

**FINDINGS, CONCLUSIONS AND DECISION
OF THE HEARING EXAMINER OF THE
THURSTON COUNTY**

CASE NO: 2009101125 (Decision on Reconsideration -- Reasonable Use Exception).

SUMMARY OF DECISION

The Request for Reconsideration made by Jeff Brown and Malanie Reimer, by and through their attorney, Allen Miller is **DENIED** regarding the proposed modified residence, subject to the Applicant providing updated exhibits and reports as outlined in this Decision. The request is **DENIED** regarding the block wall.

Background

Applicants requested a Reasonable Use Exception (RUE) to construct a single-family residence on a landslide hazard area slope. Applicants also requested that they be able to maintain two block walls constructed at the base of this slope. The above-captioned matter was heard by the undersigned Thurston County Hearing Examiner *pro tem* on June 20, 2011. On July 5, 2011, findings, conclusions, and a decision were issued (the Decision) denying the request for a RUE.

Discussion Regarding the Residence

An application for a RUE and any special reports required by this chapter shall be filed with the Thurston County development services department on a form provided by that department. Along with a recommendation made by the department the application shall be heard by the Thurston County Hearing Examiner, who shall render a decision on the matter. TCC 17.15.415 A (emphasis added).

The following special reports are required for proposals within landslide hazard areas. Every development proposal for a single-family building permit which contains a use or activity subject to Table 5 within a landslide hazard area or its buffer shall provide the following special reports: drainage and erosion control plan; grading plan; landslide geotechnical report; and re-vegetation plan. TCC 17.15.630 B (emphasis added).

When granting a reasonable use exception, the hearing examiner shall impose conditions necessary to serve the purposes of this chapter and may require mitigation under an approved mitigation plan if necessary. TCC 17.15.415 D (emphasis added).

Applicants' original application was to construct a one-story home with a daylight basement and to locate the residence on the slope or near the top of the slope as proposed in the site plan that was attached to the application. Attach. d and g.

In the Request for Reconsideration, Applicants proposed to construct a residence of a different design and location and assert that this design is consistent with Finding of fact No. 12.

The undersigned, however, cannot tell from the hand sketch submitted (as Exhibit 1) whether the newly proposed residence is consistent with Finding No. 12, particularly because the drawing appears to show a residence that is 44 feet wide, not 25-30 feet wide as described in Finding No. 12. A more detailed exhibit similar to Ex. 1, Attach g would be necessary.

Also, the original proposal came before the undersigned with a staff report that included recommended conditions upon approval of the RUE. Those recommended conditions were based on the county staff's review of no less than the following three documents: a detailed site plan and profile (Ex. 1, Attach. g), a grading and erosion control plan (Ex. 1, Attach k), and a geotechnical report (Ex. 3). Each of these special reports or exhibits was based on the residential structure as originally proposed to be designed and placed. The above-referenced reports and exhibits would change, at least to some degree, if based on a differently configured home located in a different location on the property. Without an updated staff report and recommended conditions, it would not be possible for the undersigned to properly review and condition the modified proposed residence. Accordingly, it is not possible for the undersigned to review or approve the updated design under TCC 17.15.415 C.

Regarding the residential structure, the Request for Reconsideration is denied unless: within five (5) days of this Decision on Reconsideration, Applicants notify the undersigned and the Thurston County Land Use and Environmental Review Section of their intention to submit the following updated documents: (1) an updated detailed site plan and profile, (2) updated grading and erosion control plan, (3) an updated geotechnical report, (4) and any other updated exhibits and reports set forth in TCC 17.15.630 B and identified by the Land Use and Environmental Review Section as being needed for it to provide an updated staff report and recommendations for the reasonable use exception review of the modified residence. The notification from Applicants should provide a date certain by which Applicants will submit the updated reports and exhibits. If the Applicant provides this notice, the Land Use and Environmental Review Section is to notify the undersigned and Applicants of how many business days it will need to issue an updated staff report. The undersigned will provide a timetable in which county staff should review this material and submit an updated staff report. Based upon the updated information, the undersigned would evaluate the modified proposed residence under TCC 17.15.415 C.

Discussion Regarding the Block Walls

Three of the five criteria that must be met before a RUE can be granted include:

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;
4. Any alteration to a critical area is the minimum necessary to allow for reasonable use of the property. TCC 17.15.415 C.

Regarding the rock walls, in finding of fact Nos. 27 through 30 the undersigned found as follows: Clearing the subject property of its native vegetation and grading it from its original condition violated the CAO. The Critical Areas Assessment and a Washington Department of Ecology letter submitted by Applicants did not prove that the rock walls create no adverse impact to the steep slope and can be left in place. The Applicants did not provide evidence sufficient to support a finding that their reasonable use of the property depends on their maintaining the block walls versus following the suggestion of the county staff to restore the site and provide slope protection through native vegetation.

In Conclusion of law Nos. 9 and 11, the undersigned concluded as follows: Applicants failed to carry their burden of demonstrating that no other reasonable use of the property would be permitted by

the CAO or have less impact on the critical area, because using the site after removing the walls, re-grading, and re-vegetating is authorized by the CAO and would provide protection to the slope.

In its original submissions to the county and at the hearing, Applicant limited arguments regarding the block walls to the argument that the walls are suitable to the site and, thus, represented a reasonable use of the site. Applicant did not argue that removing the walls and restoring the site would harm the site.

In the Request for Reconsideration, Applicants now argue that they properly constructed the block walls and that removing them would destabilize the slope, thus violating the CAO. To support this assertion, Applicants submit Reconsideration Exhibits 2 and 3. Through these, Applicant Brown asserts that he constructed the walls properly and a geotechnical engineer asserts that he conducted a document review believes the walls to be stabilizing the slope and preventing erosion.

In a Request for Reconsideration, new evidence is to be considered only if it was not available at the time of the public hearing and the proponent shows that the evidence is of significant relevance and that the proponent has good cause for the delay in its submission. In the Request for Reconsideration, Applicants make no argument regarding why the newly offered evidence was unavailable at the time of the hearing or why there is good cause for delay in its submission. Therefore, the undersigned is not able to consider the new evidence to support a new argument being made by Applicants. Therefore, the RUE for the block walls is denied.

DECISION AND ORDER

1. Regarding the Residence, the Request for Reconsideration is **DENIED**, subject to the Applicant, as outlined in this Decision on Reconsideration, providing notice within five (5) of its intention to submit updated exhibits and reports, submitting those reports, and thereby allowing the county staff the opportunity to review the updated plan and issue an updated staff report.
2. Regarding the block walls, the Request for Reconsideration is **DENIED for being based on new evidence that cannot be considered.**
3. This Decision on Reconsideration shall be appended to the July 5, 2011 Decision, along with the submittals identified herein.

Dated this date of July 22, 2011



Jacqueline Brown Miller
Thurston County Hearing Examiner *pro tem*

THURSTON COUNTY
PROCEDURE FOR APPEAL TO BOARD
AFTER HEARING EXAMINER RECONSIDERATION

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner after reconsideration, you may file an appeal. The appeal process is described in A below. Unless appealed, decisions of the Hearing Examiner after reconsideration become final on the 11th day after the date of the reconsideration decision. **The Board of Thurston County Commissioners renders decisions within 60 days following a notice of appeal unless the Board, the applicant, and the appellant mutually agree to a longer period.

An appeal of a SEPA decision must be filed in Superior Court pursuant to the Land Use Petition Act, RCW Chapter 36.70C. An appeal of a decision relating to SEPA shall be done in accordance with RCW 43.21C.075 and TCC 17.09.160 (T).

A. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of appeal and the appropriate fee must be filed with the Development Services Department within **ten (10) days** of the date of the Hearing Examiner's decision on a reconsideration request.
3. An appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of appeal shall concisely specify the error or issue which the Board is asked to consider on appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

B. STANDING All appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the appeal should be granted.

C. FILING FEES AND DEADLINE If you wish to appeal this determination, please do so in writing on the back of this form accompanied by a non-refundable fee of **\$820.00**. Any appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 above. **Postmarks are not acceptable.** If your application fee as well as completed application form is not filed by this time, you will be unable to appeal this determination. This deadline may not be extended.

** *Shoreline Permit decisions are not final until a 30-day appeal period to the state has elapsed following the date the County decision becomes final.*



Project No. _____ Appeal Sequence No. _____

APPEAL OF HEARING EXAMINER DECISION AFTER RECONSIDERATION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
 on this ____ day of _____ 20__, as an APPELLANT in the matter of a Hearing Examiner's decision
 rendered on _____, by _____ relating
 to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does
 now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of
 Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review
 of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of
 the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted
 to the appellant.

 APPELLANT NAME PRINTED

 SIGNATURE OF APPELLANT

Address _____

 Phone _____

Please do not write below - for Staff Use Only:

Fee of \$595.00 Received: Initial _____ Receipt No. _____ Filed with the Development Services Department this _____ day of
 _____, 20__.