



COUNTY COMMISSIONERS

Cathy Wolfe  
 District One  
 Sandra Romero  
 District Two  
 Karen Valenzuela  
 District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
 FOR THURSTON COUNTY**

|                                    |   |                        |
|------------------------------------|---|------------------------|
| In the Matter of the Appeal of     | ) | No. 2008103767         |
|                                    | ) |                        |
| <b>Dennis DeLaHunt</b>             | ) | FINDINGS, CONCLUSIONS, |
|                                    | ) | AND DECISION           |
| Of an Administrative Determination | ) |                        |
| _____                              | ) |                        |

**SUMMARY OF DECISION**

The appeal of the stream determination contained in the November 16, 2009 Critical Area Administrative Review Decision of the Thurston County Resource Stewardship Department is **GRANTED**.

**SUMMARY OF RECORD**

Procedural History:

On November 16, 2009, Assistant Planner Corina Hayes of the Thurston County Resource Stewardship Department issued a Critical Area Administrative Review Decision for a large lot subdivision application submitted by Dennis DeLaHunt. The Decision included findings that the subdivision property contains “a highly modified stream” and conditions requiring Mr. DeLaHunt to, among other things, remove a road from the required stream buffer.

On November 24, 2009, Mr. DeLaHunt filed an appeal of the stream determination. The appeal was timely under the 14-day deadline set forth in Thurston County Code 20.60.060(1) and specified in the Critical Area Administrative Review Decision.

Hearing Date:

An open record hearing on the appeal was held before the Thurston County Hearing Examiner on April 19, 2010.

Testimony:

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

Corina Hayes, Resource Stewardship Department  
Robert Smith, Resource Stewardship Department  
Jeff Fancher, Deputy Prosecuting Attorney  
Jason Kunz, Washington Department of Fish & Wildlife  
Dennis DeLaHunt  
Christian Formuth, Augua Tierra Land & Water Services, Inc.  
Key Mc Murry, Key Environmental Solutions, LLC  
Robbi Ferron

Exhibits:

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

***The County's exhibits will be identified with a 'C' prefix in the Findings that follow.***

EXHIBIT C-1 Resource Stewardship Land Use and Environmental Review Report with the following Attachments:

- Attachment A Notice of Public Hearing
- Attachment B Appeal received November 24, 2009
- Attachment C County decision letter issued November 16, 2009
- Attachment D WDFW email dated 3-25-09
- Attachment E Aqua Tierra Land and Water Services, Inc dated September 6, 2009
- Attachment F WDFW emails dated July 15, 2009 and October 14, 2009 and letter dated October 13, 2009
- Attachment G WDFW emails dated December 24, 2009 and January 7, 2010
- Attachment H Department of Natural Resources letter dated January 4, 2010
- Attachment I Key Environmental Solutions report dated March 30, 2010
- Attachment J Wild Fish Conservancy letter dated April 2, 2010
- Attachment K Appellants list of inspections, permits and approvals by Thurston County
- Attachment L Aerials of property dated 1996 & 2009 with contours and wetlands. 2009 Aerial with wetlands mapping.
- Attachment M WDFW email dated April 2, 2010
- Attachment N Large Lot map modified by County staff to show stream location.
- Attachment O Neighboring property owner letter dated April 5, 2010
- Attachment P DNR mapping of stream
- Attachment Q Photographs of property

***The Appellant's exhibits will be identified with an 'A' prefix in the Findings that follow.***

- Exhibit A-1 Map of subject property with topography and video
- Exhibit A-2 Wetland Determination Report from Ecological Land Services Inc.
- Exhibit A-3 E mails between Jason Kunz DFW and Thurston County Staff
- Exhibit A-4 Drainage/ Stream Type Assessment from Agua Tierra Land and Water Services with photographs.

- Exhibit A-5 Peer review of report of Agua Tierra, site study and additional findings by Key McMurry of Key Environmental Solutions
- Exhibit A-6 Critical Area requirements letter from Corina Hayes, Assistant Planner with attached letter from Jason Kunz of WA. Dept. of Fish and Wildlife Copies of Appellant's repeated request for meetings with County to provide documentation and County refusals to meet.
- Exhibit A-7 List of inspections, permits, and approvals by Thurston County and Washington State staff and studies performed by private consultants.
- Exhibit A-8 List of Photos from WA. Department of Transportation and Thurston County Geo-Data Center
- Exhibit A-9 Environmental Checklist for a 63 Lot proposed plat for subject property dated 7-2-90
- Exhibit A-10 Proposed plat map for 63 Lot development proposed in 1990
- Exhibit A-11 Wetland Delineation Study by Matt Bennett of the Coot Company Dated 2-25-1994
- Exhibit A-12 Plat map for LL-0851
- Exhibit A-13 Wetland & Stream Corridor Inventory Map by Thurston Regional Planning Council from 1993
- Exhibit A-14 Environmental Checklist for LL-0851 dated 1-7-94
- Exhibit A-15 Mitigated Determination of Non Significance for LL-0851 dated 4-29-1994
- Exhibit A-16 Thurston County SEPA files notes for LL-0851 dated 4-29-1994 Through 7-22-1994
- Exhibit A-17 Preliminary Conditional Approval notes
- Exhibit A-18 Preliminary Approval letter from Robert Smith dated 7-22-1994
- Exhibit A-19 Detention pond design on Grayhawk Lane and letter from Dan English Construction
- Exhibit A-20 Tolmie State Park Restoration and pond permit dated 7-2-1996
- Exhibit A-21 Drainage design and flow for subject property
- Exhibit A-22 Maps of lower field and pond area from Thurston County Geo Data
- Exhibit A-23 Application form for LL-1012 dated 7-3-1996
- Exhibit A-24 Routing letter for LL-1012 to County with list of State and County Agencies receiving documents dated 7-9-1996
- Exhibit A-25 Preliminary Conditional approval sheet for LL-1012 dated 7-3-1996
- Exhibit A-26 Comment letter from Roads and Transportation for LL-1012 date 8-5-1996
- Exhibit A-27 Preliminary approval letter for LL-1012 dated 9-17-1996
- Exhibit A-28 Conditional site approval for Project #81284 for home, water system, Septic system and road access dated 9-29-2000
- Exhibit A-29 Conditional site approval for 2005102812 for carport addition to Home dated 7-12-2005
- Exhibit A-30 Recorded agreement and map noting and showing service road crossing the subject property and neighboring property for drainage and utilities.
- Exhibit A-31 Letter from Kris Knutzen, WA. State Department of Natural Resources
- Exhibit A-32 Testimony of Dennis DeLaHunt

Upon consideration of the testimony and exhibits admitted at the open record hearing, the Hearing Examiner enters the following Findings and Conclusions:

### FINDINGS

1. The Appellant seeks Large Lot Subdivision approval to divide 30.27 acres of land into four lots. A copy of the subdivision map is included in the record as Exhibit C-1, Attachment n.<sup>1</sup> The subject property is located at 7422 Grayhawk Lane NE. *Exhibit C-1, pages 1 and 2.*
2. The subject property contains a single-family residence, a driveway serving the residence, the remains of an old logging road (the driveway and the logging road intersect near the residence), an accessory structure, a well, a sewage disposal system, and drainage facilities. The drainage facilities include a ditch that runs alongside the logging road, which the Appellant excavated in 1994 (the road itself was built by others in the mid-1970's); culverts to allow the drainage flowing from the roadside ditch to pass under the residential driveway; a storm pond ("lower storm pond") located in the northeast corner of the subject property, which the Appellant excavated in 1996 to prevent downstream drainage impacts to Tolmie State Park<sup>2</sup>; and a grassy swale between the logging road/driveway and the lower storm pond, which the Appellant constructed in 1996 (the swale is barely visible in recent photographs). The drainage facilities on site also include ditches that the Appellant constructed along the residential driveway, but the driveway ditches are not relevant to the appeal. It is the ditch running along the old logging road, along with the upstream and downstream segments of the drainage path, that the County considers a regulated stream. Off-site drainage facilities that are relevant to the appeal include a County-approved engineered storm pond ("upper storm pond") located on the north side of Grayhawk Lane (south of the subject property), which the Appellant constructed in 1994. The Appellant did not construct the drainage facilities to destroy any stream. *Testimony of Mr. DeLaHunt; Exhibits A-1; A-4; A-8; A-19; A-20; A-21; and A-31.*
3. The subject property is within a drainage basin that is approximately 450 to 500 acres in area. However, the sub-basin that actually contributes runoff to the project area is only 60 to 70 acres in area. Drainage from this area flows in a northeasterly direction into Puget Sound at Tolmie State Park, which is immediately adjacent to the subject property. *Exhibit A-4, page 1 and Figure 5.*
4. The drainage flow upstream, through, and downstream of the subject property is

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<sup>1</sup> The hand-drawn wetland and stream were added to the map by staff; they are not part of the original survey.

*Testimony of Ms. Hayes.*

<sup>2</sup> The Appellant's prior land clearing activities had resulted in a flow of sediment onto the park property during a flood event. The Washington State Parks and Recreation Commission granted the Appellant a permit to repair the damage and to construct drainage improvements on the park property. The permit did not specifically authorize the construction of the lower pond (which is off the park property), but the Appellant constructed the pond in that location to avoid impacts to the wetlands within the park. *Exhibit A-20; Testimony of Mr. DeLaHunt.*

described in a September 6, 2009 Drainage/Stream Type Assessment report prepared by Christian Fromuth of Agua Tierra Land and Water Services, Inc. (Exhibit A-4) and is visually depicted on Figure 5 of the report. The drainage flow can be summarized as follows:

- Road runoff from Grayhawk Lane and wetland overflow from a Class III wetland located on the south side of Grayhawk Lane pass through a culvert and enter the upper storm pond located on the north side of Grayhawk Lane.
- The water discharged from the storm pond enters a vegetated swale that follows the natural topography.
- Near the southern boundary of the subject property the drainage enters the ditch along the old logging road. The ditch is incised and scoured due to factors including the steep inclination (eight percent) and straight alignment of the ditch.
- The drainage exits the ditch system into an open grass meadow, where it eventually combines with runoff from the Appellant's driveway swale system. Through the meadow, the slope flattens, the soil characteristics change, and infiltration rates increase. The drainage "loses reach" in the meadow due to the high infiltration rates. There is no surface water scour or defined channel characteristics in the meadow area.
- The drainage enters the lower pond in the northeast corner of the subject property, which overflows onto a rock-lined spillway.
- The drainage exits the subject property and enters a wetland system within Tolmie State Park, and then flows into Puget Sound.

*Exhibit A-4, pages 2-3, Figure 5, and Photographs; Testimony of Mr. Fromuth.* Water only passes through the system during seasonal storm events. *Exhibit A-4.* The Appellant estimates that the upper pond overflows only 20 days a year. *Testimony of Mr. DeLaHunt.*

5. On February 5, 2009, the Appellant filed a Critical Area Administrative Review application for the proposed subdivision of the subject property, as required by TCC 17.15.412(A). *Exhibit C-1, page 2.*
6. On November 16, 2009, Assistant Planner Corina Hayes of the Thurston County Resource Stewardship Department issued a Critical Area Administrative Review Decision. The Decision included the following findings that are pertinent to the appeal:

This property also contains a highly modified stream, see the letter from Washington State Department of Fish and Wildlife. This stream is currently designated as fish bearing by Department of Natural Resources Forest Practice Water Type map. There is currently an unpermitted road/path next to the stream. The existing drive that leads up to the existing home crosses the stream. The stream also flows into a pond that was dug out sometime between 1996 and 2000, this activity also appears to be unpermitted.

*Exhibit C-1, Attachment c.* The Decision contains conditions requiring the Applicant to remove the “unpermitted road/path”, to reverse any unpermitted activities involving the stream, to re-align a proposed road easement, and to keep all road upgrades outside of the stream and steep slope buffers (the steep slope determination was not appealed). *Exhibit C-1, Attachment c.*

7. On November 24, 2009, the Appellant filed an appeal of the stream determination. The appeal was timely under the 14-day deadline set forth in Thurston County Code 20.60.060(1) and specified in the Critical Area Administrative Review Decision. *Exhibit C-1, Attachments b and c.*
8. Ms. Hayes visited the site prior to issuing her decision, but she does not have formal training in stream typing. Ms. Hayes relied on the opinion of Jason Kunz of the Washington Department of Fish and Wildlife (WDFW). Mr. Kunz’s opinion that the drainage course is a stream is contained in a series of emails and in a letter dated October 13, 2009. Mr. Kunz made two site visits prior to his October 13, 2009 letter, although he was not able to view the portion of the drainage located immediately upstream of the subject property during those initial visits. *Testimony of Ms. Hayes; Exhibit C-1, Attachment f; Testimony of Mr. Kunz; Testimony of Mr. DeLaHunt.*
9. In making critical areas determinations, County staff seeks input from the Washington Department of Fish and Wildlife (WDFW) and other agencies, but the County is responsible for making the final judgment call. *Testimony of Mr. Smith.*
10. Although Mr. Kunz’s opinion prior to the Critical Area Administrative Review Decision was that the drainage was a stream, he reversed himself after conducting a third site visit in response to the appeal. In an email dated December 24, 2009, Mr. Kunz communicated to Ms. Hayes the following:

Based on our field review yesterday, the mapped drainage does not continue onto Delahunt’s property.

The different small rills, the potential overflow of the one wetland, the sheetflow over the altered landscape, and off-site drainage input from the stormwater detention pond are what contributes to the dug-out pond, but it is my opinion that no regulated stream could be argued above the pond. ...

I really think we need to have that meeting with DNR at the Delahunt site to go over what constitutes an “Above Ground Channel System.” We need this (as training) for future stream calls.

My opinion is that the Pond is the upper extent of the regulated stream.

*Exhibit A-3, December 24 email.* Mr. Kunz has since reversed himself again and now stands by his initial determination that the drainage is a regulated stream. *Testimony of*

*Mr. Kuntz; see also Exhibit C-1, Attachment m.*

11. The Appellant submitted several special reports prior to issuance of the Critical Area Administrative Review Decision. These included a March 22, 1994 Wetland Delineation Report prepared by The Coot Company for a different subdivision application that included the subject property (the subject property is a portion of Lot 5 of that subdivision) (Exhibit A-11), a October 13, 2008 Wetland Determination Report prepared by Ecological Land Services, Inc. (Exhibit A-2), and the September 6, 2009 Drainage/Stream Type Assessment prepared by Agua Tierra Land and Water Services (Exhibit A-4). The Appellant submitted additional reports and documentation after filing the appeal. *Exhibit C-1, pages 2-3.*
12. The subdivision application that necessitated the 1994 Coot Company Wetland Delineation Report included sixty acres of land located on the north and south sides of what is now Grayhawk Lane. The wetland delineation only addressed the southernmost 20 acres of the subdivision property (south side of Grayhawk Lane) because that is where development was proposed. The northern 40 acres, which include the subject property, were not evaluated. *Exhibit A-11, March 22 Report, page 1; Exhibit A-12.*
13. Although the 1994 Wetland Delineation Report did not specifically address the subject property, it contained findings that are relevant to this appeal. The 1994 report identified a Class III wetland to the south of what is now Grayhawk Lane. This wetland is what the County now believes is the upper extent of the disputed stream. However, Matt Bennett, the ecologist who prepared the 1994 report, found the wetland to have “no connection to a stream.” *Exhibit A-11, March 22 Report, page 2.* In addition, Mr. Bennett noted the presence of an “abandoned logging road” that crosses the property from south to north, which continued north onto the northern forty acres. This logging road is the one that runs along the disputed stream. *Exhibit A-11, March 22 Report, page 2.*
14. Mr. Bennett’s conclusion that the wetland on the south side of Grayhawk Lane was a Class III wetland was based on the wetland’s hydrologic isolation and low structural diversity. *Exhibit A-11.* The County accepted the Class III classification, and conditioned its approval of the large lot on compliance with Class III buffer requirements. *Exhibits A-15 and A-18.*
15. The 2008 Ecological Land Services Wetland Determination Report, which was prepared specifically for the current subdivision proposal, identified *no critical areas* within the boundaries of the subject property (Exhibit A-2, page 1). With respect to streams, the report contained the following findings:

The site receives hydrology from precipitation and runoff from the surrounding hills. A Type F stream is mapped by the Department of Natural Resources in the eastern region of the site ... ELS field results indicate that the Type F stream does not exist on the site. Runoff from surrounding hills and valleys is collected in the man-made detention pond in the northeast corner of the site.

*Exhibit A-2, page 3.*

16. In early emails to County staff (prior to issuance of the Critical Area Administrative Review Decision), Mr. Kunz suggested that the reason ELS was not able to find a stream was that the Appellant had graded the road prior to its fieldwork. Mr. Kunz believed that the road was new and that violations had occurred. *Exhibit A-3, Kunz emails dated March 25, 2009 and July 15, 2009.* However, Washington State Department of Transportation aerial photography shows that the road existed in July of 1977. *Exhibit A-8.* The presence of the road was also noted in the findings of Mr. Bennett in his 1994 Wetland Delineation Report. *Exhibit A-11, March 22 Report, page 2.* The reason that the road now appears to be too narrow for logging equipment is that the Appellant only maintains sufficient width for an ATV or mower. *Testimony of Mr. DeLaHunt.*
17. The drainage ditch associated with the logging road is also not of recent vintage. In addition to Mr. DeLaHunt's testimony and written documentation regarding the age of the drainage ditch - which the Hearing Examiner finds credible – the age of the ditch is evidenced by the size of the vegetation growing in the excavation spoils. The ditch could not have been constructed within the past year. *Testimony of Mr. Fromuth; Testimony of Ms. McMurry.*
18. In the 2009 Drainage/Stream Type Assessment, Mr. Fromuth of Agua Tierra Land concluded, based on the stream type definitions set forth in WAC 222-16 (referenced in the Thurston County Critical Areas Ordinance), that the drainage through the subject property was not a jurisdictional stream due to the lack of defined stream channels.

No defined stream channel conditions were observed on subject parcels. All gathered flow drainage features on site and upstream contributing area drainage features were substantially human created or the direct result of stormwater collection and conveyance measures combining with direct rainfall and groundwater discharge. Human stormwater control structures dominate the physical drainage conditions observed on site.

The DNR Stream Activity Map (Figure 4) does NOT accurately locate stream channels or stream types within the subject drainage basin, nor within the subject parcel.

No stream channel bearing state or local agency regulatory jurisdiction was found on site.

*Exhibit A-4, page 7.<sup>3</sup>*

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<sup>3</sup> Mr. Fromuth has expertise in making stream determinations. His background includes a bachelor's degree in natural resources, a master's degree in water resources engineering, and more than 22 years of professional work experience. He has contracted with Thurston County and Washington Department of Ecology on water resources issues. *Testimony of Mr. Fromuth.*



19. After filing the appeal, the Appellant had stream and wildlife biologist Key McMurry of Key Environmental Solutions conduct a peer review of the Agua Tierra report and also review other documentation related to the case. Ms. McMurry conducted a site visit prior to reviewing the report so that she could make independent observations. Ms. McMurry found that there is no defined stream channel exiting the upper stormwater pond, and no defined channel between the roadside ditch and the lower stormwater pond. She did observe a defined stream channel exiting the lower stormwater pond towards Tolmie State Park. Ms. McMurry submitted that only that last segment of the drainage could be classified as a stream (specifically, a Type F stream); she otherwise concurred with Mr. Fromuth's conclusions. *Exhibit A-5; Testimony of Ms. McMurry.*
20. The County, and Mr. Kunz of WDFW, argued that the drainage is a stream because it receives some natural inputs such as seeps and sheet flow from the surrounding hills and overflow from the Class III wetland. *Testimony of Ms. Hayes; Testimony of Mr. Kuntz; Argument of Mr. Fancher; see also Exhibit A-21.* However, on this point the Hearing Examiner finds the testimony of Ms. McMurry to be credible that these inputs do not result in stream status because they are insufficient to result in a defined channel.<sup>4</sup> There is no defined channel between the Class III wetland and the upper pond, and there are no channels into the drainage system from other natural water sources.<sup>5</sup> *Testimony of Ms. McMurry; see also Exhibit A-4, Figure 5 and Photos 1 and 2.*
21. Current Department of Natural Resource (DNR) mapping identifies the drainage feature on the subject property as a Type F stream. A Type F stream is a fish-bearing stream. This designation was based on water type modeling and not on prior fieldwork. The parties to the appeal as well as DNR staff agree that the Type F designation is inaccurate, at least with respect to the portion of the drainage upstream of the lower pond. In a letter dated January 4, 2010, Kris Knutzen of DNR indicated that under the applicable state regulations, the drainage should be classified as a Type Ns stream.<sup>6</sup> A Type Ns stream is a stream that is seasonal and contains no fish. *Exhibit C-1, Attachment h; Testimony of Mr. Fromuth.* Jamie Glasgow of Wild Fish Conservancy concurred with Kris Knutzen's assessment. *Exhibit C-1, Attachment j.*
22. The current DNR water resources map was created in approximately 2003 to 2004, after storm drainage facilities were constructed on the subject property. Prior to construction of the storm drainage facilities, the DNR maps did not identify a stream on the subject property. *Testimony of Mr. Fromuth; Testimony of Ms. McMurry.*

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<sup>4</sup> Ms. McMurry is uniquely qualified in the area of stream typing. From 2000 to 2007 she was an Area Habitat Biologist for WDFW. While there, she trained with the person who developed stream typing protocols for the agency, completed a protocol surveying course, and reviewed thousands of Forest Practice Applications. Overall, she has 22 years of relevant work experience. *Testimony of Ms. McMurry.*

<sup>5</sup> In addition, the Appellant's consultants did not observe a flow of water between the Class III wetland and the upper pond during their site visits. *Testimony of Mr. Fromuth; Testimony of Ms. McMurry.*

<sup>6</sup> This opinion did not constitute an official change in DNR stream classification. *Testimony of Ms. McMurry.*

23. The DNR and Thurston County define streams differently, such that DNR’s interpretation of stream type is not conclusive as to whether the drainage feature is subject to Thurston County regulation. The relevant DNR definitions include the following:

(4) "Type Ns Water" means all segments of natural waters within the bankfull width of the defined channels that are not Type S, F, or Np Waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of a year of normal rainfall and are not located downstream from any stream reach that is a Type Np Water. Ns Waters must be physically connected by an above-ground channel system to Type S, F, or Np Waters.

(5) For purposes of this section: ...

(d) "Natural waters" only excludes water conveyance systems which are artificially constructed and actively maintained for irrigation.

*WAC 222-16-030.* In this case the artificially constructed drainage facilities can be classified as “natural waters” because they are not actively maintained for irrigation.

24. Kris Knutzen of DNR acknowledged the limitations of the typing system in a January 4, 2010 letter to the Appellant as follows:

I understand that it is crucial to your future discussions with the County in this matter that you secure a letter from DNR articulating that the noted human built and engineered stormwater system features on site are obligated by virtue of the Rules definitions to be identified as a “stream”, in this case a “Type Ns” stream. This letter is intended to fit this need.

*Exhibit A-31.* Kris Knutzen was not allowed by the applicable regulations to make a distinction between the storm drainage facilities and a stream. *Testimony of Mr. Fromuth; Testimony of Ms. McMurry.*

25. Thurston County exempts artificial drainage facilities from its definition of a stream. The County’s definition of a stream is as follows:

“Streams” means those areas of Thurston County where surface waters flow sufficiently to produce a defined channel or bed, A “defined channel or bed” is an area which demonstrates clear evidence of the passage of water and includes but is not limited to bedrock channels, gravel beds, sand and silt beds and defined channel swales. The channel or bed need not contain water year-round. This definition is not meant to include irrigation ditches, canals, storm or surface water runoff devices or other entirely artificial watercourses unless they are used by salmon or used to convey streams naturally occurring prior to construction.

*TCC 17.15.200.* For stream typing, the Thurston County Code references the DNR

regulations. *TCC 17.15.905*.

26. Historically, Thurston County has not recognized the presence of a stream on the subject property. Thurston Regional Planning Council's 1993 Wetland and Stream Corridor Inventory does not show a stream on the subject property. *Exhibit A-13*.
27. In 1996, the Appellant applied for a large lot subdivision (LL-1012) of the northern forty acres of the 1994 subdivision, an area that includes the disputed stream corridor. *Exhibit A-23*. Staff file notes from August 2, 1996 indicate that a site visit was conducted that day, and staff concluded, "No apparent critical areas or other concerns." *Exhibit A-25*. The County approved the large lot subdivision on September 17, 1996. *Exhibit A-27*.
28. In 2000, the Appellant obtained County approval of permits to construct a residence and sewage system on his parcel. The permit conditions included a note that "Arc View system review indicated no critical areas, floodplains, or wetlands of concern for this project." Inspections were conducted during the development process, yet no stream was identified. *Exhibit A-28*.
29. The County argued that the historic presence of a stream can be inferred by the size of the drainage basin and the topography of the subject property, which includes a draw that follows the course of the drainage. *Testimony of Mr. Kunz; Testimony of Ms. Hayes; Exhibit C-1, page 5*. The Hearing Examiner finds that such general evidence is not as credible as the detailed scientific and historical evidence presented by the Appellant and his witnesses. A draw is not the same as a stream. *Testimony of Mr. Fromuth*.
30. Notice of the hearing was mailed to the Appellant on April 6, 2010 and published in The Olympian on April 9, 2010. *Exhibit C-1, page 3 and Attachment a*.

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide appeals of administration decisions made under the Critical Areas Code (TCC 17.15) pursuant to Sections 17.15.410 and 20.60.060 of the Thurston County Code.

### Criteria for Review:

TCC 17.15.412 contains the requirements for Critical Area Administrative Review:

A. Applications for land use, commercial building and grading permits that meet the criteria for categorical exemption from SEPA and that have critical areas or buffers affecting the project site shall apply for a critical area administrative review (CAAR) on a form provided by the county.

B. CAAR applications shall contain all information necessary to evaluate the proposed activity, its impacts and its compliance with the provisions of this chapter, including any special reports.

C. The review authority shall confirm the nature and type of the critical areas by an on-site inspection and shall evaluate any special reports submitted by consultants who are professionals in the pertinent field.

D. The review authority may condition the activity as necessary to serve the purposes of this chapter.

Pursuant to TCC 17.15.410, appeals of administrative decisions made under the Critical Areas Code must be supported by technical evidence. “Substantial weight shall be given to the special reports prepared for the specific project, unless the appellant can provide evidence which has been prepared by a qualified professional equivalent to the one who prepared the original report.” *TCC 17.15.410(B)*.

Conclusions Based on Findings:

1. The key ordinance in resolving this appeal is TCC 17.15.200, which reads as follows:

“Streams” means those areas of Thurston County where surface waters flow sufficiently to produce a defined channel or bed, A “defined channel or bed” is an area which demonstrates clear evidence of the passage of water and includes but is not limited to bedrock channels, gravel beds, sand and silt beds and defined channel swales. The channel or bed need not contain water year-round. This definition is not meant to include irrigation ditches, canals, storm or surface water runoff devices or other entirely artificial watercourses unless they are used by salmon or used to convey streams naturally occurring prior to construction.

*Finding 25; see also Finding 23.*

2. The Hearing Examiner concludes that the drainage system is not a stream as defined in TCC 17.15.200, except for the segment that is downstream of the lower pond. Based on review of the photographic evidence, the reports that were prepared for the project, and the testimony of the consultants (who were highly qualified), the only defined channel upstream of the lower pond is the man-made roadside ditch.<sup>7</sup> The natural flow of water within the system is not sufficient to create defined channels. *Findings 3, 4, 13 – 20.*

3. It is the Hearing Examiner’s opinion, based on the County’s written analysis of TCC 17.15.200 (see Exhibit 1, page 5), that the County interpreted the language “demonstrates clear evidence of the passage of water” too broadly in this case. The features that are specifically listed as being included in the definition of “defined channel or bed” – bedrock channels, etc. – are not present on the site with the exception of the roadside ditch. Although the “includes but not limited language” suggests that the list may be expanded, it should not be expanded so as to include dissimilar items. Thus, a “defined channel or bed” should not be inferred from the occasional presence of water within the

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<sup>7</sup> To the extent it can be argued that the meadow swale is a defined channel, that too is an artificial watercourse.

drainage system or from topographical features.

4. The Appellant has adequately demonstrated, through testimony, historic maps, and other evidence, that the drainage facilities did not carry a stream prior to construction. *Findings 13, 22, 26-29.*
5. TCC 17.15.410(B) specifies that the Hearing Examiner must give substantial weight to the special reports prepared for the project. In this case, the special reports are in agreement that there is no regulated stream upstream of the lower pond. The contrary evidence from DNR was not conclusive due to differences in terminology, and the contrary evidence from WDFW was not persuasive. *Findings 8, 10, 11, 15, 16, 18, 19, 20, 21, 23, 24, and 25.*

### **DECISION**

Based upon the preceding Findings and Conclusions, the appeal of the stream determination contained in the November 16, 2009 Critical Area Administrative Review Decision of the Thurston County Resource Stewardship Department is **GRANTED**. The upper extent of the regulated stream is the lower storm pond located in the northeast corner of the subject property. Upstream of that point, the drainage system is not a regulated stream under Thurston County ordinances.

Decided this 10<sup>th</sup> day of May 2010.

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LeAnna C. Toweill  
Thurston County Hearing Examiner Pro Tem

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