



COUNTY COMMISSIONERS

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HEARING EXAMINER

Creating Solutions for Our Future

BEFORE THE HEARING EXAMINER FOR THURSTON COUNTY

In the Matter of the Application of)	NO. 2023101169
)	
NW Green Construction Inc.)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception is **GRANTED** with conditions.

SUMMARY OF RECORD

Request

NW Green Construction Inc. requested a reasonable use exception to construct a single-family residence and appurtenances on land designated as prairie habitat and containing Mima mounds. The subject property is located at 13401 Marksman Street SW, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the application on January 23, 2024. No in-person site visit was conducted, but the Examiner viewed the subject property and surroundings on Google Maps.

Testimony

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

Heather Tschackofske, Associate Planner/Biologist, Thurston County Community Planning
& Economic Development Department

Calvin Dahl, President, NW Green Construction Inc. (Applicant)

Exhibits

Through the open record hearing process, the following exhibits were admitted in the record:

- Exhibit 1 Community Planning and Economic Development Report including the following attachments:
- A. Notice of Public Hearing
 - B. Zoning Map
 - C. Master Application, received March 21, 2023
 - D. Reasonable Use Exception application, revised October 20, 2023
 - E. RUE Narrative, revised October 20, 2023
 - F. Site Plan, revised November 16, 2023
 - G. Notice of Application, dated April 5, 2023
 - H. Comment Memorandum from Kyle Overton, Thurston County Public Health and Social Services Department, dated November 15, 2023
 - I. Comment email from Shaun Dinubilo, Squaxin Island Tribe, dated April 12, 2023
 - J. Comment letter from Brad Beach, Nisqually Indian Tribe, dated April 6, 2023
 - K. Critical area report and mitigation plan, dated October 2023
 - L. Public comments (on previous proposal)
 - M. Applicant responses on communication matrix, received October 20, 2023
 - N. Community Planning and Economic Development Prairie plant inspection fact sheet and guidelines for prairie inspections, 2023 and 2022
- Exhibit 2 Email from Heather Tschaekofske, dated January 23, 2024, re: additional project condition
- Exhibit 3 Email from Calvin Dahl, dated January 23, 2024, re: additional project condition

Based on the record developed through the open record hearing process, the Hearing Examiner enters the following findings and conclusions.

FINDINGS

1. NW Green Construction Inc. (Applicant) requested a reasonable use exception (RUE) to construct a single-family residence and appurtenances on land designated as prairie habitat and containing Mima mounds. The subject property is located at 13401 Marksman Street SW, Olympia, Washington.¹ *Exhibits 1, 1.C, 1.D, 1.E, and 1.F.*
2. The RUE application was received on March 21, 2023 and deemed complete for purposes of commencing project review on April 5, 2023. *Exhibit 1.G.*

¹ The legal description of the subject property is described in the staff report as follows: "Section 9 Township 16 Range 3W S2 N2 NW NE LESS CO RD ON E FILE #856506; Tax Parcel Number 13609120100." *Exhibit 1.*

3. The subject property is 9.55 acres in area and is undeveloped. Access to the property is from Marksman Street, which runs along the eastern property line. Surrounding lots to the north and south along the west side of Marksman Street are developed with single-family residences. There is Department of Natural Resources land (Mima Mounds Natural Area) zoned Public Parks, Trails, and Preserves on the east side of Marksman Street across from the subject property. The Mima Mounds Natural Area provides habitat for endangered prairie species including the Taylor's Checkerspot butterfly. *Exhibits 1, 1.B, 1.F, and 1.K.*
4. The subject property is within the rural portion of the County and is zoned Rural Residential Resource One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit 1.* The purpose of the RRR 1/5 zone is "to encourage residential development that maintains the county's rural character; provides opportunities for compatible agricultural, forestry and other rural land uses; is sensitive to the site's physical characteristics; provides greater opportunities for protecting sensitive environmental areas and creating open space corridors; enables efficient road and utility systems; and does not create demands for urban level services." *Thurston County Code (TCC) 20.09A.010.* Primary permitted uses in the RRR 1/5 zone include single-family and two-family residences, agriculture, accessory farm housing, and home occupations. *Exhibit 1; TCC 20.09A.020.*
5. The subject property contains multiple critical areas, which are regulated pursuant to the Thurston County critical areas ordinance (CAO, TCC Title 24). These include:
 - A Type F seasonal stream with a channel width of six to eight feet. The stream bisects the subject property from north to south, dividing the parcel into roughly equal halves. The stream requires a 200-foot riparian habitat area buffer pursuant to TCC 24.25.020. The stream contains a culvert that was installed at least 15 years ago, prior to the Applicant's purchase of the property. The culvert provides the only access to the back portion of the property during wet weather.
 - Oregon white oak woodland, which is regulated as an "important habitat" under the CAO (see TCC 24.25.065). Oregon white oaks are present in the western and central portions of the property. The oaks and their respective tree protection zones do not extend east of the 200-foot stream buffer.
 - Prairie habitat, which is regulated as an "important habitat" under the CAO (see TCC 24.25.065). When prairie habitat is designated, the minimum buffer is the greater of 50 feet or the distance recommended in the critical area report. In this case, the eastern half of the subject property contains numerous Mima mounds, which the CAO identifies as "a unique geologic feature of prairie habitat." *TCC 24.03.010.* The eastern portion of the subject property also contains several plant species that are characteristic of prairie habitat, and two species of lichen listed as rare by the DNR Natural Heritage program (maritime reindeer lichen and cup lichen) were found on the subject property. The prairie habitat is in a

degraded condition and was covered with thick Scotch broom prior to mowing in spring of 2022.

Exhibits 1, 1.F, 1.K, and 1.N; Calvin Dahl Testimony.

6. There are no endangered species of wildlife known to inhabit the site. The endangered Taylor's Checkerspot butterfly is mapped as occurring within the Mima Mounds Natural Area across the street from the subject property. *Exhibits 1 and 1.K.*
7. The subject property is mapped as an (endangered) Oregon spotted frog screening area. The Thurston County Habitat Conservation Plan (HCP) provides regulations for properties mapped within Oregon spotted frog screening areas, per TCC 17.40. The Thurston HCP enables the County to locally manage habitat protection when authorizing lawful projects that may impact the federally protected species. Application and review under TCC 17.40 are required for all activities and development where the project application overlaps any land parcel with known habitat, potential habitat, or known occupancy of a covered species. An HCP application is required prior to building permit issuance, and the appropriate mitigation fees for impacts to listed species are calculated at the time of HCP application and approval. Staff reviewed the site in spring of 2023 and determined the site does not contain Oregon spotted frog habitat, and therefore no additional mitigation is required under the HCP; however, the application process must still be completed to document County review and the project's compliance with the HCP. *Exhibit 1; Heather Tschaekofske Testimony.*
8. It would not be possible to develop a single-family residence on site without impacting a regulated critical area. The only access to the property is from the east, where there is regulated prairie habitat. The stream, stream buffer, and oak woodlands are present in the central portion of the property. While the site plan depicts that there is an area of unencumbered land in the northwest corner of the property, it would not be possible to access that area without crossing all of the critical areas present on the site. *Exhibits 1.E, 1.F, and 1.K.*
9. The Applicant proposes to develop a single-family residence, driveway, and septic system in the southeast corner of the property, close to Marksman Street and in the location where the on-site Mima mound features are most disturbed, based on assessment by the Applicant's biologist. Although two Mima mounds would be impacted, the proposed development location would avoid the stream, stream buffer, and oak woodlands entirely. The development footprint for the residence would be approximately 3,500 square feet, and the footprint of the driveway would be approximately 500 square feet. The septic and reserve drainfields would each occupy 360 square feet. *Exhibits 1, 1.F and 1.K.*
10. The Applicant proposes to construct a fence behind the residence (between the residence and the 4.25 acres of prairie habitat to be preserved) to minimize impacts associated with the residential use, and proposes to manage invasive weeds within the preserved area. In addition, as mitigation for the project, the Applicant proposes to enhance 3,500 square

feet of prairie immediately west of the development area by removing Scotch broom and Himalayan blackberry by hand and by re-seeding the area with prairie species including Idaho fescue, long-stolen sedge, crown brodiaea, slender cinquefoil, Oregon sunshine, spring gold, and farewell to spring. The Applicant also proposes to transplant some patches of Natural Heritage-listed species of lichen from the proposed building footprint to a different on-site location. Although the mitigation plan describes removal of the existing stream culvert as an additional mitigation measure, at hearing the Applicant requested that the culvert be allowed to remain in order to allow access to rear of the property. Considering his reasons, the County's biologist agreed that to allow the culvert to remain in place with no additional access improvements made to the stream crossing so long as it is understood that culvert retention is not authorization for improvements to the rear portion of the property. With the mitigation proposed, the project is expected to result in enhanced habitat functions, including improved habitat for the Taylor's Checkerspot. The plantings would be monitored for five years. *Exhibits 1.K, 2, and 3; Calvin Dahl Testimony.*

11. Consistent with the comments of the Nisqually Indian Tribe and the Squaxin Island Tribe, Planning Staff recommended a condition requiring the Applicant to stop work and notify the Tribe and the state Department of Archaeology and Historic Preservation if cultural resources are discovered during construction. *Exhibits 1, 1.I, and 1.J.*
12. The Thurston County Environmental Health Division conditionally approved an on-site septic system design for the subject property. Environmental Health did not identify any issues of concern with respect to the RUE application. *Exhibit 1.H.*
13. The proposed development is categorically exempt from review under the State Environmental Policy Act. *Exhibit 1; Washington Administrative Code (WAC) 197-11-800; TCC 17.09.055(B).*
14. Notice of the open record hearing was mailed to property owners within 500 feet of the site on January 5, 2024 and published in *The Olympian* on January 12, 2024. *Exhibits 1 and 1.A.* No public comment was submitted specifically in response to the RUE application. The public comments in the record as Exhibit 1.L are from 2022 and relate to a prior development proposal on the subject property that included a forest land conversion permit application. The 2022 objections to the project concerned the quality of information provided in the environmental checklist and activities that are no longer proposed, including logging and construction of a stream crossing. The critical area report supporting the proposed RUE application, in the record at Exhibit 1.K, was prepared at a later date and appears to address the issues of concern. The Applicant withdrew the forest conversion permit request in September of 2023. *Exhibits 1, 1.K, 1.L, and 1.M.*
15. Having heard all testimony, Planning Staff maintained the recommendation that if RUE approval is granted, the conditions in the staff report should be imposed, provided that the condition requiring removal of the culvert can be modified consistent with the language in the revised recommended condition submitted post-hearing. *Exhibits 1 and 2; Heather*

Tschaekofske Testimony. The Applicant waived objection to the conditions as finally recommended. *Exhibit 3; Calvin Dahl Testimony.*

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.

Criteria for Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if the record demonstrates compliance with all of the following criteria:

- 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.

Conclusions Based on Findings

1. No other reasonable use of the property as a whole is permitted by the critical areas ordinance. Considering the RRR 1/5 zoning designation, the intent of the zone to encourage residential development that maintains the County's rural character, and the character of surrounding development, single-family residential use is the only reasonable use of the property. *Findings 3 and 4.*

2. As conditioned, no reasonable use with less impact on the critical area or buffer is possible. All proposed development would be clustered in the southeast corner of the property, adjacent to the road, to minimize impacts to prairie habitat and to completely avoid impacts to the stream and the Oregon white oak woodland. The proposed development footprint is reasonable in scale and could not be relocated without increasing impacts to protected habitat. *Findings 5, 8, 9, and 15.*
3. As conditioned, the proposal would not threaten the public health, safety, or welfare on or off the development site, or increase public safety risks on or off the subject property. The conditions of approval address erosion control and inadvertent discovery of cultural resources. No public health issues were identified during the review process. *Findings 11, 12, and 14.*
4. For the reasons described in Conclusion 2, the proposal is the minimum encroachment necessary to prevent denial of all reasonable use of the property. *Findings 8 and 9.*
5. As conditioned, the proposal would result in minimal alteration of the critical area. Development would be clustered in the southeast corner of the site, in an area that is already in a disturbed condition, to minimize alteration of the prairie habitat. The remaining prairie habitat would be maintained and enhanced. *Findings 9 and 10.*
6. As conditioned to require implementation of the critical area mitigation plan (modified to allow the culvert to remain), the proposal would ensure no net loss of critical area functions and values. *Findings 10 and 15.*
7. As conditioned, the use would not result in unmitigated adverse impacts to species of concern. The conditions of approval require implementation of the critical area mitigation plan and transplantation of rare species of lichen. Species of plants providing habitat for the endangered Taylor's Checkerspot would be planted within the enhancement area. *Findings 6, 7, 10, and 15.*
8. This decision is not based solely on the location and scale of existing development. Approval of the RUE is based on the Applicant's inability to make reasonable use of the parcel without intrusion into prairie habitat. *Findings 5 and 8.*

DECISION

Based on the preceding findings and conclusions, the request for a reasonable use exception is **GRANTED** subject to the following conditions applicable to Applicant, successors in interest, and agents thereof:

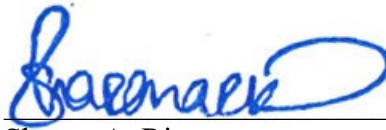
- A. Prior to or in conjunction with the issuance of any building permit, all applicable regulations and requirements of the Thurston County Public Health and Social Services Department, Public Works Department, Fire Marshal, and Thurston County Community Planning and Economic Development Department shall be met.

- B. Applicant is responsible for compliance with other jurisdictional permitting requirements.
- C. Habitat Conservation Plan application and approval for Oregon spotted frog review is required prior to building permit issuance.
- D. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. It is the Applicant's responsibility to obtain this permit if required.
- E. The Applicant shall complete mitigation prior to final building permit inspection. A surety will be required in place of mitigation completion prior to final building permit inspection, per TCC 24.70. Monitoring shall be completed in accordance with the Critical Area Report and Mitigation Plan dated October 2023, by West Fork Environmental.
- F. A critical area affidavit shall be signed and recorded with the Thurston County Auditor's office, prior to final building inspection for the proposed residence.
- G. Critical area protection fencing shall be placed prior to final building inspection, per the approved mitigation plan, on the protection line per Figure 17 of the critical area report (Exhibit 1.K).
- H. Construction fencing and erosion control shall be placed along the proposed development area, on the protection line per Figure 17 of the critical area report (Exhibit 1.K). This fencing and erosion control shall be inspected prior to building permit issuance.
- I. Lichens marked for transplant shall be marked in the field and verified by County staff prior to building permit issuance.
- J. Best management practices (BMPs) such as completing work during the dry season and maintaining proper working order of equipment, as well as temporary erosion and sediment control (TESC) methods including silt fencing and/or coir logs shall be implemented. All disturbed areas will be promptly backfilled and reseeded following installation, and TESC measures will remain in place until site conditions are restored.
- K. The Applicant must comply with all requirements of state and/or federal law to avoid disturbance and alteration of artifacts, remains, or other cultural resources on site during development. In the event of inadvertent disturbance or alteration, the Applicant must immediately stop work and contact the Tribes and the State Department of Archaeology and Historic Preservation.
- L. All development on the site shall be in substantial compliance with the approved Reasonable Use Exception application, as conditioned. Any alteration to the proposal will require approval of a new or amended Reasonable Use Exception. The Community

Planning and Economic Development Department will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

- M. The existing on-site culvert within the Type F stream may be retained in its current state and utilized for stream crossing purposes. This condition supersedes language regarding culvert removal within the approved Critical Area Report and Mitigation Plan dated October 2023. No additional access improvements to stream crossing, nor any improvements west of the stream, are permitted without further County review.

DECIDED February 6, 2024.



Sharon A. Rice
Thurston County Hearing Examiner

NOTE: Pursuant to TCC 22.62.020(C)10, affected property owners may request a change in valuation for property tax purposes.

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

NOTE: 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).

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 **\$861.00** for a Request for Reconsideration or **\$1,174.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development Center at 3000 Pacific Ave SE, Suite 100 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 ☐ \$861.00 for Reconsideration or \$1,174.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
Filed with the Community Planning & Economic Development Department this _____ day of _____, 20____.