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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. 2021104738
)	
Steve Rushing)	
)	Decision On Motion for
For a Reasonable Use Exception)	Clerical Correction
_____)	

On December 12, 2022, a decision was issued in the above-captioned application granting the reasonable use exception (RUE) to develop residential structures within a regulated stream buffer on property addressed as 7820 Mirimichi Drive in unincorporated Olympia, Washington.

On January 5, 2023, Steve Rushing (Applicant) emailed a requested a clerical correction to the Decision, stating:¹

After review of the Hearing Examiner's decision, I respectfully request the Hearing Examiner make the following clerical correction to his/her decision; page 11 item 13. The revised submitted house plan with detached garage identified eight trees needing removal instead of the seven identified on the previous site plan submitted by Enviro Vector. Moving the house over to be further away from the stream impacts one additional tree. Please review and revise this finding.

Upon receipt of the motion for clerical correction form, the undersigned checked with the Hearing Clerk as to whether the County had issued its “final” letter, informing the Applicant that the decision was final. The Clerk indicated that the final letter was issued on January 4, 2023.

Jurisdiction

Pursuant to *Thurston County Code (TCC) 2.06.060*,

¹ The clerical correction request form is dated by the Applicant December 30, 2022, but according to the Hearing Clerk it was submitted by email on January 5, 2023.

Any aggrieved person ... who disagrees with the decision of the Examiner may make a written request for reconsideration by the Examiner within ten days of the date of the written decision. The request for reconsideration shall be filed with the Development Services Department upon forms prescribed by the Department. If the Examiner chooses to reconsider, the Examiner may take such further action as he or she deems proper and may render a revised decision

Pursuant to Hearing Examiner Rules of Procedure *Rule 9.4, Procedure for Reconsideration and Reopening Hearing*

....

b. Reconsideration.

- 1) Any party of record may file a written request with the Hearings Examiner for reconsideration within ten (10) days of the date of the Hearings Examiner's recommendation or decision. The request shall explicitly set forth alleged errors of procedure or fact. The request may also include direction to a specific issue that was inadvertently omitted from the Hearings Examiner's recommendation or decision.
- 2) Additional evidence may only be submitted upon a Request for Reconsideration if it is new evidence not available at the time of the public hearing, upon a showing of significant relevance and good cause for delay in its submission. At the Examiner's discretion, parties of record will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.
- 3) The Hearing Examiner shall respond to the request for reconsideration by either denying the request or approving the request by modifying or amending the recommendation / decision based on the established record or setting the matter for an additional public hearing.

Discussion

The Applicant presented testimony and argument in support of his position at hearing. Shortly before the hearing, he offered a revised site plan that neither Planning Staff nor the undersigned had a chance to closely review prior to hearing; this lack of careful prehearing review was acknowledged by Staff and Examiner on the record.

In testimony, the Applicant was asked to describe the differences between the site plan reviewed by Staff, upon which their analysis was based (Exhibit 1.F), and the site plan submitted just prior to hearing (Exhibit 2). He stated that the site plan showed a two-story primary residence, which reduced the footprint and allowed 10 feet greater setback from the stream. Regarding trees, the Applicant discussed the fact that the project was designed to remove as few trees as possible and he specifically identified one cedar he intentionally designed around. In his testimony, he did not call out that the revised site plan (Exhibit 2) identifies eight trees for removal. Note, there is no tree removal tally provided or note on the face of the plan addressing number of trees to be removed or retained.

Based on consideration of the record as a whole, the decision adopted Planning Staff's recommended conditions of approval. Condition 13 as recommended by Staff stated:

13. Development of the proposed structures shall remove as few trees as possible. Only the seven trees identified for removal by the critical areas report & buffer mitigation plan by Envirovector dated April 29, 2022 (Exhibit 1.J) shall be removed without further review and approval by Thurston County Community Planning and Economic Development.

Both the Thurston County Code and its Hearing Examiner Rules of Procedure provide for a request for reconsideration process, in which a party can request a change in an issued decision based on material errors of fact, law, or procedure. Requests for reconsideration must be filed within 10 days of decision issuance.

The Rules of Procedure, at Rule 11.1, further allow for “clarification.” The rule does not establish a deadline for clarification requests but does require notice to the other party. [This rule speaks of appeals and may not apply to decisions on permit applications per se.]

Informally, the County’s Hearing Examiner has adopted a process through which a party to a hearing may request correction of scrivener errors in issued decisions. At the Examiner’s direction, the Planning Department created a form entitled Motion for Clerical Correction, which is the form used by the Applicant in this request. While the form does not state a deadline, nor refer to rules or regulations that establish a deadline, it does not and cannot confer an indefinite period for the filing of such requests.

In land use law, finality is an important concept. The Washington State Land Use Petition Act (LUPA, RCW 36.70C) was adopted to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review. In the decades since its adoption, courts have held that a land use decision becomes final if it is not timely appealed within 21 days of issuance. This finality applies even when it is the local government that issued the decision which seeks to correct its own error in permit issuance. See *Chelan County v. Nykreim*, 146 Wn.2d at 933, 939 (2002).

Thus, even when a land use decision contains error, it becomes final and cannot be amended without further appropriate process after expiration of the 21-day LUPA appeal period, which in this case would have been Tuesday January 3, 2023 (because the 21st day fell on a legal holiday, January 2, 2023).

Condition 13, restricting tree removal to the seven trees identified in the Applicant’s critical areas report and based on Finding 11, was stated in the staff report and the Applicant did not object to it within the reconsideration period. The December 12, 2022 decision has become final.

Further, in the opinion of the undersigned, the requested correction is not a “scrivener error.” It is not a typo and does not misstate information presented at hearing. The critical areas report, the site plan reviewed by Staff (Exhibit 1.F), and the staff report all stated that only seven trees were proposed for removal. The Applicant attended the hearing and had the opportunity – in response to a direct question asking for testimony explaining the differences between the two site

plans – to call out that an eighth tree needed to be removed based on the revised site plan submitted immediately prior to hearing. He did not call this out. The site plan itself is very complicated and filled with numbers and figures that are difficult to read. Had he called it out in his testimony, there could have been a response from Staff as to whether removal of an eighth tree altered Staff’s analysis of the proposal.

Decision

With the expiration of the LUPA appeal period and thus the finality of the decision, the undersigned is not able to make the requested change. The Applicant must request the Planning Department to allow modification of the site plan.

However, all parties please note the following. Condition 1 requires submittal of a revised site plan showing the correct dimension and sizes of proposed structures as approved through the RUE request and recommended that the revised site plan be in the form of a septic design. Also note that Condition 14 states:

14. All development shall be in substantial compliance with the revised site plan required in condition 1 above. Any expansion or alteration of this use will require approval of a new or amended approval. The Development Services Department will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

This condition confers authority upon the Planning Department to allow “alteration” of the site plan. Even condition 13 confers authority on Planning Staff to allow more than seven trees to be removed with “further review and approval by Thurston County Community Planning and Economic Development.”

Finally, on the off chance that Planning cannot approve removal of the eighth tree through these processes, the Applicant could apply for an RUE amendment.

Decided January 6, 2023.



Sharon A. Rice
Thurston County Hearing Examiner