

August 25, 2021

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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**REPORT AND RECOMMENDATION TO THE
METROPOLITAN KING COUNTY COUNCIL**

SUBJECT: Department of Natural Resources and Parks file no. **E20CT034**
Proposed ordinance no. **2021-0101**
Parcel no. **2225069073**

HAPPY VALLEY EASTSIDE INC.

Open Space Taxation Application (Public Benefit Rating System)

Location: Terminus of NE 31st Way, Redmond
(just beyond Broadmoore Estates subdivision)

Applicant: Happy Valley Eastside Inc.
represented by **Bill Moffet**
703 47th Street SE Unit D-203
Auburn, WA 98092
Telephone: (253) 232-0562
Email: b.moffet@yahoo.com

King County: Department of Natural Resources and Parks
represented by **Megan Kim**
201 S. Jackson Street
Suite 5600
Seattle, WA 98104
Telephone: (206) 477-4788

SUMMARY OF RECOMMENDATIONS:

Department's Recommendation:
Examiner's Recommendation:

Deny the application
Deny the application

PRELIMINARY REPORT:

On July 16, 2021, the Department of Natural Resources and Parks (DNRP) submitted its report on file no. E20CT034 to the Examiner.

PUBLIC HEARING:

After reviewing the preliminary report and examining available information on file with the application, the Examiner conducted a Zoom public hearing on the application on July 29, 2021. The record was left open for additional submittals and we closed the record on August 11, 2021.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

FINDINGS AND CONCLUSIONS:

1. General Information:

Owners:	Happy Valley Eastside, Inc 703 47th Street SE Unit D-203 Auburn, WA 98092
Location:	Terminus of NE 31st Way, Redmond (just beyond Broadmoore Estates subdivision)
STR:	NE-22-25-06
Zoning:	RA-10
Parcel no/s.:	2225069073
Total acreage:	70 acres

2. The Applicant timely filed an application to King County for the Public Benefit Rating System (PBRS) program current use valuation of the property to begin in 2021. As required by law, notification of the application occurred.

3. This is an unusual case. First, it is the only case we recall, in the hundreds of PBRS applications we have held hearings on over the last decade, where DNRP has recommended *denial*.¹ We do not give deference to agency determinations, Exam. R. XV.E.3, but it is noteworthy that while DNRP works with applicants to find an avenue for enrollments, and has always recommended approval in past hearings, here even DNRP concludes the current proposal does not cut it.

4. Second, this is not a scenario where the property lacks environmentally beneficial areas—it is crisscrossed with streams, springs, wetlands, and steep slopes, is covered in forests, open water, and native vegetation, provides habitat for numerous wildlife

¹ We vaguely recall a few others where enrollment looked questionable; but in those scenarios the applicant withdrew the application before we held a hearing.

species, and is adjacent to a wildlife habitat network. Instead, DNRP finds the property ineligible because it has *so many* critical areas that it is not clear the owners are able to provide at more than the regulatory buffers to those critical areas already protect.

5. KCC 20.36.190.E lists properties and areas ineligible for open space classification, including:

Open space areas protected by a native growth, forest retention or other covenant that is required as part of a development process or subdivision, or required by zoning or other land use regulation, except such an area would be eligible if its participation provides further public benefit and there is enrollment of at least ten percent additional open space beyond that restricted or required by applicable covenant or regulation. The additional acreage provided must be acceptable to the department and feature a plant community where native plants are dominant or that will be dominant following the implementation of an approved farm management, forest stewardship, resource restoration or rural stewardship plan.

6. On first blush, the case for enrollment seems easy, because the applicant entered into a conservation easement in conjunction with selling to the transferable development rights (TDR) bank 12 building sites for \$630,000, protecting the site. Unlike native growth or other covenants, conservation easements are *voluntary* measures not required as part of a development process or by a regulation, and thus easements are not inconsistent with KCC 20.36.190.E. In fact, a conservation easement is worth fifteen points, which would, standing alone, earn enough points for a 60% reduction property tax assessment. KCC 20.36.100.C.6. However, subsection C contains *bonus* categories. A property must earn at least five points under subsection B in order to make it past the door and into the PBRs program, where bonus points (and even lower taxes) would be available under subsection C. And therein lies the problem. Because the property is so encumbered with regulatory buffers, is the applicant enrolling at least ten percent additional open space beyond that already restricted by those regulatory buffers?
7. The applicant points to an appraisal done for purposes of the conservation easement and selling TDRs. The appraiser found the property capable of supporting two single-family residences. Ex. A3 at 007. There is at least some upland on the south edge of the property. Ex. A3 at 011. The appraiser identified an upland area, at the southeast corner he felt would be a potential building site. Ex. A3 at 013. However, he also documented the wetland at the base of that upland. Ex. A3 at 14. It is unclear what class wetland that is, what its buffers are, and how far into the uplands the buffer extends. Further west, the appraiser identified another site he believed to be a second potential building site. Ex. A3 at 016-17. But the appraiser was clear that “the buffer from a Category 1 wetland can range from 75ft up to 225ft if the habitat score is over 31 points. The exact boundaries of the wetland are however difficult to determine in the absence of a wetland delineation; the designation on the map is considered to be very approximate.” Ex. A3 at 35. And there are other potential critical areas in the vicinity of the potential building sites he identified, including landslide, steep slope, and erosion hazards. Ex. A3 at 036.

8. That may have been sufficient for purposes of establishing the property's eligibility to be a TDR sending site and for appraisal purposes, but it is not conclusive to our question. First, development in critical area buffers and setbacks may be permitted to allow reasonable use of a property, either through an alteration exception or a variance. KCC 21A.24.070.B; KCC 21A.44.030. So, assuming a single-family residence(s) could have been constructed on the site, that does not tell us about the underlying regulatory buffers. Second, the enrollment area must provide at least 10% more open space than those applicable regulatory buffers already require.
9. The applicant submitted a drawing from an outside person which seems to indicate space in the southwest corner. Ex. A2 at 002. The author of that was not available to testify, and DNRP testified that they spoke with the author, and the author agreed the applicant likely could not show the additional 10% necessary for enrollment.
10. An applicant bears the burden of proof Exam. R. XV.E. And here the applicant has not shown that they are providing enrollment of at least 10% additional open space beyond that restricted or required by applicable covenant or regulation. And a failure to make that 10% showing makes the property ineligible for PBRs. KCC 20.36.190.E.3.
11. That does not mean the property is not eventually enrollable. An actual critical areas study could delineate the critical areas in the vicinity of the southern, upland portions of the property, to establish exactly what is there, the associated regulatory buffers, and how the applicant is voluntarily protecting at least 10% more area than those regulatory buffers already require. But the applicant explained that doing that study could cost more than several years of tax savings. So that might need to wait.
12. The other avenue that could provide more than enough points without requiring any cash outlay would be providing some sort of the public access under one of the categories in KCC 20.36.100.B, like equestrian-pedestrian-bicycle trail linkage or active trail linkage. At this point the applicant is not interested in public access, but the dynamics could change in the future. Nothing we write here today bars a subsequent PBRs application.
13. In sum, we share the applicant's consternation that a property with these environmental attributes would be deemed currently ineligible for participation. But as we wrote in the only case where (over DNRP's objection) we previously recommended against enrollment:

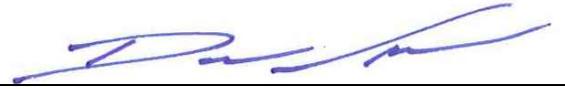
The Council has made the choice that enhancing/protecting fully developable land is worth the tradeoff of either foregoing tax revenue or requiring other, tax-paying properties to bear a larger burden. But as far as we can tell the Council has not made the choice that enhancing/projecting already protected land is worth that tradeoff.²

² https://kingcounty.gov/~media/independent/hearing-examiner/documents/case-digest/applications/Current%20Use/2015/E14CT027_Lauinger.ashx?la=en. That case was a little more ambiguous, because it relied on a policy interpretation. Here the code flat out says that properties not demonstrating enrollment of at least 10% additional open space beyond that restricted or required by applicable regulation are ineligible. KCC 20.36.190.E.3.

RECOMMENDATION:

DENY the application.

DATED August 25, 2021.



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

A person appeals an Examiner recommendation by following the steps described in KCC 20.22.230, including filing with the Clerk of the Council a sufficient appeal statement and a \$250 appeal fee (check payable to the King County FBOD). Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal. KCC 20.22.230 also requires that the appellant provide copies of the appeal statement to the Examiner and to any named parties listed on the front page of the Examiner's recommendation.

Prior to the close of business (4:30 p.m.) on *September 20, 2021*, an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov and a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. If the Office of the Clerk is not officially open on the specified closing date, delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

Unless both a timely and sufficient appeal statement and filing fee are filed by *September 20, 2021*, the Clerk of the Council shall place on the agenda of the next available Council meeting a proposed ordinance implementing the Examiner's recommended action. At that meeting the Council may adopt the Examiner's recommendation, defer action, refer the matter to a Council committee, or remand to the Examiner for further hearing or further consideration.

If a timely and sufficient appeal statement and filing fee are filed by *September 20, 2021*, the Examiner will notify all parties and interested persons and provide information about "next steps."

**MINUTES OF THE JULY 29, 2021, HEARING ON THE APPLICATION OF
HAPPY VALLEY EASTSIDE INC., FILE NO. E20CT034**

David Spohr was the Hearing Examiner in this matter. Megan Kim and Bill Moffet participated in the hearing.

The following exhibits were offered and entered into the hearing record by DNRP:

- Exhibit D1. DNRP report to the Hearing Examiner
- Exhibit D2. Reserved for future submission of the affidavit of hearing publication*
- Exhibit D3. Legal notice and introductory ordinance to the King County Council
- Exhibit D4. Arcview/orthophotograph and aerial map
- Exhibit D5. Application signed and notarized
- Exhibit D6. Proposed uses map
- Exhibit D7. King County iMap
- Exhibit D8. Email, dated April 6, 2021
- Exhibit D9. Email response to appraisal, submitted August 10, 2021

The following exhibits were offered and entered into the hearing record by Appellant:

- Exhibit A1. Site analysis and PBRS application, submitted July 26, 2021
- Exhibit A2. King County iMap with buffers, submitted July 28, 2021
- Exhibit A3. Appraisal for the conservation easement, submitted August 3, 2021

DS/jo