Appeal, Staff Report and Recommendation to the Hearing Examiner

Project Name:	The Cascade foothills Meadows Project
Case Numbers:	OLR-2020-00102 – Appeal of WHR-2020-00169
Address:	29403 NE 85th Cir
Legal description:	Tax lot 80, parcel 137154-000 SW and NW quarter of Section 06, Township 2 North, Range 4 East of the Willamette Meridian.
Appellants:	Erickson & Associates, PLLC Attorneys at Law Mark A. Erikson 110 West 13th Street Vancouver, WA 98660-2904 mark@eriksonlaw.com 360-696-1012 William Banker and Jean Louise Carmichael 29403 NE 85th Cir Camas WA 98607
Date of notice:	August 12, 2020, Re-notice September 9, 2020
Hearing Examiner:	Joe Turner
Neighborhood Association/Contact:	Proebstel Neighborhood Association Neighborhood Quick Map Link Contact: 564.397.2316 or marilee.mccall@clark.wa.gov
Public hearing date:	September 24, 2020

Recommendation

Uphold Wetland and Habitat Review Manager's Determination

Manager's Initials: BD Date issued: Sep. 9, 2020

Zoning: R-5

Community Development
1300 Franklin Street, Vancouver, Washington
Phone: 564.397.2375 Fax: 564.397.2011
www.clark.wa.gov/development

For an alternate format, contact the Clark County ADA Compliance Office.
Phone: 564.397.2322
Relay: 711 or 800.833.6384
E-mail: ADA@clark.wa.gov

Comp plan designation:	Rural 5
County Review Staff:	Ariel Whitacre, Biologist 564.397.4717 ariel.whitacre@clark.wa.gov Melissa Curtis, Planner II 564.397.5870 melissa.curtis@clark.wa.gov

Applicable Laws

Clark County Code Sections 40.200 (General Provisions); Habitat Conservation (40.440); 40.260.080 Forest Practices, 40.500 and 40.510 (Procedures); 40.510.030 (Type III Process); and the Clark County Comprehensive Plan.

Time Limits

The appeal was received on was July 10, 2020 and determined to be fully complete on July 22, 2020 Therefore, the code requirement for issuing a decision within 92 days lapses on October 22, 2020. The state requirement for issuing a decision within 120 calendar days, lapses on November 19, 2020.

Background

Appeal issues and staff response

Issue #1: "The site contains multiple Type Ns streams, priority logs and priority snags as shown in the Habitat Determination Map." *Category 1.*

Response to issue #1:

Per CCC 40.440.010(C)(1)(a), "all streams are those areas where surface waters flow sufficiently to produce a defined channel or bed as indicated by hydraulically sorted sediments or the removal of vegetative litter or loosely rooted vegetation by the action of moving water. Ns streams must connect to another stream above ground. Seasonal or intermittent streams are surface streams with no measurable flow during thirty (30) consecutive days in a normal water year."

During the County site visit conducted on March 20th, 2020, Staff observed several channels containing steadily flowing waters (Exhibit 12). Per GIS stream layers provided by the Department of Natural Resources (DNR), there is a modeled Type Ns (non fish-bearing) stream on the parcel. Based on DNR maps, the stream category changes to a Type F (fish-bearing) stream approximately 3,340 linear feet after exiting the site and before entering David Creek (also a Type F stream) (Exhibit 13). Washington Department of Fish and Wildlife's (WDFW) Salmon Scape mapping system additionally shows the stream mapped on the subject

parcel, though in this case the entire stream reach is classified as a perennial stream (Exhibit 14). "Salmon Scape merges fish and habitat data collected by state, federal, tribal and local biologists and presents it in an integrated system that can be readily accessed by other agencies and citizens. This version is based on WDFW's new Washington Integrated Fish Distribution (WIFD) which brings together WDFW fish distributions and fish distributions developed by the NorthWest Indian Fish Commission (NWIFC) for Puget Sound and the Outer Coast into a seamless consistent dataset. WIFD is integrated with the National Hydrographic Dataset (NHD), the new State and Federal Standard for depicting streams, rivers, and waterbodies on USGS topographic maps as well as web-based maps" (WDFW Salmon Scape website).

Furthermore, a County Habitat Permit was issued for the previous property owner in 2002 which identified the tributary to David Creek and the adjacent Type Ns (Type 5 under the water typing system of the time) streams on the subject parcel (Exhibit 15). The 2002 habitat permit was issued to account for placement of the current single-family home and further evinces that the hydrologic features on the parcel meet stream criteria as defined in CCC 40.440.

Issue #2 "A large portion of the riparian habitat conservation zone (HCZ) has been logged without any permits."

Response to issue #2

The appellant further asserts that the riparian HCZ has not been logged because the hydrologic features identified onsite do not meet stream criteria and that the County has not used Best Available Science (BAS) in designating critical areas. The appellant argues that "The Department of Fish and Wildlife PHS Map for the property shows no priority habitats. Hence, the County's designation of streams which do not qualify for habitat regulation, *supra,* violates both the requirement for maps and performance standards in designating critical areas under WAC 365-190-080(4), and the requirement of best available science under RCW 36.70A. l 72(1)".

However, 'Riparian Habitat' is in fact listed as a WDFW PHS priority habitat and the Riparian Habitat section of the PHS document has a footnote which states "Washington Department of Fish and Wildlife does not map locations of Riparian in the Priority Habitat and Species database. Riparian data should be obtained through other sources (e.g., DNR's stream data)" (Exhibit 16). Therefore, the County disagrees with the appellant's claim that the County is in violation of the requirement to designate critical areas through the use of maps and performance standards.

During the March 2020 predetermination assessment (WHR-2020-00054), County Staff reviewed WDNR's hydrography maps, WDFW's Salmon Scape map, and evaluated the stream based on the definition provided in the WAC: " [a] 'Type Ns Water' means all segments of natural waters within the bankfull width of the defined channels that are not Type S, F, or Np Waters. These are seasonal, nonfish habitat streams in which surface flow is not present for at least some portion of a year of normal rainfall and are not located downstream from any stream reach that is a Type Np Water. Ns Waters must be physically connected by an above-ground channel system to Type S, F, or Np Waters" (WAC 222-16-030).

The WDFW criteria for riparian habitat is defined as follows: "The area adjacent to flowing or standing freshwater aquatic systems. Riparian habitat encompasses the area beginning at the ordinary high-water mark and extends to that portion of the terrestrial landscape that is influenced by, or that directly influences, the aquatic ecosystem. Riparian habitat includes the entire extent of the floodplain and riparian areas of wetlands that are directly connected to stream courses or other freshwater" Washington Department of Fish and Wildlife. 2008. Priority Habitat and Species List. Olympia, Washington. P 267).

Issue #3: "The 2.57 acres of the impacted riparian habitat conservation zone requires restoration, mitigation, maintenance and monitoring." *Categories 3 and 4.*

Response to issue #3:

The appellant argues that restoration mitigation and monitoring are not required because "Ns streams are *not* subject to habitat regulation because they are *not* physically connected by an above-ground channel system to Type S, F, or Np Waters, as required under WAC 222-16-030(4)". Based on BAS, WDNR and WDFW maps, staff disagrees with this assertion. DNR reclassifies the stream as a Type Np (non fish-bearing, perennial) stream further downstream and offsite and then as a Type F (fish-bearing) stream before entering David Creek, another Type F stream. WDFW additionally maps the stream as perennial in their Salmon Scape maps.

Issue # 4: "A Mitigation As-Built report must be submitted to the County within 30 days of completion of planting as approved in the mitigation plan." *Category 5.*

Response to issue #4:

The appellant argues "The County's conclusion that " [a] Mitigation As-Built report must be submitted to the County is unsupported because no mitigation plan or report is required absent the impacts to jurisdictional habitat". County Staff disagrees that impacts to County jurisdictional habitat have not occurred as summarized in the County issued habitat predetermination (WHR-2020-00054) and habitat permit (WHR-2020-00169) and that the riparian habitat does not meet stream criteria as defined in WAC 222-16-031.

CCC 40.440.010(C)(3) states "In the event of inconsistencies, official habitat area definitions shall prevail over countywide maps in determining applicability of this chapter. The county shall follow the recommendations of WDFW in the interpretation of site-specific conditions as they relate to the definition of priority habitat and species". County Staff requested an additional site visit with the appellant and their consultant (Cascadia Ecological Services) to review the Critical Areas Assessment provided with this appeal; however, the appellant denied the County's request (Exhibit 17). Staff acknowledges that conditions on the site may have changed since our on-site review on March 20th, 2020 due to vegetation growth, however, we have not been provided an opportunity to review Mr. Barnes report in the context of current site conditions

Issue # 5: "Petitioners further appeal the jurisdiction and authority of Clark County to designate Critical Areas based on ad hoc field-designations."

Response to issue # 5:

The appellant further argues that the County "took the opportunity to perform an ad hoc analysis of the entire site" and that staff did not follow the procedural requirements outlined in WAC 365-190-040. However, the appellant incorrectly argues that the GMA comprehensive planning process set forth in WAC 365-190-040 is applicable to this site-specific permitting determination at issue in this case. As discussed herein, the County has utilized the best available science as required by 40.440.010(A)(1). However, neither County Code nor GMA require that the County engage in public outreach to interested stakeholders when making a site-specific determination in response to a permit application

The property owner additionally voluntarily applied for the habitat predetermination without a specific 'study area' defined for review (Exhibit 18). Therefore, staff completed a comprehensive analysis of the critical areas on the parcel, as is standard unless otherwise explicitly stated in the application. Applicants are permitted to voluntarily supply an independent Critical Areas Report for County consideration as part of the predetermination review; however, no such report was provided to the County prior to issuance of the Predetermination Staff Report. Therefore, Staff relied on on-the-ground observations, and the best available science (WDNR and WDFW maps, PHS designations) to determine the applicable critical areas located on the site. Staff additionally notified the property owner prior to scheduling the site visit so that the owner could be present during the predetermination.

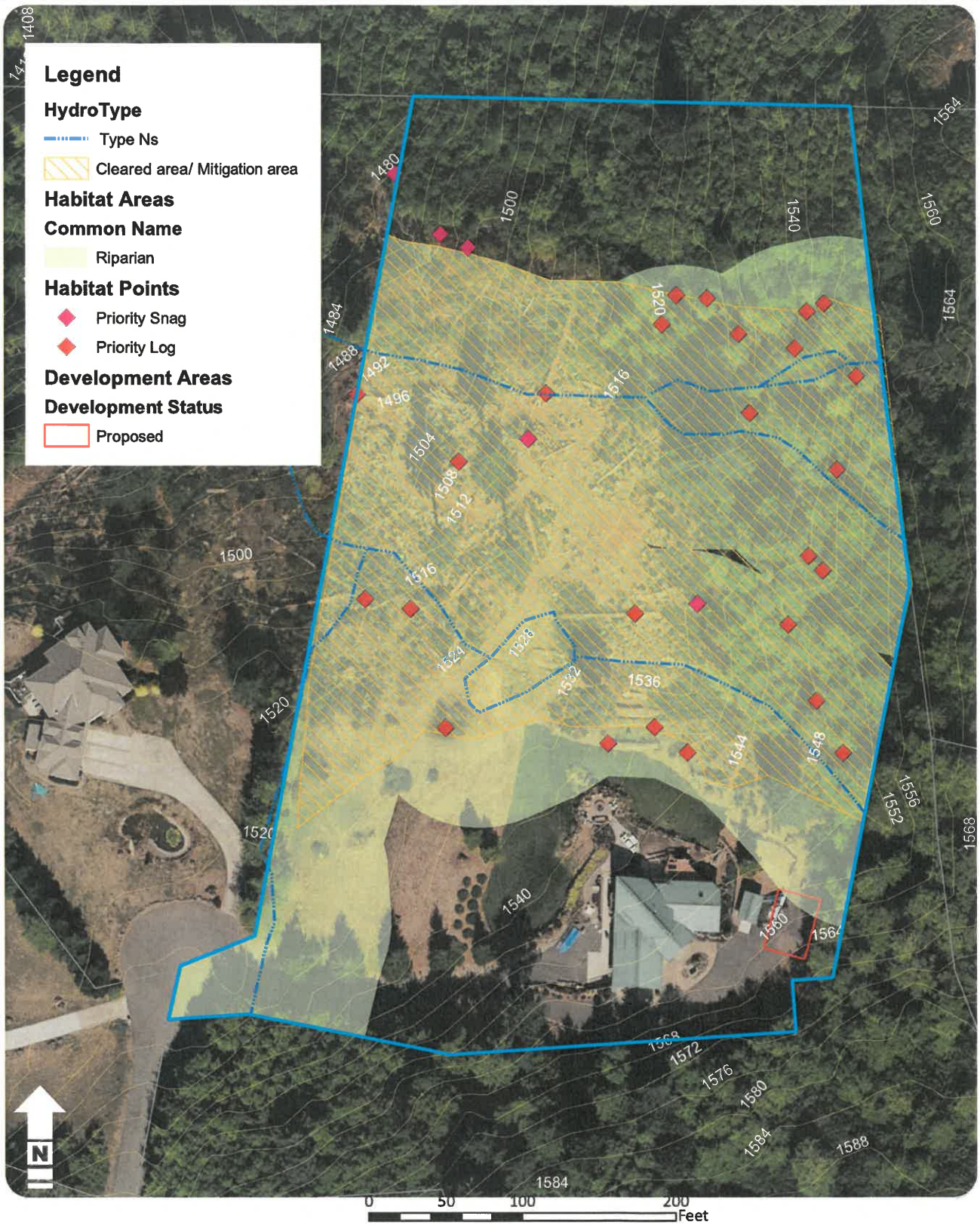
Although a Critical Areas Report was not provided to the County prior to issuance of the Habitat Predetermination report, the applicant did provide some supplementary application materials for County consideration including maps, a project narrative and a preliminary plot plan. The applicant-provided states "There are 2 streams that intersect on this property. The first runs along the west property line, the 2nd runs through the middle of the property. These are classified as seasonal streams and have a 75' protection buffer/setback". The Habitat Predetermination application also contained a preliminary plot plan with streams an buffers identified on the plans (Exhibit 18).

Conclusion

Based on site observations, best available science, and the documentation provided in the previously issued habitat permit (HAB2002-00061), staff have concluded that the stream located on the subject parcel meets the definition of a Type Ns stream. DNR and WDFW maps indicate that the stream connects to other streams and staff has been denied access to the site to verify the applicant's assessment that the stream goes underground. Therefore, based on prior review and staff's most recent observations of the site, the stream is regulated under the Habitat Conservation Order (CCC 40.440). The removal of the trees and shrubs within the riparian habitat conservation zone as shown in the previously issued Habitat Determination (WHR-2020-00054) therefore warrants the issued Habitat Permit (WHR-2020-00169) and mitigation as required by the Habitat Conservation Ordinance.

Recommendation

Based on the above findings and information in the record, it is recommended the Hearings Examiner DENY the appeal and uphold the Wetland and Habitat Review Manager's Determination.



Community Development
1300 Franklin Street, Vancouver, Washington
Phone: (360) 397-2375 Fax: (360) 397-2011
www.clark.wa.gov/development

WHR-2020-00169
Mitigation Map
137154000

Drawn By: whitacra
Sheet 1
6/26/20