



COUNTY COMMISSIONERS

John Hutchings

District One

Gary Edwards

District Two

Tye Menser

District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Application of	)	NO. 2017103260
	)	<b>LDS Camp Nisqually Access Road</b>
<b>Scott Robison,</b>	)	
<b>The Church of Jesus Christ of Latter-Day Saints</b>	)	
	)	FINDINGS, CONCLUSIONS,
For a Reasonable Use Exception and	)	AND ORDER OF <b><u>REMAND</u></b>
<u>Shoreline Substantial Development Permit</u>	)	

**SUMMARY OF DECISION**

The record submitted contains insufficient information to enter findings in favor of all required reasonable use exception criteria; however, the information missing is discreet in nature and could be provided in written form without need for additional hearing. The project is remanded for additional review consistent with the Order below.

**SUMMARY OF RECORD**

**Request**

Scott Robison on behalf of the Church of Jesus Christ of Latter-Day Saints (Applicant) requested approval of a reasonable use exception (RUE) and a shoreline substantial development permit (SSDP) to construct a new 16-foot wide access road across Medicine Creek (also known as Hartman Creek) and its associated wetlands and within the 100-year floodplain of the Nisqually River to access the Applicant's existing campground. The subject property is located at 11600 Durgin Road SE, Olympia, Washington.

**Hearing Date**

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on June 9, 2020. Due to the newness of virtual hearings, the record was held open two business days to allow for public comment, with additional time arranged for responses by the

parties. Post-hearing public comment was submitted, to which the Applicant responded on June 12, 2020.<sup>1</sup> Per the schedule announced at hearing, the record closed on June 15, 2020.

### **Testimony**

At the open record public hearing, the following individuals presented testimony under oath:

Scott McCormick, Associate Planner, Thurston County  
Dawn Peebles, Thurston County Environmental Health  
Arthur Saint, Thurston County Public Works  
Landon Baylor, PE, Baylor Consulting, for Applicant  
Fred Feller, Volunteer Coordinator for Applicant  
Scott Robison, Project Manager for Applicant  
Curtis Wambach, Biologist, EnviroVector, for Applicant  
Arlin Burbidge, Facilities Manager for Applicant  
David Troutt, Natural Resource Director, Nisqually Tribe  
Sharon Westberg  
Brian Westberg

### **Exhibits**

At the open record public hearing, the following exhibits were admitted into the record:

Exhibit 1            Community Planning & Economic Development Staff Report including the following attachments:

Attachment a	Notice of Public Hearing
Attachment b	Zoning/Site Map
Attachment c	Master Application, received June 22, 2017
Attachment d	JARPA Application, received June 22, 2017
Attachment e	Reasonable use exception application, received June 22, 2017
Attachment f	Narrative (undated)
Attachment g	Site plans, received February 13, 2020
Attachment h	Notice of Application, dated October 12, 2017 with Adjacent Property Owners list, dated September 11, 2017
Attachment i	Mitigated determination of non-significance (MDNS), dated June

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<sup>1</sup> Post-hearing comments were submitted by the representative of the Nisqually Indian Tribe who had testified at hearing. Because it was not made sufficiently clear that only those who had not succeeded in testifying during the virtual hearing were invited to submit post-hearing comment, the Tribe's two comments admitted.

	6, 2019 with Adjacent Property Owners list, dated May 30, 2019
Attachment j	SEPA Environmental Checklist, received June 22, 2017
Attachment k	Floodplain Zero-Rise Analysis, dated June 12, 2018, updated September 10, 2019
Attachment l	Cultural Resources Report, dated July 30, 2018
Attachment m	Limited Subsurface Exploration and Preliminary Geotechnical Engineering Report, dated May 8, 2017
Attachment n	Drainage Scoping Report, received August 28, 2018
Attachment o	Memo from Mark Maurer, P.E., R.L.A. with TC Water Resources Div., dated September 26, 2018 with accompanying Memo from Arthur Saint, P.E., dated September 26, 2018
Attachment p	LDS Nisqually Review Comment Response Letter from Beyler Consulting, dated August 28, 2018
Attachment q	LDS Nisqually Response to Thurston County by Envirovector, dated June 14, 2019
Attachment r	Response to public comment letters from Beyler Consulting, dated June 26, 2019
Attachment s	Comment letter from Sharon Westberg, dated June 18, 2019
Attachment t	Comment email from George Walter with the Nisqually Indian Tribe's Natural Resources Dept. dated June 19, 2019
Attachment u	Comment letter from the Nisqually Tribe, dated June 7, 2019
Attachment v	Email from Landon Beyler to Scott McCormick, dated May 9, 2019 with attached email from Kelly Still (WDFW), dated May 9, 2019
Attachment w	Comment letter from the WA Dept. of Ecology, dated November 1, 2017
Attachment x	Comment letter from Sharon Westberg, received October 23, 2017 with attached map
Attachment y	Comment letter from the Nisqually Indian Tribe, dated October 17, 2017

Attachment z	Comment letter from the WA Dept. of Ecology, dated July 31, 2017
Attachment a-1	Email from Marisa Whisman TC Assoc. Planner to Scott McCormick, TC Assoc. Planner, dated July 26, 2017
Attachment b-1	Critical Areas Report & Mitigation Plan by Envirovector, received June 7, 2019
Attachment c-1	Biological Evaluation (BE) by Envirovector, received June 7, 2019
Attachment d-1	Response to Thurston County, received February 13, 2020 from Envirovector (Spill Plan)
Attachment e-1	Approval memo from Thurston County Environmental Health, dated February 26, 2020
Attachment f-1	11 x 17 inch site plans, received Sept. 13, 2019
Attachment g-1	Email from Landon Beyler with Beyler Consulting, LLC, dated October 28, 2019.

EXHIBIT 2 Comments received after publication of Staff Report, including:

- 2a. Letter from Sharon Westberg, dated March 20, 2020 and received April 1, 2020, with photos (7)
- 2b. Letter from Joe Cushman, Nisqually Indian Tribe, dated June 4, 2020
- 2c. Letter from Joe Cushman, Nisqually Indian tribe, dated June 5, 2020, with attached comments dated June 4, 2020, June 19, 2019, and June 7, 2019

EXHIBIT 3 Email from Kelly Still, Washington Department of Fish and Wildlife, dated May 9, 2019

EXHIBIT 4 HPA status email from Curtis Wambach (not yet approved)

EXHIBIT 5 Supplemental Fish Survey, dated March 15, 2019

EXHIBIT 6 Post-hearing comments, including:

- 6a. David Troutt, Nisqually Indian Tribe, received June 9, 2020
- 6b. David Troutt, Nisqually Indian Tribe, received June 11, 2020

EXHIBIT 7 Applicant Response to Comments, including letter from Landon Beylor, Beylor Consulting, dated June 15, 2020 and Letter from Curtis Wambach, EnviroVector dated June 12, 2020

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions.

### FINDINGS

1. The Applicant requested approval of a reasonable use exception (RUE) and a shoreline substantial development permit (SSDP) to construct a new 16-foot wide access road across Medicine Creek (also known as Hartman Creek) and its associated wetlands and within the 100-year floodplain of the Nisqually River to serve as the sole access to the Applicant's existing campground. Although the Joint Aquatic Resources Permit Application (JARPA) submitted on June 22, 2017 describes the project as a "timber bridge" over the creek (Exhibit 1.D, pages 6 and 9), to be constructed "over and outside the limits of the water body" (Exhibit 1.D, page 9), the Applicant now proposes to cross the creek via a 48-inch corrugated steel pipe-arch culvert. The subject property is located at 11600 Durgin Road SE, Olympia, Washington. *Exhibits 1, 1.C, 1.D, and 1.G.*
2. The application was submitted on June 22, 2017 and was determined to be complete for purposes of commencing County review on July 21, 2017. *Exhibit 1.H.*
3. The subject property is 38.34 acres in area and is zoned Long Term Agriculture (LTA). *Exhibits 1 and 1.B.* According to the Applicant, the existing camp use received County approval of an SSDP and a special use permit to establish the church camp in 1988. Current use of the property consists of church youth group summer camping (average group size of 120), weekend family camping, and outdoor leadership training for youth. The property is used most heavily during the summer, with smaller camping events in the fall and spring. *Exhibits 1.D and 1.F; Fred Feller Testimony.*
4. Although the western portion of the subject property consists of a narrow panhandle to Durgin Road SE (the proposed new road corridor), for more than 20 years, access to the camp has been via 11th Lane SE, a narrow, winding private road through the residential section of the Riverbend campground and mobile home park. This road is difficult to navigate by larger vehicles, such as the RVs and buses that typically bring groups of kids to camp. Two corners on this existing route require larger vehicles to back up and make several passes, which poses potential safety concerns. The Applicant does not have a formal easement for use of the 11th Lane SE access. The purpose of the instant proposal is to establish permanent, safer access on the Applicant's own property. *Exhibits 1, 1.D, 1.E, 1.F, and 1.G.*
5. There are several regulated critical areas within or near the proposed road corridor:
  - Medicine Creek/Hartman Creek crosses the panhandle. Medicine Creek is classified as a Type Ns stream requiring a 150-foot buffer under the Thurston County critical areas ordinance (CAO). The buffer extends to Durgin Road SE and encompasses 300 feet of the panhandle length. *Exhibit 1.B-1.*

- Wetland A is a 4,100 square foot Palustrine Forested Semi-Permanently Flooded wetland that is located along the Medicine Creek corridor within and to the north of the panhandle. The wetland hydrology primarily derives from Medicine Creek, which backs up at a culvert beneath 11th Lane SE to the north. No fish were observed in Wetland A during fish surveys conducted in 2017 and 2019. Wetland A is classified as a Category III wetland under the CAO. Based on its habitat score of 4, Wetland A requires a 140-foot buffer, which may be reduced to 105 feet with mitigation. The standard wetland buffer generally coincides with the stream buffer in the project area. *Exhibit 1.B-1.*
- Wetland B is a 2,355 square foot Palustrine Forested Semi-Permanently Flooded wetland that is located along the Medicine Creek corridor to the south of the panhandle. The wetland hydrology derives from Medicine Creek, which backs up behind a culvert beneath a private driveway that is adjacent to the south side of the panhandle. Wetland B is classified as a Category III wetland under the CAO. Based on its habitat score of 4, Wetland B requires a 140-foot buffer, which may be reduced to 105 feet with mitigation. The standard wetland buffer generally coincides with the stream buffer in the project area. *Exhibit 1.B-1.*
- Wetland C is a 14,377 square foot Palustrine Forested Seasonally Flooded and Emergent Permanently Flooded wetland that is located in the northeast portion of the property, more than 1,000 feet from the project area. Wetland C is classified as a Category III wetland under the CAO. Based on its habitat score of 6, Wetland C requires a 220-foot buffer, which may be reduced to 165 feet with mitigation. *Exhibit 1.B-1.*
- The Nisqually River is northeast of the subject property. The 100-year floodplain of the Nisqually River is approximately 2,600 feet wide and encompasses the entire parcel, including the proposed access corridor.

*Exhibit 1.B-1 (see Sheet 1 and Appendix I); Curtis Wambach Testimony.*

6. The Shoreline Master Program for the Thurston Region (SMPTR) designates the Nisqually River as a Shoreline of Statewide Significance, and defines the regulated shoreline as including the 100-year floodplain. *SMPTR Sections Four and Five.* The SMPTR designates the subject property as a Rural shoreline environment. *Exhibit 1.* Private access roads serving permitted uses are allowed in the Rural environment. *SMPTR Section Three, Chapter XVII(D).* Landfilling is allowed if it will not significantly alter wildlife habitat, natural drainage control, maintenance of water quality, and aquifer recharge. *SMPTR Section Three, Chapter IX(D).* A shoreline substantial development permit is required for the development because it is within the regulated shoreline and the value exceeds the permit threshold of \$7,047.00. *Exhibits 1 and 1.D; WAC 173-27-040; WSR 17-17-007.*
7. The CAO standards applicable to development of roads, bridges, and culverts within wetlands and fish and wildlife conservation areas are most restrictive with respect to Category I and II wetlands and Type S and F streams (and bridges are identified in the ordinances as preferred in those critical areas). In the instant proposal, a Category III

wetland and a Type Ns stream and the associated regulatory buffers would be impacted. *Exhibit 1.B-1*. Paraphrased, the applicable fish and wildlife conservation area standards require a showing that the crossing be essential; that the alignment have the least amount of impact, be perpendicular to the stream, and avoid larger conifer trees; and that the crossing be the minimum width and meet Washington Department of Fish and Wildlife standards for fish passage. *Thurston County Code (TCC) 24.25.280*. The wetland standards contain similar requirements, plus a requirement that oversize culverts be used to allow wildlife passage. *TCC 24.30.280*. While the wetland regulations specify that bridges are preferred for Category I and II wetlands, they also include language (see *TCC 24.30.280.D.2*) that the approval authority may require that crossings be accomplished with a bridge rather than a culvert if it would significantly reduce wetland impacts. *TCC 24.30.280*. In this case it is not known whether a bridge would significantly reduce wetland impacts. *Exhibit 1, page 18*.

8. The proposed road crossing would require fill of 375 square feet of Wetland A and 5,575 square feet of wetland/stream buffer. Nine maple and fir trees would be removed from the critical areas. Consistent with *TCC Table 24.30-3*, the Applicant proposes to mitigate the wetland fill by creating 750 square feet of new wetland (2:1 replacement ratio) adjacent to Wetland C. The mitigation area would be excavated to the grade of the existing wetland, invasive species would be removed, and native plants and habitat features (e.g., snags, logs) would be installed. The Applicant proposes to mitigate the buffer loss by enhancing 5,575 square feet of Wetland C buffer. The enhancement plan would include planting western red cedar trees spaced 20 feet on center. The planting plan for both the wetland and buffer proposes to provide a variety of species to maximize habitat diversity. According to the Applicant's consultant, the proposed mitigation plan would create higher-quality wetland and buffer than the areas proposed to be impacted by road construction. *Exhibit 1.B-1*.
9. The proposed gravel access road would be 16 feet wide (the width needed to accommodate larger vehicles such as buses), 650 feet long, and would be perpendicular to the stream at the crossing point. The sidewalls of the stream crossing would be constructed of ecology blocks. Stormwater runoff from the road would be collected into biofiltration swales along the northern edge of the road for treatment and filter through rock splashpads prior to entering Wetland A. *Exhibits 1.G, 1.N, 1.Q and 1.B-1*.
10. There is an existing 24-inch culvert upstream and nearly adjacent to the proposed stream crossing, beneath the driveway serving the parcel to the south, and a 30-inch culvert downstream 50 yards to the north. The proposed culvert would exceed the water carrying capacity of both of these culverts. *Exhibit 1.G; Landon Beylor Testimony*.
11. The Nisqually River floods at rain events equal to the 10-year flood or greater. During such events, the floodwaters exceed the banks of Medicine Creek. No existing culvert in the vicinity of the site has capacity for 10-year flood events (or greater), and neither would the proposed culvert even with a larger capacity than the existing culverts. *Exhibits 1.K and 1.B.1*.

12. County flood hazard building standards do not allow fill within flood hazard areas unless a qualified professional engineer and wildlife biologist demonstrate that there is no alternative method for constructing the use and that certain identified impacts will not occur (increase in flood hazard or flood elevations, degradation of important habitats, etc.). *TCC 14.38.050(A)(5)(a)*. In this case the Applicant did not evaluate a bridge alternative to the proposed culvert, so a direct comparison of the impacts of the two structures cannot be made. Of note, a bridge could not avoid floodplain impacts entirely because it would not be possible to elevate it out of the floodplain. The floodplain is 2,600 feet wide and covers the entire panhandle. *Exhibit 1; Landon Beyler Testimony*.
13. In order to place fill within a floodplain, a qualified engineer must certify “through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the analysis will result in zero rise during the occurrence of the base flood discharge or event.” *TCC 14.38.050(A)(5)(b)*. The Applicant submitted a zero rise analysis performed by an engineer that the County has accepted as compliant with TCC 14.38. *Exhibits 1 and 1.K; Scott McCormick Testimony*.
14. The Nisqually Tribe objected to the Applicant’s zero rise analysis because it was scaled to the larger Nisqually River floodplain, and in post-hearing comment, questioned its approval process. *David Troutt Testimony; Exhibits 6a and 6b*. In the zero rise report, the Applicant’s engineer submitted that consideration of the entire floodplain was required because the existing and proposed culverts on Medicine Creek are overtopped at the ten-year event. The analysis concluded that for the 100-year event, the proposed culvert would result in water surface elevations equal to or lower than under existing conditions. *Exhibits 1.K and 7*.
15. The CAO’s frequently flooded areas standards require roads, bridges, and culverts to be designed to minimize interruption of the downstream movement of wood and gravel, minimize fill, and allow passage of one-hundred year flood flows and associated debris. *TCC 24.20.140*. The proposed culvert would have capacity to carry the five-year flood, but when the 10-year flood is reached, the proposed culvert would be overtopped, as would all existing culverts in the area. *Exhibit 1.K*.
16. During review of the project, the County recommended that the Applicant provide a six-foot culvert. The Applicant submitted that a six-foot culvert would require too much fill within the floodplain to elevate the road. The County subsequently accepted the proposed culvert - 48 inches and not round, but oval in shape with the long dimension parallel to the ground and the shorter dimension perpendicular to the ground - as the maximum culvert size that would be feasible at that location. *Exhibit 1; Landon Beyler Testimony*.
17. The adjacent property owners to the south (the Westbergs) expressed concern that the proposed culvert would create a dam that would exacerbate flooding of their property. The Nisqually Tribe expressed the same concern, based on the fact that the subject stream functions as a flood relief channel for the Nisqually River. *Exhibits 1.S and 1.T; Exhibit 2.C*. During the Nisqually River flood of 1996 (a 100-year event), the Westberg



residence flooded to a depth of eight feet. During a February 2020 flood, the Westberg driveway (adjacent to the proposed driveway) was under water, with water reaching and flowing into the residence. *Exhibit 2.A; Brian Westberg Testimony*. The Applicant's zero rise analysis did not address flood impacts that might occur in the immediate vicinity of the project area. *Exhibit 1*.

18. The Applicant's engineer submitted that the proposed culvert would not act as a dam, as it is between two smaller culverts that would have damming effects, and because its larger diameter would make it easier to maintain. The Applicant's environmental consultant emphasized that water would not flow in a way that would result in material blocking the proposed culvert; water ponds in the wetland area, then either infiltrates or evaporates. Water would only leave the impoundment when it overtops the banks or overtops a crest downstream of the subject property. *Testimony of Landon Beyler and Curtis Wambach*.
19. Based on a fish survey conducted in February 2019, and downstream analyses conducted in January 2017 and February 2019, Medicine Creek in the project area is not a fish-bearing stream. The fish survey, which was performed by a biologist with 25 years of experience, was conducted during the time period specifically recommended by the Washington Department of Fish and Wildlife to ensure the optimal opportunity to observe for presence of juveniles and a fully watered stream system. Within Wetland A, within and immediately downstream of the project area, baited minnow traps, set for two days, did not yield any fish. Seining of the wetland with a 30-inch diameter net also did not yield any fish. *Exhibits 5 and 7*.
20. The absence of fish during the February 2019 fish survey was consistent with information contained in agency databases:
  - The Washington Department of Natural Resources maps Hartman Creek at the project location and downstream for a distance of 700 feet as Type N (no fish).
  - The Washington Department of Fish and Wildlife Salmonscape database does not document a salmonid presence south of the elevated railroad ridge, to the north of the subject property.
  - The Washington Department of Fish and Wildlife Priority Habitats and Species database does not identify priority habitats or species in the project area.

*Exhibit 5.*

21. Several impediments to fish passage exist downstream of the subject property, including 12-inch culverts, blocked culverts, and a crest in the channel. During both the January 2017 and February 2019 downstream analyses, a 760-foot segment of the channel downstream of the crest was dry, constituting a complete fish barrier. Although storm runoff was observed within the dry segment in March of 2017, the water was - at one-inch depth - too shallow to allow for fish passage. Based on this configuration of physical circumstances, it appears that if a large enough flood were to overtop the crest and bring fish to the ponded area in front of the property, the fish would become trapped

and die when the ponds dry in the summer. *Exhibit 5; Exhibit 1.B-1; Curtis Wambach Testimony.*

22. The Nisqually Tribe objected to the characterization of Medicine Creek as non-fish bearing, arguing that the techniques used in the fish study were inadequate and the study should have covered a longer time period. *Exhibit 6.B.* In response to this concern, the Applicant's biologist submitted that his conclusions with respect to the creek were informed by numerous site visits over a two-year period, not just the specific dates on which the fish survey was conducted. The Applicant's biologist noted that the methodology suggested by the tribe (electroshocking) kills fish and damages the environment, and that the techniques reflected in his report accord with best available science. *Exhibit 7.*
23. The Tribe requested that the County "assume that salmon, some ESA listed, are present on this site at certain flow conditions." The Tribe did not provide any evidence that salmon are present. Rather, the tribal representative testified that the Nisqually Tribe is seeking restoration of Medicine Creek in the future, so as to allow salmonid access to off-channel short-term rearing habitat, contending that adding another undersized culvert on the grounds that there are already existing undersized culverts would violate treaty fishing rights. *Exhibit 6B; David Troutt Testimony.*
24. Based on the conclusions of a Biological Evaluation, the proposal is expected to have "no effect" on essential fish habitat or on species of wildlife listed under the Endangered Species Act, including the Mazama pocket gopher, marbled murrelet, yellow-billed cuckoo, streaked horned lark, steelhead trout, Chinook salmon, bull trout, and Oregon spotted frog. *Exhibit 1.C-1.*
25. The subject property is approximately 700 meters north of the Nisqually Reservation. Medicine Creek is of historic importance to the Nisqually Indian Tribe, which was a signatory of the Medicine Creek Treaty. A cultural resources survey, which included several shovel probes, was conducted in the project area in July of 2018. No cultural resources were observed during the survey. *Exhibit 1.L; David Troutt Testimony.*
26. Thurston County reviewed the application under the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on June 6, 2019. The MDNS, which evaluated a 30-inch culvert design, contains conditions relating to archaeological resources, fill within the floodplain, erosion and pollution control, construction hours, tracking of sediment by construction vehicles, and testing/reporting requirements with respect to contaminants. *Exhibit 1.I.*
27. The Washington Department of Fish and Wildlife commented in 2019 that it was comfortable with the then-proposed 30-inch diameter culvert design. It has not yet issued hydraulic project approval (HPA) for the proposed culvert; however, the proposal is subject to HPA approval and would be required to abide by conditions imposed by WDFW through the HPA process. *Exhibits 3 and 4.*

28. Notice of the virtual open record hearing was mailed to property owners within 500 feet of the site on May 22, 2020 and published in *The Olympian* on May 29, 2020. Notice of hearing was not posted as a result of the County's Covid-19-specific procedures. *Exhibits 1 and 1.A; Scott McCormick Testimony.*
29. In addition to the comments received regarding flooding and fish usage, comments were received from the Westbergs expressing concern regarding usage of their own driveway - the entrance to which is adjacent to the proposed road - by camp visitors and that camp traffic would pass very closely to their accessory structure (which encroaches into the Applicant's property). Even with the current access on 11th Lane SE, camp visitors regularly use the Westberg driveway to turn around. *Testimony of Sharon Westberg and Brian Westberg.* The Applicant submitted that signs would be used to guide drivers and the access road would narrow in the immediate vicinity of the neighbors' encroaching structure. *Fred Feller Testimony.*
30. In the staff report, Planning Staff repeatedly noted that no analysis was prepared by the Applicant that compares the impacts of the proposed culvert to the impacts that would result from a timber bridge built outside the stream. Staff submitted that a bridge could result in less fill in the stream and may allow for additional flood capacity and debris passage in comparison to a culvert. *Exhibit 1, pages 8, 10, 18, 20, etc.* Planning Staff also noted that the zero rise analysis provided by the Applicant and accepted by the County's Flood Plain Manager Tim Rupert does not appear to analyze local impacts, but instead focuses on flood level rise in the entire floodplain. Planning Staff based the opinion that a bridge might have lesser impacts locally than another culvert on the fact that a culvert necessarily involves the bulk of road supporting fill material to be placed in the stream channel, which could act as dam, while a bridge would not place fill in the channel. Staff noted that the existing 30-inch culverts up and downstream of the project are lower in elevation and not built up as much as the current proposal, meaning it is not possible to know that the proposed culvert would act similarly to the existing culverts. *Scott McCormick Testimony.*
31. At the hearing, following the additional public comment related to the Nisqually Indian Tribe's offer to share the costs of a bridge with the Applicant and additional testimony regarding the neighbors' flooding concerns, Planning Staff withdrew the staff report's recommendation of approval of the culvert design. Staff instead recommended that approval be conditioned on the Applicant being required to construct a bridge outside of the ordinary high water mark of Medicine Creek in place of the proposed culvert crossing. In discussing this on the record, Staff acknowledged that the specific impacts of a bridge alternative have not been evaluated. *Exhibit 1; Scott McCormick Testimony.*
32. The Applicant submitted that the cost of a bridge would be too great given its non-profit status, despite the Nisqually Indian Tribe's (which favors a bridge design) offer to share in the portion of the cost exceeding the culvert cost provided the Applicant allow the Tribe to extend the road along the southern boundary of the Applicant's property to tribal land to the east. Noting that Washington Department of Fish and Wildlife has accepted a 30-inch culvert, the Applicant also objected to the delay that a bridge requirement would

entail and suggested that Tribe-related traffic might adversely affect the Westbergs.  
*Testimony of Fred Feller and Arlin Burbidge; Exhibits 2.B and 3.*

## **CONCLUSIONS**

### **Jurisdiction**

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exceptions pursuant to TCC 2.06.010(F) and TCC 24.45.030.

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline permits pursuant to RCW Chapter 36.70, WAC 173-27, TCC 19.04.010, and Section One, Part V of the Shoreline Master Program for the Thurston region.

### **Criteria for Review: Reasonable Use Exception**

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the Reasonable Use Exception if:

- A. No other reasonable use of the property as a whole is permitted by this title; and
- B. No reasonable use with less impact on the critical area or buffer is possible. At a minimum, the alternatives reviewed shall include a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design. This may include a variance for yard and setback standards required pursuant to Titles 20, 21, 22, and 23 TCC; and
- C. The requested use or activity will not result in any damage to other property and will not threaten the public health, safety, or welfare on or off the development proposal site, or increase public safety risks on or off the subject property; and
- D. The proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property; and
- E. The proposed reasonable use shall result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources, hydrological conditions, and geologic conditions; and
- F. A proposal for a reasonable use exception shall ensure no net loss of critical area functions and values. The proposal shall include a mitigation plan consistent with this title and best available science. Mitigation measures shall address unavoidable impacts and shall occur on-site first, or if necessary, off-site; and
- G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern; and
- H. The location and scale of existing development on surrounding properties shall not be the sole basis for granting or determining a reasonable use exception.

### **Criteria for Review: Shoreline Substantial Development Permit (WAC 173-27-150)**

To be approved by the Hearing Examiner, the proposed shoreline substantial development permit must be consistent with:

- A. The policies and procedures of the Shoreline Management Act;
- B. The provisions of applicable regulations; and
- C. The Shoreline Master Program for the Thurston Region.

*A. Shoreline Management Act*

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses (in the following order of preference) that: recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

*B. Applicable regulations from the Washington Administrative Code*

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

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

twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

*C. Shoreline Master Program for the Thurston Region*

The Shoreline Master Program for the Thurston Region (SMPTR) designates the shorelands on the subject property as Conservancy. The policies and regulations that are applicable to the proposal are contained in the “Landfilling” and “Road and Railroad Design and Construction” chapters of the SMPTR (Section Three Chapters IX and XVII, respectively).

SMPTR Section Three, Chapter IX. Landfilling.

*B. Policies*

1. Shoreline fills or cuts should be designed and located so that significant damage to existing ecological values or natural resources, or alteration of local currents will not occur which create a hazard or a risk of significant injury to life, adjacent property and natural resource systems.
2. All fills should be accomplished with suitable safeguards for erosion control.
3. Fill material should be of such quality that it will not cause water quality degradation beyond the limits of adopted water quality standards defined by the Department of Ecology.
4. Priority should be given to landfills for water-dependent uses.
5. The size of landfills should be limited by the consideration of such factors as total water surface reduction, navigation restriction, impediment to water flow and circulation, reduction of water quality and destruction of habitat.

*C. General Regulations*

1. Disposal of solid wastes is not considered landfilling for the purposes of this section.
2. Landfills shall consist of clean materials including such earth materials as clay, sand, and gravel, and also may include oyster or clam shells. In addition, concrete may be included in fill material if it is not liable to pollute ground water and is approved by the Administrator. Organic debris, such as wood and other vegetative material shall not be used as fill material.
3. Landfills, except for beach feeding, shall be designed, constructed, and maintained to prevent, minimize and control all material movement, erosion, and sedimentation from the affected area.
4. Landfill areas shall be covered with sufficient earth material to support indigenous vegetative ground cover and replanted with vegetation to blend with the surrounding environment.
5. Prior to issuance of any permit for landfilling in or along a stream, it must be demonstrated that the fill will not cause any detrimental change in flood elevations, or restrict stream flow or velocity. No fill which adversely affects the capability of a stream to carry 100-year flood flows will be allowed.

6. Artificial beach maintenance may be allowed by Substantial Development Permit in any environment, notwithstanding other regulations of this section. Provided, such maintenance shall be by "beach feeding" only, with both the quality and quantity of material to be approved by the Administrator. Habitat protection is a primary concern for any beach feeding operation and must be a consideration in permit approval. [N/A]
7. Landfill which will interfere with public rights of navigation and rights corollary thereto shall not be permitted unless there is an overriding public interest.
8. Landfill placed for the purpose of providing land to ensure required distances for septic tank drainfields is prohibited. [N/A]
9. Permits for landfilling shall be granted only if the project proposed is consistent with the zoning of the jurisdiction in which the operation would be located.

#### *D. Environmental Designations and Regulations*

...

2. Suburban, Rural and Conservancy Environments. Landfill is allowed in the Suburban, Rural and Conservancy Environment to prepare a site for a use authorized by this Program, provided:
  - a. The landfill is for a use authorized by this Program. Landfilling will only be permitted if will not significantly alter any of the following functions:
    - (1) Wildlife habitat
    - (2) Natural drainage control
    - (3) Maintenance of water quality
    - (4) Aquifer recharge

#### SMPTR Section Three, Chapter XVII. Road and Railroad Design and Construction.

##### *B. Policies*

1. Major highways, freeways and railways should be located away from shorelands, except in port and industrial areas, so that shoreland roads may be reserved for slow-moving local or recreational traffic. [N/A]
2. Road and railroad locations should be planned to fit the topography and utilize existing corridors so that minimum alterations of natural conditions will be necessary. This is especially important on flood plains.
3. Roads and railroads should be designed, constructed, and maintained to minimize erosion and to permit natural movement of ground water and flood waters to the extent practical.
4. All debris, overburden, and other waste materials from construction should be disposed of in such a way as to prevent their entry by erosion from drainage, high water, or other means into any surface water body.
5. Scenic corridors containing public roadways should have provision for safe pedestrian and other nonmotorized travel. Also, provisions should be made for viewpoints, rest areas, and picnic facilities in appropriate areas. [N/A]

6. Railroad beds should be screened with trees in scenic areas. [N/A]

### *C. General Regulations*

1. Excess construction materials shall be removed from the shoreline area.
2. Major roads and railroads shall cross shoreline areas by the shortest, most direct route feasible, unless such route would cause significant environmental damage. [N/A]
3. Filling of tidelands, shorelands and marshes for road or railroad rights-of-way shall be prohibited unless no viable alternative exists.
4. All excavation materials and soils exposed to erosion by all phases of road, bridge and culvert work shall be stabilized and protected by seeding, mulching or other effective means, both during and after construction.
5. All debris, overburden and other waste materials from road and railroad construction, if permitted on shorelines, shall be disposed of in such a way as to minimize their entry by erosion from drainage into any water body.
6. Private roads shall follow natural contours where possible. Natural benches, ridge tops and flat slopes are preferred locations. Erodible cuts and filled slopes shall be protected by planting or seeding with appropriate ground cover or matting immediately following construction.
7. Where permitted to parallel shorelines, roads or railroads shall be setback a sufficient distance from the ordinary high-water line to leave a usable shoreline area. [N/A]
8. Storm water runoff shall be controlled to reduce suspended solids before entering any surface water body.

### *D. Environmental Designations and Regulations*

1. Urban, Suburban, Rural and Conservancy Environments. The following roads and railroads are permitted:
  - a. Local public or private access roads to serve uses permitted in the Urban, Suburban, Rural and Conservancy Environment.
  - b. Transportation thoroughfares including major arterials, highways and railways.

### SMPTR Section Two, Chapter V. Regional Criteria.

- A. Public access to shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be channeled into shoreline areas already so utilized or into those shoreline areas which lend themselves



to suitable industrial development. Where industry is now located in shoreline areas that are more suited to other uses, it is the policy of this Master Program to minimize expansion of such industry.

- D. Residential development shall be undertaken in a manner that will maintain existing public access to the publicly-owned shorelines and not interfere with the public use of water areas fronting such shorelines, nor shall it adversely affect aquatic habitat.
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a Permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180 (1), the person requesting the review shall have the burden of proof.
- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development or use of shorelines shall be closely analyzed for their effect on the public health.

#### **Additional Relevant Code Provisions**

##### **TCC 14.38 – Development in Flood Hazard Areas**

##### **TCC 14.38.050.A**

...

- 5. Fill. Consistent with the Thurston County Critical Areas Ordinance Title 24, Chapter 24.20 TCC. TCC Section 24.20.100 and Table 24.20.1 for restrictions of the use of fill in the special flood hazard area:
  - a. No fill is allowed within the special flood hazard area unless a qualified professional engineer licensed in the State of Washington and a qualified wildlife habitat biologist demonstrate that there is no other alternative method for constructing an approved use listed in Table 24.20-1 TCC or to provide access to essential public facilities and that such grading and filling will not block stream side channels, increase flood hazards, water velocity, or flood elevations, inhibit channel migration, or degrade important habitats (see Chapter 24.25 TCC) and the proposed cut and fill activity meets all other requirements of Chapter 14.38 TCC including, but not limited to, the zero rise and compensatory storage requirements stated below.
  - b. No fill may be allowed which acting alone or in concert with other conditions may increase flood hazards to other property, water velocities, flood elevations, or adversely impact floodplain functions. A certification by a registered professional engineer shall be provided demonstrating through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the analysis will result in zero rise

during the occurrence of the base flood discharge or event. The certification must include all calculations.

- c. In addition to meeting the requirements for zero rise, any permitted fill shall meet compensatory storage requirements to provide hydrologically equivalent compensatory storage within the one-hundred-year floodplain.
    - i. New excavated storage volume shall be equivalent to the flood storage capacity eliminated by filling or grading within the one-hundred-year floodplain.
    - ii. Equivalent shall mean that the storage removed shall be replaced by equal live storage volume between corresponding one-foot contour intervals that are hydraulically connected to the floodplain through their entire depth.
  - d. Applications for balanced cut and fill with compensatory flood storage shall include a winter water study (refer to Chapter 24.20 TCC.)
  - e. Fill or other materials shall be protected against erosions by rip rap or vegetative cover.
6. Review of Building Permits. Where base flood elevation data is not available either through the flood insurance study, FIRM, or from another authoritative source (Section 14.38.040(D)(2)), a Base Flood Elevation shall be established using FEMA approved techniques. Applications for building permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding, reflects the established base flood elevation and freeboard requirements, and complies with all applicable sections of Chapter 14.38.

*Critical Areas Ordinance (CAO, TCC 24)*

*TCC 24.01.035. General provisions – General requirements*

- A. Avoid Impacts. All uses and activities on sites containing critical areas and/or associated buffers or riparian or marine shoreline management zones shall be located, designed and constructed to avoid or, where that is not possible, minimize all adverse impacts to critical areas, associated buffers designed to protect the functions of critical areas, and management zones. The county shall not authorize impacts to critical areas or buffers unless the applicant demonstrates an inability to avoid impacts and that there will be no net loss of critical area functions as required in subsection (B). Impacts to critical areas and associated buffers that cannot be avoided shall be minimized by sensitive site design and appropriate precautions during the permitted activity and as specifically provided for in this title.
- B. No Net Loss of Critical Area Functions. Uses and activities carried out pursuant to this title shall result in equivalent or, if the applicant chooses, greater critical area functions. Impacts to critical areas, and associated buffers designed to protect the functions of critical areas, shall be repaired or mitigated through restoration, replacement, enhancement, or through purchase of credits at a mitigation bank consistent with the applicable provisions of this title.
- C. Monitoring. In addition to the specific monitoring requirements in this title, the approval authority may require that permitted uses and mitigation projects be reviewed at appropriate intervals as necessary to ensure that they are functioning consistent with the project approval and applicable provisions of this title. The approval authority may require remedial action as warranted to correct problems identified during monitoring to avoid degradation of critical

areas and associated buffers designed to protect the functions of critical areas, and to ensure that any required mitigation is successful.

*TCC 24.20.100 – Frequently flooded areas - Fill*

- A. Floodplain. The approval authority may only approve balanced cut and fill with compensatory flood storage within the 100-year floodplain, landward of the floodway, to the minimum extent necessary for construction of an approved use listed in Table 24.20-1 or to provide access to essential public facilities, if a qualified professional engineer licensed in the State of Washington and a qualified wildlife habitat biologist demonstrate that there is no other alternative method for constructing the proposed use and that such grading and filling will not block stream side channels, increase flood hazards, inhibit channel migration or degrade important habitats (see Chapter 24.25 TCC), and that the proposal meets the requirements of Chapter 14.38 TCC. Applications for balanced cut and fill with compensatory flood storage shall include a winter water study.

*TCC 24.20.140 - Frequently flooded areas—Roads, bridges and culverts.*

- A. New roads, bridges, and culverts shall be designed to minimize interruption of the downstream movement of wood and gravel, minimize fill, and allow passage of one-hundred-year flood flows and associated debris. Bridge piers and abutments shall not be placed in either the floodway or between the stream's ordinary high water marks unless there is no alternative placement, the placement results in zero increase in the backwater elevation or increase in downstream hazards during the one-hundred-year flood, and the placement minimizes habitat degradation. (See Chapter 24.25 TCC regarding road alignments in riparian habitat areas.)

*TCC Ch. 24.25 – Fish and Wildlife Habitat Conservation Areas:*

*TCC 24.25.280 - Roads/streets, railroads, and associated bridges and culverts—New and expanded.*

Proposed road and railroad crossings of streams, riparian habitat areas, marine riparian habitat areas, riparian and marine management zones, and lake and pond buffers and other important habitats shall follow all applicable local, state, and federal laws and the requirements listed below. These requirements also apply to private access roads.

- A. New road, railroad and bridge crossings of the habitats and buffers listed above shall be prohibited except where there is no alternative for an essential crossing (e.g., to provide access to property where no other access is physically possible or available) with less impact on the important habitat area.

Where the approval authority determines that alternative access with less impact on the important habitat area is physically possible, prior to authorizing a new crossing, the applicant shall demonstrate that the necessary property or easement for the alternative access cannot be obtained at reasonable terms or that the alternative is otherwise cost prohibitive.

- B. Alignment. Roads within habitat areas, where necessary, shall be aligned as follows:
1. Crossings shall occur, to the extent practical, where they would have the least adverse impact on important habitat. Proposed crossings that would degrade salmonid spawning or rearing areas, priority wildlife habitat, or stands of mature conifer trees (e.g., at least

one hundred years old) in riparian areas, shall not be allowed unless the applicant demonstrates to the approval authority's satisfaction that the crossing is essential and that no other crossing location would have less impact on habitat functions. Priority shall be given to protecting salmonid spawning and rearing areas from adverse impact. Crossings shall be located, to the greatest extent practical, to avoid fragmentation of priority habitats (e.g., prairie and oak woodlands).

2. Road alignments shall, to the extent possible and consistent with this section, avoid bends in the stream, areas with highly erodible soils and landslide prone areas (see Chapter 24.15 TCC, Geologic Hazards), unless the approval authority determines that mitigation measures will allow the project to occur without a net loss of habitat functions or increased public safety risks. (See Chapter 24.20 TCC, Frequently Flooded Areas and Chapter 24.30 TCC, Wetlands).
3. New roads crossing riparian habitat areas or streams shall be aligned perpendicular to the channel where possible. If that is not possible, they shall be aligned as close as possible to perpendicular at an angle greater than sixty degrees to the centerline of the stream channel. The approval authority may allow a deviation from this standard to avoid impacting high quality riparian habitat (e.g., mature conifers and wetlands associated with streams) or other critical areas if the net effect of the alternative alignment would reduce impact on the affected critical areas or if necessary to preserve public safety. Roads in riparian habitat areas shall not extend parallel to the stream.
4. The road alignment shall avoid, to the maximum extent practical, conifer trees greater than twelve inches in diameter at four and one-half feet above the ground, measured on the uphill side of the tree and shall stay five feet outside of the dripline of oak trees.

.....

- E. Minimize Crossing Width. Crossings of streams, riparian habitat areas, marine waters, marine riparian habitat areas, and pond or lake buffers shall have the narrowest width possible, consistent with applicable county road standards and protection of public safety. Clearing to accommodate the road shall be minimized, consistent with the protection of the most important habitat, as determined by the approval authority.
- F. Bridge and Culvert Design. The design of stream crossings shall be consistent with the WDFW Fish Passage Design at Road Culverts, 2003, as amended, and the National Marine Fisheries Service Guidelines for Salmonid Passage at Stream Crossings, 2000, as amended. Bridges are preferred on Type S and F waters unless physically infeasible. Culverts approved to be installed on Type S and F streams shall be arch/bottomless or the equivalent that provides comparable fish protection, as determined by the approval authority in consultation with WDFW and others with expertise. Crossing in estuaries shall be designed to avoid interruption of tidal flows. The approval authority may require that crossings in estuaries be accomplished with a bridge rather than a culvert if it would significantly reduce habitat impacts.
- G. Avoidance of Flood Hazards. See Chapter 24.20 TCC (above).

#### TCC Ch. 24.30 – Wetlands

*TCC 24.30.280 - Wetlands—Roads/streets, railroads, bridges and culverts—New and expanded.*

Proposed road and railroad crossings of wetlands and/or associated buffers shall be avoided unless the approval authority determines that it is not possible. Proposed road or railroad crossings of wetlands and buffers and expansion of existing roads exceeding the limitations of TCC Section 24.30.270 shall follow all applicable local, state, and federal laws and the applicable requirements listed below. These requirements also apply to private access roads and driveways. (Also see TCC Section 24.25.280).

- A. Public Safety. Expansion of existing roads is allowed in all wetlands and buffers to the minimum extent necessary to protect public safety, consistent with subsection (D) below. This provision does not apply to expansion for capacity. Expansion for additional capacity shall comply with the criteria for new or expanded roads.
- B. Criteria for Allowing Crossings. The approval authority may authorize new and expanded road crossings in wetlands and buffers as follows:
  - 1. Category I and II Wetlands and Buffers. Category I and II wetlands shall not be crossed unless it is necessary to accommodate public safety improvements to an existing road. Category I and II wetlands and the inner seventy-five percent of their standard buffers may only be crossed by roads through a Reasonable Use Exception and by meeting all of the criteria in this section.
  - 2. Category III—IV Wetlands and Buffers. The most suitable type of new crossing shall be determined by the approval authority on a case-by-case basis. New and expanded roads are permitted in Category III and IV wetlands and their buffers that meet the criteria for replacement under TCC 24.30.090(C). New and expanded roads may be permitted in Category III-IV wetlands and buffers not meeting the criteria in TCC 24.30.090(C), if:
    - a. The wetland is not a functional part of a mosaic wetland (as described in Ecology's Wetland Rating System for Western Washington);
    - b. The road complies with subsection (D) below.
- ...
- D. Road crossings, including private access roads, shall comply with all of the following requirements:
  - 1. Wetlands not meeting TCC 24.30.090(C): New and expanded roads shall not be allowed in wetlands and/or buffers unless the applicant demonstrates to the approval authority that:
    - a. It is essential (e.g., to provide access to property where no other access is physically possible or available with less impact on the wetland), or in the case of a road expansion, is needed for public safety;
    - b. There is no alternative crossing location that would have less impact on wetland and buffer functions, dependent fish and wildlife, and sensitive wetland plant species documented by the DNR Natural Heritage Program. The applicant shall demonstrate that alternative access with less impact on the wetland and buffer is not physically possible, or that an easement allowing use of the alternative alignment cannot be obtained at reasonable terms as determined by the approval authority; and
    - c. It meets the requirements for existing lots in Chapter 24.50 TCC.

2. Proposed crossings that would negatively impact Category I or II wetlands or associated buffers, or wetlands in riparian habitat areas shall not be allowed unless the applicant demonstrates to the approval authority's satisfaction that the absence of the requested crossing would landlock the property and leave it with no economically viable use. The approval authority may require that crossings be accomplished with a bridge rather than a culvert if it would significantly reduce wetland impacts.
3. If allowed pursuant to this section, new crossings and associated facilities shall:
  - a. Serve multiple properties and be designed to accommodate conduit for utility lines whenever possible. To the extent legally permissible, as part of the development approval process, the developer shall work with the county to provide for a street layout and wetland and buffer crossing location that will minimize the need for additional crossings in the future to serve surrounding property. The approval authority may waive this requirement if the additional road width required to serve multiple properties would be more detrimental to the wetland, associated buffer, or other critical area than individual access roads/driveways; and
  - b. Have the narrowest width possible, consistent with applicable county road standards and protection of public safety. Clearing to accommodate the crossing shall be minimized, consistent with the protection of the most important habitat, as determined by the approval authority.
4. Crossings using culverts shall use superspan or oversize culverts sufficient to allow wildlife passage, consistent with Chapter 24.25 TCC.
5. The design of crossings in wetlands associated with streams shall be consistent with the WDFW Fish Passage Design at Road Culverts, 2003, as amended, and the National Marine Fisheries Service Guidelines for Salmonid Passage at Stream Crossings, 2000, as amended. Culverts installed on Type S and F streams shall be arch/bottomless or the equivalent that provides comparable fish protection, as determined by the approval authority in consultation with WDFW and others with expertise. Approved crossings in estuaries shall be designed to avoid interruption of tidal flows. The approval authority may require that crossings in estuaries be accomplished with a bridge rather than a culvert if it would significantly reduce habitat impacts.
6. Bridges are preferred for spanning Category I and II wetlands.

### **Conclusions Based on Findings**

1. The record submitted does not demonstrate compliance with all criteria of RUE approval. Although establishing an access road in the proposed location is a reasonable use that is necessary to allow ongoing use of the Applicant's property (satisfying RUE criterion 1), the Applicant has not demonstrated that no reasonable use with less impact on the critical area or buffer is possible (criterion 2), nor that the proposed culvert is the "minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use" (criterion 4). Specifically, RUE criterion 2 contemplates the evaluation of alternatives, including a revision in the project design. A parallel requirement to evaluate alternatives is specified in the floodplain building standards. Per TCC

14.38.050.A.5(a), no fill is allowed within the special flood hazard area unless a qualified professional engineer licensed in the State of Washington and a qualified wildlife habitat biologist demonstrate that there is no other alternative method for constructing an approved use. That language is mirrored in CAO regulations for Frequently flooded areas at TCC 24.20.100 - Fill (“no other alternative method”). Critical area regulations specifically addressing new roads through wetlands and buffers require an applicant to “demonstrate that alternative access with less impact on the wetland and buffer is not physically possible.” TCC 24.30.280.D.1(b). Additionally, the Applicant’s zero rise study does not appear to address localized impacts of the proposed fill. Given that TCC 24.30.280.B.2 - regulating new roads in Category III wetlands, as is proposed - states that “the most suitable type of new crossing shall be determined by the approval authority on a case-by-case basis,” and given 1) the credible historical evidence of localized historical flooding in the immediate vicinity, 2) the future-looking concerns expressed by the Tribe, and 3) the final recommendation of Planning Staff that a bridge crossing would better comply with Code, the undersigned is not persuaded that the existing undersized culverts on either side of the proposed crossing are sufficient justification to excuse analysis of a potential bridge crossing in the instant proposal. In this case, a bridge may well result in lesser impacts on critical areas (RUE criterion 2) and may better demonstrate compliance with property damage avoidance/public safety requirements (criterion 3). Finally, in asking to be excused from construction of the presumptively most critical area-protective crossing (a bridge) based in part on cost, the Applicant failed to provide evidence of cost comparisons upon which discretionary relief based on “reasonableness” could be granted. *Findings 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 29, 30, 31, and 32.*

2. Significant study and effort have been undertaken by the Applicant, and the undersigned is not persuaded that the missing evidence is most appropriately addressed with denial of the permit. While Planning Staff recommended a condition of permit approval requiring that the Applicant construct a bridge instead of a culvert crossing, the record at present does not contain sufficient evidence from which to conclude that a bridge would better meet the criteria of approval. A bridge might have similar impacts, or different impacts that have not yet been contemplated. It is possible that, after further review, it would be clear that the original culvert design is the best outcome. Consequently, a remand of the application is appropriate to allow for further review of the bridge alternative. During the additional review, attention should be given to comparison of impacts with respect to localized flooding. Specific values for fill amount and for cost comparisons should be provided to make a complete record.
3. Of note, no conclusions are entered herein addressing the requested shoreline substantial development permit. The record appears to contain sufficient information upon which to grant approval of an SSDP. This remand does not preclude the Applicant from submitting additional evidence addressing shoreline permitting requirements.

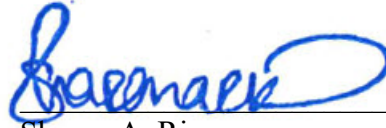
## **ORDER**

The above-captioned permits are remanded to the County for further development of evidence by the Applicant, with responses by all parties of record, as follows.

1. The undersigned retains jurisdiction over the applications until completion of the following process.
2. The Applicant shall commission and submit further professional analysis that allows for an actual comparison between the impacts of a bridge in the proposed project location with the proposed culvert. This evidence may include written memoranda, bridge plans, additional explanation of/information about the zero rise requirement, and other technical and construction evidence addressing RUE criteria 2, 3, and 4, and may include additional argument as to whether the RUE criteria are shown to be met by the record as a whole. This information shall be submitted to the Community Planning and Economic Development Department (CPED) at the Applicant's earliest convenience.
3. Upon receipt, CPED shall add the Applicant's new evidence to the official record and shall forward it to parties of record (all who commented) who commented on the instant proposal and to the undersigned.
4. Planning Staff and parties of record shall have 10 business days to submit written responses to the Applicant's new evidence. The record will close (for the purpose of establishing the decision issuance deadline) 10 business days from the receipt of the Applicant's additional evidence. All timely responses will be included in the record and forwarded to the Applicant and the undersigned.
5. The Applicant may, at its discretion, submit a final written reply within five business days of receipt of the responsive comments in item 4 above.
6. The decision issuance deadline will be 20 business days following submittal of the Applicant's additional evidence.
7. The Applicant and County Staff may submit clarifying questions, requests to extend/alter the timeline set out above, or a request to reconvene the public hearing instead of proceeding with the above written exchange to the Examiner via email through the Hearing Clerk at [Sonja.cady@co.thurston.wa.us](mailto:Sonja.cady@co.thurston.wa.us). Should the matter be reconvened for hearing, all parties of record would receive notice consistent with County Code requirements.
8. All items invited to be submitted in response to this order will be made part of the official record and posted on the County Hearing Examiner webpage as soon as possible. The decision, once issued, will be mailed to all parties of record in the normal course of business.



**DECIDED** June 29, 2020.



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Sharon A. Rice  
Thurston County Hearing Examiner

**THURSTON COUNTY**  
**PROCEDURE FOR RECONSIDERATION AND APPEAL**  
**OF HEARING EXAMINER DECISION TO THE BOARD**

<b>NOTE:</b> THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).
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If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.\* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

**The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).**

**A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)**

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

**B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)**

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Community Planning & Economic Development Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

**C. STANDING** All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

**D. FILING FEES AND DEADLINE** If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$750.00** for a Request for Reconsideration or **\$1,041.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

\* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. \_\_\_\_\_  
Appeal Sequence No.: \_\_\_\_\_

☐ Check here for: **RECONSIDERATION OF HEARING EXAMINER DECISION**

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: **APPEAL OF HEARING EXAMINER DECISION**

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW \_\_\_\_\_  
on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, as an APPELLANT in the matter of a Hearing Examiner's decision  
rendered on \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ relating to \_\_\_\_\_

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance \_\_\_\_\_
2. Platting and Subdivision Ordinance \_\_\_\_\_
3. Comprehensive Plan \_\_\_\_\_
4. Critical Areas Ordinance \_\_\_\_\_
5. Shoreline Master Program \_\_\_\_\_
6. Other: \_\_\_\_\_

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

### **STANDING**

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED \_\_\_\_\_

SIGNATURE OF APPELLANT \_\_\_\_\_

Address \_\_\_\_\_  
\_\_\_\_\_ Phone \_\_\_\_\_

Please do not write below - for Staff Use Only:

Fee of ☐ \$750.00 for Reconsideration or \$1,041.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
Filed with the Community Planning & Economic Development Department this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.