SMC, Environmentally Critical Areas. (Exhibit 16:B725) Development of the Master Plan Trail as proposed will result in permanent impacts to 13 of the 37 wetlands totaling 0.22 acres, temporary impacts to 29 of the wetlands totaling 0.59 acres, permanent impacts to 1.51 acres of wetland buffers, and temporary impacts to 2.46 acres of wetland buffers. (Exhibit 16:B791 – 793 and 1,324 – 1,346)
- B.6. King County proposes to mitigate for wetland impacts at 18 sites within the ELST corridor and at an off-site wetland mitigation bank. The on-site mitigation will consist of “0.65 acre [*sic*] of wetland enhancement, 1.53 acres of wetland buffer addition, [and] 0.77 acre [*sic*] of wetland buffer enhancement”. Wetland creation/restoration credits equaling 0.22 acres will be purchased in an off-site wetland mitigation bank. (Exhibit 16:B802, 803, 805, and 1,347 – 1,371; 65:B5666) King County is not using buffer averaging or the previously allowed buffer “truncation.” (See Exhibit 17:B1418, SMC 21A.50.290(2)(a). Prior to adoption of the code amendment reflected by this exhibit, wetland buffers could be truncated at the edge of the ELST under certain circumstances. That provision was eliminated by this code amendment.)
- B.7. Most of the 17 streams are short, perennial features with sand or silt substrates which flow through culverts beneath the Interim Trail that are barriers to fish passage. Information about fish usage of most is lacking. (Exhibit 16:B779 – 789) Five of the 17 are exceptions to the general characterization. Those five and the station where they cross the ELST are: Pine Lake Creek at Stations 379+10 and 379+15, Ebright Creek at Stations 411+85 and 411+90, Zackuse Creek at Station 424+60, George Davis Creek at Stations 441+35 and 441+40, and Stream 0143L at Stations 460+25 and 464+25. (Exhibit 16:B780)

The double stationing of Pine Lake, Ebright, and George Davis Creeks reflect the fact that each currently passes beneath the ELST in a pair of side-by-side culverts. The double stationing for Stream 0143L reflects the fact that it splits into a north fork and a south fork before passing beneath the ELST, with its crossing points separated by about 400 feet. (Exhibit 16:B782 – 789)

- B.8. King County has identified six streams where replacement of existing culverts with fish-passable structures would be beneficial: Pine Lake Creek, Stream 155, Ebright Creek, Zackuse Creek, George Davis Creek, and Stream 0143L (North Fork). In addition, two culverts, one each downstream on Pine Lake Creek and Zackuse Creek, will be replaced to facilitate fish passage if the property owners agree. (Exhibits 7:B131 – 138; 16; 57; 58)

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“The City intends to complete a study to determine the preferred stream alignment for George Davis Creek. The preferred stream alignment may require the fish passage culvert at Station 441+40 to shift in location and/or orientation during engineering design or construction phase of [Segment B].” (Exhibit 1:B14, § III.24)

- B.9. All of the regulated streams require 150 foot buffers under Chapter 21A.50 SMC. (Exhibit 16:B780) Development of the Master Plan Trail as proposed will result in permanent impacts to three stream channels totaling 24 linear feet and 114 square feet (“SF”). Temporary impacts will affect 148 linear feet and 854 SF of stream channel. Permanent stream buffer impact will affect 0.21 acres and temporary stream buffer impacts will affect 0.41 acres. (Exhibit 16:B795 and 1,324 – 1,346)
- B.10. Stream channel impacts will be offset by replacement of eight culverts with six fish-passable culverts totaling 93 feet and 681 SF. Stream buffer impacts will be mitigated by enhancing 0.24 acres of existing stream buffer within the ELST corridor. Even though the trail will be widened, “[a]ll but one of the new culverts will be wider and shorter than the existing culverts”. (Exhibit 16:B806)
- B.11. The Master Plan Trail with a cross-sectional width of between 16 and 18 feet, will be between 4 and 10 feet wider than the Interim Trail. Since most of the ELST is located on a cross slope, the additional width will necessitate cutting into the slope on the east side of the trail and/or filling on the slope west of the trail.

King County has adjusted the Master Plan Trail centerline both west and east of the Interim Trail centerline to reduce impacts to adjacent wetlands, to minimize cuts into upslope banks, to minimize impacts to vehicular crossings,¹² and to minimize impacts to driveways located west of the ELST. (Testimony) The centerline shift is as much as about 10 feet in some areas. Major westward shifts occur between Stations 320+00 – 327+00 (up to 4 feet), 343+00 – 351+50 (up to 5 feet), 354+50 – 374+75 (up to 5 feet), 377+00 – 390+25 (up to 8 feet), 399+50 – 402+50 (up to 6 feet), 408+25 – 412+00 (up to 5 feet), 418+00 – 440+00 (up to 6 feet), 444+00 – 446+75 (up to 4 feet), and 458+00 – 468+00 (up to 4 feet). Major eastward shifts occur between Stations 291+25 – 300+00 (up to 5 feet), 601+25¹³ – 306+00 (up to 11 feet), 307+00 – 315+00 (up to 6 feet), 327+00 – 334+75 (up to 4 feet), 335+50 – 343+00 (up to 6 feet), 374+75 – 377+00 (up to 3 feet), 413+00 – 417+50 (up to 3 feet), 446+75 – 449+00 (up to 5 feet), 451+25 – 455+50 (up to 6 feet). (Exhibit 7:B42 – 62)

- B.12. A total of 43 retaining walls, most retaining fill on the west, down-slope side of the ELST, will be employed to reduce the footprint of the Master Plan Trail. Wall height will range from less than 4 feet to about 12 feet. (Exhibit 7:B87 – 124) The total length of the proposed retaining walls is about 1.5 miles. (Exhibit 42:B5398) Safety fences will be installed where walls exceed 4 feet in height. (Exhibit 7:B151 – 166)

¹² Widening the ELST to the east where a steep slope exists would result in steepening the approach and departure grades of a crossing which could result in cars “bottoming out” or “high centering” at the crossing. (Testimony)

¹³ This is a B1-Line stationing number.

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- B.13. A total of 24 “driveways” cross the ELST in Segment B, one of which (SE 33rd Street) is a public street and one of which (SE 26th Street) is a private street. (Exhibit 7:B42 – 62) The 60% Plans indicate that Driveways #14, 16, 18, and 19 will be eliminated. (Exhibit 7:B109, 110, 112, and 113) King County testified that it had decided to retain all 24 driveways and that the 90% Plans would reflect that decision. (Testimony)
- B.14. Because many privately owned parcels along the lake shoreline are split by the ELST right-of-way and other upland parcels have beach rights along the shoreline, a large number of pedestrian paths, stairways, and bridges have developed over the years to facilitate pedestrian crossing of the railroad roadbed. The Examiner has counted at least 101 stairs/paths/bridges on Exhibit 7 serving the private properties to the east and west that lead to and from the trail.¹⁴ Most all of those facilities lie within the ELST right-of-way on property which King County asserts it owns. In addition, there are at least 34 gates in the fencing which King County installed along portions of the west side of the Interim Trail associated with some of those stairs, bridges, and paths. The highest concentrations of stairs, bridges, and paths occur between Stations 295+00 – 320+00, 327+00 – 334+00, 343+00 – 361+00, 373+00 – 376+00, and 447+00 – 468+00. The stairs between Stations 337+00 and 334+00 lead directly to decks and docks along the lake shore, all of which lie within the ELST right-of-way to which King County claims ownership. (Exhibit 7:B42 – 62)

King County proposes to eliminate many of those stairs, bridges, and paths. It will restrict crossing points and require shared use of the new stairs it will build. The County testified that 66 pedestrian crossing points will remain after construction. All new stairs on the west side of the ELST will be constructed abutting and parallel to the run of the trail (as opposed to at right angles to the trail which is the configuration of the majority of the current stairs/bridges). The 60% Plans depict a total of 91 stairs after project completion. (Exhibit 7:B87 – 124; and testimony)

King County proposes to remove all 34 gates but not replace any of them. The County’s position is that to maintain the gates would amount to preventing the public from using public property, something which it asserts it cannot do without appropriate compensation.¹⁵ The County will entertain applications from property owners for a County Special Use Permit (“SUP”) to allow installation of gates after construction has been completed. Part of the County’s consideration of such applications would be payment of compensation by the applicant for private use of public property. (Testimony)

¹⁴ The County testified that there are 95 pedestrian crossings within Segment B. (Testimony)

¹⁵ The question of who installed the current gates was not asked during the hearing. Since most, if not all of the 34 gates are in fencing along the Interim Trail which was installed by King County as part of that project, it would not be unreasonable to think that the County installed those gates. The question of whether King County received any compensation for installation of those gates also was not asked during the hearing. One cannot reasonably presume an answer to that question based upon the current record.

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- B.15. The 60% Plans include Type 1 rest stops at Stations 328+00 (east side), 367+75 (east side), 395+00 (east side), 418+25 (east side), and 443+75 (east side) and a Type 2 rest stop at Station 341+00 (west side). (Exhibit 7:B96, 99, 104, 110, 114, and 119) A Type 1 rest stop provides two benches and a trash receptacle. The Type 2 rest stop provides two picnic tables, one handicap accessible. (Exhibit 7:B167)
- B.16. An access point to the Master Plan Trail from the Parkway will be provided between Stations 432+00 and 433+00 near the Parkway/Louis Thompson Road intersection. The distance between the proposed edge of the Master Plan Trail and the edge of the Parkway in that area is only about 50 feet; the elevation difference between the Parkway and the ELST is about 10 feet. Therefore, King County proposes to construct a switch-back ramp that will be ADA compliant. (Exhibit 7:B117)
- B.17. King County and the City entered into a Settlement Agreement dated April 6, 2017, which holds that Segment B is vested to all codes and regulations in effect on March 15, 2017.¹⁶ (Exhibits 1:B15, § IV.3.d; 51:B5485) As such, full compliance with the 2016 King County Surface Water Design Manual (“KCSWDM”), City of Sammamish 2016 Addendum to the KCSWDM, and 2016 Public Works Standards must be demonstrated prior to issuance of the Construction Permit. Best management practices (“BMPs”) for controlling erosion and sedimentation and preventing pollutants from entering lakes must also be implemented through Construction Permit review and implementation. King County is not required to demonstrate full compliance with technical standards in Chapters 15.05 and 21A.50 SMC during SSDP review, but rather must conceptually show that compliance can be achieved through provision of preliminary plans. Full compliance with technical requirements is evaluated through Construction Permit review. (Exhibit 1:B15 and 16, § IV.3.d)
- B.18. King County submitted a preliminary drainage report (referred to as a Technical Information Report or “TIR”) and included preliminary drainage plans in the 60% Plans. (Exhibits 7:B87 – 130; 12)
- B.19. The City has extensive tree retention, protection, and replacement standards that apply to “significant” trees.¹⁷ [Chapter 21A.37 SMC] Chapter 21A.37 SMC basically requires new developments on property zoned R-4 to preserve at least 35% of the significant trees on the development site outside of critical areas and their buffers. [SMC 21A.37.250(1)(c)] Each significant tree legally removed must be replaced by between one and three new trees, depending on the sub-classification of the tree. [SMC 21A.37.280(1)]

Although Chapter 21A.37 SMC has not been incorporated into the City’s SMP [SMC 25.01.060(5)], developments regulated by the SMP “are subject to applicable provisions of the [SMC]”. [SMC 25.01.060(1)] “Removal of any significant tree in public easements and public rights-of-way” is exempt from the permit requirements of Chapter 21A.37 SMC. [SMC 21A.37.230(1)(b)] In addition,

¹⁶ The Settlement Agreement was not offered as an exhibit. Thus, the Examiner has had no opportunity to review the scope and specifics of the Settlement Agreement.

¹⁷ A “significant” tree, by definition, is a healthy, native species having a diameter at breast height of 8” or more if a coniferous tree or of 12” or more if a deciduous tree. [SMC 21A.15.1333]

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“Significant trees located in public utility easements and public rights-of-way” are exempt from the tree retention requirements of Chapter 21A.37 SMC. [SMC 21A.37.230(2)(b)] The ELST right-of-way is a public right-of-way. Therefore, neither tree retention nor tree removal requirements of Chapter 21A.37 SMC apply to the Master Plan Trail project.

- B.20. Notwithstanding the above, King County retained a Certified Arborist to inventory “significant” trees within the ELST corridor. The arborist inventoried only significant trees, as defined in Chapter 21A.37 SMC, that are within about 40 feet of the Interim Trail centerline as shown on the 60% Plans. The inventory identified 847 significant trees. Based on the current 60% Plans, King County proposes to retain 574 significant trees (68%) and remove 273 significant trees (32%). Of the 574 significant trees to be saved, 45 (8%) are close enough to construction activity that they will have to be monitored to confirm that they can be safely retained. Of the 273 significant trees to be removed, approximately 100 are within the SMA jurisdictional area. The arborist’s report also identifies notable non-significant trees within the project area. (Exhibits 61; 65:B5667) A plan set depicting significant trees to be saved, monitored, or removed was prepared and filed. (Exhibit 62)
- B.21. The Master Plan Trail proposes “different methods to encourage users to stay on the trail. Split-rail wood fencing will be installed to deter users from entering critical areas, including wetlands, and chain-link fencing [will be] used to prevent intrusion into recreational properties or into areas with an edge hazard.” (Exhibit 6:B31) Fencing is not continuous; lengthy gaps between fencing segments will permit wildlife to cross the trail. Fencing is depicted on Exhibit 7:B87 – 125.
- C. City Staff Recommendations
- C.1. In addition to the numerous technical and plan documents submitted by King County, many of which are referenced throughout this Decision, King County submitted a Project Narrative (Exhibit 6), a Memorandum responding to the Department’s Recommended Conditions (Exhibit 71), and a Closing Statement (Exhibit 132).
- C.2. The Department reviewed all of King County’s submittals and all public comments which had been received before its Staff Report was issued on October 4, 2017. The Department concluded that the SSDP application met or could be conditioned to meet applicable SMP criteria for approval. The Department recommends that the SSDP be approved subject to 16 conditions (the “Recommended Conditions”). (Exhibit 1:B17 – 19)

King County asks “the Examiner [to] modify, clarify or strike in their entirety Recommended Conditions 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 16.” (Exhibit 71, p. 1) King County believes that many of the Recommended Conditions are an “attempt to fundamentally change the project design to avoid impacts that are fully minimized or mitigated under the current proposal in a manner consistent with the Code.” (Exhibit 71, p. 5)

The remainder of this section will address the challenged conditions.

C.3. Recommended Condition 2 reads in full as follows:

An updated survey (conducted no later than one year prior to submittal or resubmittal of any construction permit applications) must be provided at submittal of the Construction Permit application(s) to show all dimensions and locations of all existing and proposed structures and improvements including but not limited to; buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities as required by WAC 173-27-180(9)(f).

(Exhibit 1:B17)

- C.4. Section 173-27-180 WAC addresses “Application requirements for [SMA] substantial development, conditional use, or variance permit[s].” Section 173-27-180 WAC requires that “A complete application for a substantial development, conditional use, or variance permit shall contain, as a minimum, the [] information” listed in its nine subsections. [Emphasis added] Subsection (9) requires “A site development plan consisting of maps and elevation drawings, drawn to an appropriate scale to depict clearly all required information, photographs and text which shall include” the items listed in subsections (a) – (m). [Emphasis added] Subsection (f) requires “The dimensions and locations of all existing and proposed structures and improvements including but not limited to; buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.” [Emphasis added]
- C.5. King County believes that no legal basis exists to require it to prepare “a new comprehensive survey”. (Exhibit 71, p. 6; see also Exhibit 132, pp. 4 and 5) King County notes (correctly) that the WAC section cited as authority for preparation of a survey lists one of the elements required for a complete SSDP application, but does not require updating the survey once submitted. (Exhibit 71, p. 6)

The survey that is the basis for Exhibit 7 was completed in 2008 and was updated, at least in part, in 2014 and 2016. The County estimates that it would cost about \$270,000.00 to prepare a completely new survey. (Testimony)

King County testified that it continually updates the survey based on on-going field work: When discrepancies between what is found in the field and what is depicted on the survey are encountered, King County has the affected part of the survey updated. The County has no objection to submitting the latest version of the survey when it files its clearing and grading (Construction Permit) applications, but asserts that all requirements of WAC 173-27-180(9)(f) have been met with its submittals. (Exhibits 71, p. 6; 132, pp. 4 and 5; and testimony)

- C.6. King County suggests that Recommended Condition 2 be revised to read as follows:

Within one year prior to submittal or resubmittal of any clearing and grading permit applications, King County will verify the accuracy of the existing survey and, where changes are identified, update the site plan to accurately show dimensions and locations of all existing and proposed structures and improvements within or immediately adjacent to the construction limits, including but not limited to buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.

(Exhibit 1:B17)

- C.7. The Department contends that the current survey is incomplete and out-of-date: Incomplete in that it doesn't depict stormwater and other utility facilities and some buildings; out-of-date in that ownership data on the current survey does not, in some cases, depict ownership changes that occurred as much as three years ago. The City also contends that the current survey is inadequate to determine where the trail could be narrowed. The City states that "[t]he County's submittal information is non-compliant because it is incomplete and out of date." (Exhibits 1:B17, § IV.6 (source of quote); 110, Slide 5; and testimony)

See Findings of Fact C.37. *et seq.*, below, for discussion of trail narrowing issues.

- C.8. Recommended Condition 3 reads in full as follows:

The County shall identify all structures not owned and controlled by the County, and existing within the Project area that were constructed or installed pursuant to a permit that is not revocable by the County ("Permitted Structures"). For each Permitted Structure, if any, the County shall identify where the Project will be modified, narrowed, or relocated to mitigate for conflicts with Permitted Structures.

(Exhibit 1:B17)

- C.9. King County asks that Recommended Condition 3 be stricken in its entirety. The County argues that it "is beyond the scope of the City's regulatory authority, has no nexus to the shoreline issues being reviewed for this [SSDP], is arbitrary, and overly burdensome." (Exhibit 71, p. 7; see also Exhibit 132, p. 5)

King County testified that all structures within proposed clearing and grading limits have been depicted on the 60% Plans. At no time prior to issuance of the Department's Report (Exhibit 1) was the County asked to indicate which of those structures were the subject of permits issued by King County. (Testimony)

King County stated that SUPs "on the ELST were issued on a temporary basis pending redevelopment of the trail." (Exhibit 68:B5683, table Index Number SB604a.1) One SUP entered

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into the record as part of a citizen comment had a term of 10 years, expired on September 17, 2017, and included a provision acknowledging “that future trail development ... may affect or alter the nature or scope of the permitted use.” (Exhibit 29:B2594 – 2596; quote from B2596, SUP §15.m)

- C.10. The Department contends that it needs to know which private structures within the ELST right-of-way are the subject of permits issued by King County or other entities in order to determine where the trail ought to be realigned or narrowed to avoid existing private structures. (Testimony)

In addition, the Department argues that “Recommended Condition 3 attempts to rectify King County’s omission [referring to WAC 173-27-180(9)(f)] while keeping the project moving.” (Exhibit 131, p. 10)

See Findings of Fact C.37. *et seq.*, below, for discussion of trail narrowing issues.

- C.11. Recommended Condition 4 reads in full as follows:

For those segments of the Project that are located within the shoreline setback (located at approximately Stations: 600+00, 328+00 through 335+00, 340+00 through 344+00, 356+00 through 357+00, and 374+00 on the plan set provided by the County in **Exhibit 7**) the County shall update the plan set to depict that no development, including clearing and grading limits, will occur waterward of the current interim trail alignment. In compliance with SMC 25.06.020(1) and SMC 25.06.020(5), this section of the Project must be minimized by either locating expanded improvement landward of the current interim trail alignment or by narrowing the Trail section. No further reduction of the current interim trail shoreline setback will be allowed.

(Exhibit 1:B17 & 18; bold in original)

- C.12. The SMP calls for a 50 foot setback from Lake Sammamish’s OHWM. [SMC 25.06.020(9)] The setback applies to structures as defined. [SMC 25.02.010(76)] Construction of the Master Plan Trail as proposed would result in permanent clearing of 4,115 SF (0.09 acres) and temporary clearing of an additional 7,372 SF (0.17 acres) within the 50-foot setback area. (Exhibit 16:B798)
- C.13. At Station 600+00 the trail is outside the setback line but necessary clearing and grading would temporarily impact about 350 SF within the setback. Any easterly shift would impact significant trees. (Exhibit 7:B91; and testimony) At Station 334+00 a westerly shift to avoid relocating a concrete retaining wall on the east side of the trail would result in about 400 SF of permanent impact within the setback area. All other impact in that area would be temporary. (Exhibit 7:B96 and 97; and testimony) Between Stations 340+00 and 344+00 the County is attempting to preserve an existing access, resulting in about 525 SF of permanent impact within the setback area. (Exhibit 7:B99; and testimony) Between Stations 356+00 and 357+00 Driveway 8 limits alignment choices.

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The proposal keeps the retaining wall outside the setback but results in about 11 SF of permanent impact within the setback area. (Exhibit 7:B102; and testimony) Finally, at Station 374+00 wetlands exist on both sides of the trail. The proposal would result in only about 165 SF of temporary impact within the setback area. (Exhibit 7:B105; and testimony)

- C.14. King County asks “that Recommended Condition 4 be stricken entirely or, in the alternative, clarified and limited.” (Exhibit 71, p. 9; see also Exhibit 132, pp. 5 and 6)

The County has identified steps that it would be willing to take to avoid permanent impacts within the shoreline setback area, but states that temporary impacts cannot be avoided given the construction limitations inherent in building within a narrow corridor. The County has identified steps that it would be willing to take in each of the cited locations to further minimize permanent impacts within the setback area. However, the County notes that the requirement to avoid waterward expansion between Stations 340+00 and 344+00 would require relocation of a planned rest stop, a use of which the City has said it approves and which is expressly allowed within the setback area. The County further questions why the City refuses to allow mitigation options for a preferred shoreline use as allowed by the SMC. (Exhibit 71, pp. 10 – 12)

The County asserts that compliance with Recommended Condition 4 would prevent the County from meeting its objective, to wit: Completion of a segment of a regional trail to its adopted Regional Trail Standard. (Testimony)

- C.15. King County suggests, as an alternative to entire elimination, Recommended Condition 4 be revised to read as follows:

For those segments of the Project that are located within the shoreline setback (located at approximately Stations: 600+00, 328+00 through 335+00, 340+00 through 344+00, 356+00 through 357+00, and 374+00 on the plan set provided by the County in Exhibit 7) the County shall update the plan set to reduce or eliminate permanent impacts waterward of the current interim trail alignment, with the exception of proposed rest stops and access points. No further permanent reduction of the current interim trail shoreline setback will be allowed.

(Exhibit 71, p. 12)

- C.16. The Department testified that it did not intend for the proposed rest stop to be affected by Recommended Condition 4. (Testimony)

See Findings of Fact C.37. *et seq.*, below, for discussion of trail narrowing issues.

- C.17. Recommended Condition 5 reads in full as follows:

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For that portion of the Project that is located within the Lake Sammamish Shoreline Setback, the County shall update the Project plans to establish and maintain a Vegetation Enhancement Area (VEA) that is equal to the 15-foot wide portion of the 50-foot Lake Sammamish Shoreline Setback immediately landward of the Ordinary High Water Mark (OHWM). SMC 25.06.020(9) and SMC 25.06.020(10). At least 75 percent of the VEA area must be planted with vegetation consisting of native trees, shrubs, and groundcover designed to improve ecological functions.

(Exhibit 1:B18)

- C.18. King County asks “that Recommended Condition 5 be stricken or modified to account for preexisting conditions.” (Exhibit 71, p. 12) About 18,000 SF within the shoreline setback is owned by King County (is within the ELST right-of-way), of which about 9,000 SF has been developed for private uses and between about 2,250 – 4,000 SF is used as private community beaches. Compliance with this condition would likely require removal of existing uses and existing lakeshore riprap. (Exhibit 71, pp. 12 – 14; and testimony; see also Exhibit 132, p. 6)

The County argues that its proposal includes mitigation for any impacts within the shoreline setback area. Creation of VEAs would require greater temporary impacts within the shoreline setback which would be in direct conflict with Recommended Conditions 4 and 9. (Exhibit 71, pp. 12 – 14)

- C.19. King County suggests, as an alternative to entire elimination, that Recommended Condition 5 be revised to read as follows:

For that portion of the Project that is owned by King County and located within the Lake Sammamish Shoreline Setback, the County shall update the Project plans to establish and maintain a Vegetation Enhancement Area (VEA) that is equal to the 15-foot wide portion of the 50-foot Lake Sammamish Shoreline Setback immediately landward of the Ordinary High Water Mark (OHWM) where it is practicable and where the impacts to the shoreline do not outweigh the benefit of establishing the VEA. SMC 25.06.020(9) and SMC 25.06.020(10) Within that portion of the established VEA that is not in current use, the County shall maintain at least 75 percent of the area with vegetation consisting of native trees, shrubs, and groundcover designed to improve ecological functions.

(Exhibit 71, pp. 13 and 14)

- C.20. In its closing argument the Department offered a minor change to King County’s suggested alternative language for Recommended Condition 5:

For that portion of the Project that is owned by King County and located within the Lake Sammamish Shoreline Setback, and that is not currently in use, the County shall

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update the Project plans to establish and maintain a Vegetation Enhancement Area (VEA) that is equal to the 15-foot wide portion of the 50-foot Lake Sammamish Shoreline Setback immediately landward of the Ordinary High Water Mark (OHWM) where it is practicable and where the impacts to the shoreline do not outweigh the benefit of establishing the VEA. SMC 25.06.020(9) and SMC 25.06.020(10) Within that portion of the established VEA that is not in current use, the County shall maintain at least 75 percent of the area with vegetation consisting of native trees, shrubs, and groundcover designed to improve ecological functions.

(Exhibit 131, pp. 11 and 12; City addition underlined)

C.21. Recommended Condition 6 reads in full as follows:

In accordance with SMC 25.07.090(6), an updated and final landscaping plan shall be provided at the time of Construction Permit submittal to ensure that native, self-sustaining vegetation is utilized throughout the Project area and to illustrate conformance with VEA requirements pursuant to SMC 25.06.020(10).

(Exhibit 1:B18)

C.22. King County suggests that Recommended Condition 6 be revised as follows to comport with its version of Recommended Condition 5, if the VEA requirement in that condition remains:

In accordance with SMC 25.07.090(6), an updated and final landscaping plan shall be provided at the time of clearing and grading application submittal to ensure that native, self-sustaining vegetation is utilized in conformance with VEA requirements in Condition X.

(Exhibit 71, p. 14; see also Exhibit 132, p. 6) “Condition X” refers to current Recommended Condition 5.

C.23. The Department did not comment on King County’s objection to or recommended alternative language for Recommended Condition 6.

C.24. Recommended Condition 7 reads in full as follows:

The Project proposes to remove Significant trees; therefore, all tree removal shall be in substantial conformance with the arborist report (**Exhibit 61**) and tree preservation plans (**Exhibit 62**) and the City’s tree regulations, Chapter 21A.37 SMC. An updated arborist report and tree inventory will be required at submittal of the Construction Permit(s) to account for any growth that occurred since approval of this SSDP.

(Exhibit 1:B18; bold in original)

- C.25. King County objects to Recommended Condition 7 on the grounds that it is overbroad and that the City lacks authority to require an updated arborist's report. (Exhibit 71, pp. 14 and 15; see also Exhibit 132, p. 6)

The County asserts that the "all tree removal" clause is overbroad as Chapter 21A.37 SMC regulates only removal/retention of "significant" trees as defined. Further, the County asserts that the Master Plan Trail project is exempt from Chapter 21A.37 SMC's tree removal, retention, and replacement regulations. (Exhibit 71, pp. 14 and 15)

The County also asserts that the City lacks authority to require a new arborist's report, especially given that the current arborist's report was prepared only about five months ago. (Exhibit 71, p. 15)

- C.26. King County suggests that Recommended Condition 7 be revised as follows:

The Project proposes to remove Significant trees; therefore, all significant tree removal shall be in substantial conformance with the arborist report (Exhibit 61) and tree preservation plans (Exhibit 62). If more than two years elapse between the July 7, 2017 arborist report and submission of a clearing and grading permit application, an updated arborist report and tree inventory will be required at application submittal.

(Exhibit 71, p. 15)

- C.27. The Department testified that all projects require an updated tree retention plan between entitlement approval and construction plan submittal. Trees grow; a tree that is not significant during the entitlement phase may grow to become significant by the time actual construction is proposed. (Testimony)

- C.28. No provision within Chapter 21A.37 SMC requires preparation of an updated tree retention plan between entitlement approval and construction plan submittal.

- C.29. Recommended Condition 8 reads in full as follows:

The Project proposes to remove trees and vegetation. SMC 21A.30.210(3) and SMC 25.06.020(5) require that clearing and grading be the minimum necessary to accommodate the allowed use/development. The proposed Trail width is the primary driver of the amount (width) of clearing and grading required. The extent of clearing and grading directly impacts the quantity of trees to be removed. The County shall provide an updated clearing and grading plan that includes adequate tree protection in accordance with SMC 21A.37.270(5). The Trail shall be narrowed as necessary to fully comply with tree protection barrier and grading/grubbing limit restrictions in

21A.37.270(5). The clearing and grading plan shall properly reflect adequate and compliant tree protection barriers and grading/grubbing limits for all trees and vegetation to be retained pursuant to Chapter 21A.37 SMC. No grading or grubbing shall be allowed within the prescriptive tree protection areas as defined by SMC 21A.37.270(5)(b). If adequate and compliant tree protection measures in accordance with SMC 21A.37.270(5) cannot be applied, the tree shall not be counted as retained and must be considered as removed.

(Exhibit 1:B18)

- C.30. King County asks “that Recommended Condition 8 be stricken in its entirety because it is over broad [*sic*], vague and unclear, without regulatory authority, creates requirements that render the project unviable, and results in significantly less tree protection than what King County has currently proposed.” (Exhibit 71, p. 15; see also Exhibit 132, pp. 6 and 7)
- C.31. King County perceives Recommended Condition 8 as an attempt by the City to use clearing and grading requirements to force it to reduce the width of the Master Plan Trail from 12 feet (plus shoulders) to 8 – 10 feet (plus shoulders). King County asserts that it has reduced the clearing and grading limits as much as is practicable: Generally only five feet beyond the top or toe of a cut or fill slope and 10 feet beyond the top or base of a retaining wall. Anything less would not provide safe working space for construction crews. (Testimony)

The County believes that the Department’s intent is to require it to construct a narrower trail in order to further reduce clearing and grading limits. The County does not believe that SMC 25.06.020(5) was intended to force it to build a trail narrower than it believes is necessary (and which matches the width of the ELST segments to the north and south of Segment B and also complies with the County’s adopted Regional Trail Standard). (Testimony)

- C.32. In addition, King County perceives Recommended Condition 8 as an attempt by the City to use tree protection requirements in SMC 21A.37.270(5) to force it to reduce the width of the Master Plan Trail from 12 feet (plus shoulders) to 8 – 10 feet (plus shoulders). Particularly in dispute is the requirement in Subsection (5)(b) that clearing be kept at least 5 feet beyond the drip line of significant trees that will be preserved. If that prescriptive requirement were imposed on the proposed 12-foot trail, an additional 408 significant trees would have to be removed. Narrowing the trail to 10 feet would still require removal of 369 additional significant trees if the prescriptive requirement is imposed. King County proposes to save as many significant trees as possible by following the protection guidance provided by its certified arborist, using the alternative methods provision of SMC 21A.37.270(7). (Exhibit 61; and testimony)
- C.33. The Department states that King County never asked to use the alternative methods authority of SMC 21A.37.270(7), so the Department Director has never considered that option. Further, the City

asserts that King County does not have a “good track record” regarding compliance with tree protection plans for other ELST segments within the City. (Exhibit 110, Slide 13; and testimony)

See Findings of Fact C.37. *et seq.*, below, for discussion of trail narrowing issues.

C.34. Recommended Condition 9 reads in full as follows:

The Project proposes to impact critical areas regulated under Chapter 21A.50 SMC and Title 25 SMC. Under SMC 21A.30.210(3), SMC 21A.50.135, SMC 25.06.020(1), and SMC 25.06.020(5), clearing and grading shall be the minimum necessary to accommodate the allowed use/development. The proposed Trail width is the primary driver of the amount (width) of clearing and grading required. The extent of clearing and grading directly impacts the extent to which critical areas regulated under Chapter 21A.50 SMC and Title 25 SMC are impacted. The Trail can be narrowed in locations to reduce required clearing and grading limits and correspondingly reduce then minimize impacts to a level that is below what is currently proposed. The County shall provide an updated Critical Areas Study (CAS) and updated clearing and grading plan (Project Plans) that address how Trail narrowing and clearing and grading limits reductions have been implemented in each instance where a critical area regulated under Chapter 21A.50 SMC and Title 25 SMC has been impacted and how the project is compliant with the Project FEIS, SMC 25.06.020(1), SMC 25.06.020(5), SMC 21A.30.210(3), and SMC 21A.50.135. The updated CAS shall also include more specific information about how impacts on shoreline ecological functions are avoided and minimized.

(Exhibit 1:B18)

C.35. King County asks “that Recommended Condition 9 be stricken in its entirety because it is redundant, vague and unclear, arbitrary, overly burdensome, and beyond the City’s regulatory authority.” (Exhibit 71, p. 18; see also Exhibit 132, p. 7) The County believes that Recommended Condition 9 effectively requires it to prepare an updated critical areas study and clearing and grading plans based on a narrowed trail cross-section. In addition to the July, 2017, updated critical areas study, the County submitted documents demonstrating minimization of impacts to shoreline ecological functions and mitigation sequencing. (Exhibits 16; 54; 55; 56; 71, pp. 18 - 20)

King County objects to the vagueness of Recommended Condition 9 in that it does not provide guidance as to where within Segment B or how much of Segment B has to be narrowed in order to comply with the condition. (Exhibit 71, pp. 19 and 20)

C.36. The Department testified that it seeks reduction of those portions of Segment B where doing so would reduce the impact on permitted private structures within the ELST right-of-way and/or critical areas (primarily wetlands). The Department asserts that it cannot be more specific regarding

narrowing of the trail because: 1) It first needs an updated survey to locate all permitted structures within the ELST right-of-way; and 2) King County must demonstrate that it has fulfilled mitigation sequencing requirements of SMC 21A.50.135 and SMC 25.06.020(1). The Department's position is that King County has done nothing to mitigate impacts other than to employ retaining walls in lieu of cut and fill slopes. (Exhibit 1:B8 and 9; and testimony; see also Exhibit 131, p. 2 *et seq.*)

See Findings of Fact C.37. *et seq.*, below, for discussion of trail narrowing issues.

C.37. King County and the Department both rely on the American Association of State Highway and Transportation Officials ("AASHTO") Guide for the Development of Bicycle Facilities ("AASHTO Bike Guide" or simply the "Guide") for guidance on the proper width of the trail. (Exhibits 1; 71; *et al.*)

C.38. Section 21A.30.210(3) SMC says the following about the width of paved trails:

The width of the cleared area, trail corridor, surface and shoulder should be designed consistent with AASHTO standards for public multi-use paved trails (Guide for the Development of Bicycle Facilities, 1999, as amended, American Association of State Highway and Transportation Officials) Cleared areas shall be the minimum necessary consistent with the standards and requirements in the SMC.

[Emphasis added] The current version of the AASHTO Bike Guide is the Fourth Edition, published in 2012. (Exhibit 70.1:KCB1) Exhibits 70.1, 108, and 121 contain excerpts from the Fourth Edition.

C.39. The AASHTO Bike Guide "is intended to present sound guidelines that result in facilities that meet the needs of bicyclists and other highway users. Sufficient flexibility is permitted to encourage designs that are sensitive to local context and incorporate the needs of bicyclists, pedestrians, and motorists." (Exhibit 121, p. 1-2)

C.40. The AASHTO Bike Guide recognizes that there are various types of bicycles and riders with varying skill levels. The Guide's designs assume a "minimum operating width of 4 ft" and a preferred operating width of 5 feet for an upright bicyclist. (Exhibit 108, p. 3-2) That width allows for the "natural side-to-side movement that varies with speed, wind, and bicyclist proficiency." (*Ibid.*) Those widths do not include "shy distances from parallel objects". (*Ibid.*)

C.41. The ELST is categorized as a "shared use path" by the Guide. (Exhibit 70.1:KCB2)

The appropriate paved width for a shared use path is dependent on the context, volume, and mix of users. The minimum paved width for a two-directional shared use path is 10 ft (3.0 m). Typically, widths range from 10 to 14 ft (3.0 to 4.3 m), with the wider values applicable to areas with high use and/or a wider variety of user groups.

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In very rare circumstances, a reduced width of 8 ft (2.4 m) may be used where [bicycle traffic volume will be low, pedestrian use will be only occasional, frequent passing and resting opportunities are available, and maintenance traffic will not damage pavement edges].

In addition, a path width of 8 ft (2.4 m) may be used for a short distance due to a physical constraint such as an environmental feature, bridge abutment, utility structure, fence, and such. Warning signs that indicate the pathway narrows ... should be considered at these locations.

A wider path is needed to provide an acceptable level of service on pathways that are frequently used by both pedestrians and wheeled users. ... Wider pathways, 11 to 14 ft (3.4 to 4.2 m) are recommended in locations that are anticipated to serve a high percentage of pedestrians (30 percent or more of the total pathway volume) and high user volumes (more than 300 total users in the peak hour).

(Exhibit 70.1:KCB4)

Ideally, a graded shoulder area at least 3 to 5 ft (0.9 to 1.5 m) wide with a maximum cross-slope of 1V:6H ... should be maintained on each side of the pathway. At a minimum, a 2 ft (0.6 m) graded area with a maximum 1V:6H slope should be provided for clearance from lateral obstructions such as bushes, large rocks, bridge piers, abutments, and poles.

(Exhibit 70.1:KCB6)

- C.42. King County and the Department each retained a well respected trail design expert to argue their positions on expected trail user volumes and trail width. The County hired William Schultheiss, P.E. ("Schultheiss;" *curriculum vitae* at Exhibit 107); the City hired Charles Alexander, P.E. ("Alexander;" *curriculum vitae* at Exhibit 114).
- C.43. King County collects bicycle user volumes on many of its regional trails. Peak bicycle volumes on weekend days on the northern segment of the ELST in Sammamish are from almost 3,000 to almost 3,500. Corresponding volumes on the Sammamish River and Burke-Gilman Trails are around 3,500. Peak weekday bicycle volumes on the northern segment of the ELST in Sammamish are around 500; corresponding volumes on the Sammamish River and Burke-Gilman Trails are around 2,250. (Exhibit 118, p. 9) Peak hour volumes on the portion of the ELST in Redmond during the past year were about 160 on weekdays and 170 on weekends. (Exhibit 113, p. 3)

The typical mode split on King County's regional trails is 50% bicycles and 50% pedestrians. (Exhibit 113, p. 3) Counting all users, the ELST segment in Redmond had about 900 users in the

peak hour during the past year; more than 50 hours during the year saw total user volumes exceeding 300. (*Ibid.*)

- C.44. Schultheiss believes that usage will rise once the entire ELST is improved to Master Plan Trail standard; the addition of a light rail station at the Redmond end of the ELST will further increase usage between Issaquah and Redmond. Schultheiss believes that both peak hour and 30th highest hour (“k factor”) total user volumes will exceed 300 in the not-too-distant future. (Exhibits 59/118¹⁸; 109; 113; 130; and testimony)

Alexander challenges the County’s trail user projections, arguing that they are high. Further, he asserts that since the peak hour user volumes are near the 300 user threshold for a 12-foot minimum width trail cited in the AASHTO Bike Guide, the flexibility inherent in the Guide can safely be employed to allow a narrower trail. (Exhibits 115; 124; and testimony)

- C.45. Schultheiss basically asserts that to be in conformance with the AASHTO Bike Guide the trail should be 12 feet wide because peak hour volumes exceed 300 users and pedestrians comprise more than 30% of the users. He opposes reducing the width to 10 or 8 feet for the same reasons. (Exhibit 60; testimony) Schultheiss concludes that “we should err on the side of caution ... and maintain a minimum trail width of at least 12 ft throughout the trails [*sic*] length.” (Exhibit 113, p. 6; in general, see Exhibits 113 and 130)

Alexander asserts that “context-sensitive design” supports using a narrower trail width. He posits that a 10-foot wide trail would have only a “marginal effect” on trail level of service. (Exhibits 115, Slide 27; 124, p. 29) He asserts that given a peak hour user volume of approximately 300, the AASHTO Bike Guide supports “a 12-foot paved trail where physical constraints do not exist” and “a narrower trail where physical constraints do exist.” (Exhibits 115, Slide 35; 124, p. 37; in general, see Exhibits 115 - 124)

- C.46. Recommended Condition 10 reads in full as follows:

An updated final project mitigation plan meeting the requirements of SMC 21A.50.145 and demonstrating how the proposed mitigation for impacts to shoreline features will ensure no net loss of shoreline ecological functions shall be provided at the time of Construction Permit submittal. To provide the greatest benefit, off-site mitigation should be in the same basin as feasible. The County should work with the King County MRP to identify an in-lieu site that is most beneficial on a landscape scale. If an in-lieu site is available within the East Lake Sammamish Basin, where the impacts will occur, it should be given priority. The updated final project mitigation plan must include a detailed analysis of mitigation compliance with SMC 21A.50.310 and SMC 21A.50.350. If off-site mitigation is proposed the updated final project mitigation plan must demonstrate how it is compliant with SMC

¹⁸ Exhibits 59 and 118 are duplicates.

21A.50.310(4) and SMC 21A.50.350(2). The updated final mitigation plan shall also clearly document significant tree replacements within the shoreline overlay.

(Exhibit 1:B18)

- C.47. King County asks “that Recommended Condition 10 be modified to clarify that [a] mitigation bank will serve the same purpose as an in lieu site.” (Exhibit 71, p. 20; King County did not address this Recommended Condition in Exhibit 132, its Closing Brief) When the North Sammamish Segment was under review by the City, the Department wanted King County to provide on-site mitigation for all wetland impacts. When Segment A was under review, King County proposed that a mitigation bank be used. The City objected and King County revised its plans to use on-site mitigation. For Segment B, King County proposed 100% on-site mitigation. However, the Department questioned the adequacy of buffers for proposed wetland creation areas, so the County changed its plans to use on-site mitigation for buffer impacts and a mitigation bank for direct wetland impacts. (Testimony)

King County testified that it has coordinated off-site mitigation with the King County Mitigation Reserves Program (“MRP”). According to the County’s consultant, they plan to use an East Lake Sammamish replacement site for mitigation of direct wetland impacts. (Testimony)

- C.48. The Department did not comment on King County’s objection to or recommended alteration of Recommended Condition 10.
- C.49. Recommended Condition 12 reads in full as follows:

Where fences, retaining walls, or a combination of fence and retaining wall exceed four feet in height, adequate provisions shall be made to allow wildlife passage at intervals along the Trail if existing driveways are not sufficient.

(Exhibit 1:B19)

- C.50. King County believes that Recommended Condition 12 is unnecessary because of information it provided during the hearing. (Exhibit 71, pp. 20 and 21; see also Exhibit 132, p. 7)

Approximately 23 driveways and/or pedestrian paths cross the ELST. King County does not propose to gate any of the driveways or pathways. Thus, there will be a number of locations along the ELST where wildlife may cross the trail. (Exhibit 7; and testimony)

- C.51. The 60% Plans indicate that two types of fencing will be employed along the trail: Split rail and chain link.¹⁹ In addition, wood guardrail will also be employed, especially near driveway crossings.

¹⁹ Although the Legend sheet (Exhibit 7:B37) includes a symbol for a board fence, the Examiner has been unable to find that symbol used on any of the Plan and Profile sheets (Exhibit 7:B87 – 124) or on any of the Landscape Plan sheets

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(Exhibit 7:B37) Split rail fence and wood guardrail by design allow for wildlife passage. (Exhibit 7:B167) Chain link fencing is proposed on top of retaining walls for safety. (*E.g.*, Exhibit 7:B415 and 416) There will be literally thousands of feet along the ELST without chain link fencing. (Exhibit 7:B87 – 124)

C.52. The Department referred the Examiner to the following text in Volume III of the FEIS: “Consider the use of alternatives to chain-link fencing in order to maintain existing wildlife passage while still discouraging human passage and minimizing visual impacts.” (Exhibit 70.11:KB1731, Appendix A – Environmental Commitments, § 5.2, bullet 1)

C.53. Recommended Condition 14 reads in full as follows:

Following complete mitigation installation, the County shall provide to the City an as-built report of the restoration and compensatory mitigation installed for the Project. After the City inspects and approves the as-built report, a required maintenance and monitoring period will begin pursuant to SMC 21A.50.145 (7) and in accordance with the final approved Project mitigation plan. A monitoring report shall be prepared by a qualified professional and provided to the City for review by October 31st of each monitoring year for the duration of the maintenance and monitoring period. Due to Project size and complexity, and pursuant to SMC 21A.50.045, the City will require use of an on-call consultant to carry out a review of annual mitigation monitoring reports to verify compliance with project goals and performance standards.

(Exhibit 1:B19)

C.54. King County seeks “clarification of Recommended Condition 14”. (Exhibit 71, p. 21) The County objects to the last sentence which it believes is so vague as to leave the County liable for open-ended consultant costs solely at the discretion of the City. (Exhibit 71, p. 21; and testimony; see also Exhibit 132, pp. 7 and 8)

C.55. The Department did not comment on King County’s objection to or requested clarification of Recommended Condition 14.

C.56. Recommended Condition 16 reads in full as follows:

Pursuant to WAC 173-27-090 construction shall be commenced on the proposed Trail and associated activities within two (2) years of the date that the SSDP is issued (or becomes final following any reconsideration or appeal periods, if applicable). Authorization to conduct development activities under the SSDP shall terminate five

(Exhibit 7:B168 – 188). The Examiner thus concludes that board fencing is not proposed along the trail at any point within Segment B.

(5) years after the effective date of this permit. The City may authorize a single extension for a period not to exceed one (1) year based on a showing of good cause to the Director of reasonable factors, if a request for extension has been filed before the expiration date, and notice of the proposed extension is given to parties of record and the City.

(Exhibit 1:B19)

C.57. King County requests “modification of Recommended Condition 16” “to clearly incorporate the tolling provisions in WAC 173-27-090(4)” and to extend the normal 5-year duration of an SSDP to “seven (7) years based on the unique nature of this project and the potential for unforeseeable obstacles to prevent completion within the standard five year timeframe.” (Exhibit 71, pp. 22 and 23; King County did not address this Recommended Condition in Exhibit 132, its Closing Brief)

C.58. King County suggests that Recommended Condition 16 be revised as follows:

The time requirements of WAC 173-27-090 shall apply, except that, based on the requirements and circumstances of this project, the authorization to conduct development activities under the SSDP [Substantial Development Permit] shall terminate seven (7) years after the effective date of this permit. All extension and tolling allowances in WAC 173-27-090 will be available to the applicant.

(Exhibit 71, p. 23)

C.59. Section 173-27-090 WAC addresses time requirements for permits issued by local government under authority of the SMA:

(1) The time requirements of this section shall apply to all substantial development permits and to any development authorized pursuant to a variance or conditional use permit authorized by this chapter. Upon a finding of good cause, based on the requirements and circumstances of the project proposed and consistent with the policy and provisions of the master program and this chapter, local government may adopt different time limits from those set forth in subsections (2) and (3) of this section as a part of action on a substantial development permit.

(2) Construction activities shall be commenced or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record on the substantial development permit and to the department.

(3) Authorization to conduct development activities shall terminate five years after the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and to the department.

(4) The effective date of a substantial development permit shall be the date of filing as provided in RCW 90.58.140(6). The permit time periods in subsections (2) and (3) of this section do not include the time during which a use or activity was not actually pursued due to the pendency of administrative appeals or legal actions or due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.

(5) Revisions to permits under WAC 173-27-100 may be authorized after original permit authorization has expired; Provided, That this procedure shall not be used to extend the original permit time requirements or to authorize substantial development after the time limits of the original permit.

(6) Local government shall notify the department in writing of any change to the effective date of a permit, as authorized by this section, with an explanation of the basis for approval of the change. Any change to the time limits of a permit other than those authorized by RCW 90.58.143 as amended shall require a new permit application.

Subsection (1) allows local governments to adopt different time limits for good cause shown; Subsection (2) requires construction to begin within two years of permit issuance; Subsection (3) requires construction to be completed within five years of permit issuance; Subsection (4) tolls time limits while permits from other agencies are obtained and during appeals; Subsections (5) and (6) do not pertain directly to permit time limits.

C.60. The Department did not comment on King County's objection to or requested clarification of Recommended Condition 16.

D. Public Participation

D.1. The hearing record contains 895 comments from the public (Exhibits 29 (consisting of comments SB1 – SB832 and comments TJ1 – TJ20); 45 – 48; 75 – 106; 111; 112; and 125 – 129) and two comments from Indian tribes (Exhibits 43; 44). The Department catalogued and summarized the 852 comments comprising Exhibit 29. (Exhibit 28) The Department also provided a more concise summary of the public comments that had been received before preparation of its Staff Report. (Exhibit 1:B9 – 12, § II.18) King County provided a tabular response to the comments in Exhibit 29. (Exhibit 68)

- D.2. About 55% of the Exhibit 29 comments are statements of support, “the majority of [which] were similar in nature and appeared to be ‘form support emails’ sent out to bicycle clubs/enthusiasts throughout the northwest.” (Exhibits 1:B9; 29)

The remainder are almost entirely from Sammamish residents, most of whom own property adjacent to or encumbered by the ELST Corridor. Virtually none of these comments address the codified criteria for approval of an SSDP. A significant number of persons submitted more than one comment – some submitted many comments. Most commenters, even those who oppose the County’s Master Plan Trail proposal, state support for and appreciation of the ELST; many state that they use the Interim Trail and expect to use the Master Plan Trail even more.

- D.3. The commenters whose properties abut or are encumbered by the ELST right-of-way express many concerns and objections to the current proposal, almost all directed to the impacts that the project will have on the improvements which they (or their predecessors in interest) have constructed or planted near the trail within the ELST right-of-way. They object to loss of parking, removal of screening vegetation, removal of privacy gates, changes to their access driveways, removal of and consolidation of their pathways/stairs that cross the trail, shifting the trail centerline westerly towards their improvements, etc. (Exhibits 29; 45 – 48; 75 – 106; 111; 112; and 125 – 129) The Department’s Staff Report contains an excellent, brief summary list of the major concerns stated in the Exhibit 29 comments. (Exhibit 1:B9 – 11)

Many believe that low value wetlands are being given priority over the physical improvements which they have erected and planted over the years. They believe the trail should be narrowed or realigned so as to avoid impacts to their improvements. They suggest that what they see as slavish dedication to wetland preservation²⁰ is misguided. They question whether some of the delineated wetlands are truly wetlands. Some argue that since the ELST right-of-way is generally 200 feet wide, the County should be able to find 0.22 acres within the site to provide on-site mitigation for direct impact to the wetlands. (Exhibits 29; 45 – 48; 75 – 106; 111; 112; and 125 – 129)

- D.4. The Muckleshoot Indian Tribe commented in January, 2017, that the then-available information was insufficient for it “to fully evaluate this trail segment’s impacts and proposed mitigation for the streams and wetlands in the segment.” (Exhibit 43:B5406) The record contains no comment from the Muckleshoot Tribe subsequent to issuance of the revised critical areas study in July, 2017.
- D.5. The Snoqualmie Tribe submitted only a procedural e-mail containing no substantive comment. (Exhibit 44)

LEGAL FRAMEWORK²¹

²⁰ That phrase is the Examiner’s characterization of the comments, not a quote from any particular comment.

²¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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

Authority

A Shoreline SSDP is a Type 4 procedure. A Type 4 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on Type IV applications which is subject to the right of reconsideration and appeal to the State Shorelines Hearings Board (“SHB”). [SMC 20.05.020, 20.10.240, 20.10.260, and 25.35.080(1)]

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 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

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.

Subsection 25.08.020(2) SMC requires that a proposed Substantial Development be “consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and [the City of Sammamish Shoreline Master Program].”

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 will be vested to the development regulations as they exist on the day the application is complete. (See Conclusions of Law A.3 *et seq.*, below, for an explanation of this statement.)

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [SMC 25.08.050(4) and 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

A. Overview

- A.1. Like the Findings of Fact, the Conclusions of Law in this Decision are grouped by topic only for the reader's convenience. Like the Findings of Fact, such groupings do not indicate any limitation of applicability to the decision as a whole.
- A.2. Based upon the record and the four days of hearing, the Examiner is reasonably convinced that any Decision he issues in this case will be appealed to the SHB. There is so much antagonism and conflict among the various parties that not even a Solomon could craft a decision to satisfy everyone. This conclusion has not affected the Examiner's analysis of the evidence, but it does affect the Examiner's approach to the decision document.
- A.3. The "elephant in the room" must first be addressed: Is King County's Segment B application complete? The Department states rather clearly that it is not. (Exhibit 1:B17, § IV.6; 131, p. 8 *et seq.*) But the Department then goes on in the same paragraph in Exhibit 1 to ignore its own finding and require King County to provide the missing information after issuance of the SSDP. (Exhibit 1:B17, § IV.6) In its Closing Argument the Department suggests that the Examiner could deny the application due to its incompleteness. (Exhibit 131, p. 10, ll. 12 – 15) Counsel for the City opined during the hearing that the Examiner has the authority to remand the application to require compliance with application completeness requirements. (Statement of counsel on November 7, 2017)
- A.4. The SMP states that the provisions within Chapter 173-27 WAC apply to all development within SMA jurisdiction in the City. [SMC 25.08.070] (WAC provisions would apply even if the SMP

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didn't say so.) WAC 173-27-180(9)(f) clearly states that an SSDP application must contain a site plan which depicts "all existing and proposed structures and improvements including but not limited to; buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities." [Emphasis added] The 60% Plans arguably do not depict all buildings within the ELST corridor and definitely do not depict any utilities within the ELST corridor; they do depict some existing and (it would seem) all proposed drainage facilities. Therefore, the 60% Plans do not conform with the content requirement of WAC 173-27-180(9)(f). On the surface of it, the 60% Plans are incomplete and, thus, the SSDP application was incomplete. The application should never have been processed by the Department until the plans had been revised to contain all required information.

- A.5. It would be wrong to defer compliance with a requirement that must be fulfilled to have a complete SSDP application until after issuance of an SSDP. But here, the picture becomes a little muddled. Section 25.08.080 SMC states that all provisions of Chapter 20.05 SMC apply in processing SSDP applications. Subsection 20.05.040(3) SMC authorizes the Department Director to "waive any of the specific submittal requirements listed herein that are determined to be unnecessary for review of an application." That provision unquestionably gives the Department Director the authority to waive a submittal requirement contained in SMC 20.05.040, but does it also give the Director the authority to waive a WAC SSDP application completeness requirement? Ultimately, that question need not be answered.

The paragraph in Exhibit 1 that discusses application completeness does not state or even imply that the Director waived compliance with WAC 173-27-180(9)(f). That paragraph could be interpreted either of two ways: The Director must have implicitly waived inclusion of all buildings and utilities on the SSDP plans, thus making the application complete as submitted; or the Department chose to simply ignore the application content requirement for the time being, with compliance to be required at a later date, after the quasi-judicial SSDP process had been completed.

The Examiner was initially inclined to accord deference to the Department and assume that the former had happened. But the Department's Closing Argument clearly states that the County's application was incomplete – and makes absolutely no mention of the Director waiving any submittal requirements. (Exhibit 131, p. 8 *et seq.*) The Department describes the situation as "information that should have been provided prior to the hearing". (Exhibit 131, p. 10, l. 17)

- A.6. The Department deferred compliance with the application completeness requirement until after the (presumed) issuance of the SSDP to "keep[] the project moving." (Exhibit 131, p. 10, l. 4) The problem with the Department's "keep the project moving" approach – in addition to the basic fact that it rewards an incomplete application with a permit approval – is that without all the required information no one can say for sure whether the current plan would run into fatal problems, resulting in lack of compliance with SMA requirements. For example, the clearing limits may have to be expanded if utilities have to be relocated when the trail is widened. The extent of any such required changes simply cannot be known without the information required by WAC 173-27-180(9)(f). The

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Department's approach would have issues that are supposed to be subject to quasi-judicial review being decided administratively after the permit had been issued.

- A.7. The SHB denied an application on appeal because the site plans that the applicant had submitted did not contain all the information required by WAC 173-27-180(9). [*Friends of Seaview v. Pacific County*, SHB No. 05-017] That case was cited by both the Department and the County in their closing arguments, although each reached a different conclusion as to its relevance. (Exhibits 131, p. 8 *et seq.*; 132, p. 9) For its part, the Department suggests that "the Examiner [could] follow the [SHB]'s example in *Friends* and deny the SSDP application." (Exhibit 131, p. 10, ll. 13 – 14)
- A.8. The Examiner concludes that the County's application was incomplete because the site development plans (Exhibit 7) lack all information required for a complete application under WAC 173-27-180(9)(f).²² Specifically, they do not depict any utilities and may not depict all structures in the vicinity of the proposed construction. An incomplete application cannot be processed. An incomplete application creates no vested rights. An incomplete application cannot be cured by imposing a condition on the requested SSDP.

Three actions are possible: Remand, denial, or denial without prejudice. Remand would put the parties in an awkward position in that a remand is typically not considered a final action, and, thus, typically not considered ripe for appeal. The Examiner does not want to leave the parties in that position. Denial is a final, appealable action. But denial is not warranted where the problem is an incomplete application. Denial without prejudice is also a final, appealable action, but it is a denial which invites correction of a problem and resubmittal.

The Examiner will use the denial without prejudice option.

- A.9. The Decision could end here. But ending here would be unfair to the parties and (arguably) to the SHB as it would deprive them of the Examiner's analysis of the voluminous record developed in this case. Therefore, the Examiner will provide a substantive analysis of the evidence in this record.
- A.10. The project for which the County seeks approval is conversion of about 3.5 miles of the Interim Trail into the Master Plan Trail. The proposed conversion will widen the trail from its present 8 – 12 feet of gravel surface to an 18 foot wide section: 12 feet of paved trail surface with a 2-foot gravel shoulder and 1-foot clear zone on each side. That is the project.

²² If the only omission were a building or two within the 3.5 mile long Segment B ELST right-of-way, the Examiner would consider such absence a minor oversight, a *de minimis* omission. But that is not the situation here. Here, the plans completely omit any indication of utility lines within the ELST Corridor. The record discloses that there are numerous water and sewer lines which cross beneath the trail. (Exhibit 40) The County's response was to assert that those facilities are "not relevant to the City's review of the [SSDP] as it addresses matters outside the scope of the [SMA] and the City of Sammamish [SMP]." (Exhibit 52) That assertion flies in the face of the WAC 173-27-180(9)(f) requirement that such facilities must be depicted on SSDP site plans in order for an application to be complete.

The Department wants the County to reduce the width of the Master Plan Trail in unspecified areas by an unspecified amount. The Department argues that potential width reductions may be required to comply with mitigation sequencing provisions of the SMC: A reduced width might allow further avoidance of critical areas impacts. But it seems to this Examiner that such a request, presented in the open-ended fashion as here, is akin to arguing that the Port of Seattle could have further reduced impacts of its Third Runway project if only it had shortened or narrowed the runway. Or that the state could reduce wetland impacts of an interstate highway project if only it would reduce the width of the travel lanes.

Shifting the alignment of a proposal to avoid impacts is one thing. Even reducing the width of a proposal for a short segment to avoid a critically important feature could be reasonable. But changing a proposal simply to further reduce impacts on low-value wetlands that have already been avoided/reduced by alignment shifts and use of retaining walls does not seem justified. And that is what is being requested here. The Examiner is inclined to agree with the County that the primary reason the Department wants the Master Plan Trail width reduced is to reduce the impact of the trail on private improvements located within the ELST right-of-way. (Exhibit 131, p. 11 *et seq.*, especially p. 13) That is not a sufficient or legally sound reason to try to change a fundamental aspect of the proposal.

- A.11. Most, if not all, of the objections to the proposed Master Plan Trail through Segment B are from property owners whose properties are bisected by the ELST right-of-way or who have improvements – stairs, bridges, fences, gates, driveways, parking areas, decks, docks, boat launches, landscaping, etc. – within the ELST right-of-way. And in almost all cases, those objecting also state that they support the ELST in principle, enjoy using it, and look forward to using the completed Master Plan Trail. Their objections are almost exclusively directed at how the widened Master Plan Trail will adversely affect them, their property, and the improvements on their property.

In many cases, those improvements pre-date King County's acquisition of the ELST right-of-way; they were apparently installed during the railroad's control of the right-of-way, when the railroad apparently didn't care what people did within the right-of-way so long as it didn't adversely affect the single rail line that ran through the right-of-way. In some cases, permits for those improvements were issued by King County itself. King County is now telling those owners that they have essentially no rights to those improvements; that it will be up to the County to decide what stays and what goes; that if improvements are allowed to remain, the owners may have to pay King County for the privilege of private use of public property.

It is no wonder that the property owners are upset. How the ownership issues will ultimately turn out remains to be seen. Resolution of the ownership disputes is far beyond the scope of both this Examiner's authority and the scope of concern of an SSDP application. Resolution of the ownership issues is a matter for the courts to decide.

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As a human being, the undersigned Examiner has a great deal of sympathy for the affected owners. But any personal sympathy cannot affect or alter the evaluation of the requested SSDP. The Examiner is required to base his land use decisions upon duly adopted laws and ordinances, and may not consider equitable defenses. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] In *Chaussee* the undersigned was faced with a situation in which the last segment of a proposed land division was the only segment legally subject to a new law enacted by the Snohomish County Council which clearly worked a significant hardship on Chaussee. He essentially wanted the undersigned to waive its application to the last segment of his project. The undersigned concluded that he had to apply the applicable law as it was written without consideration of any hardship that might befall Chaussee. The State Court of Appeals concurred.

The private improvements which property owners (and, implicitly, the Department) want the Examiner to protect by narrowing the width of the Master Plan Trail are all within the ELST right-of-way. King County has submitted voluminous evidence, which has been accepted by the City Attorney, to demonstrate that it owns the ELST right-of-way. Thus, for the purposes of this application, those private improvements all lie on King County property. The Examiner simply cannot deny or condition an otherwise compliant SSDP application to avoid impacts to things which lie within the ELST right-of-way and, thus, within the control of the applicant. Resolution of those many property rights conflicts must occur in another forum at another time.

- A.12. Once application completeness and impact on private structures within the ELST Corridor are removed from consideration, evaluation of the ELST Master Plan Trail SSDP becomes fairly simple and straight-forward. The Conclusions of Law which follow demonstrate that the proposal as currently configured, properly conditioned, complies with all applicable requirements of the SMP. Therefore, if the application had been complete and if the additionally required information disclosed no fatal problems, it could have been approved with appropriate conditions.
- A.13. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
- B. SMP Compliance
- B.1. Subsection 25.08.020(2) SMC requires that a proposed Substantial Development be “consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and [the City of Sammamish Shoreline Master Program].”
- B.2. “A use that is consistent with specific shoreline use regulations in the SMP is presumed to be consistent with the shoreline policies in the SMA.” [*The Log Foundation et al. v. City of Seattle*, SHB No. 15-003c, citing *Valero Logistics Operation, LP, v. City of Tacoma*, SHB No. 06-001]
- B.3. Since Lake Sammamish is a Shoreline of Statewide Significance, compliance with SMC 25.05.030 is required. The evidence demonstrates compliance with all six provisions in SMC 25.05.030. Completion of this segment of the regional trail would recognize and protect statewide interest over local interest. [SMC 25.05.030(1)] The trail would not actually abut the lake shoreline at any point,

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but it has been designed to minimize impacts to delineated critical areas and to allow wildlife to cross it in numerous places. [SMC 25.05.030(2) and (4)] Completion of the Master Plan Trail would be a long-term benefit to the region by providing another segment of regional trail for use by the area's many residents. [SMC 25.05.030(3)] While the Master Plan Trail would not provide direct physical access to Lake Sammamish, it's completion would make it easier for more people to enjoy the lake vistas that are available along its length. [SMC 25.05.030(5)] Improving the ELST by definition would increase recreational opportunities along the Lake Sammamish shoreline corridor. [SMC 25.05.030(6)]

- B.4. A trail is considered a "transportation use" under the SMP. [SMC 25.02.010(89)] Transportation uses are permitted uses in the Lake Sammamish Shoreline Residential Environment. [SMC 25.07.010, Table 25.07.010-1] The ELST would also be considered a "Water-Enjoyment Use," a sub-category of "Water-Oriented Uses." [SMC 25.02.010(93) and (94)]
- B.5. All proposals within the SMA jurisdictional area must comply with the requirements of Chapter 25.06 SMC. Sections 25.06.005, .010, and .040 SMC do not contain review compliance requirements applicable to Segment B.²³
- B.6. Section 25.06.020 SMC contains environmental protection requirements. Subsection (1) contains the same mitigation sequencing requirements as are contained in SMC 21A.50.135(1). King County has shifted the trail centerline east or west where possible and used retaining walls to avoid critical area impacts; the County has eliminated the parallel equestrian trail and used retaining walls to minimize impact on adjacent wetlands; the County is compensating for wetland impacts with mitigation meeting the ratios required under Chapter 21A.50 SMC and compensating for stream impacts by providing fish-passable culverts on six streams that would benefit from such an improvement. The proposal complies with subsection (1).

Subsections (2), (3), (4), (6), (8), (12), (13), and (16) clearly do not apply to the proposal.

The proposal complies with subsection (5) by minimizing its clearing limits as much as practicable given the need to build walls in a narrow, linear corridor. The walls are specifically intended to minimize the amount of grading and clearing required to improve the Interim Trail to the Master Plan Trail standard.

The proposal complies with subsection (7) because mitigation is included consistent with Chapter 21A.50 SMC. In addition, the record contains no evidence that the proposal would have a negative impact on Lake Sammamish or its shoreline.

²³

Section 25.06.005 SMC contains no project review requirements. Section 25.06.010 contains an "inadvertent discovery" requirement, but that is not a review requirement. Section 25.06.040 SMC pertains to restoration projects; the proposal is not a restoration project.

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As previously noted, the shoreline setback requirements of subsection (9) do not apply to the proposal because, by definition, setback requirements apply to structures [SMC 25.02.010(76)] and a trail is not a structure by definition [SMC 25.02.010(87)].

Given the above, the VEA requirement in subsection (10) also does not apply as it is intended to apply to a project that “affects applicable shoreline setbacks.” [SMC 25.06.020(10)(a)(i)] Since the shoreline setback is not applicable, neither is the VEA.

Likewise, subsection (11) does not apply as the shoreline setback does not apply.

The proposal complies with subsection (14) because King County has not sought any buffer reduction, averaging, or truncation under Chapter 21A.50 SMC.

Subsection (15) seems by omission to prohibit trails within critical areas in SMA jurisdictional areas. The Department made no mention of this apparent problem when it concluded that the proposal complied with SMC 25.06.010. (Exhibit 1:B15, §IV.3.b) The term “critical area” is not defined in the SMP, but is defined in Title 21A SMC: Critical areas include wetlands and streams, but not their buffers. [SMC 21A.15.254] Section 25.01.070 SMC unequivocally states that virtually all provisions in Chapter 21A.50 SMC are considered part of the SMP. Subsection 21A.50.300(1) SMC allows alterations to wetlands if certain requirements are met. Thus, trails could impact wetlands under Chapter 21A.50 SMC. Since impacts to critical areas and their buffers within SMA jurisdiction are to be regulated pursuant to Chapter 21A.50 SMC, it would make little sense to conclude that a trail could not impact a wetland. Such impact most certainly must be minimized as much as possible, but to hold that such impact is not allowed would be inconsistent with the rest of the SMC.

- B.7. To the extent that SMC 25.06.030 applies, the proposal would comply because it provides some visual access to the Lake Sammamish shoreline.
- B.8. The proposal would comply with SMC 25.06.050 because King County has agreed to meet the City’s current stormwater control regulations. The preliminary drainage materials in this record indicate that the proposal is able to meet those regulations.
- B.9. Transportation uses must meet the requirements of SMC 25.07.100(2) – (9). (Subsection (1) contains no requirements.) The proposal would meet subsection (2) because the plans indicate that stormwater would be managed in accordance with the City’s 2016 stormwater regulations, the most current adopted stormwater regulations in the City. (Subsection (3) does not apply to trails.) Even though subsection (4) applies only to “New roads,” not to trails, the proposal would meet its requirements even if they did apply because stormwater would be managed in accordance with the City’s 2016 stormwater regulations, the most current adopted stormwater regulations in the City. The proposal would meet subsection (5) because it does not touch the actual shoreline at any point and shoreline stabilization is not necessary. (Subsections (6), (8), and (9) apply to parking facilities. There are no parking facilities associated with Segment B.) The proposal would comply with subsection (7)

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because the Master Plan Trail is to be developed on the existing railroad roadbed using retaining walls to minimize topographic alterations; the trail's width cannot be further reduced without adversely affecting its safety and utility.

- B.10. Even though trails are, by definition, transportation uses, the Master Plan Trail could also be considered as a "Public Recreational Use." (That term is not defined in Chapter 25.05 SMC.) Public Recreational Uses are also permitted uses in the Lake Sammamish Shoreline Residential Environment. [SMC 25.07.010, Table 25.07.010-1]
- B.11. Public recreational uses must meet the requirements of SMC 25.07.090(1) – (6). Subsection (1) requires compliance with underlying zoning; compliance with subsection (1) will be addressed in the next nine Conclusions of Law. The proposal would comply with subsection (2) because it is, by definition, a water-oriented use and it would provide visual access to the shoreline. (Subsection (3) applies to "structures." By definition, the proposed Master Plan Trail is not a structure as it consists only of uncovered paved areas, located partly on structural or nonstructural fill. [SMC 25.02.010(87)] Subsection (4) applies only to non-water-oriented uses.) The proposal would comply with subsection (5) because it provides a pedestrian connection between the Parkway and the ELST near the Parkway NE/NE Louis Thompson Road intersection. The proposal would comply with subsection (6) because proposed landscaping would include native, self-sustaining vegetation.
- B.12. Zoning regulations for trails are contained in SMC 21A.30.200 - .220. Section 21A.30.200 does not apply: It requires that trail easements be provided within certain types of land developments.
- B.13. The proposal would comply with SMC 21A.30.210(1) because it is using an existing railroad roadbed and is clearing only that area minimally needed to construct the proposal. This section also refers to consistency with Chapter 21A.50 SMC, which will be addressed in a subsequent Conclusion of Law.
- B.14. Properly conditioned, the proposal could comply with SMC 21A.30.210(2). This subsection requires that trails "should be designed and constructed to encourage users to remain on the trail, to diminish the likelihood of trespass and to promote privacy for adjacent landowners." The County complied with that code provision in development of the Interim Trail: It placed gates across most pedestrian crossings. Those gates serve to prevent trespass onto adjacent private property along the many paths which lead to private properties between the ELST and the lake. But the County now says it will not replace those gates when the trail is widened because to do so would fence off the public from public lands, by which it means the portion of the ELST right-of-way which is not physically encumbered by the trail. But by not gating the paths to prevent trespass onto the adjacent private properties, the proposed plan would facilitate trespass by trail users onto those properties in direct contravention of the requirement of subsection (2). To ensure compliance with this provision, King County would either have to replace the gates after the trail is widened or install gates at the outer edge of the ELST Corridor where paths lead to private property.

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- B.15. The proposal complies with SMC 21A.30.210(3). Essentially, that subsection provides that trails “should be designed consistent with” the AASHTO Bike Guide and that clearing should be the minimum necessary. First, the requirement regarding the AASHTO Bike Guide is phrased as a “should,” not a “shall.” “Should” does not mandate, it suggests. Therefore, compliance with the Bike Guide is not mandatory. Second, even though the subsection refers to “AASHTO standards,” the Bike Guide contains guidelines, not rigid standards. Adopting guidelines does not convert “shoulds” to “shalls.” The City has adopted guidelines, not standards. The very language of the Bike Guide makes it clear that its contents are not rigid standards.

Having said that, the Master Plan Trail design is consistent with the AASHTO Bike Guide. The Guide recommends a 12-foot paved trail where volumes will exceed 300 users in the peak hour and where pedestrians comprise more than 30% of the users. Both situations apply here. The peak hour use factor is at or very near 300. Alexander is splitting hairs: It makes no sense to build a trail to a standard that will be outdated within a short time after completion. Further, the evidence indicates that user complaints are leading King County to widen existing 10-foot trails to 12-feet. Given Segment B’s placement in the regional trail system, it should be built to a 12-foot standard to begin with – just as were the segments to its north and south, both within the City and in Issaquah and Redmond.

Clearing limits have been reduced to a practical minimum. The testimony is compelling that even narrower clearing limits would be impractical and potentially unsafe for the workers: There simply must be adequate space beside the trail for workers to safely construct the retaining walls that are necessary to reduce the width of the trail’s footprint.

- B.16. Subsection 21A.30.210(4) SMC contains seemingly contradictory provisions. The first sentence (sensitive area avoidance/mitigation required pursuant to Chapter 21A.50 SMC) is clear and consistent with the fifth sentence (mitigation required consistent with Chapter 21A.50 SMC). The second sentence requires mitigation of trails “even ... on existing corridors.” The third sentence requires expansion of wetland and stream buffers “to compensate for the total area of the trail corridor”. But the fourth sentence says such expansion is not required for trails on “existing improved corridors, including ... railroad rights-of-way within wetland or stream buffers.”

The fourth sentence must logically be read to modify and limit the third sentence, otherwise they would be in direct conflict one with the other. Thus, the requirement to expand wetland and stream buffers does not apply to the ELST as it is located on an existing railroad roadbed within a railroad right-of-way. Thus, for Segment B, subsection (4) requires only that mitigation comply with Chapter 21A.50 SMC. Compliance with Chapter 21A.50 SMC will be addressed shortly.

- B.17. Subsection 21A.30.210(5) does not apply because the ELST is located on an existing corridor.

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- B.18. Assuming that the proposal complies with Chapter 21A.50 SMC, it would also comply with SMC 21A.30.210(6). The proposal includes split rail fencing where the trail passes adjacent to wetlands to deter human access while allowing animal passage.
- B.19. The proposal complies with SMC 21A.30.210(7): Impervious paving is warranted given that the ELST is a high volume, regional trail. Dispersion of stormwater is proposed where feasible along Segment B.
- B.20. Section 21A.30.220 SMC pertains to maintenance of the completed trail; it does not establish a review criterion or development standard.
- B.21. The Department evaluated compliance with SMC 25.07.110, Utilities regulations. (Exhibit 1:B16, § IV.4.c) Since the submitted development plans (Exhibit 7) depict no utilities, the Examiner concludes that it would be premature to conclude that those regulations apply to the project or that the proposal complies with those regulations.
- B.22. As has been noted, most provisions of Chapter 21A.50 SMC, Environmentally Critical Areas, are considered to be part of the SMP. Of the many types of critical areas regulated under Chapter 21A.50 SMC, the proposal would affect only wetlands and streams.²⁴

The preponderance of the evidence demonstrates compliance with applicable regulations for protection of wetlands. The proposal to use an off-site wetland mitigation bank in lieu of on-site replacement of permanently impacted wetland areas is reasonable given the proximity of the Parkway to the ELST and the resultant inability to provide code-compliant buffers for any newly created wetland areas.

The preponderance of the evidence demonstrates compliance with applicable regulations for protection of streams. What little impact there will be to streams is more than offset by the proposed mitigation.

- B.23. The project as it is currently proposed would comply with the SMP's requirements. Whether it will still comply when the additionally required information is added to the development plan set obviously cannot be pre-judged.

C. Conditions

- C.1. Analysis of the Recommended Conditions in this Decision, like the preceding analysis of SMP compliance, is essentially hypothetical since the application is not complete. The Conclusions of Law

²⁴ The ELST crosses Class 3 wellhead protection zones, the least sensitive of the Critical Aquifer Recharge Areas ("CARAs") regulated under Chapter 21A.50 SMC, at its southern end. (Exhibit 16:B727) Since the "new trail surface will be non-pollution generating impervious surface ... water quality treatment facilities are not required." (Exhibit 16:B800, § 4.5, ¶ 1) The project will not impact CARAs. (Exhibit 16:B800, § 4.5, ¶ 2)

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set forth in this section of the Decision are subject to revision depending upon what a complete application reveals.

- C.2. King County did not challenge Recommended Conditions 1, 11, 13, and 15. The reference to Exhibit 7 in Recommended Conditions 1 and 13 must be changed to “Exhibit *n*” in view of the fact that Exhibit 7 is the plan set that is incomplete. The “subject to applicable conditions of approval specified by the Hearing Examiner” in Recommended Condition 1 would be unnecessary as the decision would be listing the conditions of approval. Otherwise, those four Recommended Conditions are reasonable, capable of accomplishment, and reasonably related to SMA concerns. They would be imposed as conditions of approval with the two changes noted herein.
- C.3. Recommended Condition 2. Contrary to King County’s assertion in Exhibit 71, this condition does not require the County to prepare “a new comprehensive survey”. The language says that an “updated survey” not more than one year old is to be provided when Construction Permit plans are submitted. “Updated” does not inherently mean “new comprehensive.”

However, given the County’s objection to the wording, it would seem that the Department’s proposed wording is amenable to misinterpretation. King County’s suggested alternative is quite clear to the Examiner with one exception. The clause “where changes are identified” is grammatically unclear and needs to be changed. As proposed, the “changes” could mean changes in features on the ground or changes in the survey. A simple change to the wording of the clause would solve the problem.

The Examiner would use King County’s version of Recommended Condition 2, with that minor change.

- C.4. Recommended Condition 3. This condition inserts the City into possible property rights disputes between the County and owners of improvements that have been constructed within the County’s ELST right-of-way. The SSDP should not be concerned with those private property disputes.

The Examiner would omit Recommended Condition 3.

- C.5. Recommended Condition 4. First, as has been previously concluded, the shoreline setback applies to structures; uncovered paved areas and fill are not structures by SMC definition. Second, SMC 25.06.020(1) generally calls for mitigation of otherwise not mitigated environmental impacts. This hearing record does not disclose any specific environmental impacts that would flow from widening the trail in those few places where the widened trail would be within 50 feet of the Lake Sammamish OHWM. Without specifically identified impacts needing mitigation, the subsection does not apply. Third, SMC 25.06.020(5) calls for general minimization of clearing and grading. It has nothing directly to do with the shoreline setback. Fourth, SMC 25.07.100(3) requires new transportation facilities, “not including trails, [to] be located outside of the shoreline setback”. This is an express authorization for new trails to be located within the shoreline setback. (It could be argued that this

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provision does not apply to work involving existing trails, but such a narrow reading would make little sense: A totally new trail could be built within the shoreline setback, but an existing trail within the shoreline setback could not be expanded? The Examiner declines to apply that illogical reading.) Thus the condition is without foundation in the SMC and should be omitted.

The Examiner would omit Recommended Condition 4.

- C.6. Recommended Condition 5. Since the shoreline setback does not apply, the VEA requirement also does not apply.

The Examiner would omit Recommended Condition 5.

- C.7. Recommended Condition 6. The reference to the VEA requirements in this condition is not necessary since VEA requirements do not apply. In addition, the Department's language could be interpreted to relate to all vegetation within the ELST right-of-way whether existing or newly planted by the County.

The Examiner would revise Recommended Condition 6 to follow King County's alternative without the reference to VEA requirements. For consistency, the Examiner would change the County's "clearing and grading" to the Department's "Construction Permit."

- C.8. Recommended Condition 7. King County initially requested that this condition be revised. (Exhibit 71) In its closing it requested that it be omitted. (Exhibit 132)

The Examiner agrees with King County's objections to this condition as set forth in Exhibit 71: It is overbroad and not supported by SMC provisions. The trail project is largely exempt from Chapter 21A.37 SMC tree regulations; there is no authority in that chapter for a requirement that a new tree inventory be provided.

King County's suggested alternative is reasonable but needs one clarification. The reference to "clearing and grading application" in the concluding sentence uses a term that the Department apparently does not use. The Department uses "Construction Permit application" to refer to clearing, grading, etc. permit applications.

The Examiner would use King County's alternative but with the Department's "Construction Permit application" term.

- C.9. Recommended Condition 8. The Examiner agrees with King County that this condition should be omitted. First, since most of Chapter 21A.37 SMC does not apply, this condition is trying to impose restrictions that are not appropriate. Second, the evidence is quite persuasive that employing standard tree protection measures would result in the removal of more trees, not preservation of more trees. Third, the Examiner concludes that alternative measures under SMC 21A.37.270(7) can be approved

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by the Examiner in the context of an SSDP review and that the alternative measures proposed by King County are appropriate.

Finally, to the extent the purpose of this condition is to force the County to reduce Master Plan Trail width, it is a mis-use of Chapter 21A.37 SMC.

The Examiner would omit Recommended Condition 8.

- C.10. Recommended Condition 9. The obvious objective of this condition is to force the County to reduce Master Plan Trail width. This objective is flawed for two major reasons. First, the time to consider major design changes (and the Examiner would contend that reducing the paved width from 12 to somewhere between 8 and 10 feet would be a major design change) is before the SSDP is issued, not afterward. Leaving trail width decisions to after issuance of the SSDP places them in an administrative forum for which there is no established procedure nor appeal process. Second, the voluminous record in this case fails to identify any wetlands along the ELST that are so valuable or so sensitive as to warrant forcing a reduction in the width of the proposed project. The adjacent wetlands are all Category 3 or 4 with low habitat scores. They simply are not major features.

The Examiner would omit Recommended Condition 9,

- C.11. Recommended Condition 10. The request to clarify this condition by making clear that a wetland mitigation bank would serve the same purpose as an off-site mitigation site is meritorious.

The Examiner would modify Recommended Condition 10 accordingly. Also, a minor grammatical error in the second sentence would be corrected.

- C.12. Recommended Condition 12. This condition is unnecessary: The submitted plans show more than adequate opportunities for wildlife to cross the trail. Compliance with the plans would preserve those crossing opportunities.

The Examiner would omit Recommended Condition 12.

- C.13. Recommended Condition 14. The Examiner sympathizes with King County on the requirement for on-call consultant mitigation report review. But frankly, the Examiner is at a loss to fashion a requirement that would appropriately limit the County's financial exposure.

The Examiner would modify Recommended Condition 14 in an as yet to be determined fashion.

- C.14. Recommended Condition 16. This Recommended Condition essentially recites part of the WAC 173-27-090 provisions regarding SSDP time limits. However, it doesn't recite that part of WAC 197-27-090(1) which allows the City to impose different time limits for "good cause."

The complexities of the project, the lengthy linear nature of the project, the number of permits that must be obtained from other jurisdictions, and the significant controversies which swirl around this SSDP application provide more than “good cause” to extend the basic term of the SSDP from five to seven years as requested by the County. Given the controversies, it is also appropriate to specifically reference the time limit tolling provisions of WAC 173-27-090.

The Examiner would use King County’s alternative version of Recommended Condition 16, but with one minor word change. The Examiner prefers to not use the word “applicant” in permit conditions to refer to the holder of the permit. “Applicant” is usually construed to refer to the original party seeking approval of the permit. But land use entitlement permits, such as SSDPs, “run with the land.” That means that a permit remains valid regardless of who owns the property. Therefore, it is possible (though perhaps not very likely in this case given the nature of the project) that someone other than King County could some day become the developer. To avoid any possible misunderstanding, the Examiner would replace "applicant" with “permittee.”

- C.15. In Conclusion of Law B.14, above, the Examiner concluded that gates that are removed need to be replaced either at the edge of the widened trail (essentially replacing the existing gates at the edge of the trail surface) or further out at or near the edge of the ELST right-of-way.

The Examiner would add such a condition.

- C.16. Section 173-27-190 WAC contains certain content and format requirements for any SSDP R which is issued:

(1) Each permit for a substantial development, conditional use or variance, issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140(5)(a) and (b).

(2) Permits for substantial development, conditional use, or variance may be in any form prescribed and used by local government including a combined permit application form. Such forms will be supplied by local government.

(3) A permit data sheet shall be submitted to the department with each shoreline permit. The permit data sheet form shall be as provided in Appendix A of this regulation.

Subsection (2) would allow the Examiner’s Decision to serve as the SSDP (if it were an approval). Subsection (1) would require that an additional condition be added. The data sheet required by Subsection (3) would be prepared by the Department when it transmitted the SSDP and supporting exhibits to the state as required by Chapter 90.58 RCW.


The Examiner would impose the additional condition required by Subsection (1).

C.17. If the application were complete and given the record in this proceeding, the Examiner would approve the requested SSDP subject to the conditions listed in the Appendix hereto.

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 **DENIES WITHOUT PREJUDICE** the requested Shoreline Substantial Development Permit.

Decision issued January 5, 2018.


John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ²⁵

Barbara Flemming, unsworn counsel
David Linehan, unsworn counsel
Kevin Brown
Betsy MacInnes
Mark Cross
Steve Oien
Shelly Bowman
Gene Morel
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²⁵ The official Parties of Record register is maintained by the City's Hearing Clerk.

Tom Hornish
Jennifer Baisch
Jennie Bailey
Lindsey Ozbolt
Charles Alexander

Tara Rose-Large
Mike Parrott
William Schultheiss
Nell Lund

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 228th 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 APPEAL

This Decision is final and conclusive subject to the right of review before the State Shorelines Hearings Board in accordance with the procedures of Chapter 90.58 RCW, the Shoreline Management Act of 1971. See SMC 20.35.080, Chapter 90.58 RCW, and Washington Administrative Code regulations adopted pursuant thereto for further guidance regarding Hearings Board appeal procedures.

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

If the application were complete and given the record in this proceeding, the Examiner would approve the requested SSDP subject to the following conditions:

1. All required Construction Permits must be issued in accordance with SMC Titles 14 and 16 before the County may commence Project construction. Final construction plans approved for Construction Permits showing the proposed Project shall be in substantial conformance with Exhibit *n*.
2. Within one year prior to submittal or resubmittal of any clearing and grading permit applications, King County will verify the accuracy of the existing survey and, where the need for changes is identified, update the site plan to accurately show dimensions and locations of all existing and proposed structures and improvements within or immediately adjacent to the construction limits, including but not limited to buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.
3. In accordance with SMC 25.07.090(6), an updated and final landscaping plan shall be provided at the time of Construction Permit application submittal to ensure that native, self-sustaining vegetation is utilized.
4. The Project proposes to remove Significant trees; therefore, all significant tree removal shall be in substantial conformance with the arborist report (Exhibit 61) and tree preservation plans (Exhibit 62). If more than two years elapse between the July 7, 2017, arborist report and submission of a Construction Permit application, an updated arborist report and tree inventory will be required with that application submittal.
5. An updated final project mitigation plan meeting the requirements of SMC 21A.50.145 and demonstrating how the proposed mitigation for impacts to shoreline features will ensure no net loss of shoreline ecological functions shall be provided at the time of Construction Permit submittal. To provide the greatest benefit, off-site mitigation should be in the same basin if feasible. The County should work with the King County MRP to identify an in-lieu site that is most beneficial on a landscape scale. If an in-lieu site is available within the East Lake Sammamish Basin, where the impacts will occur, it should be given priority. If an appropriate in-lieu site is not available, use of a mitigation bank would be acceptable. The updated final project mitigation plan must include a detailed analysis of mitigation compliance with SMC 21A.50.310 and SMC 21A.50.350. If off-site mitigation is proposed, the updated final project mitigation plan must demonstrate how it is compliant with SMC 21A.50.310(4) and SMC 21A.50.350(2). The updated final mitigation plan shall also clearly document significant tree replacements within the shoreline overlay.
6. To ensure critical area functions and values are maintained through the proposed on-site mitigation, in addition to standard mitigation monitoring and maintenance requirements, prior to issuance of

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Construction Permits the County shall complete an ELST 2B segment-specific update to the ELST Vegetation Management Plan and King County trail maintenance program to ensure avoidance of impact to proposed mitigation sites through native plant clearing, pruning, gravel placement, or other measures.

7. Fences over six (6) feet tall and retaining walls exceeding 48 inches in height, as shown in the Project plans (**Exhibit n**), will require structural review during the Construction Permit review process.
8. (Modified version of Recommended Condition 14 would go here. Text to be determined.)
9. The grading, temporary erosion and sediment control, and drainage plans as shown on the approved Shoreline Substantial Development Permit (SSDP) are not approved for construction. Construction Permit(s) are required. Further detailed review of proposed construction plans by the City and County response to City comments and required corrections is required for Construction Permit issuance.
10. Any existing gates across pedestrian trail crossings shall be replaced by the permittee either in the new fences to be constructed along the edge of the trail or elsewhere within or at the edge of the trail right-of-way in such a fashion as to deter trespass by trail users onto abutting private properties.
11. The time requirements of WAC 173-27-090 shall apply, except that, based on the requirements and circumstances of this project, the authorization to conduct development activities under the SSDP [Substantial Development Permit] shall terminate seven (7) years after the effective date of this permit. All extension and tolling allowances in WAC 173-27-090 will be available to the permittee.
12. Except as provided in RCW 90.58.140(5)(a) and (b), construction pursuant to this permit shall not begin and is not authorized until twenty-one days from the date this permit is filed with the Washington State Department of Ecology and Attorney General as required by RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated.