



Community Development Department

Director: Lauren Prentice

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Submit to: planning@co.walla-walla.wa.us

[https://www.co.walla-](https://www.co.walla-walla.wa.us/residents/community_development/index.php)

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NOTICE OF DECISION (NOD)

Date of Notice: 8/26/2021
Applicant: KONEN, CHARLES S
Type of Application: SUBDIVISION
File Number: SUB20-010
Decision: UNDER REVIEW

Pursuant to Walla Walla County Code (WWCC) 14.09.090(F), enclosed is the Hearing Examiner's decision. This decision shall be effective on the date of this notice (WWCC 14.09.090(H)).

Affected property owner(s) may request a change in valuation for property tax purposes notwithstanding any program of revaluation (WWCC 14.090.090(F)(6)).

APPLICATION FILE

The file is available for inspection electronically or in person; please contact our Planning Technician, Tamara Ross, or the assigned planner, Don Sims, by phone at 509-524-2610 or by email at planning@co.walla-walla.wa.us between 10 AM and 3 PM Monday through Friday to make arrangements to access the files.

APPEAL

This decision will be considered final if no appeals are filed within the allowed time frame described in [Walla Walla County Code \(WWCC\) Chapter 14.11, Appeals](#). Firstly, WWCC 14.11.060 allows for the applicant or party of record to seek reconsideration of the final decision. A reconsideration request (appeal) must be submitted to the Director within ten (10) days of this notice. If no reconsideration request is submitted by this date, the decision will be final.

Submittal Requirements for Reconsideration Requests

The following must be submitted to the Department by the end of business (5 PM) on **September 6, 2021** by email to planning@co.walla-walla.wa.us or via the Department's drop-box at 310 W. Poplar, Walla Walla, WA.

- A. [Appeal \(reconsideration\) Application](#)
- B. **Written Notice of Appeal** containing a concise statement identifying:
 1. The decision being appealed;
 2. The name and address of the appellant and his or her interest(s) in the matter;
 3. The specific reasons why the appellant believes the decision to be wrong, including identification of each finding of fact, each conclusion, and each condition or action ordered which the appellant alleges is erroneous. The reconsideration request must

be based on one of the following grounds: (1) A material error of law was made; (2) a material error or omission of material fact was made; (3) new material information is presented that was not knowable at the time of hearing. The appellant shall bear the burden of proving the decision was wrong; and

4. The specific desired outcome or changes to the decision.
- C. The **appeal fee (\$745)**, payable by cash, check, or credit card. If you wish to pay by credit card, notify the department and they will help you make arrangements to pay by credit card once the request is entered into the County's tracking system.

Pursuant to WWCC 14.11.020 and 14.11.040, **after/if** a reconsideration request has been considered, the Hearing Examiner's decision may be appealed to the Walla Walla County Superior Court under the Land Use Petition Act (LUPA), RCW 36.70C. A LUPA petition must be submitted to the Walla Walla County Superior Court within twenty one (21) days of issuance of the final decision (on reconsideration) per RCW 36.70C.040(3), unless another time period is established by state law.



Walla Walla County Hearing Examiner

310 W. Poplar Street, Suite 200, Walla Walla, WA 99362

**BEFORE THE HEARING EXAMINER
FOR
WALLA WALLA COUNTY**

**FINDINGS, CONCLUSIONS AND DECISION
APPROVING**

**PRELIMINARY PLAT APPLICATION FOR
WHISPER ROCK
(9-LOT CLUSTER SUBDIVISION)**

FILE NUMBER: SUB 20-010

OWNER/APPLICANT: Charles S. and Catherine Konen

SURVEYOR: PBS Engineering and Environmental

TYPE OF APPLICATION: Preliminary Subdivision – 9-lot cluster development of 107.6 acres in unincorporated Walla Walla County. The proposed subdivision contains 8 residential lots which would be located off of Beet Road on a new private road built to comply with applicable County road standards; the remaining 91.66 acres would be preserved in a designated resource parcel. The entire project is in the County’s Agriculture Residential 10-acre (AR-10) zoning district.

LOCATION/TAX PARCELS: The 107+ acre project site includes 3 (three) adjoining tax parcels, APNs 350610510017, 350610510018, and 350610510033 west of Beet Road and south of Frog Hollow Road, in unincorporated Walla Walla County.

STAFF RECOMMENDATION: Approval.

SUMMARY OF DECISION: APPROVED, subject to conditions

DATE OF DECISION: August 26, 2021

I. CONTENTS OF RECORD.

Exhibits:

1. Community Development Department Staff Report and Recommendation (of APPROVAL) to the Hearing Examiner regarding the Whisper Rock Preliminary Plat Application File No. SUB20-010, a proposed 9-lot cluster development, prepared by Community Development Department staff, dated July 14, 2021 [hereinafter referenced as the “*Staff Report*”];
2. Environmental Checklist (SEPA20-017) dated October 15, 2020.
3. Final Staff Evaluation Report dated June 25, 2021.
4. Preliminary Subdivision (SUB20-010) application dated October 15, 2020.
5. Preliminary Plat Map 3 dated May 18, 2021.
6. Critical Areas Permit (CAP20-027) application dated October 15, 2020.
7. Geotechnical Engineering Report dated June 15, 2020.
8. Short Plat Certificate (title company report) issued September 25, 2020.
9. Declaration of Restrictive Covenants, signed by Charles and Catherine Konen, dated October 5, 2020
10. Letter from Washington State Department of Archaeology and Historic Preservation (DAHP) dated December 15, 2020.
11. Email from DAHP dated February 22, 2021.
12. Email from Rocky Eastman, Walla Walla County Fire District #4 Fire Chief dated February 19, 2021.
13. Email from Washington State Department of Ecology dated February 23, 2021.
14. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone Subdivision, signed by Steven Shulman, dated December 21, 2020.
15. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone Subdivision, signed by Mike Smith, dated December 21, 2020.
16. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone subdivision, signed by Tom Underhill, dated December 21, 2020.
17. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone subdivision signed by Russ and Lynne Pierce, dated December 21, 2020.
18. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone subdivision signed by Ron Smith, dated December 21, 2020.
19. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone subdivision signed by Justin Mason, dated December 21, 2020.
20. Public comment with Greystone Subdivision map and written agreement regarding water for the Greystone subdivision signed by Cary and Jane Rayment, dated December 21, 2020.
21. Public comment from Rosalind Duthie, dated December 21, 2020.
22. Public comment from Stu Ross, resubmitted February 18, 2021.
23. Public comment from Cary and Jane Rayment, resubmitted February 18, 2021.
24. Public comment from Justin Mason, resubmitted February 18, 2021.
25. Public comment from Ron Smith, resubmitted February 18, 2021.
26. Public comment from Russ and Lynne Pierce, resubmitted February 18, 2021.
27. Public comment from Steven Shulman, resubmitted February 18, 2021.
28. Public comment from Tom Underhill, resubmitted February 18, 2021.
29. Public comment from Mike Smith, resubmitted February 18, 2021.
30. Public comment from Stu Ross, resubmitted February 18, 2021.
31. Public comment from the residents of Brickwood Heights subdivision submitted February 12, 2021.
32. Exhibit A, Declaration for the Greystone water delivery system, resubmitted February 18, 2021.
33. Exhibit B, Map of Brickwood Heights subdivision resubmitted February 18, 2021.
34. Decision by Joy Bader, Walla Walla County Public Works, denying a private road variance, dated March 19, 2021 (with attachments).

35. Memorandum from Charles S. Konen to Don Sims, Associate Planner regarding comments from public regarding water on proposed subdivision, dated March 22, 2021.
36. Cultural Resources Report, by Christopher Landreau, M.S., and Andrew Fleming, M.S., RLR Archaeology and Cultural Resources, LLC, dated June 15, 2021.
37. Preliminary Road Civil Plans dated May, 2021
38. Memorandum responding to preliminary plat comments by Michael Melder, P.E., PBS Environmental and Engineering, dated May 27, 2021.
39. Memorandum from Joy Bader, Walla Walla County Public Works, dated June 9, 2021.
40. Memorandum from Darrell Sowards, Walla Walla County Public Works, dated June 9, 2021.
41. Notice of Public Hearing for July 15, 2021 Public Hearing
42. Agenda of Continued Public Hearing rescheduling from July 15, 2021 to July 27, 2021
43. Certificate of Notification, July 15, 2021 Public Notice
44. Certificate of Notification, Public Hearing Rescheduled to July 27, 2021
45. Public Notice Mailing List sent June 28, 2021
46. Public Notice Mailing List sent July 13, 2021
47. Emails from Don Sims notifying of continued public hearing
48. Written public comments received after Staff Report was issued, entered into the record by Mr. Sims during the public hearing and transmitted to the Examiner.

Testimony/Comments: The following persons participated in the open-record hearing held on July 27, 2021, and provided testimony under oath as part of the record:

1. Donald Sims, Planner, Walla Walla County Community Development Department, summarized the staff report, recommended conditions, responded to public comments;
2. Greg Flowers, with PBS Engineering, the applicant's engineering and survey firm, served as the applicant's primary representative during the public hearing, accepted Staff Report analysis and recommended conditions without objection, offered responses to public comments;
3. Robert Page, local resident, family members own land in vicinity of the proposed plat;
4. Ben Wolfram, local resident, lives east of site along Beet Road, expressed concerns about setbacks, how project might impact those who sometimes shoot firearms into hillside on or near project site;
5. Ben Page, local resident, owns property to east of site, expressed concerns with water resources, potential impacts on irrigation wells used on surrounding properties;
6. Lauren Prentice, Director of the County's Community Development Department, responded to comments about water resources, verified that proposal is designed and conditioned to comply with county codes addressing water use, and that there are no county codes that generally protect private views, other than current height limits (35 feet) for homes and other bulk, setback, and density standards, with which this proposal complies.

The applicant, Mr. Konen, and Jesse Maxwell, were also online to observe the public hearing.

II. SUMMARY OF PROCEEDINGS.

The applicant, Charlie Konen, seeks approval of a development project known as the *Whisper Rock Subdivision*, a 9-lot cluster subdivision preliminary plat of a 107+ acre site, with 8 single-family residential lots and one 91.66-acre lot to be preserved as a designated resource parcel, generally designed to comply with County cluster development requirements found in Chapter

17.31 WWCC, the only type of land division permitted in the County’s Agriculture Residential 10-acre (AR-10) zoning district, where the project is located. (See WWCC 17.31.020(C)).

The original proposal was for a 5-lot subdivision and was the subject of a combination Notice of Application and Optional DNS issued on December 7, 2020. At some point, the applicant revised the application adding additional lots, so a second Notice of Application/ODNS was issued for the 9-lot proposal considered in this Decision. Notices were published, posted and mailed in accord with County practices. (Staff Report, pages 2-3). After considering the application materials, the SEPA Checklist submitted by the applicant (Ex. 2), and any comments received, the County’s SEPA Responsible Official issued a final SEPA Determination of Non-Significance (DNS) for the project on June 29, 2021, which decision was not appealed. (Staff Report, page 3).

III. APPLICABLE LAW.

Jurisdiction.

Under WWCC 2.50.070(A)(1) and (B), the Hearing Examiner is granted jurisdiction and authority to conduct public hearings and issue final decisions for preliminary subdivision applications. The hearing examiner's decision shall be based upon the policies of the comprehensive planning documents of the county, the standards set forth in the various development regulations of the county or any other applicable program adopted by the board of county commissioners. When addressing a preliminary subdivision, the hearing examiner may grant or deny the application, or may attach reasonable conditions, modifications and restrictions found necessary to make the project compatible with its location and to carry out the goals and policies of the applicable comprehensive plan, or other applicable plans or programs adopted by the board of county commissioners. WWCC 2.50.070(C).

Approval Criteria for Preliminary Plat (also known as a preliminary subdivision).

As provided in WWCC 16.14.030, decisions on applications for a preliminary subdivision or preliminary short subdivision shall be based on a determination as to whether:

- A. The proposed subdivision of land complies with the applicable codes, plans and policies in Chapter 16.04.050 or their successors; and
- B. The proposed lots are served with adequate means of access, fire protection, water supplies and means of sanitary sewage disposal; and
- C. The proposed division of land provides adequate measures for the control of drainage and stormwater; and
- D. The public health, safety and general welfare will be served by permitting the proposed division of the land.

WWCC 16.14.050, referenced above, reads as follows:

Applications shall be approved, approved with conditions or denied based on a determination that the application complies with the following adopted county and state rules, regulations, plans and policies, including, but not limited to:

- A. RCW 43.21C SEPA;
- B. RCW 58.09 Survey— Recording;
- C. RCW 58.17 Subdivisions;
- D. RCW 36.70A Growth Management;
- E. RCW 36.70B Local Project Review;
- F. WWCC Title 11 Stormwater;
- G. WWCC Title 12 Streets, Sidewalks, and Public Places;
- H. WWCC Title 17 Zoning;
- I. WWCC Title 18 Environment;
- J. Walla Walla County Shoreline Master Program;
- K. Walla Walla County board of public health rules and regulations;
- L. Walla Walla County Comprehensive Plan; and
- M. This title.

As required by state law, the County’s preliminary plat approval criteria is substantially similar to state subdivision mandates found in RCW 58.17.110(2), which reads as follows:

“A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. []” RCW 58.17.110(2).

Burden of Proof.

As explained in WWCC 14.03.010, applicants for project approvals bear the burden of proof of showing compliance with all applicable standards in the Walla Walla County Code.

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IV. ISSUE PRESENTED.

Whether sufficient evidence demonstrates that the applicant has met its burden of proof to satisfy the criteria for preliminary plat approval?

Short Answer: Yes, subject to conditions of approval.

V. FINDINGS OF FACT.

1. Upon consideration of all the evidence, testimony, codes, policies, regulations, and other information contained in the file, the undersigned issues the following findings, conclusions and Decision approving the Whisper Rock preliminary plat/ cluster subdivision, subject to conditions, as set forth below.
2. Any statements in previous or following sections of this document that are deemed findings are hereby adopted as such, including without limitation the summary of proceedings provided above.
3. The Staff Report and Recommendation of Approval, shared with the Examiner in the week before the hearing, (*the "Staff Report", Ex. 1*), includes a number of findings and conditions suggesting how the underlying plat application satisfies provisions of applicable law, is consistent with the county's Comprehensive Plan, and is designed or conditioned to comply with applicable development standards and guidelines. For reasons explained below, with additional conditions necessary to ensure compliance with applicable County requirements, the Examiner finds that the proposal can be approved.

Summary of Public Hearing.

4. Given the ongoing Covid-19 public health emergency and associated directives and proclamations issued by state and local officials, the public hearing for this matter was conducted on July 27, 2021, using an electronic audio-video communication portal coordinated by County staff, with call-in numbers and participation methods explained in public notices issued and posted on the county's website. Since the public hearing, no one submitted any additional written public comments regarding this matter, and, as of the date of this Decision, the Examiner has not been advised of any requests to submit additional public comments. Accordingly, the Examiner is satisfied that the public has had a full and fair opportunity to participate in this hearing process, including ample time to review the Staff Report, public notices, and application materials, all available on the County's website for several weeks since the hearing. The additional time provided is an appropriate way to ensure that public comment has not been stifled by any real or perceived difficulties presented by the public health emergency situation and its impact on regular office hours

and the like. In any event, the record includes thoughtful analysis by Staff, specific questions and concerns expressed by neighboring property owners, and hearing testimony offered by applicant representatives in response to comments. The record for this matter is sufficient to fully inform the decision maker and is hereby closed. This Decision is now in order.

5. The County's Planner designated to coordinate review of the pending application, Donald Sims, testified at the public hearing to provide a summary of the County's staff review process for the proposed preliminary plat application and staff's recommendation of approval, subject to certain conditions of approval. He explained that the proposal is for a clustered development, which is the only type of residential development allowed in the zone where the property is located. He explained that the review process included consideration and denial of a variance requested by the applicant, regarding the location of a street connection to serve the project. Public Works staff did not support such variance request so it is not included as part the current design under consideration by the Examiner. Mr. Sims noted that the project will receive access via a new private road that connects to Beet Road. He directed attention to the cultural resources report commissioned by the applicant, which found that there are no such resources needing protection or mitigation measures on the project site. (*Ex. 36, Cultural Resources Report*). Finally, Mr. Sims confirmed that all noticing for the project complied with County practices, and that the project is designed to be generally consistent with County cluster development standards that apply to all residential subdivision applications in this Agricultural zone.
6. Mr. Flowers served as the applicant's primary hearing representative and summarized the merits of the proposal. He explained how the lots are designed, located, and set back so as to avoid slope concerns on portions of the project site; that each lot will have individual wells for domestic water, and that irrigation water will be provided from a well to the north. Mr. Flowers accepted the Staff Report analysis and recommended conditions of approval without objection or requests for changes.
7. Robert Page, Ben Wolfram, and Ben Page, expressed general concerns about access, preferred road connections, views, heights of new structures and vegetation like tall trees, water resources, setbacks, agricultural equipment access, and using a part of the applicant's property as a place to shoot firearms. A written email comment from Dan and Ginny Moullet (*Ex. 48*), who own a property that looks down upon and across the project site, was submitted after the Staff Report was issued, and expressed concerns with losing their current views and requested conditions to generally limit the height of homes built within their preferred view corridor. Other written comments expressed similar concerns, generally dealing with water availability, views, and changes to the property they feel might impact their preferred aesthetic for the area.
8. None of the public comments were supported by sufficient evidence or legal authority that would serve as a basis to deny the pending application.

9. Mr. Flowers responded to public comments on behalf of the applicant and explained that access via the Graystone development would require approval of Graystone owners, so it is not viable; that the current site access proposal meets County public work standards for road connections that serve new plats; that the 50-foot buffer around Lot 1 is sufficiently sized and designed to accommodate equipment access; that heights of structures and vegetation are to be limited so as to not unreasonably block views from along the ridge above the project; and that water supply concerns are unfounded, because the project is designed to comply with applicable standards on how much water can be drawn per day. In response to follow-up questions, Mr. Flowers indicated that homes on Lots 1-4 would be limited to a single story, generally 24 feet or less in height, but that lots 5-8 would not be subject to any height limit other than the County's 35-foot limit, given that impacts will not be significant on lots 5-8. (*Testimony of Mr. Flowers; Proposed CC&R's, included as Ex. 9; Ex. 48, the applicant's proposed modification to CC&R's to voluntarily limit height of homes on Lots 1-4*).
10. The record includes an unrebutted email exchange between the Moullet's and the applicant, Mr. Konen, included in the record as part of *Ex. 48*, where Mr. Konen wrote:

"After carefully considering it, we have decided to honor your request that Lots 1-4 be limited to one story dwellings. The following language has been incorporated into the Declaration of Restrictive Covenants for Whisper Rock (sp?) Estates:

IV. Home Construction & Landscape

4. Dwelling Size: One-story construction only is required on Lots 1-4 to preserve the view integrity of surrounding homes. Two-story homes may be allowed on Lots 5-8 but are subject to the same provisions of protecting neighboring views, if applicable."

11. During or after the public hearing, no one spoke on the applicant's behalf to deny that the email exchange included as part of *Ex. 48* ever happened or that it was in any way false or misleading. The Examiner finds and concludes that the above email exchange is substantially similar to Mr. Flowers' explanation of how the applicant intends to restrict homes on lots 1-4 to just one story.
12. Mr. Sims responded to public comments noting that discharging guns on private property is a private, civil issue for property owners to address. The Examiner is aware of no caselaw, statute, or code under which neighbors hold inherent rights to discharge their weapons onto another neighbor's property without permission from the affected property owner.
13. Ms. Prentice expanded on Mr. Sims responses, noting that this project satisfies county water use standards that apply to cluster developments, and that there are now no restrictions on water draws in this area based on previous determinations that supplies were inadequate; and

that there are no County codes protecting private views, other than the 35 foot building height limit and other bulk, setback, and density standards that will apply to this project.

Site Visits.

14. The Examiner has visited the area where the applicant's property is located on numerous occasions, in all four seasons, over the years, including surrounding wineries, farms, roads, homes, and properties. Since the hearing, the Examiner reviewed online maps and aerial images of the project site. Accordingly, the Examiner is familiar with and adequately informed to assess conditions discussed in the application materials and the hearing record.

Summary of staff review.

15. *Critical Areas:* The Staff Report credibly explains that no significant impacts are expected to occur with respect to critical areas as a result of this proposal since no development is proposed within any designated critical areas or associated buffers. The Geotechnical Report (Ex. 7) provides conclusions that show how the development site is not an erosion hazard area or a seismic hazard area. (Staff Report, pages 3 and 4).
16. WWCC 18.08.015(C) provides that the county shall not approve any permit, including a preliminary subdivision, or otherwise issue any authorization to alter the condition of any land, water, or vegetation, or to construct or alter any structure or improvement in, over, or on a critical area or associated buffer, without first ensuring compliance with the requirements of WWCC Ch. 18.08, the County's Critical Areas regulations. Figure 1 of WWCC 18.08.015 explains how review for compliance with county critical areas regulations is incorporated into the application process for an underlying permit, which is in this matter the requested preliminary plat approval. While express authority exists for the Examiner to impose conditions as needed to protect or mitigate potential impacts on critical areas, or shorelines, the proposed subdivision has been designed in a manner to avoid such impacts, so no special critical area or shoreline protection conditions are necessary.
17. Based on the record, including the application materials, particularly the proposed plat design and the Geotech report prepared for the site, the preliminary plat approved by this decision fully-integrates all applicable critical areas considerations associated with this project, which the Examiner finds and concludes will be consistent with WWCC 18.08.060(B), which provides in relevant part: "[i]f a project requires another permitting action by the county that requires a public hearing, consideration of critical areas will be integrated with the underlying permitting process".
18. *Access:* As shown on the proposed plat map, access to the eight residential lots will be via a new private road that connects with Beet Road.

19. *Neighborhood Characteristics:* The site is surrounded by agricultural and rural residential uses, including other cluster subdivisions.
20. *Traffic Impacts:* This proposal is expected to result in additional traffic from no more than 9 additional dwelling units when fully developed. The Public Works Department determined that a full traffic analysis would not be required. (Ex. 39). Conditions of approval require compliance with County regulations regarding private roads, among other things.
21. *Cultural Resources:* Application materials were distributed to DAHP and regional tribes. Written comments from DAHP and CTUIR recommend that a survey of the site should occur prior to development. To the applicant's credit, and as a gesture of respect for the comments noted above, the applicant commissioned a Cultural Resources study for the project site, which found that there would be no need for additional mitigation measures or conditions to protect cultural resources. (Staff Report, page 4; Exs. 10, 11 and 36; Testimony of Mr. Sims, confirming there are no cultural resources on the site).
22. *Stormwater:* The proposal will have to comply with the County's stormwater regulations and retain all stormwater on site (WWCC Title 11). The Public Works Department did not submit any specific comments about stormwater but will review storm drainage plans prior to construction of any improvements.
23. *Wastewater Disposal:* On-site septic systems will be designed to serve the proposal. Application materials were sent to the Walla Walla County Environmental Health Department, which did not submit comments or raise objections to the proposal.
24. *Water:* The new lots will use individual wells as a source of potable water. An existing irrigation well will be used for irrigation on the resource parcel, identified as Lot 9.
25. *Fire Protection.* Staff provided notice of this application to the County's Fire Marshall and the Walla Walla County Fire District No. 4. Fire officials confirm that the project has been designed in compliance with applicable access and fire safety standards. (See Exhibit 12, comments from Rocky Eastman, Fire Chief District 4, re: onsite fireflow and distribution as required for other cluster developments with similarly sized lots; Staff Report, pages 3 and 6).
26. *Comprehensive Plan.* As required by WWCC 16.04.050, the proposed plat is consistent with the Walla Walla County Comprehensive Plan, including without limitation the following goals and policies:

Goal RL-1 *In rural areas consider both human uses and the natural environment by encouraging rural development that maintains the rural character of the land and supports natural resource-based economic activities, fish and wildlife habitats, rural lifestyles, outdoor recreation, and other open space.*

Finding: The proposed development meets the requirements and intent of WWCC Chapter 17.31 by preserving land for long term farming activities. Any adjustments made to lot boundaries before final plat approval must be consistent with County policies and regulations intended to preserve the viability of designated agricultural resource lands. “Orphan” fingers of agricultural resource land that are too narrow, remote, or difficult to maintain given their configuration within the plat, should not be approved. Viable is defined to mean: “capable of working [or] functioning”; “capable of existence and development as an independent unit”; “having a reasonable chance of succeeding”; or “financially sustainable”. (Merriam-Webster Dictionary). The final plat design and lot configurations shall not include segments of the “resource parcel” that are too small, narrow, or constricted so as to be economically viable.

Policy RL-2 *Allow limited new development that is consistent with the current rural character of the County.*

Finding: The subdivision is similar to other subdivisions that have been approved in the Agriculture Residential 10-acre (AR-10) zoning district. Cluster subdivisions are required in the AR-10 zone.

Policy RL-3 *Limit the amount of development in rural areas through density requirements that protect and maintain the existing rural character, natural resource lands, open space, critical areas, and that manage traffic volumes.*

Finding: The proposed subdivision’s density is based on one lot per ten acres, and the applicant is not being allowed a higher density than what the code permits. The proposed development is not impacting or encumbering any adjacent critical areas. Possible traffic impacts have been reviewed by the public works department and have not been determined to be significant.

Goal RL 21 *Protect and conserve long-term, commercially viable forest, agricultural and mineral natural resource lands.*

Finding: As proposed, the development is in general compliance with WWCC Chapter 17.31, which requires the protection of agricultural resource lands. As noted above, any lot configuration changes made before final plat approval must ensure that areas included in the agricultural resource parcel (Lot 9) are, in fact, viable for agricultural uses and purposes.

Policy RL-47 *Allow residential uses near agricultural lands and designated mineral resource lands to be developed only in a manner that minimizes conflicts and discourages the unnecessary conversion of resource land.*

Finding: As proposed, the preliminary plat is designed and conditioned to provide the minimum buffer space between residential uses and agricultural uses. WWCC 17.31.060(Q) mandates a 50-foot buffer space from any resource parcel created in a cluster development to any dwelling in the cluster development. (See WWCC 17.31.060(Q), which also requires that “All required buffers between the resource parcel and the smaller development parcels shall be provided within the new lots, and shall not encumber the resource parcel”).

27. The Comprehensive Plan definition of the “Agriculture Residential” land use designation reads as follows:

“All lands designated as Agricultural Residential lands are lands of long-term commercial significance. This land use designation is intended for areas that are currently in agricultural use, that are located adjacent to existing rural lands, rural activity centers, and urban growth areas. Typically, these areas are in smaller land ownerships with higher density residential development than in other agricultural areas of the County. This land use designation is primarily agricultural with a mix of residential land uses. Limited home occupations that are clearly incidental to the agricultural nature of these areas will be allowed. A limited amount of commercial-tourism activity will be allowed in this district, while limited commercial businesses that support agriculture will be allowed outright, with those uses having a high nuisance value, safety issues, or environmental implications allowed only by conditional use permit. Large-scale natural resource-

processing industry is not considered a compatible use, except on a limited basis. The allowed density in this designation is one dwelling unit per 10 acres.

Outside of those lands designated by the Resource Lands Committee as agriculture lands of primary significance or unique lands, as shown on Maps RL-9 and RL-10, land divisions that comply with the minimum lot size of 10 acres will be allowed, provided that adequate provision of public facilities, utilities, and services such as water, wastewater disposal and access to public roads is available concurrent with the final approval of the short plat. The maximum number of lots will continue to be determined at the rate of one unit per ten acres.

Cluster developments that seek to preserve large tracts of resource land while still allowing residential development on smaller lot sizes are the preferred method of residential land development, provided the overall density of development does not exceed one dwelling unit per 10 acres. All cluster developments shall be implemented by development regulations that address the minimum provisions identified in the goals and policies of this sub-element to ensure the resource use is preserved and protected through the development process.” *(emphasis added)*.

28. As explained in the Staff Report, the entire project is located in County’s Agriculture Residential 10-acre (AR-10) zoning district.
29. Based on the record, particularly the Staff Report, the application materials, and the proposed cluster development reflected in the plat design, the Examiner finds and concludes that the applicant’s project qualifies as the “preferred method of residential land development” in an area designated as Agricultural Residential land, where this project is located. Again, any adjustments to residential lot configurations before final plat approval must ensure that all areas included in the agricultural resource parcel (Lot 9) are, in fact, viable for agricultural uses and purposes. *(See previous findings, particularly underlined portions of Finding No. 27)*. An additional condition of approval has been added to ensure compliance with relevant County policies and development regulations intended to protect and conserve long-term agricultural lands. *(See Conditions of Approval)*.

Views across a neighboring property are not protected by County codes or Washington caselaw.

30. Several local residents raised general view loss concerns, like views across the mostly vacant project site out towards the Blue Mountains or open farmland in the vicinity being altered by the presence of new homes, new road surfaces to access such homes, and general feelings about a loss of adjacent open space. These concerns do not serve as a basis to reject the proposal. While some neighbors will be able to see changes in their views, none will be significant, largely because the entire project has been designed to comply with applicable bulk and scale standards found in County codes. The project opponents cannot dispute that Walla Walla County codes do not provide protection for general views from one property onto another. Comments opposing the project or seeking major modifications based on personal view considerations were not sufficiently supported and should be rejected.
31. In Washington, a person has no property right in the view across their neighbor's land. A constitutionally protected property interest exists when a plaintiff demonstrates that he or

she possesses a “legitimate claim of entitlement” under the law. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Here, the Walla Walla County Code does not grant adjoining property owners a claim of entitlement in the protection of their views; the code does not require the county to deny a permit or other project application that might impair private views of lands beyond a landowner’s property boundaries. Thus, any potential constitutional due process claims alleging view loss should fail.

32. The criteria for approval of a preliminary plat does not include analysis of views of the proposed development from adjacent properties, nor do County regulations protect the views from adjacent properties other than any view protection that may result from compliance with applicable building height limits, setback requirements, and other bulk and density standards for the property. More significantly, the proposed cluster development/preliminary plat has been designed in full compliance with residential development standards for the zone and is consistent with nearby uses and developments in the vicinity, including other cluster subdivisions.
33. Washington case law is very clear that there is no view protection in common law; nor are general views from a neighbor’s property onto an adjoining property protected in County Codes at issue in this matter. See *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475, 2006 Wash. App. LEXIS 434 (Div. II, 2006). Simply put, project opponents do not have a common law right in a view across their neighbor’s property. Any arguments based on assertions to this effect must be rejected.
34. As discussed elsewhere in this Decision, the County Code imposes height, bulk, and setback limitations on the construction of residential structures, like the homes proposed in this preliminary plat application. Some written comments and hearing testimony generally asserted that the new structures may be too tall or too close to their property, that new paved areas for roads will be closer than they prefer, that car lights might shine up onto their property, and that the new development will somehow interfere with their preferred aesthetic and previous views out into a mostly vacant and undeveloped site and then onto mountains or open farmland beyond. While not a perfect comparison, the Washington Supreme Court decision in *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014), is persuasive authority on some issues raised in this application process. Durland argued that county building codes about the height and size of a proposed garage on a neighboring property created a property interest because they were intended to protect neighbors' views of the water. The Supreme Court rejected Durland’s arguments, because the local codes did not contain mandatory language requiring the jurisdiction to consider neighbors' views of the water before issuing building permits for garage construction on nearby properties. Similarly, the neighbors in this matter directed attention to no county code provisions that would essentially serve as a basis to consider their preferred aesthetic for structures or developments that can be viewed from their property.

35. In this matter, the applicant has volunteered to limit the height of homes to just a single story, or no more than 24 feet, on lots 1-4, in order “*to preserve the view integrity of surrounding homes.*” (Previous Findings above; Ex. 48). All other homes will be limited by height restrictions for structures in the zone, i.e. 35 feet. To ensure the applicant’s voluntary commitment to neighboring property owners is satisfied, a condition of approval has been included to address the issue.
36. The Examiner finds that all testimony by staff members was credible and supported by evidence included in the record. Except as modified in this Decision, all findings and statements of fact included in the Staff Report are adopted as Findings of Fact by the Hearing Examiner supporting this Decision.

As Conditioned, the application meets requirements for Preliminary Plat approval

37. WWCC 16.14.030 sets forth the County’s approval criteria for this preliminary plat application, which expressly requires a determination that: “*A. The proposed subdivision of land complies with the applicable codes, plans and policies in Chapter 16.04.050 or their successors; and B. The proposed lots are served with adequate means of access, fire protection, water supplies and means of sanitary sewage disposal; and C. The proposed division of land provides adequate measures for the control of drainage and stormwater; and D. The public health, safety and general welfare will be served by permitting the proposed division of the land.*”
38. WWCC 16.04.050, referenced in the previously cited code provision, requires that applications shall be approved, approved with conditions or denied based on a determination that the application complies with the following adopted county and state rules, regulations, plans and policies, including, but not limited to: A. RCW 43.21C SEPA; B. RCW 58.09 Survey—Recording; C. RCW 58.17 Subdivisions; D. RCW 36.70A Growth Management; E. RCW 36.70B Local Project Review; F. WWCC Title 11 Stormwater; G. WWCC Title 12 Streets, Sidewalks, and Public Places; H. WWCC Title 17 Zoning; I. WWCC Title 18 Environment; J. Walla Walla County Shoreline Master Program; K. Walla Walla County board of public health rules and regulations; L. Walla Walla County Comprehensive Plan; and M. Title 16.
39. As conditioned below, the Examiner finds that the requested preliminary plat application complies with applicable codes, plans and policies found in WWCC 16.04.050. The proposed plat meets the Walla Walla County Code Chapter 16.20-Design Requirements, Chapter 17.18 - Density and Dimensions Requirements, and Chapter 17.31 – Cluster Developments. In addition to Walla Walla County code regulations, the proposed plat is subject to RCW 58.17. Cluster developments are the only type of subdivision allowed in the AR-10 zoning district. (See WWCC 17.31.020). In addition to Walla Walla County code

regulations, the proposed plat is subject to RCW 58.17, and satisfies applicable requirements set forth in RCW 58.17.110(2). *(See All Findings herein; Staff Report findings and conclusions, except as modified in this Decision; and all Conditions of Approval).*

40. As conditioned below, the Examiner finds that the proposed lots in requested preliminary plat application will be served with adequate means of access, fire protection, water supplies and means of sanitary sewage disposal. *See WWCC 16.14.030(B). (See Staff Report findings and conclusions, except as modified in this Decision, which explain that the proposed plat was reviewed by the following agencies: Walla Walla County Department of Public Works, Walla Walla County Health Department, the Walla Walla County Building Official/Fire Marshal, and Walla Walla County Fire District #4, and that no agency officials raised concerns that the plat should not be approved).*
41. As conditioned below, the Examiner finds that the proposed division of land provides adequate measures for the control of drainage and stormwater. *See WWCC 16.14.030(C). The project is required to retain and infiltrate all water onsite and comply with all County stormwater regulations found in WWCC Title 11.*
42. As conditioned below, the Examiner finds that the public health, safety and general welfare will be served by permitting the proposed division of the land. *See WWCC 16.14.030(D). (See all Findings in this Decision; all Conditions of Approval; Staff Report findings and conclusions, except as modified in this Decision, see list of agencies listed above that reviewed the application and raised no concerns that would serve as a basis to deny the pending application. The application has been designed in compliance with County development regulations and relevant comprehensive plan provisions, which were all adopted to serve public health, safety and general welfare).*
43. The Staff Report credibly summarizes and explains how the proposal complies with various design requirements and dimensional standards that apply to cluster subdivisions like the applicant's project. *(Staff Report, pages 6 and 7).*

SEPA compliance; Conditions imposed under authority of County Code requirements.

44. The County satisfied its SEPA review process for this preliminary plat application through compliance with applicable review and notice procedures. The county received no appeals of its SEPA DNS determination (*Ex. 12*) issued in connection with the application. *(Testimony of Mr. Sims: Staff Report, pages 2, 3).*
45. Conditions imposed as part of this approval Decision are not based on SEPA, but other County development regulations and requirements, including without limitation WWCC 2.50.070(C), which reads as follows:

When addressing a preliminary subdivision application, the hearing examiner may grant or deny the application, or may attach reasonable conditions, modifications and restrictions found necessary to make the project compatible with its location and to carry out the goals and policies of the applicable comprehensive plan, or other applicable plans or programs adopted by the board of county commissioners.

46. Based on all evidence, exhibits and testimony in the record, the undersigned examiner specifically finds that the proposed plat, as conditioned below, makes appropriate provision for the considerations detailed in WWCC 16.14.030 and that the public use and interest will be served by the proposed plat and associated dedications and improvements.

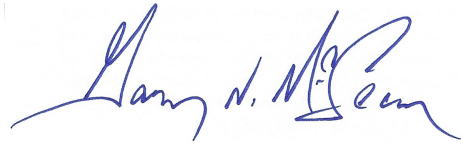
VI. CONCLUSIONS OF LAW.

1. Based on the Findings as summarized above, the undersigned examiner concludes that the proposed plat, as conditioned below, conforms to all applicable County codes and policies. Upon reaching such findings and conclusions as noted above, the preliminary plat meets the standards necessary to obtain approval by the County.
2. The recommended conditions of approval, as set forth in the Staff Report and modified below, are reasonable, supported by the evidence, and capable of accomplishment.
3. Any Findings or other statements in previous or following sections of this document that are deemed Conclusions are hereby adopted as such.

VII. DECISION.

Based upon the preceding Findings of Fact and Conclusions of Law, evidence presented through the course of the open record hearing and all materials contained in the contents of the record, the undersigned examiner APPROVES the Whisper Rock Preliminary Plat / Cluster Subdivision (Department File No. SUB20-010), subject to the attached Conditions of Approval.

Decision issued: August 26, 2021.



Gary N. McLean
Hearing Examiner for Walla Walla County

FINALITY OF DECISION AND NOTICE OF RIGHTS OF APPEAL

As provided in WWCC 2.50.070(B), *the decision of the hearing examiner on all matters is final and conclusive, unless appealed pursuant to Chapter 14.11 of the Walla Walla County Code.*

WWCC 2.50.120, captioned “Reconsideration”, provides that: *An applicant or party of record to a hearing examiner's public hearing may seek reconsideration only of a final decision by filing a written request for reconsideration with the community development director within ten days of the final decision. The request shall comply with Section 14.11.030 of this code. The hearing examiner shall consider the request at the next regularly scheduled meeting, without public comment or argument by the party filing the request. If the request is denied, the previous action shall become final as of the date of the decision on the request for reconsideration. If the request is granted, the hearing examiner may immediately revise and reissue its decision or may call for argument in accordance with the procedures for closed record appeals. Reconsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision.*

Finally, WWCC 2.50.130 addresses appeals of a hearing examiner decision, and reads as follows: *The final decision by the hearing examiner on any matter within his or her jurisdiction may be appealed in accordance with Chapter 14.11 of the Walla Walla County Code.*

NOTE: The Notice provided on this page is only a short summary, and is not a complete explanation of fees, deadlines, and other filing requirements applicable to appeals. Individuals should confer with advisors of their choosing and review all relevant codes, including without limitation the code provision referenced above and state law, particularly the Land Use Petition Act (Chapter 36.70C RCW), for additional information and details that may apply.

CONDITIONS OF APPROVAL

WHISPER ROCK PRELIMINARY PLAT / CLUSTER SUBDIVISION

SUB20-010

General:

A. The preliminary plat known as the Whisper Rock (Cluster) Subdivision shall comply with all applicable provisions of the Walla Walla County Code, whether or not such provisions are enumerated or referenced in the approved preliminary plat plans, in the staff report or in this Decision. The burden is on the applicant to show compliance with applicable provisions of the WWCC at every stage of development. FURTHER, the applicant shall comply with all professional report conclusions and recommendations submitted in connection with the preliminary plat and engineering reviews, as approved and or modified by the County.

B. The plat shall be developed in substantial conformance with the project plans described, depicted, and identified in *Exhibits 4 and 5*, except as modified by these Conditions of Approval, PROVIDED:

(i) The Director retains full authority and discretion to consider and approve Minor Revisions to such plans, consistent with WWCC 16.14.040(B);

(ii) That Major Revisions – i.e. revisions that result in any substantial changes as determined by the Director, including but not limited to, the creation of additional lots; the elimination of open space; the addition or elimination of a road; a change in the road layout; and material changes to conditions of approval – shall be treated as a new application (WWCC 16.14.040(A)); and

(iii) That all changes are subject to the approval criteria for preliminary subdivisions (WWCC 16.14.040(C)).

C. The Director has discretion to require that some or all of these conditions of approval shall be included as part of CC&Rs or written on the face of the plat to ensure that the applicant, future owners, residents and assigns are mindful of their requirement to comply with conditions of approval for this plat that might regulate or restrict their conduct or activities within portions of the plat.

Conditions derived the Staff Report and public hearing process:

1. Before construction, the applicant must first obtain any other associated permit(s) or approvals required by the County or any other governmental agency or regulatory authority with jurisdiction over a particular aspect of the project. Any conditions of approval or requirements imposed as part of such permits or approvals shall be and are hereby incorporated as Conditions of Approval for this plat.
2. The applicant must comply with applicable County and State stormwater management regulations.
3. Adequate fire protection shall be required pursuant to WWCC 16.14.030(B).
4. Private road improvements must be provided in compliance with Walla Walla County Road Standards established by the Walla Walla County Public Works Department.
5. The final plat must comply with all applicable County and State surveying requirements, including without limitation those found in WWCC Ch. 16.14 and WWCC Ch. 16.36.
6. Based on the applicant's representations made in response to public comments generally regarding the possible height of homes closest to the ridge above the project, final CC&R's shall be subject to review and approval by the Director and must be recorded as part of the final plat, and must include language substantially similar to that referenced in *Ex. 48* and Findings 11 and 12 above, restricting the height on new homes on Lots 1-4 to just a single story, less than 24 feet in height, except for chimneys and other possible mechanical equipment the Director finds that there is good cause to not apply such restriction.

7. *Density Restriction* – As required by WWCC 17.31.060(W), the final plat map shall include a note on the recorded land division instrument stating that the acreage shall not be used more than once for determining the allowable number of units, and shall explain the number of potential/unused dwelling units remaining, if any, subject to review and approval by the Director. The applicant shall denote on the land division instrument the specific acreage used for determining the proposed new lots. The language in such note is subject to review and approval by the Director.
8. Consistent with WWCC 16.14.060, this preliminary plat approval shall be null and void if a final plat application is not made within seven years from the date of preliminary plat approval or the date of resolution of all appeals.
9. Any proposed changes to lot boundaries or lot configurations before final plat approval must demonstrate that all segments of land included as part of the agricultural resource parcel are viable. All adjustments made to lot boundaries before final plat approval must be consistent with County policies and regulations intended to preserve the viability of designated agricultural resource lands. “Orphan” fingers of agricultural resource land that are too narrow, remote, or difficult to maintain given their configuration within the plat, should not be approved. Viable is defined to mean: “capable of working [or] functioning”; “capable of existence and development as an independent unit”; “having a reasonable chance of succeeding”; or “financially sustainable”. (*Merriam-Webster Dictionary*). The final plat design and lot configurations shall not include segments of the “resource parcel” that are too small to be viable for agricultural uses and purposes, economically or otherwise, as determined by the Director.