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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. 2016100538
)	
)	Oster RUEX
Joshua Snodgrass on behalf of)	
Ken Oster)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The requested reasonable use exception to construct a single-family residence and appurtenances in a wetland buffer is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request

Joshua Snodgrass, on behalf of Ken Oster (Applicant), requested a reasonable use exception to construct a single-family residence and appurtenances in a wetland buffer located between Johnson Point Road and a County-owned parcel known as the Johnson Point Wetlands.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on September 6, 2016. Due to substantial overlap in exhibits and parties, the hearing on this application was consolidated with the hearing on the Snodgrass RUEX (2016100539) in one public hearing with the consent of all Applicants. Separate decisions are being issued for each application.

Testimony

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

Leah Davis, Thurston County Resource Stewardship Department, Associate Planner

Dawn Peebles, Thurston County Environmental Health Department
Joshua Snodgrass, Applicant/Applicant Representative
Ken Oster, Applicant¹
Mike Thorniley, Neighbor

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:

- A. Notice of Public Hearing
- B. Master Application, received February 16, 2016
- C. Reasonable Use Exception Application, dated February 16, 2016
- D. Project narrative
- E. Site plan, received June 2, 2016
- F. Notice of Application, dated August 5, 2016
- G. Comment memo from Thurston County Environmental Health Department, dated May 3, 2016
- H. Comment memo from Thurston County Public Works, dated March 9, 2016
- I. Comment letter from Nisqually Indian Tribe, dated March 1, 2016
- J. Comment letter from Department of Ecology, dated March 16, 2016
- K. Letter from Jim Henry, dated May 31, 2016
- L. Large Lot Subdivision map, dated August 17, 1999
- M. Wetland delineation from EnviroVector, dated October 15, 2016
- N. Wetland ratings forms completed by Brad Murphy, dated August 16, 2015
- O. Wetland buffer restoration plan, dated May 2016
- P. Wetland buffer restoration site plan, received August 17, 2016

¹ Mr. Oster did not testify but was present and indicated his consent to have Mr. Snodgrass speak on his behalf in the consolidated hearing by affirmatively nodding his head from the front row of the audience.

Q. Priority Habitats and Species Report

R. Photos (2) of driveway road bed and slash piles

Exhibit 2 Copy of two photographs of the posted notice of hearing

Exhibit 3 Two color photographs of the Snodgrass property, taken by Josh Snodgrass, depicting understory growth in the cleared area

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 and appurtenances in a wetland buffer on a residential parcel between Johnson Point Road and a County-owned parcel containing the Johnson Point Wetlands. The undeveloped subject property is 7432 Johnson Point Road NE in rural Thurston County, Washington.² *Exhibits 1, 1.B, 1.D, and 1.E.*
2. The 5.02-acre subject property is undeveloped except for a temporary rock driveway that enters from Johnson Point Road. A wetland extending south from the northern lot line occupies a significant portion of the central section of the parcel; it is oriented north/south and vegetated with scrub-shrub wetland species. The wetland is located in a natural low point, with the property gently sloping up to the east and west. The wetland is regulated pursuant to the Thurston County critical areas ordinance (CAO, Title 24). In preparation for development, the front of the property along Johnson Point Road was cleared without permits in 2015 or 2016, impacting the wetland buffer. Except for this cleared area at the west end, the parcel is densely vegetated with mature trees and understory growth. *Exhibits 1, 1.E, 1.N, and 3.*
3. Surrounding land uses include single-family residences on lots of similar size to the subject property and the adjacent public wetlands parcel. The property is surrounded by RRR 1/5 zoning, with the exception of the wetlands which are zoned Public Parks. *Exhibit 1.*
4. The subject property has a Rural Residential Resource – One Dwelling Unit per 5 Acres (RRR 5/1) zoning designation. *Exhibit 1.* Single-family residences and appurtenances are a permitted use in the RRR 5/1 zone. Other permitted uses include agriculture, duplexes, home occupations, and farm housing in conjunction with a farm residence on-site. *Thurston County Code (TCC) 20.09A. 020.* Thurston County Code Chapter 20.34 would allow a shop as an accessory use in conjunction with a residence. The minimum required property line setbacks for all structures larger than 120 square feet are: 20 feet

² The legal description of the property is as follows: 16-19-1W KA Lot 8 LL-0506, 3/625 Revised 3249271; also known as Tax Parcel No. 1196210800. *Exhibit 1.*

from the front property line, six feet from side lot lines, and 10 feet from rear property line. *TCC 20.07.030*.

5. The Applicant submitted two professionally prepared wetland reports. The first wetland report was declined because it used the former 2004 wetlands rating system; Thurston County amended its code and began requiring the use of the Department of Ecology's 2014 rating system as of January 1, 2015. The second wetland report was rejected by County Staff for being incomplete. A County Staff member with a wetland science background completed the proper wetland ratings forms based on the second wetland consultant's report, and determined the subject property's wetland has the rating of Category II, requiring a 280-foot buffer. At the time of hearing, the Applicant waived objection to the County's wetland rating determination. *Exhibits 1, 1.M, and 1.N; Snodgrass Testimony*.
6. The property is also encumbered by a tree retention buffer along the Johnson Point Road frontage that was a condition of subdivision approval in 1999. *Exhibits 1 and 1.L*.
7. The on-site portion of the Category II wetland and its required 280-foot buffer occupy the majority of the subject parcel except for narrow swaths along the east and west ends. There is no way to access the eastern portion of the site outside the wetland buffer without traveling through the wetland buffer. In order to have productive use of the parcel, the Applicant submitted an application for reasonable use exception on February 16, 2016, which was deemed complete on March 15, 2016. *Exhibits 1, 1.B, 1.C, and 1.E*.
8. The proposal would place a residence, decks, patios, driveway, and separate shop building with its own driveway within a 10,000 square foot building envelope in the west end of the property near the road. Other proposed improvements include a septic system to serve both the proposed residence and the residence on the adjacent parcel to the north. A well serving both the subject property and the residence to the north would be located just north of the shared property boundary, on the parcel to the north. Approximately one-half-acre of the site would be developed with residence and appurtenances, and the rest would be maintained in a natural condition. *Exhibits 1, 1.D, and 1.E; Snodgrass Testimony*.
9. All improvements would be outside the wetland, and a minimum 149-foot buffer from the wetland edge would be maintained for all development except for a soft surface foot trail providing access to the septic drainfield site located east of the wetland on the parcel to the south. To mitigate the unavoidable impacts from any residential development of the site, the Applicant proposes to restore 10,000 square feet of native plantings. The Applicant submitted a professionally prepared buffer restoration report (ACERA, dated May 2016) and an Applicant-prepared revegetation plan. The proposed mitigation would address the previously unpermitted clearing by removing the rock driveway and planting additional trees that would provide food, nesting, and refuge resources for wildlife in areas now occupied by grasses. The new plantings would provide for additional filtration of pollutants from the driveway and human activity on-site prior to any sheet flow reaching the wetland. The planting plan calls for eight species of shrubs, five species of

native grasses, and one species of tree - the Shore Pine. The plan proposes maintenance consisting of irrigation twice monthly from May 15th to October 15th, with supplemental irrigation as necessary and replacement of dead or dying plants. No long term monitoring was proposed. *Exhibits 1, 1.E, and 1.O.*

10. Resource Stewardship Staff were concerned about the mitigation plan's exclusive use of the Shore Pine which, while a native tree in Washington, is not presently found on-site. Staff contacted the consultant to inquire as to the choice of tree but found the consultant's response - that Shore Pines don't get too tall - not persuasive. Staff noted that Washington Department of Fish and Wildlife (WDFW) Priority Habitat and Species (PHS) mapping shows both Little Brown Bat and Yuma Miotis, two protected species of bats, in the project vicinity. Because the Shore Pine is not found on-site and is not known to draw or support the bats and other species currently using the undeveloped property for food and refuge resources, Staff determined that the proposed monospecies planting of Shore Pine did not adequately mitigate the existing and proposed impacts and requested that more variety in tree species be required by condition of approval. Potential species include Big Leaf Maple, Red Alder, Douglas Fir, Western Red Cedar, Western Hemlock, Madrona, and Holly, which are also found on-site or in the area. Of these, Madrona and Holly are known not to grow to excessive heights. Staff also submitted that the mitigation plan does not provide enough details about ongoing monitoring after initial plantings, consistent with the CAO at TCC 24.35.017. *Exhibit 1; Davis Testimony; Thorniley Testimony.*
11. Planning Staff submitted that the foreseeable expectation of any owner of the subject property would be to build a residence. Although the site could be possibly be used for occasional recreational use, such use would be out of character with the surrounding neighborhood and would constitute less than full use of this parcel. The proposal would maintain 100 feet of clearing between the frontage tree buffer and a reduced wetland buffer to accommodate the infrastructure and buildings consistent in size and use with surrounding development. Staff submitted that the proposal would be a reasonable use of the property and would constitute minimal encroachment consistent with residential use. *Exhibit 1; Davis Testimony.*
12. The Development Review Division of the Thurston County Public Works Department reviewed the project for access, traffic, and stormwater control requirements, and recommended approval subject to a condition requiring the Applicant to apply with the Department of Ecology for a Construction Stormwater Permit, if required by that state agency. *Exhibit 1.H.*
13. The Thurston County Environmental Health Department reviewed the project for compliance with the County's health codes and recommended approval without condition. Environmental Health Division Staff submitted comments indicating that the on-site septic system design has been approved and is on file, and that, as proposed, the project would comply with all applicable requirements of the Sanitary Code. *Exhibits 1, 1.E, 1.G, and 1.K; Peebles Testimony.*

14. The Nisqually Tribe commented on the application, noting that the subject property is in an area of high likelihood for archeological findings. They requested that a cultural resources survey be required and that an inadvertent discovery plan be put in place to address discovery of archeological resources or human remains during site development. *Exhibit 1.I.* Planning Staff recommended a condition requiring these measures. *Exhibit 1; Davis Testimony.*
15. Reasonable use exceptions are non-project actions that are exempt from the requirements of the State Environmental Policy Act (SEPA). *WAC 197-11-800.*
16. Notice of application was mailed to all property owners within 500 feet of the site on August 24, 2016. Notice of the public hearing was posted on-site and published in The Olympian on August 26, 2016. *Exhibits 1, 1.A, and 2.*
17. At hearing, one neighboring property owner presented testimony. He confirmed the presence of bats on his parcel, noting that he has bat boxes, and testified as to other tree species in the neighborhood that are compatible with bats and that can be placed nearer to homes than Douglas Fir or other taller species known for fall risks. He supported approval of the requested reasonable use exception. *Thorniley Testimony.*
18. The Applicant agreed with the majority of Staff's analysis and waived objection to both the conditions recommended in the staff report and those discussed on the record at hearing, except that he urged the prepared mitigation planting plan be adopted as written. His concern is that with tall trees to the east, south, and west, the proposed residence would not get much light, and that the taller trees present a greater fall risk. *Snodgrass Testimony.*

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. The subject property is too small to be used for agriculture and does not contain a farm residence. Considering the uses allowed by the zoning ordinance, the size of the parcel, surrounding existing residential development, and the encumbrance by critical areas, there are no other reasonable uses of the property. *Findings 1, 2, 5, 6, 7, 8, 9, and 11.*
2. There is no other reasonable use of the property that would have less impact on the wetland buffer. The proposed development envelop is modest in size and would provide a substantial, undisturbed wetland buffer. The proposed placement is set back as far from the wetland edge as is possible while complying with the 50-foot tree retention buffer along the site frontage. *Findings 2, 3, 8, 9, and 11.*
3. The use would be similar in nature and intensity to the use of surrounding residences. There is no evidence of potential hazard to other properties, public health, safety, or welfare. *Findings 3, 4, 8, 9, 12, 13, and 14.*
4. The development envelope would be set back as far as possible from the wetland edge. Unavoidable impacts of development would be mitigated through buffer enhancement planting. As proposed, the project minimizes encroachment to the extent possible. *Findings 2, 8, and 9.*
5. In order to comply with the requirements of criteria E, F, and G that the proposal should (E) “result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources...”, (F) “ensure no net loss of critical area functions and values [and] include a mitigation plan consistent with this title and best available science...”, and (G) “ not result in the unmitigated adverse impacts to species of

concern”, it is necessary to defer to Resource Stewardship’s recommendation that the planting plan tree species diversity be expanded to include trees that are already present on-site. To do so would ensure minimal interruption of existing habitat and best possible replacement of previously removed habitat, for the priority bat species known to exist in the project vicinity. With a condition of approval to ensure that the planting plan is revised and approved by Resource Stewardship for compliance with TCC Chapters 24.30 and 24.35, the proposal would comport with criteria E and F. *Findings 2, 5, 6, 7, 8, 9, 10, 11, 17, and 18.*

6. The location and scale of existing development on surrounding properties was not a primary factor in considering approval. *Findings 3, 4, 8, and 11.*

DECISION

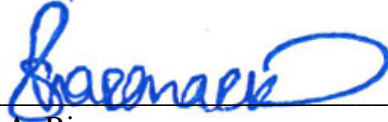
Based on the preceding findings and conclusions, the requested reasonable use exception to place a single-family residence and appurtenances in a wetland buffer is **APPROVED** subject to the following conditions:

- A. Prior to issuance of any building permit, the Applicant shall hire a professional archaeologist to conduct a cultural resources survey. A report from the archaeologist shall be submitted to Thurston County Resource Stewardship Department Staff, who will provide it to the Nisqually Indian Tribe. The cultural resources survey report and an inadvertent discovery plan shall be approved prior to the commencement of development.
- B. 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, and Thurston County Resource Stewardship Department shall be met.
- C. Prior to building permit issuance, a new planting plan indicating a diversity of tree species shall be approved by Thurston County Resource Stewardship. Revegetation shall follow the approved plan and shall be completed prior to final inspection of the residence. The new planting plan shall provide details on the monitoring of success of the mitigation after initial plantings, as required by the CAO (TCC 24.35.017). Staff reserves the opportunity to require a surety bond, pursuant to TCC 24.70 to cover the potential costs to monitor and replant an approved buffer restoration plan.
- D. The slash piles on site left over from the clearing shall be hauled away. Burning these in the wetland buffer will cause adverse impacts.
- E. The driveway rock bed that was installed after the clearing operation shall be removed from all areas except the development envelope to enable the planting and survival of native species. The removal of rock shall be inspected by staff *prior* to implementing the buffer revegetation plan.

- F. A construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found on Ecology's website. It is the Applicant's responsibility to obtain this permit if required.

DECIDED September 20, 2016.

By:



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 \$651.00 for Reconsideration or \$866.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Resource Stewardship Department this _____ day of _____, 20___.