



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Fish, Wildlife & Parks Division
PO Box 40100 • Olympia, WA 98504-0100 • (360) 664-8520

December 27, 2018

Stephen Neuenschwander
Planning Manager
City of Wenatchee Department of Community Development
1350 McKittrick Street
PO Box 519
Wenatchee, WA 98807-0519
Delivered via Email to sneuenschwander@wenatcheewa.gov

SUBJECT: WDFW REQUEST FOR RECONSIDERATION OF THE HEARING EXAMINER'S DECISION IN THE MATTER OF P-17-01, BLACK ROCK TERRACE

Dear Mr. Neuenschwander:

I have been asked by my client, the Washington Department of Fish and Wildlife (WDFW), to request reconsideration of the Hearing Examiner's December 14, 2018, decision in the matter of P-17-01, Black Rock Terrace (hereinafter "Decision"). This request is filed in accordance with Wenatchee City Code WCC 13.11.060, and specifically relies upon subsections (1)(c) and (d), clear mistake as to a material fact, and clear error as to the law which should be corrected in the interests of justice.

The contents of a reconsideration request must follow the provisions of WCC 13.11.030(2), which requires that the following subjects be addressed:

(a) Decision being appealed: The Land Use Hearing Examiner's decision dated December 14, 2018, on subdivision request file number P-17-01, Black Rock Terrace.

(b) Name and address of the party requesting reconsideration and its interests in the matter:

The party is the Washington Department of Fish and Wildlife.

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For purposes of correspondence regarding this request, I can be contacted at the following address:

Joseph Panesko, Senior Counsel
Washington State Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

WDFW's interest lies in the department's statutory mandate to "preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters." RCW 77.04.012. WDFW's decisions involving the department's Priority Habitat and Species (PHS) program are factored directly into the City's current environmental planning code. *See, e.g.,* WCC 12.08.020(17).¹ WDFW has participated directly in the permitting process for Black Rock Terrace, most specifically with respect to concerns over the adverse impacts the proposal has on valuable winter foraging habitat for Rocky Mountain Mule Deer (*Odocoileus hemionus hemionus*).

(c) The specific reasons why the party moving for reconsideration believes the decision to be wrong, including identification of each finding of fact, each conclusion, and each condition or action ordered which the party alleges is erroneous:

WDFW believes findings of fact ## 43 – 47 are incorrect because the project site should be considered a priority habitat for a priority species and mitigation beyond just a fence should be required for the adverse impacts on mule deer winter foraging habitat. As a result of these factual errors, Conclusion of Law # 6 is also erroneous, and the interest of justice and interests of our environment mandate correction of these errors. These errors are explained in further detail below under the Argument section.

(d) The specific desired outcome or changes to the decision:

WDFW requests that additional mitigation requirements be imposed to address the complete loss of over 10 acres of mule deer winter forage habitat that will be caused by the proposed subdivision. Because this habitat loss cannot be replaced within the proposed subdivision, compensatory mitigation is required under the 2009 version WCC Section 7.2(8) Fish and Wildlife Habitat Conservation Areas, which WDFW understands to be the version of the code applicable to this project. In addition to mitigation for habitat loss, WDFW also requests

¹ WDFW understands that the current WCC Chapter 12.08 was adopted in 2018 and thus does not technically apply to this project which appears to have vested in 2017. WDFW will cite to a copy of the 2009 ordinance (No. 2009-11) adopting the last version of the critical areas provisions that it obtained from the City's website.

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additional conditions be imposed to further mitigate the wildlife conflicts that are highly likely to occur within the planned subdivision.

ARGUMENT

Findings of Fact requiring reconsideration:

43. “The subject property and immediate vicinity of the subject property has never been designated by the City of Wenatchee as a critical habitat conservation area.”

The project site has been identified by WDFW’s Priority Habitats and Species Program as containing priority habitat for Mule Deer. This fact is admitted by the applicant’s Fish and Wildlife Habitat Management and Mitigation Plan, page 10. This fact can also be verified by reviewing WDFW’s PHS listings and online maps posted on the agency’s website under the Priority Habitats and Species Program sub-page, available at:

<https://wdfw.wa.gov/conservation/phs/>

Under the new 2018 Code, this Priority Habitat designation would directly require that the site be managed and conditioned as a critical area. Unlike the new 2018 Code, the City’s 2009 Code provides far fewer specifics about what qualifies as fish and wildlife habitat conservation areas. Section 2.1(21)(b) of the 2009 Ordinance includes “Habitats and species of local importance which include a seasonal range or habitat element with which a given species has a primary association and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term. These might include areas of high relative density or species richness, breeding habitat, winter range and movement corridors.” (Emphasis added). The materials WDFW previously submitted to the City and applicant demonstrate that the project site is in fact high value winter forage habitat. WDFW’s comments included statements raising concerns over the loss of 13 acres of winter forage habitat, which contributes to cumulative losses and adverse impacts. WDFW asserts the project site qualifies as a fish and wildlife habitat conservation area even under the 2009 Code.

Section 3.2 of the 2009 Code includes a provision that “All areas within the city of Wenatchee meeting the definition of one or more critical areas, regardless of any formal identification, are hereby designated critical areas and are subject to the provisions of this ordinance.” Because the project site qualifies as a fish and wildlife habitat conservation area because of its value as winter foraging site for mule deer, it automatically must be treated as a critical area “regardless of any formal identification.” As a result, the fact that the site may not be listed on a city critical area map is not legally controlling.

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The applicant's consultant prepared a Fish and Wildlife Habitat Management and Mitigation Plan as part of its submissions. That Plan relied upon an out-of-date 2010 report to characterize the project site as "low priority" mule deer habitat. The City adopted and relied upon this statement in its December 5, 2018, letter to the hearing examiner rebutting WDFW's concerns. WDFW effectively rebutted that 2010 report in an email from Ms. Barg to Stephen Neuenschwander dated August 21, 2018. In that email, Ms. Barg points out that the habitat mapping associated with the 2010 report was conducted on a coarse scale, that mule deer habitats have changed significantly since the 2010 report due to wildfire activity, and that additional survey data on winter range habitat had since been acquired by WDFW. Numerous comments submitted to the City from the public identify the extensive use the project site receives from mule deer in the winter time, and some public submitted photographs of the mule deer herds allegedly on or near the site. The consultant concedes the site is "frequently used by mule deer for winter foraging." Fish & Wildlife Habitat Management and Mitigation Plan at 13. In conclusion, the facts demonstrate the high value habitat the site currently provides for mule deer winter foraging. The fact that the City may not have "formally identified" the project site as a critical area does not overcome Section 3.2 of the 2009 Code, quoted in the previous paragraph, which provides that the site should be treated as a critical area.

44. "The City of Wenatchee has adopted Best Available Science which excludes the property from designation as a fish and wildlife habitat conservation area."

For the reasons stated with regard to Finding of Fact # 43, this statement is a mistake in fact and is legally incorrect. The project applicant's own consultant admits that the project site is "frequently used by mule deer for winter foraging." Fish & Wildlife Habitat Management and Mitigation Plan at 13. WDFW submitted additional information about the value of the lowland habitats in the Wenatchee Foothills including the project site. There is no "best available science" justifying this site as not being considered a fish and wildlife habitat conservation area.

45. "The November 21, 2018 letter sent from Amanda Barg, Washington State Department of Fish and Wildlife, contains comments that are not responsive to the inquiry of the Hearing Examiner when the Hearing Examiner invited additional comments from the Washington State Department of Fish and Wildlife. The Hearing Examiner particularly asked whether or not the mitigation measures proposed by the applicant, that were in compliance with the regulations of the Wenatchee City Code, were sufficient to mitigate the potential adverse impacts of the development on a mule deer."

This is a mistake in fact, and it confuses between two separate adverse impacts caused by the proposed subdivision. One independent impact is the loss of over 10 acres of steppe habitat that serves as winter foraging habitat for mule deer. Ms. Barg's November 21, 2018, letter expressly states on page 2: "Mitigation for habitat loss was not included in the revised Mitigation Plan."

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(Emphasis added). A separate adverse impact is the increase in wildlife conflict that will occur by allowing residences to be constructed in steppe habitat. With respect to this separate adverse impact, Ms. Barg expressly states: "It is WDFW's opinion that a 6-foot fence alone would not mitigate for the loss of mule deer habitat and impacts to mule deer from the potential increase in human-wildlife conflicts." These plain statements about insufficient mitigation for habitat loss and for wildlife conflicts directly respond to the Hearing Examiner's query, and the answer is plainly: "No, the imposed mitigation measures are not sufficient to mitigate the potential adverse impacts of the development on mule deer." The old 2009 Code, Section 7.2(8) requires mitigation of development proposals. WDFW contends the single current mitigation requirement of a fence does not sufficiently address the adverse habitat loss impacts or human-wildlife conflicts.

46. "The comments by Ms. Barg discussed issuance of a revised MDNS to include mitigation measures to achieve no net loss of mule deer winter habitat functions and values caused by the property development. These comments are not responsive to the Hearing Examiner's inquiry."

This statement is a mistake in fact. In an email to Ms. Barg, City staff specifically stated "The Hearing Examiner is looking for a response from you on the revised plan and the MDNS restrictions on the height of the fence and the use of cattle guards and gates." (Emphasis added). Ms. Barg's response suggesting that the MDNS conditions be modified by adding more mitigation directly responded to the query. Ms. Barg's suggestion that additional mitigation conditions should be imposed under the MDNS is consistent with her underlying statement that the existing mitigation measures are insufficient. Even if the old 2009 critical areas code provides little guidance about the scope of mitigation requirements, the MDNS provides another direct avenue for the City to ensure that the development proposal does not impose adverse environmental impacts on the land. The MDNS conditions should be increased to adequately offset the adverse impact, which requirement can be imposed independently of the critical areas ordinance.

47. "The Hearing Examiner finds that a revised MDNS is not necessary because the subject property has not been designated a critical habitat conservation area or fish and wildlife habitat conservation area."

This is a mistake in fact for all the reasons stated above with respect to Finding of Fact # 43. WDFW PHS data lists this project site, as well as the entirety of the Wenatchee Foothills (much of which is protected for Mule Deer Habitat by the Land Trust and Chelan PUD) as Mule Deer Regular Concentration. The new 2018 Code, section WCC 12.08.180(5)(d) Rocky Mountain Mule Deer Habitat goes into further detail of what shall be considered in a management and mitigation plan, which the City required of the applicant as part of the City's Notice of

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Additional Information Required, number 12, “the applicant was required to submit a site analysis prepared by a qualified professional based upon BAS to evaluate impacts to fish and wildlife habitat conservation areas, specifically priority winter range habitat for mule deer.” This code subsection states, “Per the Washington State Department of Fish and Wildlife (WDFW), effective management of mule deer in Washington requires ensuring that mule deer have adequate levels of quality habitat year-round. Development standards to avoid and minimize the potential impacts to mule deer winter range may include, but are not limited to:

- (i) Preservation of the existing high-quality mule deer winter range (sagebrush and bitterbrush habitat).
- (ii) Installation of a deer fence around the proposed development in order minimize human-deer interactions.
- (iii) Cluster development on properties in order to maintain the migration of mule deer through the property.
- (iv) Minimize overall disturbance of vegetation on the property and control invasive and noxious weed species.
- (v) Installation of native shrub steppe vegetation to provide a functional strip of habitat.

Rather than preserving existing high-quality mule deer winter range, this proposal destroys over 10 acres of habitat that is “frequently used” according to the applicant’s own consultant. This proposal destroys over 10 acres of valuable habitat and offers no compensatory mitigation to offset those adverse effects. Even if the mitigation requirements under the 2018 WCC 12.08.180(5)(d) are not legally binding on this 2017 application, they serve as good guidelines for what kind of mitigation should be imposed under the more ambiguous provisions of the older 2009 Code, or independently imposed under the MDNS.

Conclusion of Law 6 “The subject application, as conditioned, demonstrates consistency with Title 12 Environmental Protection standards.”

WDFW believes the subject application, as conditioned, does not demonstrate consistency with the 2009 version of the Resource Lands and Critical Areas Development Ordinance, for all the reasons stated above.

WDFW requests the City of Wenatchee Hearing Examiner to consider and grant this request for reconsideration. It is not WDFW’s intention to prevent the development of the property, but rather to make sure the City’s Code is followed, and with the hope that WDFW’s recommendations for mitigation are included as part of the Hearing Examiner’s decision. WDFW’s goal is to fully mitigate for all impacts by avoiding and minimizing impacts to the extent possible, and compensating for unavoidable impacts to achieve no net loss of habitat functions and values, as is required by the Code. Because this proposal necessarily results in the

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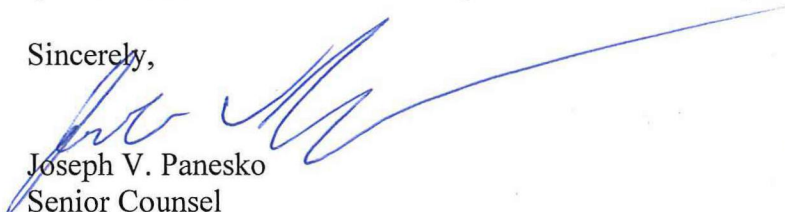
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destruction of over 10 acres of valuable winter foraging habitat, compensatory off-site mitigation should be required to offset this adverse impact. In addition to the need to compensate for habitat loss, more site-appropriate measures to reduce human-wildlife conflict should also be part of the mitigation package.

While WDFW understands there are limitations in the City's code for fencing, alternative conflict mitigation measures are available. The following was included in Ms. Barg's November 21, 2018, letter and these mitigation measures should be considered to be included as part of the Hearing Examiner's Decision: "Avoidance and minimization actions could include, e.g.: landscaping with materials not palatable to deer; shielding of lights to reduce glare and light trespass; requirements to fence pets and leash dogs when outside home fences; signage cautioning drivers to watch for deer; covenants acknowledging the responsibility and costs of responding to human-deer conflicts are the responsibility of homeowners. Compensation for the loss of 13.16 acres of mule deer wintering habitat could include enhancements of vicinity habitat to improve habitat function and values commensurate with those function and values lost."

Ms. Barg and other WDFW staff look forward to continuing to work with the City and the applicant to ensure these environmental issues are successfully resolved. If you have any questions that I can answer directly, I can be reached at (360) 586-0643.

Sincerely,



Joseph V. Panesko
Senior Counsel

cc: Jim Brown, WDFW Region 2 Director
Jeff Davis, WDFW Habitat Program Assistant Director
Margen Carlsen, WDFW Habitat Program Deputy Assistant Director
Carmen Andonaegui, WDFW Region 2 Habitat Program Manager
Dave Volsen, WDFW District Wildlife Biologist, Wenatchee
Amanda Barg, WDFW Region 2 Habitat Biologist, Wenatchee