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BEFORE THE HEARING EXAMINER FOR THE CITY OF BRIER

In Re:	)	
SUNBROOK PRELIMINARY PLAT	)	Case SUB06-001
People for an Environmentally Responsible Kenmore (PERK)	)	Motion for Reconsideration
Appeal of MDNS and Recommendation for Plat Approval	)	
_____	)	

**I. INTRODUCTION / BACKGROUND**

The Special Hearing Examiner, John Galt, issued a Recommendation on September 23, 2009 following a “consolidated open record hearing on the SEPA appeal and the underlying *Sunbrook* application (convened) at 7:00 p.m. on July 30, 2009, which was continued to July 31, 2009, and then to August 4, 2009, to complete receipt of testimony and evidence. The hearing concluded on August 4, 2009, after approximately 18 hours of testimony.” Recommendation at 3.

PERK is filing this timely Motion for Reconsideration on the basis of Procedural errors; Errors of Law; and, new information which was not available to PERK or the Hearing Examiner at the time of the hearing, yet is material to the Recommendation and issues raised.

1 Mr. Galt, upon convening the hearing on July 30, 2009, proceeded to rule on numerous  
2 objections offered by applicant PDI's counsel (Courtney Kaler) to proposed exhibits offered by  
3 the appellant PERK. PERK was represented by two citizen, non-attorney members.

4 Exhibits P-25 through 35, P-37 and 39 were objected to on the basis of relevance. The  
5 Hearing Examiner did not allow the appellant to develop their case and show relevance for the  
6 excluded exhibits, including for exhibits that subsequent testimony and argument demonstrate to  
7 have significant relevance. E.g., Exhibit P-26, the draft Shoreline Management Plan, and, P-31  
8 both of which relate to pending governmental actions and proposals relevant under SEPA's  
9 requirements for consideration of cumulative impacts and related governmental actions.

10 After ruling on motions to exclude exhibits, Hearing Examiner Galt proceeded to invite  
11 applicant PDI to make a presentation and proceed with the applicant's case and witnesses despite  
12 the fact that this was a SEPA public hearing, as well an appeal of the plat recommendation.<sup>1</sup> The  
13 record – a transcript has been prepared by PERK preparatory for appeal – shows that the hearing  
14 was not opened for public testimony (only after inquiry from Elizabeth Mooney for PERK due to  
15 her concern that the public would never have the chance to testify at the only publicly noticed  
16 comment hearing on the SEPA determination) until after 10:10 PM.

17 Significant issues of fact and law in the Hearing Examiner's Recommendation revolve  
18 around the disparity between Kenmore's designation of Stream 0056 as a potentially salmon  
19 bearing stream requiring a one hundred foot buffer and an additional fifteen foot setback for  
20 development under KMC 18.55.270, 18.55.42 and Brier's designation of it as a ditch, with only a  
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25 <sup>1</sup> Transcript at Day One, page two: Ms. Kaylor, counsel for PDI, suggested that the hearing start with public  
26 testimony. Mr. Galt responded "I'd rather have the applicant start."

1 minimal 25 foot buffer, *in which roads are allowed*, pursuant to Chapter 18.12 BMC, Brier’s  
2 “Sensitive Areas Ordinance”, adopted in 1992.

3 State law requires that Critical Area Ordinances (e.g., Chapter 18.12 BMC) be updated to  
4 reflect Best Available Science (BAS), with “special consideration to conservation or protection  
5 measures necessary to preserve or *enhance* anadromous fisheries.”RCW 36.70A.172(1) (emphasis  
6 added). Snohomish County were required by update such ordinances by December 1, 2004. RCW  
7 36.70A.130(4)(a).

9 The Hearing Examiner compared Brier’s and Kenmore’s codes and reached an  
10 unsupported conclusion that “Kenmore’s Type 2 classification cannot be supported under the  
11 KMC and the available facts. Based upon the evidence in the record and Kenmore’s own code, the  
12 West Tributary should be a Type 4 stream under the Kenmore system, subject to a 25 foot buffer  
13 requirement.” Recommendation at 13, Finding of Fact B.9.

15 This Finding is a critical element of the Recommendation. Under SEPA, the impact of a  
16 development in an adjoining jurisdiction must be considered in an environmental review (not just  
17 in an EIS, including in a Threshold Determination). See, e.g., WAC 197-11-330(3)(e)(iv); or,  
18 060(4)(b).

19 Kenmore’s City Manager, who may have been able to provide significant background to  
20 Kenmore’s designation of the West Tributary of Stream 0056, was only allowed to testify at  
21 approximately 10:50 PM due to the decision of the Hearing Examiner to allow the applicant to  
22 present witnesses at the start of the hearing, and not allow public testimony until sometime after  
23 10PM on the only evening of the public hearing, and the only time for which the public was  
24 provided reasonable notice for comment.  
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1 Kenmore’s City Manager made clear that he was not available if the hearing was  
2 continued. The Hearing Examiner did not ask clarifying questions. In any event, the hearing  
3 Examiner, as discussed infra made a clear error of law and fact in failing to recognize the validity  
4 of Kenmore’s designation of the stream, pursuant to an ordinance which has been updated  
5 pursuant to state law to reflect “best available science”, unlike Brier’s 1992 ordinance. Reliance on  
6 Brier’s 1992 ordinance is to rely on an ordinance which is ultra vires – its application is outside  
7 the authorizing law, and it can not be presumed to provide a “best available science” basis for  
8 determining that the proposal will not have a probable significant impact on the environment on  
9 the basis of compliance with the Brier ordinance alone.  
10  
11

## 12 **II. PROCEDURAL ERRORS:**

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14 **1.** The Hearing Examiner erred in failing to allow the interested public time to comment until after  
15 10 PM, rather than from early in the hearing, which convened at 7 PM on July 30, 2009, pursuant  
16 to the published public notice for the hearing.

17 a) By allowing applicant PDI to present witnesses until after 10 PM, numerous members of  
18 the public who wished to testify were denied the opportunity to testify.

19 b) The public only had reasonable notice of the hearing for purposes of public testimony  
20 for the July 30 7 PM hearing. No further notice and opportunity for public comment was provided.  
21

22 c) It is impossible to determine how many members of the public left without testifying or  
23 cut short vital testimony due to the severe time restraints imposed because public comment was  
24 taken only after 10 PM; and, Mr. Galt’s specific procedural determination that there would be no  
25  
26

1 sign in list or sign up list for testimony.<sup>2</sup> Unless notice and opportunity for additional comment is  
2 provided for, it is not possible to know who was, or how many people were, deprived of the  
3 opportunity to comment.

4 d) The Hearing Examiner should reconvene the hearing for purposes of taking additional  
5 public comment at an evening hearing beginning at 7 PM, with proper notice.

6 e) The time constraints on testimony caused by allowing the applicant to present witnesses  
7 adversely affected both the public's rights and appellant's rights to present appellant's witnesses  
8 and case, depriving appellant of due process. The record shows that important witnesses who were  
9 noted in the pre-hearing filing – were not able to testify due to the late hour and inability to return  
10 on later dates. Appellant, under the normal rules of civil procedure applicable, should have had the  
11 right to present its case before the applicant presented witnesses.  
12

13 g) City of Kenmore witnesses – whose testimony is central to key issues in the  
14 Recommendation – could not fully testify due to the procedural error of not taking public  
15 testimony until after 10 PM.  
16

17 - The Hearing Examiner erred further in not asking questions of the City Manager  
18 in regard to Kenmore's Critical Area Ordinance, while reaching unsupported conclusions about  
19 the validity of the Kenmore ordinance.  
20

21 h) The City of Brier informed at least one citizen seeking to provide testimony and exhibits  
22 after the initial hearing that the record was closed and that she could not submit records. Peggy

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23 <sup>2</sup> Transcript Excerpt at 3:

24 Hearing Examiner: Are there any questions regarding hearing procedures... Sir?

25 Unidentified Male: Is there a signup sheet at all for general public?

26 Hearing Examiner: To testify? No, not necessary.

Unidentified Male: It's first come, first serve?

1 Trompler, who lives immediately adjacent to the Sunbrook Plat and its eastern wetlands, sought to  
2 submit significant new information not otherwise in the record in regard to the wetlands  
3 discharging via a stream on her property (and, therefore, they are not isolated) , and the project’s  
4 potential impact on groundwater recharge of the stream and wetlands.  
5

6 h.1) Ms Trompler’s information, which would also qualify for rehearing under new  
7 information, shows an intermittent stream on the east side of Sunbrook connected to Wetlands A  
8 and/or B. This Stream is part of Stream 0056 flowing to the Kuestners and down 60th Ave NE,  
9 where Sunbrook plans to put the outfall of its vault. The watercourse was referenced in  
10 documents and was highlighted by Kenmore's Suzanne Anderson of Otak in testimony during the  
11 hearing on the first night.  
12

13 h.2. The reliability of Peggy Trompler’s information is demonstrated by the significant  
14 new information (Item 2, New Information) from the formal letter sent PDI and provided to Brier  
15 by the Army Corps of Engineers on September 15, 2009, stating that the Army Corps has new  
16 information showing that Wetlands A and B may not be “isolated”.

17 h.3. Expert public testimony of Ms. Anderson of “Otak” was shortened because the  
18 applicant was allowed to speak first and present witnesses ahead of the appellant, with no public  
19 testimony taken until 10:15 PM on July 30<sup>th</sup>. This denied Ms. Anderson the opportunity to fully  
20 present her testimony, and denied PERK the opportunity to further explore this issue on the  
21 record.  
22

23 h.4. The stream flowing from Wetlands A and B is called “Stream flowing to Kuestners  
24 (aka ‘Jake Stream,’ pers comm., Trompler)” in testimony in the record (Testimony Lowzen;  
25

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26 Hearing Examiner: Yes. ... I try to call on people in the order that I see the hands go up.

1 Exhibit B-15 p. 8, 3-2). No mitigation or buffer is proposed for this stream. Reconsideration is  
2 required to have further information from the U.S. Army Corps of Engineers, Ms. Trompler, Otak  
3 and other experts, in regard to potential impacts to this wetland and stream and potential  
4 mitigation measures. As there is evidence in regard to the stream in the record, the City's failure to  
5 consider impacts and mitigation measures – including failure to apply a buffer – is a clear error of  
6 law.  
7

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10 2. The Hearing Examiner erred in excluding pre-filed exhibits offered by PERK which were  
11 relevant to demonstrating that similar developments had already created cumulative impacts, or  
12 that downstream tax funded efforts to restore salmon to Stream 0056 might be impacted by the  
13 proposed Brier actions and related or similar actions (cumulative impacts); and, erred in failing to  
14 allow PERK to demonstrate the relevance of its offered Exhibits. E.g., Exhibit 26 and 28,  
15 regarding efforts supported by King County funds to restore salmon in stream 0056 (relevance  
16 shown later and with new information that restoration of culvert access for salmon is likely to be  
17 required, and that sedimentation caused by upstream projects, such as Sunbrook is recognized in  
18 the NLW Tributary 0056 Basin Plan documents which we ask to be considered.); Exhibit 31  
19 (excluding evidence of plans for swimming beach which may be affected by sedimentation from  
20 upstream); Exhibit 27 a formal draft Shoreline Master Plan offered to show potential impact of the  
21 development and related actions on downstream plans for fish restoration and on exercise of  
22 Treaty rights at the mouth of the stream and, potentially, up the stream (for salmon enhancement  
23 and restoration).  
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1 - Each of the Exhibits should be entered into the record, or a hearing must be held on  
2 relevance in light of the testimony, and whether they should be admitted.  
3

4 **III. NEW INFORMATION NOT REASONABLY AVAILABLE FOR THE**  
5 **HEARING**  
6

7 1. The City of Brier is a party to a proposed interlocal governmental agreement to address erosion  
8 and sedimentation downstream of Brier in the “North Lake Washington Tributary 0056 Basin  
9 Plan.” Notice for this agreement and study, issued by Kenmore on September 18, 2009,  
10 acknowledges significant adverse (not just potential) impacts downstream in Stream 0056 from  
11 development upstream, including in Brier.

12 1.a. Notice of this Plan and its scope was mailed to appellant PERK by the City of  
13 Kenmore on September 18, 2009 – after the closing date of the record in this hearing.  
14

15 1.b. The City of Brier had notice of this Plan, and its relevance to the hearing on the  
16 Sunbrook Plat and the MDNS during the course of the hearing. Brier did not submit this Plan for  
17 the record or inform PERK and its members of the Plan before the hearing closed. This was a  
18 failure to disclose and consider a related governmental action.

19 1.c. The notice issued by local governments for the “North Lake Washington (NLW)  
20 Tributary 0056 Basin Plan” acknowledges that sediment from upstream developments – such as  
21 Sunbrook and other projects – “adversely affects downstream properties.”  
22

23 1.d. The notice received by Brier for a study in which Brier is a participant in scoping  
24 includes a clear statement of adverse environmental impact from developments – which is the key  
25 issue in this hearing in regard to: a) whether all reasonable and necessary mitigation measures  
26 have been identified and required; and, b) whether the proposal and other proposed or



1 contemplated actions by Brier (the government agency acting under SEPA, which the Hearing  
2 Examiner wrongly conflated with the applicant as the actor) will individually or cumulatively have  
3 significant impacts on the environment, including downstream.

4           1.e. The notice sent by Kenmore (signed by the Kenmore City Engineer) states that the  
5 purpose of the proposed agreement and study is to “investigate sediment sources and identify  
6 potential projects that, if implemented, could reduce / manage sediment load in stream 0056 that  
7 adversely impacts downstream properties.”

8           1.f. Brier had a duty to disclose and consider related governmental actions, especially those  
9 to which it is a party, that bear on potential significant environmental impacts to Stream 0056. In  
10 this case, the notice states positively that adverse impacts are occurring, and that mitigation  
11 measures should be identified.

12           1.g. SEPA requires consideration of both cumulative impacts and other related  
13 governmental actions (e.g., other Brier actions and pending Brier plans and approvals) which may  
14 have a potential significant effect on the environment in conjunction with the project or which are  
15 closely related. It is impossible to deny that mitigation measures for the largest remaining  
16 undeveloped tract of land and reach of Stream 0056 is not related to study of mitigation of  
17 downstream impacts from sediment.

18           1.e. The Conclusions of Fact and Law in the Recommendation to the effect that there were  
19 no demonstrated potential downstream impacts from the development are both shown to be in  
20 error by the local governments’ own description of the problem to be addressed by the NLW  
21 Tributary 0056 Basin Plan. It is not permissible to piecemeal consideration of the impacts from  
22 related projects to avoid a finding of cumulative impacts.

1 1.f. As discussed in Errors of Law, the Hearing Examiner erred in concluding that SEPA  
2 does not require consideration of cumulative impacts, or related governmental actions in making  
3 threshold determinations and adoption of a MDNS or DNS. Conclusions of Law A.2 and A.3 at 32,  
4 33.

5 - A Mitigated Determination of Non-Significance (MDNS) or a DNS is an “environmental  
6 review” under SEPA.

7 - All “environmental reviews” and “environmental documents” including threshold  
8 determinations must consider the “scope” of “impacts”, which are defined in WAC 197-  
9 11-792 (c) (iii) as always including “cumulative impacts.”

10 - “Indirect” impacts and the combination of “several marginal impacts” from either the  
11 specific action or reasonably foreseeable or related governmental actions must be  
12 considered in making a threshold determination. WAC 197-11-330(3)<sup>3</sup>

13 1.g. Appellants submitted expert testimony, and it is undisputed, that sediment may impair  
14 salmon or other fish habitat and affect fish populations, as well as having other significant  
15 environmental impacts.<sup>4</sup>

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19 <sup>3</sup> WAC 197-11-330 (3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take  
20 into account the following, that:

- 21 (a) The same proposal may have a significant adverse impact in one location but not in another location;  
22 (b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact  
23 regardless of the nature of the existing environment;  
(c) Several marginal impacts when considered together may result in a significant adverse impact;

24 <sup>4</sup> The Recommendation finds that “clearing trees from a non-sensitive area will not, in and of itself, result in  
25 probable significant adverse impacts. Conclusion of Law D.3 at page 39. The Recommendation fails to recognize that  
26 the evidence shows a reasonable likelihood that the areas where trees are to be extensively cleared with significant  
earth moving include sensitive areas (including removal of significant trees – although clearing of any trees is likely to  
impact water quality and cause erosion). As a matter of law, a per se probable significant impact occurs if there is  
clearing of trees in a required buffer zone or in the area which would be required as a buffer if state law were

1 1.h. The NLW Tributary 0056 Basin Plan is a closely related governmental action which  
2 should be considered in regard to both mitigation measures for Sunbrook and in regard to the  
3 acknowledgement that upstream developments *are* causing sediment impacts downstream (not just  
4 probable) and that further mitigation – presumably measures exceeding the current code and  
5 development regulations relied upon in the Recommendation – is necessary.  
6

7 1.i. The Hearing Examiner should reopen the hearing to take testimony and consider the  
8 NLW Tributary 0056 Basin Plan, which is not disclosed or discussed in the record.  
9

10 **2. The Army Corps of Engineers has sent Brier and PDI significant new information since**  
11 **the close of the hearing which directly contradicts Findings of Fact and Conclusions of Law**  
12 **in the Recommendation:**  
13

14 “We have received additional information since making our “isolated” jurisdictional  
15 determination” on July 31, 2006, that these two wetlands (“A” and “B” on the Sunbrook /  
16 PDI property) may in fact not be isolated.”

17 “Your project may require authorization from the U.S. Army Corps of Engineers under  
18 Section 404 of the Clean Water Act... for the discharge of dredged or fill material (e.g.,  
19 fill, excavation, or mechanized land clearing)... We recommend you contact our office to  
20 discuss specific permit requirements or submit a permit application form...”  
21

22 Department of the Army, Seattle District, Corps of Engineers, Jonathan Smith, Project Manager to  
23 PDI Properties, September 15, 2009.  
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25 complied with and best available science used in determining the size of buffers for Sunbrook and in Brier generally.  
26 The significance of the potential determination by the Army Corps that the wetlands are not isolated and that there  
may be a stream connecting them – referred to in Ms. Anderson’s testimony - is that the proposed clearing and earth

1           2.a. A copy of this letter was sent to Brier's Director of Community Development and  
2 Planning by the US Army Corps before the Hearing Examiner issued his Recommendation and  
3 before final submission of appellant's final argument. A copy was obtained under the Public  
4 Records Act from Brier on September 28, 2009.

5  
6           2.b. Inquiry by PERK disclosed that Brier did not provide the Hearing Examiner with this  
7 new information, which is clearly material in regard to numerous issues being considered by the  
8 Hearing Examiner, despite the fact that the information was received before he could have begun  
9 drafting his opinion (received the day Appellant's Post-Hearing Brief was submitted).

10  
11           3.       A major issue before the Hearing Examiner was the question of cumulative impacts and  
12 related governmental actions – including efforts to restore anadromous and salmonid species, cut  
13 throat trout and other fish – to Stream 005 and its West Tributary.

14  
15           Pursuant to the federal courts decisions on Treaty Rights in *U.S. v. Washington*, known as  
16 “Boldt 2”, *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*,  
17 520 F.2d 676 (9<sup>th</sup> Cir. 1975), *cert. denied* 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976);  
18 *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694  
19 F.2d 1374 (9<sup>th</sup> Cir. 1983), it has been clearly established that Washington State (including its local  
20 jurisdictions) has a positive duty towards restoration of salmon, which includes a duty to:  
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25 \_\_\_\_\_  
26 movement, including building a road within ten feet of a wetland, is a per se significant environmental impact likely to  
have the impacts ascribed by numerous PERK witnesses.

1 "refrain from building or operating culverts under state-maintained roads that hinder fish  
2 passage and thereby diminish the number of fish that would otherwise be available for  
3 Tribal harvest."<sup>5</sup>

4 The Washington Attorney General summarizes this case and its implication as follows:

5 "On August 22, 2007, the United States District Court for the Western District of Washington granted summary judgment  
6 in plaintiffs' favor. The court held that the treaty right of taking fish requires the State to refrain from building or  
7 operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that  
8 would otherwise be available for tribal harvest. The court declared that the State currently owns and operates culverts  
9 violating this duty. Since then, the parties have been attempting to negotiate a remedy consistent with the court's  
10 judgment. Settlement negotiations are ongoing." <http://www.atg.wa.gov/page.aspx?id=1800>

11 The State and Tribes have been unable to reach a settlement, and a remedy trial is now set  
12 for October, 2009. [http://faculty.washington.edu/dtetta/test333/presentations/TribalLaw2009-  
13 ConnieSue.PPT](http://faculty.washington.edu/dtetta/test333/presentations/TribalLaw2009-ConnieSue.PPT)

14 3.a. The record establishes that anadromous salmon, including those listed as endangered  
15 under the endangered Species Act and critical habitat designations have been observed at the  
16 outfall of Stream 0056, and that the stream was historically a salmon bearing stream.

17 3.b. The Hearing Examiner erred in not considering exhibits and taking notice of new  
18 governmental information regarding actions on the basis of these Treaty Rights which will likely  
19 lead to removal of the fish blocking culverts and other impairments downstream on Stream 0056.  
20 One excluded exhibit specifically talked of Muckleshoot Tribe efforts for restoration.  
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24 <sup>5</sup> Order on Cross Motions for Summary Judgment, Case No. CV 9213RSM, Document No. 388  
25 (8/22/07) ("SJ Order"), at 12, as amended by Document No. 392 (8/23/07), available at  
26 <http://static.scribd.com/docs/jn98scwyp5181.swf>

1           3.c. The Hearing Examiner erred as a matter of law, as discussed in Part IV.1 and 2 by  
2 entering Conclusions of Law that the City did not have to consider either impacts to downstream  
3 fish because the stream is currently not fish passable for salmon; and, did not have to consider  
4 cumulative impacts to the downstream environment, including impacts to anadromous fish  
5 restoration efforts.  
6

7           3.d. There is significant new information in regard to those fish passage efforts and  
8 Highway 522, which the hearing Examiner should now reopen the hearing to reconsider.

9         4.         The City erred procedurally by not following BMC 16.24.010 requiring the Planning  
10 Commission to hold a hearing on the plat. Consolidation under SEPA can not replace the Planning  
11 Commission. Per RCW 36.70B allows the Planning Commission and Hearing Examiner to hold  
12 the hearing jointly. The public and PERK’s rights to a hearing by the Planning Commisison were  
13 denied by the process utilized.  
14

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16   **IV. ERRORS OF LAW:**  
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18         1. On the basis that the culvert under State Route 522 is *currently* impassable for fish, the Hearing  
19 Examiner recommends that the impacts from the proposed action has no probable significant  
20 impacts and no further mitigation is necessary (B.7 at Page 12). This was a significant error of law  
21 failing to consider state policy to restore salmon habitat and duties under federal court decisions  
22 regarding Treaty rights.  
23

24           1.a. The Hearing Examiner found that the buffer “does not comply with Kenmore’s buffer  
25 requirement... nor is it necessarily recommended by current BAS literature (BAS is Best  
26 Available Science). At B.3 page 36.

1 The Hearing Examiner concluded:

2 “the buffer requirement is specific to the reach of the stream in question, not based upon  
3 other reaches of the same stream or other streams in its basin.”

4 B.4 page 36

5  
6 1.b. ***This conclusion is a legal error ignoring the duty of Brier to consider the potential***  
7 ***significant impact if the development*** – and cumulative impacts from other actions by Brier under  
8 the same outdated code provision – ***may affect the ability of salmon to return or be restored to***  
9 ***the stream.*** Numerous elements of the appellants’ case were wrongly ruled irrelevant or excluded  
10 during the hearing on the basis of the Hearing Examiner’s error in not recognizing that the positive  
11 duty to restore salmon includes replacing the culverts which he cited, as a finding of fact, as  
12 precluding any impact on salmon.

13 As one legal publication noted:

14  
15 “Local governments may find themselves required to clean out, repair, or replace culverts  
16 that block fish access as a condition of state or federal transportation funding. Proponents  
17 of new developments that require state or federal action in the form of permitting decisions  
18 may be forced to address fish passage to obtain permits.”<sup>6</sup>

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<sup>6</sup> <http://www.bullivant.com/Go-fish-State-told-not-to-build> (internal citation omitted).

1 2. Failure to have a buffer requirement which reflects Best Available Science is a direct violation  
2 of RCW 36.70A.172<sup>7</sup>. Further, it violates the specific mandate of that state law to “give special  
3 consideration to conservation or protection measures necessary to preserve or *enhance*  
4 anadromous fisheries.” RCW 36.70A.172(1) (emphasis added)  
5

6 2.a. Under state law, Brier – and the Hearing examiner in this appeal – have a positive duty  
7 to consider whether the buffer, sedimentation, loss of groundwater feed to the stream, erosion  
8 potential in major storms, loss of shading will all have potential significant impacts on the ability  
9 of the state and other agencies to restore salmon to Stream 0056 – downstream, and not just in the  
10 West Tributary Reach. As such, the HE decision that the City need not consider such impacts and  
11 had no duty to impose mitigation measures beyond compliance with its out of date ordinance was  
12 a clear error of law.  
13

14 2.b. Under SEPA’s mandate to consider other governmental agencies’ actions and out of  
15 jurisdiction impacts (literally and figuratively “downstream” impacts), the City and Hearing  
16 Examiner had a duty to consider the impact on the ability of the state and tribe to restore salmon to  
17 Stream 0056. This duty comes not only from SEPA, but also from the duty established in the  
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21 <sup>7</sup> **RCW 36.70A.172: Critical areas — Designation and protection — Best available science to  
22 be used.**

23 (1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available  
24 science in developing policies and development regulations to protect the functions and values of critical areas. In  
addition, counties and cities shall give special consideration to conservation or protection measures necessary to  
preserve or enhance anadromous fisheries.

25 (2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in  
reaching its decision, a growth management hearings board may retain scientific or other expert advice to assist in  
reviewing a petition under RCW 36.70A.290 that involves critical areas.  
26



1 federal court decisions under U.S. v. Washington, supra; and, from the State Growth Management  
2 Act, RCW Chapter 36.70A.

3 2.c. The record is devoid of any such consideration. State law requires that Brier consider  
4 these impacts on the State's positive duty to restore salmon. The conclusion of law that Brier need  
5 not consider prospective impacts from the proposal on the ability of the stream to bear salmon is a  
6 clear error of law.  
7

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9 3. The Hearing examiner erred in concluding that Brier may rely on its outdated development  
10 regulations to "provide adequate analysis of and mitigation for" adverse environmental impacts  
11 (Recommendation at page 40 Conclusion of Law F.2):

12 3.a. The Recommendation, without further explanation states that the issuance of a  
13 Mitigated DNS demonstrated that Brier's responsible official believed the regulations were  
14 inadequate to "provide adequate mitigation for all potential significant project impacts." Id at 40.  
15

16 3.b. The error of law was in failing to require additional mitigation based on Best  
17 Available Science in regard to:

- 18 a) buffers;  
19 b) shading;  
20 c) stream flow (both loss of stream flow due to diversion of water to the vault and potential  
21 erosion during large storm events);  
22 d) loss of significant trees;  
23

24 3.c. State law requires that the City utilize Best Available Science. The Hearing Examiner  
25 specifically found it did not use BAS. The Hearing Examiner errs as a matter of law in issuing a  
26 finding that the City need not use BAS.

1 4. The Hearing Examiner made an error of law in concluding that “The age of Brier’s  
2 development regulations is completely irrelevant to the SEPA threshold determination process.”

3 Conclusion of Law F.1 at page 39.

4 4.a. State law requires that the City of Brier’s SAO (Chapter 18.12 BMC) and  
5 comprehensive plan be updated utilizing Best Available Science (BAS), particularly in regard to  
6 the element of the environment which is a key issue in this case – the ability of Stream 0056 to be  
7 restored via culvert replacement and other steps to “enhance anadromous fisheries.” RCW  
8 36.70A.172(1) and RCW 36.70A.130 (4) (requiring update and revision by December 1, 2004).<sup>8</sup>

9  
10 4.b. The threshold determination depends on not only meeting current regulations  
11 (violation of which creates a per se significant environmental impact), but on whether mitigation  
12 measures utilizing Best Available Science would allow restoration of the stream for salmon or  
13 other fish.

14  
15 4.c. When a government has a positive duty to restore or enhance a natural resource, the  
16 appellant does not have the burden of showing there will be probable significant impacts if the  
17 record is devoid of any consideration of whether the project and cumulative impacts from pending

---

18  
19 <sup>8</sup> 36.70A.130 (4):

20 (4) The department shall establish a schedule for counties and cities to take action to review and, if needed,  
21 revise their comprehensive plans and development regulations to ensure the plan and regulations comply with the  
22 requirements of this chapter. Except as provided in subsections (5) and (8) of this section, the schedule established by  
23 the department shall provide for the reviews and evaluations to be completed as follows:

24 (a) On or before December 1, 2004, and every seven years thereafter, for Clallam, Clark, Jefferson, King, Kitsap,  
25 Pierce, Snohomish, Thurston, and Whatcom counties and the cities within those counties;

1 or reasonably expected similar projects will negatively impact that positive duty. However, the  
2 record does show – without contradiction – that there are already efforts to restore salmon and that  
3 the project will reduce buffers that Best Available Science has determined to be important for such  
4 restoration efforts.

5  
6  
7 5. The Recommendation finds that “clearing trees from a non-sensitive area will not, in and of  
8 itself, result in probable significant adverse impacts. Conclusion of Law D.3 at page 39. The  
9 Recommendation fails to recognize that the evidence shows a reasonable likelihood that the areas  
10 where trees are to be extensively cleared with significant earth moving include sensitive areas  
11 (including removal of significant trees – although clearing of any trees is likely to impact water  
12 quality and cause erosion).

13  
14 5.a. As a matter of law, a per se probable significant impact occurs if there is clearing of  
15 trees, excavation or building in a required buffer zone or in the area which would be required as a  
16 buffer if state law were complied with and best available science used in determining the size of  
17 buffers for Sunbrook and in Brier generally. The significance of the potential determination by the  
18 Army Corps that the wetlands are not isolated and that there may be a stream connecting them –  
19 referred to in Ms. Anderson’s testimony - is that the proposed clearing and earth movement,  
20 including building a road within ten feet of a wetland, is a per se significant environmental impact  
21 likely to have the impacts ascribed by numerous PERK witnesses.

22  
23 5.b. PERK’s Opening statement noted the significance of potential erosion on sediment  
24 deposition and its significant adverse environmental impacts downstream – a finding echoed by  
25 the notice for the NLW Tributary 0056 Basin Plan. PERK’s Opening Statement has since been  
26 supported by witnesses on the record:

1           “The effect of excessive sediment deposition is particularly evident in pools, where  
2 fish tend to reside, and in the lower reaches of Stream 0056. One such reach is located  
3 near the mouth of the stream, where in-channel sediment detention ponds are filled and  
4 must be cleaned out on a regular basis. Another is the mouth of the stream, where  
5 sediments have filled in along the lakeshore and adversely affected the quality of moorage  
6 at the nearby boat marina.”  
7

8           5.c. The Hearing Examiner did not allow Exhibit 26 following a long argument about  
9 whether sediment impacts at the mouth of stream 0056 where it enters lake Washington was  
10 relevant to determining probable significant environmental impacts from the project. Also  
11 excluded was a description of an agreement between Kenmore and the Muckleshoot Tribe due to  
12 the presence of salmon at the mouth. As is developed separately, exclusion was an error of law  
13 because downstream impacts from this development (or cumulative impacts from Brier actions in  
14 conjunction with this action) may adversely impact the ability of the state and local governments  
15 to enhance and restore salmon habitat (and is likely to “adversely modify critical habitat” as  
16 designated under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (specifically 16 U.S.C. §  
17 1536(a)(2)).  
18

19           5.d. Stream 0056 flows into Lake Washington, which is home to populations of Puget  
20 Sound Chinook salmon (*Oncorhynchus tshawytscha*) and steelhead trout (*Oncorhynchus mykiss*),  
21 both of which are listed as threatened species under the federal Endangered Species Act. Juvenile  
22 Chinook salmon use tributary mouths and near shore areas in Lake Washington to forage in and  
23 migrate through en route to the ocean. Sedimentation resulting, in part, from the development of  
24 the Sunbrook property will likely have an adverse effect on shoreline areas and associated juvenile  
25 salmon habitat in the vicinity of the mouth of Stream 0056. The NLW Tributary 0056 Basin plan  
26

1 clearly states that upstream development has an adverse impact on downstream properties. SEPA  
2 requires that the cumulative impacts from numerous developments must be considered at this  
3 time.

4  
5 5.e. Testimony of the applicant's stormwater engineer Ken Lauzen is worthy of special  
6 note in regard to erosion and sediment deposition. Lauzen was shown photographs of a  
7 downstream property flooded during a storm with massive erosion and sediment flow. Lauzen's  
8 testimony illustrates that the City and Hearing Examiner *should have considered the likelihood of*  
9 *failure of controls in contributing to cumulative erosion and sediment impacts on Stream 0056.*  
10  
11 Instead, the City and Hearing Examiner's Recommendation ignores clear evidence of failure of  
12 controls in similar development projects and the significant probable environmental impacts -  
13 without any discussion as to why or how regulatory controls would work at Sunbrook when they  
14 had failed at recent nearby developments<sup>9</sup> :

15  
16 Ken Lauzen: Well, there's no erosion control measures in place here. You don't see  
17 anything in terms of silt fence. There's some straw bales over there to the side, but they  
18 don't look like they're doing anything. In addition, I do know a little bit about this project.  
19 It's hard to tell at the bottom of this what this area is down here.

20 Miss Bowers: That's a \*\* straw and it's along 55<sup>th</sup> Avenue.

21 Ken Lauzen: I do know that this area of this site is a created wetland. So it was  
22 probably used as a sediment pond, sediment trap during construction. And ideally what  
23 they would've done is something in this fashion where they're... I can't tell what's  
24 happening at the bottom. It does not look like what they should've been doing, but what  
25 they would've been doing is trapping the water here and letting the settlement settle out  
26 before it releases the site. Because when you are doing construction, there is rain  
sometimes and you have to do something with it. There do not appear to be any erosion

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<sup>9</sup> Including impacts from flooding and "blowout" of controls at developments approved by the Hearing Examiner for other jurisdictions In the vicinity and In the same stream basin, which should have been disclosed prior to the hearing, or provided for recusal from this case, as it was known that the issue of flooding and other impacts caused by similar developments in the vicinity would be put into issue by PERK.

1 control measures in place here and I don't know... I can't speak to what happened with  
2 this project, but it could have been the contractor not doing it. It could have been Lake  
3 Forest Park not monitoring it or the Department of Ecology or anything. So what we do is  
4 we get erosion control plans approved by Department of Ecology and the city and  
5 hopefully prevent anything like this from happening.

5 PERK's Transcription Day One, Page 41.

6 5.f. The excerpt from Lauzen's testimony above shows irrefutably that controls for  
7 stormwater at similar projects on the same stream, subject to the same Department of Ecology  
8 rules and enforcement, have recently failed. Other examples are in the record, while others were  
9 excluded from the Exhibits. PERK established the significant potential for failure of erosion and  
10 stormwater controls, and the severe real impacts to Stream 0056 – not speculative impacts – from  
11 such failure. The failure of controls requires that the City and hearing Examiner address the  
12 potential impacts from such failure and apply specific mitigation measures to avoid the adverse  
13 impacts from such failure. Failure is not speculative when shown to have occurred repeatedly in  
14 the same stream basin. PERK need only show the "potential" and that failure is reasonably  
15 foreseeable (as opposed to showing that it is more likely than not to happen) to establish that the  
16 City must address the catastrophic consequences to the stream from failure of controls.  
17  
18

19  
20 6. It was an error of law to find that clearing of trees will not occur in sensitive areas, as well as an  
21 error of fact. A determination as to whether an area is legally a critical area is a legal as well as  
22 factual determination (e.g., the jurisdictional definition of the scope of the wetland as determined  
23 by the Army Corps of Engineers).  
24  
25  
26

1           6.a. Applicants’ expert Ken Lauzen testified on July 30 that “dispersion trenches” would  
2 be “all pretty much right on the edge of the buffers or if they’re not on the edge of the buffers,  
3 they’re on the outer I think 75% of the buffers.”

4           6.b. Other examples of construction in the buffer zones include a road proposed by PDI  
5 and approved by the City’s Responsible Official within ten feet of a wetland, which the Hearing  
6 examiner recommends be a “public street” rather than a private street and moved to 25 feet. Here  
7 we have a clear error of law since, best available science has not been applied to determine if 25  
8 feet is an adequate buffer, as required by RCW Chapter 36.70A; and, an error if the area of the  
9 wetland is not as described by PDI and the City, but larger as the Army Corps letter indicates is  
10 possible. (The Army Corps did not visit wetlands A and B in making its 2006 decision, which it  
11 has now formally informed Brier and PDI that it will revisit).

12           6.c. The record shows that the City approved construction of a northeast spur road with a  
13 stream crossing and no mitigation. There is no record of the City considering impacts from this  
14 proposal. The Hearing Examiner properly disagrees (G10 at page 45). However, there is no  
15 consideration of the impacts as required by SEPA, and the City may proceed despite the  
16 Examiner’s Recommendation.

17           6.d. These are illustrations of the record showing construction is planned to occur within  
18 Brier’s own defined buffer, and within a large buffer that would likely be required if best available  
19 science were used to define buffers in a legally required update of the Brier Code. The probable  
20 result of construction is some undefined increase in erosion within the buffer zones which may be  
21 significant in terms of cumulative impacts on site or in conjunction with other projects. Either  
22 way, it is the city’s duty under SEPA to disclose and consider these impacts. It was an error of law  
23 to find that the appellant had to prove by a preponderance of evidence that such impacts will occur  
24  
25  
26

1 when the record shows disturbance, tree removal, trench construction, and road building within  
2 buffer zones and within the buffer which would be prescribed by Best Available Science if Brier  
3 followed state law and updated its Sensitive Areas Ordinance.

4  
5 7. The Hearing Examiner committed several related errors of law in issuing Conclusions of  
6 Law that the City has no duty to consider **cumulative impacts** in issuance of threshold  
7 determinations (Conclusions of Law A.2 at 32, 33); and, that “it would be legally impermissible  
8 for the City to impose conditions on a development proposal for the purpose of correcting  
9 problems associated with past developments.” Id.

10 7.a. Threshold determinations and issuance of either an MDNS or a DNS are an  
11 “environmental review” under SEPA, the MDNS or DNS is an “environmental document”;  
12 and SEPA specifies that the full range of impacts must be analyzed or considered in all  
13 environmental reviews. WAC 197-11- 060 provides:  
14

15 (1) Environmental review consists of the range of proposed activities, alternatives, and impacts to be analyzed  
16 in an environmental document, in accordance with SEPA's goals and policies. This section specifies the  
17 content of environmental review common to *all* environmental documents required under SEPA.

18 7.b. All “environmental reviews” and “environmental documents”<sup>10</sup> including threshold  
19 determinations must consider the “scope” of “impacts”, which are defined in WAC 197-  
20 11-792 (c) (iii) as always including “cumulative impacts.”

21 7.c. “Indirect” impacts and the combination of “several marginal impacts” (e.g.  
22 cumulative impacts) from either the specific action or reasonably foreseeable or related  
23

24  
25 

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<sup>10</sup> “Environmental documents” refers to any and all written documents prepared pursuant to SEPA. WAC 197-11-744.

26 “Environmental review’ means the consideration of environmental factors as required by SEPA.” WAC 197-11-746.



1 governmental actions must be considered in making a threshold determination. WAC 197-  
2 11-330(3)<sup>11</sup>

3 7.d. The conclusions that the City need not consider cumulative impacts, including how  
4 numerous minor impacts within the project or numerous impacts from other City actions, in  
5 conjunction with approval of this project, might combine to create significant potential impacts  
6 was a serious and harmful error of law.

7  
8 7.e. “But even if Brier had to consider cumulative impacts (which it does not in the  
9 threshold determination process), where is the evidence of such?” Conclusion of Law A.2  
10 at page 33.

11 7.f. The evidence includes:

- 12 - Construction and tree removal in buffer zones, a per se significant environmental  
13 impact;
- 14 - Failure to have buffer zones that reflect Best Available Science as required by state  
15 law, another per se significant environmental impact;<sup>12</sup>

16  
17  
18  
19 <sup>11</sup> WAC 197-11-330 (3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take  
into account the following, that:

- 20 (a) The same proposal may have a significant adverse impact in one location but not in another location;
- 21 (b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact  
regardless of the nature of the existing environment;
- 22 (c) Several marginal impacts when considered together may result in a significant adverse impact;

23 <sup>12</sup> The Hearing Examiner errs in stating that “(a) wider buffer would not increase shading...In order to  
24 increase shading, additional buffer would have to be on the south of the stream on property not controlled by PDI.”  
Conclusion of Law B.3 at page 36. This defies the sun law – that the sun rises in the East and sets in the West. The  
25 Examiner admits additional buffer could be added to the East. During summer, buffer on the North could be  
significant, and trees along a buffer add snags, branches, and other value. Further, mitigation could be required to have  
26 the applicant reach agreements to plant some of the replacement trees on the south side of the stream (the Brier Code  
allows half of replacement trees to be offsite).

- 1 - Failure to properly delineate wetlands (e.g., Wetland C), which is a duty on the  
2 applicant for a complete application and a duty on the City to enforce and consider;
- 3 - Reduction of groundwater recharge to established wetlands and streams (by redirecting  
4 most of the rainfall to a vault, rather than a retention pond(s) per preference in Brier’s  
5 own code), which may have potential significant impacts on salmon and fish  
6 restoration and enhancement as well as on current downstream fish;
- 7 - Loss of hundreds of significant trees, providing significant habitat – this is an  
8 acknowledged significant impact proposed to be mitigated by planting of street trees.  
9 However, the record shows no evidence that planting of street trees mitigates for loss  
10 of significant trees in a natural habitat;  
11

12 8. A separate, but related, significant error of law was the Hearing Examiner’s Conclusion  
13 (A.5) that the City need not consider at this stage the eventual cutting of additional significant  
14 trees in Phases 2 and 3 of the Plat Approval process, stating that the City will have to give final  
15 plat approval for specific plans. Again, SEPA requires the environmental impacts (including  
16 cumulative impacts) of all reasonably foreseeable and related actions to be considered in one  
17 process at this time, not piecemealed and considered after it is too late to avoid impacts.  
18

- 19 - 8.a. The Hearing Examiner found (Finding of Fact) that 111 “significant” trees and 381  
20 “non-significant” trees will be cut during Phase 1. D.6 Page 22. Significant trees,  
21 according to testimony and exhibits, would be replaced by street parking strip trees,  
22 with no habitat value (and not of significant tree species). Half of replacements may be  
23 offsite per Chapter 18.20 BMC.
- 24 - 8.b. Rather than require consideration of the impacts of the certain cutting of far more  
25 trees (and potential mitigation) during Phase 3, the Hearing Examiner erred as a matter  
26

1 of law by saying that, since the precise number of trees to be cut during final  
2 development is not currently known, the City had no obligation under SEPA to  
3 consider the impacts of the related and necessary future governmental action of City  
4 approval of Phase 3 plans with cutting of those trees.  
5

6  
7 9. The Hearing Examiner erred as a matter of law in holding that PERK “abandoned” claims of  
8 potential significant environmental impacts to Stream 0056 by stormwater and impacts from tree  
9 removal. Conclusions of Law B.1 at page 35; and, D.1 at 38, 39.

10 - 9.a. The Hearing Examiner reaches this adverse conclusion based on a strained reading  
11 of a single sentence in the PERK Post-Hearing Brief, which is followed in the Brief by  
12 extensive argument that there are potential significant adverse impacts.  
13

14 - 9.b. The Hearing Examiner improperly punishes PERK for being represented by lay  
15 volunteers, rather than legal counsel, and having a single sentence which dropped the  
16 word “significant” in describing the range of impacts that Sunbrook will have. The lack  
17 of the adjective “significant” in the context of an entire argument presented about the  
18 significance of the “adverse” impacts from stormwater and tree removal can not be  
19 reasonably interpreted as the legal abandonment of these two claims.  
20

21 - 9.c. The Hearing Examiner should reissue his decision striking the unreasonable  
22 assertion / Conclusion of Law that PERK legally “abandoned” these issues.

23 10. It was an error of law to dismiss PERK’s claim that the Stream 0056 corridor from the  
24 Southeast of the property running to the North is a significant wildlife corridor, which will suffer  
25 significant disruption if plans proceed without further mitigation. Conclusion of Law B.1 in fnote  
26 35, page 35. See expert testimony of Jim Miers, Gordon Orians and others. This issue was not

1 raised for the first time in the Post-Hearing Brief. It was clearly raised in the testimony and in the  
2 pre-hearing opening statement and appeal in regard to habitat loss impacts. While Brier's  
3 development is legally high density at quarter or third acre lots, that does not negate the clear  
4 presence (and uncontroverted) of an important wildlife corridor along the stream.  
5

6 11. A clear error of law exists in the Hearing Examiner's Conclusion of Law B.3 at page 36  
7 that the buffer widths do not create a probable significant environmental impact –despite the  
8 Hearing Examiner's specific acknowledgement that the buffers for streams and wetlands do not  
9 reflect Best Available Science.

- 10           ▪ Neither Brier nor the Hearing Examiner may substitute their opinion for  
11           the determination in state laws that buffer zones must reflect Best  
12           Available Science. Failure to do so is a per se significant environmental  
13           impact – defined by the state as such when it set a minimum standard  
14           that Brier has ignored for how buffers are to be established and updated.  
15           See RCW 36.70A.172(1) and RCW 36.70A.130 (4).  
16

17 12. The Hearing Examiner erred as a matter of law in concluding that, because the culvert  
18 under State Route 522 is not currently fish passable, that the City and he need not consider the  
19 potential impacts from the development and its lack of adequate buffer zones, tree removal, loss of  
20 groundwater recharge, stormwater sediment and erosion impacts, etc... on the future potential  
21 enhancement of salmon and fish habitat in Stream 0056. As discussed above, federal court  
22 decisions and state policy require efforts to restore salmon habitat and replacement of culverts  
23 such as the 522 and other downstream fish unfriendly culverts with fish passable culverts.  
24 Adoption of City actions which disregard these important obligations and duties pursuant to *U.S. v*  
25  
26

1 *Washington* and ignore the potential of City actions, such as approval of Sunbrook with  
2 inadequate buffers, to frustrate fish restoration efforts is not permissible.

3 - The Hearing Examiner must reopen the record to consider the NLW Tributary  
4 0056 Basin Plan, fish restoration potential (including Treaty rights) and related findings;  
5 and must revise the Recommendation to find, as a matter of law, that the City must show  
6 that it has considered the potential impacts from the project and related actions on the  
7 potential for salmon and fish restoration.  
8

9  
10 13. The Hearing Examiner made an error of law in concluding that the application vested  
11 under Brier's Comprehensive Plan update of 2000.

12 - 13.a. The application underwent significant changes in 2007, coupled with a change in  
13 ownership, making the 2004 Comprehensive Plan fully applicable (adopted November,  
14 2006).  
15

16 - 13.b. The Brier Staff Report stated "the application was deemed complete on  
17 [March 27, 2008.](#)"

18 - 13.c. The Staff finding is uncontroverted. If the application was not deemed complete  
19 until March 27, 2008, it could not have vested in 2006.  
20

21 - 13.d. The Hearing Examiner stated that the law vests the application under the  
22 subdivision, zoning and land use ordinances when "a fully completed application... has  
23 been submitted..." Citing RCW 58.17.033.

24 - 13.e. The Examiner errs in concluding that "*Sunbrook* is vested to City regulations as  
25 they existed on June 8, 2006." The application was not deemed complete until March  
26

1 27, 2008. <sup>13</sup>Even if disputed by PDI, the City’s Determination of whether the  
2 application was deemed complete must be given substantial weight, and there is no  
3 challenge to the City’s determination in the record.

4 - 13.f. A complete application requires delineation of wetlands by the applicant.  
5 Yet, the City of Brier’s Staff Report to the Hearing Examiner states “after the  
6 appeal hearing was scheduled, the City was informed that there may be one  
7 wetland on the Sunbrook site that had not been delineated.” This was based on  
8 communications from Paul Anderson for the Department of Ecology.  
9

10  
11 - 13.g. It was an error of law to conclude that the Comprehensive Plan of 2008 was not  
12 to be considered in regard to potential significant environmental impacts under SEPA,  
13 as opposed to the question of vesting for plat approval. SEPA requires consideration of  
14 policies for protection of the environment at the current time, not as of 2000.  
15

16 - 13.h. Mitigation measures or denials under authority of SEPA must be based upon  
17 adopted SEPA policies “in effect when the DNS or [Draft] EIS is issued,” rather than  
18 plans in effect nine years prior to the MDNS. WAC 197-11-660(1)(a).  
19

20 - 13.i. Therefore, the Recommendation must be revised to compare the proposal and  
21 potential significant impacts and conformity with environmental preservation goals  
22 under the most current Comprehensive Plan.

23 14. It was an error of law, as well as of fact, to conclude that **wetlands A and B** are isolated.  
24 As presented above, there is significant new information challenging the basis for this in the form  
25

---

26 <sup>13</sup> The redesigned proposal on which this MDNS is based was submitted in August, 2007. This is a

1 of the September 15, 2009 letter from the U.S. Army Corps of Engineers. This letter is the basis  
2 for seeking reconsideration in regard to wetlands issues due to new information which was not  
3 available at the time of the hearing.

4           14.a. Both Otak and Sewalls testimony state that wetlands A and B drain through  
5 the property directly to the East. Mr. Sewell implies that this is only an occasional  
6 occurrence and that it drains through an old dug ditch. He also states this ditch does not  
7 contain any contiguous hydric soil or hydrophytic vegetation. This “ditch” is on private  
8 property. The owners of this property were never contacted to allow access to the “ditch”,  
9 nor were they questioned as to the frequency of water flow through the “ditch” in  
10 question. The validity of the information used by Mr. Sewall and relied upon by the  
11 Examiner is speculative at best (and self serving). Further investigation needs to be done as  
12 to the existent of Wetlands A & B’s drainage in to the tributary 0056 - which is the point of  
13 the Army Corps' letter.  
14  
15

16           14.b. The Examiner’s Recommendation finds that “The northeastern three quarters  
17 of the site drain to a low area along the center of the east property line.” Page 7,  
18 Finding D. If that is the case then the significance of Wetland B takes on  
19 considerably more importance in a major portion of the site drain to this “isolated”  
20 wetland, whose water will be diverted to a detention vault – drying up the wetland  
21 and impacting the stream if Wetland B is not isolated.  
22  
23  
24  
25

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26 substantially different proposal as described in Recommendation A.3 at page 8.

1 15. A serious error of law was also made in determining that, under current Brier Code, that the  
2 wetlands are Category IV, or part of the “Abbey View Drainage”, with low intensity land use,  
3 requiring only a 25 foot buffer. The evidence shows that the wetland is not isolated, and the land  
4 use is considered high intensity under the Brier code, with nearly one hundred percent clearing and  
5 grading on all buildable land and 50% of the land covered with impervious surfaces. This requires  
6 a one hundred foot or greater buffer. As discussed above, at minimum, the Hearing should  
7 reconsider the question of whether the wetlands are isolated in light of the new information in the  
8 form of the formal notice letter from the Army Corps.  
9

10 15.a. A further error of law was concluding that a 25 foot buffer was adequate to mitigate  
11 impacts despite evidence that the 25 foot buffer was not based on the Best Available Science – an  
12 admission made by the applicant’s wetlands expert Mr. Sewall.<sup>14</sup> The Finding of Fact that the  
13 buffers do not reflect BAS is uncontroverted and established by PDI’s own expert. Failure to meet  
14 BAS was acknowledged by the Hearing Examiner, on the record (footnote 14) to be a per se  
15 significant environmental impact.  
16

17 15.b. Pursuant to BMC 18.12.060.E, the Hearing Examiner has determined that, as part of  
18 the Abbey View Pond drainage, the required buffer for all wetlands on the property is only 25 feet.  
19  
20

---

21 <sup>14</sup> Hearing Examiner: By definition it’s going to create a significant adverse impact because it’s  
22 not in agreement with BAS, best available science.

23 Ed Sewall: I guess first off, we work within the code limitations. And if the code says  
24 that type of wetland has a 25 foot buffer that’s what we propose on it. These are low value  
25 wetlands. They’re isolated. They rate as the lowest value wetlands and the functions...

26 Hearing Examiner: What about wetland C?

Ed Sewall: Wetland C, they’ve got a separate designation in the code for that. So we  
didn’t rate it other than by the way the code rates it with a 25 foot buffer.



1           15.c. However, for Wetlands A and B, the testimony and maps show, *they are not isolated*.  
2 Rather, they discharge to a stream to the east and outside the Abbey View Pond drainage. See  
3 Kuestner testimony Day One. Suzanne Anderson (Otak for Kenmore) testimony Day One and  
4 Two; Paul Anderson testimony, and this Motion re Trompler property. If isolated, they are  
5 certainly not subject to the rule for the Abbey View drainage, but rather to the rules in BMC  
6 18.12.070, which utilize an old version of Washington State's four tier rating system for wetlands.  
7

8           15.d. Pursuant to BMC 18.12.110, wetland buffers for Categories I through IV range from  
9 50 feet to 300 feet with the exception of a 25 foot buffer for Category IV, Low Intensity  
10 development. BMC 18.12.030 defines high intensity land use as including medium density  
11 housing, consistent with the Sunbrook plat proposal at approximately three units per acre, as  
12 opposed to rural residential.  
13

14           15.e. Are the wetlands Category IV, or are they of higher value?

15           15. f. Category II wetlands, per BMC 18.12.070 and 110, are those which exhibit any of  
16 the following:

- 17           1. Regulated wetlands that do not contain features outlined in category I; and
- 18           2. Documented habitats for sensitive plant, fish or animal species recognized by federal or  
19           state agencies; or
- 20           3. Rare wetland communities listed in subsection (A)(3) of this section which are not high  
21           quality; or
- 22           4. Wetland types with significant functions which may not be adequately replicated through  
23           creation or restoration;
- 24           5. Regulated wetlands with significant habitat value based on diversity and size;
- 25           6. Regulated wetlands contiguous with salmonid fish-bearing waters, including streams where  
26           flow is intermittent; or
7. Regulated wetlands with significant use by fish and wildlife.

23           15.g. Testimony was offered by experts, including Gordon Orians, of the use of the  
24 wetland areas by rare species. They are regulated wetlands contiguous with salmonid fish bearing  
25 waters of Stream 005, even if the flow is intermittent (6), and have significant use by wildlife  
26

1 15.h. Category III wetlands are those that are neither Category I, II or IV.

2 15.i. Therefore, consider if the wetlands are Category IV, defined in the code as:

3 D. C category IV Criteria.

- 4 1. Regulated wetlands which do not meet the criteria of a Category I or II wetland; and
- 5 2. Isolated wetlands that are less than or equal to one acre in size; and have only one wetland class; and have only one dominant plant species (monotypic vegetation); or
- 6 3. Isolated wetlands that are less than or equal to two acres in size, and have only one wetland class and a predominance of exotic species.

7 15.j. As discussed in great length above, significant evidence has been introduced without  
8 contradiction that Wetlands A and B are not isolated. *If they are not isolated, they can not be*  
9 *Category IV. If they are not Category IV, a buffer of a minimum of fifty feet is required, for*  
10 **low intensity development; and, a minimum of 100 to 200 feet is required for any other**  
11 **wetland at either low or high intensity development.**

12 15.k. Even if isolated, evidence (Paul Anderson, Suzanne Anderson of Otak (no relation))  
13 shows more than one dominant plant species and no evidence of predominance of exotic species.  
14 Suzanne Anderson's testimony indicated that the wetlands were not isolated. At minimum, the  
15 Hearing Examiner erred as a matter of law in the following ways in regard to the wetlands:

- 17 1. More than a 25 foot buffer is required by Brier Code for Wetlands A and B because  
18 they are not in the Abbey View drainage (if isolated, they are outside the drainage;  
19 and if not isolated, they flow to a stream outside the drainage);
- 21 2. More than a 25 foot buffer is required because the three wetlands are, at minimum,  
22 Category III, if not Category II, wetlands. Brier Code requires buffers of at least 50  
23 feet.
- 24 3. The development is not "low intensity" rural residential, but medium density for  
25 Brier, per the Brier Code. If not low intensity, then a 50 foot buffer would even be  
26 required under BMC 18.12.110 for Category IV wetlands.

1  
2 16. The Hearing Examiner erred as a matter of law in refusing to consider the expert opinion and  
3 testimony of Paul Anderson on behalf of the Department of Ecology. In reaching this Conclusion,  
4 the hearing Examiner errs in reading and applying WAC 197-11-545:  
5

6 **“WAC 197-11-545 Effect of no comment. (1) Consulted**  
7 **agencies.** If a consulted agency does not respond with written WAC (9/10/03 10:03 AM) [  
8 56 ] comments within the time periods for commenting on environmental documents, the  
9 lead agency may assume that the consulted agency has no information relating to the  
10 potential impact.....

11 “Any consulted agency that fails to submit substantive information to the lead agency in  
12 response to a draft EIS is thereafter barred from alleging any defects in the lead agency's  
13 compliance with Part Four of these rules.  
14

15 16.a. The input “barred” is limited to EIS review, not input to a SEPA hearing on a MDNS,  
16 as we have with the Sunbrook plat. The lack of input within the comment period was, in  
17 accordance with the WAC cited above, because the DOE lacked information. That information  
18 was submitted *to* them for review via Brier, leading to Paul Anderson’s visit to the site and his  
19 determination that there is another wetland on the site. Paul Anderson’s testimony should be  
20 considered.  
21

### 22 **III. RELIEF SOUGHT**

23 1. Based on the foregoing, the hearing Examiner should withdraw his Recommendation to be  
24 revised following reconsideration of the errors cited above and significant new information, which  
25 was not available at the time of the hearing.

26 2. Based on the record, all exhibits proffered by PERK should now be entered into the record as  
relevant.

3. A new public hearing should be ordered, noticed and held to allow for public testimony on the  
SEPA MDNS and issues under reconsideration.

1 This is necessary to cure the procedural errors which led to public testimony being limited  
2 to those who stayed to testify after 10 PM on July 30, 2009, and the lack of any sign up sheet for  
3 that hearing.

4 The hearing should be held jointly with the Planning Commission, which was improperly  
5 bypassed. (Procedural Error 4).  
6

7 4. The hearing should be reopened for reconsideration of significant new information relating to:

8 a) The North Lake Washington Tributary 0056 Basin Plan, and reports or findings of potential  
9 adverse impacts downstream from Brier, and for consideration of mitigation measures consistent  
10 with the plans and impacts;

11 b) The Army Corps of Engineers' formal letter of September 15, 2009, withdrawing their  
12 determination that Wetlands A and B on the Sunbrook plat are "isolated";  
13

14 - Reconsidering whether the wetlands are isolated and whether Wetland C was properly  
15 delineated;

16 - Reconsidering if all the wetlands on the property were wrongly classified – an error of  
17 law - in regard to minimum buffer sizes required by law and to mitigate impacts;

18 c) Treaty rights, federal court decisions and state policy regarding duties to restore fish passage  
19 and enhance habitats such as Stream 0056 and its tributary;  
20

21 - Including consideration of whether the proposed project may have impacts which have  
22 the potential to significantly impair or impact restoration or enhancement, in light of  
23 the new information that the culvert(s) and other barriers blocking fish passage in  
24 Stream 0056 are likely to be required to be removed in the future in order to meet the  
25 duties for restoration.

26 - The Recommendation should be revised to correct the error of law in the Hearing

1 Examiner's erroneous conclusions that the City of Brier need not consider downstream  
2 impacts, cumulative impacts, or impacts to fish because fish passage is currently  
3 blocked.

4  
5 5. The Recommendation of the Hearing Examiner should be revised to correct the 16 enumerated  
6 errors of law cited above. This should occur after opening the hearing for reconsideration and  
7 additional public testimony as requested above.

8 Correcting the errors of law in regard to the appropriate categorization of wetlands on the  
9 property and the requirement that best available science be used in setting buffers (it was  
10 uncontroverted that BAS was not used in setting the buffers for the wetlands on the property)  
11 requires either: a) rehearing must occur to consider specific mitigation measures and appropriate  
12 buffer sizes, including whether proposed mitigation measures will meet BAS and avoid all  
13 probable significant impacts; or, b) remand to the City to prepare an EIS or require substantial  
14 revision of the application and consideration of additional mitigation measures.  
15

16 6. In light of the new information and errors cited, the Hearing Examiner should – after conclusion  
17 of hearing on reconsideration and additional public testimony – consider additional mitigation  
18 measures to be suggested by the parties, or find that the actions are likely to result in potential  
19 significant environmental impacts and recommend that a full environmental impact statement be  
20 prepared.  
21

22 Examples of additional conditions which may be recommended to be required of the developer by  
23 the City include:

- 24 • Require a 100-foot riparian buffer adjacent to the tributary to stream 0056 to reflect the  
25 presence of salmonids in the stream basin.
- 26 • Increase wetland buffers according to the wetland category system set forth in the Brier

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Code as cited herein, and Snohomish County Code 30.62A.320.

- Require consultation with the USACE regarding classification and delineation of the wetland identified by Paul Anderson prior to final SEPA determination.
- Require the applicant to cluster housing provided that low-impact development (LID) practices are employed, without allowing concern over cost of sidewalk or driveway maintenance to outweigh the environmental benefits of permeable surfaces.

Attached: Army Corps of Engineers Letter to PDI, as sent to Brier, of September 15, 2009. This is a true and correct copy of the letter provided to Elizabeth Mooney by Brier pursuant to the Public Records Act on September 28, 2009.

I affirm that the foregoing is true to the best of my knowledge,

**Dated this 30<sup>th</sup> day of September, 2009,**

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**Elizabeth Mooney**  
**PERK Representative**

**Delivered to the City Clerk:**