

THURSTON COUNTY
 WASHINGTON
 SINCE 1852

COUNTY COMMISSIONERS

Cathy Wolfe
 District One
 Sandra Romero
 District Two
 Karen Valenzuela
 District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
 FOR THURSTON COUNTY**

| | | |
|-------------------------------------|---|------------------------|
| In the Matter of the Application of |) | NO. 2007102340 |
| |) | |
| |) | |
| GA Corporation |) | |
| |) | FINDINGS, CONCLUSIONS, |
| |) | AND DECISION |
| For a Reasonable Use Exception |) | |
| _____ |) | |

SUMMARY OF DECISION

A Reasonable Use Exception (RUEX) to construct a single-family residence within the 100-year floodplain of Scott Creek in Thurston County, Washington is **APPROVED**, subject to conditions.

SUMMARY OF RECORD

Request

Doug and Ron Fulwider, on behalf of GA Corporation (Applicant), request approval of a RUEX to construct a single-family residence within the 100-year floodplain of Scott Creek. The subject property is located at 2712 and 2714 Scotlac Drive SW, Olympia, in unincorporated Thurston County.

Hearing Date

The Thurston County Hearing Examiner held an open record public hearing on the request on April 19, 2010.

Testimony

At the open record public hearing, the following individuals presented testimony under oath:

- Robert Smith, Senior Planner, Resource Stewardship Department
- John Ward, Thurston County Public Health and Social Services Department
- Tim Rubert, Acting Floodplain Manager
- Ron Fulwider, Applicant Representative
- Doug Fulwider, Applicant Representative
- Larry Andruss

SENT
 DATE: 5-4-10 CP

Vincent McElroy
Robert Joseph Conrad

Exhibits

At the open record public hearing, the following exhibits were admitted into the record:

EXHIBIT 1 Land Use and Environmental Review Section Report with the following Attachments:

Attachment a Notice of Public Hearing

Attachment b Zoning/Site Map

Attachment c Reasonable Use Exception Application, received June 14, 2007

Attachment d Letter from Richard Phillips, Jr., Accompanying Application, dated June 5, 2007

Attachment e Letter from Doug Fulwider Amending Application, dated January 16, 2009

Attachment f Site Plan, received May 26, 2009

Attachment g Elevation Certificate, David M. Icenhower, Professional Land Surveyor, dated August 4, 2006

Attachment h Flood Zone Sketch, David M. Icenhower, Professional Land Surveyor, dated August 4, 2006

Attachment i Mapped Flood Plain for Site, undated

Attachment j January 26, 2010 Comment Memorandum from John Ward, Thurston County Public Health and Social Services Department

Attachment k June 5, 2009 Comment Memorandum from Chuck Meyers, Thurston County Public Works Department

Attachment l February 23, 2009 Comment Memorandum from Joseph Butler, Certified Building Official for the Thurston County Development Services Department

Attachment m Comment Letter from Ernie and Beverly Decker, received September 16, 2008

Attachment n Comment Letter from Vincent McElroy, dated and received September 16, 2008

- EXHIBIT 2 Original septic design, preliminarily approved May 22, 2006
- EXHIBIT 3 Color copy of photograph of posted notice
- EXHIBIT 4 Revised preliminary septic design, submitted November 13, 2009
- EXHIBIT 5 Thurston County Geomap
- EXHIBIT 6 Original septic plan (six pages)
- EXHIBIT 7 Applicant's color photographs of neighborhood (17 photos on five pages)
- EXHIBIT 8 Earlier version of site plan, "Revised", June 30, 2008 (showing residence and septic components adjacent to Scotlac Drive)
- EXHIBIT 9 Wetlands Inventory, prepared by The Coot Company, February 2007
- EXHIBIT 10 Andruss comments, dated April 19, 2010
- EXHIBIT 11 Earlier version of site plan, dated received November 15, 2007
- EXHIBIT 12 Color copies of photos submitted by neighbor McElroy depicting snow and standing water at 2724 Scotlac Drive in December 2008 and January 2009
- EXHIBIT 13 Additional recommended condition of approval

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicant requested RUEX approval to construct a single-family residence partially within the 100-year floodplain of Scott Creek. The subject property is located at 2712 and 2714 Scotlac Drive SW, Olympia, in unincorporated Thurston County.¹ The site is bordered by Scott Creek to the north and Scotlac Drive SW to the south. *Exhibit 1, pages 1-3; Exhibit 1, Attachment c, Application.*
2. The parcel has a Residential LAMIRD Two Dwelling Units per Acre (RL 2/1) zoning designation. Single-family residential development is allowed in the RL 2/1 zone, with a required front yard setback of 20 feet. *Exhibit 1, page 2; Thurston County Code (TCC)*

¹ The subject property is comprised as two lots known as Lots 22 and 23, Block 11, Scott Lake Division 3, also known as Tax Parcel Nos. 72771102200 and 72771102300. *Exhibit 1, page 1.*

20.13A.020 and .030. The site is forested with a mix of tree species and contains a large grass area. *Exhibit 1, page 2; Exhibit 7, photos 3 and 10.*

3. The Scott Lake Division 3 subdivision was recorded on November 13, 1962. Most of the lots in the plat have been developed with residences for many years. The subject property (Lots 22 and 23) has been vacant since the plat was recorded. According to neighbor testimony, it has become a fire hazard, a nuisance, and an eyesore in the neighborhood. *Exhibit 1, pages 2-3; McElroy Testimony.*
4. The Applicant purchased the parcels in 2006 and submitted the RUEX application to the County in June 2007. According to the undisputed testimony of the Applicant, substantial delay in processing the application resulted from the differing County staff opinions about how the proposal could comply with the code requirements, with design changes required by each new staff person. *Exhibit 1, Attachment c; Ron Fulwider Testimony; Doug Fulwider Testimony.*
5. The Applicant submitted an application for boundary line adjustment in 2007 (File 2007104729) to combine the two lots into one parcel. Processing of the BLA has been on hold pending the outcome of the RUEX application. *Exhibit 1, page 2; Smith Testimony.*
6. Scott Creek is the outlet for Scott Lake. Although testimony of residents identified it as a manmade drainage containing only planted trout, Scott Creek is classified as a Type 3 fish-bearing stream pursuant to the Thurston County critical areas ordinance (CAO). It is not subject to the jurisdiction of the Shoreline Master Program for Thurston County (SMPTR). The 100-year floodplain of Scott Creek was identified by the Federal Emergency Management Agency (FEMA) as a flood zone in 1982. *Exhibit 1, page 2; Ron Fulwider Testimony; McElroy Testimony; Exhibit 1, Attachment L.*
7. The Thurston County CAO defines the 100-year floodplain as those lands which are subject to a one percent or greater chance of flooding in any year. *TCC 17.15.200.* The CAO's purpose in regulating floodplains is to accomplish the following: to preserve natural flood control, stormwater storage, and drainage or stream flow patterns; to control siltation, protect nutrient reserves, and maintain stream flows and water quality for fish and marine shellfish; to prevent turbidity and pollution of wetlands, streams, or fish/shellfish bearing waters and maintain associated habitat; and to minimize loss of wetlands and to increase the function and quality of wetlands in the County. *TCC 17.15.900.*
8. The Thurston County Building Code regulates construction in flood hazard areas to promote the public health, safety and general welfare, and to minimize losses due to floods with the intention to: 1) require that uses vulnerable to floods, including public facilities which serve such uses, be provided with flood protection at the time of initial construction; 2) restrict or prohibit uses which are dangerous to human health, safety or property in times of flood, or cause increased flood heights or velocities; 3) control filling, grading, dredging and other development which may increase flood damage; 4)

control the alteration of natural floodplains, stream channels and natural protective barriers which help accommodate or channel floodwaters; and 5) alert individuals to lands which are in areas of special flood hazard. *TCC 14.38.010*.

9. The RUEX would allow construction of one single-family residence on the combined parcels. The proposal is for a two-bedroom manufactured home on a raised flow-through foundation with a footprint of approximately 1,300 square feet. The current proposal places the home site near the center of the property with septic drainfield and components in the southeastern corner adjacent to Scotlac Drive. Domestic water would be provided by the existing Group A water system of the Scott Lake subdivision. *Exhibit 1, page 2; Exhibit 1, Attachment c*.
10. Thurston County GIS mapping shows the Scott Creek floodplain encroaching on approximately two-thirds of the site, with the one-third of the site closest to Scotlac Drive outside the 100-year floodplain. *Exhibit 1, Attachment i*. In the course of seeking building approval, the Applicant was required to accurately locate the boundary of the floodplain on-site, consistent with TCC 17.15.1005.D. According to the Applicant's professionally prepared survey, the floodplain covers much more of the subject property than Thurston County GIS mapping indicates. *Exhibit 1, Attachment h*.
11. The Applicant's surveyor completed an elevation certificate in which the Scott Creek floodplain is defined as the 192-foot elevation. The source of the information of the base flood elevation is listed in the elevation certificate as the County Flood Plain Manager. *Exhibit 1, Attachment g*. Neither the surveyor nor the County Flood Plain Manager who provided the information for the elevation certificate was available to provide testimony at hearing. A staff person was called to answer questions about the basis and accuracy of the floodplain elevation. Although the current staff member provided information generally about how the base flood elevation is established, he could not provide information that verified the accuracy of the 192-foot base flood elevation measurement in the instant case. *Rubert Testimony; Ron Fulwider Testimony*.
12. According to the survey, approximately less than one-tenth of the subject property is above 192-foot elevation (meaning, outside of the 100-year floodplain). The southeastern corner of the site has elevations ranging from 192.3 to 192.97 feet. The remainder of the subject property slopes gently down towards the creek, with elevations lower than 192. Adjacent to the north of the site, the centerline of Scott Creek is at elevation 187.33, and the top of the creek bank is at 190.74. Adjacent to the south of the site, the near edge of the asphalt of Scotlac Drive ranges from elevation 194.8 at the west boundary of the site to 196.44 at the east corner. *Exhibit 1, Attachment h*.
13. The CAO prohibits new residential construction in the floodplain of Scott Creek. Staff indicated that approval of an RUEX is the only way the Applicant can develop the subject property. *Exhibit 1, page 2; Smith Testimony*.

14. The combined parcels total 0.63 acres and have an assessed value of \$38,250.00. The subject property is similar in size, shape, slope, and vegetation to the other lots in the subdivision along Scott Creek, most of which are developed with residences. *Exhibit 1, page 4.*
15. The site could be used for camping or to park a recreational vehicle; however, these uses would not be consistent with the surrounding single-family residential development and would fail to utilize the property to an extent commensurate with its assessed value and tax burden. A single-family residence is the most reasonable use of the site. *Exhibit 1, page 4; Smith Testimony.*
16. A 1,300 square foot two-bedroom home would be consistent in character with surrounding residences and would not exceed the scale of residential development on other lots. *Exhibit 1, page 4; Smith Testimony; Exhibit 7.*
17. County Building Official Joseph Butler reviewed the RUEX application and recommended denial on February 23, 2009. In a memorandum, Mr. Butler stated, "Thurston County ... recognizes, in part, that the cost to the public in recovery and abatement of flood damaged buildings has a direct effect on the public welfare." *Exhibit 1, Attachment L.* Mr. Butler had extensive experience responding to County flood events; however, he is no longer employed with the County. *Exhibit 1, page 4.* No current County personnel were able to identify specific public costs that Mr. Butler implied the County would incur in the event of future flooding of the site. Current building department staff stated that public costs generally arising from flooding of private property can include rescue or evacuation of stranded residents, inspections, and the time spent reviewing flood damage by County staff. *Rubert Testimony; Smith Testimony.*
18. Thurston County Public Health and Social Services Department Environmental Health Division (EHD) reviewed the proposed residence and septic system for compliance with County health codes. EHD recommended approval of the RUEX based on the current design which places the septic components in the southeast corner of the site (above the floodplain elevation) and the residence in the center of the site. EHD staff noted that septic drainfields must be set back a minimum of 30 feet from the residence. *Exhibit 1, Attachment j; Ward Testimony; Exhibit 4.*
19. Thurston County Public Works recommended approval. *Exhibit 1, Attachment k.*
20. Based in part on the recommendation of Building Official Joe Butler, the Resource Stewardship Department recommended denial of the RUEX. In addition to citing the costs to the public mentioned in Mr. Butler's memorandum, Staff submitted the position that the current proposal was not the minimum necessary to allow reasonable use of the property, because the residence could be placed at a higher elevation adjacent to Scotlac Drive. Staff asserted that moving the residence to an elevation several inches higher would reduce the impact to the floodplain by reducing the frequency of floods affecting the residence. *Exhibit 1, pages 4-5; Smith Testimony.*

21. An earlier version of the site plan had placed the residence and the septic design adjacent to Scotlac Drive. *Exhibit 8*. The Applicant testified that after submitting the site plan at Exhibit 8, he was advised to redesign the proposal with the residence in the middle of the property (as it is in the present proposal) by someone at the County. The Applicant waived objection to a requirement to move the residence closer to the road. *Ron Fulwider Testimony; Doug Fulwider Testimony*.
22. The approved septic design has the residence in the center of the site and the septic components near the street. If the residence were to be moved closer to the street, the revised proposal would be required to undergo additional septic review. *Ward Testimony*.
23. At the southeastern corner of the site, the 192-foot elevation is set back approximately 34 feet from the south lot line. The floodplain elevation gradually gets closer to the street west of the east lot line. At the center of the site, the edge of the floodplain is only 11 feet from the south lot line. There is no buildable area outside the floodplain west of the centerline (the shared boundary between Lots 22 and 23). *Exhibit 1, Attachment h*.
24. Written notice of the public hearing was sent to all property owners within 500 feet of the site on April 6, 2001. Notice of the hearing was posted on-site on April 8th and published in The Olympian on April 9, 2010. *Exhibit 1, page 2; Exhibit 1, Attachment a; Exhibit 3*.
25. The County received several public comments on the application, all in favor of RUEX approval. *Conrad Testimony; McElroy Testimony; Andruss Testimony; Exhibit 10; Exhibit 1, Attachments m and n*.
26. One neighboring land owner on Trevue Avenue submitted written comments expressing frustration about the flooding that occurs during every heavy rain. This neighbor noted that although they've owned the property since 1973, it has only been flooding in the last 15 years. *Exhibit 1, Attachment m*.
27. Larry Andruss has owned the property to the west of the site (Lot 21) since 1971. His house is closer to the road and his garage is set farther back from the street and at a lower elevation than the house. He stated that although water backs up at the back of his lot, he has never had flooding in his buildings. *Exhibit 10; Andruss Testimony*.
28. A neighbor west of Mr. Andruss submitted written and oral comments, as well as photos, in support of the RUEX. Mr. McElroy testified that although the rear of his parcel (closest to the creek) had standing water on it during the rain on snow storm events of winter 2008-09, none of the buildings on his property has ever been damaged by flooding or had flood waters enter them since he moved in to the property in 1976. Mr. McElroy testified that properties on the other side of Scott Creek are lower and they receive flood waters from Trevue Avenue, which floods upstream of Scott Creek Drive. *Exhibit 1, Attachment n; Exhibit 12; McElroy Testimony; see also, Exhibit 7, photo #7*.

29. The Applicant challenged the accuracy of the 192-foot base flood elevation, based on the testimony of neighbors that the site has not flooded since before the FEMA flood zone was designated, and argued that he should be entitled to rely on the County GIS mapping in the record at Exhibit 1, Attachment i. The Applicant argued that any damage to the proposed structure would be the owner's responsibility, rather than the County's, and covered under homeowners and flood insurance. *Ron Fulwider Testimony.*
30. County staff indicated that between the GIS mapping and a professionally prepared survey, the survey would more accurately depict the location of the floodplain. *Rubert Testimony.*
31. The proposed residence would be placed on a raised, flow-through foundation that would lift the bottom of the structure above the elevation of the floodplain. No fill would be imported into the floodplain. As currently proposed, the septic system would be closer to the street, with drainfield and reserve both located outside of the floodplain. *Exhibit 4; Exhibit 1, Attachment e; Ron Fulwider Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exception pursuant to Chapter 36.70 of the Revised Code of Washington and Chapters 2.06 and 17.15 of the Thurston County Code.

Criteria for Review

Reasonable use Exception:

Pursuant to TCC 17.15.415, the Hearing Examiner shall grant the Reasonable Use Exception if the following five specific findings can be made:

1. No other reasonable use of the property as a whole is permitted by this chapter.
2. No reasonable use with less impact on the critical area or buffer is possible.
3. The requested use or activity will not result in any damage to other property and will not threaten the public health, safety or welfare on or off the development proposal site.
4. Any alteration to a critical area is the minimum necessary to allow for reasonable use of the property.
5. The inability of the Applicant to derive reasonable use of the property is not the result of actions by the Applicant in subdividing the property or adjusting a boundary line thereby creating an undevelopable condition after the effective date of this chapter.

Conclusions Based on Findings

1. The property is located in a single-family residential subdivision and is surrounded by residential development. Based on the size and assessed value of the site, a residence is the only reasonable use of the property permitted by the County Code. The proposed

1,300 square foot home would be consistent with the existing residential development in the area. *Findings 1, 2, 3, 9, 10, 14, 15, and 16.*

2. More than 90% of the site is encumbered by the floodplain. The area outside the floodplain is only large enough to contain the proposed septic drainfield and reserve field. The modestly sized single-family residence that the Applicant proposes is the only reasonable use of the property, due to its size and location within a subdivision. The raised flow-through foundation, other design requirements of the building code, and clearing restrictions would limit alteration of the floodplain to the minimum extent necessary to allow reasonable use of the site. *Findings 2, 3, 14, 15, and 16.*
3. As conditioned, the proposal would not result in harm to other properties or to the public welfare. Thurston County Environmental Health Division preliminarily approved the proposed septic system, concluding that no public health issues would be raised. The Building Official's recommendation of denial was based on unspecified, generalized "costs" to the public that could result from flooding of the site. Given the testimony of neighbors with continued residence in the immediate vicinity since the 1970s and the photographic evidence of standing water resulting from the rain on snow event in the winter of 2008-2009, it strains credibility to assert evacuation and rescue as likely public costs to be incurred from on-site flooding in the future. No other threats to public welfare were asserted by the County. *Findings 9, 12, 16, 17, 18, 19, 21, 23, 27, 28, and 31.*
4. Moving the proposed residence closer to the street would place it at a higher elevation, but even if moved closer to the street, the residence would still be within the floodplain. The Resource Stewardship Department's recommendation of denial is based in part on the premise that because a few inches higher elevation could be achieved on-site, the instant proposal is not the minimum necessary alteration to the critical area. The record doesn't identify the exact elevation of the currently proposed location for the house, nor the exact elevation of the site closer to the street in which Staff asserts the residence should be placed. From the survey at Exhibit 1, Attachment h, it can be assumed that the difference is a matter of approximately eight inches in elevation gain. The Applicant is proposing to combine two residential lots into one and build only one residence, when two could be applied for. The raised flow-through foundation would raise the bottom of the structure above the elevation of the floodplain, regardless of where on the lot the house is situated. Given all the circumstances related to the processing of the application, the nearly total encumbrance of the site, and the testimonial and photographic evidence supporting the proposal in its current configuration, the Examiner concludes that the "minimum necessary alteration" criterion has been satisfied. *Findings 3, 9, 12, 16, 21, 23, 27, 28, and 31.*
5. The Applicant has not in any way created the circumstances that give rise to the need for RUEX. *Findings 2 and 6.*

DECISION

Based on the foregoing findings and conclusions, the request for RUEX to construct a single-family residence in the 100-year floodplain of Scott Creek in Thurston County, Washington is **APPROVED** subject to the following conditions:

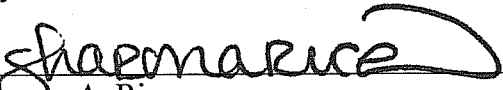
- A. Prior to or in conjunction with the issuance of any building permit, all applicable regulations and requirements of the Thurston County Environmental Health Department, Fire Marshal, Public Works Department, and building codes shall be met.
- B. Plans and specifications for the construction of the home must meet the requirements of chapter 14.38.050 of the Thurston County Building Code. The finished floor must be two feet above the base flood elevation. The foundation must be designed by a licensed engineer.
- C. An elevation certificate of the completed construction must be completed by a licensed surveyor and must be filed with the Thurston County Resource Stewardship Department.
- D. The occupants of the home must subscribe to the Thurston County flood warning system.
- E. The property owner must obtain and maintain flood insurance covering improvements on the property.
- F. Clearing of existing trees and other vegetation on the property shall be limited to only that necessary for construction of the residence. Prior to building permit issuance, the Applicant shall submit a landscape plan that proposes revegetation of all disturbed areas on the property. The plan must be approved by the Planning & Environmental Section.
- G. Revegetation of the site shall be completed prior to final inspection of the residence. Revegetation shall follow the submitted and approved landscape plan and at minimum include replanting three trees of a similar species for each protected tree removed and covering all exposed soil outside of the allowed lawn with native species of groundcover.
- H. Erosion control measures must be in place prior to any clearing, excavation, grading or construction and must be approved by the Planning and Environmental Section. These measures must be effective to prevent soil from being carried into surface water by stormwater runoff. Sand, silt, and soil will damage aquatic habitat and are considered pollutants.
- I. Prior to issuance of building permits a Boundary Line Adjustment that combines Lots 22 and 23 of Block 11, Scott Lake Division 3 into one lot shall be recorded and finalized.
- J. Prior to issuance of building permits for any structure, the Applicant shall prepare and record a notice that states the following:

This property lies within a flood hazard area. The property may experience flood conditions in the future that could cause damage to structures or personal property.

This notice shall reference the subject property and be recorded with the Thurston County Auditor. A copy of the recorded notice shall be submitted to the Resource Stewardship Department with the building permit application.

DECIDED May 4, 2010.

By:



Sharon A. Rice

Thurston County Hearing Examiner Pro Tem

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