



Community Development Memo

To: Alex Sidles, Burlington Hearing Examiner

Subject: Supplemental Information – Post Hearing Memo

Date: February 15, 2024

Project: LUP 6-23 – (Gages Crossing Townhome Subdivision)

From: Brad Johnson, Community Development Director

BJ

Mr. Sidles,

On January 18, 2024 you conducted a hearing on Burlington Land Use Application LUP 6-23 (Gages Crossing). At the close of the hearing, you asked that the City provide additional information on two areas of concern. First, you asked that we provide additional clarification or support for SEPA MDNS condition “2.c”, which requires the construction of turn restrictions on East Sharon Avenue. Second, you asked that we provide further guidance on the applicability of the City’s Fish and Wildlife Habitat Conservation Area (FWHCA) regulations to the portion of Gages Slough that crosses the development site. Each area of concern is addressed below.

Sharon Avenue Turn Restrictions

At the hearing, a significant amount of confusion surfaced regarding SEPA MDNS condition “2.c”, which appears on page 21 of the City’s Permit Recommendation and SEPA Determination (Hearing Examiner Exhibit “1”). As it appears in the Permit Recommendation and SEPA Determination this condition reads:

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

Much of the confusion stems from the phrase “prohibit eastbound traffic from entering Sharon Avenue” (emphasis added). As the Examiner correctly noted during the hearing, it is not possible for eastbound traffic to enter Sharon Avenue because Sharon Avenue does not continue on the east side of Anacortes Street. Staff concedes this condition was incorrectly

drafted. The condition was intended to prohibit vehicle traffic from turning off Anacortes Street and onto Sharon Avenue. This traffic would be moving west, rather than east.

From a procedural standpoint, the City would like to clarify that the condition discussed above is a SEPA MDNS condition as opposed to a recommended permit condition. Consistent with the City's SEPA policies, the MDNS was issued on December 11, 2023 in conjunction with the staff recommendation on the underlying permit. As noted in the Permit Recommendation and SEPA Determination (Page 20, Hearing Examiner Exhibit "1"), a 14-day appeal period was provided following the issuance of the MDNS. No appeal was filed during the appeal period. Had an appeal been filed, it would have been considered together with any appeal of the underlying land use decision, in this case by the City Council (BMC 14A.05.190.C.3 & 14.10.250.B).

Because no appeal was filed, the SEPA MDNS conditions are now final and not subject to further appeal. However, given that an obvious mistake was made, the City has no objection to waiving SEPA MDNS condition "2.c" through the issuance of a SEPA addendum under WAC 197-11-625. We have discussed this condition with our engineering staff, and they have concluded that the condition is not necessary to mitigate traffic and pedestrian safety impacts.

Applicability of FWHCA Regulations

Questions were also raised regarding the applicability of Fish and Wildlife Habitat Conservation Area (FWHCA) regulations to Gages Slough, or more specifically, the applicability of the riparian habitat buffer requirements identified in BMC 14.15.380. At the close of the hearing, you asked that we address this question. You also requested that we solicit guidance from the Washington State Department of Fish and Wildlife (WDFW). On January 29, 2024 the City contacted WDFW using the email address WDFW has established for local government assistance requests. As of February 15, 2024 the City had not received a response from WDFW.

For the reasons discussed below, the City finds that Gages Slough is a FWHCA and that a riparian habitat buffer does apply, but that the resulting buffer may be smaller, and no more restrictive, than the wetland buffer that has already been applied to the site. Regardless, the permit applicant's plans and project documents should be revised to reflect the existence of a riparian buffer, and to address any relevant mitigation criteria.

Gages Slough is unquestionably a FWHCA. The slough is explicitly identified as such in BMC 14.15.360.B.4. However, the specific question raised at the hearing is whether or not Gages Slough is a "stream" for purposes of applying the riparian habitat buffers in BMC 14.15.380.B. These buffer requirements specifically apply to any of the "waters of the state" listed in WAC 222-16-030 (BMC 14.15.360.B.2). Importantly, the water types listed in WAC 222-16-030 correspond to riparian habitat management guidelines published by WDFW and adopted by the City of Burlington for the purpose of establishing riparian buffers and protection standards (BMC 14.15.360.B).

Relevant to Gages Slough, WAC 222-16-030(1) specifies that “type S” waters include all waters, within their “bankfull” width, as inventoried as “shorelines of the state” under Chapter 90.58 RCW and the regulations promulgated under Chapter 90.58 RCW (Shoreline Management Act), including periodically inundated areas of their associated wetlands (emphasis added). Consistent with Shoreline Management Act (SMA) requirements, the City of Burlington has adopted a Shoreline Master Program (SMP) identifying the location and jurisdictional boundaries of shorelines of the state. In Burlington, shorelines of the state include the Skagit River and Gages Slough (BMC 18.07.010.A.1). Because the Skagit River is a “shoreline of the state” under the SMA, and because Gages Slough is a periodically inundated wetland associated with the Skagit River, it is a “type S” water and therefore subject to the riparian habitat buffer requirements in BMC 14.15.380.B.

Having established that Gages Slough is “water of the state”, the question then turns to identifying the applicable buffer width. To identify the required buffer, BMC 14.15.380.B specifies that WDFW’s current guidance document be used. The guidance document and a related online mapping tool are available using the following webpage links:

<https://wdfw.wa.gov/publications/01988> (guidance document)

<https://wdfw.maps.arcgis.com/apps/MapJournal/index.html?appid=35b39e40a2af447b9556ef1314a5622d> (site potential tree height mapping tool)

<https://wdfw.wa.gov/species-habitats/ecosystems/riparian#resources> (general information)

As the City understands this system, WDFW has replaced the previous recommendations, employing fixed buffer widths for different water types, with a “tree height potential” system that uses site specific ecological factors to identify an appropriate buffer width based on the height of the mature tree canopy that would be expected to occur on a site under natural conditions. The online mapping tool referenced above can be used to identify the tree height potential for different sites.

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

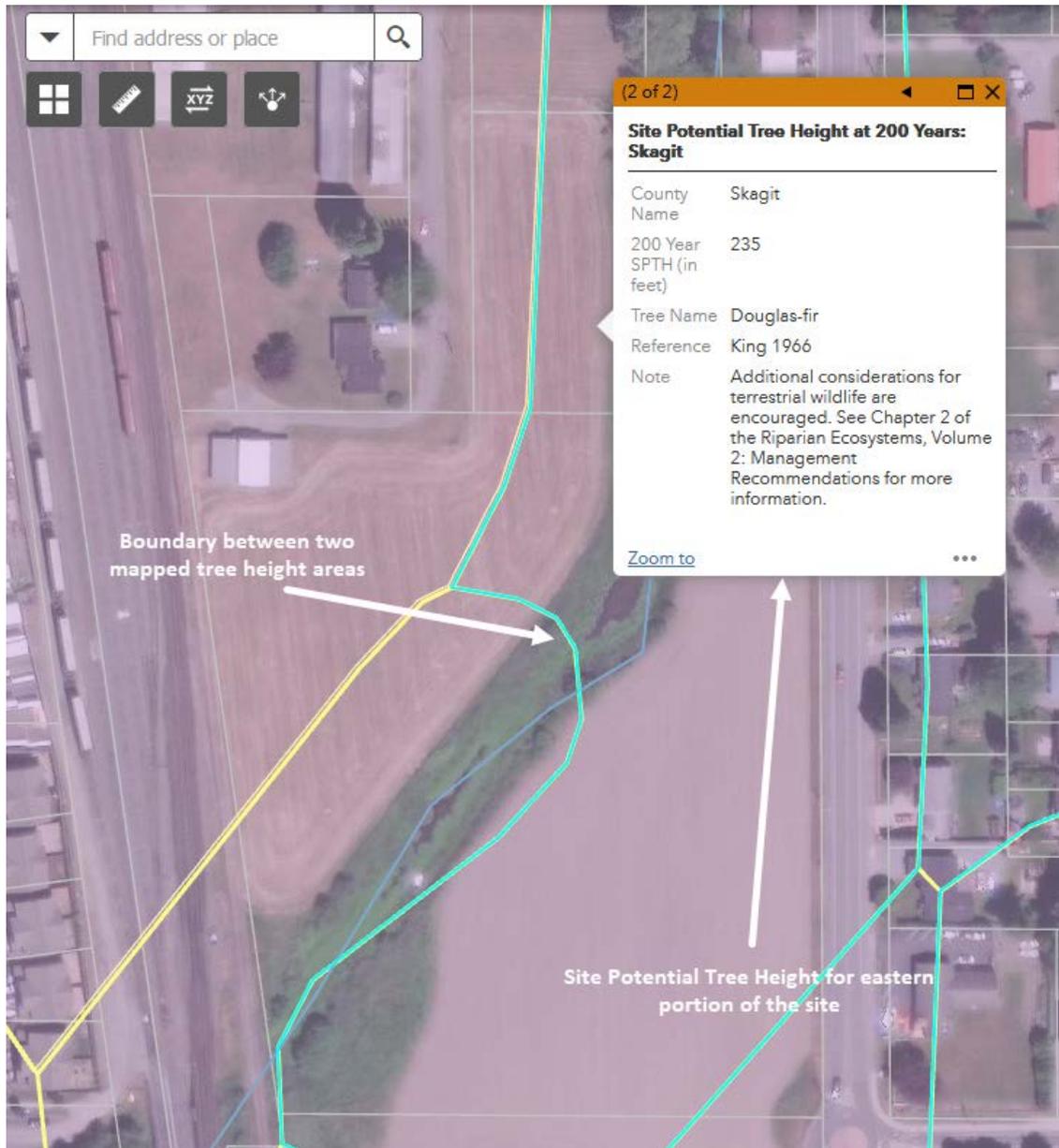
The City recommends adding a condition requiring the submittal, and approval, of a revised habitat assessment, mitigation plan, and design drawings prior to the approval of a grading permit or other construction approvals. To provide an opportunity for agency concurrence, the City further recommends that a condition of approval be added requiring that the revised

habitat assessment and mitigation plan be routed to WDFW and that an opportunity be provided for WDFW to comment.

Figure 1.



Figure 2.



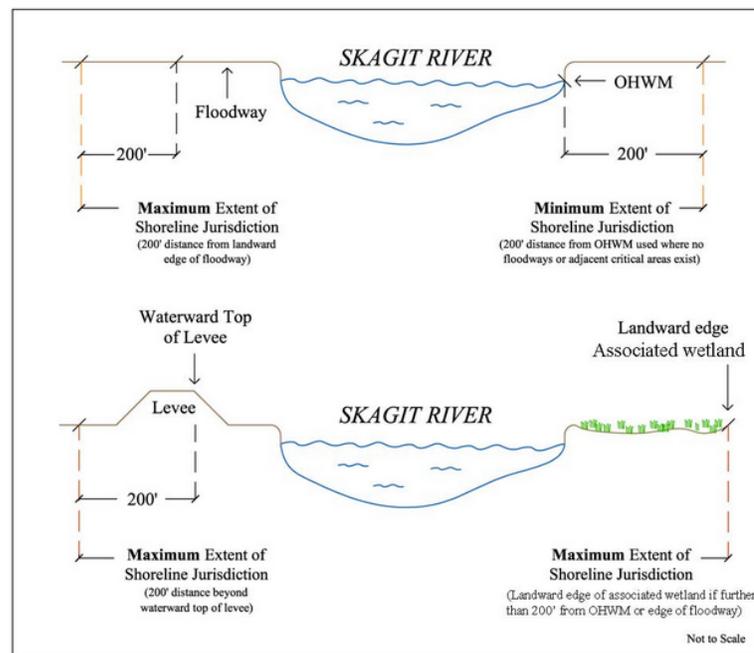
Additional Clarifications

The City would also like to offer the following additional clarifications regarding issues raised at the hearing, including (1) the jurisdictional boundaries of the Washington State Shoreline Management Act (SMA) (Chapter 90.58 RCW), and (2) an explanation of who the Skagit River Systems Cooperative (SRSC) is.

1. Gages Slough is subject to SMA jurisdiction because it has hydraulic continuity with the Skagit River. Gages Slough is not within 200 feet of the “ordinary high water mark” (OHWM) of the Skagit River and does not have an open water connection to the river. The jurisdiction of the SMA includes both “shorelines” and “shore lands”. Shorelines are open-water areas defined in the act, which includes the Skagit River. Shore lands, include (a) upland areas within 200 feet of the OHWM of a shoreline, (b) associated wetlands, and (c) floodways and contiguous floodplain areas (RCW 90.58.030(2)(d), (e), & (f)(v)(A)). Floodways and floodplains do not include areas protected by a dike or levee (RCW 90.58.030(2)(b)). As a result, in Burlington, the area covered by the SMA includes the Skagit River, the land between the dikes and the Skagit River, land 200 feet inland from the dikes, and Gages Slough. This is illustrated by figure 3.

From a regulatory standpoint, this means the regulations included in the City’s SMP apply only within the delineated boundaries of the Gages Slough wetlands. Direct impacts falling within SMA/SMP jurisdiction are regulated under the SMA/SMP, but buffer impacts are regulated under the City’s critical areas code (Title 14 BMC).

Figure 3. (From Burlington SMP – BMC 18.07.010.A)



For additional information on determining the jurisdictional boundaries of the SMA/SMP the City recommends the Hearing Examiner take notice of Chapter 5 of the Washington State Department of Ecology SMP Handbook.

<https://apps.ecology.wa.gov/publications/parts/1106010part5.pdf>

2. At the hearing the comments provided by the Skagit River Systems Cooperative (SRSC) were discussed extensively; however, the City did not explain who SRSC is, or the role they play in reviewing permits with potential critical area impacts. SRSC is a natural resources agency serving Sauk-Suiattle and Swinomish tribes. The City of Burlington coordinates with our tribal planning partners as government entities or agencies. The City considers SRSC an agency with unique natural resource expertise and affords their permit comments additional weight accordingly. This is supported by the City’s critical areas code (BMC 14.15.380.B) and Washington State regulations for identifying “best available science” (BAS) (WAC 365-195-910(1)).
3. The permit applicant has also submitted a post-hearing memo addressing questions raised by the Hearing Examiner. The City has reviewed the applicant’s post-hearing memo. The City has no significant concerns with the conclusions reached by the applicant’s critical areas consultant.
4. The City’s online code publishing contractor has not updated their website to reflect certain recently adopted amendments to the Burlington Municipal Code. Revised code sections are available on the City’s website using the link below.

<https://burlingtonwa.gov/105/Community-Development>

COMPREHENSIVE PLAN UPDATE - Adopted

The following revised code titles and maps will be **effective Monday May 22, 2023**:

Burlington Municipal Code chapters:

1. [Title 12](#) - Streets, Sidewalks and Public Places
2. [Title 13](#) - Sewage Disposal
3. [Title 14](#) - Environmental Regulations
4. [Title 14A](#) - Land Use Decisions
5. [Title 15](#) - Buildings and Construction
6. [Title 16](#) - Land Divisions and Adjustments
7. [Title 17](#) - Zoning

Maps:

1. [Zoning](#)
2. [Comprehensive](#)
3. [Special Planning Areas](#)

Click on links here to
access current updated
codes

Code titles not listed above, including Title 18 (Burlington SMP) can be access using the code publishing website.

<https://www.codepublishing.com/WA/Burlington/>