



COUNTY COMMISSIONERS

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HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Application of)	NO. 2019101127 McGlothin RUE
)	
Bosco Construction)	FINDINGS, CONCLUSIONS
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to construct a single-family residence within a wetland buffer and landslide hazard area is **GRANTED** subject to conditions.

SUMMARY OF RECORD

Request

Bosco Construction (Applicant) requested a reasonable use exception (RUE) to construct a single-family residence within a wetland buffer and landslide hazard area. The subject property is located at 18044 Clearland Boulevard, Yelm, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on September 10, 2019.

Testimony

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

Robert Smith, Senior Planner, Thurston County Community Planning & Economic Development Department

Dawn Peebles, Thurston County Environmental Health Division

Desarae Nash, Bosco Construction, Applicant Representative

John McGlothin, Property Owner

Lee Reiner

Exhibits

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

EXHIBIT 1 Development Services Section Report with the following Attachments:

- Attachment a Notice of Public Hearing
- Attachment b Zoning/Site Map
- Attachment c Master Application, received March 15, 2019
- Attachment d Reasonable Use Exception Application, received March 15, 2019
- Attachment e Project Narrative, received March 15, 2019
- Attachment f Site Plan, dated July 28, 2017
- Attachment g Wetland Buffer Mitigation Site Plan, dated June 20, 2019
- Attachment h Support Letter from Beaver Creek Environmental Services, dated August 1, 2019
- Attachment i Support Letter from All American Geotechnical, dated August 2, 2019
- Attachment j Complete Application Letter, dated April 17, 2019
- Attachment k Notice of Application, dated April 18, 2019
- Attachment l Comment Memorandum from Amy Crass, Thurston County Public Health and Social Services Department, dated May 28, 2019
- Attachment m Comment Memorandum from Mark Biever, Thurston County Community Planning and Economic Development Department, dated April 16, 2019
- Attachment n Comment Letter from the Washington State Department of Ecology, dated April 3, 2019
- Attachment o E-mail from Rhonda Foster, Squaxin Island Tribe, dated April 24, 2019
- Attachment p Comment Letter from Jackie Wall, Nisqually Indian Tribe, dated April 18, 2019

EXHIBIT 2 Wetland and Stream Evaluation and Delineation Report and Buffer Enhancement Plan, dated May 20, 2019

EXHIBIT 3 Landslide Hazard Geotechnical Report, dated February 1, 2019

EXHIBIT 4 Revised Notice of Public Hearing

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions.

FINDINGS

1. The Applicant requested a reasonable use exception (RUE) to construct a single-family residence within a wetland buffer and landslide hazard area. The subject property is located at 18044 Clearland Boulevard, Yelm, Washington.¹ *Exhibits 1, I.C, I.D, and I.E.*
2. The RUE application was submitted on March 15, 2019 and determined to be complete on April 12, 2019. *Exhibit 1, I.C, I.D, and I.J.*
3. The subject property is in the rural portion of the County and is zoned Residential LAMIRD – Two Dwelling Units Per Acre (RL 2/1), a zone which allows single-family and two-family residences, agriculture and home occupations as primary permitted uses. *Thurston County Code (TCC) 20.13A.020; Exhibits 1 and I.B.* The purpose of the RL 2/1 zone is described in TCC 20.13A.010 as follows:
 1. Establish a district that contains limited areas of more intensive rural residential development, consistent with RCW 36.70A.070(5)(d), that existed as of July 1, 1990 at a density of approximately two dwelling units per acre.
 2. Provide for infill residential development at a maximum density of two dwelling units per acre, consistent with the development pattern established before July 1, 1990.
 3. Provide development standards to assure that infill residential development is consistent with surrounding uses and can be accommodated without new urban level services.*TCC 20.13A.010.*
4. The standards applicable to development in the RL 2/1 zone include a minimum lot area of 12,500 square feet, a maximum hard surface coverage of 60% (in this case, 6,011

¹ The legal description of the property is Lot 44 of Division 16 of Clearwood Subdivision; known as Tax Parcel No. 41310004400. *Exhibits 1 and I.C.*

square feet), and minimum front, side and rear yard setbacks of 20 feet, five feet, and five feet, respectively. *Exhibit 1; TCC 20.13A.030.*

5. The subject property is 0.23 acre in area (10,018 square feet) and is located within Division 16 of the Clearwood Subdivision, which was recorded on April 26, 1974. Because the lot was legal when it was created, it is allowed to be developed despite its nonconforming size pursuant to TCC 20.56.020(2). Surrounding lots within the subdivision are developed with single-family residences. *Exhibit 1; Robert Smith Testimony.*
6. There is a wetland located offsite to the southeast of the subject property, field identified to be a Category II wetland, which according to the Applicant's consultant has a habitat function score of 7, a water quality function of 7, and a hydrologic function score of 8, for a total score of 22.² The County critical areas ordinance establishes wetland buffers either based on habitat function score or water quality function, as described in TCC Table 24.30.045-1. Both the Applicant's wetland consultant and Planning Staff indicated that the wetland requires a minimum buffer of 180 feet, or 135 feet with mitigation. A 180-foot buffer would envelop virtually the entire site, and a 135-foot buffer would cover approximately half of the site, leaving the northwest corner unencumbered. *Exhibits 1, 1.F, and 2.* The Hearing Examiner notes that, pursuant to TCC Table 24.30-1, a habitat score of 7 would appear to require a larger buffer of 240 feet, or with mitigation 180 feet.³ *TCC Table 24.30-1.* As noted previously, a 180-foot buffer would occupy the entire parcel.
7. The unencumbered northwest corner of the property contains an existing septic tank and drainfield designed to serve a three-bedroom residence. The septic system was approved in 1995 and installed in 1996. The septic system occupies much of the available area outside of a reduced 135-foot wetland buffer. *Exhibits 1.F and 1.L; Testimony of Robert Smith and Dawn Peebles.*
8. The Applicant proposes to construct a two-story, 1,112 square foot single-family residence in the north-central portion of the parcel, east of the septic drainfield area. The residence would have a footprint of 860 square feet. The combined impervious surface coverage of the residence and driveway would be 1,760 square feet. At its closest point, the residence would be 110 feet from the wetland edge. Due to the relatively small area of the parcel and the approved location of septic system components, which occupy the developable land farther from the wetland edge⁴, it would not be possible to provide for a substantially wider buffer between the wetland and the residence. *Exhibits 1, 1.E, 1.F, and 1.H.*

² The Staff report misstates the habitat score as 22. *Exhibit 1, page 3.*

³ The Applicant's wetland consultant was not available at hearing to answer questions.

⁴ The septic drainfield would be approximately 140 feet from the wetland edge at its closest point. *Exhibits 1 and 1.F.*

9. In order to compensate for the unavoidable impacts from the proposed development within the on-site buffer, the Applicant's wetland consultant prepared a mitigation plan that calls for establishment of 3,030 square feet of dedicated buffer area in the eastern portion of the site (closest to the wetland), from which area existing invasive species would be removed and replaced with native species plantings. The area would be fenced and signed with County-approved critical area signage. Irrigation would be provided between June and September for the new plantings. The enhanced buffer area would be monitored for three years to ensure survival rates that satisfy the mitigation plan objectives, which include 100% survival of the plantings for at least five years. The plan also calls for appropriate implementation of erosion control measures during construction and continuity of hydrologic flow after construction, mimicking the existing hydrology. The Applicant's consultant submitted that the mitigation plan would effectively ensure no net loss in the wetland's functions and values, and would in fact improve all functions and values over the existing condition. *Exhibit 2*. County Staff accepted the Applicant's wetland report and mitigation plan as satisfying the requirements of the critical areas ordinance. *Exhibit 1; Robert Smith Testimony*.
10. The subject property slopes downward to the east, from an elevation of 568 near Clearland Boulevard to an elevation of 532 feet at the eastern site boundary. The eastern portion of the property contains slopes of 46%, meeting the definition of a landslide hazard area under the Thurston County critical areas ordinance. *TCC 24.03.010; Exhibits 1 and 10*. The minimum required buffer from a landslide hazard area is 50 feet from the top of slope, a distance that encumbers the proposed development area. *Exhibits 1 and 3 (page 10)*.
11. Based on a geotechnical evaluation by the Applicant's engineering geologist, the slope is stable against deep-seated failure and erosion can be managed with standard practices during construction and revegetation following construction. The residence would be constructed on pin piles⁵ to reduce any deep-seated failure damage, protect the residence from shallow slope failure damage, and to provide a deep and unyielding foundation for the residence. The residence would be constructed as far west as possible given the constraints posed by the location of the septic system. *Exhibits 1.F, 1.H, 1.I, and 3*.
12. The County's engineering geologist reviewed the Applicant's geotechnical report, concurred that the site would be sufficiently stabilized using the techniques outlined in the report, and determined that the report fulfills the requirements of the critical areas ordinance. *Exhibit 1.M*.
13. Construction of the residence would not require the removal of trees or other significant vegetation. The central portion of the property was cleared by a previous owner of the property, likely during the 1990s based on historic aerial photography and the timing of septic system construction. At that time, the clearing would not have been a violation

⁵ The County's engineering geologist, who reviewed the Applicant's geotechnical submittals, described pin piles as follows: "Pin piles are permanent, steel, small-diameter pipes that are mechanically driven to a specified depth below a layer of concern to add bearing capacity to the soils." *Exhibit 1.M*.

because slopes of less than 50% were not regulated and wetlands such as the one adjacent to the subject property would have only required a 100-foot buffer. *Testimony of Robert Smith and Desarae Nash; Exhibit 3.*

14. No species of concern were identified on the subject property by the Applicant's biologist. The County accepted this determination. *Exhibits 1, 1.H, and 2.*
15. The proposed residence would be served by the Clearwood Group A water system and the existing on-site septic system. The septic system would be subject to inspection prior to occupancy to ensure that the components are in sound condition. *Testimony of Robert Smith and Dawn Peebles; Exhibit 1.L.*
16. The Nisqually and Squaxin Island Tribes were notified of the application and did not identify any issues of concern but requested that they be contacted if archaeological resources are discovered during construction. *Exhibits 1.O and 1.P.*
17. Notice of the open record hearing was mailed to property owners within 500 feet of the site on August 20, 2019, re-mailed with corrected Applicant name on August 27, 2019, published in *The Olympian* on August 30, 2019, and posted on site on August 29, 2019. *Exhibits 1, 1.A, 4, and 5.*
18. At hearing, a member of the public expressed concern that any reasonable use exception diminishes the intended protection of critical areas required in the County's critical areas ordinance, arguing that the instant approval would act as a precedent, and specifically expressed concern about stormwater and habitat impacts, as well as concern that the now older septic system would not operate correctly. *Lee Reiner Testimony.* Planning Staff noted that the critical areas ordinance expressly creates reasonable use exceptions for parcels that meet the established criteria and that any given permit decision does not act as a precedent that would excuse future permit applications from the requirement to comply with critical areas provisions. *Robert Smith Testimony.* Environmental Health Staff confirmed that the septic system would be tested for operational compliance with the Sanitary Code prior to occupancy of the proposed residence. *Dawn Peebles Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exceptions pursuant to TCC 2.06.010(F) and TCC 24.45.030.

Criteria for Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if:

- 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 County's critical areas ordinance establishes the reasonable use exception procedures that expressly allow development of parcels in cases where a project proponent can show compliance with the criteria for RUE approval. The instant Applicant has shown that no other reasonable use of the property as a whole is permitted by applicable County codes. Based on the small area of the lot, the allowed uses and stated intent of the RL 2/1 zone, and the use of surrounding parcels, single-family residential development is the only reasonable use of the property. *Findings 3, 4, 5, and 18.*
2. No reasonable use with less impact on the critical area or buffer is possible. The proposed development site is modest in scale and is as far from the critical areas as possible. *Findings 6, 7, 8, 10, 11, and 18.*
3. The result of the geotechnical review was that, with the proposed construction techniques, the residence could be safely constructed at the proposed location. As conditioned to provide the mitigation proposed for wetland buffer impacts and with a condition to require compliance with the recommendations of the geotechnical report, the requested residential development would not result in damage to other property and would not threaten the public health, safety or welfare on or off the development site, or increase public safety risks on or off the subject property. *Findings 11 and 12.*

4. The proposed reasonable use is limited to the minimum buffer encroachment necessary to prevent denial of all reasonable use of the property. The proposed residence is modest in scale and would be placed as far from critical areas as possible, minimizing encroachment into the wetland and landslide hazard buffers to the extent possible while allowing some development of the property. *Findings 6, 7, 8, 10, 11, and 18.*
5. With conditions of approval, the proposed reasonable use would result in minimal alteration of the critical area. The wetland is offsite and would not be directly impacted by the proposed development. Implementation of the mitigation would result in improved wetland functions and values. The residence would have a small footprint and would be located as far west as possible to minimize alteration of critical area buffers. *Findings 6, 7, 8, 9, 10, and 11.*
6. With conditions of approval requiring implementation of the mitigation plan, the proposal ensures no net loss of critical area functions and values. *Finding 9.*
7. The proposal would not result in unmitigated adverse impacts to species of concern. *Finding 14.*
8. The location and scale of existing development is not the sole basis for granting the reasonable use exception. The basis for the reasonable use exception is the wetland buffer encumbering virtually the entire parcel, as well as the location of the landslide hazard. Without a RUE, it would not be possible to develop a residence of any scale. *Findings 6, 7, and 8.*

DECISION

Based on the preceding findings and conclusions, the request to construct a single-family residence within a wetland buffer and landslide hazard area at 18044 Clearland Boulevard is **GRANTED** 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 Community Planning and Economic Development Department shall be met.
- B. 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.
- C. 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].

- D. The Applicant shall contact the proper authorities, including the Nisqually Indian Tribe Preservation Officer at (360) 456-5221, if during excavation there are discoveries of archaeological artifacts or human burials.
- E. The Applicant shall complete all mitigation as proposed in the Wetland and Stream Evaluation Report and Buffer Enhancement Plan dated June 20, 2019 by Beaver Creek Environmental Services, Inc., in the record as Exhibit 2.
- F. The Applicant shall provide a surety agreement and bond, in compliance with TCC 24.70, to ensure the proposed three-year monitoring and maintenance portion of the proposed the Wetland and Stream Evaluation Report and Buffer Enhancement Plan dated June 20, 2019 by Beaver Creek Environmental Services, Inc., in the record as Exhibit 2.
- G. Fencing and critical area signs shall be installed along the reduced wetland buffer, subject to standards of TCC 24.60.
- H. Design and construction of the residence shall comply with all recommendations of the February 1, 2019 geotechnical report by All American Geotechnical Inc, in the record at Exhibit 3.
- I. 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 Community Planning and Economic Development Department will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

DECIDED September 23, 2019.



Sharon A. Rice
Thurston County Hearing Examiner

NOTE: Pursuant to TCC 22.62.020(C)10, affected property owners may request a change in valuation for property tax purposes.

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___.