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HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE THURSTON COUNTY
HEARING EXAMINER**

In the Matter of the Application of)	NO. 2014100560
)	
Thomas Helpenstell)	
)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The requested reasonable use exception to construct a single-family residence within a marine riparian area and a marine bluff hazard area is **APPROVED**, subject to conditions.

SUMMARY OF RECORD

Request

Thomas Helpenstell (Applicant) requested a reasonable use exception to construct a single-family residence within a marine riparian area and a marine bluff hazard area at 4309 - 79th Avenue NW, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner held an open record public hearing on the request on February 17, 2015.

Testimony

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

- Robert Smith, Senior Planner, Resource Stewardship Department
- Brad Sangston, Thurston County Public Health and Social Services
- Tom Helpenstell, Applicant
- Doug Haye, Applicant Representative
- Bruce Studeman, Bracy & Thomas, Applicant Representative

Exhibits

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

- Exhibit 1 Thurston County Resource Stewardship Department Report including the following attachments:
- Attachment A Notice of Public Hearing
 - Attachment B Zoning/Site Map
 - Attachment C Master Application, received February 19, 2014
 - Attachment D Reasonable Use Exception Application, received February 19, 2014
 - Attachment E Supplemental Application Letter, Bruce Studeman, Bracy & Thomas, dated September 25, 2014
 - Attachment F Site Plan, received February 19, 2014
 - Attachment G Geotechnical Evaluation Report , Bradley-Noble Geotechnical Services, dated October 30, 2013
 - Attachment H Letter from David Strong, Bradley-Noble Geotechnical Services, dated August 25, 2014
 - Attachment I Notice of Application, dated July 16, 2014
 - Attachment J Comment Memorandum from Brad Sangston, Thurston County Public Health and Social Services Department, dated May 20, 2014
 - Attachment K Comment Memorandum from Kevin Chambers, Thurston County Public Works Department, dated March 21, 2014
 - Attachment L Comment E-Mail from Mark Biever, Water Resources Group, Thurston County Resource Stewardship Department, dated January 7, 2015
 - Attachment M Comment Letter from the Washington State Department of Ecology, dated March 12, 2014
- Exhibit 2 Habitat Management Plan, Acera, dated November 2014
- Exhibit 3 Photographs of Posted Notice of Public Hearing

Exhibit 4 Site Photograph

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 a reasonable use exception to construct a single-family residence within a marine riparian area and a marine bluff hazard area at 4309 - 79th Avenue NW, Olympia, Washington.¹ The application was submitted February 14, 2014 and deemed complete for review on March 19, 2014. *Exhibit 1, page 1; Exhibit 1, Attachments C, D, and I.*
2. The 0.47-acre subject property is located on the eastern shoreline of Totten Inlet. It is developed with an existing well and septic system. The eastern portion of the property is encumbered by a 30-foot-wide access easement for 79th Avenue NW. The septic drainfields are immediately west of the access easement. *Exhibit 1, page 2; Exhibit 1, Attachments B and F.*
3. Surrounding waterfront parcels to the north and south of the subject property are the same approximate size as the subject property and are developed with single-family residences. *Exhibit 1, pages 2 and 5.*
4. The subject property has a Rural Residential/Resource (RRR) 1/5 zoning designation; single-family residences are allowed as a primary use in this zone. *Exhibit 1, page 3; TCC 20.09A.*
5. The Shoreline Master Program for the Thurston Region (SMPTR) designates the shorelands adjacent to Puget Sound on-site as a Conservancy shoreline environment. Single-family residential development is allowed on Conservancy shorelines subject to a minimum building setback of 100 feet from the ordinary high water mark and a maximum lots impervious surface coverage of 30 percent. The proposed residence would be set back 142 feet from the ordinary high water mark (OHWM). The proposed building footprint (including driveway from 79th Avenue NW) would be 3,500 square feet, which is less than 30 percent of the total site area. *Exhibit 1, page 3; Exhibit 1, Attachment F; Exhibit 2.*
6. For properties designated as a Conservancy shoreline, the Thurston County critical areas ordinance (CAO) designates the area extending 250 feet from the ordinary high water mark as a marine riparian habitat area. This critical area encompasses virtually all of the subject property. However, because the lot was legally created prior to adoption of the CAO, Thurston County Code (TCC) 24.50.060 would allow a single-family residence to be constructed in the outer 25 percent of the riparian area subject to applicable standards.

¹ The legal description of the subject property is a portion Lot 185 of the Boston Harbor Waterfront Acre Tracts, Division 2 subdivision; also known as Tax Parcel No. 36020018501. *Exhibit 1.*

On this site, that would require an approximately 188-foot setback from the OHWM. Because of the existing private road easement and septic drainfields, together with other applicable zoning setbacks, this would still not leave a reasonable building envelope. Thus the application for reasonable use exception was submitted. *Exhibit 1, pages 2 and 4; Exhibit 1, Attachment F; Exhibit 2.*

7. There are no species of concern on or around the subject property. In its existing condition, the proposed building envelope provides low levels of habitat functions because it was previously cleared of native trees and shrubs and has been colonized by invasive species. In order to address unavoidable impacts of the proposed development, the Applicant submitted a mitigation plan consistent with requirements of the CAO. Its primary purpose would be restoring 7,000 square feet of previously cleared area by removing invasive species and planting native shrubs and plants. The plantings would improve habitat and would also contribute to future stability of the slope. *Exhibits 2 and 4.*
8. The subject property is also located within a designated marine bluff hazard area. The Coastal Zone Atlas of Washington maps the marine bluff as "unstable." Pursuant to TCC 24.03.010, the marine bluff hazard area includes the unstable bluff and the upland area extending 200 feet from the top of the bluff. *Exhibit 1, page 4; TCC 24.03.010.*
9. The Applicant submitted a site evaluation prepared by a licensed geologist, which concluded that the bluff and the upland area extending inland a distance of 30 feet from the top of the bluff are unstable, but that a minimum building setback of 60 feet would be safe for the expected life of the structure, provided certain construction and stormwater techniques are implemented on site. *Exhibit 1, Attachments G and H.* Thurston County's Geologist concurred with this recommendation. *Exhibit 1, Attachment L.* The recommended 60-foot setback would be consistent with 9and slightly in excess of) the setbacks of residences on surrounding parcels. *Exhibit 1, Attachments G and H; see also Attachment M, Figure 2.*
10. The Thurston County Health Department approved the on-site septic system. The Washington State Department of Ecology granted a variance allowing the location of the well 75 feet from the septic drainfield. Concluding that the proposal would not result in any issues of public health concern, Environmental Health Division Staff recommended approval of the reasonable use exception. *Exhibit 1, Attachment J.*
11. The Thurston County Public Works Department reviewed the application and determined that the requirements of Thurston County Road Standards and the Drainage Design and Erosion Control Manual have been satisfied. Public Works Staff recommended approval of the application subject to a condition that the Applicant obtain a Construction Stormwater Permit from the Washington State Department of Ecology, if required by that agency. *Exhibit 1, Attachments K and M.*

12. Reasonable use exceptions are considered non-project actions and are exempt from the requirements of the State Environmental Policy Act (SEPA). *WAC 197-11-800.*
13. Notice of application was issued on July 16, 2014 with a 20-day comment period. Written notice of the public hearing was sent to all property owners within 500 feet of the site on February 2, 2015, and posted on-site and published in The Olympian on February 6, 2015. *Exhibit 1, page 3; Exhibit 1, Attachments A and I; Exhibit 3.*
14. Resource Stewardship Staff reviewed the application and submitted that, with the recommended conditions it would satisfy all criteria for approval. The conditions specifically require compliance with the mitigation measures specified in the habitat management plan and the geotechnical reports, as well as the requirements identified by the commenting agencies. *Exhibit 1, pages 4-8.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for reasonable use exception pursuant to Chapter 36.70.970 of the Revised Code of Washington and Chapters 2.06 and 24.45 of the Thurston County Code.

Criteria for Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if all of the following specific findings can be made:

- A. No other reasonable use of the property as a whole is permitted by this title; and
- B. No reasonable use with less impact on the critical area or buffer is possible. At a minimum, the alternatives reviewed shall include a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design. This may include a variance for yard and setback standards required pursuant to Titles 20, 21, 22, and 23 TCC; and
- C. 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, or increase public safety risks on or off the subject property; and
- D. The proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property; and
- E. The proposed reasonable use shall result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources, hydrological conditions, and geologic conditions; and
- F. A proposal for a reasonable use exception shall ensure no net loss of critical area functions and values. The proposal shall include a mitigation plan consistent with this title and best available science. Mitigation measures shall address unavoidable impacts and shall occur on-site first, or if necessary, off-site; and

- G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern; and
- H. The location and scale of existing development on surrounding properties shall not be the sole basis for granting or determining a reasonable use exception.

Conclusions Based on Findings

1. Considering the uses allowed in the RRR 1/5 zone and the character of development surrounding the site, there is no reasonable use of the property other than residential uses such as that proposed. *Findings 3 and 4.*
2. Because nearly the entire site is encumbered, there is no reasonable use with less impact on the critical areas is possible. The proposal would place a modest building and driveway footprint situated as far east on the property as possible while avoiding the road easement and septic drainfields. The site has already been disturbed. The proposed mitigation would restore an area equivalent to two times the building footprint to compensate for the impacts of the proposed development. *Findings 2, 5, 6, and 7.*
3. As conditioned, the use would not result in any damage to other property, nor create any threat to the public health, safety, or welfare, nor increase public safety risks. *Findings 9-12.*
4. The proposal is limited to the minimum encroachment into the critical areas necessary to allow reasonable use of the property. The critical areas and road easement encumber the entire parcel. The Applicant proposes a modest building and driveway footprint placed as far from the shoreline as possible while avoiding the road easement and septic drainfields. *Findings 2, 5, 6, and 8.*
5. With conditions requiring implementation of the habitat management plan and the recommendations of the geotechnical report, the proposal would result in minimal alteration of the critical areas. *Findings 7 and 9.*
6. With conditions requiring implementation of the habitat management plan, the proposal would ensure no net loss of critical area functions and values. *Finding 7.*
7. The use would not result in unmitigated adverse impacts to species of concern. *Finding 7.*
8. The location and scale of existing development on surrounding properties is not the sole basis for approving the requested reasonable use exception. Critical areas encumber the entire parcel, and compliance with the regulations would not allow a reasonable building envelope. *Findings 6 and 8.*

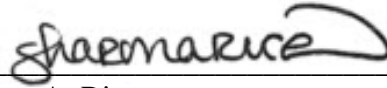
DECISION

Based on the preceding findings and conclusions, the application for a reasonable use exception to build a single-family residence within a marine riparian area and a marine bluff hazard area at 4309 - 79th Avenue NW, Olympia, 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 Public Health and Social Services Department, Public Works Department, Fire Marshal, and Thurston County Resource Stewardship Department shall be satisfied.
- B. All development shall comply with the Shoreline Master Program for the Thurston Region, except as altered by the requirements of the Critical Areas Ordinance.
- C. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. It is the applicant's responsibility to obtain this permit if required.
- D. If contamination is currently known or suspected during construction, testing of potentially contaminated media must be conducted. If contamination of soil or groundwater is readily visible, or is revealed by testing, the Washington State Department of Ecology must be notified [contact the Environmental Report Tracking System Coordinator at the Southwest Regional Office at (360) 407-6300].
- E. Site development shall abide by the recommendations in the Geotechnical Evaluation Report and addendum prepared by David C Strong of Bradley-Noble Geotechnical Services in the record at Exhibit 1 Attachments G and H.
- F. The Applicant shall complete all mitigation proposed in the Habitat Management Plan, in the record at Exhibit 2. The mitigation work shall be completed prior to final occupancy approval of the residence. If the work is not able to be completed prior to final occupancy (because of time of year) a surety and bond, prepared in compliance with TCC 24.70, shall be submitted.
- G. A monitoring and contingency plan, prepared in conformance with standards specified in TCC 24.35.017, shall be submitted prior to final occupancy approval of the residence. A surety and bond, prepared in compliance with TCC 24.70, shall also be submitted prior to final occupancy approval of the proposed residence.
- H. All development on the site shall be in substantial compliance with the approved reasonable use exception application, as conditioned. Any alteration to the proposal will require approval of a new or amended reasonable use exception. The Land Use and Environmental Review Section will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

DECIDED March 2, 2015.

By:

A handwritten signature in black ink, appearing to read "sharonarice", written over a horizontal line.

Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

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, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

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 Resource Stewardship Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
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.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$651.00** for a Request for Reconsideration or **\$866.00** an Appeal. Any Request for Reconsideration or 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 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____
Appeal Sequence No.: _____

Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

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

Check here for: APPEAL OF HEARING EXAMINER DECISION

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 _____, 20___, 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. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED

SIGNATURE OF APPELLANT

Address _____

Phone _____

Please do not write below - for Staff Use Only:

Fee of \$652.00 for Reconsideration or \$870.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____ 20___.