



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. 2020100817
)	
Eric Larsen)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to construct a 1,296 square foot accessory pole building with a 420 square foot lean-to within a wetland buffer is **GRANTED** subject to conditions.

SUMMARY OF RECORD

Request

Eric Larsen (Applicant) requested a reasonable use exception to construct a 1,296 square foot accessory pole building with a 420 square foot lean-to for shop and storage use within a wetland buffer. The subject property is located at 8120 Kerbaugh Road NE, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on February 9, 2021. The record was held open until February 11, 2021 to allow any members of the public having difficulty joining the virtual hearing to submit written comments, with time scheduled for responses from the parties. No post-hearing comments were submitted, and the record closed on February 11, 2021.

Testimony

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

Richard Felsing, Associate Planner, Thurston County Community Planning & Economic Development Department

Eric Larsen, Applicant

Alexander Callender, Land Services Northwest LLC, Applicant's wetland consultant

Exhibits

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

- EXHIBIT 1 Community Planning and Economic Development Report including the following attachments:
- A. Notice of Public Hearing
 - B. Master Application, dated February 26, 2020
 - C. Reasonable Use Exception Application, dated February 26, 2020
 - D. Property Map with wetlands, 220 foot buffers and 165 foot buffers
 - E. Revised Site Plan, dated January 27, 2021; Site Plan, dated February 26, 2020
 - F. Impact & Mitigation Plan/Map, dated November 6, 2019
 - G. Notice of Application, dated January 15, 2021 (4 pages)
 - H. Wetland Report, dated November 6, 2019, Larsen Shop Wetland Delineation Report, Alexander Callender, Land Services NW
 - I. Comment letter from Shaun Dinubilo, Squaxin Island Tribe, dated March 11, 2020
 - J. Comment letter from Brad Beach, Nisqually Indian Tribe, dated March 22, 2020
 - K. Comment Memorandum from Amy Crass, Thurston County Environmental Health Division, dated April 2, 2020
 - L. Photos, site visit of January 7, 2021 (4 pages)

Based on the record developed through the open record hearing process, the Hearing Examiner enters the following findings and conclusions.

FINDINGS

1. The Applicant requested a reasonable use exception (RUE) to construct a 1,296 square foot accessory pole building with 420 square foot lean-to for shop and storage use within a wetland buffer. The subject property is located at 8120 Kerbaugh Road NE, Olympia, Washington.¹ *Exhibits 1, 1.B, and 1.C.*
2. The RUE application was submitted on February 26, 2020 and determined to be complete for purposes of commencing project review on March 9, 2020. *Exhibits 1.B, 1.C, and 1.G.*

¹ The legal description of the subject property is a portion of Section 09 Township 19 Range 1W Quarter SW NW LL-0215 LT 8 Document 002/033; also known as Tax Parcel No. 11909230800. *Exhibit 1.*

3. The subject property is within the rural portion of the County and is zoned Rural Residential Resource One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit 1*. Primary permitted uses in the RRR 1/5 zone include single- and two-family residences, agriculture (including forest practices), home occupations, and accessory farm housing. *TCC 20.09A.020*. Planning Staff indicated that accessory buildings such as the proposed shop are typical and customary residential uses in the zone. *Richard Felsing Testimony*.
4. The subject property is 5.1 acres in area and is developed with a single-family residence, gravel driveway, well house, and septic system. The existing impervious surface coverage totals 8,652 square feet, including 1,700 square feet for the residence. The residence was constructed in 1993, prior to the County's adoption of its critical areas ordinance (Title 24 Thurston County Code). *Exhibits 1, 1.E, and 1.H*.
5. There are four regulated wetlands on or near the subject property, each of which satisfies the criteria for a Category III wetland under the Thurston County Code and requires a standard buffer width of 220 feet, plus a 15-foot building setback. The 220-foot buffers may be administratively reduced to a minimum width of 165 feet with mitigation pursuant to *TCC 24.30.050*. The Applicant submitted a mitigation plan in support of reduced wetland buffer widths. *Exhibit 1.H; Richard Felsing Testimony*.
6. The standard 220-foot wetland buffers applicable to the four wetlands overlap and wholly encompass the subject property. Although reducing the buffers to 165 feet would create a small amount of developable land in the central and northwest portions of the property, development in these areas would require extensive grading to construct the building and provide access due to slopes on site. The proposed development area, which is within the reduced 165-foot buffer of the wetland identified in the project materials as Wetland D, is level, lacks significant vegetation, has been previously disturbed, and is close to the residence and the end of the existing driveway. At the proposed location, formerly used as a burn pile location during the clear cutting of the parcel, the shop building would be set back 95 feet from the edge of Wetland D and would impact 5,699 square feet of buffer, including the area comprising the CAO-required 15-foot construction setback from the buffer edge. *Exhibits 1.E, 1.F, 1.H, and 1.L; Eric Larsen Testimony*.
7. As mitigation for the reduced Wetland D buffer, the Applicant proposes to plant dense vegetation within the on-site portion of the buffer (the wetland is off site) lying between the development area and the wetland. The mitigation area would be 8,066 square feet. This area is forested but lacks shrub-scrub vegetation near the wetland. The proposed plantings would provide species diversity, structure, and roughness. Other proposed mitigation includes removing invasive species from all on-site wetlands. Existing culverts along the driveway would hydraulically isolate the proposed structure from wetland hydrology for any of the identified wetlands. As proposed, placement of the shop in relation to off-site Wetland D would not result in excess light or noise impacts to wildlife species using that wetland; the plantings would provide sufficient screening and the structure would be insulated, which would provide adequate noise attenuation to avoid impacts. As submitted by the Applicant's critical areas consultant, the proposed

mitigation would ensure that is the project results in no net loss of wetland buffer functions and values. *Exhibits 1.F and 1.H; Alexander Callender Testimony.*

8. As a matter of personal interest in the natural environment, separately from the mitigation proposed as part of the RUE request, the Applicant has been restoring the forest on site, which was clear cut in the 1970s but not subsequently replanted with commercial timber. He has planted 100 trees and shrubs since his purchase of the property in 2018. The Applicant indicated that approval of the proposed structure would allow him to store tools, equipment, and supplies used in his reforestation efforts and general property maintenance out of the elements and out of view from off-site. *Exhibit 1; Eric Larsen Testimony.*
9. No species of concern have been documented on the subject property based on Thurston County and Washington Department of Fish and Wildlife databases. Species of wildlife observed by the Applicant's wetland scientist during field investigations were typical urban/suburban adapted species and did not include any federally-listed or priority species. *Exhibit 1.H; Alexander Callender Testimony.*
10. The Thurston County Environmental Health Division reviewed the proposal and did not identify any issues of concern. Environmental Health recommended approval of the variance request. *Exhibit 1.K.*
11. Neither the Washington Department of Ecology nor the Washington Department of Fish and Wildlife commented on the application. *Exhibit 1.*
12. Notice of the open record hearing was mailed to property owners within 500 feet of the site on January 25, 2021 and published in *The Olympian* on January 29, 2021. There was no public comment submitted on the application. *Exhibits 1 and 1.A.*
13. At the open record hearing, the Applicant requested waiver of the surety bond requirements of the CAO, which are designed to ensure completion of critical areas mitigation.² He otherwise waived objection to the recommended conditions. *Eric Larsen Testimony.* County Staff submitted that to the best of their knowledge, the Thurston County Code does not provide authority to Planning Staff or the Hearing Examiner to waive the surety requirement. Staff recommended approval subject to the conditions in the staff report. *Richard Felsing Testimony; Exhibit 1.*

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

² See TCC 24.70.010.

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if the application materials succeed in demonstrating the following criteria can be satisfied:

- 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. No other reasonable use of the property as a whole is permitted by the critical areas ordinance. Single-family residential use is the only reasonable use of the property considering the area and zoning of the property, environmental constraints, and the lack of commercial-quality timber. The proposed shop building is a reasonable and typical accessory building for the existing residential use. *Findings 3, 4, 5, 6, and 8.*
2. No reasonable use with less impact on the critical area or buffer is possible. Buffers encumber the entire parcel, and while it would be possible to establish a building site a greater distance from the wetlands, alternate sites would have greater buffer impacts. *Finding 6.*
3. The requested 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. The request is for an accessory shop building. No issues of concern relating to public health, safety, or welfare were identified

by review agencies or by members of the public. The conditions of approval include a stop work/notice requirement if cultural resources are uncovered during development. *Findings 10, 11, and 12.*

4. The proposed reasonable use is limited to the minimum encroachment necessary to prevent denial of all reasonable use of the property. The proposed shop building has been sited to minimize impacts to wetland buffers. *Finding 6.*
5. The proposed reasonable use would not result in alteration of a critical area. No wetland impacts are proposed. The proposed shop building would be set back 95 feet from the nearest wetland, and dense vegetation to be planted within the reduced buffer would provide additional wetland protection as compared to the existing condition. *Findings 5, 6, and 7.*
6. As conditioned to require implementation of the proposed mitigation plan, the proposal ensures no net loss of critical area functions and values. The Hearing Examiner concurs with Staff that the surety bond requirement cannot be waived in this context. TCC 24.70.030 provides an exception only when the Board of County Commissioners agrees to accept obligation for maintenance and monitoring. *Findings 7 and 13.*
7. The record contains no evidence that the proposed use would result in unmitigated adverse impacts to species of concern. *Finding 9.*
8. The location and scale of existing development on surrounding parcels is not the basis for granting the reasonable use exception. The RUE is needed because wetland buffers preclude development of an appropriate accessory building. *Finding 6.*

DECISION

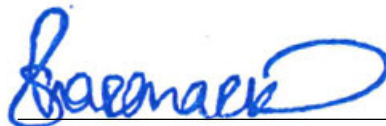
Based on the preceding findings and conclusions, the request for a reasonable use exception is **GRANTED** subject to the following conditions:

- A. The Applicant and subsequent property owners must comply with all requirements of state and/or federal law to avoid disturbance and alteration of artifacts, remains, or other cultural resources on site during development. In the event of inadvertent disturbance or alteration, the Applicant must immediately stop work and contact the Tribes and the State Department of Archaeology and Historic Preservation @ 360-586-3065.
- B. Prior to or in conjunction with the issuance of any building permit, all applicable regulations and requirements of Thurston County Public Health and Social Services, Public Works, and Thurston County Planning Departments shall be met. All required permits shall be obtained prior to commencing construction.
- C. Prior to earth disturbing activities, erosion control best practices shall be implemented. The erosion control methods must be maintained to ensure ongoing protection throughout construction until there is no longer risk of erosion polluting waters of the state. Erosion

control best practices shall be monitored and approved through the building site review associated with the required building permit application.

- D. 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.
- E. The project shall implement the measures identified in the Mitigation Plan, as detailed in the *Larson Shop Wetland Delineation Report*, and the project proponent shall adhere to the findings, mitigating measures, monitoring programs and financial surety stipulated in the Mitigation Plan as specified on pp. 21-32 of the *Report* (Exhibit 1.H, *Wetland Delineation Report* Alexander Callender, Land Services NW, pp. 21-32).
- F. Prior to groundbreaking or commencement of construction activities, the project proponent shall install the phased mitigation measures and best management practices specified by the *Larson Shop Wetland Delineation Report* to minimize potential impacts to the wetlands and to wetland buffer functions and values (Exhibit 1.H, Alexander Callender, Land Services NW, p. 21). Prior to issuance of building permit—and again prior to occupancy—the Owner/Applicant shall provide a written status update to Thurston County Community Planning & Economic Development staff that documents implementation of phased mitigation measures, to the satisfaction of a coordinating County biologist/planner.
- G. Prior to the release of surety, the project proponent shall obtain written approval from Thurston County Community Planning & Economic Development that the measures agreed to have been implemented in the time period specified.
- 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 Thurston County Land Use and Environmental Review Section will determine if any proposed amendment is substantial enough to require Hearing Examiner approval.

DECIDED February 19, 2021.



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 **\$777.00** for a Request for Reconsideration or **\$1,054.00** 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 \$777.00 for Reconsideration or \$1,054.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Community Planning & Economic Development Department this _____ day of _____, 20___.