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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. 2018104905
)	
John Scherer)	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 fish and wildlife conservation area is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request

John Scherer (Applicant) requests a reasonable use exception to construct a single-family residence within a fish and wildlife conservation area. The subject property is located at 8046 Ellison Loop NW, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on June 25, 2019.

Testimony

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

- Scott McCormick, Associate Planner, Thurston County Planning & Economic Development
- Dawn Peebles, Thurston County Environmental Health
- John Scherer, Applicant
- Brian Amendala, 8050 Ellison Loop NW

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. Zoning Map
 - C. Master Application, received August 28, 2018
 - D. Reasonable Use Exception Application, received August 28, 2018
 - E. Reasonable Use Exception Narrative, received August 28, 2018
 - F. Map to site
 - G. Aerial Photo of Area and Subject Property (Google Map)
 - H. Plat Map of Area and Subject Property
 - I. Site Plan for Proposed New Residence
 - J. Notice of Application, dated April 11, 2019, with Adjacent Property Owner List dated November 27, 2018
 - K. Memorandum from Jeremy Baarsma, TC Public Health and Social Services, dated November 29, 2018
 - L. Letters from the WA State Department of Ecology, dated October 3, 2018 and May 19, 2019
 - M. Letter from the Nisqually Tribe, dated September 25, 2018
- EXHIBIT 2 Photograph of posted hearing notice
- EXHIBIT 3 Email from John Scherer to Scott McCormick, dated June 16, 2019 re: On-site Septic System
- EXHIBIT 4 Building Site Application for septic system approved March 22, 1993 and record drawing approved September 29, 1997

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 requests a reasonable use exception to construct a single-family residence within a fish and wildlife conservation area. The subject property is located at 8046 Ellison Loop NW, Olympia, Washington. *Exhibits 1, 1.C, 1.D, 1.E, and 1.I.*

2. The subject property is 0.54 acres in area and is located on Oyster Bay of Puget Sound, on the north side of Burns Point. The Applicant purchased the subject property in 1984. The subject property is undeveloped except for a septic system in the southwest portion of the property that was installed in 1997, pursuant to an application approved by Thurston County on March 22, 1993. Thurston County approved the as-built drawings for the septic system on September 29, 1997. *Exhibits 1, 1.E, 3, and 4; Dawn Peebles Testimony.*
3. The Applicant proposes to construct a two-story, 2,250 square foot residence and attached 576 square foot garage on site, resulting in a total impervious surface coverage of 2,416 square feet. This represents a smaller residence and impervious surface coverage than surrounding lots. The four waterfront parcels nearest the subject property contain residences ranging from 2,379 to 3,362 square feet and garages ranging from 506 to 624 square feet, with total impervious surface coverage ranging from 3,288 to 5,015 square feet. The Applicant intentionally sized his proposal to be smaller than surrounding residences. *Exhibit 1.E; John Scherer Testimony.*
4. The residence and garage would be constructed in the southern portion of the site, as close to the street as possible without encroaching into either the 20-foot front yard setback specified in Thurston County Code (TCC) 20.07.030 or the existing septic system components. At this location, a minimum shoreline setback of 110 feet would be maintained. County Planning Staff submitted that the proposed building envelope would provide an effective buffer for the shoreline, and that a front yard setback reduction to increase the buffer is not warranted. *Exhibit 1, page 5; Scott McCormick Testimony.*
5. The Applicant proposes to use construction techniques designed to minimize excavation of the site. The Applicant anticipates that 65% of the residence could be built to perch above the site on piles or other supported foundation styles rather than being excavated into the site. Based on his work as an architect, he estimated cuts and fills would be 40 cubic yards each. *Exhibit 1.E; John Scherer Testimony.*
6. The average slope of the subject property is approximately 25%. Although the steeper marine bluff (north edge of site) is classified as a landslide hazard area, that critical area would not be impacted by the development due to the proposed 110-foot setback. The portion of the site proposed for development is not classified as a landslide hazard area. However, Planning Staff recommended as a condition of approval that the Applicant be required to submit an engineered storm drainage and erosion control plan prior to building permit issuance. *Exhibit 1, pages 4 and 7.*
7. The subject property is vegetated with mature evergreen trees and native understory vegetation. Most of this vegetation would remain undisturbed; three trees are proposed for removal within the building footprint. Planning Staff recommended that the Applicant be required to submit a native vegetation replanting and restoration plan prior to building permit issuance and complete the revegetation work prior to final occupancy approval (or enact a bond or irrevocable assignment of funds for 125% of the cost). *Exhibit 1, pages 3, 6 and 7.*

8. The subject shoreline is designated a Conservancy shoreline under the Shoreline Master Program for the Thurston Region (SMPTR). Although the SMPTR specifies a 100-foot structural setback from the ordinary high water mark (OHWM), the County's critical areas ordinance (TCC Title 24) designates the area within 250 feet of the OHWM of a Conservancy shoreline as a marine riparian habitat area, which is a type of regulated fish and wildlife habitat conservation area. *TCC 24.25.050; Exhibit 1, page 7*. New single-family residential development is allowed on legally established lots with less than 3,500 square feet of buildable area outside of the critical area and buffer, provided that a reasonable use exception is obtained for development within the inner 50 % of the buffer (or the inner 75% of the buffer for riparian area buffers). *TCC 24.50.060*. In this case, due to the property depth of approximately 180 feet, the marine riparian habitat area encumbers the entire parcel. The proposed building envelope would be set back 110 feet from the OHWM, within the inner portion of the buffer that cannot be developed without reasonable use exception approval. *Exhibits 1.E and 1.I*.
9. The subject property is zoned Residential LAMIRD – One Dwelling Unit Per Acre (RL 1/1), a zone which allows single-family residences, home occupations, and agriculture as primary permitted uses. *TCC 20.11A.020; Exhibits 1 and 1.B*. The subject property is within the Burns Point Beach Estates residential subdivision. Surrounding waterfront parcels are developed with single-family residences, most of which, according to the Applicant, appear to have structures within 250 feet of the OHWM. The subject parcel is one of the last waterfront parcels in the neighborhood to be developed. *Exhibits 1.D, 1.E, 1.G, and 1.H; John Scherer Testimony*.
10. The proposed residence would be served by an existing Group A public water system and by the existing septic system. The Thurston County Environmental Health Division reviewed the proposal and submitted that it meets the requirements of the Thurston County Sanitary Code. Environmental Health recommended approval of the application, subject to conditions requiring that minimum 10-foot building setbacks be maintained between the building foundation and the septic drainfield, and between all on-site septic components and the water supply line. *Exhibits 1 and 1.K*.
11. The application was filed on August 28, 2018 and deemed complete on September 26, 2018. Notice of the application was sent to reviewing agencies and surrounding property owners within 500 feet on April 11, 2019. *Exhibits 1 and 1.J*.
12. Reasonable use exceptions are non-project actions that are exempt from the requirements of the State Environmental Policy Act (SEPA). *WAC 197-11-800*.
13. Notice of the public hearing was posted on-site on June 14, 2019, mailed to all owners of parcels within 500 feet of the site on June 6, 2019, and published in The Olympian on June 14, 2019. *Exhibits 1, 1.A and 2*.

14. Public comment at the hearing did not relate to the proposed new development per se but involved concern of a neighboring property owner that the existing septic system encroaches on his parcel and that certain Madrona trees on the subject property lean over his residence and are a hazard, which hazard might be exacerbated by a possible septic failure. *Brian Amendala Testimony.*
15. The approved as-built septic drawings depict that the septic system components are wholly on the subject property, except for the reserve drainfield, which is in an easement across Ellison Loop. Prior to building permit issuance, the Environmental Health Division would review the building permit and confirm that the septic system is consistent with the approved plan and that it is properly connected to the new residence. Once in use, the septic system would require an operational maintenance certificate that must be renewed every three years. *Testimony Dawn Peebles and John Scherer; Exhibit 4.*
16. Due to the status of the subject property as a critical area, the trees on the subject property are protected, and the County considers the issue of whether the trees are hazard trees requiring removal to be a private, civil matter. *Scott McCormick Testimony.* The Applicant had trees on-site evaluated by an arborist on two occasions in response to the neighbor's concerns. During the first arborist visit, the arborist identified some Douglas fir trees with root rot, and those trees were removed. During the second arborist visit, the arborist evaluated the Madrona trees complained of and determined that they are not a threat to the neighbor's residence. *John Scherer 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. Considering the uses allowed by the zoning ordinance, the small size of the parcel, and the character of existing residential development in the vicinity, the proposed single-family residential use is the only reasonable use of the property. Given the site's total encumbrance by critical areas, there is no way to develop a single-family residence without a reasonable use exception. *Findings 2, 3, 8, and 9.*
2. As conditioned, no reasonable use with less impact on the critical area is possible. The Applicant proposes a modest building footprint that is located as far from the shoreline as possible and would retain a setback from the marine bluff of 110 feet. The contemplated residential design would minimize excavation of the slope. Conditions of approval contain stormwater, erosion control, and revegetation requirements to further minimize potential impacts to the critical area. *Findings 3, 4, 5, 6, and 7.*
3. As conditioned, the requested residential development would not result in damage to other property or threaten the public health, safety, or welfare on or off the subject property, nor increase public safety risks on or off the subject property. The Applicant does not propose any construction within a landslide hazard area. Engineered stormwater and erosion control plans and revegetation of disturbed areas would be required. Conditions of approval incorporate the minimum septic system setbacks identified by the Environmental Health Division. With regard to the neighbor's concerns, no removal of the Madrona trees is required by this decision; such requirement would be inconsistent with County tree retention requirements for critical areas and the RUE criterion that the use result in "minimal alteration of the critical area" (see below). Whether the existing trees are hazard trees is not an issue that is relevant to the requested RUE; the issue is whether the proposed residential development would create a hazard, and the evidence demonstrates that it would not. *Findings 6, 7, 10, 14, 15, and 16.*

4. As conditioned, the proposal is limited to the minimum encroachment into the critical area necessary to prevent denial of all reasonable use of the property. The Applicant proposes a modest building footprint that would be located as far from the shoreline as possible. The conditions of approval do not allow disturbance of native vegetation in excess of ten feet waterward of the residence. *Findings 3, 4 and 7.*
5. As conditioned, the proposal would result in minimal alteration of the critical area. Engineered stormwater and erosion control plans and revegetation of disturbed areas will be required. Most existing native vegetation would be retained. *Findings 4, 5, 6 and 7.*
6. As conditioned to require submittal and implementation of a native vegetation replanting and restoration plan, the proposed reasonable use exception would be consistent with the requirement to ensure no net loss of critical area functions and values. *Finding 7.*
7. No adverse impacts to species of concern are anticipated, due to the setback proposed and the extent of native vegetation retained. *Findings 4 and 7.*
8. The location and scale of existing development on surrounding properties is not a basis for granting approval. The basis for approval is a critical area that encumbers the entire parcel. The Applicant proposes development that is more modest in scale than surrounding properties. *Findings 3, 8, and 9.*

DECISION

Based on the preceding findings and conclusions, the requested reasonable use exception to construct a single-family residence within a fish and wildlife conservation Area at 8046 Ellison Loop NW is **APPROVED** subject to the following conditions:

1. 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 CPED shall be met.
2. Due to relatively steep slopes of approximately 25% and reduced shoreline buffer, prior to building permit issuance the Applicant shall submit an engineered storm water drainage and erosion control plan specific to the proposed future residence which meets all of the requirements of the Thurston County Drainage and Erosion Control Manual.
3. Prior to building permit issuance, erosion control measures must be installed in the field prior to any clearing, excavation, grading or construction and must be reviewed and approved by CPED. 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.

4. There shall be no disturbance of native vegetation beyond 10 feet of the proposed structure on the waterward side.
5. A native vegetation replanting and restoration plan shall be submitted to Thurston County CPED prior to building permit issuance. The plan shall show how areas disturbed by construction and septic system installation will be revegetated. Replanting and mitigation work shall be completed prior to final occupancy approval, unless a bond or irrevocable assignment of funds is enacted (125% of cost of replanting plan).
6. At time of building permit, the following setbacks must be met:
 - 10 foot minimum setback from the building foundation to the drainfield
 - 10 foot minimum setback between all on-site septic components and the water supply line.
7. All development shall comply with the Shoreline Master Program for the Thurston Region.

DECIDED July 10, 2019.

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 Community Planning & Economic Development 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 **\$750.00** for a Request for Reconsideration or **\$1,020.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development 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 \$750.00 for Reconsideration or \$1,020.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
Filed with the Community Planning & Economic Development Department this _____ day of _____, 20___.