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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. 2019100313
)	
Robert Johnson)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to construct a single-family residence within native prairie habitat is **GRANTED** subject to conditions.

SUMMARY OF RECORD

Request

Robert Johnson (Applicant) requested a reasonable use exception (RUE) to construct a single-family residence within native prairie habitat. The subject property is located at 7630 Celesta Lane SW, Rochester, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on August 13, 2019.

Testimony

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

Robert Smith, Senior Planner

Nikki Westman, Applicant representative

Dawn Peebles, Thurston County Public Health, Environmental Health Division

Exhibits

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

EXHIBIT 1 Development Services Section Report with the following Attachments:

Attachment a	Notice of Public Hearing
Attachment b	Zoning/Site Map
Attachment c	Master Application, received January 23, 2019
Attachment d	Reasonable Use Exception Application, received January 23, 2019
Attachment e	Informal Site Plan, undated
Attachment f	Prairie Habitat Management Plan, EnviroVector, dated May 20, 2019, including Site Plan at Figure 3
Attachment g	Complete Application Letter, dated March 11, 2019
Attachment h	Notice of Application, dated March 12, 2019
Attachment i	Report on Prairie Habitat, prepared by Marissa Whisman, Thurston County Biologist, dated May 21, 2018
Attachment j	February 5, 2019 Comment Memorandum from Amy Crass, Thurston County Public Health and Social Services Department
Attachment k	Comment Letter from the Washington State Department of Ecology, dated February 13, 2019
Attachment l	E-Mail from Rhonda Foster, Squaxin Island Tribe, dated March 14, 2019
Attachment m	Comment Letter from Jackie Wall, Nisqually Indian Tribe, dated January 30, 2019
Attachment n	E-mail from Katherine Porter, dated March 19, 2019

EXHIBIT 2 Photo of posted notice

EXHIBIT 3 Comment email from Katherine Porter, dated August 12, 2019

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

FINDINGS

1. The Applicant requested an RUE to construct a single-family residence within native prairie habitat. The subject property is located at 7630 Celesta Lane SW, Rochester, Washington.¹ *Exhibits 1, 1.C, 1.D, and 1.F.*
2. The RUE application was submitted on January 23, 2019 and determined to be complete on February 20, 2019. *Exhibits 1.C, 1.D, and 1.H.*
3. The subject parcel is 1.25 acres in area. It was created legally as Lot 3 of short subdivision number SS-1723 on November 18, 1982. The lot lines have not been adjusted since that time. *Exhibit 1, pages 1 and 2.*
4. The subject property is zoned Rural Residential Resource - One Dwelling Unit per Five Acres (RRR 1/5), a zone that allows single-family development, agriculture, home occupations, and accessory farm housing as primary uses. The purpose of the zone is described in Thurston County Code (TCC) 20.09A.010 as follows:

The purpose of this chapter 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.

TCC 20.09A.010; Exhibit 1. Although the subject parcel is smaller than five acres in area, it is considered a developable lot pursuant to TCC 20.56.020(2) because it was lawfully created. The proposed residential use is consistent with surrounding land uses. *Exhibits 1 (page 3) and 1.B; TCC 20.56.020.*

5. Development standards in the RRR 1/5 zone include a minimum 20-foot front yard setback, minimum five-foot side and rear yard setbacks, and maximum hard surface coverage of 10,000 square feet. *Exhibit 1, page 3; TCC 20.07.030; TCC 20.09A.030.*
6. The subject property contains 6,735 square feet of prairie habitat, which generally occupies a narrow band extending longitudinally through the central portion of the property, with the largest amount located in the northern portion of the property. Prairie habitat is a regulated habitat under the Thurston County critical areas ordinance (CAO). Single-family residential development is prohibited within prairie habitat and within a 50-foot buffer surrounding prairie habitat. Due to the central location of the habitat, it would not be possible to develop a residence and associated infrastructure (well, septic system, vehicular access, yard, etc.) entirely outside of the regulated habitat and required buffer area on-site. *Exhibit 1.F; see also Exhibit 1.I.*

¹ The legal description of the subject property is Lot 3 of Short Subdivision, SS-1723; also known as Tax Parcel No. 13610130503. *Exhibit 1.*

7. The Applicant proposes to develop the southern portion of the subject property with a single-family residence, driveway, well, septic system, and yards. The combined footprint of the residence (1,700 square feet) and attached garage would be 2,320 square feet. The total proposed development envelope (including yards not containing structures) would occupy 21,050 square feet. The development area would cover the southern extent of the prairie habitat – resulting in impact to 1,267 square feet of habitat - as well as the associated required buffer.² The encroachment of the actual building footprint into the delineated habitat would be much more modest, and the Site Plan suggests that it could be avoided with an adjustment of location. However, the Applicant submitted that maintaining the narrow band of prairie plants in the area would be impractical and would result in future impacts from encroaching yard plants, with which assertion County Staff concurred. Consequently, the Applicant proposes to designate the entire southern portion of the property as a development area and enhance the prairie habitat in the northern portion of the property as mitigation. The proposal does not call out a 50-foot buffer adjacent to or within the proposed prairie area. *Exhibits 1.E and 1.F.* Planning Staff submitted that identification of a new 50-foot buffer surrounding the proposed new prairie area with the subject property is not required because the proposed enlarged and enhanced prairie would be protected by critical area fencing and signage in perpetuity as recorded on the deed of the lot, and because five years of maintenance and monitoring of the proposed mitigation would ensure a net prairie habitat benefit from the proposal. *Robert Smith Testimony.*
8. The delineated prairie habitat on site is severely degraded and dominated by invasive weed species. As mitigation for proposed impacts to prairie habitat in the southern portion of the subject property, the project would designate the entire northern portion of the subject property (29,873 square feet) as prairie habitat. Invasive species of weeds would be removed, and the area would be planted with the same seven species of prairie plants as found in the impacted area. A five-year maintenance and monitoring plan is proposed, and a restrictive covenant would be recorded to alert future owners and to ensure that the enhanced area is protected in perpetuity. Based on a functional analysis by a professional biologist, the proposal would not result in a loss of habitat functions or values, but on the contrary would improve habitat function. *Exhibit 1.F.*
9. Aside from prairie plants, no species of concern were identified on the subject property. *Exhibit 1; see also Exhibits 1.F and 1.I.*
10. The Thurston County Environmental Health Division has approved an on-site sewage disposal design for the subject property. The locations of the sewage disposal system and well as shown on the proposed site plan are consistent with the approved design. The Environmental Health Division submitted that the proposal appears to satisfy the

² The extent (square footage) of prairie habitat buffer impact proposed was not separately quantified from the total prairie impact, a fact that Planning Staff felt was acceptable due to the more rigorous reasonable use exception process. *Exhibit 1.F, Figure 3 (site plan); Robert Smith Testimony.* In the instant case, because a larger area of prairie habitat is proposed to be created, arguably resulting in net ecological benefit, this omission of the application materials can reasonably be accepted; however, given other facts, this omission could have resulted in denial.

requirements of the Thurston County Sanitary Code and recommended approval of the RUE. *Exhibit 1.J; Dawn Peebles Testimony.*

11. Notice of the open record hearing was mailed to owners of property within 500 feet of the site on July 30, 2019, published in *The Olympian* on August 2, 2019, and posted on site on July 30, 2019. *Exhibits 1 (page 2), 1.A, and 2.*
12. Public comment on the application included references to three additional homes proposed to be developed adjacent to the one proposed, with concern that all would be excepted from the requirements of the CAO with respect to prairieland preservation, and that this impact would have an adverse impact on wildlife habitat. *Exhibits 1.N and 3.* However, the land referenced in this comment (including the subject property) is part of a four-lot short plat that was approved in 1982. Based on the findings of a site visit by a County biologist, the other three parcels have buildable area outside of the critical area and can be developed without a RUE. The requested RUE only applies to the subject parcel, which is Lot 3 of the short subdivision. *Exhibits 1 and 1.I; Smith Testimony.*
13. Considering all information presented by the Applicant, including hearing testimony, County Staff recommended approval subject to the conditions in the staff report. *Testimony of Robert Smith and Dawn Peebles; Exhibit 1.* The Applicant representative waived objection to the recommended conditions. *Nikki Westman 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:

- 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. Based on the size of the lot, the allowed uses in the RRR 1/5 zone, and the use of surrounding parcels, single-family residential development is the only reasonable use of the property. *Findings 3 and 4.*
2. The submitted materials do not completely demonstrate that no reasonable use with less impact on the critical area or buffer is possible, because the application materials fail to explain why/whether it would not be possible to wedge reasonable residential use into the outer unencumbered sliver of the property along the southeastern property boundary through the use of a buffer reduction and a smaller development envelope. On the other hand, given the identified prairie habitat's narrow dimension and degraded condition, it is not obvious that requiring the development area to be relocated and/or reduced would result in any environmental benefit, largely because there would be no opportunity for the County to require retention of as large a prairie area as is currently proposed under the buffer reduction process. The central location of the existing prairie habitat within the property clearly makes avoidance of the habitat difficult, if not demonstrably impossible (particularly with respect to the required buffer). The scale of the proposed residence and development envelope are reasonable. The proposed mitigation plan would result in a larger, contiguous prairie habitat over the existing condition. Given all of these factors, the undersigned is convinced that County Staff's decision not to require further Applicant analysis of the potentially relocated development envelope along the southeastern boundary through buffer reduction (in order to demonstrate strict compliance with this provision) is nevertheless consistent with the second RUE approval criterion. *Findings 6, 7, and 8.*
3. The requested residential development would not result in damage to other property and 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. A septic system and well can be developed on site consistent with Thurston County Sanitary Code requirements. *Finding 10.*
4. Again, the application materials have not strictly demonstrated that the proposed use is limited to the minimum critical area/buffer encroachment necessary to prevent denial of all reasonable use of the property, in that the other possible development scenario was not required to be developed to show its infeasibility. However, as in conclusion 2 above, the proposed outcome would result in a much larger contiguous area of greatly enhanced

prairie habitat than exists in the undeveloped condition and therefore the proposal meets the intent of the fourth RUE criterion. *Findings 6, 7, and 8.*

5. As conditioned, the proposed reasonable use would result in minimal alteration of the critical area. The majority of the existing prairie habitat would be preserved and enhanced in the northern portion of the property. *Findings 6, 7, 8, and 13.*
6. Conditioned to require compliance with the submitted habitat management plan, the proposal ensures no net loss of critical area functions and values. *Findings 8 and 13.*
7. The use would not result in unmitigated adverse impacts to known species of concern. *Finding 9.*
8. The location and scale of existing development is not the sole basis for granting the reasonable use exception. The basis for the reasonable use exception is the prairie habitat that bisects the property. The proposed building envelope is not excessive in area, and it appears that even a smaller building envelope would encroach into the regulated area. *Findings 6 and 7.*

DECISION

Based on the preceding findings and conclusions, the request to construct a single-family residence within native prairie habitat is **GRANTED** subject to the following conditions:

- 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. 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.
- C. If contamination is currently known or suspected during construction, testing of potentially contaminated media must be conducted. If contamination of soil or groundwater is readily visible, or is revealed by testing, The Washington State Department of Ecology must be notified [Contact the Environmental Report Tracking System Coordinator at the Southwest Regional Office at (360) 407-6300].
- D. The Applicant shall contact the proper authorities, including the Nisqually Indian Tribe Preservation Officer at (360) 456-5221, if during excavation there are discoveries of archaeological artifacts or human burials.
- E. The Applicant shall complete all prairie habitat mitigation as proposed in the Prairie Habitat Management Plan, EnviroVector, dated May 20, 2019.

- F. The Applicant shall provide a financial security to ensure the proposed five-year monitoring and maintenance portion of the proposed prairie habitat mitigation. The financial security shall comply with requirements identified in County Code TCC Chapter 24.70.
- G. Fencing and critical area signs shall be installed along the prairie habitat set-aside, subject to standards of TCC Chapter 24.60.
- H. 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.

DECIDED August 27, 2019.



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 **\$750.00** for a Request for Reconsideration or **\$1,020.00** 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 \$1,020.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
Filed with the Community Planning & Economic Development Department this _____ day of _____, 20____.