

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

In the Matter of the Application of)	No. SPR 131/19
)	
Larry Kwarsick, on behalf of)	Whitney Kennel Proposal
Julie Ann Pecha and John and)	
Elsa Whitney)	
)	FINDINGS, CONCLUSIONS, AND
For Approval of Site Plan Review)	DECISION

SUMMARY OF DECISION

Because the proposal does not meet requirements related to minimum parcel size under the municipal code, does not adequately address concerns related to water availability and noise, is duplicative of a previous permit denial from 2016, and the Applicant has been operating without required building and operation permits since that denial, the request for after-the-fact approval of a Site Plan Review to operate a dog kennel/dog breeding operation at 4630 Upper Harbor Drive is **DENIED**.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on May 18, 2020, using remote technology, due to the COVID-19 outbreak. The record was left open until May 21, 2020, to assure that any member of the public having difficulty connecting to the remote hearing would have the opportunity to provide comments on the request and to allow the Applicant to submit additional materials requested by the Hearing Examiner.¹ The Applicant submitted an additional memorandum (Exhibit 50) as requested by the Hearing Examiner and the record closed on May 21, 2020.

Testimony:

The following individuals testified under oath at the open record hearing:

Michelle Pezley, County Senior Planner
Hiller West, County Development Services Manager

¹ Island County Public Works Development Coordinator Bill Poss submitted written comments during this timeframe, having noted that he was unable to provide testimony during the hearing (although he was able to listen to the hearing in real time). Specifically, Mr. Poss noted that he reviewed a revised site plan for the proposal and determined that there was over 70 feet of separation between the kennel facilities and the property line, consistent with requirements of the municipal code related to setbacks. His comments have been included as Exhibit 51. *Exhibit 51*.

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Larry Kwarsick, Applicant Representative
Andrew Scott, Applicant Attorney
John Whitney, Applicant
Else Whitney, Applicant
George Dimoff
Jody Bone
Gherry Taylor
Gretchen Luxenberg
Luther Lund
James Rodman
Baz Stevens
Zachary Reese-Whiting
Sandra Towne
Gerald Thorne
Ina Thorne
Ken Wilcox

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report & Recommendation, dated April 27, 2020
2. Request for Comments, dated April 15, 2019
3. ICGeo Map, with Island County Planning & Community Development: Site Data, undated
4. Island County Planning & Community Development: Site Data – Tax Lot Information, dated April 26, 2020
5. Master Land Development Permit Application, received April 12, 2019, with Application Materials:
 - a. Application for Site Plan Review, Type III Decision, received April 12, 2019
 - b. Letter from John Whiney to Michelle Pezley, dated February 28, 2019, with enclosures
 - c. Kennel Operations Narrative, received April 12, 2019
 - d. Letter of Understanding and Land Lease, dated June 8, 2016, with Parcel Map
 - e. Site Plan, undated
 - f. Vegetation Plan, undated,
 - g. Lighting Plan and Fire Suppression Plan, undated
 - h. Parcel Map with Sound Impact Measurements, undated
 - i. Visual Analysis, with Photographs, undated
 - j. Soil Logs for Parcel No. R23036-209-0540, dated September 11, 1998, and Parcel No. S8175-00-00009-0, dated January 9, 2008
 - k. Septic System As-built Certification, dated June 20, 2016
 - l. Water Availability Verification Application, dated February 17, 2019

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- m. Solid Waste Management Plan, received April 12, 2019
- n. Drainage Narrative, Davido Consulting Group, dated February 2016
- o. Letter from Spencer Keane to John Whitney, dated June 11, 2015
- p. Comment Letters:
 - i. Plat of Skyline West, Division No. 1
 - ii. Email from Paul Tschetter to John Whitney, dated April 23, 2018
 - iii. Memo from Robin Edgeman to Elsa and John Whitney, dated February 20, 2019
 - iv. Email from Denise Clark and Don Carscadden, dated June 16, 2018, with email string
 - v. Email from Christine Clapp, dated June 11, 2018, with email string
 - vi. Letter from Betty Bartholomew to Island County Planning, dated June 10, 2015
- q. Letter from Skymeadow Farm to Tamra Patterson, dated February 28, 2019, with attachments
- r. Letter from John Whitney to Michelle Pezley, dated July 10, 2019, with attachments
- s. Email from John Whitney to Michelle Pezley, dated November 15, 2015, with email string
- 6. Affidavit of Posting, dated April 30, 2019
- 7. Affidavit of Mailing, dated April 18, 2019
- 8. Affidavit of Publication, *News Times/Record*, dated April 30, 2020; Classified Proof, published May 1, 2019; Email from Patricia Shults to Michelle Pezley, dated April 27, 2020, with email string; Classified Proof receipt, No. 85344, dated April 19, 2019
- 9. Staff Report & Recommendation, SPR 276/15, dated January 4, 2016, with attachments:
 - a. Affidavit of Mailing, dated January 4, 2016
 - b. Memorandum from Aneta Hupfauer, dated November 23, 2015, with attachments
 - c. Memorandum from John Bertrand to Michelle Pezley, dated November 16, 2015
 - d. Email from John Clark to Michelle Pezley, dated December 7, 2015, with email string
- 10. Memorandum from Greg Goforth to Michelle Pezley, dated April 11, 2019
- 11. Memorandum from Bill Poss to Michelle Pezley, dated May 17, 2019
- 12. Memorandum from Tamra Patterson to Michelle Pezley, dated May 15, 2019; Letter from Tamra Patterson to Michelle Pezley, dated September 24, 2015; Letter from Tamra Patterson to Michelle Pezley, dated October 31, 2017
- 13. Memorandum from Clea Barenburg to Michelle Pezley, dated May 23, 2019
- 14. Memorandum from Clea Barenburg to Michelle Pezley, dated May 31, 2019
- 15. Letter from Michelle Pezley to Larry Kwarsick, dated June 13, 2019
- 16. Memorandum from Clea Barenburg to Michelle Pezley, dated August 8, 2019
- 17. Memorandum from Bill Poss to Michelle Pezley, dated August 9, 2019
- 18. Island County Inadvertent Discovery Plan, undated
- 19. Draft Home Industry Agreement, undated

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20. Comment from Jody Bone, dated May 3, 2019
21. Comment from Duane Spangler, dated May 1, 2019; Email from Duane Spangler to Michelle Pezley, dated May 7, 2019
22. Comment from Luther and Tricia Lund, dated May 5, 2019
23. Comment from Gerald and Ina Thorne, received May 6, 2019, with four (4) photos
24. Comment from Baz Stevens, dated May 7, 2019, with attached letters and emails
25. Comment from Nadine and Ken Wilcox, dated April 29, 2019
26. Comment from Gretchen Luxenberg and Leigh Smith, dated May 6, 2019, with attached email from Gretchen Luxenberg to Michelle Pezley, dated May 15, 2019
27. Comment from James Rodman, dated May 8, 2019
28. Comment from Fred Johnson, dated May 9, 2019
29. Comment from George Dimoff, dated May 9, 2019
30. Comment from Ralph and Connie Brotherton, dated May 10, 2019
31. Comment from Sandra Towne, dated May 10, 2019
32. Comment from Michele Guinn, dated May 13, 2019
33. Comment from Melinda and David Gardiner, dated May 13, 2019
34. Comment from Gherry Taylor, dated May 14, 2019
35. Comment from Somrack Jaion, dated May 14, 2019
36. Comment from Donna Taylor, dated May 12, 2019, with attached letters
37. Comment from Richard Weiss, dated May 15, 2019
38. Comment from Gherry Taylor, received May 16, 2019
39. Email from Baz Stevens to Michelle Pezley, dated May 15, 2019, with email string; Letter from John Clark, Island County Code Enforcement, to John Whitney, dated June 6, 2016, with Cease and Desist Order #10382, posted May 20, 2016, with Certified Mail
40. Email from Baz Stevens to Michelle Pezley, dated July 6, 2019
41. Email from Baz Stevens to Michelle Pezley, dated July 11, 2019, with attachments
42. Staff Report Letter, mailed May 8, 2020
43. Comment from Baz Stevens, dated May 14, 2020
44. Comment from Sandra Towne, dated May 15, 2020
45. Memorandum on “Timely and Reasonable Water Service,” Washington State Department of Health, dated January 2017
46. Chapter 9.60 Island County Municipal Code (Public Disturbance Noise Control) excerpts; WACs 173-60-060, -080, and -110
47. County-Wide Water Supply Policies, excerpt
48. Letter from John Whitney, dated May 12, 2020, with attachments
49. Email from Aneta Hupfauer, March 4, 2020
50. Memorandum from Larry Kwarsick, dated May 20, 2020, with attachments
51. Email from Bill Poss, dated May 18, 2020

Based upon the admitted testimony and exhibits, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Background

1. John and Else Whitney (Applicant) own a 2.4-acre lot (2.5 acres counting the right-of-way) at 4630 Upper Harbor Drive, where they have housed 30 or more dogs that are used in relation to their dog breeding business since approximately 2012. In 2015, Island County (County) received several complaints about the property and issued code violations related to noise and for operation of the facility without required building and operation permits. Accordingly, the Applicant applied for Site Plan Review (SPR) approval and, on August 24, 2015, the County determined the SPR application was complete (No. SPR 276/15). At that time, administrative review of the SPR application was required and, on January 4, 2016, the County denied the SPR application. *Exhibit 9.*

2. In denying the 2015 SPR application, the County determined, specifically, that:
 - The proposal would not meet the minimum lot size requirements related to operation of a kennel as a home industry in the Rural zone.
 - The property would not have adequate water service. The Skyline West Community Club water system serves the property and conveyed that it would not provide water to serve the commercial business on-site. The Applicant stated that it was working with the Skymeadow Farm water system to provide water for the commercial business, but the Skymeadow Farm water system is not approved to serve the property, and the Skymeadow Farm water system would need its governing documents (specifically related to its service territory and the number of connections allowed to be served) to be amended to serve the property.
 - Concerns expressed by neighboring property owners indicate that the site is not physically suitable to address issues related to the intensity of use.
 - The County's Code Enforcement Officer determined the use creates an inordinate amount of noise and a significant public disturbance.
 - The commercial buildings on the property, including the kennel and nursery, do not have necessary building permits.*Exhibit 9.*

3. The record does not reflect that the Applicant appealed the administrative decision. Despite the denial, the Applicant continued (and continues) to operate the commercial business on the property. On June 6, 2016, for instance, the County issued a Cease and Desist Order (#10832) specifically noting that the Applicant "continued operation of a Home Industry after the disapproval of SPR 276/15" and that "no additional activities considered in association with any dog breeding/selling business can occur on the subject parcel without express permission from the Planning Director." *Exhibit 39.* The

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Applicant also supplied a letter from Island County Animal Control related to a site visit on August 29, 2018, and a compliance report from the American Kennel Club, dated July 24, 2018, both indicating that over 30 dogs are housed on the property despite the Applicant's failure to obtain necessary County permits. *Exhibit 48.*

4. In May 2016, the County code was amended to require kennels to meet Home Industry criteria and Institutional Use criteria, as well as require a minimum lot area of five acres. *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 9; Exhibits 9.a to 9.d; Exhibit 9.*

Application and Notice

5. In 2017, the Applicant submitted a Type II Site Plan Review application (No. 354/17) but did not complete the application process. On April 12, 2019, Larry Kwarsick, on behalf of the Applicant, submitted a new Type III Site Plan Review application (No. 131/19). The Applicant's current request is for approval of Site Plan Review to operate a 2,160 square foot dog kennel on their property along with a 240 square foot nursery. The Applicant leases approximately 7 acres of an adjacent property, owned by Julie Ann Pecha, and the lease agreement related to that property has been included with the application materials. In addition, the Applicant included a memorandum, dated July 10, 2019, in which it requested that the application be "reviewed in an unconventional manner" because building permits for the kennel and nursery would be unnecessary if the SPR permit is denied, and resolving the water availability issue would be unnecessary in light of a permit denial. Accordingly, the Applicant requested that review occur without regard for required building permits or water availability because such issues could later be resolved following a decision on the current application.² *Exhibit 1, Staff Report, pages 2, 3, 7, and 19; Exhibit 5.*
6. The County determined that the application was complete on April 15, 2019. On April 18, 2019, the County mailed the Notice of Application to property owners within 300 feet of the subject properties, with a comment deadline of May 15, 2019. On April 30, 2019, the Applicant posted the Notice of Application on the property. The next day, the County published notice of the application in the *Whidbey News Times* and *Whidbey Record*. The County published notice of the open record hearing associated with the application in the *Whidbey News Times* and *Whidbey Record* on April 29, 2020. As detailed more fully below, the County received approximately two dozen comments in response to its notice materials, mostly opposing the application. *Exhibit 1, Staff Report, page 5; Exhibits 6 through 8; Exhibits 20 through 41; Exhibit 43; Exhibit 44.*

² The Applicant's property is identified by Tax Assessor Parcel No. S8175-00-00009-0. The leased property is identified as No. R23036-209-0540. *Exhibit 1, Staff Report, page 3.* A legal description of the property is included with the application materials. *Exhibit 5.*

State Environmental Policy Act

7. The County determined that the proposal was exempt from State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), review under Washington Administrative Code (WAC) 197-11-800 as a commercial building under 4,000 square feet. *Exhibit 1, Staff Report, page 4.*

Comprehensive Plan and Zoning

8. The County Comprehensive Plan designates the property as “Rural Lands.” The purpose of the Rural designation is “to permit land uses that are compatible with the rural character and to preserve open space, agricultural opportunities, recreational opportunities, and the protection of natural resources.” *Comprehensive Plan, page 33.* The County values its rural character and “seeks to foster land use patterns that support traditional rural lifestyles.” *Comprehensive Plan, page 33. Exhibit 1, Staff Report, page 4.*
9. The property is zoned Rural (R). The Rural zone is the principal land use classification for Island County. Limitations on density and uses are designed to provide for a variety of rural lifestyles and to ensure compatible uses. *Island County Code (ICC) 17.03.060.* The proposed use is subject to the County code’s home industry standards (*ICC 17.03.180.J*), institutional use standards for kennels (*ICC 17.03.180.L.10*), as well as land use standards (*ICC 17.03.180.A, P, Q, R, and S*). In addition, ICC 16.15.060 provides that no application for a non-residential (NR) use in the rural, rural residential, rural agriculture, rural forest, or commercial agriculture zones shall be approved unless a specific finding is made that the proposed use is appropriate in the location for which it is proposed. ICC 16.15.080 also provides that no application for site plan review shall be approved unless it meets the requirements of Titles 8, 11, 13, and 17 ICC pertaining to such development. *ICC 16.15.080. Exhibit 1, Staff Report, pages 4 and 6 through 18.*

Existing Site and Surrounding Development

10. As explained above, the Applicant owns the 2.4-acre parcel on which the commercial dog breeding operation is located and is leasing an adjacent parcel that is approximately seven acres. There is a type N (non-fish) stream located south of the subject parcel with a 75-foot buffer. The existing and proposed uses are located outside of the 75-foot perennial stream buffer. Property to the north, east, south, and west is also zoned Rural, with single-family residences to the east, south, and west and with vacant property and single-family residences to the north. *Exhibit 1, Staff Report, pages 2 through 7; Exhibit 10.*

Site Plan Review

11. Site Plan Review is governed by Chapter 16.15 ICC. The County reviewed the proposal against the criteria related to approval of Site Plan Review for non-residential uses in the

Rural zoning district for a dog kennel – which the County has determined is both a “Home Industry” and “Institutional” use – and determined:

- The reasons for the previous denial of the application have not changed. The property is within the Skyline West Community Club water system, which has stated that it will not provide service for the commercial operation of the kennel on the property. The Applicant has installed a water connection to the Skymeadow Farm water system to service the kennel without necessary County approval. The Skymeadow Farm water system has not been approved to provide this additional connection, and the Applicant would need to submit a Water System Review to change the water system boundaries and ensure adequate water is available to serve the facility.
- The County Building Department has determined that the business owner has never applied for a building permit for the kennel building, nor for several other structures on the property.
- County Public Health does not have an approved Water Availability Verification associated with the kennel. In addition, Public Health does not have a septic system application approving the water connection to the Skymeadow Farm water system.
- The Applicant’s property, standing alone, does not meet the minimum lot size requirements for operation of a kennel, as required by ICC 17.03.180.L.10. With use of the lease related to the adjacent property, however, this requirement may be met.
- County Public Health has approved a Solid Waste Management Plan for the proposal, but additional information about water availability and the septic systems on-site is necessary.
- The proposal would meet the definition of “Rural Character” in the Comprehensive Plan because it promotes an opportunity to both live in and work in rural areas.
- Neighbors have expressed concern about ongoing noise related to the proposal. Although fencing exists, additional screening in the form of landscape buffering would be necessary to further address noise impacts. In addition, all dogs should be kept indoors after 5:00 PM.
- Code Enforcement has expressed concern that noise levels associated with a kennel would exceed allowable levels under WAC 173-60-040.

Exhibit 1, Staff Report, pages 14 through 19; Exhibit 49.

Written Comments

12. As noted above, the County received over two dozen written comments in response to its notice materials, mostly opposing approval of the SPR application. Specifically, Jody Bone, Duane Spangler, Luther and Tricia Lund, Gerald and Ina Thorne, Baz Stevens, Nadine Wilcox, Gretchen Luxenberg and Leigh Smith, James Rodman, Fred Johnson, George Dimoff, Ralph and Connie Brotherton, Sandra Towne, Michelle Guinn, Melinda

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and David Gardiner, Gherry Taylor, Somrack Jaion, Donna Taylor, and Rick Weiss provided written comments expressing opposition to the proposal. In particular, these area residents expressed concern over:

- Potential impacts to the Skymeadow Farm and Skyline West Community Club water systems and concern over the Applicant's failure to obtain approval of its use of the Skymeadow Farm water system prior to connecting to it. Cross contamination and depletion of area aquifers for a commercial use are also a concern.
- Appropriate waste management and disposal of animal waste.
- The continued operation of the facility, despite the permit denial in 2016 and issuance of a Cease and Desist Order that same year.
- Noise impacts from operation of the facility.
- Impacts to property values.
- The Applicant's property failing, on its own, to meet the 5-acre requirement associated with operation of a kennel and the inadequacy of using leased property to meet the requirement, including the precedent that this sets.
- The County's inability to adequately enforce the municipal code and concerns that, if approved, the Applicant would be able to continue operations indefinitely without obtaining required permits.
- Environmental impacts from the use, including impacts to the stream adjacent to the property.

Exhibits 20 through 41; Exhibit 43; Exhibit 44.

13. The Applicant submitted additional materials prior to the open record hearing in response to the notice materials and staff report. These materials include letters of support from other area residents including Paul Tschetter, Robin Edgman, Denise Clark and Don Carscadden, Chris and Robert Clapp, Betty Bartholomew, and Randy Vanaddison. In addition, as noted above, the Applicant included a letter from Island County Animal Control related to a site visit on August 29, 2018, in which the Animal Control Officer noted that noise did not appear to be a significant problem, as well as a compliance report from the American Kennel Club, dated July 24, 2018, in which all dogs on the property were found to be appropriately cared for and in excellent health. *Exhibit 48.*

Hearing Testimony

14. Applicant Representative Larry Kwarisck testified that the Applicant acknowledges that, typically, site plan review or review of a conditional use permit normally occurs prospectively, prior to development occurring. Here, however, review is occurring retrospectively because the Applicant began operation of the commercial dog breeding business on the property prior to realizing that permits would be necessary. Mr. Kwarisck stated that the Applicant understands that the water availability issues would need to be resolved following permit approval such that the kennel operation would be served by the Skymeadow Farm water system in light of the Skyline West water system

denying the Applicant's request to connect the kennel operation to its system. In addition to the potential expense associated with amending the water system agreements, Mr. Kwarsick acknowledged that other significant expenses would be necessary to bring the property into compliance with municipal code and building code requirements but the Applicant would like to avoid undertaking such expense if the SPR permit is denied because it would cease operations of the dog breeding business were that to occur. Mr. Kwarsick also testified that, while noise has been brought up as a concern, it is unclear from the municipal code whether the Applicant would be required to meet the requirements related to noise in the Washington Administrative Code or, instead, meet the requirements associated with nuisances under the municipal code. He stressed, however, that an animal control officer for the County visited the site and reported that noise did not appear to be a significant concern. *Testimony of Mr. Kwarsick.*

15. Area resident George Dimoff testified that he is concerned that cease and desist orders were issued for the property, related to the kennel facilities, but the County did not follow through on enforcement of these orders and has allowed the Applicant's operations to continue for more than five years without obtaining necessary permits. He stressed that the Applicant's property being connected to two different water systems is not legal and that the Applicant knew or should have known that the Skyline West water system would not allow connection to its system for the kennel because commercial use of water under that system is not allowed. Finally, Mr. Dimoff expressed concern over fire suppression for the unpermitted buildings in use on the property. *Testimony of Mr. Dimoff.*
16. Jody Bone testified that she lives nearby and has witnessed water pooling at the base of the Applicant's driveway during the summer, which seems like a waste of water resources. She also expressed concern over materials from the dog kennel operation being dumped in the stream buffer on the property. Ms. Bone noted that the water in the area is intended for single-family residential use and, accordingly, operation of a commercial kennel/dog breeding operation is a concern in light of the limited water resources available. *Testimony of Ms. Bone.*
17. Gherry Taylor testified that he is a member of the Skyline West board and a resident of the Skyline West community. He expressed concern that this review process has been ongoing for over five years without a resolution, that the Applicant has continued operating the facility during this time, and that this sets a dangerous precedent for other potential home industry or institutional uses in the future. Mr. Taylor stated that the noise impacts from barking dogs are significant and that this has detrimental impacts on property values in the area. Finally, Mr. Taylor stressed that the Applicant knew or should have known that commercial use of the Skyline West water system would not be allowed and that he is concerned with the potential of cross-connections or cross-contamination that currently exists with multiple water systems serving the same property. *Testimony of Mr. Taylor.*

18. Gretchen Luxenberg testified that she agrees with County staff's recommendation that the permit be denied. She stressed that the Applicant's current connection to the Skymeadow Farm water system is not legal and that this issue must be resolved before any permit approval could occur. Ms. Luxenberg further noted that the County lacks the resources to appropriately monitor the property and that, because of this, conditional approval of the SPR would create problems and put the onus of "monitoring" compliance with approval conditions on neighboring property owners. Finally, she stated that the requirement under IMC 17.03.180.L.10 of a minimum parcel size of 5-acres should be strictly interpreted and that it is inappropriate to circumvent this requirement through counting acreage on additional leased property. *Testimony of Ms. Luxenberg.*
19. Luther Lund testified that he lives approximately a half-mile from the subject property and, despite this, is frequently disturbed by the noise coming from the kennel operations. He stressed that a 15-foot landscape barrier would have little impact on diminishing the sound impacts created by the use. Like others, Mr. Lund expressed concern over the precedent this process would create, if approved, because it would encourage others to move forward with proposal prior to obtaining necessary inspections and permits. *Testimony of Mr. Lund.*
20. James Rodman testified that he lives just outside the mandatory notification area but is aware of the kennel operations because of the noise that is created by the use. He explained that, in purchasing his property, he was attracted to the idea that no commercial uses would be allowed in the area based on the size of the parcels. In addition, Mr. Rodman stressed that, whether the kennel operations are on the Skyline West water system or Skymeadow Farm water system, the wells are in close proximity to each other and it would be valuable to determine what impacts a commercial use would have on the associated aquifer or aquifers, information that has not been provided. *Testimony of Mr. Rodman.*
21. Baz Stevens testified that the issue of counting leased property toward the 5-acre minimum parcel size is a serious concern. He also stressed that the Applicant previously applied for SPR review, which was denied, and yet operations have continued on the property continuously since that time. Mr. Stevens testified that he does not believe there is adequate room to provide an appropriate vegetative barrier for sound along the property boundary and, like others, that the issue of water availability is a major concern that has not been adequately addressed. *Testimony of Mr. Stevens.*
22. Zachary Reese-Whiting testified that he is concerned with how pet waste is disposed of on the property. In addition, he expressed concerns over the water availability situation and the issue related to the 5-acre minimum parcel size. *Testimony of Mr. Reese-Whiting.*

23. Sandra Towne testified that she lives in the Skyline West subdivision and has a background in landscape architecture and land use planning. In relation to noise, she testified that a 15-foot vegetative buffer would provide some visual relief for adjoining properties in relation to the kennel operations but would be woefully inadequate in terms of providing sound attenuation. Ms. Towne also stated that, in her view, the requirement under IMC 17.03.180.L.10 related to parcel size should be strictly construed and that it is highly unusual to allow such a requirement to be satisfied through the addition of leased property. She also discussed the concerns, expressed by others, related to the two water hookups currently being used on the property and the potential for cross-contamination because of water pressure differential between the two systems. Finally, Ms. Towne stressed that she finds it very disconcerting that the Applicant has been allowed to continually operate its facility during the last five or six years since the previous permit request was denied. *Testimony of Ms. Towne.*
24. Ina Thorne testified that she concurs with the testimony of other area residents and, in particular, is concerned about the water availability issues and the issue concerning the minimum parcel size. She objects to the proposal. *Testimony of Ms. Thorne.*
25. Ken Wilcox testified that noise from barking dogs is a constant issue. He also stressed that the Applicant appears to be disregarding requirements under the Clean Water Act, and other regulations, in relation to its management of a sheep flock on the leased property because waste is piled up and allowed to impact the adjacent stream. Mr. Wilcox also stated that other area residents have paid appropriate fees for permits and have had their properties assessed, for taxation, on the presence of legal permitted structures and it is unjust that the Applicant is not being held to the same standard. Finally, Mr. Wilcox reiterated concerns over the water availability situation and proper disposal of pet waste for the property. *Testimony of Mr. Wilcox.*
26. Applicant John Whitney testified that he and Else Whitney lived on an adjacent partial from 1997 to 2012 or 2015 and operated a dog kennel and breeding operation on that property, under a conditional use permit, without incident. He stated that, when they moved to the current property, they decided to cease operations as a boarding kennel (i.e., kennel operation being used to house other people's dogs) and instead focus just on breeding. As a result, they did not realize they needed SPR approval or building permits for that use. After the County received complaints, they applied for SPR approval in 2015 but were told insufficient information had been provided to warrant approval. Since that time, they have been working with the County to get to a point at which approval is possible. Significant costs, however, would accrue to obtain a water availability certificate and bring the kennel building up to current requirements under the energy code and the Applicant would like to have a decision on the SPR before spending money on these issues. In response to public comments, Mr. Whitney testified that any water that

pools on the property is not from the Skyline West system and is more a function of soil conditions and topography, not water waste. He also noted that the Applicant does not dump dog waste into the critical area buffer and that a representative of the Whidbey Island Conservation District visited the property and determined that they have employed best farming practices in relation to their tending to the flock of sheep on the adjacent, leased property. Mr. Whitney stated that the 5-acre minimum parcel size is a County requirement and the County itself suggested this requirement could be met through documentation of the Applicant's lease arrangement with the adjoining 7-acre parcel. Mr. Whitney also testified that he did not realize they would have to "defend" themselves but submitted an additional exhibit in advance of the hearing (Exhibit 48) that included letters of support from several neighboring property owners. *Testimony of Mr. Whitney.*

27. Applicant Else Whitney testified about operation of the facility and how noise is not a significant problem in light of the procedures that the Applicant has in place for dealing with the dogs. *Testimony of Ms. Whitney.*
28. Attorney Andrew Scott explained that he has worked with the Applicant on issues related to the Cease and Desist Order that was issued and with the water availability issues. He stated that he communicated with the County Prosecutor's Office after the Cease and Desist Order was issued and that the Applicant took steps to limit commercial operations from that time on. This was accomplished through having breeding take place off-island and commercial sales occurring off-site at an office. He noted that the Prosecutor's Office determined these steps would be sufficient to comply with the Cease and Desist Order until the current permit review has concluded. In terms of the water availability issues, he explained that the two water systems, the Skymeadow Farm system and the Skyline West system, are totally separate and that separate infrastructure exists on the property providing connections to both systems. From a legal standpoint, Mr. Scott explained that the territorial area of the two systems would need to be adjusted to allow the Applicant use of the two systems: the residence would continue to be served by the Skyline West system while the kennel operations would continue to be served by the Skymeadow Farm system. Mr. Scott stated, in response to a question from the Hearing Examiner, that he did not believe that any restrictions or covenants existed that would preclude the Skymeadow Farm system from legally providing water for the kennel operations and that the "territorial area" of each system is the only issue that actually needs to be resolved. Mr. Scott also explained that he helped the Applicant's with the current lease agreement for the neighboring property and argued that he does not believe it to be unusual to meet a minimum lot size requirement through aggregation of separate parcels, through ownership or lease agreements. Finally, he noted that there would be significant expenses associated with obtaining necessary building permits and the Applicant would prefer to wait until it knows whether SPR approval is possible prior to incurring such expenses. *Argument of Mr. Scott.*

29. In response to public comments, Mr. Kwarisick testified that he believes it should be the Skyline West water system's or the County's burden to amend or assist in addressing the territorial area issues because, under the law, a property owner has a right to seek alternative sources when a request for service is denied and that the party denying service has an obligation to assist in that process. Mr. Kwarisick stated his view that, under the municipal code, there is the possibility of a "home industry kennel" that would only require a 2.5-acre parcel versus an "institutional kennel" which would require a 5-acre parcel. He explained that, in his view, a non-profit organization seeking to shelter rescue dogs would be an example of the latter type whereas the Applicant's operation should be viewed as the former. He believes the 5-acre requirement would only be triggered in this instance if the Applicant's had two or more non-family members employed on-site, which they do not.³ Finally, he noted that the Applicant operated its kennel business for years without complaint and he is confident that all necessary permits can be obtained in a timely manner if the SPR is approved. *Testimony of Mr. Kwarisick.*
30. County Senior Planner Michelle Pezley testified generally about the proposal and whether it would meet the requirements for SPR approval under the municipal code. She noted that the County recommends denial of the application, specifically because the water availability issues have not been adequately addressed. In addition, as is explained in the provided staff report, without building permit applications, County staff is not able to determine whether the buildings on the property meet building codes and safety requirements for a commercial activity. While the Applicant requests approval of the site plan review, with a list of conditions, to rectify the violations, it is the County's practice to ensure that the violations are fixed prior to issuance of a land use decision. If the SPR was approved, it would be difficult to hold the property owner to the proposed conditions of approval. *Testimony of Ms. Pezley; Exhibit 1, Staff Report, pages 2 and 19.*
31. In response to a question from the Hearing Examiner, County Development Services Manager Hiller West testified that the County recognizes that there is a difference between property owned outright in a "fee simple" manner and leased property. He stated that, although the County told the Applicant that it would be possible to use the adjacent, leased property to meet the 5-acre requirement, this was not a "formal" code interpretation to which the Hearing Examiner should grant deference and, ultimately, the Hearing Examiner has the authority to make an independent determination about this requirement. *Testimony of Mr. West.*

³ Mr. Kwarisick, at the Hearing Examiner's request, submitted a memorandum after the hearing further elaborating on this point. *Exhibit 50.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted authority by the County Commissioners to receive and examine available information, conduct public hearings and prepare a record thereof, and enter decisions on applications for Type III Site Plan Reviews. *ICC 16.13.110.B.4; ICC 16.19.040, Table A and Table B; ICC 16.19.180.*

Criteria for Review

Site Plan Review

- A. No application for site plan review shall be approved unless it meets the requirements of this section. No development pursuant to an approved site plan shall be undertaken unless it meets the requirements of titles 8, 11, 13, and 17 pertaining to such development.
1. Open space. Provide open space in the amount required by chapter 17.03 or chapter 17.06, as applicable. The location, use and design shall meet the following standards:
 - a. Include critical areas designated and regulated by chapter 17.02B; and
 - b. Include areas of prime soils identified by NRCS.
 2. Site lay-out. The location of the development, parking, landscape screening and buffers shall meet the requirements of chapter 17.03 or chapter 17.06, as applicable and following standards:
 - a. Locate development to minimize the amount of disturbance to natural features and landscape;
 - b. Development shall be located so as to minimize the amount of agricultural land loss and shall not be located on prime soils.
 3. Lighting. Shall comply with the requirements of chapter 17.03 or chapter 17.06, as applicable.
 4. Building design. Shall comply with the applicable non-residential design guidelines set forth in chapter 17.03 or chapter 17.06, as applicable, except that for essential public facilities the approving authority may waive design requirements as determined by the approving authority to be necessary and appropriate to the type and location of the essential public facility.
 5. Surface water drainage. Shall meet the requirements of chapter 11.03 and special attention shall be given to proper site surface drainage so that site drainage will enhance groundwater recharge and not adversely affect downstream properties and the site.
 6. Utility services. Wherever feasible, electric, telephone, and cable utility lines shall be underground.

7. Advertising features. The size, location, design, color, texture, lighting, and materials of all exterior signs and outdoor advertising structures or features shall be harmonious with the design of proposed and existing buildings and structures and surrounding properties and shall comply with the requirements of chapter 17.03 or chapter 17.06, as applicable.
 8. Traffic and circulation. Shall comply with the requirements of chapter 17.03 or chapter 17.06, as applicable.
- B. The above criteria shall be in addition to any standards or requirements established by applicable state and county laws or ordinances. They are not intended to be absolute in nature or to discourage creativity and innovation. The approving authority shall have the authority to modify the standards contained within these criteria when found necessary. However, said modifications shall be made only to ensure that the proposal is adapted to any unique or special site features and is compatible with surrounding land use; provided, that for proposals which require only administrative site plan approval, the Planning Director may waive and/or modify certain of the criteria for approval as appropriate to the limited scale and impact of the project.

ICC 16.15.080.

Home Industry

A home industry shall meet the requirements of this chapter and the following standards:

- a. In order to establish a new home industry, the property owner shall sign an agreement that:
 - (i) Acknowledges the requirements of this section; and
 - (ii) Agrees that the home industry will be discontinued or brought into strict conformance with the requirements of this section upon notification from the director of any violation of this section.
 - (iii) The owner(s) of a home industry shall certify compliance with conditions of approval.
 - (iv) When the business no longer complies with the criteria established above and the conditions included in any approval, the business shall relocate to a zoning classification which would permit the activity. Such conditions shall be recorded by the owner against the title of the property with the Island County Auditor.
- b. Minimum parcel size shall be two and one-half (2.5) acres gross site area if no more than two (2) full time, non-family employees are employed on site; otherwise the minimum parcel size shall be five (5) acres.
- c. A site plan is approved pursuant to chapter 16.15.

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- d. To qualify as a Type II application, no more than two (2) full-time non-family member employees who reside off the subject property may be employed on-site. More than a total of five (5) full-time employees who reside off the subject property and either work on-site or report to work on-site is prohibited.
- e. More than one (1) home industry may be authorized on a single parcel provided that the total number of employees and gross square feet is not exceeded.
- f. The owner(s) of the business(es) shall be a full-time resident of the lot, tract or parcel proposed for the home industry, except in the Commercial Agricultural Zone where the owner shall be a full-time resident of the contiguous ownership in the vicinity.
- g. No on-site direct retail sales of products not produced on-site are allowed, except for antiques.
- h. All activity related to the conduct of the business or industry shall be conducted within an enclosed structure unless totally screened from view, as approved on the site plan. The outside storage of vehicles, supplies, or materials shall be justification for the imposition of additional requirements as a condition of site plan approval.
- i. A Type II application shall be limited fifty (50) percent of the gross floor area of the dwelling unit but no greater than 800 square feet. A Type III application, shall be required for activities greater than 800 square feet or fifty (50) percent of the gross floor area of the dwelling unit limit but less than a maximum 4,000 square feet gross floor area. Properties which are ten (10) acres or greater may exceed the 4,000 square foot maximum allowable area, provided that the use complies with all applicable county standards.
- j. More restrictive noise standards may be established for specific NR uses in the Rural, Rural Residential, Rural Agriculture, Rural Forest, or Commercial Agricultural Zones.
- k. There shall be no external evidence of any incidental commercial activities taking place within the building.
- l. Only those buildings or areas specifically approved by the county may be used in the conduct of the business.
- m. All home industry activities, parking areas and structures shall be totally screened from the view of adjacent properties, using landscaping, fencing, the retention of native vegetation, or a combination thereof.
- n. The minimum building setback for nonresidential structures from all property lines is fifty (50) feet, which may be increased at the discretion of the approving authority to specific minimize impacts.

- o. Home industries shall comply with the non-residential rural design, landscape, open space, screening, buffering, signage, parking, and lighting standards set forth in this section.
- p. For any home industries the county shall impose such reasonable conditions as may be found necessary to ensure that the activity or use does not disrupt adjacent permitted uses.

ICC 17.03.180.J.2.

Institutional Uses

Institutional uses may be established as permitted or conditional uses as specifically enumerated in the applicable zone. Provisions shall be made for multi-modal access including transit access or transit stops, and include provisions for non-motorized access to the development as appropriate for the nature and scale of the project. An institutional use shall meet the requirements of this chapter and the following standards:

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- 10. Kennels and animal shelters are subject to the following standards:
 - a. The minimum parcel size shall be five (5) acres.
 - b. All kennels, runs and other facilities shall be designed, constructed, and located on the site in a manner that will minimize the adverse effects upon the surrounding properties. Among the factors that shall be considered are the relationship of the use to the topography, natural and planted horticultural screening, the direction and intensity of the prevailing winds, the relationship and location of residences and public facilities on nearby properties, and other similar factors.
 - c. Animals being kept on the premises shall be allowed outside only between the hours of 7:00 a.m. and 7:00 p.m.
 - d. Animals shall be sheltered in suitable, noise attenuating, clean structures.
 - e. All waste shall be disposed of in a sanitary manner as approved by the Island County Health Department.
 - f. If animals are kept or let outside unleashed, they shall be kept in a fenced and screened enclosure.
 - g. Kennels and animal shelters shall comply with the non-residential rural design, landscape, open space, screening, buffering, signage, parking, and lighting standards set forth in this section.
 - h. Visual screening, increased setback, increased lot size and other conditions may be required by the approval authority taking into account safety, noise and odor factors.

ICC 17.03.180.L.

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Non-Residential Conditional Uses

Except for essential public facilities, no application for a NR use in the rural, rural residential, rural agriculture, rural forest or commercial agriculture zones shall be approved unless a specific finding is made that the proposed conditional use is appropriate in the location for which it is proposed. This finding shall be based on the following criteria:

- A. The proposed use shall not result in a significant adverse environmental impact that cannot be mitigated by reasonable mitigation measures.
- B. The use will be adequately served by and will not impose an undue burden on any of the improvements, facilities, utilities, or services existing or planned to serve the area.
- C. The proposed development/use is one (1) conditionally permitted within the subject zone and complies with all of the applicable provisions of this chapter and all other applicable regulations, including prescribed development/performance standards and all applicable development standards and design guidelines;
- D. The subject site is physically suitable for the type, density and intensity of the use being proposed;
- E. The location, size, design and operating characteristics of the proposed development/use would not be detrimental to the neighborhood, nor be detrimental to the public interest, health, safety, or welfare of the County in conformance with the standards of this chapter, chapters 17.02B, and 17.03.
- F. The proposed use and its design fulfill the definition of rural character as defined in chapter 17.03.
- G. Proposals within the rural agriculture or commercial agriculture zones shall not be located on prime agricultural soils or interfere with agricultural use of the land.

ICC 16.15.060.

In approving an application for a nonresidential conditional use in the R, RR, RA, RF, or CA zones, including home industries, the decision-making authority may impose conditions to protect the rural character surrounding the proposed use and to preserve the purpose of the underlying zone. Any such conditions shall be supported by a written finding and have a direct nexus to and be limited to those specific actions necessary to protect the rural character for any specific project. These conditions may include, but are not limited to, the following:

- A. Increasing the required parcel size, buffer width or yard dimensions;
- B. Limiting the height, size, or location of buildings and structures;

- C. Controlling the location and number of vehicle access points;
- D. Limiting the hours and days of operation;
- E. Increasing the number of required off-street parking or loading spaces;
- F. Limiting the number, size, location or lighting of signs;
- G. Requiring fencing, screening, or landscaping to protect adjacent or nearby property;
- H. Prescribing exterior finish for buildings or additions thereto;
- I. Designating areas for open space;
- J. Prescribing a time limit within which to fulfill any established conditions; and
- K. Such conditions shall be recorded against the title of the property with the Island County Auditor.

ICC 16.15.070.

The criteria for review adopted by the County Commissioners implements the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed developments to ensure consistency with County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **The proposed use would not satisfy the requirements of IMC 17.03.180.L.10 related to minimum parcel size for a kennel, under the Institutional Use requirements of the municipal code.** County staff determined that the 5-acre minimum parcel requirement for kennels, under “Institutional Uses,” would be applicable to the proposal. The Hearing Examiner concurs with this assessment. Contrary to Mr. Kwarsick’s assertions, the Hearing Examiner is not convinced that updates to the municipal code were intended to allow for two separate types of dog kennels with differing requirements and treatments under the municipal code (a “home industry kennel” and an “institutional kennel”). Although kennels are listed as a type of use that may be treated as a home industry in the non-exhaustive list provided in IMC 17.03.180.J.2, no other specific information about kennels is provided in this section of the municipal code. IMC 17.03.180.L.10, however, is explicit in the requirements concerning dog kennels. There is no justification to believe that these provisions are conflicting. Instead, it is reasonable to interpret the code such that kennels are allowed as a home industry but that, in addition to the need to meet the home industry requirements, the requirements specific to kennels under the institutional use section of this portion of the municipal code must also be met.

That said, it is inappropriate to allow leased land to be used to satisfy the minimum parcel requirements under the municipal code. As a preliminary matter, the home industry standards themselves provide that more than one home industry “may be authorized on a single parcel provided that the total number of employees and gross square feet is not

exceeded” and that the “owner(s) of the business(es) shall be a full-time resident of the lot, tract, or parcel proposed for the home industry.” *ICC 17.03.180.J.2.e and -f*. In both instances, the home industry standards convey the notion that a single lot or parcel is at issue, that the homeowner lives on the property in question (which makes sense because home industries are meant to be ancillary uses to residential use of a property) and nowhere is the aggregation of land through lease agreements contemplated. Had the County Commissioners desired lease agreements to be considered, the code could have been written to allow for this.

Perhaps even more tellingly, ICC 17.03.040 has definitions for both “lot” and “parcel.” A *lot* is defined as a “fractional part of divided lands having fixed boundaries and being of sufficient area and dimension to meet minimum zoning requirements for width and area.” *ICC 17.03.040 (“lot”)*. A *parcel* is defined as “a legal division or segregation of land including an assessor’s parcel established by the assessor and assigned numbers for assessment purposes.” *ICC 17.03.040 (“parcel”)*. Moreover, the definition for parcel then states “See definition of ‘Lot,’” further supporting the notion that these two definitions are used interchangeably. Importantly, neither definition contemplates a ‘parcel’ meeting zoning requirements through the lease of adjacent lands. Presumably, the County Commissioners intended the use of the word “parcel” in relation to minimum lot size for a dog kennel to relate to the definition of parcel provided in this earlier section of the same chapter of the municipal code. Accordingly, the proposal fails to satisfy the minimum parcel requirements for a kennel under the requirements of ICC 17.03.180.L.10, warranting denial of the SPR request. *Findings 1, 6 – 31*.

- 2. The Applicant has not sufficiently addressed concerns related to water availability, noise, and required inspections and building permits.** The Applicant acknowledges that it is applying for this permit retroactively and that significant resources must be exhausted to ensure water availability is possible as well as upgrades to the kennel facility to meet building code requirements. Receiving SPR approval prior to addressing these concerns is inappropriate, especially because the Applicant has known about these issues for the last five years. There is insufficient evidence in the record concerning what progress, if any, has been made toward resolving these issues since the last time an SPR application for the property was denied. It is clear that the Skyline West water system will not allow water to service the commercial aspects of the property. This has been clear since 2015. It is unclear whether approvals related to use of water from the Skymeadow Farm water system is forthcoming. Moreover, there is insufficient evidence in the record whether use of significant water quantities for a commercial operation in this rural residential area would have detrimental impacts on the aquifer serving the area (or even whether a single aquifer serves both water systems). This information should be considered prior to any further amendments to the water system agreements and, presumably, would be addressed by the State Department of Health’s Office of Drinking Water and by County officials. Prior to a final determination about water availability,

approval of Site Plan Review is inappropriate. Moreover, several neighbors have continued to express concern over noise. The Applicant submitted additional information prior to the hearing minimizing these concerns stressing, in particular, that an animal control officer visited the site briefly on a single occasion. Further information, however, would be necessary prior to SPR approval. The County, for instance, could require a noise study. Because the Hearing Examiner does not believe it is appropriate to approve the proposal prior to water availability issues being addressed (and, in addition, obtaining necessary building permits) further analysis of noise issues is not necessary at this time. Ultimately, however, an applicant carries the burden of persuasion when seeking a permit—especially a retroactive permit—and, in this instance, the Applicant has not taken appropriate efforts to assuage the many concerns raised about noise impacts from the ongoing use of the property for a kennel/dog breeding operation. *Findings 1 – 31.*

- 3. The application is duplicative of a previous permit denial and the Applicant has been operating its facility for over five years, despite such denial, without necessary inspections and permits.** Finally, the record reflects that the Applicant applied for essentially the same permit over five years ago with all of the same information and potential problems. The County denied that permit approval administratively and it does not appear from the record that the Applicant appealed that decision. After a Cease and Desist Order was issued, the Applicant again sought SPR approval. That process began in 2016. Over five years later, very little has changed other than the requirements under the municipal code related to minimum lot size increasing, the requirement for Type III review being necessary, and building standards under the energy code becoming more onerous. It is unclear to the Hearing Examiner why review of a second, nearly identical application to SPR 276/15 has been necessary. Nevertheless, such review has now occurred and, like the County’s administrative decision over five years ago, the Hearing Examiner is left with the impression that insufficient information exists to warrant approval of the SPR application. Specifically, there is insufficient information in the record concerning whether the water availability issues for the property will ever be adequately addressed. In addition, the Applicant has been able to operate its facility (perhaps with some modifications related to breeding and sales) for over five years, seemingly with little consequence, despite proper building inspections never occurring or necessary permits being obtained. This “method” of review is contrary to the spirit and intent of municipal code requirements related to permitting. The Hearing Examiner is unable to potentially compound this situation by approving the SPR with conditions that may or may not be enforced. To be clear, the record does not indicate that the Applicant is mistreating its animals (to the contrary, all indications are that the operations are excellent). It does, however, indicate that the site is not of a suitable size for this type of operation in a rural residential zone and, further, that operations have occurred without necessary inspections or permits, contrary to municipal code requirements. *Findings 1 – 31.*

DECISION

Based on the preceding findings and conclusions, the request for retroactive Site Plan Review approval to operate a dog kennel at 4630 Upper Harbor Drive is **DENIED**.

DECIDED this 5th day of June 2020.

A rectangular box containing a handwritten signature in black ink. The signature appears to read "Andrew M. Reeves" in a cursive style.

ANDREW M. REEVES
Hearing Examiner
Sound Law Center