



COUNTY COMMISSIONERS

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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. 2017103260
)	LDS Camp Nisqually Access Road
Scott Robison,)	
The Church of Jesus Christ of Latter-Day Saints)	FINDINGS, CONCLUSIONS,
)	AND DECISIONS
For a Reasonable Use Exception and)	
Shoreline Substantial Development Permit)	

SUMMARY OF DECISIONS

The request for approval of a reasonable use exception and a shoreline substantial development permit to construct a new 16-foot wide access road across Medicine Creek (also known as Hartman Creek) and its associated wetlands and within the 100-year floodplain of the Nisqually River to access the Applicant’s existing campground addressed as 11600 Durgin Road SE, Olympia are **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request

Scott Robison on behalf of the Church of Jesus Christ of Latter-Day Saints (Applicant) requested approval of a reasonable use exception (RUE) and a shoreline substantial development permit (SSDP) to construct a new 16-foot wide access road across Medicine Creek (also known as Hartman Creek) and its associated wetlands and within the 100-year floodplain of the Nisqually River to access the Applicant’s existing campground. The subject property is located at 11600 Durgin Road SE, Olympia, Washington.

Hearing Date and Remand Process

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on June 9, 2020. Due to the newness of virtual hearings, the record was held open two business days to allow for public comment, with additional time arranged for responses by the parties. Post-hearing public comment was submitted, to which the Applicant responded on June

12, 2020.¹ Per the schedule announced at hearing, the record closed on June 15, 2020. However, on June 29, 2020 the matter was remanded for further development of evidence by the Applicant addressing reasonable use exception criteria for approval.

Consistent with the remand order, the Applicant submitted additional information on September 9, 2020 (Exhibit 8). Per the order, Planning Staff and parties of record were to have 10 business days to respond to the Applicant's post-hearing submittal, the Applicant was afforded a reply opportunity, and the decision issuance date was set at 20 business days following Applicant's post-hearing submittal.² County Staff did not initially submit a response to the order before the 10th business day following Applicant's submittal. On request, Staff submitted a response on September 25, 2020 (Exhibit 9). A response from a party of record, also submitted late, was also admitted (Exhibit 10) because Staff's time for response had been extended.³ Following receipt of this additional evidence, the instant decision was completed.

Testimony

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

Scott McCormick, Associate Planner, Thurston County
Dawn Peebles, Thurston County Environmental Health
Arthur Saint, Thurston County Public Works
Landon Beyler, PE, Beyler Consulting, for Applicant
Fred Feller, Volunteer Coordinator for Applicant
Scott Robison, Project Manager for Applicant
Curtis Wambach, Biologist, EnviroVector, for Applicant
Arlin Burbidge, Facilities Manager for Applicant
David Troutt, Natural Resource Director, Nisqually Tribe
Sharon Westberg
Brian Westberg

Exhibits

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

Exhibit 1 Community Planning & Economic Development Staff Report including the following attachments:

Attachment a Notice of Public Hearing

¹ Post-hearing comments were submitted by the representative of the Nisqually Indian Tribe who had testified at hearing. Because it was not made sufficiently clear that only those who had not succeeded in testifying during the virtual hearing were invited to submit post-hearing comment, the Tribe's two comments admitted.

² Applicant's post-hearing submittal cover letter is dated September 4, but it was not submitted to the Hearing Examiner's Office until September 9. Per the Remand Order, this resulted in the following schedule. Applicant Submittal, 9/9; Comments by parties of record due 9/23; Applicant discretionary reply due within 5 business days of responses, and Decision due 20 business days from Applicant submittal, or 9/30.

³ Mr. Trout submitted additional post-hearing comment on September 29, 2020. Although it was submitted later than invited, because Planning Staff's late response was admitted, Mr. Troutt's late response is also admitted. The Applicant was expressly invited to reply, due to the extended schedule.

Attachment b	Zoning/Site Map
Attachment c	Master Application, received June 22, 2017
Attachment d	JARPA Application, received June 22, 2017
Attachment e	Reasonable use exception application, received June 22, 2017
Attachment f	Narrative (undated)
Attachment g	Site plans, received February 13, 2020
Attachment h	Notice of Application, dated October 12, 2017 with Adjacent Property Owners list, dated September 11, 2017
Attachment i	Mitigated determination of non-significance (MDNS), dated June 6, 2019 with Adjacent Property Owners list, dated May 30, 2019
Attachment j	SEPA Environmental Checklist, received June 22, 2017
Attachment k	Floodplain Zero-Rise Analysis, dated June 12, 2018, updated September 10, 2019
Attachment l	Cultural Resources Report, dated July 30, 2018
Attachment m	Limited Subsurface Exploration and Preliminary Geotechnical Engineering Report, dated May 8, 2017
Attachment n	Drainage Scoping Report, received August 28, 2018
Attachment o	Memo from Mark Maurer, P.E., R.L.A. with TC Water Resources Div., dated September 26, 2018 with accompanying Memo from Arthur Saint, P.E., dated September 26, 2018
Attachment p	LDS Nisqually Review Comment Response Letter from Beyler Consulting, dated August 28, 2018
Attachment q	LDS Nisqually Response to Thurston County by EnviroVector, dated June 14, 2019
Attachment r	Response to public comment letters from Beyler Consulting, dated June 26, 2019
Attachment s	Comment letter from Sharon Westberg, dated June 18, 2019

- Attachment t Comment email from George Walter with the Nisqually Indian Tribe's Natural Resources Dept. dated June 19, 2019
- Attachment u Comment letter from the Nisqually Tribe, dated June 7, 2019
- Attachment v Email from Landon Beyler to Scott McCormick, dated May 9, 2019 with attached email from Kelly Still (WDFW), dated May 9, 2019
- Attachment w Comment letter from the WA Dept. of Ecology, dated November 1, 2017
- Attachment x Comment letter from Sharon Westberg, received October 23, 2017 with attached map
- Attachment y Comment letter from the Nisqually Indian Tribe, dated October 17, 2017
- Attachment z Comment letter from the WA Dept. of Ecology, dated July 31, 2017
- Attachment a-1 Email from Marisa Whisman TC Assoc. Planner to Scott McCormick, TC Assoc. Planner, dated July 26, 2017
- Attachment b-1 Critical Areas Report & Mitigation Plan by EnviroVector, received June 7, 2019
- 2019 Attachment c-1 Biological Evaluation (BE) by EnviroVector, received June 7, 2019
- Attachment d-1 Response to Thurston County, received February 13, 2020 from EnviroVector (Spill Plan)
- Attachment e-1 Approval memo from Thurston County Environmental Health, dated February 26, 2020
- Attachment f-1 11 x 17 inch site plans, received Sept. 13, 2019
- Attachment g-1 Email from Landon Beyler with Beyler Consulting, LLC, dated October 28, 2019.
- Exhibit 2 Comments received after publication of Staff Report, including:
- 2a. Letter from Sharon Westberg, dated March 20, 2020 and received April 1, 2020, with photos (7)
- 2b. Letter from Joe Cushman, Nisqually Indian Tribe, dated June 4, 2020

- 2c. Letter from Joe Cushman, Nisqually Indian tribe, dated June 5, 2020, with attached comments dated June 4, 2020, June 19, 2019, and June 7, 2019
- Exhibit 3 Email from Kelly Still, Washington Department of Fish and Wildlife, dated May 9, 2019
- Exhibit 4 HPA status email from Curtis Wambach (not yet approved)
- Exhibit 5 Supplemental Fish Survey, dated March 15, 2019
- Exhibit 6 Post-hearing comments, including:
 - 6a. David Troutt, Nisqually Indian Tribe, received June 9, 2020
 - 6b. David Troutt, Nisqually Indian Tribe, received June 11, 2020
- Exhibit 7 Applicant Response to Comments, including letter from Landon Beyler, Beyler Consulting, dated June 15, 2020 and Letter from Curtis Wambach, EnviroVector dated June 12, 2020
- Exhibit 8 Applicant's submittal in response to Remand Order, submitted September 9, 2020, comprised of:
 - 8a. Letter from Landon Beyler, Beyler Consulting, dated September 4, 2020
 - 8b. Letter from Curtis Wambach with EnviroVector, dated 25 August 2020
 - 8c. Hydraulic Project Approval Permit Number: 2020-6-332+01, issued August 21, 2020
 - 8d. Floodplain Zero-Rise Analysis Comparison (Culvert vs. Bridge), prepared by Beyler Consulting, dated July 27, 2020
 - 8e. Cost Estimate Comparison, culvert vs. bridge, prepared by Beyler Consulting, dated September 4, 2020
- Exhibit 9 Planning Staff Response to Applicant's remand submittal, dated September 25, 2020
- Exhibit 10 Additional public comment from David Troutt, dated September 29, 2020

Also included in the record of these proceedings is the June 29, 2020 Order of Remand by the Thurston County Hearing Examiner.

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

FINDINGS

1. The Applicant requested approval of a reasonable use exception (RUE) and a shoreline substantial development permit (SSDP) to construct a new 16-foot wide access road across Medicine Creek (also known as Hartman Creek) and its associated wetlands and

within the 100-year floodplain of the Nisqually River to serve as the sole access to the Applicant's existing campground. Although the Joint Aquatic Resources Permit Application (JARPA) submitted on June 22, 2017 describes the project as a "timber bridge" over the creek (Exhibit 1.D, pages 6 and 9), to be constructed "over and outside the limits of the water body" (Exhibit 1.D, page 9), the Applicant now proposes to cross the creek via a 48-inch corrugated steel pipe-arch culvert. The subject property is located at 11600 Durgin Road SE, Olympia, Washington. *Exhibits 1, 1.C, 1.D, and 1.G.*

2. The application was submitted on June 22, 2017 and was determined to be complete for purposes of commencing County review on July 21, 2017. *Exhibit 1.H.*
3. The subject property is 38.34 acres in area and is zoned Long Term Agriculture (LTA). *Exhibits 1 and 1.B.* According to the Applicant, the existing camp use received County approval of an SSDP and a special use permit to establish the church camp in 1988. Current use of the property consists of church youth group summer camping (average group size of 120), weekend family camping, and outdoor leadership training for youth. The property is used most heavily during the summer, with smaller camping events in the fall and spring. *Exhibits 1.D and 1.F; Fred Feller Testimony.*
4. Although the western portion of the subject property consists of a narrow panhandle to Durgin Road SE (the proposed new road corridor), for more than 20 years, access to the camp has been via 11th Lane SE, a narrow, winding private road through the residential section of the Riverbend campground and mobile home park. This road is difficult to navigate by larger vehicles, such as the RVs and buses that typically bring groups of kids to camp. Two corners on this existing route require larger vehicles to back up and make several passes, which poses potential safety concerns. The Applicant does not have a formal easement for use of the 11th Lane SE access. The purpose of the instant proposal is to establish permanent and safer access on the Applicant's own property. *Exhibits 1, 1.D, 1.E, 1.F, and 1.G.*
5. There are several regulated critical areas within or near the proposed road corridor:
 - Medicine Creek/Hartman Creek crosses the panhandle. Medicine Creek is classified as a Type Ns stream requiring a 150-foot buffer under the Thurston County critical areas ordinance (CAO) (*Exhibit 1.B-1, page 19*).⁴ The buffer extends to Durgin Road and encompasses 300 feet of the panhandle length. *Exhibit 1.B-1.*
 - Wetland A is a 4,100 square foot Palustrine Forested Semi-Permanently Flooded wetland that is located along the Medicine Creek corridor within and to the north of the panhandle. The wetland hydrology primarily derives from Medicine Creek, which backs up at a culvert beneath 11th Lane SE to the north. No fish were observed in Wetland A during fish surveys conducted in 2017 and 2019. Wetland A is classified as a Category III wetland under the CAO. Based on its habitat score

⁴ Despite having identified Medicine/Hartman Creek as a regulated stream in this June 2019 critical areas report, in the post-hearing submittals, the Applicant's biologist/consultant challenged its status as a stream. *Exhibit 8b.*

of 4, Wetland A requires a 140-foot buffer, which may be reduced to 105 feet with mitigation. The standard wetland buffer generally coincides with the stream buffer in the project area. *Exhibit 1.B-1.*

- Wetland B is a 2,355 square foot Palustrine Forested Semi-Permanently Flooded wetland that is located along the Medicine Creek corridor to the south of the panhandle. The wetland hydrology derives from Medicine Creek, which backs up behind a culvert beneath a private driveway that is adjacent to the south side of the panhandle. Wetland B is classified as a Category III wetland under the CAO. Based on its habitat score of 4, Wetland B requires a 140-foot buffer, which may be reduced to 105 feet with mitigation. The standard wetland buffer generally coincides with the stream buffer in the project area. *Exhibit 1.B-1.*
- Wetland C is a 14,377 square foot Palustrine Forested Seasonally Flooded and Emergent Permanently Flooded wetland that is located in the northeast portion of the property, more than 1,000 feet from the project area. Wetland C is classified as a Category III wetland under the CAO. Based on its habitat score of 6, Wetland C requires a 220-foot buffer. *Exhibit 1.B-1.*
- The Nisqually River is northeast of the subject property, more than 300 feet east of Wetland C. The 100-year floodplain of the Nisqually River is approximately 2,600 feet wide and encompasses the entire parcel, including the proposed access corridor.

Exhibit 1.B-1 (see Sheet 1 and Appendix I); Curtis Wambach Testimony.

6. The Shoreline Master Program for the Thurston Region (SMPTR) designates the Nisqually River as a Shoreline of Statewide Significance, and defines the regulated shoreline as including the 100-year floodplain. *SMPTR Sections Four and Five.* The SMPTR designates the subject property as a Rural shoreline environment. *Exhibit 1.* Private access roads serving permitted uses are allowed in the Rural environment. *SMPTR Section Three, Chapter XVII(D).* Landfilling is allowed if it will not significantly alter wildlife habitat, natural drainage control, maintenance of water quality, and aquifer recharge. *SMPTR Section Three, Chapter IX(D).* A shoreline substantial development permit is required for the development because it is within the regulated shoreline and the value exceeds the permit threshold of \$7,047.00. *Exhibits 1 and 1.D; WAC 173-27-040; WSR 17-17-007.*
7. The CAO standards applicable to development of roads, bridges, and culverts within wetlands and fish and wildlife conservation areas are most restrictive with respect to Category I and II wetlands and Type S and F streams (and bridges are identified in the ordinances as preferred in those critical areas). In the instant proposal, a Category III wetland and a Type Ns stream and the associated regulatory buffers would be impacted. *Exhibit 1.B-1.* Paraphrased, the applicable fish and wildlife conservation area standards require a showing that the crossing be essential; that the alignment have the least amount of impact, be perpendicular to the stream, and avoid larger conifer trees; and that the crossing be the minimum width and meet Washington Department of Fish and Wildlife standards for fish passage. *Thurston County Code (TCC) 24.25.280.* The wetland standards contain similar requirements, plus a requirement that oversize culverts be used

to allow wildlife passage. *TCC 24.30.280*. While the wetland regulations specify that bridges are preferred for Category I and II wetlands, they also include language (see *TCC 24.30.280.D.2*) that the approval authority may require that crossings be accomplished with a bridge rather than a culvert if it would significantly reduce wetland impacts. *TCC 24.30.280*. At the time of hearing, it had not been closely considered, and thus had not been demonstrated by the Applicant, whether a bridge would significantly reduce wetland impacts as compared to the proposed culvert. *Exhibit 1, page 18*.

8. The proposed culvert road crossing would require fill of 375 square feet of Wetland A and 5,575 square feet of wetland/stream buffer. Nine maple and fir trees would be removed from the critical areas. Consistent with *TCC Table 24.30-3*, the Applicant proposes to mitigate the wetland fill by creating 750 square feet of new wetland (2:1 replacement ratio) adjacent to Wetland C, which again is 1,000 feet from the access road. The mitigation area would be excavated to the grade of the existing wetland, invasive species would be removed, and native plants and habitat features (e.g., snags, logs) would be installed. The Applicant proposes to mitigate the buffer loss by enhancing 5,575 square feet of Wetland C buffer. The enhancement plan would include planting western red cedar trees spaced 20 feet on center. The planting plan for both the wetland and buffer proposes to provide a variety of species to maximize habitat diversity. According to the Applicant's consultant, the proposed mitigation plan would create higher-quality wetland and buffer than the areas proposed to be impacted by road construction. *Exhibit 1.B-1*.
9. The proposed gravel access road would be 16 feet wide (the minimum width needed to accommodate larger vehicles such as buses), 650 feet long, and would be perpendicular to the stream at the crossing point. The sidewalls of the stream crossing would be constructed of ecology blocks. Stormwater runoff from the road would be collected into biofiltration swales along the northern edge of the road for treatment and filter through rock splashpads prior to entering Wetland A. *Exhibits 1.G, 1.N, 1.Q and 1.B-1*.
10. There is an existing 24-inch culvert upstream of and nearly adjacent to the proposed stream crossing, beneath the driveway serving the parcel to the south, and a 30-inch culvert downstream 50 yards to the north. The proposed culvert would exceed the water carrying capacity of both of these culverts. *Exhibit 1.G; Landon Beyler Testimony*.
11. The Nisqually River floods at rain events equal to the 10-year flood or greater. During such events, floodwaters exceed the banks of Medicine Creek. No existing culvert in the vicinity of the site has capacity for 10-year flood events (or greater), and neither would the proposed culvert even with a larger capacity than the existing culverts. *Exhibits 1.K and 1.B.1*.
12. County flood hazard building standards do not allow fill within flood hazard areas unless a qualified professional engineer and wildlife biologist demonstrate that there is no alternative method for constructing the use and that certain identified impacts will not occur (increase in flood hazard or flood elevations, degradation of important habitats, etc.). *TCC 14.38.050(A)(5)(a)*. Prior to the public hearing, the Applicant did not

evaluate a bridge alternative to the proposed culvert, so a direct comparison of the impacts of the two structures could not be made. In support of the lack of a bridge alternative analysis, Applicant representatives submitted that a bridge could not avoid floodplain impacts entirely because it would not be possible to elevate it out of the floodplain, as the floodplain is 2,600 feet wide and covers the entire panhandle. *Exhibits 1 and 1.B-1, Appendix I; Landon Beyler Testimony.*

13. In order to place fill within a floodplain, a qualified engineer must certify “through hydrologic and hydraulic analyses performed in accordance with standard engineering practice that the analysis will result in zero rise during the occurrence of the base flood discharge or event.” *TCC 14.38.050(A)(5)(b)*. The Applicant submitted a zero rise analysis performed by an engineer that the County Flood Plain Manager accepted as compliant with TCC 14.38. *Exhibits 1 and 1.K; Scott McCormick Testimony.*
14. The Nisqually Tribe objected to the Applicant’s zero rise analysis on the grounds that it was scaled to the larger Nisqually River floodplain, and in post-hearing comment, questioned the review and approval process for the zero rise analysis. *David Troutt Testimony; Exhibits 6a and 6b*. In the zero rise report, the Applicant’s engineer submitted that consideration of the entire floodplain was required because the existing and proposed culverts on Medicine Creek are overtopped at the ten-year event. The analysis concluded that for the 100-year event, the proposed culvert would result in water surface elevations equal to or lower than under existing conditions. *Exhibits 1.K and 7.*
15. The CAO’s frequently flooded areas standards require roads, bridges, and culverts to be designed to minimize interruption of the downstream movement of wood and gravel, minimize fill, and allow passage of one-hundred year flood flows and associated debris. *TCC 24.20.140*. The proposed culvert would have capacity to carry the five-year flood, but when the 10-year flood is reached, the proposed culvert would be overtopped, as are all existing culverts in the area. *Exhibit 1.K.*
16. During review of the project, the County recommended that the Applicant provide a six-foot culvert. The Applicant submitted that a six-foot culvert would require too much fill within the floodplain to elevate the road. The County subsequently accepted the proposed culvert - 48 inches and not round, but oval in shape with the long dimension parallel to the ground and the shorter dimension perpendicular to the ground - as the maximum culvert size that would be feasible at that location while minimizing fill. *Exhibit 1; Landon Beyler Testimony.*
17. The adjacent property owners to the south (the Westbergs) expressed concern that the proposed culvert would create a dam that would exacerbate flooding of their property. The Nisqually Tribe expressed the same concern, based on the fact that the subject stream functions as a flood relief channel for the Nisqually River. *Exhibits 1.S and 1.T; Exhibit 2.C*. During the Nisqually River flood of 1996 (a 100-year event), the Westberg residence flooded to a depth of eight feet. During a February 2020 flood, the Westberg driveway (adjacent to the proposed driveway) was under water, with water reaching and flowing into the residence. *Exhibit 2.A; Brian Westberg Testimony.* As of the hearing,

the Applicant's zero rise analysis did not address flood impacts that might occur in the immediate vicinity of the project area. *Exhibits I and I.K.*

18. The Applicant's engineer submitted that the proposed culvert would not act as a dam, as it is between two smaller culverts that would have damming effects, and because its larger diameter would make it easier to maintain. The Applicant's environmental consultant emphasized that water would not flow in a way that would result in material blocking the proposed culvert; water ponds in the wetland area, then either infiltrates or evaporates. Otherwise, water would only leave the impoundment in the immediate project vicinity when it overtops the banks or overtops a significant crest downstream of the subject property. *Testimony of Landon Beyler and Curtis Wambach.*
19. Based on a fish survey conducted in February 2019, and downstream analyses conducted in January 2017 and February 2019, Medicine Creek in the project area is not a fish-bearing stream. The fish survey, which was performed by a biologist with 25 years of experience, was conducted during the time period specifically recommended by the Washington Department of Fish and Wildlife to ensure the optimal opportunity to observe for presence of juveniles and a fully watered stream system. Within Wetland A, within and immediately downstream of the project area, baited minnow traps, set for two days, did not yield any fish. Seining of the wetland with a 30-inch diameter net also did not yield any fish. *Exhibits 5 and 7.*
20. The absence of fish during the February 2019 fish survey was consistent with information contained in agency databases:
 - The Washington Department of Natural Resources maps Hartman Creek at the project location and downstream for a distance of 700 feet as Type N (no fish).
 - The Washington Department of Fish and Wildlife Salmonscape database does not document a salmonid presence south of the elevated railroad ridge, to the north of the subject property.
 - The Washington Department of Fish and Wildlife Priority Habitats and Species database does not identify priority habitats or species in the project area.

Exhibit 5.

21. Several impediments to fish passage exist downstream of the subject property, including 12-inch culverts, blocked culverts, and a crest in the channel. During both the January 2017 and February 2019 downstream analyses, a 760-foot segment of the channel downstream of the crest was dry, constituting a complete fish barrier. Although storm runoff was observed within the dry segment in March of 2017, the water was - at one-inch depth - too shallow to allow for fish passage. Based on this configuration of physical circumstances, it appears that if a large enough flood were to overtop the crest and bring fish to the ponded area in front of the property, the fish would become trapped and die when the ponds dry in the summer. *Exhibit 5; Exhibit I.B-1; Curtis Wambach Testimony.*

22. The Nisqually Tribe objected to the characterization of Medicine Creek as non-fish bearing, arguing that the techniques used in the fish study were inadequate and the study should have covered a longer time period. *Exhibit 6.B*. In response to this concern, the Applicant's biologist submitted that his conclusions with respect to the creek were informed by numerous site visits over a two-year period, not just the specific dates on which the fish survey was conducted. The Applicant's biologist noted that the methodology suggested by the tribe (electroshocking) kills fish and damages the environment, and that the techniques reflected in his report accord with best available science. *Exhibit 7*.
23. The Tribe requested that the County "assume that salmon, some ESA listed, are present on this site at certain flow conditions." The Tribe did not provide any evidence that salmon are present. Rather, the tribal representative testified that the Nisqually Tribe is seeking restoration of Medicine Creek in the future, so as to allow salmonid access to off-channel short-term rearing habitat, contending that adding another undersized culvert on the grounds that there are already existing undersized culverts would violate treaty fishing rights. *Exhibit 6B; David Troutt Testimony*.
24. Based on the conclusions of a Biological Evaluation, the proposal is expected to have "no effect" on essential fish habitat or on species of wildlife listed under the Endangered Species Act, including the Mazama pocket gopher, marbled murrelet, yellow-billed cuckoo, streaked horned lark, steelhead trout, Chinook salmon, bull trout, and Oregon spotted frog. *Exhibit 1.C-1*.
25. The subject property is approximately 700 meters north of the Nisqually Reservation. Medicine Creek is of historic importance to the Nisqually Indian Tribe, which was a signatory of the Medicine Creek Treaty. A cultural resources survey, which included several shovel probes, was conducted in the project area in July of 2018. No cultural resources were observed during the survey. *Exhibit 1.L; David Troutt Testimony*.
26. Thurston County reviewed the application under the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on June 6, 2019. The MDNS, which evaluated a 30-inch culvert design, contains conditions relating to archaeological resources, fill within the floodplain, erosion and pollution control, construction hours, tracking of sediment by construction vehicles, and testing/reporting requirements with respect to contaminants. *Exhibit 1.I*.
27. The Washington Department of Fish and Wildlife commented in 2019 that it was comfortable with the then-proposed 30-inch diameter culvert design. As of the hearing date, it had not yet issued hydraulic project approval (HPA) for the proposed culvert; however, the proposal is subject to HPA approval and would be required to abide by conditions imposed by WDFW through the HPA process. *Exhibits 3 and 4*.
28. Notice of the virtual open record hearing was mailed to property owners within 500 feet of the site on May 22, 2020 and published in *The Olympian* on May 29, 2020. Notice of

hearing was not posted as a result of the County's Covid-19-specific procedures. *Exhibits 1 and 1.A; Scott McCormick Testimony.*

29. In addition to the comments received regarding flooding and fish usage, comments were received from the Westbergs expressing concern regarding usage of their own driveway - the entrance to which is adjacent to the proposed road - by camp visitors and that camp traffic would pass very closely to their existing accessory structure (which encroaches into the Applicant's property). Even with the current access on 11th Lane SE, camp visitors regularly use the Westberg driveway to turn around. *Testimony of Sharon Westberg and Brian Westberg.* The Applicant submitted that signs would be used to guide drivers and the access road would narrow in the immediate vicinity of the neighbors' encroaching structure. *Fred Feller Testimony.*
30. In the staff report and at hearing, Planning Staff repeatedly noted that no analysis had been prepared by the Applicant comparing the impacts of the proposed culvert to the impacts that would result from a timber bridge built outside the stream. Staff submitted that a bridge could result in less fill in the stream and may allow for additional flood capacity and debris passage in comparison to a culvert. *Exhibit 1, pages 8, 10, 18, 20, etc.* Planning Staff also noted that the zero rise analysis provided by the Applicant and accepted by the County's Flood Plain Manager Tim Rupert does not appear to analyze local impacts, but instead focuses on flood level rise in the entire floodplain. Planning Staff based the opinion that a bridge might have lesser impacts locally than another culvert on the fact that a culvert necessarily involves the bulk of road supporting fill material being placed in the stream channel, which could act as dam, while a bridge would not place fill in the channel. At hearing, Staff noted that the existing 30-inch culverts up and downstream of the project are lower in elevation and not built up as much as the current proposal, meaning it is not possible to know that the proposed culvert would act similarly to the existing culverts. *Scott McCormick Testimony.*
31. At the hearing, following the additional public comment related to the Nisqually Indian Tribe's offer to share the costs of a bridge with the Applicant and additional testimony regarding the neighbors' flooding concerns, Planning Staff withdrew the staff report's recommendation of approval of the culvert design. Staff instead recommended that approval be conditioned on the Applicant being required to construct a bridge outside of the ordinary high water mark of Medicine Creek in place of the proposed culvert crossing. In discussing this on the record, Staff acknowledged that the specific impacts of a bridge alternative have not been evaluated. *Exhibit 1; Scott McCormick Testimony.*
32. At hearing, the Applicant submitted that the cost of a bridge would be too great given the Applicant's non-profit status, despite the Nisqually Indian Tribe's (which favors a bridge design) offer to share in the portion of the cost exceeding the culvert cost provided the Applicant allow the Tribe to extend the road along the southern boundary of the Applicant's property to tribal land to the east. Noting that Washington Department of Fish and Wildlife has accepted a 30-inch culvert, the Applicant also objected to the delay that a bridge requirement would entail and suggested that Tribe-related traffic might

adversely affect the Westbergs. *Testimony of Fred Feller and Arlin Burbidge; Exhibits 2.B and 3.*

33. On June 29, 2020, the matter was remanded to the Applicant for development of additional information addressing reasonable use exception criteria 2, 3, and 4 (or B, C, and D), which read as follows:
2. 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
 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 on or off the development proposal site, or increase public safety risks on or off the subject property; and
 4. 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;

Because Planning Staff called for a bridge, and because per TCC 14.38.050.A.5(a), no fill is allowed within a special flood hazard area unless a qualified professional engineer licensed in the State of Washington and a qualified wildlife habitat biologist demonstrate that there is no other alternative method for constructing an approved use, and because TCC 24.30.280.D.1(b) requires an applicant to “demonstrate that alternative access with less impact on the wetland and buffer is not physically possible,” the matter was returned to the Applicant for analysis comparing the impacts of a bridge to the proposed culvert, as well as for zero rise analysis relevant to the immediate project vicinity, and for cost estimates for the bridge and culvert. *June 29, 2020 Remand Hearing.*

34. Consistent with the remand order, the Applicant submitted further analysis comparing the impacts of a bridge to those anticipated from the proposed culvert. Following are excerpts from the additional analysis.

The ... proposed ... crossing is entirely within the 100-yr flood plain and as such any type of crossing, whether a culvert or a bridge, will not have the capacity to “allow passage of one-hundred-year flood flows” per TCC 24.20.140. This is because the 100-year floodplain of the Nisqually River is approximately 2,600 feet wide and encompasses the entire parcel, including the proposed access corridor and all the surrounding properties.

To ... further satisfy the criterion of the RUE we have provided additional flood analysis and comparison of a Bridge versus a Culvert crossing, see **Enclosure 2** for the detailed analysis. A conceptual profile is provided in Enclosure 2 with a 60-foot-long bridge to minimize fill within the floodplain area. The Hartman Creek was analyzed separately from the Nisqually River basin for the 5-year flood event to focus on the effects of each crossing type for the localized flooding impacts. In summary here are the results of this analysis.

Crossing	Cut Volume (CY)	Fill Volume (CY)	Net Volume (CY)
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Culvert	198	132	66
Bridge	282	196*	86

The results of our analysis indicate that neither a culvert nor the bridge have a significant impact on the flooding and that the culvert condition will provide adequate conveyance and there is no additional benefit to the Hartman Creek subbasin with a bridge. ...

River			
<u>Station</u>	<u>Existing</u>	<u>Culvert</u>	<u>Bridge</u>
6726.68	28.59	28.59	28.59
5636.34	28.26	28.26	28.26
4448.21	26.00	26.01	26.00
4357.16	Culvert	Culvert	Culvert
4355.59	25.84	25.85	25.84
4346.08	N/A	Culvert	Bridge
4223.65	25.84	25.84	25.84
3066.66	25.79	25.79	25.79
741.36	19.25	19.25	29.25

The installation of the proposed 48-inch squashed culvert will not increase habitat or flood [plain] impacts over a bridge design because no significant habitat or flood plain impacts would occur as a result of the proposed [culvert]. The WDFW agree that the seasonal impoundments at the proposed project site are not fish-bearing waters and they have issued the HPA permitting the proposed forty-eight (48)-inch culvert. The project with a proposed 48-inch culvert complies with TCC 24.30.270 with a crossing that provides a minimum impact to the critical areas. A bridge is not required per the code, and the proposed 48-inch culvert will not increase flood plain impacts over a bridge if it was required. ...

Cost is ... a secondary factor as it relates to alternatives and should be weighed out based on the cost to benefit of impacts to the critical areas. As shown above in our analysis and additional documentation either alternative crossing, a culvert or a bridge, provide similar impacts to the critical areas and neither is superior than the other. ... In summary a culvert is estimated to cost \$64,910 while a bridge would cost \$404,923. ...

Exhibit 8.

35. Despite having characterized Hartman Creek/Medicine Creek as a Type Ns stream in the critical areas report and mitigation plan (Exhibit 1.B-1), in the supplemental fish survey (Exhibit 5), and in the biological evaluation (Exhibit 1.C-1)⁵, in post hearing submittals, the Applicant’s biologist contended that Hartman Creek/Medicine Creek is not a stream per Thurston County Code definitions. Also, despite the application stating that nine trees with diameters between 24 and 48 inches at breast height (Exhibit 1.G, Site plans, Figure 19 “Nine trees impacted in wetland/stream buffer”) would be impacted by the proposed crossing, in post-hearing submittal the biologist contended that only one coniferous tree would be removed from the critical area for the proposed culvert. *Exhibit 8.b.* These discrepancies are not clarified in the post-hearing submittals.

⁵ The Biological Evaluation on page 10 states: “Hartman Creek meanders to the west, extending to McAllister Creek... . Both Hartman Creek and McAllister Creek are sinuous watercourses that meander across relatively flat farmland and have been channelized and altered for agricultural purposes... .” *Exhibit 1.C-1.*

36. Planning Staff offered the following comments in response to the Applicant's submittal on remand.

If the information provided by [the Applicant's engineer] is to be taken at face value in terms of the net impact to Hartman Creek, then staff would tend towards retraction of the recommended condition to require a bridge at the location. I do question some of the information, including the volume of fill material with a culvert vs. a bridge. It does not make logical sense. However, staff does not have the knowledge or qualifications to say for certain that the analysis is incorrect.

Staff does not agree with the statements by [the Applicant's biologist] that Hartman Creek is not a stream. It has a bed and it flows during times of flooding in the valley. ... Staff does agree that there does not seem to be high quality habitat that will be disturbed by the [proposed] culvert Regardless of whether a bridge or a culvert is permitted, at least one or possibly more large conifers would be impacted by the project, so there would be no difference in terms of these impacts and there would appear to be no difference in impact to habitat in general. The main difference would appear to be the passage of flood waters.

Staff has no comment on the technical analysis due to lack of expertise in these areas. However, based on the information provided staff would lean towards allowing a culvert vs. a bridge based upon the cost benefit analysis and other analysis provided by the applicant's representative.

Exhibit 9.

37. The post-hearing materials submitted by the Applicant included an approved hydraulic project approval (HPA) from WDFW. The state agency with jurisdiction over impacts to fish bearing waters, WDFW described the project as follows: "The project proposes to construct an access road to the LDS facility. Road construction includes a crossing structure composed of ecology block with a 48 inch culvert in the Medicine Creek channel to pass flow." *Exhibit 8.c, page 1.* The HPA authorizes work below the ordinary high water mark in dry conditions only, requires implementation of the mitigation proposed in the Applicant's March 2019 critical areas report and mitigation plan, and requires compliance with 25 additional "provisions" (conditions). The HPA was approved August 21, 2020 and requires the project to be completed by December 31, 2022. Language in the HPA decision notes the following: "The person(s) to whom this Hydraulic Project Approval is issued and operator(s) performing the work may be held liable for any loss or damage to fish life or fish habitat that results from failure to comply with the provisions of this Hydraulic Project Approval." *Exhibit 8.c, HPA Permit Number: 2020-6-332+01.*
38. Parties of record were allowed to submit responses to the Applicant's submittals on remand. According to its post-hearing comments, the Nisqually Indian Tribe remains opposed to the proposed culvert, asserting that the Applicant has not fulfilled their obligation to make a clear showing of no impact to fish resources. The Tribe reiterated its support for a properly designed bridge, arguing the Tribe should be included as a review authority and contesting any approval of a culvert as a taking of treaty rights under the 1854 Treaty of Medicine Creek. *Exhibit 10.*

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.

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline permits pursuant to RCW Chapter 36.70, WAC 173-27, TCC 19.04.010, and Section One, Part V of the Shoreline Master Program for the Thurston region.

Criteria for Review: Reasonable Use Exception

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.

Criteria for Review: Shoreline Substantial Development Permit (WAC 173-27-150)

To be approved by the Hearing Examiner, the proposed shoreline substantial development permit must be consistent with:

- A. The policies and procedures of the Shoreline Management Act;

- B. The provisions of applicable regulations; and
- C. The Shoreline Master Program for the Thurston Region.

A. Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses (in the following order of preference) that: recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

B. Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

C. Shoreline Master Program for the Thurston Region

The Shoreline Master Program for the Thurston Region (SMPTR) designates the shorelands on the subject property as Conservancy. The policies and regulations that are applicable to the proposal are contained in the “Landfilling” and “Road and Railroad Design and Construction” chapters of the SMPTR (Section Three Chapters IX and XVII, respectively).

SMPTR Section Three, Chapter IX. Landfilling.

B. Policies

1. Shoreline fills or cuts should be designed and located so that significant damage to existing ecological values or natural resources, or alteration of local currents will not occur which create a hazard or a risk of significant injury to life, adjacent property and natural resource systems.
2. All fills should be accomplished with suitable safeguards for erosion control.
3. Fill material should be of such quality that it will not cause water quality degradation beyond the limits of adopted water quality standards defined by the Department of Ecology.
4. Priority should be given to landfills for water-dependent uses.
5. The size of landfills should be limited by the consideration of such factors as total water surface reduction, navigation restriction, impediment to water flow and circulation, reduction of water quality and destruction of habitat.

C. General Regulations

1. Disposal of solid wastes is not considered landfilling for the purposes of this section.
2. Landfills shall consist of clean materials including such earth materials as clay, sand, and gravel, and also may include oyster or clam shells. In addition, concrete may be included in fill material if it is not liable to pollute ground water and is approved by the Administrator. Organic debris, such as wood and other vegetative material shall not be used as fill material.
3. Landfills, except for beach feeding, shall be designed, constructed, and maintained to prevent, minimize and control all material movement, erosion, and sedimentation from the affected area.
4. Landfill areas shall be covered with sufficient earth material to support indigenous vegetative ground cover and replanted with vegetation to blend with the surrounding environment.
5. Prior to issuance of any permit for landfilling in or along a stream, it must be demonstrated that the fill will not cause any detrimental change in flood elevations, or restrict stream flow or velocity. No fill which adversely affects the capability of a stream to carry 100-year flood flows will be allowed.
6. Artificial beach maintenance may be allowed by Substantial Development Permit in any environment, notwithstanding other regulations of this section. Provided, such maintenance shall be by "beach feeding" only, with both the quality and quantity of

material to be approved by the Administrator. Habitat protection is a primary concern for any beach feeding operation and must be a consideration in permit approval. [N/A]

7. Landfill which will interfere with public rights of navigation and rights corollary thereto shall not be permitted unless there is an overriding public interest.
8. Landfill placed for the purpose of providing land to ensure required distances for septic tank drainfields is prohibited. [N/A]
9. Permits for landfilling shall be granted only if the project proposed is consistent with the zoning of the jurisdiction in which the operation would be located.

D. Environmental Designations and Regulations

...

2. Suburban, Rural and Conservancy Environments. Landfill is allowed in the Suburban, Rural and Conservancy Environment to prepare a site for a use authorized by this Program, provided:
 - a. The landfill is for a use authorized by this Program. Landfilling will only be permitted if will not significantly alter any of the following functions:
 - (1) Wildlife habitat
 - (2) Natural drainage control
 - (3) Maintenance of water quality
 - (4) Aquifer recharge

SMPTR Section Three, Chapter XVII. Road and Railroad Design and Construction.

B. Policies

1. Major highways, freeways and railways should be located away from shorelands, except in port and industrial areas, so that shoreland roads may be reserved for slow-moving local or recreational traffic. [N/A]
2. Road and railroad locations should be planned to fit the topography and utilize existing corridors so that minimum alterations of natural conditions will be necessary. This is especially important on flood plains.
3. Roads and railroads should be designed, constructed, and maintained to minimize erosion and to permit natural movement of ground water and flood waters to the extent practical.
4. All debris, overburden, and other waste materials from construction should be disposed of in such a way as to prevent their entry by erosion from drainage, high water, or other means into any surface water body.
5. Scenic corridors containing public roadways should have provision for safe pedestrian and other nonmotorized travel. Also, provisions should be made for viewpoints, rest areas, and picnic facilities in appropriate areas. [N/A]
6. Railroad beds should be screened with trees in scenic areas. [N/A]

C. General Regulations

Findings, Conclusions, and Decisions

Thurston County Hearing Examiner

1. Excess construction materials shall be removed from the shoreline area.
2. Major roads and railroads shall cross shoreline areas by the shortest, most direct route feasible, unless such route would cause significant environmental damage. [N/A]
3. Filling of tidelands, shorelands and marshes for road or railroad rights-of-way shall be prohibited unless no viable alternative exists.
4. All excavation materials and soils exposed to erosion by all phases of road, bridge and culvert work shall be stabilized and protected by seeding, mulching or other effective means, both during and after construction.
5. All debris, overburden and other waste materials from road and railroad construction, if permitted on shorelines, shall be disposed of in such a way as to minimize their entry by erosion from drainage into any water body.
6. Private roads shall follow natural contours where possible. Natural benches, ridge tops and flat slopes are preferred locations. Erodible cuts and filled slopes shall be protected by planting or seeding with appropriate ground cover or matting immediately following construction.
7. Where permitted to parallel shorelines, roads or railroads shall be setback a sufficient distance from the ordinary high-water line to leave a usable shoreline area. [N/A]
8. Storm water runoff shall be controlled to reduce suspended solids before entering any surface water body.

D. Environmental Designations and Regulations

1. Urban, Suburban, Rural and Conservancy Environments. The following roads and railroads are permitted:
 - a. Local public or private access roads to serve uses permitted in the Urban, Suburban, Rural and Conservancy Environment.
 - b. Transportation thoroughfares including major arterials, highways and railways.

SMPTR Section Two, Chapter V. Regional Criteria.

- A. Public access to shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be channeled into shoreline areas already so utilized or into those shoreline areas which lend themselves to suitable industrial development. Where industry is now located in shoreline areas that are more suited to other uses, it is the policy of this Master Program to minimize expansion of such industry.

- D. Residential development shall be undertaken in a manner that will maintain existing public access to the publicly-owned shorelines and not interfere with the public use of water areas fronting such shorelines, nor shall it adversely affect aquatic habitat.
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a Permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180 (1), the person requesting the review shall have the burden of proof.
- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development or use of shorelines shall be closely analyzed for their effect on the public health.

Conclusions Based on Findings

A. Reasonable Use Exception

1. Camp Nisqually has occupied the subject property for some time. It is an established use of the property, the intensity of which fluctuates seasonally. The existing access is by informal permission to use a private road that is inadequate in width, causing busses and delivery trucks to conduct maneuvers that are not optimally safe. The subject property includes a pipestem that connects to Durgin Road, for which no other purpose appears to exist other than to connect the parcel to public roads. The use of the property as a rural camp facility is both established and reasonable, and the use of the pipestem to accomplish access to the camp is also reasonable. On the record submitted, there is no evidence of alternate permanent and adequate access to the site. *Findings 3, 4, 5, 7, 8, 9, 16, 34, 36, and 37.*
2. The pipestem crosses Medicine Creek and Wetlands A and B. In order to use the pipestem for access, it is not possible to avoid crossing these waterbodies. The road was designed to meet minimum road standards; its width cannot be reduced if it is to provide access via bus, RV, and delivery truck. In the course of project review, the Applicant agreed to increase the culvert size from 30 to 48 inches. The proposed 48-inch culvert is of a larger capacity than the culverts up and down stream of the crossing location and, maintained properly, would allow for passage of flood volumes exceeding the capacity of the existing facilities. The Applicant submitted an initial zero rise analysis that was accepted by the County Flood Plain Manager, and on remand, submitted additional analysis comparing the impacts of a hypothetical bridge to those anticipated from the proposed culvert. Although a party of record disputes the results (and manner) of the zero rise analyses, no technical evidence in the record contradicts their conclusions, and the initial analysis was accepted by the County Flood Plain

Manager. Based on the combined results of the two analyses, the evidence shows that the culvert would not result in worse localized flooding than would a bridge. The Applicant received WDFW hydraulic project approval for the 48-inch culvert. Because the Nisqually River floodplain is 2,600 feet wide and encompasses the entire subject property and environs, it is not possible to lift a crossing out of the floodplain. With the size of the road minimized and the size of the culvert exceeding adjacent culverts, the record submitted demonstrates that that it would not be possible to cross via the pipestem with less impact to critical areas. *Findings 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 16, 18, 19, 20, 21, 25, 26, 34, 36, and 37.*

3. The proposal includes implementation of a mitigation plan replacing the impacted wetland area at a 2:1 replacement ratio and mitigating unavoidable buffer impacts by enhancing 5,575 square feet of wetland buffer in nearby Category II Wetland C. Replacement/enhancement actions include removal of invasive species and planting of native species designed to improve the Wetland C buffer over the existing condition. Together, the mitigation plan and compliance with the provisions of the HPA would ensure no direct impacts to protected species and a net enhancement in buffer function. Given the approvals of the zero rise analysis by the County Flood Plain Manager and of the HPA by WDFW, the record presented demonstrates that the project would not adversely impact other properties or the public health, safety, and welfare generally. *Findings 3, 4, 5, 7, 8, 9, 13, 18, 19, 20, 21, 25, 26, 34, 36, and 37.*
4. The road was designed to the minimum road standard and the culvert increased to 48 inches in diameter. On the record submitted, the proposed crossing is the minimum encroachment into the critical area and buffer necessary to prevent the denial of reasonable use of the property. *Findings 3, 4, 8, 9, 13, 16, 18, 34, 36, and 37.*
5. Considering the HPA approval by WDFW and conditioned to require implementation of the mitigation plan, the proposal represents the minimum alteration to the critical areas necessary to accomplish access via the pipestem. Mitigation would include invasive species removal and enhancement with native species, lifting the function of the buffer of Wetland C as compared to the current condition. The only evidence in the record prepared by qualified professionals addressing the requirements of County Code demonstrates no unmitigated impacts to wildlife and to fish resources. *Findings 4, 5, 8, 9, 16, 18, 19, 20, 21, 22, 23, 24, and 37.*
6. The zero rise analysis approved by the County Food Plain Manager supports a conclusion that there would be no impacts as a result of flooding on or off site. Implementation of the proposed mitigation plan and compliance with the provisions of the HPA would ensure no impacts to the critical areas go unmitigated. The record does not contain evidence showing there would be net loss of critical area functions and values. Additionally, the proposed crossing comports with the use-specific standards for roads in fish and wildlife habitat conservation areas at TCC 24.25.280 as follows: the location of the crossing is essential, as there is no other connection of the property to public roads; the alignment of the crossing to the FWHCA is perpendicular and the road has been designed to the minimum road standard (width); impacts to large trees have

been minimized (it is not possible to realign the crossing); and WDFW has given approval for the proposed 48-inch culvert in light of applicable standards for fish passage. *Findings 8, 9, 13, 14, 16, 18, 34, 36, and 37.*

7. Planning Staff accepted the critical areas study and mitigation plan and the biological evaluation, which were prepared by a qualified professional consistent with the critical areas ordinance. Conditioned to require implementation of the mitigation plan and with the provisions of the approved HPA, the record submitted supports a conclusion that the proposed crossing would not result in unmitigated adverse impacts to species of concern. The County's SEPA mitigation of non-significance was not appealed. *Findings 8, 9, 13, 16, 18, 19, 20, 21, 22, 23, 24, 34, 36, and 37.*
8. The location and scale of existing development on surrounding properties is a basis for requesting a reasonable use exception and is not a factor weighing in support of the instant approvals.

B. Shoreline Substantial Development Permit

1. As conditioned, the proposal is consistent with the policies and procedures of the Shoreline Management Act. Access to the site for camping, recreation, and educational purposes is consistent with the goals of the state Shoreline Management Act and the proposal represents a "reasonable and appropriate use" of regulated shoreline. Conditions of the MDNS, the instant permit, and the WDFW HPA would ensure control of pollution and prevention of damage to the natural environment. *Findings 3, 4, 5, 6, 8, 9, 26, and 37.*
2. As conditioned, the project complies with applicable regulations in the Washington Administrative Code. No portion of the stream/wetland crossing would exceed 35 feet above average grade. *Findings 3, 4, 5, 6, and 8.*
3. As conditioned, the proposal is consistent with applicable provisions of the SMPTR addressing access roads in the floodplain including SMPTR Section 3, Chapter IX. Landfilling and SMPTR Section 3, Chapter XVII, Road and Railroad Design and Construction. The Applicant applied for the instant SSDP, as required. The location of the proposed crossing does not contain high quality habitat. Impacted square footage in the Wetlands A and B and Medicine Creek would be replaced at nearby Wetland C, approximately 1,000 feet away from the proposed roadway. The mitigation plan addresses impacts to ecological values and natural resources to a point of no net loss. The submitted zero rise analyses, accepted by the County Flood Plain Manager, demonstrate that the project would not cause additional flooding over current conditions. The proposed 48-inch culvert is larger and provides greater flood water passage capacity than existing culverts immediately adjacent to the proposed crossing. A full drainage and erosion control plan would be required to be submitted, receive County approval, and be implemented prior to earth disturbing activities. The affected waterbodies are not navigable; there would be no impact to navigation. A zero rise analysis was provided, reviewed and approved by Thurston County, demonstrating to the satisfaction of Thurston County Flood Plain Manager and Planning Department that no detrimental

change in flood elevations would result from the proposed crossing. The proposed crossing is immediately adjacent to/partially located on an existing land bridge between the two wetlands and is perpendicular to the stream channel and designed to the minimum road standard allowed, this reducing fill and other impacts to the extent possible. Conditions of the MDNS, the instant permit, and the HPA would ensure only clean fill materials are used and that all construction debris and excavated material not reused are removed from the waterbodies and properly disposed of. This proposed private road accessing private property would not affect public access to shorelines and does not properly trigger requirements for public viewpoints. As concluded in the RUE section above, there is no alternate route to access the subject property; no viable alternative exists. The route of the crossing is the shortest and most direct possible. Stormwater management from the proposed road would be required to be designed and constructed in conformance with applicable provisions of the County's Drainage Design and Erosion Control Manual. No industrial activities or uses are proposed. The project was reviewed by the Thurston County Public Health and Social Services Department; no concerns regarding public health were identified and the Department recommended approval. *Findings 3, 4, 5, 6, 8, 9, 10, 11, 13, 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 34, 36, and 39.*

4. With sincere respect to the Nisqually Indian Tribe, the County's hearing examiner possesses only the authority conferred in County Code by the Board of Bounty Commissioners. Neither the Commissioners nor the examiner have jurisdictional authority to determine treaty rights. A hearing examiner's authority is limited to the determination of whether the evidence demonstrates compliance with applicable County regulations and standards. *Skagit Surveyors v. Friends of Skagit County*, 135 Wash.2d 542, 558, (1998); *Chaussee v. Snohomish County Council*, 38 Wash.App. 630, 636, (1984).

DECISIONS

Based on the preceding findings and conclusions, the request for approval of a reasonable use exception and a shoreline substantial development permit to construct a new 16-foot wide access road across Medicine Creek and associated wetlands and within the 100-year floodplain of the Nisqually River to access existing Camp Nisqually on property addressed as 11600 Durgin Road SE, Olympia are APPROVED subject to the following conditions

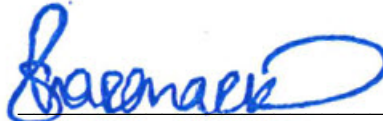
1. Erosion control measures must be in place prior to any clearing, grading, or construction. These control measures must be effective to prevent stormwater runoff from carrying soil and other pollutants into the critical areas.
2. The Applicant shall stop work and contact the proper authorities, including Nisqually Tribe Cultural Resources Preservation Officer, the Squaxin Tribe, Chehalis Tribe, Thurston County CPED, and the WA State Department of Archaeology and Historic Preservation (DAHP) if during excavation there are discoveries of archaeological artifacts or human burials.

3. An irrevocable assignment of savings or bond in the amount of 125% of the fair market value of the mitigation and monitoring plan shall be submitted to CPED prior to a construction / grading permit being issued for the project. An irrevocable assignment of funds or bond is used to ensure that the mitigation plan is completed. Once the mitigation work has been completed the irrevocable assignment of funds or bond will be released except for funds related to project monitoring which will be released once the monitoring has been completed.
4. If contamination of soil or groundwater 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).
5. Fill material shall be of such quality that it will not cause water quality degradation beyond the limits of adopted water quality standards defined by the Department of Ecology.
6. Excess construction materials shall be removed from the critical area and buffer.
7. All debris, overburden, and other waste materials from road construction shall be disposed of in such a way as to minimize their entry by erosion from drainage into any water body.
8. The project will direct new traffic to the subject pipestem, which is adjacent to an existing single-family residence. Screening or fencing shall be provided between the proposed new access road and the neighboring property directly to the south.
9. Construction shall occur when water is not flowing in the creek.
10. Clearing limits shall be clearly marked by temporary construction fencing. Construction fencing shall be reviewed and approved by staff in the field prior to the beginning of work.
11. Clearing and grading shall only occur between May 1 and September 30th (TCC 24.20.090.D.) unless otherwise approved by Thurston County CPED per this section.
12. The Applicant shall remove all construction related debris to an approved site (landfill or recycling center) outside of shoreline jurisdiction.
13. The maximum impervious surface on the parcel shall not exceed 30%.
14. Prior to a construction / grading permit being issued by Public Works, an engineered drainage and erosion control plan must be submitted to Thurston County CPED.
15. The supplemental spill plan information dated February 12, 2020 should be incorporated into the Biological Evaluation or included as an attachment to ensure it is readily available.
16. 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.

17. Construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

DECIDED October 5, 2020.



Sharon A. Rice
Thurston County Hearing Examiner

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 **\$1,041.00** 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 \$1,041.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Community Planning & Economic Development Department this _____ day of _____, 20___.