



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. 2021101376
)	
Patrick Kehoe)	FINDINGS, CONCLUSIONS,
)	AND DECISION
)	
For a Shoreline Conditional Use Permit and)	
<u>Shoreline Substantial Development Permit</u>)	

SUMMARY OF DECISIONS

The request for a shoreline substantial development permit and shoreline conditional use permit to authorize a previously constructed steel mesh and soil nail landslide retaining structure is **GRANTED**.

SUMMARY OF RECORD

Request

Patrick Kehoe (Applicant) requested a shoreline substantial development permit (SSDP) and shoreline conditional use permit (SCUP) for after-the-fact authorization of a previously constructed steel mesh and soil nail landslide retaining structure at 3122 Leeward Court NW, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on April 12, 2022. The record was held open through April 14, 2022 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 public comment was submitted and the record closed on April 14, 2022.

Testimony

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

Scott McCormick, Associate Planner, Thurston County Community Planning & Economic Development Department

Arthur Saint, Civil Engineer, Public Works

Patrick Kehoe, Applicant

Exhibits

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

- Exhibit 1 Community Planning & Economic Development Department Report, including the following attachments:
- A. Notice of Public Hearing, dated March 18, 2022
 - B. Zoning/Vicinity Map
 - C. Master and JARPA Application Form, received March 22, 2021.
 - D. Aerial photo / site plan of project area
 - 1. Profile view of repair work (undated)
 - 2. Photo showing project area (undated)
 - E. Consultant, Terra Firma Drilling's project cost estimate / itemized list, dated March 19, 2021
 - F. Photos of finished project from May 21, 2021
 - G. Notice of Application, dated November 5, 2021 with adjacent property owners list, dated November 2, 2021
 - H. Geotechnical Addendum from Insight Geologic Inc., dated November 17, 2021
 - I. Geotechnical Investigation from Insight Geologic Inc., dated July 12, 2018
 - J. Approval Memo from Amy Crass, Thurston County Environmental Health, dated April 20, 2021
 - K. Comment email from the Squaxin Island Tribe, dated November 11, 2021
 - L. Comments from the Nisqually Indian Tribe, dated March 31, 2021
 - M. Comments from Washington Department of Ecology, dated September 13, 2018
 - N. Emergency approval (email) from Scott McCormick (CPED) to Patrick Kehoe, dated March 22, 2021
 - O. Hearing Examiner decision for project no. 2018104407

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

FINDINGS

1. Patrick Kehoe (Applicant) requested a shoreline substantial development permit (SSDP) and shoreline conditional use permit (SCUP) for after-the-fact authorization of a

previously constructed steel mesh and soil nail landslide retaining structure at 3122 Leeward Court NW, Olympia, Washington.¹ *Exhibits 1 and 1.C.*

2. The application was submitted on March 22, 2021 and determined to be complete for purposes of commencing project review on April 20, 2021. *Exhibits 1.C and 1.G.*
3. The subject property is within the Olympia Urban Growth Area and is zoned Residential Four Dwelling Units Per Acre (R-4). Consistent with the R-4 designation, the subject property is 0.3 acre in area and is developed with a single-family residence. Adjacent parcels to the north, south, and west are developed with single-family residences. *Exhibits 1, 1.B, and 1.C.*
4. The subject property is located on the west shore of Budd Inlet of Puget Sound. *Exhibits 1 and 1.B.* The Shoreline Master Program for the Thurston Region (SMPTR) designates the subject property shoreline as Rural shoreline environment. Residential development is allowed in the Rural environment, subject to the applicable policies and regulations of the SMPTR. *Exhibit 1; SMPTR Section Three, Chapter XVI.*
5. The existing residence is on a marine bluff with an inclination of approximately 60 to 70 degrees. A landslide occurred in February 2021 that threatened the stability of the residence. The affected area was a 20-foot wide by 20-foot high portion of the slope extending from the back of the residence to a shoreline access road below.² To stabilize the slope and slow erosion, the Applicant installed textured landscape fabric and a Tecco steel mesh system, which was pinned to the marine bluff with anchors (soil nails) and secured with spike plates. Following installation of the hardware, the slide area was hydroseeded with native grass mix. The work was conducted pursuant to an emergency authorization issued by the County in March of 2021. A licensed engineering geologist confirmed that the installation occurred consistent with his firm's design recommendations and under his firm's observation. No work occurred below the ordinary high water mark of Puget Sound. *Exhibits 1, 1.C, 1.D, 1.D1, 1.D2, 1.E, 1.F, 1.H, 1.I, and 1.N; Patrick Kehoe Testimony.*
6. On June 10, 2019 the Applicant received SSDP and SCUP approval for an identical after-the-fact slope stabilization project on the subject parcel after a landslide in 2018. *Exhibit 1.O.* The previously approved project area is immediately south of the 2021 project area. *Exhibits 1 and 1.D2.* A geotechnical report was prepared in support of the prior application, which concluded that the 2018 slide had occurred as a result of the weathering of surficial soils and did not indicate a larger failure in the hillside. *Exhibit 1.I.* The Applicant used the same technology to address the 2021 landslide as was used to address the 2018 slide. *Exhibit 1; Patrick Kehoe Testimony.*

¹ The legal description of the subject property is: Lot 32 of Oldport Community, Tax Parcel Number 65950003200. *Exhibits 1 and 1.C.*

² The 2021 slide was immediately adjacent to the 40- by 40-foot area of a slide that occurred on the same slope in spring 2018 following a heavy rain event. *Exhibit 1.I; Patrick Kehoe Testimony.*

7. A shoreline substantial development permit is required for the project because it is within 200 feet of a regulated shoreline and its value exceeds the permit threshold of \$7,047.00. *Exhibits 1, 1.C, and 1.E.; WAC 173-27-040; WSR 17-17-007.*
8. The SMPTR does not contain a use category that is applicable to the retaining structure (the closest category is “shoreline protection,”³ which includes structures such as bulkheads). Pursuant to Washington Administrative Code (WAC) 173-27-160, an unclassified use may be authorized with a shoreline conditional use permit. *WAC 174-27-160; WAC 173-27-030(4); Exhibit 1.*
9. The subject property is classified as a Geologic Hazard Area under the Thurston County critical areas ordinance (CAO, Title 24 Thurston County Code). *Exhibit 1.* The CAO allows slope stabilization if necessary to protect a lawfully established existing structure, provided the project satisfies the requirements of the SMPTR and the selected stabilization technique is supported by a geological assessment. *Thurston County Code (TCC) 24.15.150.* The Applicant submitted a comment from the geological consultant upon completion of the 2021 repair work (the same consultant as performed the 2018/19 assessment and repair work) that confirmed all hardware installation was done under the supervision of geotechnical consultants and in accordance with their design recommendations, which the County accepted as satisfying the CAO’s documentation requirements. *Exhibits 1, 1.H, and 1.I.*
10. The project does not affect shoreline views. Following completion of installation of the hardware, the slide scar was hydroseeded, as had the previous scar been. Owing to the very hot temperatures in the summer of 2021, the Applicant set up sprinklers to keep the new grass alive in the heat of the summer. The grass over the two slide areas has grown together. The view from off-site is of a grassy bluff. *Exhibits 1 and 1.F; Testimony of Scott McCormick and Patrick Kehoe.*
11. The completed project is expected to decrease erosion of the marine bluff. The recommended conditions of approval require erosion control measures to be maintained on the site until the slope has been fully revegetated and surface soils are stabilized; however, all work has already been completed and the bluff is fully vegetated. No work remains to be done under the instant permit. *Exhibit 1; Testimony of Scott McCormick and Patrick Kehoe.*
12. The project is categorically exempt from review under the State Environmental Policy Act. *Exhibit 1; WAC 197-11-800.*
13. The subject property is served by City of Olympia water and sewer. The Thurston County Environmental Health Division reviewed the project and did not identify any issues of concern. Environmental Health recommended approval of the application. *Exhibit 1.J.*

³ The SMPTR defines “shoreline protection” as “action taken to reduce adverse impacts caused by current, flood wake or wave action. ...” *SMPTR, Section 3, Chapter XVIII, Section A.*

14. The Nisqually and Squaxin Island Indian Tribes reviewed the project and did not identify issues of concern. *Exhibits 1.K and 1.L.*
15. Notice of the open record hearing was mailed to property owners within 300 feet of the site on March 18, 2022 and published in The Olympian on April 1, 2022. No public comment was submitted. *Exhibits 1 and 1.A.*
16. Upon hearing all testimony at hearing, Planning Staff maintained their recommendation for approval. *Exhibit 1; Scott McCormick Testimony.* The Applicant waived objection to the recommended conditions. *Patrick Kehoe Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline permits pursuant to RCW Chapter 36.70, WAC 173-27, TCC 19.04.010, and Section One, Part V of the Shoreline Master Program for the Thurston region. Pursuant to WAC 173-27-200, decisions to approve a Shoreline Conditional Use Permit must be submitted to the Department of Ecology for a final decision to approve, approve with conditions, or disapprove the permit.

Criteria for Review

Shoreline Substantial Development Permit (WAC 173-27-150)

To be approved by the Hearing Examiner, the proposed shoreline substantial development permit must be consistent with:

- A. The policies and procedures of the Shoreline Management Act;
- B. The provisions of applicable regulations; and
- C. The Shoreline Master Program for the Thurston Region.

A. Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses (in the following order of preference) that: recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the

public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

B. Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

C. Shoreline Master Program for the Thurston Region

SMPTR Section Two, Chapter V. Regional Criteria.

- A. Public access to shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be channeled into shoreline areas already so utilized or into those shoreline areas which lend themselves to suitable industrial development. Where industry is now located in shoreline areas that are more suited to other uses, it is the policy of this Master Program to minimize expansion of such industry.

- D. Residential development shall be undertaken in a manner that will maintain existing public access to the publicly-owned shorelines and not interfere with the public use of water areas fronting such shorelines, nor shall it adversely affect aquatic habitat.
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a Permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180 (1), the person requesting the review shall have the burden of proof.
- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development or use of shorelines shall be closely analyzed for their effect on the public health.

Shoreline Conditional Use Permit (WAC 173-27-160)

1. Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:
 - A. That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
 - B. That the proposed use will not interfere with the normal public use of public shorelines;
 - C. That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
 - D. That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
 - E. That the public interest suffers no substantial detrimental effect.
2. In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.
3. Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with

the requirements of this section and the requirements for conditional uses contained in the master program.

4. Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

Conclusions Based on Findings

1. With conditions of approval, the project satisfies the criteria for a shoreline substantial development permit. It is consistent with Shoreline Management Act policies to protect against adverse effects to public health and the land and to preserve the character of the shoreline. The project is consistent with the shoreline regulations, in that the project is being reviewed under the appropriate criteria and the structure does not obstruct views. The project is consistent with the regional criteria contained in the SMPTR. The project is protective of water quality by reducing the potential for erosion and does not degrade the scenic qualities of the shoreline. No public health issues were identified during the review process. *Findings 1, 5, 6, 7, 8, 10, 11, 13, and 16.*
2. The project satisfies the criteria for a shoreline conditional use permit. As described above, the project is consistent with the policies of RCW 90.58.020 and the SMPTR. The project is on a private parcel and would not affect public use of public shorelines. The project is protective of the existing single-family residential development on the property, which use is consistent with the R-4 zoning and the uses of surrounding parcels. Due to its location above the ordinary high water mark and its potential for reducing erosion, the project would not cause significant adverse effects to the shoreline environment. The public interest would not suffer as a result of the project. *Findings 1, 3, 4, 5, 11, 13, 14, and 16.*

DECISION

Based on the preceding findings and conclusions, the request for a shoreline substantial development permit and shoreline conditional use permit to authorize a previously constructed steel mesh and soil nail landslide retaining structure at 3122 Leeward Court NW is **GRANTED** subject to the following conditions:

1. Storm water runoff shall be controlled through all phases of the project by facilities designed to control the quality and quantity of discharges and shall not alter nor impact the existing drainage or other properties. The stormwater management system shall conform to the current Thurston County Drainage Design & Erosion Control Manual and Title 15.05 Thurston County Code.
2. Proper erosion and sediment control practices shall be maintained at the construction site and adjacent areas to prevent upland sediments from entering the shoreline environment. All areas disturbed or newly created by construction activities shall be seeded, vegetated, or given some other equivalent type of protection against erosion. Erosion control shall be maintained until the site has been fully revegetated and surface soils are sufficiently stabilized by the retaining wall system and vegetation.

3. All development shall be in substantial compliance with the submitted drawings and site plans identified in this decision.
4. The proposed project must be consistent with all applicable policies and other provisions of the Shoreline Management Act, its rules, and the Shoreline Master Program for the Thurston Region.
5. Washington State Water Quality Laws, Chapter 90.48 RCW Water Pollution Control and WAC 173-201A, Water Quality Standards for Surface Waters of the State of Washington, define quality of state waters. Any discharge of sediment-laden runoff or of other pollutants to waters of the state is in violation of these state laws and may be subject to enforcement action.
6. The plants used in the project revegetation shall be native species suited to the site. No invasive species such as English ivy shall be used in the project.
7. 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.

DECIDED April 25, 2022.



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 **\$804.00** for a Request for Reconsideration or **\$1,093.00** 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 \$804.00 for Reconsideration or \$1,093.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Community Planning & Economic Development Department this _____ day of _____ 20___.