April 12, 2018

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **PREA170710**

CRESTLINE BUILDERS LLC
Preliminary Determination Appeal

Location: Parcel no. 0321049132

Appellant: Vasiliy Strizheus
represented by **Justin Park**
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King County: Department of Permitting and Environmental Review
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	April 3, 2018
Hearing Closed:	April 3, 2018

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS:

Background

1. The matter before the Hearing Examiner is an appeal by Crestline Builders LLC of the preliminary determination by the Department of Permitting and Environmental Review (DPER) that its proposed subdivision is not permissible under applicable County regulations and that groundwater monitoring wells are required in order to determine whether a wetland exists on the Property. Exhibits 20 and 21.

2. Crestline Builders LLC is the record owner of Parcel 0321049132 located on the north side of S 298th Street in the R-6 zone (Property). Crestline acquired the Property on February 16, 2016, with the intent to develop it as a residential subdivision. Testimony of Vasiliy Strizheus, managing member of Crestline Builders LLC. The record before the Hearing Examiner does not reveal the extent of the due diligence Crestline may have undertaken before acquiring the Property.

Definition of Wetlands, Wetland Indicators, and Delineation Manual

3. KCC 21A.06.1391 defines wetlands:

> [A]n area that is not an aquatic area and that is inundated or saturated by ground or surface water at a frequency and duration sufficient to support, and under normal circumstances supports, a prevalence of vegetation typically adapted for life in saturated soil conditions. For purposes of this definition:
>
> A. Wetlands shall be delineated using the wetland delineation manual required by RCW 36.70A.175;…

4. RCW 36.70A.175 requires that wetlands regulated under development regulations adopted pursuant to the Growth Management Act be delineated in accordance with the manual adopted by the Department of Ecology pursuant to RCW 90.58.380, which provides:

> The department [of ecology] by rule shall adopt a manual for the delineation of wetlands under this chapter that implements and is consistent with the 1987 manual in use on January 1, 1995, by the United States army corps of engineers and the United States environmental protection agency. If the corps of engineers and the environmental protection agency adopt changes to or a different manual, the department shall consider those changes and may adopt rules implementing those changes.

5. The Department of Ecology adopted the Corps of Engineers Wetlands Delineation Manual, January 1987 (1987 Manual) and the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coastal Region Version 2.0, May 2010 (Supplement) to delineate wetlands. The 1987 Manual is found in the record at Exhibit 30. The parties did not provide the Supplement as an exhibit; however, the Examiner has reviewed the Supplement and, pursuant to Rule XIII.C of the Hearing Examiner Rules of Procedure and Mediation (Hearing Examiner Rules), takes official notice of it.

6. The 1987 Manual defines saturated soil conditions:

> Saturated soil conditions. A condition in which all easily drained voids (pores) between soil particles in the root zone are temporarily or permanently filled with water to the soil surface at pressures greater than atmospheric.

Exhibit 30, page 114.[1]

7. Wetlands have three general diagnostic environmental characteristics referred to as parameters: (a) hydrophytic vegetation species which, due to morphological, physiological, and/or reproductive adaptation(s) have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions; (b) hydric soils; and (c) hydrology. 1987 Manual, Exhibit 30, pages 20-21.

8. Hydrology is often the least exact of the parameters. Indicators of wetland hydrology are sometimes difficult to find in the field. 1987 Manual, Exhibit 30, page 40.

9. The water source may be runoff from direct precipitation, headwater or backwater flooding, tidal influence, ground water, or some combination of these sources. 1987 Manual, Exhibit 30, page 40.

10. The 1987 Manual allows routine or comprehensive wetland determination methods. The routine method is used to make determinations rapidly and simply on sites that are not complex and is used in the vast majority of determinations. In contrast, the comprehensive approach should seldom be necessary and its use should be restricted to situations in which the wetland is very complex and/or is the subject of likely or pending litigation. 1987 Manual, Exhibit 30, pages 18-19. Procedures for both methodologies have been tested and found to be reliable. 1987 Manual, Exhibit 30, page 19. The 1987 Manual provides flowcharts for use of the routine and comprehensive wetland determination methods. Figure 14 applies to routine wetland determinations when an on-site visit is necessary; Figure 16 provides the steps involved in making a comprehensive wetland determination. 1987 Manual, pages 61-62 and 74-75, respectively.

11. When using the routine method, one primary indicator from any group is sufficient to conclude that wetland hydrology is present. Supplement, page 69. Surface soil cracks are a primary indicator of wetland hydrology. Supplement, Table 12, page 70.

[1] All page references are to the Bates number stamped on the exhibit contained in the official record.

12. The 1987 Manual acknowledges that site-specific conditions may require modification of field procedures, but cautions that the basic approach for making wetland determinations should not be altered (i.e., the determination should be based on the dominant plant species, soil characteristics, and hydrologic characteristics of the area in question). The user should document reasons for using a different characterization procedure than described in the manual.

DPER's Preliminary Determination

13. On July 21, 2017, Crestline submitted a request to DPER for a pre-application meeting for a residential subdivision of the Property. Exhibit A. The application included a proposed site plan and a study entitled "Geological and Hydrogeological GMA Critical Areas Wetland Report" prepared by SNR Company (SNR Report). The SNR Report is in the record at Exhibit 7. The SNR Report concluded that there are no wetlands on or within 300 feet of the Property.

14. On August 29, 2017, DPER Environmental Scientist III Colleen Kroe performed a site visit of the Property, during the growing season, conducting sampling at two points using Level 2 of the routine determination method. Exhibit B; testimony of Colleen Kroe. Ms. Kroe's qualifications are in the record at Exhibit F. At Sampling Point 1, she found primary indicators of hydrophytic vegetation, hydric soils, and wetland hydrology (surface soil cracks). Exhibits B and B-8. At Sampling Point 2, she found primary indicators of hydrophytic vegetation and wetland hydrology (surface soil cracks). The soils at Sampling Point 2 did not meet any of the hydric soil indicators, but may satisfy the Supplement's criteria for seasonally ponded soils, a category of problematic hydric soils. Exhibits B and B-9; testimony of Colleen Kroe.

15. The Supplement describes problematic hydric soils as follows:

> Some soils that meet the hydric soil definition may not exhibit any of the indicators presented in Chapter 3. These problematic hydric soils exist for a number of reasons and their proper identification requires additional information, such as landscape position, presence or absence of restrictive soil layers, or information about hydrology.

Supplement, pages 109-110. The Supplement provides six examples of problematic soils including seasonally ponded soils:

> **Seasonally Ponded Soils.** Seasonally ponded, depressional wetlands occur in basins and valleys throughout the Western Mountains, Valleys, and Coast Region. Most are perched systems, with water ponding above a restrictive soil layer, such as a hardpan or clay layer that is at or near the surface (e.g. Vertisols). Some of these wetlands lack hydric soil indicators due to limited saturation depth, saline conditions, or other factors.

Supplement, page 111.

16. Ms. Kroe followed the Supplement's procedures for problematic soils. She verified that indicators of hydrophytic vegetation and hydrology are present (Steps 1 and 2). She verified that the area is in a landscape position that is likely to collect or concentrate water in that it has a concave surface and a restrictive soil layer within 24 inches of the surface (Step 3). Step 4 offers five approaches to determine whether the problematic soils are hydric where hydrophytic vegetation and hydrology have been found. These approaches include water-table monitoring, which she recommended. Supplement, pages 109-115; Exhibits B-9 and 27; testimony of Colleen Kroe.

17. Ms. Kroe reviewed prior critical areas designations which verified wetlands on properties directly adjacent to or within 300 feet of the Property. In January 2007, DPER determined that a Category III wetland and Type N stream existed on the Property. Exhibit B-3. Among other things, DPER found at that time that more than one quarter of the total area of the wetland was seasonally ponded. Exhibit B-3, page 10. The wetland determinations for the other two properties are found in the record at Exhibits B-2 and B-4. The three properties are mapped on Exhibit B-5.

18. Two of these wetland determinations, including the determination for the Property, are more than five years old. Wetlands delineations generally expire after five years due to the fact that wetlands can change significantly in a five-year period due to changes and hydrology, land uses, and plant species composition. Exhibit 32. While two of the determinations have expired, the March 20, 2018, aerial photograph contained in Exhibit B-5 shows that the properties for which the wetland determinations were made as well as the property immediately to the north of the Property remain undeveloped and heavily vegetated.

19. Based on her site visit, review of the wetland determinations discussed above, and review the references and resources listed in Exhibit B-11 and the discrepancy between this information and the SNR Report, Ms. Kroe concluded that, in order to assess whether wetland hydrology is present during the growing season, Crestline should install a series of eight to ten groundwater monitoring wells on the Property prior to the start of the early growing season. Exhibit B-1.

20. Crestline contended that groundwater monitoring wells are not warranted, expensive and could produce "false positives." Exhibits 9 and 20. DPER offered Crestline the option of appealing its preliminary determination pursuant to KCC 20.20.030.D or proceeding with a subdivision application. Exhibit 20. See also, Exhibit 13. Crestline chose to appeal. Exhibit 21.

The SNR Report

21. Steven Neugebauer prepared the SNR Report. His qualifications are provided in Exhibit 33.

22. The SNR Report includes a wide-ranging criticism of a number of federal and state statutes and agencies, the 1987 Manual, Ecology's adoption of the 1987 Manual, and the assumed practices and motivations of Washington municipalities which are not relevant

to the matter before the Hearing Examiner and which the Hearing Examiner does not address.

23. The SNR Report states that it meets the criteria for the comprehensive method. Exhibit 7, page 24. However, the preponderance of the evidence is that it does not.

A. SNR used selected portions of the comprehensive method, omitting or altering Steps 3-10, 12, and 13 (10 of 21 steps) without documenting reasons for using a different characterization procedure than described in the 1987 Manual. Exhibits B and D; testimony of Colleen Kroe.

B. Rather than using the hydrology assessment methods prescribed for either the routine or comprehensive methods for on-site determination, SNR used well drill log data. Not only is the data not specific to the Property, the closest well drill location is more than one-quarter mile from the Property. The depths of the well drill logs SNR reviewed varied from 30 to 377 feet below the soil surface. Exhibit B; Exhibit 7, pages 144-173. In contrast, primary indicators of hydrology include a high water table (direct, visual observation of the water table 12 inches or less below the surface in a soil pit, auger hole, or shallow monitoring well) and saturation (visual observation of saturated soil conditions 12 inches or less from the soil surface as indicated by water glistening on the surfaces and broken interior faces of soil samples removed from the pit or auger hole). Supplement, Hydrology Indicators A2 and A3, pages 72-73.

C. Mr. Neugebauer testified that he does not find analysis of hydrophytic vegetation useful as it can occur in any "unmaintained stormwater facility." As explained below, he believes most areas identified as wetlands to be stormwater facilities.

D. Disagreeing with the term "hydrophytic vegetation," Mr. Neugebauer altered the data forms to refer to "wetland vegetation." Exhibit 7, pages 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142.

E. As discussed below, the SNR Report relied on criteria which are inapplicable to support its contention that wetland hydrology is not present.

24. The SNR Report contends that farmers mined relict peat bogs on the western ridge of the Green River Valley to obtain the organic peat materials for use in soil augmentation in the agricultural areas on the floor of the Green River Valley. Exhibit 7, pages 11, 100. For this reason, SNR characterizes virtually all of the lakes and ponds on the western ridge of the Green River trough as "manmade surface water features," which, in its opinion, filled with unsaturated zone flow groundwater creating irrigation reservoirs. Exhibit 7, pages 12, 13, 15. SNR similarly contends that agricultural drainage and irrigation ditch systems which were created in the late 1800s have been misidentified as natural streams. Exhibit 7, pages 16, 17. SNR contends that water in these "misidentified" streams is not "natural stream flow," but rather "surface water runoff" resulting from human-induced changes in the landscape including conversion of forested areas to agricultural land and creation of impervious surfaces. Exhibit 7, page 16.

25. SNR contends that once this "surface water runoff" reaches drainage systems, lakes, ponds, or wetlands, it becomes a "point source" under the Federal Clean Water Act, that it is no longer a water of the United States or a water of the State, and cannot provide wetland hydrology. Exhibit 7, pages 17, 29, 44, 53. Thus, in SNR's opinion, the large wetland to the north of the Property, shown in Exhibit 5, is not a wetland because the source of the hydrology is "storm water hydrology (permitted, point source MS4 storm water) that has been diverted into this area." Exhibit 7, page 29. See also, Exhibit 7, pages 44, 47.

26. In SNR's opinion, virtually all modern-day maps show incorrect surface water hydrology, incorrectly show man-made reservoirs as being natural lakes and ponds, and incorrectly identify stormwater detention areas as wetlands. Exhibit 7, pages 17-18, 28, 44.

27. SNR contends that the definition of saturated soils clearly identifies unconfined ground water aquifers as the only source of wetland hydrology. Exhibit 7, pages 59, 69, 70. See also, Exhibit 7, Wetland Data Forms, pages 121, 123, 125, 127, 129, 131, 133, 135, 137, 139. SNR explains that unconfined ground water aquifers are typically found in the near-water areas of the marine shoreline. Exhibit 7, pages 58, 60, 66. In Mr. Neugebauer's opinion, the only wetland areas that can generally form above the mean sea level are unique organic wetlands such as bogs, fens, vernal pools, and swamps. Testimony of Steven Neugebauer.

28. The Hearing Examiner finds that Ms. Kroe is the more credible witness.

29. Any Finding of Fact which may be deemed a Conclusion of Law is hereby adopted as such.

CONCLUSIONS:

1. As the Appellant, Crestline Builders LLC bears the burden of proof to show by a preponderance of the evidence that DPER' preliminary determination is in error. Hearing Examiner Rules, Rules XV.E.1 and XV.F.1.

2. In support of its contention that unconfined groundwater aquifers are the only source of wetland hydrology, SNR cites the following passage from the 1987 Manual:

> b) Analyze hydrologic data. Subject the hydrologic data to appropriate analytical procedures. Either use duration curves or a computer program developed by WES (available from the Environmental Laboratory upon request) <u>for determining the mean sea level elevation representing the upper limits of wetland hydrology</u>. … (Emphasis in SNR Report).

Exhibit 7, pages 50, 94.

Its reliance on this provision is misplaced. Step 8 of the comprehensive determination method directs the person conducting the analysis to summarize available hydrology data considering nine criteria (a through i). The passage to which SNR refers is found in

criterion i, which applies in circumstances where a nearby water body apparently influences the area. The 1987 Manual expressly provides OMIT IF GAGING STATION DATA ARE UNAVAILABLE. Exhibit 30, page 54 (capitalization in 1987 Manual). SNR does not contend that a nearby water body appears to influence any area on the Property, nor has it provided or analyzed gaging station data. Criterion i does not apply to the Property and does not support SNR's contention that the only possible source of wetland hydrology is an unconfined groundwater aquifer.

3. SNR's contention that an unconfined groundwater aquifer is the only possible source of wetland hydrology is not supported by the 1987 Manual which, as explained in the Findings above, provides that the water source may be runoff from direct precipitation, headwater or backwater flooding, tidal influence, ground water, or some combination of these sources.

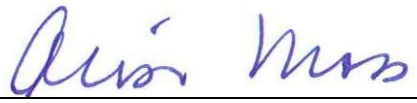
4. SNR's contention that any surface water runoff reaching a wetland is a "point source" which cannot provide wetland hydrology is not supported by the 1987 Manual which includes direct precipitation as a source of wetland hydrology.

5. Any Conclusion of Law which may be deemed a Finding of Fact is hereby adopted as such.

DECISION:

1. The appeal is DENIED.

ORDERED April 12, 2018.



Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE APRIL 5, 2018, HEARING IN THE APPEAL OF CRESTLINE BUILDERS LLC, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. PREA170710

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Kevin LeClair, Colleen Kroe, Justin Park, Vasiliy Strizheus, and Steven Neugebauer.

The following exhibits were offered and entered into the record on April 5, 2018:

Department-offered exhibits

Exhibit no. A	Department of Permitting and Environmental Review staff report to the Hearing Examiner for file no. PREA170710
Exhibit no. B	Internal DPER letter with investigation and critical areas comments, dated March 20, 2018 1. Internal Department of Development and Environmental Services letter with ecological critical areas comments, dated September 6, 2017 2. Letter from DPER to Alex Prokhor with critical areas designation no. CADS140120, dated June 13, 2014 3. Letter from DDES to Michelle Thompson with critical areas designation no. L07SA012, dated January 22, 2007 4. Sensitive area notice, dated January 21, 2004 5. iMap of critical areas reviews 6. Critical area review key 7. Flowchart of wetland determination 8. Wetland determination data form, dated August 29, 2017 9. Wetland determination data form, dated August 29, 2017 10. Flowchart of comprehensive wetland determination 11. Reviewed documentation, references, and resources in preparation of memorandum
Exhibit no. C	Internal DPER letter with ecological critical areas comments, dated September 6, 2017
Exhibit no. D	Excerpts from Corps of Engineers Wetland Delineation Manual; and Excerpts from Regional Supplement to the Corps of Engineers Wetland Delineation Manual
Exhibit no. E	Aerial map with marked indicators
Exhibit no. F	Resume of Colleen Kroe

Appellant-offered exhibits

Exhibit no. 1	Critical areas designation application form by Federal Way Methodist Church/Michelle Thompson, dated November 30, 2006
Exhibit no. 2	Letter from DDES to Michelle Thompson with critical areas designation no. L07SA012, dated January 22, 2007
Exhibit no. 3	DDES invoices to Federal Way United Methodist Church
Exhibit no. 4	Technical standard for water-table monitoring of potential wetland sites by U.S. Army Corps of Engineers, dated June 2005
Exhibit no. 5	iMap of neighborhood

Exhibit no. 6	*Not admitted: Design and installation of monitoring wells by U.S. Environmental Protection Agency, dated January 29, 2013*
Exhibit no. 7	Geologic and hydrogeologic GMA critical areas wetland report by SNR Company, dated February 2017
Exhibit no. 8	Internal DDES letter with ecological critical areas comments, dated September 6, 2017
Exhibit no. 9	Letter from Justin Park to DPER with response to ecological critical area comments, dated October 20, 2017
Exhibit no. 10	Letter from DPER to Justin Park with wetland investigation for Crestline Subdivision, dated November 1, 2017
Exhibit no. 11	Letter from Justin Park to DPER with response to ecological critical area comment, dated November 8, 2017
Exhibit no. 12	Email from DPER to Justin Park with response to critical areas, dated November 9, 2017
Exhibit no. 13	Letter from DPER to Justin Park with preliminary determination for proposed plat, dated November 9, 2017
Exhibit no. 14	Email from DPER to Justin Park, dated November 15, 2017
Exhibit no. 15	Email from Justin Park to DPER, dated November 15, 2017
Exhibit no. 16	Email from Justin Park to DPER, dated November 15, 2017
Exhibit no. 17	Email from Justin Park to DPER, dated January 2, 2018
Exhibit no. 18	Email from DPER to Justin Park, dated January 2, 2018
Exhibit no. 19	Email from Justin Park to DPER, dated January 15, 2018
Exhibit no. 20	Email from DPER to Justin Park, dated January 16, 2018
Exhibit no. 21	Statement of appeal, dated January 24, 2018
Exhibit no. 22	Installing monitoring wells/piezometers in wetlands by WRP, dated August 1993
Exhibit no. 23	Meeting attendees sign-up sheet, dated September 6, 2017
Exhibit no. 24	Mandatory pre-application conference, dated September 6, 2017
Exhibit no. 25	Map of SE ¼ SEC 35, T 21 N, R
Exhibit no. 26	Notation on installing monitoring wells/piezometers in wetlands by WRP, dated August 1993
Exhibit no. 27	ERDC/EL excerpts
Exhibit no. 28	Wetland determination data form, dated August 29, 2017
Exhibit no. 29	Photographs of property x
Exhibit no. 30	Wetlands delineation manual by U.S. Army Corps Engineers, dated January 1987
Exhibit no. 31	Regulatory guidance letter by U.S. Army Corps Engineers, dated June 14, 2005
Exhibit no. 32	Wetland delineation resources by WA State Department of Ecology
Exhibit no. 33	Resume of Steven Neugebauer
Exhibit no. 34	Field indicators of hydric soils in the United States by United States Department of Agriculture, dated 2017
Exhibit no. 35	Munsell color 10YR diagram of soil-color charts, dated 2009

AM/ed

April 12, 2018

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **PREA170710**

CRESTLINE BUILDERS LLC
Preliminary Determination Appeal

I, Elizabeth Dop, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED April 12, 2018.

Elizabeth Dop
Legislative Secretary

Archuleta, Wally
Department of Permitting and Environmental Review

Carlson, Joanne
Department of Permitting and Environmental Review

Goll, Shirley
Department of Permitting and Environmental Review

Kroe, Colleen
Department of Permitting and Environmental Review

LeClair, Kevin
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Neugebauer, Steven
SNR Company
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Crestline Builders LLC
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