



SCHEIBMEIR, KELLY & NELSON, PS

ATTORNEYS AT LAW

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www.centerstlaw.com

January 21, 2026

VIA EMAIL (tsmith@ci.olympia.wa.us)

Mr. Tim Smith
Planning & Engineering Manager
City of Olympia
601 4th Avenue East
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. As you know, I have served as the City's Hearing Examiner since 2013. I would like to continue in the role if possible.

As the City already has most of my information, I am reducing my application materials to: (1) a copy of my 2022 RFQ response; (2) sign copies of the required Declarations; and (3) responses to the additional questions posed in the most recent RFQ.

My status is largely unchanged from my 2022 application. Since that application, I have been selected as the Skamania County Hearing Examiner and have also been selected as Hearing Examiner for several additional cities, most notably Tumwater, Gig Harbor, University Place, and Issaquah. As a result, I am currently serving three counties and approximately twenty cities and towns.

I have also largely retired from my private practice effective the end of 2025, leaving only my work as a Hearing Examiner. My partial retirement should make the scheduling of hearings somewhat easier.

My current hourly rate is \$275 per hour. I would be willing to maintain this rate for the duration of the four-year agreement.

The current RFQ inquiries into the possibility of mentoring other interested applicants. I believe that I have previously expressed my willingness to help mentor interested applicants and I remain willing to do so. Somewhat relatedly, it is my goal to have another member of my firm eventually be able to assume my work as Hearing Examiner, recognizing that each jurisdiction would be required to approve the change.

The RFQ also inquires as to the use of "plain talk". I believe that my response to the previous RFQ spoke to this issue. To elaborate upon what I may have said in that earlier response, I recognize that the majority of individuals who come before the Hearing Examiner do not have legal counsel and may have had little previous experience with the City's land use

regulations. At the same time, these individuals may find that the matter pending before the Hearing Examiner has tremendous potential impact to their property, and that their property is their single most important asset. In contested hearings it is unavoidable that one or more parties will be disappointed with the outcome. But while it is not possible to make all interested parties pleased with the outcome, it is possible to at least make them feel that they have been carefully listened to; that their concerns have been considered; and that the decision is written in a manner which makes it easily understandable. I would invite you to confer with your planning and other staff to see if they find my approach to be consistent with these goals.

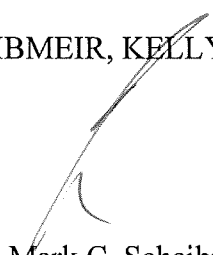
The RFQ also seeks examples of Rules of Procedure. As you know, Olympia has operated under the same Rules of Procedure for many years. Rules very similar to Olympia's are currently used in a number of nearby cities. I am enclosing two examples of somewhat different Rules currently used in the Cities of Issaquah and Black Diamond.

Again, please let me know if this abbreviated application is sufficient. In advance, thank you for your consideration of my application.

Very truly yours,

SCHEIBMEIR, KELLY & NELSON, P.S.

By



Mark C. Scheibmeir
mark@centerstlaw.com

Exhibit "A"
SOQ SIGNATURE SHEET

Solicitation Name: _____

Legal Name: Mark C. Scheibmeir

Business Name: Scheibmeir, Kelly & Nelson, P.S.

Address: P.O. Box 939, Chehalis, WA 98532

Unified Business Identifier (UBI) No.: 601-088-580

M/W/DBE Certification No. (If Applicable): _____

For questions regarding this Statement of Qualifications, the City RFQ Coordinator should contact the following individual:

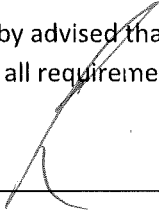
Name: Mark C. Scheibmeir

Telephone No.: 360-748-3386

Email Address: mark@centerstlaw.com

Signature of Authorized Official

The Consultant is hereby advised that by signature of this Statement of Qualifications, they are deemed to have acknowledged all requirements and signed all certificates contained herein.

Signature:  _____

Name of Person Signing: Mark C. Scheibmeir

Title: _____

Date: January 20, 2026

Email Address: mark@centerstlaw.com

Exhibit "B"
**STATEMENT OF COMPLIANCE WITH NONDISCRIMINATION REQUIREMENT
AND
EQUAL BENEFITS DECLARATION**

The Olympia City Council mandates compliance with the City's *Nondiscrimination in Delivery of City Services or Resources* ordinance (OMC 1.24) and *Employee Benefits* ordinance (OMC 3.18) for all services provided by City employees or through contracts with other entities. All contract agencies or vendors and their employees must understand and fully carry out the City's nondiscrimination policy. Accordingly, each City agreement or contract for services contains language that requires an agency or vendor to agree that it shall not unlawfully discriminate against an employee or client based on any legally protected status. This includes but is not limited to: race, creed, religion, color, national origin, age, sex, marital status, veteran status, sexual orientation, gender identity, genetic information, or the presence of any disability and any other status protected from discrimination by state or federal law. Unlawful discrimination includes transphobic discrimination or harassment, including transgender exclusion policies or practices in employee benefits.

Listed below are methods to ensure that this policy is communicated to your employees, if applicable.

- Nondiscrimination provisions are posted on printed material with broad distribution (newsletters, brochures, etc.).
- Nondiscrimination provisions are posted on applications for service.
- Nondiscrimination provisions are posted on the agency's web site.
- Nondiscrimination provisions are included in human resource materials provided to job applicants and new employees.
- Nondiscrimination provisions are shared during meetings.

Failure to implement at least two of the measures specified above or to comply with the City of Olympia's nondiscrimination ordinance constitutes a breach of contract.

By signing this statement, I acknowledge compliance with the City of Olympia's Nondiscrimination ordinance by the use of at least two of the measures specified above.

If this contract is valued at \$50,000 or more, I affirm that Consultant listed below complies with the City of Olympia Equal Benefits Ordinance (OMC 3.18) and shall, prior to contracting with the City, have policies in place prohibiting discrimination in the provision of employee benefits.

Should I operate as a sole proprietor, I agree not to discriminate against any client, or any future employees, based on any status protected from discrimination by state or federal law.

Signature

Mark C. Scheibmeir

Printed Name of Signatory

January 20, 2026

Date

Consultant Name

HILLIER, SCHEIBMEIR, KELLY & SATTERFIELD, P.S.

MARK C. SCHEIBMEIR
BRIAN J. KELLY

WILLIAM T. HILLIER
Retired

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www.centersllaw.com

ERIN L. HILLIER
SAMUEL D. SATTERFIELD

MICHAEL P. ROEWE
In Memoriam

January 11, 2022

VIA EMAIL (tsmith@ci.olympia.wa.us)

Mr. Tim Smith
Planning & Engineering Manager
City of Olympia
601 4th Avenue East
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. I would like to continue in the role as the City's Hearing Examiner and am submitting the enclosed materials in response to the RFQ.

As you know, I have been serving as Olympia's Hearing Examiner for the past nine years, since 2013. As the current Hearing Examiner, I am uncertain as to how much additional information you feel is necessary. I am therefore lessening my responses knowing that the City is well aware of my work. For similar reasons, my listed references exclude any Olympia officials and my attached decisions exclude any Olympia decisions. I trust that all of this makes sense. Should my proposal fail to include any of the requested information, please let me know and I will promptly supplement.

In advance, thank you for your consideration of my proposal.

Very truly yours,

HILLIER, SCHEIBMEIR,
KELLY & SATTERFIELD, P.S.

By


Mark C. Scheibmeir
mark@centersllaw.com

METHOD AND APPROACH

I will attempt to make this statement of my method and approach as non-repetitive of other materials as possible. I apologize for any overlap.

I have served as a Hearing Examiner for more than 26 years for both counties and cities, and cities both large and small. While there are common threads in the land use planning of all of these jurisdictions, each has its own approach and vision. It has been my goal to render decisions reflecting the jurisdiction's vision of its land use, not my own. To that end, my decisions may at times seem progressive while at other times less so depending on the jurisdiction's Comprehensive Plan, Development Regulations, Shoreline Master Program, etc.

As an appointed Hearing Examiner, I recognize that I have not been elected to the position and have not been empowered to establish land use policy, as this role is reserved to the elected governing body. My role is limited to applying the received facts to the Comprehensive Plan and Development Regulations enacted by the governing body. At times, members of the public would prefer that I expand my role and that I be more responsive to their wishes - especially when those wishes are expressed in large numbers - but I have respectfully declined, as to do so would usurp the role of elected officials.

I have been practicing law for more than 40 years. While my private practice involves some representation of small businesses, much of my other work involves assisting individuals with their real estate issues. This other, non-hearing examiner work offers me a unique perspective on the consequences of land use decisions. I fully understand how approving or denying a proposed land use has rippling effects across neighboring properties, neighborhoods, and the community as a whole. In particular, I realize that for most individuals their home is their most significant asset and that my decision may affect the value of that asset. I strive to never forget this.

Land use hearings, and land use decisions, are only effective if all of the participants believe they have an equal right to be heard and that their concerns are fully considered. It is simply not possible to render decisions that please all interested parties, but it is possible to render decisions that leave the participants believing they have been given a fair opportunity to be heard. It has been, and remains, my goal to conduct hearings that achieve this result while carving out the jurisdiction's vision of its land use.

SUMMARY OF QUALIFICATIONS, EXPERIENCE AND AVAILABILITY

A. CV OF ACADEMIC AND PROFESSIONAL QUALIFICATIONS

Bachelor of Science in Business Administration (with honors) from the University of Kansas in 1978.

Law Degree from the University of Washington Law School in 1981.

Private law practice in Chehalis, Washington from 1981 to the present, or 41 years.

Hearing Examiner Experience

Hearing Examiner for Lewis County since the position was created in 1996, or 26 years.

Hearing Examiner for Cowlitz County since 2007.

Hearing Examiner for the City of Olympia since 2013.

Hearing Examiner for Cities of Black Diamond and Yelm commencing late 2021.

Also Hearing Examiner for the Cities of Kelso, Castle Rock, and Elma, and the Towns of Cathlamet and Vader.

Additional Background Information

I have been practicing law in Chehalis since 1981, or for the past 41 years. In addition to my work as Hearing Examiner, my practice centers on real estate, business and estate planning matters. I have been involved in community activities throughout my professional career, including nearly 30 years of service on the Centralia College Foundation. In 2017 I was appointed by Governor Inslee as a Trustee for Centralia College and am currently in my second 5-year term as Trustee.

B. PREVIOUS EXPERIENCE CONDUCTING PUBLIC HEARINGS RELATING TO LAND USE REGULATIONS

In 1996, Lewis County established the position of Hearing Examiner and I was selected for the position. I have served as the County's Hearing Examiner ever since, or for twenty-six years. My role has expanded over the years to include appeals of dangerous animal notifications as well as appeals relating to the Health Department and Sanitary Code.

In 2007, I became Hearing Examiner for Cowlitz County and have conducted hearings for Shorelines Substantial Development Permits for two nationally-recognized projects: The

Millennium Coal Port proposed for Longview, and the Northwest Innovations Methanol Plant proposed for Kalama.

In 2013, I was selected as Hearing Examiner for the City of Olympia. Since then I have presided over a number of complex, often controversial, land use issues including several new subdivisions and a number of mixed-use projects in the downtown area. The City's land use regulations allow the Director to transfer decision-making authority to me for highly complex or controversial projects including the "Views on 5th" project.

Following the recent retirement of the Hearing Examiner for several cities in Thurston and Pierce Counties, I was asked by two of those cities, Black Diamond and Yelm, to serve as their Hearing Examiner. I am currently under consideration for appointment in one or more similar cities.

As earlier noted, I am also Hearing Examiner for several small cities including Kelso, Castle Rock, Cathlamet and Vader.

It is perhaps important to add that in 26 years of work as a Hearings Examiner I have not had a decision overturned on appeal, including several that have reached the Court of Appeals.

C. PREVIOUS EXPERIENCE WITH EVALUATION CRITERIA

Criteria 1.

- I have 41 years of legal experience, with more than 26 years' experience as a Hearing Examiner.
- I have presided over hundreds of hearings relating to land use planning. Many of these hearings have been extremely complex and/or controversial, involving difficult legal issues and significant public participation.
- I am responsible for development project review in all of the jurisdictions I serve. This authority includes master plan development, subdivisions and mixed-use projects.
- I am intimately familiar with the Growth Management Act and its application to development in both cities and counties.
- I am quite familiar with SEPA and have conducted numerous SEPA-related hearings.
- I am responsible for subdivision approval in the City of Olympia as well as in other jurisdictions I serve.

- I am very familiar with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) of Olympia as well as the other SMP's jurisdictions I am currently involved with. As earlier noted, my Shoreline Decisions for the Millennium Bulk Terminal Port in Longview and the Kalama Methanol Plant received national attention.

- I am familiar with the design review process and, in particular, the Olympia design review process.

- As previously noted, I have conducted hundreds of hearings relating to land use; have established rules and procedures for those hearings; and have been responsible for the orderly management of hearings that, on occasion, have involved several hundred participants.

- I have significant experience addressing public utilities, engineering and transportation issues, and have reviewed countless Traffic Impact Analyses.

- I am familiar with impact fees, including Olympia's. My decision in the Douglass Properties appeal involved a thorough analysis of Olympia's impact fees. My decision was subsequently affirmed by the Washington State Court of Appeals.

- I am fully aware of the constitutional principles involved in land use including, in particular, those relating to Substantive Due Process, Standing and the Vested Rights Doctrine.

Criteria 2. I would invite the City to review my previous land use decisions for the City as evidence of my legal writing ability. As earlier noted, in more than 26 years of work as a Hearing Examiner I have not had a decision overturned on appeal. I hope that this speaks to the clarity of my legal writing and the strength of my legal analysis.

Criteria 3-5. I have been involved in land use hearings with as many as 500 participants and thousands of exhibits, and with decisions running 100 pages or more in length. Even in such complex hearings I have managed to control the hearing and render a written decision within the allowed time. I have adjusted my hearing procedures to best accommodate the challenges associated with Covid. I am equally comfortable in conducting either in-person or remote hearings, understanding that the primary goal is to ensure that every participant is given a full opportunity to be heard.

Criteria 6. As evidenced by my prior work for the City, I am available at all days and times preferred by the City for its hearings. I am very familiar with all of the City's staff and its hearing protocols. I am also familiar with the City's current rules and procedures (having prepared them).

Criteria 7. I have been licensed to practice law in the State of Washington since 1981, or 41 years.

Criteria 8. My references are as follows:

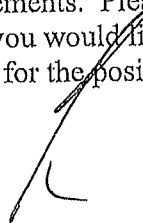
1. Lee Napier, Lewis County Community Development Director.
Telephone: (360) 740-2606.
2. Greta Holmstrom, Interim Director of Planning for Cowlitz County.
Telephone (360) 577-3052 (ext. 6676).

D. RECENT WRITTEN DECISIONS

I am enclosing two recent written decisions, one from Lewis County and one from Cowlitz County. I have selected these decisions as they involve somewhat controversial projects with notable public participation. The Lewis County matter involves an application by the County for a Shorelines Substantial Development Permit to establish a County-owned park along the Cowlitz River near Packwood to allow a put-in location for kayakers on the upper Cowlitz (approved). The Cowlitz County matter involves an after-the-fact variance to resolve conflicts between a marijuana manufacturing facility and an adjoining historic cemetery (approved). An invoice for the Cowlitz County matter is attached. I am paid a monthly retainer from Lewis County and therefore do not have a separate invoice for the individual hearings.

SUMMARY

I hope that I have responded to all of the RFQ requirements. Please let me know if there is any additional information you need or any other matters you would like to discuss. In advance, thank you for your consideration of my application for the position of Hearing Examiner.



Mark C. Scheibmeir

CITY OF BLACK DIAMOND HEARING EXAMINER RULES OF PRACTICE AND PROCEDURE

Note: These Rules of Procedure were amended by the Hearing Examiner on August 11, 2014 in order to renumber Section 3.15, Subpoenas, to 2.32.

Section 1: General Provisions

- 1.01 Applicability
- 1.02 Effective Date
- 1.03 Interpretation

Section 2: Rules of General Application

- 2.01 Scope
- 2.02 Definitions
- 2.03 Hearing Examiner's Jurisdiction
- 2.04 Computation of Time
- 2.05 Filing and Service of Documents
- 2.06 Expeditious Proceedings
- 2.07 Scheduling Hearings
- 2.08 Consolidation
- 2.09 Presiding Official
- 2.10 Disqualification or Recusal of an Examiner
- 2.11 Witnesses
- 2.12 Expected Conduct
- 2.13 Motions
- 2.14 Evidence
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- 2.16 Site Inspection
- 2.17 Continuing or Reopening Hearing
- 2.18 Leaving the Record Open
- 2.19 Distribution of Decisions and Recommendations
- 2.20 Remand
- 2.21 Termination of Jurisdiction
- 2.22 Clerical Errors
- 2.23 Proceedings Recorded
- 2.24 Disclosure of Public Records
- 2.25 Transcript of Proceedings
- 2.26 Retention of Records
- 2.27 Recording Devices
- 2.28 Appearance of Fairness
- 2.29 Hearing Examiner's Decision

- 2.30 Reconsideration
- 2.31 Record
- 2.32 Subpoenas

Section 3: Code Enforcement Actions

- 3.01 Dismissal
- 3.02 Clarification
- 3.03 Amendment
- 3.04 Withdrawal of Code Enforcement Appeal
- 3.05 Party Representative Required
- 3.06 Notice of Appearance
- 3.07 Intervention
- 3.08 Parties' Rights and Responsibilities
- 3.09 Default
- 3.10 Hearing Format
- 3.11 Communications From Non-Parties
- 3.12 Burden of Proof
- 3.13 Reconsideration
- 3.14 Subsequent Appeal

Section 4: Recommendations to Council

- 4.01 Nature and Purpose of Proceedings
- 4.02 Rights of Parties and Interested Persons
- 4.03 Format of Public Hearing

SECTION 1: GENERAL PROVISIONS

1.01 APPLICABILITY

These Hearing Examiner Rules (Rules) are adopted to supplement the ordinance requirements for matters within the Hearing Examiner's jurisdiction and govern administrative practice and procedure before the Hearing Examiner. In any case of conflict between a Hearing Examiner Rule (HER) and the Black Diamond Municipal Code (Code), the Code shall control.

1.02 EFFECTIVE DATE

These Rules shall apply to all matters filed with or otherwise properly before the Hearing Examiner on or after the effective date of adoption of these Rules by the Hearing Examiner.

1.03 INTERPRETATION OF RULES

(a) The Hearing Examiner shall interpret the Hearing Examiner Rules of Practice and Procedure and determine how the Rules apply in specific instances. An affected party may petition the Hearing Examiner during the pendency of a matter under review to request a declaratory ruling regarding the applicability of these Rules to specific actual circumstances. Except during hearing, such request must be in writing and clearly identify the subject Rules and describe the circumstances for which the declaratory ruling is sought.

(b) Where questions of practice and procedure arise that are not addressed by these Rules, the Hearing Examiner shall determine the practice or procedure that she or he deems most appropriate and consistent with providing fair treatment and due process. In making such determinations, the Hearing Examiner may look to the current Civil Rules of Superior Court for guidance.

SECTION 2: RULES OF GENERAL APPLICATION

2.01 SCOPE

Rules in this section apply generally to all matters where the Hearing Examiner has authority to decide or recommend the outcome.

2.02 DEFINITIONS

The following definitions shall apply unless the context or subject matter requires otherwise:

(a) "Affidavit" - a written or printed statement declared or certified to be true and correct under penalty of perjury under the laws of the state of Washington. "Affidavits" includes the declarations authorized under RCW 9A.72.085, as now or hereafter amended.

(b) "Appeal" - a challenge to a decision or other action where the MCC or other authority authorizes the Hearing Examiner to review and decide.

(d) "Appellant" - the person(s), organization, association, corporation, or other entity who files a complete and timely appeal of a decision or other appealable action.

(e) "Applicant" - the person(s), organization, association, corporation or other entity who files an application or otherwise formally requests a permit or other type of County action, interpretation, or authorization which is the subject of an appeal or other review by the Hearing Examiner.

(f) "Code" – Black Diamond Municipal Code (BDMC).

(g) "Code Enforcement Action" - Any civil proceeding the purpose of which is to stop a person or entity from violating any provision of the Black Diamond Municipal Code.

(h) "Days" - calendar days.

(i) "Department" - the department, agency, board, commission or other County entity responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.

(j) "Director" - the head of the department, agency, board or commission, or other unit of County government or the department head's designee responsible for the recommendation, decision or other action that is subject to review by the Hearing Examiner.

(k) "Examiner" - the Hearing Examiner, or a Deputy Hearing Examiner or an alternate Hearing Examiner who has been delegated responsibility by the Hearing Examiner or County Commissioners to conduct a hearing or otherwise preside over a particular matter.

(l) "Ex parte communication" - a communication between one party and the Examiner in the absence of the other party(s).

(m) "Hearing Examiner" – same as "Examiner".

(n) "Interested person" - any individual, or public or private organization of any character, significantly affected by, or interested in proceedings before the Hearing Examiner, including any party.

(o) "Motion" - a request made to the Hearing Examiner, whether written or oral, for an order or other ruling.

(p) "Order" - a ruling, instruction, or other directive issued by the Hearing Examiner in response to a request or motion by a party, or on the Hearing Examiner's own initiative.

(q) "Party" - the person(s), group, organization, corporation, or other entity that has filed a development permit application or an appeal, or is granted right of appeal automatically by ordinance; the person(s), group, organization, corporation, or other entity granted party status

through intervention; County staff when the County is prosecuting a code enforcement action or has a decision subject to appeal before the Examiner; the person(s), group, organization, corporation, or other entity who filed the application, request, or petition for a permit or other type of City authorization or action which is the subject of the appeal; the owner(s) of the property subject to the City decision or other action.

(r) "Public hearing" - a hearing held by the Hearing Examiner for the purpose of developing a record to substantiate a recommendation or decision. Serves as the "open record hearing" as defined in the Regulatory Reform Act, Chapter 36.70B RCW.

(s) "Representative" - that individual designated by a party to be the official contact person and to speak for the party.

(t) "Rule(s)" - the Hearing Examiner Rules of Practice and Procedure, as currently amended.

(u) "Timely" - within the time prescribed by applicable ordinance or, in the absence of ordinance provision, the time prescribed by Hearing Examiner rule, or within the time determined by the Hearing Examiner.

(v) "Witness" -- Any person who provides testimony (sworn or unsworn) at a hearing.

2.03 HEARING EXAMINER'S JURISDICTION

The Hearing Examiner can only hear and make recommendations and decisions in those matters and on those issues where ordinance or other appropriate authority grants to the Hearing Examiner the authority to do so. The Hearing Examiner does not have the authority to rule on the validity of ordinances.

2.04 COMPUTATION OF TIME

Except as otherwise provided by the Code, computation of any period of time prescribed or allowed for matters before the Hearing Examiner, shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national, state or City holiday, the period shall extend to the end of the next day when the County offices are open for business.

2.05 FILING AND SERVICE OF DOCUMENTS

(a) Documents shall be deemed filed with the Hearing Examiner on receipt at the City of Black Diamond Department of Community Development located at 24301 Roberts Drive with a mailing address of City of Black Diamond Department of Community Development, P.O. Box 599, Black Diamond, WA 98010.

(b) Documents shall be served personally or, unless otherwise provided by applicable ordinance, by first-class, registered, or certified mail, or by facsimile (fax) transmission. Service shall be

regarded as complete upon deposit in the regular facilities of the U.S. Mail of a properly stamped and addressed letter or packet, or at the time personally delivered, or transmitted by fax.

2.06 EXPEDITIOUS PROCEEDINGS

To the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously. At every stage in the proceedings, all parties shall make every reasonable effort to avoid delay.

2.07 SCHEDULING HEARINGS

The City of Black Diamond Department of Community Development shall promptly schedule hearings after consultation with the Hearing Examiner.

2.08 CONSOLIDATION

Where practical, feasible, and consistent with ordinance requirements, all matters under the jurisdiction of the Hearing Examiner relating to the same matter, should be consolidated for hearing. The Hearing Examiner may order consolidation with or without a request from any party.

2.09 PRESIDING OFFICIAL

(a) The Hearing Examiner shall preside over hearings held under these Rules.

(b) The Examiner conducting a hearing shall have the duty to ensure a fair and impartial hearing, to take all necessary action to avoid undue delay in the disposition of proceedings, and to maintain order. The Examiner shall have all powers necessary to these ends, including, but not necessarily limited to the following:

1. Determine the order of presentation of evidence;
2. Administer oaths and affirmations;
3. Rule on offers of proof and receive evidence;
4. Rule on procedural matters, objections and motions;
5. Question witnesses and request additional exhibits;
6. Permit or require oral or written argument or briefs and determine the timing and format for such submittals;
7. Regulate the course of the hearings and the conduct of the parties and others so as to maintain order and provide for fair hearing;

8. Make and issue the decision or recommendation.

2.10 DISQUALIFICATION OR RECUSAL OF AN EXAMINER

- (a) In the interest of fairness to the parties, an Examiner on his/her own initiative may recuse himself/herself from hearing a particular matter in the event of personal bias, prejudice, financial interest, or other substantial reason.
- (b) Prior to hearing, a party may request that the Hearing Examiner assign a different Examiner to hear a particular matter. The request must be in writing, submitted at least seven (7) days prior to the day the hearing is to begin, with a copy of the request to each of the other parties. The request must set forth the reasons for the belief that personal bias, prejudice, financial interest, or other substantial reason for disqualification or recusal exists.
- (c) In case of disqualification or recusal, the Hearing Examiner shall reassign the matter to a different Examiner.

2.11 WITNESSES

- (a) All witnesses except citizens expressing their opinion as identified in HER 4.03 are subject to cross-examination by the other party(s).
- (b) The rules of privilege shall be effective to the extent recognized by law.
- (c) Hearing Examiner hearings are open to the public. However, in code enforcement actions and the appeals thereof, persons who are not parties are generally not permitted to testify unless called as witnesses. In closed record appeals as defined by the Regulatory Reform Act, Chapter 36.70B RCW, only persons who previously contributed to the record are allowed to present argument.
- (d) The Examiner may limit the length of testimony to expedite the proceedings and avoid the necessity to continue the hearing. Maximum practicable advance notice will be provided if such time limitations are to be imposed. If parties are unable to complete their arguments and testimony within the allotted time, an opportunity will be granted to submit written materials after the close of the hearing; other parties will be allowed an opportunity to offer written rebuttal to any such materials.
- (e) At the discretion of the Examiner, or where the parties agree and the rights of the parties will not be prejudiced, the Examiner may allow testimony via telephone or television or similar electronic means if the County has the technology available. Each party to the proceeding shall have the opportunity to hear (or, if televised, to both hear and see) testimony given in this manner and to question the person giving such testimony.

2.12 EXPECTED CONDUCT

(a) All persons appearing before the Hearing Examiner shall conduct themselves with civility and courtesy to all persons involved in the hearing.

(b) No party or other person shall communicate with an Examiner presiding over a matter or with any employee of the Hearing Examiner's Office in an attempt to influence the outcome or to discuss the merits of that matter.

(c) No party or other person, other than staff when not acting as a party, shall make or attempt ex parte communication with the Examiner regarding any matter under pending review by the Examiner. Procedural matters may be addressed by written correspondence, copied to all known parties. In all matters involving an open record hearing, prior to and during the hearing, the Examiner may ask County staff to submit additional information into the record.

(d) If a substantial prohibited ex parte communication is made, such communication shall be publicly disclosed by the Examiner: any written communications, and memorandums summarizing the substance and participants of all oral communications, shall promptly be made available to the parties for review and an opportunity to rebut those communications.

2.13 MOTIONS

(a) All motions, other than those made during a hearing, shall be in writing, and shall state the order or relief requested and the grounds for the motion. Every motion and answering statement and accompanying papers, shall be served on each party representative on the day it is filed with the Hearing Examiner.

(b) Within seven (7) days after service of any written motion, or such longer or shorter period of time as may be designated by the Hearing Examiner, the other party(s) shall file a written answer. When the Hearing Examiner has received the answering statement(s), or the seven (7) days or other period of time designated by the Hearing Examiner has elapsed, the Hearing Examiner shall rule on the motion. Failure of a party to file a timely response, may be considered by the Hearing Examiner as evidence of that party's consent to the motion.

(c) The Hearing Examiner may call for oral argument prior to ruling if consistent with state law.

(d) For motions made at hearing or for motions made for the extension of time or the expedition of hearings, the Hearing Examiner may waive the requirements of this section and may also rule upon such motions orally.

2.14 EVIDENCE

(a) Evidence, including hearsay, may be admitted if, in the judgment of the Examiner, it is relevant to the issue(s) on appeal, comes from a reliable source, and has probative (proving) value. Such evidence is that which would commonly be relied upon by responsible persons in the conduct of their important affairs.

(b) The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, unduly repetitive, or privileged.

(c) Opinion evidence of non-experts presented at public hearings is discouraged but may be admitted, although it need not be given weight by the Examiner.

(d) Documentary evidence may be received in the form of copies or excerpts. The Examiner may require that the parties be given an opportunity to compare the copy with the original, and that the complete document from which an excerpt is taken be made available for inspection by all parties.

2.15 OFFICIAL NOTICE

(a) The Examiner may take official notice of judicially cognizable facts. In addition, the Examiner take notice of general, technical, or scientific facts within his or her specialized knowledge.

(b) Parties must be notified during the hearing, or before issuance of decision, of the specified facts or materials noticed and the source thereof, and afforded an opportunity to contest or rebut the facts or materials so noticed if additional evidence may still be admitted as restricted by state law.

(c) A Hearing Examiner ruling, decision, or recommendation may refer to and utilize any part of the Code or any state law and any issued Hearing Examiner decision.

2.16 SITE INSPECTION

Where it would assist the Examiner in clarifying or understanding the evidence adduced at hearing, the Examiner may inspect property subject to Examiner review prior to the close of the record.

2.17 CONTINUING OR REOPENING HEARING

(a) A scheduled hearing may be continued for good cause as determined by the Hearing Examiner. Motions for continuance shall be served and received by all parties and the Examiner at least seven days prior to the hearing date, unless extraordinary circumstances justify a later date. Written notice of the date, time, and place of the continued hearing shall be provided to each party and the County. The notice of a rescheduled hearing need not observe the time requirements to which the original notice was subject.

(b) Prior to the issuance of the subject decision or recommendation, the Examiner may continue or reopen (if consistent with state law) proceedings for good cause and may permit or require written briefs or oral argument.

(c) If the Examiner determines at hearing that there is good cause to continue such proceeding and then and there specifies the date, time, and place of the new hearing, no further notice is required

(d) If a matter is reopened after conclusion of the hearing, parties shall be provided not less than ten (10) days notice of the reopened hearing.

2.18 LEAVING THE RECORD OPEN

(a) The Examiner may leave the record of hearing open at the conclusion of a hearing in order to receive argument or for other good purpose. Parties shall be provided notice of the consideration of any evidence received after hearing and shall have an opportunity to review such evidence and to file rebuttal evidence or argument.

(b) Except as provided elsewhere in these Rules, information submitted after the close of the record shall not be included in the hearing record or considered by the Examiner making the decision or recommendation.

2.19 DISTRIBUTION OF DECISIONS AND RECOMMENDATIONS

A copy of the Hearing Examiner's decision or recommendation shall be distributed to each party representative, to those persons who have specifically requested a copy, and to others as specified by applicable ordinance(s).

2.20 REMAND

(a) Prior to the issuance of the Hearing Examiner's recommendation or decision, if the Examiner determines that information, analysis, or other material necessary to the Hearing Examiner's recommendation has not been provided, the matter may be remanded to the Department for the addition of that information, analysis, or other material if allowed by state law.

(b) Where the Hearing Examiner's decision is to remand the matter to the Department for additional information, analyses, or other material, the Hearing Examiner shall retain jurisdiction in order to review the adequacy of that information, analysis, or other material. The Examiner may then issue a final decision or recommendation using the additional information. The decision to remand shall expressly state that jurisdiction is retained and what information, analysis, or other material is to be provided, and it may indicate when it is to be submitted. A copy of that information, analysis, or other material shall also be provided to each party to the proceeding, except where the size or condition of the required materials make copying impractical, notification to the other parties of the submittal, shall be sufficient. The parties shall have an opportunity to review, comment upon, and submit rebuttal to the information, analysis, or other material submitted. At the discretion of the Examiner and consistent with state law, the hearing may be reopened following such submittal.

(c) Where the decision of the Hearing Examiner is to remand for the preparation of a new departmental decision, the Hearing Examiner's jurisdiction is terminated and Director's subsequent decision shall be issued and subject to appeal in accordance with applicable ordinance(s).

2.21 TERMINATION OF JURISDICTION

The jurisdiction of the Hearing Examiner is terminated upon the issuance of the decision or recommendation except where jurisdiction is expressly retained, or as otherwise provided in ordinance or in these Rules, or when a matter is remanded to the Hearing Examiner by the County Commissioners.

2.22 CLERICAL ERRORS

Clerical mistakes in decisions, recommendations, orders, or other parts of the record, and errors arising from oversight or omission, may be corrected by Order at the Hearing Examiner's initiation, or in response to the motion of any party.

2.23 PROCEEDINGS RECORDED

All proceedings before the Hearing Examiner shall be electronically recorded. The recordings of hearings shall be part of the official case record. Copies of the recordings shall be made available to the public upon request, subject to payment of a reasonable fee for copying.

2.24 DISCLOSURE OF PUBLIC RECORDS

Hearing Examiner decisions and recommendations, the hearing record, and associated official files, are public records and shall be available for public review.

2.25 TRANSCRIPT OF PROCEEDINGS

(a) Anyone desiring a certified transcript of a hearing may obtain a duplicate copy of the hearing tapes from the City of Black Diamond Department of Community Development and shall be responsible for arranging and paying for the preparation of a verbatim transcript. The completed transcript must be returned to the Hearing Examiner for certification.

(b) The parties shall have an opportunity to review and comment on the transcript. The Hearing Examiner shall resolve conflicts as to form and content of the transcript and provide a certification when such disputes are resolved and the Examiner is satisfied that the transcript provides a reliable record of the proceedings.

2.26 RETENTION OF RECORDS

The case file, including the tape recording(s) and exhibits, shall be retained by the City of Black Diamond Department of Community Development consistent with the requirements of the Public Records Act (Chapter 42.17 RCW) and applicable retention schedules.

2.27 RECORDING DEVICES

Photographic and recording equipment are permitted at hearings. The Examiner may deny or condition use of such equipment as she or he deems necessary to avoid disruption to the proceedings or prejudice to any party.

2.28 APPEARANCE OF FAIRNESS

The appearance of fairness doctrine applies to proceedings under these Rules.

2.29 HEARING EXAMINER'S DECISION

(a) Issuance. The Hearing Examiner shall issue a written decision and provide a copy of that decision to each party representative within the time required by the applicable ordinance.

(b) Contents. A decision or recommendation of the Hearing Examiner shall include, but not be limited to, a statement regarding the following:

- Background. The nature and background of the proceeding, including identification of party representatives participating in the hearing, prehearing determinations, and other similar information.
- Findings. The individual facts that the Examiner finds relevant, credible, and requisite to the decision, based on the evidence presented at hearing and those matters officially noticed. (This may include recitation of relevant provisions of ordinance, other regulation, or case law.)
- Conclusions. Legal and factual conclusions based upon specific provisions of law and the findings of fact.
- Decision or Recommendation. The Hearing Examiner's decision or recommendation based upon a consideration of the whole record and supported by substantial evidence in the record.
- Postscript. Information regarding subsequent procedural step(s), if any, for appealing the Hearing Examiner's decision.

(c) The decision may also include an order disposing of contested issues and/or directing parties to take actions consistent with the decision.

2.30 RECONSIDERATION

(a) A party as defined in Section 2.02 may file a written motion for reconsideration within 10 calendar days of the date of the Hearing Examiner's decision. The timely filing of a motion for reconsideration shall stay the Hearing Examiner's decision until such time as the motion has

been disposed of by the Hearing Examiner. No party may file a motion to reconsider on a decision issued after reconsideration.

(b) The grounds for seeking reconsideration shall be limited to the following:

1. The Hearing Examiner engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
2. The Hearing Examiner's decision is an erroneous interpretation of the law;
3. The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
4. The Hearing Examiner's decision is a clearly erroneous application of the law to the facts; or
5. The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;

(c) The motion for reconsideration must:

1. Contain the name, mailing address and daytime telephone number of the moving party, together with the signature of the moving party;
2. Identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested;
3. State the specific grounds upon which relief is requested;
4. Describe the specific relief requested; and
5. Where applicable, identify the specific nature of any new evidence. Such new evidence shall be considered only if the additional evidence relates to: (i) the grounds for disqualification of the Hearing Examiner when such grounds were unknown by the moving party at the time the record was created; or (ii) matters that were improperly excluded from the record after being offered by a party.

(d) The Hearing Examiner shall issue a decision on the motion as follows:

1. Deny the motion in writing; or
2. Issue an amended decision; or
3. Accept the motion and set the matter for closed record review with no or limited new evidence or information allowed to be submitted and only written reconsideration arguments allowed. Any written arguments must be filed within 10 calendar days from notice of the Hearing Examiner.

2.31 RECORD

The record of an Examiner proceeding shall include:

1. All evidence received or considered;
2. Pleadings, procedural rulings, and other non-evidentiary materials that are part of the Hearing Examiner's file;
3. Statement of matters officially noticed, if any;
4. Findings, conclusions and decision of the Hearing Examiner;
5. Tape recording of the hearing.

2.32 SUBPOENAS

(a) A request or motion may be made in writing for a subpoena to require a person to appear and testify at a hearing, or for a person to produce specified documents or other physical exhibits at a prehearing conference or at hearing.

(b) A request for a subpoena for a person shall: include the person's name and address; show the relevance of that person's testimony; and, demonstrate the reasonableness of the scope of subpoena sought. A request for a subpoena for documents or other physical exhibits shall: include the name and address of the person who is to produce the documents or other physical exhibit; specify the materials to be produced; indicate the relevance of the materials subpoenaed to the issues on appeal and, demonstrate the reasonableness of the scope of the subpoena sought.

(c) The party requesting the subpoena shall be responsible for serving the subpoena. An affidavit or declaration of personal service or of mailing shall be submitted to the Hearing Examiner as proof of that service.

(d) Except as otherwise allowed by the Hearing Examiner, subpoenas shall be served no less than seven (7) days prior to the appearance or production ordered.

(e) A subpoena may be issued with like effect by an attorney of record in the proceeding. The issuing attorney must sign the subpoena.

(f) Any motion to limit or quash (i.e., vacate or void) a subpoena shall be filed with the Hearing Examiner within seven (7) days of receipt of the subpoenas or such other time as specified by the Hearing Examiner.

(g) Requests for subpoenas and the rulings upon such requests may be made ex parte unless otherwise ordered by the Hearing Examiner.

SECTION 3: CODE ENFORCEMENT ACTIONS

In addition to the Rules of General Application in Section 2, the Rules in Section 3 shall apply to code enforcement actions and the appeals thereof.

3.01 DISMISSAL

(a) A code enforcement action or appeal thereof may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, does not comply with filing requirements, or is without merit on its face, frivolous, or brought merely to secure delay.

(b) Any party may request dismissal of code enforcement action at any time with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.

(c) When an appeal is withdrawn by the issuing Department, the appeal becomes moot and shall be dismissed.

3.02 CLARIFICATION

Specified parties shall provide clarification, additional information, or other submittals as the Hearing Examiner deems necessary in order that the code enforcement action or appeal thereof can be made complete and understandable. The Hearing Examiner shall rule on the request of any party for clarification of a code enforcement action or appeal thereof. Request for clarification must be made in a timely manner as to afford reasonable opportunity for other parties to prepare response(s) for hearing.

3.03 AMENDMENT

The Hearing Examiner may allow, for good cause shown, an appeal to a code enforcement action to be amended within 10 days after it has been filed. In deciding whether to allow such an amendment, the Hearing Examiner shall attempt to ensure that the opportunity for a fair hearing by the other parties will not be prejudiced by the amendment.

3.04 WITHDRAWAL OF CODE ENFORCEMENT APPEAL

(a) An appeal to a code enforcement action may be withdrawn only by the appellant.

(b) Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person who had been designated as the party representative [See HER 3.05].

(c) An appellant's request to withdraw shall be granted as a matter of right and the appeal dismissed.

3.05 PARTY REPRESENTATIVE REQUIRED

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the Hearing Examiner of the name, address and telephone number of that designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative, is notice or communication to party.

3.06 NOTICE OF APPEARANCE

When a party is represented by an attorney, the attorney shall file a notice of appearance with the Hearing Examiner and send a copy of that notice to the other parties. Where the appellant's attorney filed the appeal and indicated his/her representative capacity, a notice of appearance does not need to be filed. The notice of appearance shall serve to designate the attorney as the party representative.

3.07 INTERVENTION

(a) Upon a showing of a substantial or significant interest that is not otherwise adequately represented, the Hearing Examiner may permit an interested person, group, organization, corporation, or other entity, who is not a party to a code enforcement action or appeal thereof, to participate in the code enforcement action.

(b) A written request for intervention must be submitted to the Hearing Examiner at least five (5) days prior to the day on which the hearing begins. The intervention request must state the basis for the intervention and how the person, group, organization, corporation, or other entity making the request is affected by or interested in the code enforcement action or appeal thereof. In considering the requested intervention, the Hearing Examiner shall seek to ensure that intervention will not unduly delay the hearing process, will not expand the issues beyond those within the appeal, and will not prejudice the rights of any of the original parties. In granting intervention, the Hearing Examiner may limit the nature and scope of the intervention.

(c) Intervention is not a substitute means of participating in a code enforcement action or appeal thereof for those who could have appealed but failed to do so.

3.08 PARTIES' RIGHTS AND RESPONSIBILITIES

(a) Each party in an appeal proceeding shall have the right to: due notice of hearing, presentation of evidence, rebuttal, objection, cross-examination, argument, and other rights determined by the Hearing Examiner as necessary for the full disclosure of facts and a fair hearing.

(b) Parties have the right to be represented by an attorney. Representation by an attorney is not required.

(c) Where a party has designated a representative, the representative shall exercise the rights of the party.

(d) All parties, witnesses, and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.

3.09 DEFAULT

The Hearing Examiner may dismiss an appeal to a code enforcement action by an order of default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing. The Hearing Examiner may also dismiss a code enforcement action and the appeals thereof if the County fails to appear to prosecute its case.

3.10 HEARING FORMAT

(a) Code enforcement hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Examiner to make the relevant evidence most readily and efficiently available to the Examiner and to provide the parties a fair opportunity for hearing.

(b) Where the Code provides that the defendant or appellant must overcome deference accorded the Director's decision being appealed, the order of hearing is generally as follows:

1. Examiner's introductory statement;
2. Parties' opening statements (optional);
3. Appellant/defendant's presentation of evidence;
4. Department's presentation of evidence;
5. Rebuttal;
6. Closing argument of parties.

(c) Where no deference is accorded the Director's decision, the order of hearing for a code enforcement action or appeal thereof is generally as follows:

1. Examiner's introductory statement;

2. Parties' opening statements (optional);
3. Department's presentation of evidence;
4. Appellant/defendant's presentation of evidence;
5. Rebuttal;
6. Closing argument of parties.

(d) Notwithstanding the order presented above, the order of hearing may be modified or a different order established as the Examiner deems necessary for the clear and fair presentation of evidence. The order of the hearing may also be modified as agreed upon by the parties with the Examiner's approval.

(e) The order of presentation at hearing shall not alter or shift any burden(s) or presumption(s) established by applicable law(s).

3.11 COMMUNICATIONS FROM NON-PARTIES

(a) Written communications received from non-parties regarding a pending matter, shall be disclosed by the Examiner at hearing for the review of all parties.

(b) The Examiner, after considering the objections of the parties and determining that undue delay or prejudice will not result, may permit relevant oral or written statements or both, by persons who are not parties or called by parties as witnesses. Limitations may be imposed on the length of such statements and cross-examination by the parties shall be permitted.

3.12 BURDEN OF PROOF

(a) Where applicable ordinance(s) or other applicable law so provide, the Hearing Examiner shall accord deference or other presumption as directed by the applicable ordinance(s).

(b) Where the applicable ordinance(s) provide that the code enforcement defendant or appellant has the burden, defendant/appellant(s) must show by the applicable standard of proof that the Department's decision or action is not in compliance with the ordinance(s) authorizing that decision or action.

(c) Where the applicable ordinance(s) do not provide that the code enforcement defendant or appellant has the burden, the Department shall make a prima facie showing that its decision or action is in compliance with the ordinance(s) authorizing that decision or action.

(d) Unless otherwise provided by applicable ordinance(s), statute, or case law, the standard of proof is a preponderance of the evidence.

3.13 RECONSIDERATION

(a) Reconsideration of a Hearing Examiner code enforcement decision may be granted by the Hearing Examiner to the extent consistent with state law, if a moving party demonstrates one or more of the following:

1. Irregularity in the proceedings by which the moving party was prevented from having a fair hearing;
2. Newly discovered evidence of a material nature that could not, with reasonable diligence, have been produced at hearing;
3. Error in the computation of the amount of damages or other monetary element of the decision;
4. Clear mistake as to a material fact.

(b) Motions for reconsideration must be filed within 10 days of the date of the Hearing Examiner's decision. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiner's decision.

3.14 SUBSEQUENT APPEAL

Hearing Examiner decisions may be appealed as provided for in applicable law. Information regarding subsequent appeal opportunities shall be provided as a postscript on the Hearing Examiner decision.

SECTION 4: RECOMMENDATIONS TO COUNCIL

In addition to the Rules of General Application in Section 2.0, the rules in Section 4 shall govern review of matters where the Hearing Examiner is to hold a public hearing and prepare a recommendation or final decision on land use permit applications or appeals of staff decisions on such applications.

4.01 NATURE AND PURPOSE OF PROCEEDINGS

Public hearings shall generally be informal in nature, but conducted in such manner that the information and facts relevant to a particular proceeding will become the most readily and efficiently available to the Examiner. Irrelevant, immaterial, unreliable or unduly repetitious testimony, exhibits, or other information presented may be excluded by the Examiner.

4.02 RIGHTS OF PARTIES AND INTERESTED PERSONS

Any party to a matter subject to a public hearing before the Hearing Examiner has the right to: to testify and present evidence; to ask questions of those testifying at hearing; and to receive a copy of the Hearing Examiner's recommendation or decision.

4.03 FORMAT OF PUBLIC HEARING

(a) A public hearing shall include, but need not be limited to, the following:

1. Examiner's introductory statement;
2. Report by the Director (including introduction of the official file, reference to exhibits, and a summary of the recommendation of the Department);
3. Testimony by the applicant or appellant;
4. Public comment in support of or in opposition to the application or appeal;
5. Opportunity for parties and Examiner to ask questions;
6. Opportunity for presentation of additional information as rebuttal.

(b) The Examiner may alter or modify the order of hearing if and as necessary to best provide for the presentation and understanding of information.

(c) Questions asked of citizens expressing their opinions shall generally be limited to clarification.

(d) Persons testifying as expert witnesses are subject to cross-examination.

**RULES OF PROCEDURE FOR
PROCEEDINGS BEFORE THE HEARING EXAMINER
OF THE CITY OF ISSAQUAH, WASHINGTON**

NOTE: The following definitions apply to Chapters I and II of these rules. Please consult them when the following terms appear in the rules.

DEFINITIONS

"IMC" means the Issaquah Municipal Code.

"Appellant" means a person, organization, association, or other similar group who files a complete and timely appeal of a decision or other appealable action in accordance with the IMC.

"Applicant" means a person who is the owner of the subject property or the authorized representative of the owner of the subject property, and who has applied for a land use permit.

"City" means the City of Issaquah, Washington.

"Clerk to the Hearing Examiner" means a person designated by the City to assist the Hearing Examiner in his/her duties.

"Closed record appeal" means an administrative appeal on the record to the Hearing Examiner, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

"Ex parte communication" means written or oral communications to the Hearing Examiner about a matter pending before the Hearing Examiner, not included in the record and made outside of a hearing, but does not include communication of a purely procedural nature.

"Hearing Examiner" or "Examiner" means the Hearing Examiner or the Hearing Examiner Pro Tempore of the City of Issaquah.

"Interested Person" means any individual, partnership, corporation, association, or public or private organization of any character that may be affected by proceedings before the Hearing Examiner and shall include any party in a contested case. The City's administrative staff shall be considered an Interested Person and shall have the same rights as any other Interested Person.

"Motion" means an oral request during the course of a hearing or a written request made to the Hearing Examiner for an order or other ruling.

"Notice of Decision" means the written document of the Hearing Examiner that communicates a decision on an action before the Hearing Examiner.

"Open Record Appeal Hearing" means an administrative hearing that creates the record on appeal through written and oral testimony and submission of evidence and information.

"Order" means a written determination of the Hearing Examiner.

"Person" means any individual, firm, association, partnership, corporation or any entity, public or private.

"Party of record" means:

- a. A person who has testified at the open record hearing on the application and signed in at the hearing;
- b. The applicant, or applicant's representative;
- c. The subject property tax payer as identified by the records available from the King County assessor's office;
- d. A person submitting written testimony about a matter pending before the Examiner, excluding persons who have only signed petitions or mechanically produced form letters;
- e. The City's administrative staff; and
- f. A person who files a written request for Notice of Decision.

"Public Hearing" means a hearing with advance public notice, where the public is given the opportunity to provide written and oral testimony and the testimony is made part of the official project record. The hearing, conducted by the Hearing Examiner, creates the City's record through testimony and submission of evidence and information. An open record hearing may be held prior to the City's decision on a Project Permit to be known as an "open record predecision hearing."

"Public Meeting" means an informal meeting, hearing, workshop, or other public gathering of people to obtain comments from the public or other agencies on a proposed project permit prior to the local government's decision. A public meeting does not include an open record hearing. The proceedings at a public meeting may be recorded and a report or recommendation may be included in the local government's project permit application file.

"Record" means the oral testimony and written exhibits submitted at a hearing or the oral comments and written exhibits submitted at a meeting. The electronic recording of the proceeding shall be included as part of the record. At the discretion and order of the Hearing Examiner, the record may be supplemented after the closing of testimony.

"Staff Report" means the document prepared by the City planning staff.

"Working Day" means any day for which the City's offices are open.

CHAPTER I: **HEARINGS ON APPLICATIONS**

SECTION 1.1: APPLICATION OF RULES

This Chapter applies to open record hearings on land use applications.

SECTION 1.2: JURISDICTION

The Hearing Examiner's jurisdiction is limited to those issues where ordinance or other appropriate authority grants the Hearing Examiner the authority to hold hearings, make decisions or recommendations, and issue orders.

SECTION 1.3: EX PARTE COMMUNICATION

- 1.3.1 No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Examiner shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a related petition or application. This rule shall not prohibit ex parte communication concerning procedural matters.
- 1.3.2 The Examiner shall not communicate ex parte directly or indirectly with any interested person, nor his or her agent, employee, or representative, with regard to the merits of a petition or application that is pending before the Examiner.
- 1.3.3 If prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed, and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

SECTION 1.4: NATURE OF PROCEEDINGS

- 1.4.1 Expeditious Proceedings
It is the policy of the Office of the Hearing Examiner that, to the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously.
- 1.4.2 Frequency
Hearings will be scheduled through the Clerk to the Hearing Examiner in coordination with the Hearing Examiner. There may be more than one case scheduled to commence at the same time, and in such event the Hearing Examiner shall have discretion in setting the agenda.
- 1.4.3 Format
The format for a hearing will be designed in such a way that the evidence and facts relevant to a particular proceeding become available to the Hearing Examiner and easily ascertainable by a reviewing body.
- 1.4.4 Record of Hearing
 - a. Hearings shall be electronically recorded and such recordings shall be a part of the record. No minutes of the hearing will be kept. Copies of the electronic recordings of a particular proceeding shall be made available to the public if requested. The requester shall pay the reasonable cost of such copying.

- b. Copies of any written materials in the record may be obtained by any person who shall be responsible for paying the cost of reproducing such material.

1.4.5 Computation of Time

Computation of any period of time prescribed or allowed by these rules, ordinances of the City of Issaquah, and laws of the State of Washington shall begin with the first day following that on which the act or event initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or a national, state, or City holiday, the period shall run until the end of the next following working day.

SECTION 1.5: RIGHTS AND RESPONSIBILITIES OF PARTIES

1.5.1 Rights of City

The City staff shall have the right to present evidence and testimony, object, and make motions, arguments, recommendations, and all other rights essential to a fair hearing.

1.5.2 Rights of Applicant

Every applicant shall have the right of notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. Further, the applicant shall have the right to timely access to the City staff report.

The Hearing Examiner may limit the time allowed to parties testifying on an equal basis, may establish time limits for initial or rebuttal evidence, and may limit the number of witnesses to be heard. Cross-examination is permitted as necessary for a full disclosure of the facts, but the Hearing Examiner shall control the amount and style of cross-examination.

1.5.3 Rights of Parties of Record

Every party of record shall have the right to present evidence and testimony at hearings. The right of persons to cross-examine, object, and submit motions and arguments shall be at the discretion of the Hearing Examiner. The Hearing Examiner may impose reasonable limitations on the number of witnesses heard, and the nature and length of their testimony.

1.5.4 Responsibilities of City Staff

The City staff shall provide a report consistent with the provisions of Rule 7.6, provide notice of hearings, present materials at the hearings, and provide documentation relevant to the case. Staff reports should be available to the public at least five working days before the hearing.

1.5.5 Responsibilities of Applicant

Whenever possible the applicant shall provide the Hearing Examiner with material that supports his or her application prior to the hearing, be prepared for questions by the Hearing Examiner, and treat all who participate in these proceedings courteously. All supporting materials shall be provided to the Hearing Examiner a minimum of five working days before the hearing.

1.5.6 Responsibilities of All Participants, Witness and Observers

Parties, witnesses, or observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so will result in removal from the hearing at the discretion of the Hearing Examiner.

SECTION 1.6: PRESIDING OFFICIALS

1.6.1 Presiding Officials

- a. The Hearing Examiner shall preside over the hearings.
- b. The Hearing Examiner shall have all of the authority and duties as granted to him or her in state statutes, the IMC, and other local ordinances. Included in the duties of the Hearing Examiner are the following: to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. He or she shall have all powers necessary to perform his functions, including the following:
 1. To administer oaths and affirmations;
 2. To issue subpoenas;
 3. To rule upon offers of proof and receive evidence;
 4. To regulate the course of the hearings and the conduct of the parties and their agents;
 5. To question any party presenting testimony at the hearing;
 6. To hold conferences for settlement, simplification of the issues, or any other proper purpose;
 7. To require briefs on legal issues;
 8. To consider and rule upon all procedural and other motions appropriate to the proceedings; and
 9. To make and file recommendations or decisions.
- c. In the performance of his or her adjudicative functions, the Hearing Examiner shall not be subject to the supervision or direction of any elected official, officer, employee or agent of the City.

1.6.2 Presence of Legal Counsel at Hearings or Public Meetings

- a. All parties participating in the hearings may be represented at the hearings by legal counsel of their choice.
- b. Attorneys engaged in the representation of clients before the Hearing Examiner shall conduct themselves in accordance with all applicable Rules of Professional Conduct, including the display of courtesy to other members of the bar, witnesses, and all other persons present in the hearing room.

SECTION 1.7: CONDUCT OF HEARINGS

1.7.1 Notice Requirements of Hearings and Filings

- a. All notice, time requirements, and methods of notification shall be consistent with the provisions as set forth in the IMC, in addition to the provisions of this Section.

- b. Affidavit of Notice: An affidavit attesting to the notice given of a hearing (including dates and places of publication, and list of addressees) shall be provided by the City and made part of each record.

1.7.2 Oath or Affirmation

All testimony before the Hearing Examiner shall be given under oath or affirmation to tell the truth.

An interpreter acting on behalf of any interested person shall take an oath that a true interpretation of the interested person's testimony shall be made.

1.7.3 Content of the Record

The record of a hearing conducted by the Hearing Examiner shall include the following materials:

- a. The application or petition;
- b. The departmental staff reports;
- c. All evidence received, which shall include oral testimony given at the hearing, all exhibits, other materials admitted as evidence, and any written material submitted pursuant to Hearing Examiner order;
- d. A statement of all materials officially noticed;
- e. A decision or a recommendation containing the findings and conclusions of the Hearing Examiner;
- f. Recordings made on electronic equipment; and
- g. An environmental determination made pursuant to the State Environmental Policy Act of 1971, if applicable.

1.7.4 Development of Record

A hearing usually will follow this order of procedure:

- a. Hearing Examiner's introductory statement.
- b. A report by the departmental staff that may include introduction of the request, reference to visual aids, and a summary of the recommendation of the department;
- c. Testimony by the applicant or petitioner, and cross-examination of the witnesses;
- d. Testimony of interested parties;
- e. Opportunity for cross-examination and rebuttal; and

- f. An opportunity for questions by the Hearing Examiner.

1.7.5 Content and Form of Staff Reports

The City staff report on a land use application should include the following, if relevant to the application:

- a. A list of the names and addresses of the owner and applicant of the subject property and his/her property interest in the property that is the subject of the hearing.
- b. A brief summary of the requested action and the citation of the ordinance controlling the request.
- c. A common description of the subject property and a reference to the legal description of the subject property.
- d. A summary of the Comprehensive Plan designation and zoning designation of the subject property; the current development of the subject property and the adjoining properties; topographical information; geological and soils information; information on the vegetation on the property; and any other relevant scientific, environmental or engineering information.
- e. A history of the requested action and a history and vicinity map of the development in the surrounding properties.
- f. A summary of the reports or recommendations of any other agencies consulted.
- g. Appropriate maps of the subject property.
- h. The result of the determination pursuant to the State Environmental Policy Act.
- i. Staff's recommendations.

The staff report shall be filed with the Hearing Examiner at least five working days prior to the scheduled hearing and copies provided to the applicant and made available to the public.

1.7.6 Continuances of Hearings

a. Hearing Examiner

If the Hearing examiner finds that more information is necessary in order to make a decision or recommendation, or he or she is unable to hear all of the public comments on the matter, the hearing may be continued to a specified date. If the hearing is continued to a specific date, time, and place, at a hearing, or if notice is posted on the door of the hearing room before a noticed hearing begins, no further notice of the hearing need be given.

b. At the Request of a Party

Any party of record may request continuance of a hearing. The request, if made prior to the hearing, must be in writing and state reasonable grounds for a

continuance. If the request is made orally at the hearing it must be based on reasonable grounds. The Hearing Examiner shall have discretion to grant or deny the request for continuance.

1.7.7 Evidence

- a. Burden of proof. In each proceeding, the applicant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and the City of Issaquah.
- b. Admissibility. The hearing generally will not be conducted in strict adherence to Rules of Evidence. Any relevant evidence shall be admitted if it is the type that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The Hearing Examiner shall have discretion on the admissibility of all evidence.
- c. Copies. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. It is advisable to provide extra copies of all documents to the Hearing Examiner.
- d. Occasionally, the Hearing Examiner may request a document to be filed after the close of public testimony. Only those documents referred to at the hearing may be submitted and only those specifically requested by the Hearing Examiner. Additional evidence may only be submitted upon a Request for Reconsideration based on new evidence not reasonably available at the time of the hearing. If additional evidence is submitted with a Request for Reconsideration, it will be considered only upon a showing of significant relevance and good cause for delay in its submission.

SECTION 1.8: WITHDRAWAL OF APPLICATION

1.8.1 Withdrawal Prior to Service of Notice

If a withdrawal request is made before official notice of the hearing is given, the applicant or petitioner shall notify the City of the withdrawal request and the withdrawal shall be automatically permitted.

1.8.2 Withdrawal Made Any Other Time

Withdrawal requests made at any time other than that mentioned in Sec. 1.8.1, the Clerk to the Hearing Examiner shall post a notice of withdrawal and cancellation of application hearing on the hearing room door on the date of hearing.

SECTION 1.9: DECISIONS AND RECOMMENDATIONS

1.9.1 Written Decisions or Recommendation

For permits on which the Hearing Examiner has final approval authority, a written report of findings, conclusions, and decision shall be sent to all parties of record. The Hearing Examiner's decision or recommendation shall be submitted within ten working days following the conclusion of all testimony and hearings, unless a longer period is agreed to by the Applicant.

1.9.2 Content of Decision or Recommendation

A decision or recommendation shall include a statement of:

- a. Findings. The findings shall be based exclusively on the evidence presented in the hearing and those matters officially noticed.
- b. Conclusions. Conclusions shall include a determination of whether application approval criteria have been met, and whether conditions of approval are necessary in order for an application to comply with approval criteria.
- c. The appropriate decision, recommendation or order. The decision, recommendation or order shall be based upon a consideration of the whole record and supported by substantial evidence.

1.9.3 Procedure for Reopening Hearing

At any time prior to the filing of the final decision or recommendation, the Hearing Examiner may reopen the proceeding for the reception of further evidence. All parties of record who participate at the hearing shall be given notice of the consideration of such evidence and granted an opportunity to review such evidence.

SECTION 1.10: RECONSIDERATION

1.10.1 Reconsideration of the decision may be granted by the Hearing Examiner on a showing of one or more of the following:

- a. A substantial change in circumstances affecting the subject property;
- b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing; and
- c. Clear mistake as to a material fact.

1.10.2 Each party is limited to one Motion for Reconsideration, even though the original decision may be subsequently reversed or modified.

1.10.3 A Motion for Reconsideration must be filed within ten working days of the date of the Hearing Examiner's decision. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a Motion for Reconsideration shall not stop the period provided to appeal the Hearing Examiner's decision.

1.10.4 No party may file a response to a Motion for Reconsideration except at the request of the Hearing Examiner.

1.10.5 Reconsideration will not be granted to review prehearing orders.

SECTION 1.11: APPEALS OF DECISIONS

When the Hearing Examiner has issued a decision and all reconsideration periods and any administrative appeals have expired, the decision shall be final and may be appealed only to

King County Superior Court within twenty-one calendar days from the date of the final decision.
See, RCW 36.70C.

SECTION 1.12: CONFLICTS

These Rules of Procedure are adopted to supplement the requirements set forth in the IMC.
Any conflict between the rules and the provisions of the IMC will be decided consistent with the provisions of the IMC.

CHAPTER II:
RULES OF APPEAL OF ADMINISTRATIVE DECISIONS

SECTION 2.1: APPLICATION OF RULES

This chapter applies to appeals of administrative decisions.

SECTION 2.2: JURISDICTION

The Hearing Examiner's jurisdiction is limited to those issues where ordinance or other appropriate authority grants the Hearing Examiner the authority to hold hearings, make decisions or recommendations, and issue orders.

SECTION 2.3: EX PARTE COMMUNICATION

- 2.3.1 No person, nor his or her agent, employee, or representative, who is interested in a particular petition or application currently pending before the Examiner shall communicate ex parte, directly or indirectly, with the Hearing Examiner concerning the merits of that or a related petition or application. This rule shall not prohibit ex parte communication concerning procedural matters.
- 2.3.2 The Examiner shall not communicate ex parte directly or indirectly with any interested person, nor his or her agent, employee, or representative, with regard to the merits of a petition or application that is pending before the Examiner.
- 2.3.3 If prohibited ex parte communication is made to or by the Examiner, such communication shall be publicly disclosed, and proper discretion shall be exercised by the Examiner on whether to disqualify himself or herself as Examiner for that particular hearing.

SECTION 2.4: NATURE OF PROCEEDINGS

- 2.4.1 Expeditious Proceedings
It is the policy of the Office of the Hearing Examiner that, to the extent practicable and consistent with requirements of law, hearings shall be conducted expeditiously.

SECTION 2.5: FILING

- 2.5.1 Compliance with Rules
All appeals must comply with the Rules and with the requirements established in the applicable IMC ordinance under which the appeal is filed.
- 2.5.2 Timeliness
To be considered timely, an appeal from an administrative decision must be received no later than 5:00 PM on the last day of the appeal period. Such an appeal must be filed with the clerk of the City of Issaquah.
- 2.5.3 Fee
Appeals shall be accompanied by the appropriate filing fee as required by the IMC Fee Schedule.

2.5.4 Contents

An appeal must be in writing and contain the following:

- a. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- b. A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
- c. The specific relief requested, such as reversal or modification; and
- d. Signature, mailing and email addresses, and phone number of the appellant, and name and address of appellant's designated representative, if any.

2.5.5 Briefs

Briefs or other memoranda of law may be submitted by the parties in support of or in response to an appeal. Each party is permitted one primary brief not exceeding fifteen double-spaced pages in length. In addition, the appellant may submit a reply brief not exceeding ten pages in length. The Hearing Examiner may, at his or her discretion, waive or modify these page limits at the request of a party in order to accommodate complex legal and factual issues. Submission of briefs should be submitted by the date set out in a Pre-Hearing Order, if issued by the Hearing Examiner, or at least five days prior to the hearing. Briefs must be limited to the specific issues set forth in the appellant's statement of appeal.

2.5.6 Motions

Motions and responses to motions are not to exceed fifteen double-spaced pages in length without prior approval of the Hearing Examiner.

2.5.7 Proposed Findings and Conclusions

The Hearing Examiner may request proposed findings and conclusions to be submitted at the option of the parties.

SECTION 2.6: DISMISSAL

- 2.6.1 An appeal may be dismissed without a hearing if the Hearing Examiner determines that it fails to state a claim for which the Hearing Examiner has jurisdiction to grant relief, or it is without merit on its face, frivolous, or brought merely to secure delay.
- 2.6.2 Any party may request dismissal of all or part of an appeal as a motion by the deadline set out in the Pre-Hearing Order with notice to all parties. The Hearing Examiner may make a ruling on a motion to dismiss based upon written arguments or may call for oral arguments.
- 2.6.3 When decision or action being appealed is withdrawn by the issuing department, or when the appellant withdraws the appeal, the appeal becomes moot and shall be dismissed.

SECTION 2.7: PREHEARING CONFERENCE

- 2.7.1 The Hearing Examiner may issue prehearing orders or, with the consent of the parties, hold a conference prior to the hearing for the purpose of:
- a. Identification, clarification, and simplification of the issues;
 - b. Disclosure of witnesses to be called and exhibits to be presented;
 - c. Hearing and deciding motions; and
 - d. Other matters deemed by the Hearing Examiner appropriate for the orderly and expeditious disposition of the proceedings.
- 2.7.2 At the hearing the Hearing Examiner shall develop for the record the time, purpose and result of the conference. If any orders have been issued they will be part of the record.
- 2.7.3 Prehearing orders may not be appealed until the Hearing Examiner issues an appeal decision.

SECTION 2.8: WITHDRAWAL

- 2.8.1 Only the appellant may withdraw an appeal.
- 2.8.2 Where an appeal is made by several persons, a group, organization, corporation, or other entity, withdrawal shall be made by the person who had been designated as the party representative.
- 2.8.3 An appellant's Request to Withdraw shall be granted as a matter of right and the appeal dismissed.

SECTION 2.9: PARTY REPRESENTATIVE

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the party shall designate an individual to be its representative and inform the Clerk to the Hearing Examiner of the name, address, and telephone number of the designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative is considered to be notice or communication to party.

SECTION 2.10: NOTICE OF HEARING

2.10.1 All notice, time requirements, and methods of notification shall be consistent with the provisions set forth in the IMC. Normally, only parties to an appeal need to be notified, as there is no public comment at appeal hearings.

SECTION 2.11: PARTIES' RIGHTS AND RESPONSIBILITIES

- 2.11.1 Although appellants and applicants have the right to be represented by an attorney, representation by an attorney is not required.
- 2.11.2 Where a party has designated a representative, the representative shall exercise the rights of the party.

2.11.3 Parties, witnesses, and observers shall conduct themselves with civility and deal courteously with all who participate in the proceedings. Failure to do so will result in removal from the hearing at the discretion of the Hearing Examiner.

SECTION 2.12: DEFAULT

The Hearing Examiner may dismiss an appeal by an Order of Default where the appellant, without good cause, fails to appear or is unprepared to proceed at a scheduled and properly noticed hearing.

SECTION 2.13: HEARING FORMAT

2.13.1 Appeal hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Hearing Examiner to make the relevant evidence most readily and efficiently available to the Hearing Examiner and to provide the parties a fair opportunity for hearing.

2.13.2 The order of an appeal hearing will generally be as follows:

- a. Hearing Examiner's introductory statement;
- b. Appellant's argument;
- c. Department's presentation;
- d. Applicant's presentation;
- e. Rebuttal; and
- g. Closing argument of parties.

2.13.3 Notwithstanding the provisions of the IMC, the order of hearing may be modified or a different order established as the Hearing Examiner deems necessary for a clear and fair presentation. The order of the hearing may also be modified as agreed upon by the parties, with the Hearing Examiner's approval.

SECTION 2.14: HEARING EXAMINER'S DECISION

A decision of the Hearing Examiner shall normally be issued within ten working days of the appeal hearing and include the following:

- a. Findings. The individual facts that the Hearing Examiner finds relevant, credible, and requisite to the decision, based on the record of proceedings.
- b. Conclusions. Legal and factual conclusions based upon specific findings of fact.
- c. Decision. The Hearing Examiner's decision as to the outcome of the appeal (affirm, modify, or reverse) based upon a consideration of the whole record and supported by substantial evidence in the record.

SECTION 2.15: RECORD

Normally, the record of an appeal shall include:

- a. The decision being appealed;
- b. The appeal statement;
- c. All evidence received which shall include oral testimony given at the hearing, all exhibits, and other materials admitted as evidence;
- d. A decision or a recommended decision containing the findings and conclusions of the Hearing Examiner;
- e. Recordings made on electronic equipment; and
- f. An environmental determination made pursuant to the State Environmental Policy Act of 1971, if applicable.

SECTION 2.16: RECONSIDERATION

2.16.1 Reconsideration of the appeal decision may be granted by the Hearing Examiner on a showing of one or more of the following:

- a. A substantial change in circumstances affecting the subject property;
- b. Newly discovered evidence of a material nature which could not, with reasonable diligence, have been produced at hearing; and
- c. Clear mistake as to a material fact.

2.16.2 Each party is limited to one Motion for Reconsideration, even though the original decision may be subsequently reversed or modified.

2.16.3 A Motion for Reconsideration must be filed within ten working days of the date of the Hearing Examiner's decision on the appeal. Unless otherwise specifically provided by the applicable ordinance(s), the filing of a Motion for Reconsideration shall not stop the period provided to appeal the Hearing Examiner's decision.

2.16.4 No party may file a response to a Motion for Reconsideration except at the request of the Hearing Examiner.

2.16.5 Reconsideration will not be granted to review prehearing orders.

HILLIER, SCHEIBMEIR, KELLY & SATTERFIELD, P.S.

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ERIN L. HILLIER
SAMUEL D. SATTERFIELD

MICHAEL P. ROEWE
In Memoriam

January 11, 2022

VIA EMAIL (tsmith@ci.olympia.wa.us)

Mr. Tim Smith
Planning & Engineering Manager
City of Olympia
601 4th Avenue East
Olympia, Washington 98501

Re: Hearing Examiner Position

Dear Tim:

This letter is in response to the City's recent RFQ for the position of Hearing Examiner. I would like to continue in the role as the City's Hearing Examiner and am submitting the enclosed materials in response to the RFQ.

As you know, I have been serving as Olympia's Hearing Examiner for the past nine years, since 2013. As the current Hearing Examiner, I am uncertain as to how much additional information you feel is necessary. I am therefore lessening my responses knowing that the City is well aware of my work. For similar reasons, my listed references exclude any Olympia officials and my attached decisions exclude any Olympia decisions. I trust that all of this makes sense. Should my proposal fail to include any of the requested information, please let me know and I will promptly supplement.

In advance, thank you for your consideration of my proposal.

Very truly yours,

HILLIER, SCHEIBMEIR,
KELLY & SATTERFIELD, P.S.

By


Mark C. Scheibmeir
mark@centerstlaw.com

SUMMARY OF QUALIFICATIONS, EXPERIENCE AND AVAILABILITY

A. CV OF ACADEMIC AND PROFESSIONAL QUALIFICATIONS

Bachelor of Science in Business Administration (with honors) from the University of Kansas in 1978.

Law Degree from the University of Washington Law School in 1981.

Private law practice in Chehalis, Washington from 1981 to the present, or 41 years.

Hearing Examiner Experience

Hearing Examiner for Lewis County since the position was created in 1996, or 26 years.

Hearing Examiner for Cowlitz County since 2007.

Hearing Examiner for the City of Olympia since 2013.

Hearing Examiner for Cities of Black Diamond and Yelm commencing late 2021.

Also Hearing Examiner for the Cities of Kelso, Castle Rock, and Elma, and the Towns of Cathlamet and Vader.

Additional Background Information

I have been practicing law in Chehalis since 1981, or for the past 41 years. In addition to my work as Hearing Examiner, my practice centers on real estate, business and estate planning matters. I have been involved in community activities throughout my professional career, including nearly 30 years of service on the Centralia College Foundation. In 2017 I was appointed by Governor Inslee as a Trustee for Centralia College and am currently in my second 5-year term as Trustee.

B. PREVIOUS EXPERIENCE CONDUCTING PUBLIC HEARINGS RELATING TO LAND USE REGULATIONS

In 1996, Lewis County established the position of Hearing Examiner and I was selected for the position. I have served as the County's Hearing Examiner ever since, or for twenty-six years. My role has expanded over the years to include appeals of dangerous animal notifications as well as appeals relating to the Health Department and Sanitary Code.

In 2007, I became Hearing Examiner for Cowlitz County and have conducted hearings for Shorelines Substantial Development Permits for two nationally-recognized projects: The

Millennium Coal Port proposed for Longview, and the Northwest Innovations Methanol Plant proposed for Kalama.

In 2013, I was selected as Hearing Examiner for the City of Olympia. Since then I have presided over a number of complex, often controversial, land use issues including several new subdivisions and a number of mixed-use projects in the downtown area. The City's land use regulations allow the Director to transfer decision-making authority to me for highly complex or controversial projects including the "Views on 5th" project.

Following the recent retirement of the Hearing Examiner for several cities in Thurston and Pierce Counties, I was asked by two of those cities, Black Diamond and Yelm, to serve as their Hearing Examiner. I am currently under consideration for appointment in one or more similar cities.

As earlier noted, I am also Hearing Examiner for several small cities including Kelso, Castle Rock, Cathlamet and Vader.

It is perhaps important to add that in 26 years of work as a Hearings Examiner I have not had a decision overturned on appeal, including several that have reached the Court of Appeals.

C. PREVIOUS EXPERIENCE WITH EVALUATION CRITERIA

Criteria 1.

- I have 41 years of legal experience, with more than 26 years' experience as a Hearing Examiner.
- I have presided over hundreds of hearings relating to land use planning. Many of these hearings have been extremely complex and/or controversial, involving difficult legal issues and significant public participation.
- I am responsible for development project review in all of the jurisdictions I serve. This authority includes master plan development, subdivisions and mixed-use projects.
- I am intimately familiar with the Growth Management Act and its application to development in both cities and counties.
- I am quite familiar with SEPA and have conducted numerous SEPA-related hearings.
- I am responsible for subdivision approval in the City of Olympia as well as in other jurisdictions I serve.

- I am very familiar with the Shoreline Management Act (SMA) and the Shoreline Master Program (SMP) of Olympia as well as the other SMP's jurisdictions I am currently involved with. As earlier noted, my Shoreline Decisions for the Millennium Bulk Terminal Port in Longview and the Kalama Methanol Plant received national attention.

- I am familiar with the design review process and, in particular, the Olympia design review process.

- As previously noted, I have conducted hundreds of hearings relating to land use; have established rules and procedures for those hearings; and have been responsible for the orderly management of hearings that, on occasion, have involved several hundred participants.

- I have significant experience addressing public utilities, engineering and transportation issues, and have reviewed countless Traffic Impact Analyses.

- I am familiar with impact fees, including Olympia's. My decision in the Douglass Properties appeal involved a thorough analysis of Olympia's impact fees. My decision was subsequently affirmed by the Washington State Court of Appeals.

- I am fully aware of the constitutional principles involved in land use including, in particular, those relating to Substantive Due Process, Standing and the Vested Rights Doctrine.

Criteria 2. I would invite the City to review my previous land use decisions for the City as evidence of my legal writing ability. As earlier noted, in more than 26 years of work as a Hearing Examiner I have not had a decision overturned on appeal. I hope that this speaks to the clarity of my legal writing and the strength of my legal analysis.

Criteria 3-5. I have been involved in land use hearings with as many as 500 participants and thousands of exhibits, and with decisions running 100 pages or more in length. Even in such complex hearings I have managed to control the hearing and render a written decision within the allowed time. I have adjusted my hearing procedures to best accommodate the challenges associated with Covid. I am equally comfortable in conducting either in-person or remote hearings, understanding that the primary goal is to ensure that every participant is given a full opportunity to be heard.

Criteria 6. As evidenced by my prior work for the City, I am available at all days and times preferred by the City for its hearings. I am very familiar with all of the City's staff and its hearing protocols. I am also familiar with the City's current rules and procedures (having prepared them).

Criteria 7. I have been licensed to practice law in the State of Washington since 1981, or 41 years.

Criteria 8. My references are as follows:

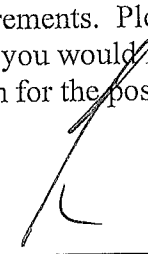
1. Lee Napier, Lewis County Community Development Director.
Telephone: (360) 740-2606.
2. Greta Holmstrom, Interim Director of Planning for Cowlitz County.
Telephone (360)577-3052 (ext. 6676).

D. RECENT WRITTEN DECISIONS

I am enclosing two recent written decisions, one from Lewis County and one from Cowlitz County. I have selected these decisions as they involve somewhat controversial projects with notable public participation. The Lewis County matter involves an application by the County for a Shorelines Substantial Development Permit to establish a County-owned park along the Cowlitz River near Packwood to allow a put-in location for kayakers on the upper Cowlitz (approved). The Cowlitz County matter involves an after-the-fact variance to resolve conflicts between a marijuana manufacturing facility and an adjoining historic cemetery (approved). An invoice for the Cowlitz County matter is attached. I am paid a monthly retainer from Lewis County and therefore do not have a separate invoice for the individual hearings.

SUMMARY

I hope that I have responded to all of the RFQ requirements. Please let me know if there is any additional information you need or any other matters you would like to discuss. In advance, thank you for your consideration of my application for the position of Hearing Examiner.



Mark C. Scheibmeir

METHOD AND APPROACH

I will attempt to make this statement of my method and approach as non-repetitive of other materials as possible. I apologize for any overlap.

I have served as a Hearing Examiner for more than 26 years for both counties and cities, and cities both large and small. While there are common threads in the land use planning of all of these jurisdictions, each has its own approach and vision. It has been my goal to render decisions reflecting the jurisdiction's vision of its land use, not my own. To that end, my decisions may at times seem progressive while at other times less so depending on the jurisdiction's Comprehensive Plan, Development Regulations, Shoreline Master Program, etc.

As an appointed Hearing Examiner, I recognize that I have not been elected to the position and have not been empowered to establish land use policy, as this role is reserved to the elected governing body. My role is limited to applying the received facts to the Comprehensive Plan and Development Regulations enacted by the governing body. At times, members of the public would prefer that I expand my role and that I be more responsive to their wishes - especially when those wishes are expressed in large numbers - but I have respectfully declined, as to do so would usurp the role of elected officials.

I have been practicing law for more than 40 years. While my private practice involves some representation of small businesses, much of my other work involves assisting individuals with their real estate issues. This other, non-hearing examiner work offers me a unique perspective on the consequences of land use decisions. I fully understand how approving or denying a proposed land use has rippling effects across neighboring properties, neighborhoods, and the community as a whole. In particular, I realize that for most individuals their home is their most significant asset and that my decision may affect the value of that asset. I strive to never forget this.

Land use hearings, and land use decisions, are only effective if all of the participants believe they have an equal right to be heard and that their concerns are fully considered. It is simply not possible to render decisions that please all interested parties, but it is possible to render decisions that leave the participants believing they have been given a fair opportunity to be heard. It has been, and remains, my goal to conduct hearings that achieve this result while carving out the jurisdiction's vision of its land use.

LEWIS COUNTY DECISION

BEFORE THE LEWIS COUNTY HEARINGS EXAMINER

IN RE:	)	HEARING NO. 20-2-001
	)	
COWLITZ RIVER PUBLIC ACCESS	)	FINDINGS OF FACT,
POINT	)	CONCLUSIONS OF LAW
	)	AND DECISION APPROVING
LEWIS COUNTY PUBLIC WORKS,	)	PERMITS
	)	
Applicant.	)	

APPLICANT: Lewis County Public Works

REPRESENTATIVES: Ann Weckback
Environmental Planner

Cullen Gatten
Lewis County Prosecuting Attorney's Office

Summary of Request: A Shoreline Substantial Development Permit and Shoreline Conditional Use Permit to establish a public day use area along the Cowlitz River near Packwood for recreational activity. The proposed construction includes a 24-foot wide gravel access road to the parking area; a gravel parking area with 21 single vehicle stalls and 17 stalls for vehicles with trailers; a double stall ADA-accessible precast concrete vault toilet within a 240-square foot building; nonmotorized kayak/canoe/boat access; a 35-foot log stringer pedestrian bridge and a loop gravel pathway providing access to the river. Possible additional improvements include future paving of the parking area and access road. The project also includes installation of interpretive signs, cutting/filling and tree removal and replacement.

Location of Proposal: 105 Alta Drive, Packwood, Washington (Mile Post 0.04520,055) in Sections 15 and 16, Township 13 North, Range 9 East, W.M., Tax Parcel Nos. 035132-005-005 and 035147-001-001.

Summary of Decision: The Shoreline Substantial Development and Shoreline Conditional Use Permits are **approved** subject to amended conditions.

BACKGROUND

There is limited public access to the upper Cowlitz River above Lake Scanewa and no public access in the Packwood area, although fishers and kayakers often find means of access either by the permission of private landowners or unpermitted access through public lands.

Several years ago, discussions got underway over the possible use of a County-owned

*Findings of Fact, Conclusions of
Law and Decision Approving
Permits - 1*

LEWIS COUNTY HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
CHEHALIS, WASHINGTON 98532
Phone: 360-748-3386/Fax: 748-3387

1 property along the Cowlitz River, and just upriver from the Skate Creek Bridge, for use as public
2 access to the river for fishing and kayaking. This ultimately led to discussions between Lewis
3 County and the Destination Packwood Association which, in turn, led to application for funding.

4 At some point in this process Destination Packwood was dissolved, leaving a void in
5 local participation in the project. That void was subsequently filled by a new volunteer
6 organization, the Packwood Improvement Club ("PIC") which has entered into an agreement
7 with Lewis County (the "Memorandum of Agreement" or "MOA") to manage the facility should
8 it receive all of its necessary permits and be constructed.

9 The project proposes to establish a day use recreational area on the County-owned
10 property along the Cowlitz River to allow public access for fishing, kayaking and other
11 recreational access. The primary components of the project are a graveled entrance road,
12 graveled parking area, vault toilets, graveled pathway to the river including a suspension bridge
13 over an overflow channel of the river, and informal access point between existing protective rock
14 barriers for non-motorized boats and kayaks to put into the river.

15 The project has divided the local population. It is supported by fishing, boating and
16 recreational interests, and at least some of the Packwood business community, but opposed by
17 adjoining and nearby residential neighborhoods who are concerned about potential impacts of the
18 project on their private properties. Their concerns include impacts to property values; trespass;
19 noise; other nuisances; trash; public safety; aesthetics; wildlife impacts; and possible increased
20 impacts from flooding.

21 One of the unusual aspects of this project is that the County-owned facility would be
22 operated and maintained by the volunteer PIC. PIC would be responsible for managing garbage,
23 maintaining the premises, cleaning the toilets, closing and locking the facility at night, and
24 otherwise being responsible for the facility's operation. Opponents are concerned that PIC will
25 not be able to fulfill its responsibilities.

1 If this project is to go forward it must obtain various permits and other regulatory
2 approvals, but the only permits before the Hearing Examiner are the Shorelines Permits. The
3 project requires a Shorelines Substantial Development Permit for construction of all of the
4 proposed improvements with the exception of the pedestrian suspension bridge, which requires a
5 Shorelines Conditional Use Permit.

6 When this matter was first submitted to the Hearing Examiner for the Shorelines Permits
7 there was a concurrent appeal of the SEPA Determination by Chris Murphy. Subsequently Mr.
8 Murphy withdrew his SEPA Appeal, leaving only the Shorelines Permits before the Hearing
9 Examiner.

10 The matter awaited public hearing before the Hearing Examiner for several months as a
11 result of the many challenges posed by the Covid-19 pandemic and the resulting restrictions on
12 public gatherings. These restrictions led to several continuances of the scheduled hearing and,
13 ultimately, a decision to hold the public hearing remotely rather than in person.

14 PUBLIC HEARING

15 The application by Lewis County Public Works was submitted to the Hearing Examiner
16 for a public hearing on the Shoreline Permits in April. At or about the same time, Chris Murphy
17 submitted an appeal of the SEPA Determination. In keeping with land use regulations, the two
18 matters were combined into a single hearing on a date to be determined in accordance with
19 public health restrictions due to the ongoing Covid-10 pandemic. Mr. Murphy ultimately
20 decided to withdraw his appeal of the SEPA Determination, leaving only the public hearing for
21 the Shoreline Permits. A public hearing date of June 30, 2020 was scheduled but then stricken.
22 A new hearing date of September 29, 2020, was ultimately agreed upon by the parties, leaving
23 only the question of whether the hearing would be in person or done remotely. As the hearing
24 date neared and the pandemic failed to abate it was concluded that the hearing should take place
25 remotely.

1 Utilizing the Zoom platform, supplemented by telephone access, the public hearing
2 commenced at 10:30 a.m. on September 29, 2020. Zoom Webinar was utilized to regulate input
3 (that is, to mute all participants except the person authorized to speak by the Hearing Examiner).
4 Notice that the hearing would be held remotely was provided in advance of the hearing and all
5 interested parties were given a link to the Zoom hearing or, alternatively, a telephone connection
6 to the hearing. County Staff served as the host of the remote hearing to assist with and regulate
7 public participation.

8 The Applicant, Lewis County Public Works, was represented by Cullen Gatten of Lewis
9 County Prosecuting Attorney's Office, and appeared through Ann Weckback, its Environmental
10 Planner. Separately, Lewis County Community Development Office, which was responsible for
11 reviewing the application and providing recommendations, was represented by Eric Eisenberg,
12 also of the Lewis County Prosecuting Attorney's Office, and appeared through Karen
13 Witherspoon, Senior Planner.

14 In advance of the public hearing a Staff Report authored by Karen Witherspoon was
15 prepared on June 26, 2020. The Staff Report, together with a substantial number of attachments,
16 is collectively identified as Exhibit 1 (hereafter the "Staff Report"). The Staff Report includes
17 several "Attachments" as well as "Exhibits", all of which are considered part of the "Staff
18 Report".¹ The Staff Report includes all application materials as well as a substantial amount of
19 public comment received during staff review (Attachment 2 to the Staff Report). The 22
20 additional exhibits to the Staff Report are itemized at pages 50-51 of the Staff Report.

21 It is the recommendation of the Staff Report that the requested Shoreline Permits be
22 approved subject to a number of conditions.

23 _____
24 ¹ The Staff Report's reference to attached "exhibits" is likely to cause confusion with the Hearing Examiner's
25 reference to the "exhibits" presented during the public hearing. To minimize this confusion, a reference to an
exhibit attached to the Staff Report will be "Exhibit X to the Staff Report", while reference to one of the exhibits
presented during the hearing will simply be "Exhibit X".

1 A list of other exhibits admitted at, during or following the commencement of the Public
2 Hearing is attached hereto.

3 The parties and members of the public were reminded of the protocol for the public
4 hearing, including protocol for conducting a remote hearing via Zoom. With the exception of the
5 Hearing Examiner the parties were muted until such time as called upon by the Hearing
6 Examiner to participate. All oral testimony was under oath.

7 The public hearing commenced with the testimony of Karen Witherspoon, author of the
8 Staff Report. Ms. Witherspoon testified fairly briefly and relied instead upon her extensive Staff
9 Report and supporting materials. She concluded her testimony by reiterating County Staff's
10 recommendation that the permits be approved subject to the 49 conditions found at pages 46-50
11 of the Staff Report.

12 Ms. Witherspoon responded to various questions posed by the Hearing Examiner and
13 provided the following supplemental testimony:

14 • Like other County day use facilities, the facility is expected to operated from
15 dawn to dusk which translates to 8:00 a.m. to dusk.

16 • To the extent that the Staff Report is unclear, it is the intention that the facility be
17 locked when not in use. The County is entering into an agreement with the Packwood
18 Improvement Club ("PIC") for the maintenance and operation of the facility. County Staff has
19 no objection to an additional condition of approval that would require the operator to keep the
20 facility locked when not in use.

21 • Garbage pickup and all other maintenance will be performed by PIC. County
22 Staff has no objection to an additional of permit approval that the operator not allow garbage to
23 accumulate.

1 Ms. Witherspoon followed up on these matters by email dated September 29 to the
2 Hearing Examiner proposing language for two additional conditions of permit approval (Exhibit
3 13).

4 Following Ms. Witherspoon's testimony, Ann Weckback, Environmental Planner for
5 Lewis County Public Works, spoke on behalf of the Applicant. Ms. Weckback is responsible for
6 applications for projects, grants and related matters and is responsible for this application. Much
7 of her information is contained in the application materials, including the "Burden of Proof"
8 Statement and supporting documents contained in the Staff Report, as well as in her written
9 testimony (Exhibit 11). She notes that there is currently no public access to the upper Cowlitz
10 River in the Packwood area and that the project will allow for fishers, kayakers and other
11 recreationalists, and the general public access to the upper Cowlitz by providing vehicular
12 access, parking, restrooms, trails, and an informal location to put kayaks, canoes, and other non-
13 motorized boats into the river. Ms. Weckback asserts that the application is consistent with the
14 County Shoreline Master Program and the State's Shoreline Management Act and that it will
15 satisfy all requirements of Chapter 15.45 LCC for stormwater management and Chapter 15.38
16 for Critical Areas.

17 Ms. Weckback described the layout of the project: driving into the facility on the
18 proposed gravel road, public parking and the vault toilets will be to the left of the road while the
19 trail leading to the river will be to the right. A graveled trail will lead to the river and the boat
20 access location, relying on a pedestrian suspension bridge to cross an overflow channel to the
21 river. Interpretive signs will be placed along the trail to inform as well as to warn not to trespass
22 onto adjoining private lands. The put-in place for kayaks and canoes will not be developed but is
23 simply a protected area between existing rock barriers. Any trees needing to be removed will be
24 replaced in accordance with the revegetation plan. The easterly portion of the site, adjacent to
25

1 private residences, will be hydroseeded with shrubs and trees to establish a vegetative buffer
2 over the next several years. The existing vegetative buffer to the west will be maintained to
3 provide effective screening. Once developed, these vegetative buffers will limit view of the
4 parking lot/toilets except from the Skate Creek Bridge. Ms. Weckback explained that the
5 proposed vault toilets are the "standard Forest Service" model and will be placed on an elevated
6 platform to minimize the possibility of being flooded. The facility is designed to experience
7 minimum impact from flooding. Proposed conditions of approval will require that, following
8 any flooding, the facility will be closed for the necessary length of time to properly restore it and
9 eliminate any potential public hazards.

10 Ms. Weckback, in conjunction with Ms. Witherspoon, recognize the MOA with PIC
11 whereby the volunteer nonprofit organization will be tasked with managing the facility. The
12 draft MOA is attached to the Staff Report as Exhibit 22. The MOA would allow PIC to provide
13 all grounds maintenance, garbage removal, custodial services, pay operational costs, manage the
14 gate's opening and closing (with no overnight use) and provide security, while the County would
15 agree to pay for the cost of pumping the toilets and custodial supplies.

16 Ms. Weckback concluded by asking for approval of the project subject to the conditions
17 proposed by County Staff.

18 Following the presentations by Community Development and Public Works the hearing
19 was open to public testimony. Seven individuals asked to testify:

20 **Chris Murphy.** As noted earlier, Chris Murphy had originally appealed the SEPA
21 Determination but then later withdrew his appeal. Mr. Murphy has provided written testimony
22 on several occasions which can be found within Attachment 2 to the Staff Report. In his oral
23 testimony, Mr. Murphy expands upon his earlier written testimony and asserts that the project's
24 long term impacts have not been fully analyzed. Citing to WAC 197-11-046(c), he argues that

1 review of the project must carefully consider both short term and long term impacts. He argues
2 that the County has failed to prove that there will be no net loss of ecological function and that
3 the project has not mitigated its most significant environmental impacts. In particular, he
4 believes it unacceptable to allow development of a parking lot so close to the Cowlitz River and
5 that it will result in hazardous contamination from parked cars. Mr. Murphy asks that the project
6 be denied outright or, in the alternative, that greater conditions be imposed to ensure that there is
7 no net loss of ecological function, including heightened requirements for oil/water separators.
8 Alternatively, Mr. Murphy asks that the parking lot be reduced in size as there is simply no need
9 for 37 parking stalls and the parking lot is an aesthetic blight to neighboring properties. He
10 concludes by noting that there have been six "100-year" floods during the last twenty years along
11 this portion of the Cowlitz River and that any similar flooding event would place the toilets at
12 risk. In summary, Mr. Murphy believes that the project has little public use; will be harmful to
13 adjoining private landowners and has failed to prove that it will not be environmentally harmful.

14 **Francie Jordan.** Ms. Jordan resides at 109 Alta Drive immediately east of the project. It
15 is generally acknowledged that Ms. Jordan's property will see the greatest amount of impact from
16 the project due to its immediate proximity. Ms. Jordan notes that an earlier owner of the project
17 site was denied permits to build on it due to its environmental issues. She is strongly opposed to
18 the County's projects as she fears it will cause a loss of habitat for wildlife; will be left to a
19 volunteer, nonprofit group to manage; and is at constant risk of flooding. She questions how the
20 site will be beneficial to either of its primary intended uses, fishing and kayaking. She asserts
21 that it is a poor location for fishing and that the public chooses to instead fish from the opposite
22 side of the river. She also asserts that the site has no reasonable access for kayaks as the existing
23 riprap structures will get in the way. Finally, she notes that there have been archaeological finds
24 on the property but that the County is refusing to disclose those findings.

1 **Lee Grose.** Mr. Grose was having trouble testifying orally and therefore presented his
2 testimony via email. Mr. Grose speaks as a representative for the Packwood Improvement Club.
3 He explains how the PIC has agreed to partner with the County to maintain and operate the
4 proposed facility, including assuring that trash is routinely disposed of and the facility is secured
5 and locked in the evening. Mr. Grose adds that he has personally witnessed the various major
6 floods to have struck the area and that he does not believe that any similar floods in the future
7 will adversely affect the facility, nor will the facility adversely affect the flooding in the
8 Packwood area. He concludes by noting that there is a significant need in the Packwood area for
9 public access to the river to avoid the current public safety hazards caused by lack of such
10 access.

11 **Lonnie Goebel.** Mr. Goebel resides in Packwood and has been a lifelong resident of the
12 area. He has observed the various recent floods in the region and witnessed that the proposed
13 site was not impacted by them. At peak fishing times there may be 85-90 people fishing nearby,
14 resulting in more than 60 cars parked along Skate Creek Road, which in turn, have blocked the
15 shoulders along Skate Creek Road and placed bicyclists at risk, resulting in at least one serious
16 accident. Mr. Goebel also believes that the project will significantly improve public safety by
17 directing the public to this facility and away from Skate Creek Road. Mr. Goebel believes, that
18 based upon past flooding, any future flooding would not likely affect the proposed toilets but it
19 would affect private septic systems, and that the threat of flooding to septic systems lies not with
20 this project but with adjoining private properties.

21 **Bonnie Muesch.** Ms. Muesch has been a resident in the area for the past 20 years and
22 owns three nearby lots. She is concerned that public use of the facility will lead to trespass onto
23 adjoining private properties as individuals seek improved access to the river. Ms. Muesch has
24 spent 25 years with the Thurston County Assessor's Office as an appraiser and asserts that
25

1 historical data demonstrates that properties abutting public boat launches suffer a loss in value.
2 She opposes the project as it will result in a loss of privacy and be disruptive.

3 **William Serahn.** Mr. Serahn had earlier provided written testimony and wished to rely
4 primarily on it. Mr. Serahn believes that the project is badly needed for the reasons set forth in
5 his written testimony and, in particular, to reduce the current risk to public safety resulting from
6 the public parking along Skate Creek Road due to a lack of alternatives.

7 At the conclusion of this public testimony, the Community Development and Public
8 Works Departments were allowed an opportunity for response. Ms. Witherspoon responded that
9 an important goal of the County's Shoreline Management Plan is public access to the shoreline.
10 Without this project the Plan's goals are not being fulfilled. She also responds that the proposed
11 mitigation for the project ensures that there is no net loss of ecological function. Ms. Weckback
12 responded that the materials prepared in support of the application fully demonstrate why the
13 project will have no net loss of ecological function or impact flood levels. She also responded to
14 Ms. Jordan's comments about archaeological finds on the property by explaining that State law
15 prohibits the disclosure of archaeological discoveries in order to protect them, but that all
16 archaeological work onsite has been in cooperation with the State and with local tribes.

17 In response to a follow-up question by the Hearing Examiner regarding the potential
18 flooding of the vault toilet, Ms. Witherspoon explained that the required septic permit for the
19 toilet will impose a management and maintenance plan that will require consideration of health
20 emergency issues, including possible flooding.

21 Following the conclusion of all responsive testimony, counsel for Community
22 Development and for Public Works were allowed to make concluding statements. Following
23 these statements the hearing was declared to be complete. A few days later, however, County
24 Staff discovered that the audio portion of the Zoom record was inaudible. This discovery
25

1 resulted in the Hearing Examiner directing County Staff to notify parties and witnesses who
2 testified that the audio recording of their testimony had not been properly preserved. Witnesses
3 were given the opportunity to restate their testimony in written form, or, alternatively, to simply
4 rely upon the Hearing Examiner's notes. All interested parties were given until 5:00 p.m. on
5 Friday, October 9, 2020, to provide supplemental testimony. Ms. Grose (Exhibit 13) and Mr.
6 Serahn (Exhibit 14) responded by re-submitting earlier written testimony. Ms. Jordan responded
7 by written letter restating her earlier testimony (Exhibit 15). In addition to this supplemental
8 testimony, Eric Eisenberg provided a brief letter summarizing his concluding statements (Exhibit
9 16). None of the other parties or witnesses provided any supplemental materials.

10 Accordingly, I make the following:

11 FINDINGS OF FACT

12 General Findings.

13 1. Any Findings of Fact contained in the foregoing Background or Public Hearing
14 Sections are incorporated herein by reference and adopted by the Hearing Examiner as Findings
15 of Fact.

16 2. The Applicant, Lewis County Public Works, requests a Shoreline Substantial
17 Development Permit to establish a day use recreational area along the Cowlitz River near
18 Packwood. The proposed construction includes a 24-foot wide gravel access driveway to the
19 parking area; a gravel parking area with approximately 21 single vehicle stalls for passenger
20 vehicles and 17 stalls for vehicles with trailers; a double stall ADA-accessible concrete vault
21 toilet building with 240-square feet of area; a non-motorized kayak/canoe/boat access point and a
22 loop gravel pathway providing access the boat launch and to the Cowlitz River. Additionally,
23 interpretive signs will be mounted on displays around the trail and other areas. The development
24 will include approximately 1,881 cubic yards of fill material and 2,551 cubic yards of
25

1 cut/grading. In addition, should funding become available the driveway and parking area may
2 become paved. See site maps, Attachment 3 to the Staff Report.

3 3. The Applicant, Lewis County Public Works, also requests a Shoreline Conditional
4 Use Permit to construct a 35-foot log stringer pedestrian bridge across an overflow channel of
5 the Cowlitz River as part of the looped trail from the parking area to the river as noted on the site
6 maps.

7 4. The project site is adjacent to the Ordinary High Water Mark of the Cowlitz
8 River, a shoreline of statewide significance (Exhibit 16 to the Staff Report). The project is
9 therefore subject to the Shorelines Management Act (SMA) and the Lewis County Shoreline
10 Master Program (SMP) and requires a Shorelines Substantial Development Permit for the
11 improvements noted above.

12 5. The project is located along shoreline that is partially designated as Rural
13 Conservancy in the SMP and partly as Shoreline Residential in the SMP. In either shoreline
14 designation, bridges for non-motorized uses are a Conditional Use. Table 5-1 of the SMP. The
15 proposed 35-foot long stringer pedestrian bridge therefore requires a Shoreline Conditional Use
16 Permit.

17 6. The project is located at 105 Alta Drive, Packwood, Washington, located in
18 Sections 15 and 16, Township 13 North, Range 9 East, W.M., bearing Tax Parcel Nos.
19 035132005005 and 035147001001. The site's two tax parcels contain approximately 5.06 acres

20 7. The site is partially within the Rural Development District 20 Acre (RDD-20)
21 zoning designation and partially within the Small Town Residential 4 Units Per Acre (STR-4)
22 zoning designation. See Exhibit 19 to the Staff Report.

23 8. Within the Lewis County Comprehensive Plan Land Use Designation, the project
24 site is partially within "Other Rural Lands (Nonresource)" and partially within "LAMIRD-Rural
25 Residential Settlement".

1 9. As noted earlier, the project site is partially within the Rural Conservancy
2 designation in the SMP Shoreline Environment and partially within the Shoreline Residential
3 designation.

4 10. The project site is within the Lewis County Water Sewer District No. 3-Packwood
5 Service Area but no water utilities are proposed.

6 11. As noted in the Staff Report, page 4, County Staff has confirmed that the project
7 site lies within the Lewis County Airport Obstruction Zone (AOZ) but will not require an AOZ
8 permit as all improvements will be less than 35 feet in height.

9 12. Pursuant to the State Environmental Policy Act, the County, as lead agency,
10 issued a Determination of Non-Significance (DNS) March 17, 2020. The DNS was subsequently
11 challenged by Chris Murphy but he has since withdrawn his appeal of the SEPA Determination.
12 No other appeals have been filed.

13 13. Notification of the public hearing was originally published June 23, 2020, in The
14 Chronicle and also sent to required agencies, nearby property owners, and those who have
15 commented on the application (Staff Report, pages 4 and 5). Subsequent notices of revised dates
16 for the public hearing have similarly been published and mailed in accordance with County
17 requirements.

18 14. County Staff recommends approval of the requested permits subject to the 49
19 conditions of approval set forth at pages 46-50 of the Staff Report.

20 15. In response to questioning from the Hearing Examiner, Staff would not oppose
21 two additional conditions of permit approval assuring that the facility is locked when not in use
22 and that garbage is not allowed to accumulate onsite. Staff has proposed the following two
23 conditions of project approval to address these issues:
24
25

1 • Add the following to the end of condition number 26: "Per Lewis County Code
2 (LCC) Section 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk
3 seven days a week. Gates will be locked during non-operating hours. These hours may be
4 seasonally adjusted so long as they remain day-use oriented."

5 • Add new condition number 50: "Garbage is not allowed to accumulate on-site and
6 shall be removed periodically."

7 Findings Relating to the Project Site.

8 16. Site maps of the project are included in the Applicant's "Burden of Proof"
9 statement contained in Attachment 3 to the Staff Report. Aerial photos of the site with the
10 project overlay, as well as photos of the site with the proposed development, are also contained
11 in the Applicant's Burden of Proof statement.

12 17. Site maps with overlays of shoreline jurisdiction, tax parcels, floodplains,
13 floodways and zoning designations are attached to the Staff Report as Exhibits 16-19.

14 18. The Staff Report, at pages 5-7, contains Findings relating to the site's natural
15 environment including its topography, soils, surface water, vegetation and wildlife. The Hearing
16 Examiner has reviewed these Findings and adopts them as his own Findings of Fact.

17 19. The Staff Report notes that the shoreline along the project site was armored with
18 riprap, rock barbs and supplemental riprap at various times recently, and 6 bank-roughening
19 logjams were installed. The project does not propose any alteration to these earlier site
20 modifications nor does it propose any alteration to the existing riverbank.

21 20. As noted in the Staff Report, the project will remove 132 trees from the project
22 area resulting in 1.35 acres with permanent removal of vegetation. Within the shoreline
23 jurisdiction there will be approximately 1.23 acres of disturbance with .67 acres converted to
24 non-forestry use.

25 21. Areas subject to disturbance within designated shoreline jurisdiction will be
replanted/hydroseeded with native vegetation including 106 new native trees. A minimum 20-

1 foot vegetative buffer will be retained along property lines and a minimum of 50-foot buffer will
2 be planted/hydroseeded between existing private residential parcels and the proposed access road
3 and parking area (see Site Plan).

4 22. No project work will be conducted below the Ordinary High Water Mark of the
5 Cowlitz River.

6 23. In addition to the replanting of trees and revegetation as noted above, additional
7 proposed mitigation includes placing 12 conifers with root wads within the shoreline project area
8 as well as installing wildlife nesting boxes throughout the area.

9 24. There are no mapped wetlands, wetland buffer, hydric soils, landslide hazard
10 areas, erosion hazard areas or mapped areas of high arsenic level at the project site.

11 25. There are no wetlands at the project site.

12 26. The project site includes a channel migration zone, areas of moderate to high
13 liquefactions susceptibility, a mapped critical aquifer recharge area, a 100-year floodplain, and
14 floodway within portions of the site. These conditions will require additional permits to be
15 approved by staff or third parties.

16 27. As shown on the aerial map of the site and surrounding properties, the project site
17 is bordered by the Cowlitz River to the north/west; Skate Creek Road to the west; and residential
18 development to the south and east. Immediately east of the project is a residential neighborhood
19 along Alta Drive. At least two of these residential properties have a common border with the
20 project site while the others are in close proximity. The property most affected by the project is
21 that belonging to Francie Jordan lying immediately east of the site. Residential development is a
22 mix of vacation homes and year-round residents. Residential development continues to the south
23 and east of the project as well as north of the project across the Cowlitz River.

1 28. There is no public access to the Cowlitz River in the vicinity and none
2 downstream until Lake Skanewa near Randle.

3 29. The upper Cowlitz River is popular with fishers, kayakers and other boaters, and
4 the public.

5 30. To gain access to the upper Cowlitz River, recreational users are currently relying
6 upon permission from private landowners or are making unauthorized use of public lands. A
7 popular access point is just north of the Skate Creek Road Bridge across the Cowlitz River.
8 Access to this and nearby popular locations leads to large numbers of vehicles being parked
9 along Skate Creek Road during fishing seasons and other popular recreational times.

10 Finding Relating to General Regulations.

11 Archaeological Resources.

12 31. Archaeological and historic resources are addressed in the SMP at 4.02.

13 32. The Staff Report, at pages 13 and 14, contains Findings relating to the Staff's
14 review of the project to determine compliance with SMP 4.02. As noted in the Staff Report, a
15 Cultural Resources Survey was conducted and its findings were submitted by the Recreation and
16 Conservation Office to DAHP and potentially affected tribes, with no comments, concerns or
17 recommended conditions by either DAHP or affected tribes.

18 33. The Hearing Examiner has reviewed these Findings and adopts them as his own
19 Findings of Fact.

20 34. A neighbor observed that during the Cultural Resources Survey, archaeological
21 items appear to have been discovered yet none of the agencies involved will reveal the nature of
22 the assets discovered. The Applicant and Staff respond that the reason why these assets are not
23 revealed is that State law requires their nondisclosure in order to protect the assets.

1 35. To fully comply with SMP 4.02 Staff recommends various conditions of approval
2 as noted at page 13 in the Staff Report.

3 Environmental Impacts and Mitigation.

4 36. The SMP addresses environmental impacts and mitigation at SMP 4.03.

5 37. The Staff Report, at pages 14-15, analyzes the project's compliance with SMP
6 4.03. The Staff Report addresses efforts to minimize vegetation removal, especially within the
7 shoreline buffer; replanting and reseeding to ensure no net loss of ecological functions;
8 utilization of regional road maintenance, Best Management Practices (BMP's); compliance with
9 the Lewis County Stormwater regulations through a Stormwater Permit and Construction
10 Stormwater General Permit; mitigation through riparian enhancements (trees and root wads) and
11 wildlife nesting boxes; spill response plans and various other environmental protections and
12 mitigations as noted in the Staff Report.

13 38. Staff has determined that the project does not generate sufficient traffic for a
14 Traffic Impact study as it is not anticipated to generate 50 or more peak PM hour trips.

15 39. To assure compliance with SMP 4.03 Staff recommends a list of conditions for
16 project approval set forth at page 16 of the Staff Report. Staff finds that the project, as
17 conditioned, satisfied SMP 4.03.

18 40. The Hearing Examiner has reviewed the Staff's proposed Findings relating to
19 compliance with SMP 4.03 and adopts them as his own Findings of Fact.

20 Critical Areas and Shoreline Vegetation Conservation.

21 41. The SMP addresses critical areas and shoreline vegetation conservation at SMP
22 4.04.

23 42. The Staff Report, at pages 17-19, contains Findings relating to the project's
24 compliance with SMP 4.04.

1 43. Table 4-1 of the SMP establishes standard shoreline buffers from the Ordinary
2 High Water Mark. As noted in the Staff Report, the non-motorized boat put in location; the
3 pedestrian bridge and 355 linear feet of the gravel pathway are water dependent uses having a
4 zero-foot shoreline buffer. The remaining looped gravel pathway is within a 75-foot shoreline
5 buffer for recreational development. Forest practice areas and parking have a 150-foot shoreline
6 buffer. The proposed parking area is located outside of this buffer. Staff finds that the project, as
7 designed and as conditioned, satisfies all shoreline buffer requirements.

8 44. The Staff Report, at pages 18-19, contains Findings relating to vegetation
9 conservation standards. Staff finds that the project has been designed to avoid removing existing
10 native vegetation to the maximum extent feasible within shoreline and critical area buffers. Staff
11 proposes various conditions of project approval, found at pages 18 and 19 to ensure compliance
12 with vegetation conservation standards.

13 45. Staff finds that the project satisfies the requirements of SMP 4.04 subject to the
14 conditions found at pages 18 and 19 of the Staff Report.

15 46. The Hearing Examiner has reviewed the Staff's proposed Findings relating to
16 compliance with SMP 4.04 and adopts them as his own Findings of Fact.

17 Flood Hazard Management.

18 47. The SMP addresses flood hazard management at SMP 4.05.

19 48. The Staff Report, at pages 20-22, contains Findings relating to the project's
20 compliance with SMP 4.05.

21 49. Staff notes that the entire project lies within the mapped 100-year floodplain and
22 that a portion of the parking area, the looped gravel trail, the pedestrian bridge, and the boat
23 launch area are all located within the floodway. The Applicant has submitted a Flood
24 Development Permit Application for all development within the 100-year floodplain and a
25

1 Hydraulic Impact Assessment for development within both the 100-year floodplain and the
2 floodway. These assessments are referred to as the "H&H Study" in the Staff Report and is
3 included in Attachment 3 to the Staff Report.

4 50. The H&H Study concludes that development in the floodplain and floodway will
5 not increase flood hazards and will not impact the pre-project base flood elevations, floodway
6 elevations or floodway data widths.

7 51. The Staff Report notes that a majority of the project site is within the mapped
8 moderate and severe Channel Migration Zone (CMZ) and the entire project is within the mapped
9 moderate to high Soil Liquefaction Susceptibility Area, although both the entrance driveway and
10 vault toilet facility are outside of the mapped moderate and severe CMZ.

11 52. A Geomorphic Hazard Study was performed to determine the potential impacts
12 from soil liquefaction (Exhibit 20 to Staff Report). The report concludes that there are no
13 additional structural flood hazard reduction measures required for the project, and that the project
14 is adequately protected from channel migration as a result of previously constructed revetments
15 intended to protect the Skate Creek Bridge.

16 53. The County's Public Works Senior Engineer, Rod Lakey, finds that onsite
17 infiltration tests confirm that the project soil is highly permeable but that the project components
18 have low ground pressure and, as a result, potential damage from soil liquefaction would be
19 extremely low.

20 54. To ensure compliance with SMP 4.05, Staff has recommended conditions of
21 approval set forth on page 22 of the Staff Report.

22 55. Staff finds that the project, as conditioned satisfied SMP 4.05.

23 56. Members of the public have voiced concerns with potential damage to the site
24 from soil liquefaction as well as from possible channel migration but have not presented any
25 expert testimony contradicting the Staff's Findings.

1 57. The Hearing Examiner has reviewed the Staff's Findings relating to compliance
2 with SMP 4.05 and adopts them as his Findings of Fact.

3 Public Access.

4 57. The SMP addresses public access at SMP 4.06.

5 58. Among other requirements, projects intended to provide shoreline public access
6 shall be designed to achieve no net loss of ecological functions and where impacts are identified,
7 mitigation shall be required. SMP 4.06(E). Public access facilities shall be compatible with
8 adjacent private properties using vegetative buffering or other techniques to define the separation
9 between public and private space. SMP 4.06(G).

10 59. The project is intended to provide shoreline public access and is therefore subject
11 to SMP 4.06.

12 60. The Staff Report, at pages 23 and 24, contains Findings relating to the project's
13 compliance with SMP 4.06. Staff finds that the project's purpose is to establish public access to
14 the Cowlitz River in an area where there is currently no assured public access. Staff also finds
15 that the project, as conditioned, will clearly identify the boundaries to the project site and warn
16 public users against trespass onto adjoining private properties. County Staff adds that the
17 facilities will be compatible with adjacent private properties or will be made compatible by using
18 vegetative buffering as described earlier in other Findings.

19 61. Staff also notes that the project includes the re-establishment of a vegetative
20 buffering along the project's east boundary and the preservation of an existing vegetative buffer
21 on its west boundary to separate the public and private properties. Although this does not ensure
22 an immediate vegetative buffering between the project and private properties to the east, the
23 conditions of permit approval require not only the revegetation of this buffer but its continued
24 maintenance to make certain that the buffer develops as envisioned.

1 62. To further ensure compatibility between the project and adjoining private
2 properties, permit approval has been conditioned upon the installation of an access gate and use
3 limited to daylight hours. In addition, Staff would not object to a refinement of the conditions of
4 approval to make certain that the gate is locked at all other times.

5 63. Neighboring landowners remain concerned that the project will become unsightly
6 due to the accumulation of trash. In response, the County is in agreement to add an additional
7 condition of permit approval that the park operator not allow trash to accumulate onsite.

8 64. Neighbors are also concerned that users of the public facility will venture off of
9 the property and trespass onto adjoining private properties. County Staff responds that it will
10 install signs along the park boundary to warn users from trespassing. These warning signs,
11 together with the vegetative buffers, will improve compatibility.

12
13 65. The County's approval of the requested permits have been conditioned upon
14 installing and maintaining signs indicating the public's right to access and hours of operation, and
15 have these signs placed in conspicuous locations.

16 66. County Staff finds that the project will comply with SMP 4.06 subject to the
17 conditions set forth on page 24 of the Staff Report but is willing to amend the proposed
18 conditions of project approval as follows:

19 • Add the following to the end of condition number 26: "Per Lewis County Code
20 (LCC) Section 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk
21 seven days a week. Gates will be locked during non-operating hours. These hours may be
seasonally adjusted so long as they remain day-use oriented."

22 • Add new condition number 50: "Garbage is not allowed to accumulate on-site and
shall be removed periodically."

23 (See Exhibit 13 to the Staff Report).
24
25

1 67. The Hearing Examiner has reviewed Staff's Findings relating to SMP 4.06 and,
2 with the adoption of the additional conditions agreed to by Staff, adopts them as his own
3 Findings of Fact.

4 Water Quality.

5 68. The SMP addresses water quality at SMP 4.07.

6 69. Public opposition to the project has identified two water quality issues: (a) the
7 possible release of effluent from the vault toilets in the event of a major flood, and (b)
8 contamination from parked vehicles migrating to stormwaters or the Cowlitz River.

9 70. The Staff Report, at pages 24-28, contains Findings relating to the project's
10 compliance with SMP 4.07 and responds to the concerns raised by project opponents.

11 71. The project proposes the installation of a vault toilet that does not include a septic
12 system. As shown on site maps, it will be placed outside of the 150-foot shoreline buffer but will
13 be located within the 100-year floodplain as well as the mapped critical aquifer recharge areas.
14 A Flood Development Permit will therefore be required.

15 72. As noted in the Staff Report, the vault toilet must be in compliance with all
16 requirements for critical aquifer recharge areas. Underground tanks, including vault toilets, are
17 identified as high intensity uses and are allowed in critical aquifer recharge areas subject to
18 compliance with LCC Chapter 17.35A. Similarly, the project's day-use facilities must also
19 comply with standards for parks as set forth in LCC 17.35A.880(4)(g).

20 73. County Staff finds that the project, as conditioned, meets all requirements for
21 construction of the vault toilet and other improvements within the floodplain and critical aquifer
22 recharge areas.

23 74. County Staff (Witherspoon/Weckback) have explained that the vault toilet will be
24 elevated making flooding of the toilet highly unlikely. In addition, and as noted earlier in the
25

1 Public Hearing Section, the permitting for the toilet will require a maintenance plan that, among
2 other things, requires the County to plan for flooding as part of emergency planning.

3 75. County Staff acknowledge public concerns regarding contamination from vehicle
4 runoff in the parking lot. Staff proposes a condition of permit approval that there must be written
5 verification that the design of the stormwater facilities under the stormwater permit comply with
6 LCC 17.35A.880(1)(b) and (1)(c) including oil-water separators for impervious surfaces.

7 76. Staff finds that the project, subject to the conditions found at page 27 and 28 of
8 the Staff Report, satisfies the requirements of SMP 4.05.

9 77. The Hearing Examiner has reviewed the Staff's Findings and adopts them as his
10 own Findings of Fact.

11 Findings Relating to Specific Shoreline Regulations, SMP Chapter 5.

12 SMP 5.02 General Shoreline Use.

13 78. The Staff Report, at pages 29-37, contains Findings relating to the project's
14 compliance with the specific shoreline use regulations contained in SMP 5.02, et seq.

15 79. Staff finds that the project complies with the most restrictive bulk and
16 dimensional requirements in LCC Title 17 or SMP Section 5.04, and thus satisfies SMP 5.02(B).

17 80. Staff finds that all accessory uses, including parking, stormwater management
18 facilities and the toilet are located out of the 150-foot shoreline buffer, thus satisfying SMP
19 5.02(C).

20 81. The Hearing Examiner has reviewed these Findings and adopts them as his own
21 Findings of Fact.

22 SMP 5.03 Allowed Shoreline Use.

23 82. Proposed improvements including the informal boat launch, forest practice
24 activities; parking, water-orientated recreational development, trails, and signs are all permitted
25

1 uses in the Shoreline Residential environment as well as the Rural Conservancy environment
2 subject to a Substantial Development Permit.

3 83. The proposed pedestrian bridge is permitted in the Shoreline Residential
4 environment as well as the Rural Conservancy environment subject to a Shoreline Conditional
5 Use Permit.

6 84. The Hearing Examiner has reviewed these Findings and adopts them as his own
7 Findings of Fact.

8 SMP 5.04 Development Standards.

9 85. No proposed structures will exceed the 35-foot height limit set forth in SMP 5.04.

10 SMP 5.05 Boating and Water Access Facilities.

11 86. Staff finds that the proposed non-motorized boat access and other water access are
12 in compliance with SMP 5.07. The proposed boat access area does not involve any
13 improvements and no work will be conducted below the Ordinary High Water Mark of the river,
14 nor will any alteration of the riverbank be necessary. Signage will direct kayakers to an area
15 with an existing general grade into the river between existing rock barbs. Conditions of permit
16 approval require the access site to be monitored for continued safe water access and modification
17 to its location and/or the signage it later determined to be appropriate. Its status will be
18 reassessed after each five-year flood event or greater to confirm its continued safety. There will
19 be no lighting for the access point or any other areas of the facility as it is intended for day-use
20 only. Staff finds that subject to these conditions the project is in compliance with SMP 5.07.

21 87. The Hearing Examiner has reviewed these Findings and adopts them as his own
22 Findings of Fact.

23 SMP 5.09 Forest Practice.

24 88. Staff finds that the project is in compliance with SMP 5.09 relating to forest
25 practices.

1 89. The Hearing Examiner has reviewed these Findings and adopts them as his own
2 Findings of Fact.

3 SMP 5.12 Parking.

4 90. The proposed parking facilities are regulated by SMP 5.12.

5 91. SMP 5.12(C) requires that exterior parking facilities shall be designed and
6 landscaped to minimize adverse impacts to adjacent and abutting properties in shoreline
7 jurisdiction.

8 92. Those opposing the project argue that the proposed parking facilities are larger in
9 size, and contain more parking stalls, than the project requires and argue that the parking lot's
10 excessive size fails to minimize adverse impacts to adjacent and abutting properties by causing
11 visual blight.

12 93. Supporters of the project have responded that the purpose of the project is to
13 alleviate the current problem with public parking along Skate Creek Road where, during peak
14 fishing periods, many dozens of vehicles are parked along Skate Creek Road resulting in public
15 safety concerns.

16 94. The size of the parking lot is reasonably related to the intended purposes of the
17 facility and the expected number of users. Its design, and the vegetative buffers surrounding it,
18 are designed to minimize adverse impacts to adjacent and abutting properties.

19 95. Staff finds that the project, as conditioned, is in compliance with SMP 5.12.

20 96. The Hearing Examiner has reviewed these Findings and adopts them as his own
21 Findings of Fact.

22 SMP 5.13 Recreational Development.

23 97. The SMP addresses recreational development at SMP 5.13. Among other
24 requirements, recreational facilities shall make adequate provisions, such as screening, buffer
25

1 strips, fences and signs, to minimize impacts to neighbors and prevent the overflow of
2 pedestrians onto adjacent private properties.

3 98. Trails shall be planted or landscaped to provide a visual buffer for adjoining
4 similar uses or scenic areas. .

5 99. Recreational proposals shall include facilities for water supply, wastewater and
6 garbage disposal in conformance with County standards.

7 100. Recreational development shall be located, designed and constructed in a manner
8 that assures no net loss of shoreline ecological functions.

9 101. The County has entered into a Memorandum of Agreement (MOA) with PIC
10 (Exhibit 22 to Staff Report). The MOA is intended to allow PIC to operate and maintain the
11 facility. It states that "The Club will provide all grounds maintenance services, including
12 garbage removal and custodial services, pay all operational costs relating to grounds
13 maintenance, provide gate opening and closing (no overnight camping), and provide security for
14 the park. In return, the County agrees to pay for pumping of the vault toilets, provide custodial
15 supplies for the toilets, and ensure an adequate inventory of custodial supplies to facilitate
16 maintenance of the facility.

17 102. The MOA provides that in the event PIC fails to maintain the park adequately, the
18 County reserves the right to resume operation or to advertise and retain other organizations to
19 operate it. Public Works confirms that should PIC not fulfill its responsibilities in the MOA,
20 Lewis County Facilities Department will be responsible for ensuring that all obligations are met
21 (Exhibit 12 to Staff Report).

22 103. To assure compliance with the requirements for SMP 5.13, County Staff has
23 requested a condition of approval that the MOA be signed by the parties and submitted to
24 Community Development prior to operations; that the facilities shall meet the requirement of
25

Lewis County Code Chapter 12.05 for County park use; and that Lewis County Facilities Department will be ultimately responsible for the oversight of the maintenance and use of the facility, whether through third party (PIC) or directly if the third party contractor fails to comply.

104. Staff finds that, as conditioned, the project will satisfy the requirements of SMP 5.13.D for screening and buffers, signs, and will minimize impacts to neighbors and prevent the overflow of pedestrians onto adjacent private properties; that the requirements of SMP 5.13.F have been satisfied in that trails will have visual buffers from adjoining dissimilar uses; that the requirements of SMP 5.13.G for water, wastewater and garbage disposal are adequately addressed; and that the project, as conditioned, assures no net loss of shoreline ecological functions pursuant to SMP 5.13.H.

105. The Staff Report, at pages 35 and 36, finds that the project, as conditioned, will satisfy the requirements of SMP 5.13.

106 As noted in prior Findings, Staff is in agreement to amend the proposed conditions to better ensure compliance with SMP 5.13.

107. The Hearing Examiner has reviewed the Staff's proposed Findings, as well as the proposed amended conditions, and adopts them as his own Findings of Fact.

SMP 5.15 Signs.

108. The Staff Report, at page 37, contains Findings relating to SMP 5.15 and the requirements for any signs. Staff finds that all proposed signage on the property is in compliance with SMP 5.15. The Hearing Examiner has reviewed these Findings and adopts them as his own Findings of Fact.

Findings Relating to SMP Chapter 6, Shoreline Modification Regulations.

SMP 6.01, Shoreline Modification.

109. As noted in prior Findings, the project includes clearing, grading and filling activities landward of the Ordinary High Water Mark.

1 110. Pursuant to Table 6-1 of the SMP, clearing and grading activities and the
2 placement of will landward of the Ordinary High Water Mark are permitted uses in both the
3 Rural Conservancy environment and the Shoreline Residential environment.

4 SMP 6.02, Shoreline Modification Provisions.

5 111. All shoreline modifications must be in compliance with SMP 6.02.

6 112. The project's shoreline modifications include: the access road, parking area,
7 stormwater system, vault toilets, looped gravel pathway, and pedestrian bridge.

8 113. The Staff Report, at page 38, finds that these shoreline modifications are designed
9 in compliance with SMP 6.02.

10 114. The Hearing Examiner has reviewed these Findings and adopts them as his own
11 Findings of Fact.

12 SMP 6.03, Clearing, Grading and Fill.

13 115. Any clearing, grading and filling activities as part of the project must be in
14 compliance with SMP 6.03.

15 116. The project proposes to clear 1.23 acres of vegetation including 117 trees in the
16 designated shoreline. Proposed mitigation includes replanting/hydroseeding .5 acres of native
17 vegetation within the designated shoreline, including 106 trees. The removal of native
18 vegetation within the shoreline buffer will be compensated at a minimum of 1/1 ration and 12
19 conifers with root wads will be placed within the designated shoreline.

20 117. The project also requires excavation of 2,551 cubic yards of material and the
21 placement of 1,881 cubic yards of fill. All excavated material not utilized onsite will be taken
22 offsite to a government approved pit or fill site.

23 118. The Staff Report, at page 40 and 41, contains Finding relating to the project's
24 compliance with SMP 6.03. Staff finds that clearing, grading and filling activities are the
25

1 minimum needed for the construction of the day-use area and that no speculative clearing,
2 grading or fill is proposed. The clearing and grading will not significantly alter the topography
3 of the landscape in a manner that affects hydrology or increases the risk of slope failure.
4 Proposed clearing and grading within the 75-foot shoreline buffer is necessary for the graveled
5 loop pathway that provides public access to the boat launch, fishing access and general
6 enjoyment of the shoreline.

7 119. Staff additionally finds that the required construction stormwater general permit;
8 the stormwater pollution prevention plan to be approved by Ecology; stormwater plan review by
9 Lewis County; the use of temporary and permanent erosion control measures and Best
10 Management Practices; ongoing and long term site inspection and maintenance of erosion
11 control mechanisms; and other requirements for compliance with the Flood Development Permit,
12 together with no placement of fill on State-owned aquatic lands or any placement of fill below
13 the Ordinary High Water Mark, will all contribute toward compliance with SMP 6.03 and ensure
14 that there is no net loss of ecological function.

15 120. Staff concludes that the project, as conditioned, is in compliance with all
16 requirements of SMP 6.03.

17 121. The Hearing Examiner has reviewed these Findings and adopts them as his own
18 Findings of Fact.

19 Findings Relating to SMP Chapter 7.

20 122. All shoreline permits must comply with the provisions of SMP 7.02.02 which, in
21 turn, requires compliance with all development standards of the Lewis County Code, Chapter
22 90.58 RCW, the SMA and the SMP. The Applicant must also meet all review criteria for
23 development found in WAC 173-27-140.

1 123. Staff finds that the project, as conditioned, satisfies all requirements of SMP
2 7.02.02. The Hearing Examiner has reviewed the Staff's Findings and adopts them as his own
3 Findings of Fact.

4 124. Applications for Shorelines Substantial Development Permits must satisfy the
5 requirements of SMP 7.04.01.

6 125. Staff finds that the application, as conditioned, has satisfied all requirements for a
7 Shorelines Substantial Development Permit. The Hearing Examiner has reviewed the Staff's
8 Findings and adopts his own Finding of Fact.

9 126. Applications for Shoreline Conditional Use Permits must satisfy the requirements
10 of SMP 7.04.02 including compliance with the criteria found in WAC 173-27-140 and WAC
11 173-27-160.

12 127. As noted in earlier Findings, the proposed pedestrian bridge requires a Shoreline
13 Conditional Use Permit.

14 128. Staff finds that the project, as conditioned, satisfies all requirements for a
15 Conditional Use Permit for the pedestrian bridge. The Hearing Examiner has reviewed these
16 Findings and adopts them as his own Findings of Fact.

17 Additional Findings Relating to No Net Loss of Ecological Functions.

18 129. Several provisions of the SMP require that the project, as conditioned, assures no
19 net loss of ecological functions in the shoreline jurisdiction, including SMP 4.03, 4.04, 4.05,
20 4.06, 5.07, 5.09, 5.13, 6.02, and 6.03.

21 130. Opponents of the project assert that the Applicant has not provided adequate
22 assurance that there will be no net loss of ecological functions to the shoreline.

23 131. County Staff finds that the project, as conditioned, fully assures that there will be
24 no net loss of ecological function for all of the reasons set forth in earlier Findings.

1 132. Opponents of the project have not presented any evidence contradicting the
2 County's evidence in support of there being no net loss. Although opponents express concern
3 about such a possibility, no evidence has been presented that the project, as conditioned, will not
4 assure no net loss of ecological function.

5 133. The Hearing Examiner concurs with County Staff finds that the project, as
6 conditioned, will have no net loss of ecological function for all of the reasons set forth in earlier
7 Findings.

8 Findings Relating to Compatibility with Adjoining Uses.

9 134. Many of the provisions of the SMP applicable to this project, especially SMP
10 4.06, 5.07, 5.12 and 5.13, recognize the need to make adequate provisions to minimize impacts
11 to neighbors and prevent the overflow of users onto adjoining private properties. The SMP
12 recognizes that screening, buffers, signs, limitations on hours of use, proper provisions for
13 control of garbage, proper use of utilities, and the regular maintenance of the facility, are all
14 means by which compatibility with adjoining private uses can be achieved.

15 135. Staff finds that the project, as conditioned, achieves a sufficient level of
16 compatibility with adjoining private properties by implementing all of the above mitigations.

17 136. The Hearing Examiner concurs with Staff and finds that the project, as
18 conditioned, makes adequate provision to minimize impacts to neighboring properties.

19 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

20 **CONCLUSIONS OF LAW**

21 General Conclusions.

22 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.

23 2. Any Conclusions of Law contained in the foregoing Background, Public Hearing,
24 or Findings of Fact Sections are hereby incorporated herein by reference and adopted by the
25 Hearing Examiner as his Conclusions of Law.

*Findings of Fact, Conclusions of
Law and Decision Approving
Permits - 31*

LEWIS COUNTY HEARING EXAMINER
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1 3. All public notice requirements for this application have been met.

2 4. All SEPA requirements have been met.

3 5. To more fully accomplish the goals and policies of the SMA and the SMP, the
4 proposed conditions of project approval should be amended to include those additional
5 conditions set forth in Finding of Fact No. 15. All Conclusions of Law hereafter are premised
6 upon these revised conditions.

7 Conclusions Relating to the General Requirements of the SMA.

8 6. The project is adjacent to the Ordinary High Water Mark of the Cowlitz River.
9 The Cowlitz River is a shoreline of statewide significance. This project is therefore subject to
10 the requirements of the Shoreline Management Act (SMA, Chapter 90.58 RCW).

11 7. The Washington Legislature enacted the SMA because Washington's shorelines
12 are fragile and the mounting pressure of development in the shorelines necessitates coordination
13 in their management. The SMA is broadly construed to protect the State's shorelines as fully as
14 possible. All development on the shorelines of the State must conform to the SMA (*Beuchel v.*
15 *Department of Ecology*, 125 Wn.2d 196, 203 (1994)).

16 8. The Applicant has the burden of proving that all requirements of the SMA and the
17 Lewis County SMP have been met for the issuance of a Shoreline Substantial Development
18 Permit and/or a Shoreline Conditional Use Permit.

19 9. For shorelines of statewide significance, Ecology and local governments shall
20 give preference in the following order to uses which: (1) recognize and protect the statewide
21 interest over local interests; (2) preserve the natural character of a shoreline; (3) result in long-
22 term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
23 term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
24 term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase
25

1 public access to publicly owned areas of the shoreline; (6) increase recreational opportunities for
2 the public in the shoreline; (7) provide for any other element as defined in RCW 90.58.100
3 deemed appropriate or necessary. (RCW 90.58.020)

4 10. The project, as conditioned, recognizes and protects the statewide interest over
5 local interest.

6 11. The project, as conditioned, preserves the natural character of the shoreline.

7 12. The project, as conditioned, results in long-term over short-term benefit.

8 13. The project, as conditioned, protects the resources and ecology of the shoreline.

9 14. The project, as conditioned, increases public access to publicly owned areas of the
10 shorelines.
11

12 15. The project, as conditioned, increases recreational opportunities for the public in
13 the shoreline.

14 16. The project, as conditioned, is consistent with the policies of the SMA.

15 17. Three categories of shoreline use enjoy priority under the SMA: (1) single-family
16 residences; (2) water dependent uses, including ports, industrial and commercial development;
17 and (3) shoreline recreation uses or other uses which provide public access to the shorelines.
18 (RCW 90.58.020)

19 18. No one category of priority shoreline use enjoys a higher priority over the other
20 two.
21

22 Conclusions Relating to the Lewis County SMP.

23 Conclusions Relating to Chapter 3 SMP.

24 19. The project, as conditioned is consistent with the Rural Conservancy Management
25 Policies.

1 20. The project, as conditioned, is consistent with the Shoreline Residential
2 Management Policies.

3 Conclusions Relating to Chapter 4 SMP.

4 21. The project, as conditioned, is in compliance with SMP 4.02 relating to
5 archaeological and historic resources.

6 22. The project, as conditioned, complies with the requirements of SMP 4.03 relating
7 to environmental impacts and mitigation.

8 23. The project, as conditioned, is in compliance with the requirements of SMP 4.04
9 relating to critical areas and shoreline vegetation conservation.

10 24. The project, as conditioned, is in compliance with the requirements of SMP 4.05
11 relating to flood hazard management.

12 25. The project, as conditioned, is in compliance with the requirements of SMP 4.06
13 relating to public access.

14 26. The project, as conditioned, is in compliance with the requirements of SMP 4.07
15 relating to water quality including the requirements set forth in Chapters 17.35 and 17.35A LCC.

16 27. The project, as conditioned, is in compliance with all other requirements of
17 Chapter 4 of the SMP.

18 Conclusions Relating to Chapter 5 SMP.

19 28. The project, as conditioned, is in compliance with SMP 5.02 relating to general
20 shoreline use.

21 29. The proposed improvements are permitted uses in both the Shoreline Residential
22 environment as well as the Rural Conservancy environment, while the pedestrian bridge is a
23 permitted use subject to a Shoreline Conditional Use Permit. SMP 5.03

1 30. The project, as conditioned, is in compliance with SMP 5.04 relating to
2 development standards.

3 31. The project, as conditioned, is in compliance with SMP 5.07 relating to boating
4 and water access facilities.

5 32. The project, as conditioned, is in compliance with SMP 5.09 relating to forest
6 practices.

7 33. The project, as conditioned, is in compliance with SMP 5.12 relating to parking.

8 34. The project, as conditioned, is in compliance with SMP 5.13 relating to
9 recreational development.

10 35. The project, as conditioned, is in compliance with SMP 5.15 relating to signs.

11 36. The project, as conditioned, is in compliance with all other requirements of
12 Chapter 5 SMP.

13 Conclusions Relating to Chapter 6 SMP.

14 37. The project, as conditioned, satisfies the requirements of SMP 6.01 relating to
15 shoreline modifications.

16 38. The project, as conditioned, satisfies the requirements of SMP 6.04 relating to
17 clearing, grading and fill.

18 39. The project, as conditioned, satisfies all other requirements of Chapter 6 SMP.

19 Conclusions Relating to Chapter 7 SMP.

20 40. The project, as conditioned, satisfies all requirements of Chapter 7 SMP.

21 Conclusions Relating to Shoreline Conditional Use Permits (SCUP).

22 41. The pedestrian bridge is a conditional use in either the Rural Conservancy or
23 Shoreline Residential shorelines.

42. Project uses requiring an SCUP must be evaluated for compliance with the five criteria listed in WAC 173-27-160.

43. The project, as conditioned, is consistent with the goals and policies of the SMA and the SMP.

44. The project, as conditioned, does not interfere with the normal public use of public shorelines.

45. The project, as conditioned, is compatible with other authorized uses within the area and with uses planned for the area under the Lewis County Comprehensive Plan and SMP.

46. The project, as conditioned, will cause no significant adverse effects to the shoreline environment in which it is to be located.

47. The public interests will not suffer any substantial detrimental affect.

48. Consideration has been given to the cumulative impact of additional requests for like actions in the area.

49. The project, as conditioned, satisfies the conditional use criteria for an SCUP.

50. The project satisfies all other requirements of Chapter 173-27 WAC.

51. The requested Shoreline Substantial Development Permit and Shoreline Conditional Use Permit should be granted subject to the revised conditions of approval.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

DECISION

Based upon the above Findings of Fact and Conclusions of Law, the requested Substantial Development Permit and Shoreline Conditional Use Permit to establish a public day

1 use area along the Cowlitz River near Packwood for recreational activity are hereby **approved**
2 subject to the following conditions:

3 1. The applicant/ property owner shall comply with the conditions of development
4 identified in the Land Development Review file number LDR19-0049 as corrected on June 5,
5 2020 (Staff Exhibit 11). If there is a conflict between and the LDR conditions of approval and
6 another permit's conditions of approval, the more restrictive conditions of approval shall apply.

7 2. Twelve conifers, to be felled with root wads, are to be placed within the shoreline
8 area of this project and wildlife nesting boxes shall be installed throughout the project area.

9 3. The applicant shall follow the Planting Plan submitted in the burden of proof
10 statement Appendix A – Site Development Plan.

11 4. In the event any archaeological or historic materials are encountered during
12 project activity, work in the immediate area (initially allowing for a 30 foot to 100 foot buffer;
13 this number may vary by circumstance) must stop and the following actions taken: 1) Implement
14 reasonable measures to protect the discovery site, including any appropriate stabilization or
15 covering; 2) Take reasonable steps to ensure the confidentiality of the discovery site; and 3) Take
16 reasonable steps to restrict access to the site of discovery.

17 5. The project proponents will notify the concerned Tribes and all appropriate
18 county, state, and federal agencies, including the Department of Archaeology and Historic
19 Preservation (DAHP). The agencies and Tribe(s) will discuss possible measures to remove or
20 avoid cultural materials, and will reach an agreement with the project proponent regarding
21 actions to be taken and disposition of material.
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1 6. If human remains are uncovered, appropriate law enforcement agencies shall be
2 notified first, and the above steps will be followed. If the remains are determined to be Native,
3 consultation with the affected Tribes will take place in order to mitigate the final disposition of
4 said remains.

5 7. All project work completed for this project will be above the Ordinary High
6 Water Mark (OHWM) of the Cowlitz River.

7 8. Regional Road Maintenance Best Management Practices (BMPs) will be
8 implemented; these include staking of project limits, installation of silt fencing, installation of
9 straw wattles, and the marking or clearing limits in the field to minimize vegetation disturbance.

10 9. Any/all disturbed soil that is not being worked, whether at final grade or not, shall
11 be hydro seeded within 2 to 7 days as appropriate (within 2 days from October 1st through April
12 30th and within 7 days from May 1st through September 30th).

13 10. The gravel parking area, gravel access road and gravel looped pathway exceeds
14 5,000 square foot of disturbed area and will require a Lewis County Stormwater Permit in
15 addition to the Construction Stormwater General Permit (with Stormwater Pollution Prevention
16 Plan – SWPPP) required by the Washington State Department of Ecology (ECY).

17 11. Riparian enhancements within the shoreline will include the planting of an 11,531
18 square feet area with a native riparian tree/shrub mix; mulching and hydro seeding of a 11,422
19 square foot area with native scrub/shrub mix; and the placement of 12 conifers, to be felled with
20 root wads, within the designated shoreline of the project area. Wildlife nesting boxes will be
21 placed throughout the project area to enhance wildlife viewing opportunities.
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1 12. The standard County spill prevention control and counter-measures plan will be
2 utilized for this project. Spill kits will be onsite (within vehicles) to treat any chemical or fluid
3 leaks during the project construction.

4 13. Excavation will be monitored for potential contamination from off-site sources
5 and/or past activities.

6 14. No refueling of vehicles or equipment will be allowed within 150 feet of any
7 waterbody.

8 15. If an accidental spill occurs in the parking area during on-going operations of the
9 day use area that would trigger a Washington State Department of Ecology (ECY) response (due
10 to volume or type of material) Lewis County Facilities Department is responsible for the spill
11 reporting/response/clean-up/disposal of materials according to ECY reporting guidelines.
12

13 16. Clearing of invasive, noxious non-native vegetation in shoreline buffers is
14 allowed by hand labor or with light equipment. Removal of noxious weeds as listed by the State
15 in Chapter 16-750 WAC is allowed in a manner consistent with State Noxious Weed Control
16 Board regulations. Native vegetation shall be promptly reestablished in the disturbed area.

17 17. All areas that are cleared of vegetation in the shoreline or critical area buffers that
18 are not developed will be replanted within one year with native plant.

19 18. Replanted areas shall be planted and maintained such that within three years the
20 vegetation cover is at least 90% reestablished.

21 19. Non-native species on the County's list of invasive species shall not be allowed to
22 be used to revegetate cleared areas.
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1 20. In advance of a predicted flood event, the facility will be temporarily closed to the
2 public. Once the flood event is over and any flood waters have receded, Lewis County Facilities
3 Department staff will evaluate the facility and repair any damage (with proper permits, if
4 needed) before re-opening the facility to the public.

5 21. Following a severe earthquake, Lewis County Facilities Department staff will
6 temporarily close the facility to the public, evaluate any damage and repair any differential
7 settlement within the facility (with proper permits, if needed) before re-opening the facility to the
8 public.

9 22. The review, issuance and construction activities of the building permits for 35-
10 foot pedestrian bridge (B19-00630) and the pre-cast concrete ADA vault toilet facility (B19-
11 00631) shall conform to applicable seismic analysis and all applicable design criteria of the
12 International Building Code as part of the building permit review.

13 23. The project development shall be in compliance with the conditions of approval
14 of the flood development permit (FD19-00041) and the fill/grading permit (G19-00032).

15 24. Park boundary signs shall be installed along the boundary lines to clearly identify
16 the separation of public property from the adjacent private properties.

17 25. The applicant shall undertake a minimum of 0.39 acres of vegetative plantings
18 and hydroseeding (Planting Zone A and Hydroseeding Area) as shown in the Burden of Proof
19 Statement – Appendix A – Site Development Plan.

20 26. Access gates and signs limiting the facility use to day-use hours of operation shall
21 be installed prior to operation of the recreational facility. Per Lewis County Code (LCC) Section
22 12.05.100, the operating hours of day-use parks are 8:00 a.m. to dusk seven days a week. Gates
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24

1 will be locked during non-operating hours. These hours may be seasonally adjusted so long as
2 they remain day-use oriented.

3 27. Physical development of the recreational facility and all conditions of approval
4 shall be complete/met prior to operation of the recreational facility.

5 28. The applicant shall implement a Construction Stormwater Pollution Prevention
6 Plan (SWPPP) that satisfies the requirements of the NPDES General Permit for Stormwater
7 Discharges Associated with Construction Activities. The SWPPP will include Best Management
8 Practices (BMP) recommended by Ecology's 2019 Stormwater Management Manual for
9 Western Washington and will include measures for temporary and permanent erosion and
10 sedimentation control and will identify a regular inspection and maintenance schedule for all
11 erosion control structures.

12 29. The temporary erosion and sedimentation control measures will be implemented
13 at the beginning of the construction process.

14 30. BMPs will also include covering of exposed soils, managing runoff, and
15 revegetating temporary disturbed soils as soon as possible following the onset of construction.

16 31. Prior to construction a spill prevention, control and containment (SPCC) plan will
17 be in place, in accordance with applicable local, state and federal regulations.

18 32. The pre-cast concrete ADA vault toilet facility septic permit application (S19-
19 00226) shall conform to the applicable design criteria of LCC 8.40, provide stamped designs by
20 a Professional Engineer, and shall submit a management program to the health officer assuring
21 ongoing operation, monitoring and maintenance before the health officer issues the installation
22 permit. Verification of the health officer's approved management program shall be submitted to
23
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1 the Building Official as documentation prior to the issuance of the building permit for the ADA
2 vault toilet facility (B19-00631).

3 33. Written verification that the ADA vault toilet facility meets the criteria of LCC
4 17.35A.880(4)(b)(i)-(v) shall be submitted to the Building Official as documentation prior to the
5 issuance of the building permit for the ADA vault toilet facility (B19-00631).

6 34. A management plan prepared by a qualified professional to address fertilizer,
7 herbicide, and pesticide management practices of the day-use park facility in relation to best
8 management practices as recommended by the Cooperative Extension Service shall be provided
9 to the Community Development Department prior to operation of the day-use facility.

10 35. Potentially harmful materials, including but not limited to oil, chemicals, tires, or
11 hazardous materials, shall not be allowed to enter any body of water or wetland, or be discharged
12 onto the land in shoreline jurisdiction, including any ditch, swale or other non-impervious
13 surfaced area where migration to the aquifer is a reasonable likelihood. Potentially harmful
14 materials should be stored outside of shoreline jurisdiction if feasible, and shall be maintained in
15 safe and leak-proof containers.

16 36. Written verification the design of the stormwater facilities under the Lewis
17 County Stormwater permit process includes review and compliance with LCC 17.35A.880(1)(b)
18 and (1)(c), including but not limited to oil-water separator(s) for impervious surfaces, shall be
19 submitted to the Community Development Department prior to the issuance of the preliminary
20 approval of the stormwater permit and the issuance of the grading permit (G19-00032).

21 37. Herbicides, fungicides, fertilizers, and pesticides shall not be applied within 25
22 feet of a water body, except by a qualified professional in accordance with State and Federal
23 laws. Further, pesticides subject to the final ruling in Washington Toxics Coalition, et al., v. EPA

1 shall not be applied within 60 feet for ground applications or within 300 feet for aerial
2 applications of the subject water bodies and shall be applied by a qualified professional in
3 accordance with State and Federal law.

4 38. The non-motorized boat launch/ water access point location will be monitored and
5 reassessed after significant flood events (5-year flood event or greater) by Lewis County
6 Facilities Department staff. If at any time in the future the site is found to be unsafe or not
7 functioning as intended, it is anticipated another location along the shoreline will be selected and
8 the signage moved as appropriate. Any Memorandum of Agreement (MOA) for maintenance
9 activities of this facility shall not transfer responsibility of the inspections of the safety and
10 functionality of the access point or other site facilities.

12 39. Prior to the issuance of the grading permit (G19-00032) for the entire project, the
13 applicant shall either obtain a Hydraulics Permit Application (HPA) approval from Washington
14 State Department of Fish & Wildlife (WDFW) for the project or provide documentation from
15 WDFW that an HPA is not required.

16 40. The boat launch/ water access point is a day-use facility only. No lighting shall be
17 associated with this project.

18 41. The Lewis County Stormwater Permit shall review the design of the 24-foot wide
19 access driveway and parking area as paved, not just gravel, as the applicant has indicated paving
20 of these components could happen in the future if funding becomes available.

21 42. A signed copy of the memorandum of agreement (MOA) between Lewis County
22 and the Packwood Improvement Club shall be submitted to the Community Development
23 Department prior to the final approval of the grading permit (G19-00032) and prior to the
24 operation of the day-use facility.

43. As part of the Lewis County Park System, the day-use facility operations shall meet the criteria of Lewis County Code (LCC) Chapter 12.05 – County Park Use.

44. Lewis County Facilities Department is ultimately responsible for the oversight of the on-going maintenance of the day-use facility, whether through contract or directly if the contractor fails to do so.

45. Signs shall be installed and located to minimize interference with visual access to the shoreline jurisdiction.

46. Signs will not be installed in locations that obstruct sight distance of drivers and non-motorized roadway users.

47. All excavated material that is not utilized on site will be taken off site to a government approved pit or fill site.

48. Cut and fill slopes shall generally be sloped no steeper than one foot vertical for every two feet horizontal (1:2) unless a specific engineering analysis has been provided that demonstrates the stability of a steeper slope. Documentation will be included in the grading permit (G19-00032).

49. The applicant shall obtain all other required local, state and federal permits and approvals.

50. Garbage is not allowed to accumulate on-site and shall be removed periodically.

DATED this 23 day of October, 2020.

Mark C. Scheibmeir
Lewis County Hearing Examiner

Findings of Fact, Conclusions of Law and Decision Approving Permits - 44

LEWIS COUNTY HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
CHEHALIS, WASHINGTON 98532
Phone: 360-748-3386/Fax: 748-3387

EXHIBITS

1		
2		
3	Exhibit 2	Affidavit of Publication
4	Exhibit 3	Affidavit of Mailing
5	Exhibit 4	Email from Karen Witherspoon to various parties
6		regarding notice of documents to be entered into the
7		record at the hearing
8	Exhibit 5	Notice of Cancellation of Hearing
9	Exhibit 6	Email/photos from Francie Jordan to Karen
10		Witherspoon
11	Exhibit 7	Email from Bonnie Muench to Karen Witherspoon
12		dated September 25, 2020
13	Exhibit 8	Email from Jeff St. Aubyn to Kare Witherspoon
14		dated September 26, 2020 with attachments
15	Exhibit 9	Letter from Barbara Wright
16	Exhibit 10	Email from William Serahn to Karen Witherspoon
17		dated September 28, 2020 with attachments
18	Exhibit 11	Weckback presentation
19	Exhibit 12	Written testimony of Lee Grose in lieu of
20		oral testimony
21	Exhibit 13	Lee Grose - Resubmittal of earlier written testimony
22	Exhibit 14	William Serahan - Resubmittal of earlier written testimony
23	Exhibit 15	Francie Jordan - Resubmittal of earlier written testimony
24	Exhibit 16	Eric Eisenberg - Summary of concluding statements
25		

COWLITZ COUNTY DECISION

Hillier, Scheibmeir, Kelly & Satterfield

299 N.W. Center Street

P. O. Box 939

Chehalis, WA 98532

Date	Invoice #
6/25/2019	13083

360-748-3386

Bill To
COWLITZ COUNTY c/o ANGELA JORDAN 207 FOURTH AVE N KELSO WA 98626

PAID
07/15/2019

Matter
Bunker Hill

Date	Item	Description	Qty	Rate	Amount
6/10/2019	Scheibmeir	Review Staff Report	1	225.00	225.00
6/19/2019	Scheibmeir	Review additional materials	0.7	225.00	157.50
6/20/2019	Scheibmeir	Review court records; make site visit; prepare for and attend Hearing	4	225.00	900.00
6/24/2019	Scheibmeir	Prepare Decision	3.5	225.00	787.50
Total					\$2,070.00

BEFORE THE COWLITZ COUNTY HEARINGS EXAMINER

IN RE:	)	HEARING NO. 1980.02
	)	
350 BUNKER HILL ROAD/STELLA'S	)	FINDINGS OF FACT,
CHOICE, LLC,	)	CONCLUSIONS OF LAW
	)	AND ORDER GRANTING
Applicant.	)	VARIANCE

APPLICANT: Stella's Choice, LLC

REPRESENTATIVE:

Brian Hewitt
Brian L. Hewitt Engineering, LLC
3025 Maple Street
Longview, Washington 98632

SUMMARY OF REQUEST:

An after-the-fact variance for an existing "dry pond", allowing for a reduction from the minimum 50-foot front yard setback standard to approximately 30 feet. The existing dry pond provides required water storage capacity for firefighting in the event of a fire at the existing recreational marijuana production/processing facility located on the premises.

LOCATION OF PROPOSAL:

350 Bunker Hill Road, Longview, Washington. Tax Parcel No. 6258201, located in the Northeast Quarter of Section 11, Township 8 North, Range 4 West, in the Southeast Quarter of Section 2, Township 8 North, Range 4 West, Willamette Meridian.

SUMMARY OF DECISION:

The variance is **approved** subject to the requirement of constructing a site obscuring fence described more fully below.

BACKGROUND

In 2016, the Applicant, Stella's Choice, LLC, applied for and received a "Tier 1" Recreational Marijuana Growing and Processing Permit for a project to be located at 350 Bunker Hill Road. The project site sits atop Bunker Hill several miles west of Longview in a scenic, rural/suburban area. The site is surrounded by large lot rural residential properties in all

*Findings of Fact, Conclusions of Law
and Order Granting
Variance - 1*

COWLITZ COUNTY HEARING EXAMINER
299 N.W. CENTER ST. / P.O. BOX 939
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1 directions with the exception that immediately west of the project site, across Bunker Hill Road,
2 is the historic Bunker Hill Cemetery.

3 Several neighbors and the Bunker Hill Cemetery Association felt aggrieved by the
4 administrative approval of the Tier 1 Permit and commenced a LUPA action in the Cowlitz
5 County Superior Court, Case No. 16-2-01261-3. In 2017, the Cowlitz County Superior Court
6 ruled that the permit had been validly issued.

7 Thereafter the project proceeded toward construction and site layout designs were
8 submitted to County Staff. Initial designs did not show a "dry pond" between the facility and
9 Bunker Hill Road, but the final design identified a dry pond for firefighting purposes in close
10 proximity to the road. The Applicant's engineer, Brian Hewitt, did not believe (and still does not
11 believe) that the dry pond is a "structure" subject to the County's setback requirements.

12 Following submittal of the final plans to the County, Staff concurred with Mr. Hewitt that
13 the dry pond was not a "structure" and therefore not subject to setback requirements. Staff
14 approved the final design including both the construction of the production facility as well as the
15 dry pond in close proximity to Bunker Hill Road.

16 The purpose of a "dry pond" is to provide onsite water storage for better firefighting
17 capability in the event of a fire at a commercial structure when there are no fire hydrants nearby.
18 As a commercial facility, the Applicant's production facility is required by the fire code to have
19 onsite water storage to support firefighting efforts.

20 The constructed dry pond is 51 feet by 27 feet. It is constructed two feet below ground
21 with a two-foot aboveground berm, creating four feet of water depth.

22 After construction of the dry pond, County Staff began to receive complaints about its
23 close proximity to the County Road. Staff investigated and concluded that the dry pond had
24 been constructed within the County's sixty-foot right-of-way. The Applicant was therefore
25

1 required to relocate the dry pond several feet further east to where it is now outside of the County
2 right-of-way, approximately thirty feet east of the centerline of Bunker Hill Road. At the time of
3 this action County Staff remained of the belief that the dry pond was not a "structure" subject to
4 the County's fifty-foot front yard setback requirement.

5 At the same time as the dry pond was relocated further east, the Applicant was also
6 directed to relocate newly planted Cyprus trees between the perimeter fencing and the dry pond
7 so as to increase the screening of both the dry pond and the production facility. Cyprus were
8 chosen as a fast growing tree intended to provide significant screening within a relatively few
9 number of years.

10 The current status of the dry pond is as follows: Commencing at the as-built eastern edge
11 of Bunker Hill Road, there is a grassy area leading east to the property's perimeter barbed wire
12 fence. Just inside (east) of this fence is the row of recently planted Cyprus, followed then by the
13 dry pond. The dry pond is utilitarian in its appearance, with no landscaping and a visible pond
14 liner covering its berm. The entire pond is enclosed within a haphazard array of fencing
15 materials: the barbed wire fence to the west; gridded or "hog wire" fence to the south and north;
16 and chain link fence to the east. The haphazard nature of the fencing, coupled with the non-
17 landscaped pond, result in an unattractive appearance for both pond and fence, although much of
18 it is currently hidden from view as a result of waist-high grass along the perimeter fencing.
19 During those portions of the year where the grass is not as tall the pond will be more visible.

20 The relocated dry pond remains a significant concern to several neighbors and the
21 Cemetery Association. They voiced their continuing concerns to County Staff who, on further
22 analysis, concluded that the dry pond is a "structure" under CCC 18.10.040. It defines
23 "structure" as "an object (including a mobile object) constructed or installed by persons
24 including, but without limitation, buildings, towers, cranes, smoke stacks, *earth formations*, and
25

1 overhead transmission lines." In other words, as an above-ground "earth formation", the dry
2 pond is deemed a structure and therefore subject to the fifty-foot front yard setback.

3 In light of this determination, the Applicant seeks an "after-the-fact" variance from the
4 fifty foot front yard setback requirement to allow the existing dry pond to remain in its current
5 location. Several neighbors and the Cemetery Association challenge the request and argue that
6 the application does not satisfy the County's requirements for a variance.

7 **PUBLIC HEARING**

8 The public hearing commenced at 2:30 p.m. June 20, 2019, in the Commissioner's
9 Hearing Room in the County Administration Building. Sworn testimony was received from
10 Jason Lugo and Ron Melin of County Staff, from the Applicant's representative, Brian Hewitt,
11 and from several members of the public. All testimony was taken under oath.

12 Prior to the public hearing I undertook an independent site examination.

13 During the hearing several exhibits were received including the following:

- | | | |
|----|-----------|---|
| 14 | Exhibit 1 | Revised County Staff Report including attachments. |
| 15 | Exhibit 2 | Additional public comment received prior to the public |
| 16 | | hearing including letters from Jonathan and Danika Mark |
| 17 | | (in support); Harold Cockrell (in opposition); and |
| 18 | | representatives for the Bunker Hill Cemetery Association |
| 19 | | (in opposition). |
| 20 | Exhibit 3 | Supplemental materials attached to Harold Cockrell's letter |
| 21 | | including a copy of the Cowlitz County Superior Court |
| 22 | | Decision, etc. |
| 23 | Exhibit 4 | Written comments of Elaine Cockrell. |
| 24 | Exhibit 5 | The original design layout for the project site ("Plan A"). |

- 1 Exhibit 6 Revised design layout showing dry pond ("Plan B").
- 2 Exhibit 7 Additional written comments from Harold Cockrell.
- 3 Exhibit 8 Written comments regarding the history of Bunker Hill
- 4 Cemetery provided by Harvey Williamson.
- 5 Exhibit 9 Correspondence between County Staff and Brian Hewitt
- 6 regarding redesign of the dry pond to its current location.
- 7 Exhibit 10 Email from Jason Lugo to the Hearing Examiner providing
- 8 the definition of "structure" as found in the Development
- 9 Code, CCC 18.10.040 as well as in the Recreational
- 10 Marijuana Code, CCC 18.76.030.
- 11 Exhibit 11 Photo taken from the County's PowerPoint presentation
- 12 during the hearing, depicting the site in its current summer
- 13 condition with tall grass obscuring the dry pond.

14 Jason Lugo and Ron Melin of County Staff testified to the somewhat complicated history

15 of this project and the need for the variance. Their testimony is consistent with the information

16 contained in the previous Background Section. Staff reviewed the five criteria for approving a

17 variance as found in CCC 18.10.355(c) as well as the additional requirements found in CCC

18 18.10.355(b), and concluded that all statutory requirements had been satisfied. Staff therefore

19 recommends that the requested variance be approved without further conditions.

20 Following the Staff's presentation, Brian Hewitt testified on behalf of the Applicant. Mr.

21 Hewitt has been a professional engineer for thirty-five years with a lengthy practice in Cowlitz

22 County. He has ten years' experience designing dry ponds for commercial projects in Cowlitz

23 County. Mr. Hewitt continues to believe that the dry pond is not a "structure" and should

24 therefore be exempt from the front yard setback requirements. In the alternative, if it is

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1 concluded that the pond is a "structure", then Mr. Hewitt argues that it should be granted a
2 variance to remain in its current location. He explains that the purpose of a dry pond is to
3 provide a ready source of water for firefighting needs. The project site slopes downward from
4 Bunker Hill Road with its highest elevation being at the road. Placing the dry pond as close to
5 the road as possible serves multiple purposes: (1) being located above the commercial structure,
6 it increases water pressure to the structure; (2) it is immediately available to firefighting
7 apparatus from the road or from the site entrance; (3) its proximity to the road allows it to be
8 easily used to assist in firefighting at other locations, creating a substantial benefit to nearby
9 residents; and (4) if the pond had to be relocated the logical choice would be east and below the
10 commercial building, making it more difficult to access and requiring its water to be pumped
11 uphill to the building.

12 Mr. Hewitt argues that the pond is not a "structure" as the County has consistently
13 interpreted its code to not impose setback requirements on similar earthen constructions, most
14 notably above-ground septic systems. Indeed, if the County now considers all such installations
15 to be "structures" then it must change its policies for the location of above-ground septic
16 systems.

17 Mr. Hewitt concluded his testimony by noting that the fire district specifically requested
18 the dry pond in its current location as it serves as its optimum site for both the project and the
19 neighborhood, with many challenges associated with any other location. Mr. Hewitt also noted
20 that the Cyprus trees planted in front of the pond are rapidly obscuring it from the public's view.

21 Following presentation by Mr. Hewitt the hearing was opened to public testimony.
22 Elaine Cockrell first testified in opposition to the requested variance. Mrs. Cockrell asserts that
23 the purpose of this setback requirement is to avoid an imposition on neighbors, and that the dry
24 pond is an imposition to her and other neighbors. She asserts that the Applicant has the burden
25

1 of proving the requirements of CCC 18.10.355(c). She adds that the Cyprus trees, which are
2 eight feet apart, fail to block the view of the pond, taking away the scenic beauty of the adjoining
3 cemetery.

4 Mrs. Cockrell's husband, Harold Cockrell, next testified. Mr. Cockrell had earlier
5 submitted written comments and a large amount of material relating to the earlier administrative
6 permit. He supplemented these earlier materials with additional written comments and other
7 documents (Exhibits 5-7). He argues that allowing the variance would materially compromise
8 the goals of the County's Comprehensive Plan as well as the Marijuana Facility Siting
9 Ordinance, Chapter 18.76. Mr. Cockrell is upset that the intended location of the dry pond was
10 not revealed in the Applicant's plans until well into the design process with the result being that
11 this issue was not one of the matters reviewed by the Cowlitz County Superior Court Judge. He
12 concludes that the requested variance is yet another opportunity for the Applicant to get what it
13 wants without there being a fair and full hearing.

14 Susan Fuhrman was the next person to testify. Ms. Fuhrman resides at 191 E. McAdams
15 Road immediately east of the project site. She views the matter as "not a big deal" and sees no
16 reason why the variance should not be granted as requested. She also believes that in just a few
17 years the Cyprus trees will fully obscure any public view.

18 Following Ms. Fuhrman's testimony Harvey Williamson, testified. Mr. Williamson's
19 testimony was not directly in opposition to the requested variance but was instead a history
20 lesson on the Bunker Creek Cemetery and its cultural and historical significance to the Stella
21 Community. Mr. Williamson's testimony was then submitted in written form as Exhibit 8.

22 At the conclusion of the public testimony Mr. Hewitt responded on behalf of the
23 Applicant to portions of Mr. Cockrell's testimony. Mr. Hewitt explained that the reason the dry
24 pond was not identified in the first design layouts was not to avoid its notice but simply because
25

1 plans for utilities (including dry ponds) are not submitted until final building approval. He then
2 reiterated his belief that the dry pond serves a significant community function in its current
3 location by being readily available for use should any neighboring property experience a fire.

4 ANALYSIS

5 There appears to be a common assumption that the requested variance enjoys an
6 advantage merely because it is already in existence, and because it had earlier been (incorrectly)
7 approved by County Staff. Neither assumption is correct. This application is being reviewed as
8 if the existing dry pond had never been constructed and the Applicant was seeking to construct it
9 for the first time. The fact that the Applicant could be forced to move the existing facility is not a
10 factor in the decision making except to the extent that its relocation would have an impact on one
11 of the factors required to be proven in order to be granted the variance.

12 The requested variance has caused a difference in opinion among the surrounding
13 neighbors. Neighbors to the east (Fuhrman) and north (Mark) have given the project their full
14 support while neighbors to the south (Cockrell) and west (Cemetery) remain strongly opposed.
15 Supporting neighbors wonder what the fuss is about while opposing neighbors feel that the pond
16 is an affront to the historic cemetery across the street.

17 With the grass along the property's fenceline at its summer peak, the pond is barely
18 visible from public view. Unfortunately, this status will soon change when the summer ends and
19 the grass is no longer site obscuring. Recently planted Cyprus trees will eventually provide a
20 vegetative buffer but this will take many years. In the meantime, and when the grass is not so
21 tall, the barren pond and its haphazard fencing are an unsightly blemish immediately across from
22 the entrance to a historic cemetery.

23 I conclude that the dry pond, in its current location, serves several important functions
24 that justify its retention. The current site provides maximum water pressure, the greatest
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1 convenience to firefighters, and a community-wide benefit of available water to fight fires on
2 other properties. Conversely, relocating the pond to a location outside the setback would lessen
3 the ability to use this water for firefighting onsite; would make the firefighters job more difficult;
4 and would preclude the pond's use for fires on neighboring properties. At the same time,
5 however, the pond is a visual eyesore, especially to the historic cemetery across the street, as
6 long as the pond remains visible to the public. The solution is to grant the variance but on the
7 condition that the dry pond must be screened from public view by a solid fence, at least four feet
8 in height, along the north, west and south sides of the pond (a fence along the east side will not
9 obscure the pond and therefore is optional). The fence must be made of wood unless County
10 Staff approves an alternate material having at least equal site obscuring qualities and aesthetics.
11 On the west side of the pond the fence is to be located between the pond and the existing Cyprus.
12 The fence must be constructed within ninety days.

13 Subject to this condition the requested variance will satisfy the various criteria of CCC
14 18.10.355.

15 Accordingly, I make the following:

16 **FINDINGS OF FACT**

17 **General Findings.**

18 1. All Findings of Fact contained in the previous Background, Public Hearing and
19 Analysis Sections are incorporated herein by reference and adopted by the Hearing Examiner as
20 his own Findings of Fact.

21 2. The Applicant requests a variance from the minimum 50-foot front yard setback
22 standard to approximately thirty feet, allowing the retention of an existing dry pond required for
23 fire suppression purposes.

1 3. The project site is located at 350 Bunker Hill Road near Longview. The project
2 site adjoins Bunker Hill Road and the existing dry pond is approximately thirty feet east of the
3 centerline of Bunker Hill Road.

4 4. The project site consists of 5.31 acres. It is unzoned and designated as "Rural" in
5 the County Comprehensive Plan.

6 5. Adjoining properties generally consist of large lot suburban/rural residential
7 properties with the exception that the Bunker Hill Cemetery is immediately west of the project
8 site across Bunker Hill Road.

9 6. The site is used as an approved Marijuana Production Facility. As a commercial
10 activity, this production facility is required to have onsite water storage to assist in firefighting
11 needs. The dry pond at issue provides this service and has been designed to meet fire code
12 requirements.

13 7. The dry pond is 51 feet long by 27 feet wide and is located approximately thirty
14 feet from the centerline of Bunker Hill Road. The pond is four feet deep consisting of two feet
15 below grade and a two foot high berm above-ground.

16 8. The pond and its berm are covered by a dark colored pond liner. There is no
17 landscaping surrounding the pond.

18 9. The pond is surrounded on all sides by various types of fencing: west of the
19 pond, separating the property from Bunker Hill Road, is a longstanding barbed wire fence; north
20 and south of the pond are "hog wire" fences; and east of the pond is a chain linked fence. All of
21 these fences connect to each other but have a very haphazard appearance.

22 10. This haphazard fencing, coupled with the lack of landscaping surrounding the
23 pond and its berm, result in a visually unattractive feature in close proximity to Bunker Hill Road
24 and the Bunker Hill Cemetery immediately across the street.

1 11. The Applicant has planted some Cyprus between the barbed wire fence and the
2 dry pond to aid in its visual screening. These trees have been chosen for their fast growing
3 tendencies but they are at least several years away from providing an effective screen of the dry
4 pond.

5 12. A site obscuring fence of wood or similar, aesthetically pleasing material would
6 provide effective screening of the dry pond and eliminate the existing haphazard fencing.

7 Findings Relating to CCC 18.10.355(c)(1).

8 13. The variance will not be materially detrimental to public health, or injurious to
9 property in the vicinity or district in which the property is located.

10 14. The dry pond is necessary for complying with County Fire Code and Building
11 Code requirements.

12 15. The current location of the dry pond maximizes its effectiveness for use on the
13 property while also allowing it to be used in the event of fires on neighboring properties. Its
14 location is therefore beneficial to the public health and to properties in the vicinity.

15 16. As conditioned through additional fencing, the dry pond will not have any
16 materially detrimental impact to surrounding properties including the cemetery directly across
17 the road.

18 Findings Relating to CCC 18.10.355(c)(2).

19 17. The requested variance will not detract from livability or appearance of a rural
20 residential area, or character of a nonresidential area.

21 18. The surrounding area is residential with the exception of Bunker Hill Cemetery.
22 The dry pond, as conditioned, will not detract from the livability or appearance of the
23 surrounding properties, and will provide additional firefighting capability in the event one of the
24 surrounding properties suffers a fire.

1 Findings Relating to CCC 18.10.355(c)(3).

2 19. The variance will not adversely effect significant natural, scenic, historic, cultural,
3 open space, or energy resources.

4 20. The Bunker Creek Cemetery is a historic cemetery and is both a historic and
5 cultural resource.

6 21. As conditioned, the dry pond in its current location will not adversely effect the
7 cemetery as the pond will become obscured from view.

8 Findings Relating to CCC 18.10.355(c)(4).

9 22. The variance will not materially compromise the goals and policies of the
10 Comprehensive Plan, or the spirit of this chapter.

11 23. The project site is designated as rural in the County Comprehensive Plan. The
12 project site has previously been approved as a Tier 1 Marijuana Production Facility. The dry
13 pond is a necessary requirement of the County's fire and building codes to ensure the safety of
14 persons and property in the event of a fire at this site. The Cowlitz County Comprehensive Plan
15 recognizes and encourages small scale commercial and industrial uses in rural settings. The
16 existing dry pond ensures the safe use of a small scale commercial/industrial use in this rural
17 setting.

18 Findings Relating to CCC 18.10.355(b)(1).

19 24. Unusual circumstances are applicable to the subject property, most notably its
20 topography. The site slopes downward from Bunker Hill Road. The most effective location for
21 a dry pond is at a higher elevation than the existing production facility. This allows greater water
22 pressure and easier access by firefighting personnel.

23 25. If not allowed to remain at the existing location, the dry pond would need to be
24 relocated below the existing production facility. Water from the pond would then have to be
25

1 pumped uphill to assist in firefighting. Firefighting personnel would have greater difficulty
2 reaching and utilizing this water source.

3 26. For these reasons the Regional Fire District encourages the continued use of the
4 current site for the dry pond.

5 Findings Relating to CCC 18.10.355(b)(2).

6 27. Strict application of Chapter 18.10 CCC would deprive the Applicant of property
7 rights and privileges enjoyed by others in the vicinity.

8 28. Without the dry pond in its current location the existing use would not enjoy the
9 same firefighting abilities as surrounding properties.

10 29. The County has historically interpreted the term "structure" to not include earthen
11 structures, including above-ground septic designs. Applying a much stricter interpretation to this
12 project would deprive the Applicant of property rights and privileges which have been enjoyed
13 by other landowners who have been benefitted from a more generous interpretation to date.

14 Findings Relating to CCC 18.10.355(d).

15 30. When granting a variance adverse impacts resulting from the variance shall be
16 mitigated to the extent practicable.

17 31. The only significant adverse impact of the requested variance is that the existing
18 dry pond and surrounding fencing is visually unattractive, especially to the Bunker Hill
19 Cemetery immediately across the road. This adverse impact will be mitigated through the
20 condition that a site obscuring fence be constructed, thereby obscuring the dry pond from public
21 view and eliminating the current haphazard fencing that surrounds it.

22 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

23 **CONCLUSIONS OF LAW**

24 1. The Hearing Examiner has jurisdiction over the parties and the subject matter.

1 2. Any Conclusions of Law contained in the foregoing Background, Public Hearing,
2 Analysis, or Finding Sections are incorporated herein by reference and adopted by the Hearing
3 Examiner as his own Conclusions of Law.

4 3. Any Finding herein which may be deemed a Conclusion is hereby adopted as
5 such.

6 4. The existing dry pond is an earth formation constructed or installed by persons
7 and, therefore, is a "structure" as defined by CCC 18.10.040.

8 5. As a structure, the dry pond must comply with the County's setback requirements
9 unless a variance has been granted.

10 6. The requested variance, as conditioned, will not constitute a grant of special
11 privileges inconsistent with the limitations upon uses of other property in the vicinity and land
12 use classification which the property is located.

13 7. The Applicant has provided substantial evidence of unusual circumstances that
14 are applicable to the subject property including its size, shape, topography, surroundings, or
15 location. CCC 18.10.335(b)(1).

16 8. The Applicant has provided substantial evidence that the strict application of this
17 chapter would deprive the Applicant of property rights and privileges enjoyed by others in the
18 vicinity. CCC 18.10.355(b)(2).

19 9. Pursuant to CCC 18.10.355(c):

20 1. As conditioned, the variance will not be materially detrimental to public
21 health, or injurious to property in the vicinity or district in which the property is located.
22

23 2. As conditioned, the variance will not detract from livability or appearance
24 of a rural residential area, or character of a nonresidential area.
25

3. As conditioned, the variance will not adversely effect significant natural, scenic, historic, cultural, open space, or energy resources.

4. As conditioned, the variance will not materially compromise the goals and policies of the Comprehensive Plan, or the spirit of this Chapter.

10. Pursuant to CCC 18.10.355(d) the adverse impacts resulting from the requested variance have been mitigated to the extent practicable through the additional condition imposed by the Hearing Examiner.

11. The requested variance should be approved subject to the following additional condition:

The dry pond must be screened from public view by a solid fence, at least four feet in height, along the northwest and south sides of the pond (a fence along the east side will not obscure the pond and therefore is optional). The fence must be made of wood unless County Staff approves an alternate material having at least equal site obscuring qualities and aesthetics. On the west side of the pond the fence is to be located between the pond and the existing Cyprus. The fence must be constructed within ninety days.

ORDER GRANTING VARIANCE

The Hearing Examiner having issued his Findings of Fact and Conclusions of Law, now, therefore, the requested variance is GRANTED subject to the following condition:

The dry pond must be screened from public view by a solid fence, at least four feet in height, along the northwest and south sides of the pond (a fence along the east side will not obscure the pond and therefore is optional). The fence must be made of wood unless County Staff approves an alternate material having at least equal site obscuring qualities and aesthetics. On the west side of the pond the fence is to be located between the pond and the existing Cyprus. The fence must be constructed within ninety days.

1 DATED this _____ day of June, 2019.

2
3 _____
4 Mark C. Scheibmeir
5 Cowlitz County Hearing Examiner
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*Findings of Fact, Conclusions of Law
and Order Granting
Variance - 16*

**COWLITZ COUNTY HEARING EXAMINER
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