



COUNTY COMMISSIONERS

Carolina Mejia-Barahona

District One

Gary Edwards

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District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Application of	)	NO. 2019100747
	)	
<b>Perry &amp; Diana Wiens</b>	)	<b>Wiens Release of Moratorium</b>
	)	
For Approval of a	)	
Release of Development Moratorium	)	FINDINGS, CONCLUSIONS,
	)	AND DECISION
	)	

**SUMMARY OF DECISION**

The requested release of development moratorium is **GRANTED** subject to conditions.

**SUMMARY OF RECORD**

**Request:**

Perry and Diana Wiens (Applicant) requested a release of development moratorium, enacted for logging without a County permit, to allow a future large lot subdivision of Tax Parcel Number 12607320000, which is located on the north side of 140th Avenue SW in Rochester, Washington.

**Hearing Date:**

The Thurston County Hearing Examiner held a virtual open record hearing on the request on January 12, 2021. In order to ensure public access to the virtual hearing process, the record was held open two business days (through January 14, 2021) to allow written public comment from members of the public who may have had difficulty joining the virtual hearing, with additional time arranged for responses by the parties. No post-hearing public comment was submitted, and the record closed on January 14, 2021. However, prior to decision issuance, the Hearing Examiner reopened the record for additional information, which was timely submitted; the order reopening the record established a decision issuance date of February 5, 2021.

**Testimony:**

At the hearing, the following individuals presented testimony under oath:

Scott McCormick, Associate Planner, Thurston County

Dawn Peebles, Thurston County Environmental Health Division

Arthur Saint, Thurston County Public Works Department  
Heather Burgess, Applicant Representative  
Alex Callender, Land Services Northwest, Applicant consultant  
Perry Wiens, Applicant  
Thomas Craig Jr., neighbor

**Exhibits:**

The following exhibits were admitted in the record:

- EXHIBIT 1 Community Planning & Economic Development Department Staff Report including the following attachments:
- A. Notice of Public Hearing
  - B. Vicinity / Zoning Map
  - C. Master Application, received February 21, 2019
  - D. Release of Moratorium for a Development Project Application, dated February 21, 2019
  - E. Notice of Application, dated April 25, 2019 with adjacent property owners list dated March 25, 2019
  - F. Mitigated determination of non-significance (MDNS), issued September 18, 2020 with adjacent property owners list dated September 16, 2020
  - G. Environmental Checklist, received February 21, 2019
  - H. Large Lot Subdivision Map dated August 4, 2020
  - I. Wetland Reconnaissance Report by Key Environmental Solutions LLC, dated December 18, 2018
  - J. Stillwater Ridge Large Lot Subdivision Wetland Delineation and Stream Assessment Report with Mitigation Plan by Land Services Northwest, dated August 13, 2020
  - K. Letter from Thurston County CPED to Phillips Burgess PLLC, dated March 23, 2020
  - L. Photos and descriptions of wetland test pits from site visit of April 30, 2019

- M. Comments from Washington State Department of Ecology, dated October 2, 2020 and March 21, 2019
- N. Comments from Thomas Joseph Craig Jr., dated October 1, 2020
- O. Email from Zachary Meyer, Washington State Department of Ecology, dated September 10, 2019
- P. Email from Heather Burgess to Travis Burns, dated May 13, 2019
- Q. Email from Thomas Craig, dated May 9, 2019
- R. Email from Carla Fosberg with Washington State Department of Natural Resources, dated May 8, 2019
- S. Email from Zachary Meyer, Washington State Department of Ecology, dated May 1, 2019
- T. Comment letter from the Nisqually Indian Tribe, dated March 6, 2019

Exhibit 2 Alexander Callender Curriculum Vitae, received January 11, 2021

Exhibit 3 LIDAR Tech Memo and Images, received January 12, 2021

Exhibit 4 Email from Zachary Meyer, Washington State Department of Ecology, January 25, 2021, with “cover email” from Scott McCormick, same date

Also included in the record is an Order Requiring Supplementation of the Record, issued January 25, 2021.<sup>1</sup>

Based on the record developed through the open record hearing process, the following findings and conclusions are entered in support of the decision of the Hearing Examiner:

### FINDINGS

1. The Applicants requested a release of development moratorium, enacted for logging without a County permit, to allow a future large lot subdivision of Tax Parcel Number 12607320000, which is located on the north side of 140th Avenue SW in Rochester, Washington.<sup>2</sup> *Exhibits 1, 1.C, and 1.D.*

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<sup>1</sup> The Applicants also submitted a timely response to this order; however, it consisted of a document that the undersigned felt was unresponsive to the Order and a duplicate of the document at Exhibit 1.J. The Applicants withdrew their response after being informed that the information submitted by the County adequately addressed the Order.

<sup>2</sup> The subject property is unaddressed. The legal description is Section 7 Township 16 Range 2W Quarter NW SW W.M., EXCEPT COUNTY ROAD KNOWN AS ERSKINE ROAD ALONG THE SOUTH BOUNDARY THEREOF; known as tax parcel 12607320000. *Exhibit 1.*

2. The application was submitted on February 21, 2019 and determined to be complete for purposes of commencing County review on March 22, 2019. *Exhibit 1.E.*
3. The subject property is 32.73 acres in area and is zoned Rural Residential/Resource - One Dwelling Unit per Five Acres (RRR 1/5). The parcel is undeveloped. The Applicants propose a large lot subdivision that would divide the parcel into six single-family residential lots. *Exhibits 1, 1.D, and 1.H.*
4. The Washington State Department of Natural Resources (DNR) issued a Class III forest practices permit to the prior owner of the subject property on October 19, 2015. The prior owner subsequently logged the subject property without obtaining a County forest practices permit sometime between 2016 and 2017. Neither the prior owner nor the Applicants have reforested the property in accordance with DNR requirements. After taking possession, the Applicants stumped and graded the property in preparation for future development, and planted rye grass to control erosion. *Exhibits 1, 1.J, 1.R, and 3; Perry Wiens Testimony.*
5. The southeastern portion of the subject property contains an approximately 6,927 square foot depressional wetland (Wetland A) that meets the criteria for a Category III wetland under the Thurston County critical areas ordinance (CAO).<sup>3</sup> The standard buffer width for a category III wetland is 180 feet, but the buffer may be administratively reduced (without a public hearing) to a minimum of 135 feet with mitigation. The Applicant proposes to reduce the wetland buffer width on its west side to allow for development of a subdivision access road from 140th Avenue SW. The 12,837 square feet of impacted buffer would be replaced on the east side of the wetland. *Exhibits 1.J and 1.H.*
6. There is an approximately three-acre Category III wetland off site to the north of the subject property. The buffer associated with the offsite wetland extends slightly onto the subject property but need not be affected by future development. *Exhibits 1.J and 1.H.*
7. Wetland A and its buffer were disturbed by the prior owner's logging activity and subsequent activities by the Applicants. The Applicants submitted a mitigation plan that includes plantings and other measures that would improve wetland and buffer functions and values compared to their current condition, including those related to screening, nutrient intake, snags and other habitat features, structure, surface roughness, temperature attenuation, and erosion control. Seven planting zones are proposed over an area of approximately 158,633 square feet, including new wetland buffer area proposed as mitigation for the buffer that would be reduced for placement of the subdivision road. County Planning Staff submitted that implementation of the mitigation plan would correct the damage that has occurred because of the logging, stumping, and grading activities and recommended that the mitigation occur prior to final approval of the large lot subdivision. *Exhibits 1 and 1.J.*

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<sup>3</sup> The delineation report gives multiple, differing total area figures for Wetland A. This figure, from the table on page 24, appears to the undersigned to be most accurate/representative. *Exhibit 1.J.*

8. The Thurston County Public Health and Social Services Department, Environmental Health Division (EHD), reviewed the proposed moratorium in the context of reviewing the separate subdivision application. At hearing, EHD Staff testified that following its review, the subdivision application received EHD's recommendation for approval in June 2019, and that EHD has no concerns or conditions regarding the instant release of moratorium. *Dawn Peebles Testimony*. County Public Works development review staff also reviewed both the subdivision and the moratorium. At hearing, Public Works Staff testified that access roads and drainage would be reviewed through the subdivision application, and that their department has no concerns on the request for release of moratorium. *Arthur Saint Testimony*.
9. Thurston County acted as lead agency for review of the environmental impacts of the subdivision proposal under the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on September 18, 2020. The MDNS contains conditions addressing archaeological protection, wetland mitigation, erosion control, pollution control, construction hours, and road cleaning. *Exhibit 1.F*.
10. Comments on the MDNS were timely submitted by an adjacent property owner. Relevant to the release of moratorium, these comments submitted the position that the wetland on site was more extensive prior to the Applicant's activities on the property, which included constructing a drainage ditch from the wetland, and that the proposed mitigation is inadequate to return the feature to its former functions and values. *Exhibit 1.N*. In response to these concerns, County Staff submitted that it would be nearly impossible to accurately prove the original wetland characteristics at this point, and that the County cannot require mitigation without accurate or adequately detailed evidence. The MDNS was not appealed. *Exhibits 1 and 1.F*.
11. Notice of the public hearing was mailed to all property owners within 500 feet of the site on December 22, 2020 and published in The Olympian on January 1, 2021. *Exhibit 1.A*.
12. At hearing, Mr. Craig appeared to provide public comment in which he reiterated his concerns that the wetland delineation report fails to accurately describe the extent and thus the functions and values of previously extant Wetland A. He contended that in the process of stumping and grading the wetland, the Applicant used large equipment ("the biggest cat I've ever seen") to dramatically grade the area of the wetland with cuts up to five feet deep and created a ditch to drain the "pond" that was there for "hundreds of years." Mr. Craig testified that the Applicant's actions made the wetland area drain west to Koala Court. Before the Applicants purchased the property, Mr. Craig had talked to a realtor and had considered buying it, but a realtor had dissuaded him on the basis of the wetlands. He stated that originally the Applicant had said his proposal would just be a couple of family homes, but now it's six lots and he is concerned about having the access road along the shared property line for that many units. In response to Mr. Wiens's testimony that he is opposed to construction and fabricating this information about the extent of the former wetland, Mr. Craig alleged the Applicants are not telling the truth about how big it was. He contended that he is concerned about wildlife habitat, drainage,

and the aquifer. *Thomas Craig Jr. Testimony.*

13. In response to Mr. Craig's assertions, Mr. Wiens testified that he feels they are making every effort to restore property that was damaged by the previous owner. The loggers who cleared the property left a mess, and Mr. Craig had communicated approval while the Applicant was clearing that mess. Mr. Wiens stated that he doesn't understand the after the fact concerns, because he cleared the property under a DNR permit, inquired with DNR if it was ok to clear, and got an affirmative answer, asserting that DNR had agreed there was no wetland and that he had moved forward in good faith. Mr. Wiens submitted that he's been a builder in the area for 43 years and that his neighbor is trying to prevent development. *Perry Wiens Testimony.*
14. Responding to Mr. Craig's testimony, the Applicants' critical areas consultant indicated that in addressing the County's concerns (related to the previous code enforcement action that has since settled), he (Alex Callender) had done more than typical wetland delineation; he took a five-foot auger and installed a couple of groundwater monitors down to a depth of 36 inches. He testified that the soil profiles were consistent throughout the site and that nothing he observed was consistent with a recent incident of five-foot deep grading. In support of this, he offered LiDAR aerial photographs of the subject property, and testified that in the earlier profile from 2003 to the more recent aerial from 2017, there is no real change to the topography. Had the kind of grading described by Mr. Craig been performed, Mr. Callender asserted that it would be obvious on the LiDAR, and he testified that it is not visible. In his opinion, given that the area is now unforested, the wetland resulting from the proposed mitigation would be larger than could have existed in the former forested condition. He further offered that the Applicants have already contacted him about buying plants and they are ready to get started. Because the area is sunny, Mr. Callender testified that after planting it will fill in within about three years. *Exhibit 3; Alex Callender Testimony.*
15. To the eye untrained in interpreting LiDAR, these images are not possible to interpret as to whether or not they show a substantial change in grade. *Exhibit 3.*
16. In response to this conflicting testimony, Planning Staff testified if the area containing the wetland had really been graded to depths of four to five feet, it would obviously have severely disturbed the wetland and changed topography of the site, but as of these proceedings, there is no evidence left from which to determine whether this occurred. The testimony of both individuals is uncorroborated by any available evidence, resulting in a situation in which the only path forward is to restore the stumped and graded, now acknowledged wetland as proposed. Because of this, Planning Staff recommended approval of the release of moratorium subject to a condition requiring implementation of the restoration plan. Planning Staff testified that the Washington Department of Ecology has reviewed and accepted the proposed mitigation plan. *Scott McCormick Testimony; Exhibit 4.*
17. An Applicant representative at hearing asserted that the determination of the nature and extent of the damaged wetland had been the subject of an administrative appeal, which

appeal had resolved through settlement. Following what she described as a fairly exhaustive review of critical area, including a site visit with County and Department of Ecology representatives, the Applicants had retained a second wetland consultant, who had submitted the restoration plan, which was accepted by the County as satisfying the requirements of the critical areas ordinance. She noted, again, that the Applicants had acquired the property after it had been logged by the former owner without appropriate County permits. She agreed with Planning Staff's position that the only path forward is to restore the site as proposed and indicated that the Applicants waived objection to the recommended condition of approval. *Heather Burgess Testimony*.

## **CONCLUSIONS**

### **Jurisdiction**

The Hearing Examiner has jurisdiction to authorize, conditionally authorize, or deny a release a forest practices development moratorium pursuant to TCC 17.25.700(F).

### **Criteria for Review**

The Hearing Examiner may authorize release of a forest practices development moratorium if the following findings set forth in TCC 17.25.700(G) can be made:

1. The person requesting the release did not attempt to avoid County review or restrictions of a conversion forest practices application;
2. Critical areas and their buffers, and shoreline area as set forth in Title 24, Chapters 17.15 and 19.04, respectively, of the Thurston County Code were not damaged in the forest practice operation, or that any such damage is repairable with restoration; and
3. Corrective action can be undertaken to provide for compliance with applicable conversion standards established by this chapter.

### **Conclusions Based on Findings**

1. Because the logging was performed by the prior owner of the property, the Applicants did not attempt to avoid County review of a forest practices application. *Findings 4 and 16*.
2. The damage to the wetland is repairable with restoration. *Findings 7*.
3. The record contains directly conflicting testimony from two individuals who each have a personal stake in the outcome. Because there is no neutral, empirical evidence upon which to determine which side is closer to truth, and because the Department of Ecology has assented to the proposed restoration without further enforcement, the best path forward is to restore as proposed. The proposed corrective action can be undertaken to provide compliance to the best extent possible with applicable forest conversion standards, which pursuant to TCC 17.25.500(C) include the Thurston County critical areas ordinance. Given these circumstances, the recommended condition of approval requiring implementation of the mitigation plan prior to large lot subdivision approval is

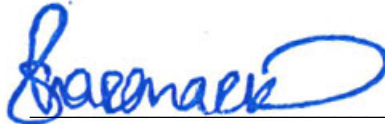
adequate to demonstrate compliance with release of moratorium criteria. *Findings 5, 7, 12, 13, 14, 15, 16, and 17.*

### DECISION

Based on the preceding findings and conclusions, the requested release of development moratorium is **GRANTED** subject to the following condition:

1. The proposed mitigation measures contained in Exhibit 1.J shall be implemented prior to final approval of the Applicant's large lot subdivision, project no. 2019100747, Folder Sequence no. 19 102056 ZE. An irrevocable assignment of savings shall be initiated for any outstanding items such as monitoring prior to final approval of the large lot subdivision.

Decided February 4, 2021.



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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 **\$777.00** for a Request for Reconsideration or **\$1,054.00** 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 ☐ \$777.00 for Reconsideration or \$1,054.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
Filed with the Community Planning & Economic Development Department this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.