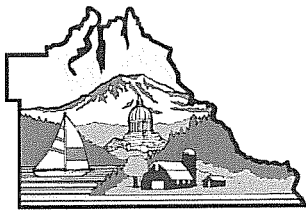


COUNTY COMMISSIONERS

Cathy Wolfe  
District One

Sandra Romero  
District Two

Karen Valenzuela  
District Three



**THURSTON COUNTY**  
WASHINGTON  
SINCE 1852

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**RESOURCE STEWARDSHIP DEPARTMENT**

*Creating Solutions for Our Future*

Cliff Moore  
Director

**MEMORANDUM**

TO: Parties of Record

FROM: Cami Petersen  
Land Use Clerk

DATE: July 25, 2011

SUBJECT: **Project No. 2010102115, Sequence No. 11-105439, Lance Mueller and Associates on behalf of Comcast Cable Services**

Attached is a copy of the Decision of the Board of Thurston County Commissioners relating to the above-mentioned case.

Please contact me at (360) 754-3355 extension 6348 if you have questions regarding this Decision.

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
THURSTON COUNTY, WASHINGTON

In Re the Matter of the Application of,

**Comcast Cable Services**  
For Approval of a Reasonable Use  
Exception

Project # 2010102115

APP. No. 10-121784 XI

DECISION

## I. PROCEDURAL BACKGROUND

**THIS MATTER came before the Board of County Commissioners (Board) on July 13, 2011, as a result of a Notice of Appeal** filed by Comcast Cable Services. Comcast appeals the hearing examiner's decision, dated May 23, 2011, provisionally approving a reasonable use exception to standards for critical areas concerning the Mazama pocket gopher for the construction of a telecommunications building. The provisional approval requires Comcast to preserve the "proposed 44,614 square foot on-site gopher habitat area" and "carry out additional off-site mitigation of at least 84,304 square feet" in the form of future purchase of real property or mitigation bank credits. Comcast requests that the condition for off-site mitigation be rescinded.

The issues raised in Comcast's Notice of Appeal are whether the hearing examiner's imposition of the off-site mitigation (1) nullified the Reasonable Use Process in TCC 17.15.415, (2) violated RCW 82.02.020 and (3) violated the state and federal constitution.

The Board reviewed the hearing examiner's decision and the evidence in the record. In addition, each Board member made a declaration, pursuant to the Appearance of Fairness Doctrine, that since this appeal was filed with the Board they have had no ex—parte contact with any of the parties and that they could fairly and impartially judge this case on the record and pursuant to applicable law. No party challenged the participation of any Board member in this case.

## II. ANALYSIS

**The Hearing Examiner Erroneously Interpreted the Reasonable Use Exception**

### **Standards On the Facts of This Case When He Required Compliance With DFW Recommendations for Off-site Mitigation.**

In this case, Comcast is proposing to build a telecommunications building on its property which is located in Deschutes Industrial Park. Comcast's property is located in the Tumwater Urban Growth Area (UGA) and is zoned light industrial. Comcast's proposed use of its property is permitted outright in the light industrial zone, and does not require a special use permit. However, Comcast's proposed development is subject to the Critical Areas Ordinance (CAO) because its property contains Mazama pocket gophers, which are regulated as an important species under the CAO.

Pursuant to TCC 17.15.710, industrial uses, such as Comcast's proposed development, are allowed within 600 feet of a mapped location of Mazama pocket gophers provided that it is in compliance with certain performance standards, including the preparation of a habitat management plan ("HMP"). See TCC 17.15.715. The HMP must identify how the impacts from the proposed development will "be addressed through on or off-site habitat mitigation." TCC 17.15.735. The "basis" for this report shall be the "Management Recommendations for Washington's Priority Habitats and Species" ("DFW Recommendations"), as amended.

Application of the DFW Recommendations would place virtually all of Comcast's project site in a habitat protection area in which development would not be allowed. Hearing Examiner's Decision, conclusion 6. In situations such as this, the CAO provides applicants the opportunity to apply for a reasonable use exception (RUE) "to carry out a use or activity which is prohibited . . . due to the location of the use or activity" within a critical area or the required buffer. TCC 17.15.415(1). The purpose of the RUE is to ensure that applicable land use regulations will allow a property owner some reasonable use of his property.

Comcast applied for a RUE and prepared a HMP for its proposal. Consistent with DFW Recommendations, Comcast proposed on-site mitigation. The protected area on-site was slightly less than half of the project site. Due to the design of the proposed development, the on-site mitigation was designed as a single contiguous protected area, rather than piecemeal pockets of protected areas. In addition, and also consistent with DFW Recommendations, the contiguous protected area is in connection with the adjoining gopher conservation area in the Bridlewood subdivision. Further, the proposed disturbed area is the minimum necessary for Comcast's reasonable use of the property.

Based on Comcast's proposed design of its development, the contiguous protected area on-site and the connectivity of the on-site protected area to the adjoining protected gopher habitat, staff made a recommendation of approval to the hearing examiner. Staff determined that Comcast's proposal satisfied the RUE criteria contained in TCC 17.15.415

C1. The hearing examiner agreed that Comcast's proposal satisfied criteria 1, 2, and 5. However, the hearing examiner determined that in order for Comcast to be in compliance

with criteria 3 and 4, Comcast needed to follow "all provisions in the [DFW Recommendations], including the provision of 84,304 square feet of additional off-site mitigation." Emphasis supplied. Hearing Examiner's Decision, conclusion 11.

The hearing examiner's requirement for an additional 84,304 square feet of mitigation, in addition to the on-site mitigation proposed by Comcast is equivalent to the total recommended mitigation in the DFW Recommendations. As explained above, application of the DFW Recommendations would preclude development of the Comcast's property, which is why Comcast applied for a RUE in the first place. The hearing examiner's decision in this case misinterprets and nullifies the RUE process.

It is the Board's opinion, that staff appropriately applied the RUE criteria for the reasons stated in the staff report. The Board also agrees with Comcast that the condition for off-site mitigation should be rescinded for the following reasons: (1) Comcast's property is within an approved industrial plat; (2) Comcast's property is zoned light industrial and within the Tumwater UGA; (3) the size and location of Comcast's proposed development is the minimum necessary for reasonable use of its property; (4) the protected area on-site is in one contiguous piece, consistent with DFW Recommendations; and (5) Comcast's on-site mitigation is in connection with adjoining gopher habitat, which is also consistent with DFW Recommendations.

Because the Board is able to resolve this case on its analysis of the RUE standards, it is not necessary for the Board to address whether the hearing examiner's decision is in violation of RCW 82.02.020 or state and federal constitutional provisions.

### III. DECISION

For the reasons discussed above, it is hereby ORDERED:

Condition A of the hearing examiner's May 23, 2011 decision is rescinded to the extent it requires Comcast to provide off-site mitigation for impacts to the Mazama

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<sup>1</sup> Pursuant to TCC 17.15.415 C, the hearing examiner *shall* grant the RUE if the following five requirements are met: (1) no other reasonable use of the property as a whole is permitted by this chapter; (2) no reasonable use with less impact on the critical area or buffer is possible; (3) the requested use or activity will not result in any damage to other property and will not threaten the public health, safety or welfare; (4) any alteration to a critical area is the minimum necessary to allow for reasonable use of the property; and (5) the inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant in subdividing the property or adjusting a boundary line thereby creating the undevelopable condition.

pocket gopher habitat in the form of future purchase of real property or mitigation bank credits.

DATED: 7-25-11

ATTEST:

BOARD OF COUNTY COMMISSIONERS  
Thurston County, Washington

Cami S. Petersen  
Clerk of the Board

Karen Valenzuela  
Chair

Joselia Romero  
Vice-Chair

Cathy Stelfe  
Commissioner