



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. 2021105624
)	
Zachary Bates)	FINDINGS, CONCLUSIONS,
)	AND DECISION
)	
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to construct a private driveway within a wetland buffer is **GRANTED** with conditions.

SUMMARY OF RECORD

Request

Zachary Bates (Applicant) requested a reasonable use exception (RUE) to construct a private driveway within a Category III wetland buffer to provide access to a future single-family residence. The subject property is located at 10626 KatieAnn Lane, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on December 20, 2022. The record was held open through December 22, 2022 to allow members of the public who may have had technology-related 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 December 22, 2022.

Testimony

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

Kraig Chalem, Planner/Compliance Unit Supervisor, Thurston County Community Planning & Economic Development Department

Dawn Peebles, Senior Environmental Health Specialist, Thurston County Public Health and Social Services Department

Arthur Saint, Civil Engineer, Thurston County Public Works Department

Zachary Bates, Applicant

Exhibits

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

- Exhibit 1 Community Planning and Economic Development Report including the following attachments:
- A. Legal Notice of Public Hearing
 - B. Master and Reasonable Use Exception Application received, October 19, 2021
 - C. Wetland Report & Buffer Mitigation, Skillings, dated August 21, 2021
 - D. Notice of Application, mailed January 21, 2022
 - E. Comment letter from Brad Beach, Nisqually Indian Tribe, dated July January 24, 2022
 - F. Comment email from Shaun Dinubilo, Squaxin Island Tribe, dated January 25, 2022
 - G. Comment Memorandum from Amy Crass, Thurston County Public Health and Social Services Department, dated December 22, 2021
 - H. Emails: Heather Tschaekofske, Thurston County Staff Biologist, dated February 2-16, 2022
 - I. Impervious Surface Worksheet
 - J. Revised Mitigation Planting Plan, dated February 4, 2022
 - K. Site Plan, Vicinity, and Lot-5 of Large Lot Subdivision No: LLS 05-112251 TC, recorded February 6, 2007, Auditor File No: 3900481

Exhibit 2 Revised Site Plan received December 19, 2022

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

FINDINGS

1. Zachary Bates (Applicant) requested a reasonable use exception (RUE) to construct a private driveway within a Category III wetland buffer to provide access to a future single-family residence. The subject property is located at 10626 KatieAnn Lane, Olympia, Washington. *Exhibits 1, 1.B, and 2.*

2. The RUE application was received on October 19, 2021 and deemed complete for purposes of commencing project review on November 16, 2021. *Exhibits 1.B and 1.D.*
3. The subject property is 5.02 acres in area and is currently vacant. The subject property is Lot 5 of a six-lot large lot subdivision (No. LL05112251TC) originally approved in 2007. The approved plat map does not indicate any wetlands on the subject property or elsewhere within the subdivision; the affected wetland was discovered only after the Applicant submitted a building permit application and County Staff conducted a site visit. The other five parcels within the large lot subdivision have already been developed with single-family residences. Development of the surrounding parcels was not subject to critical areas review. *Exhibits 1.B and 1.K; Kraig Chalem Testimony.*
4. 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). Primary permitted uses in the RRR 1/5 zone include single-family and two-family residences, agriculture, accessory farm housing, and home occupations. *Exhibit 1; Thurston County Code (TCC) 20.09A.020.*
5. Access to the subject property is from an existing private road (KatieAnn Lane), which terminates in a cul-de-sac at the southwest corner of the subject property. There is an existing gravel driveway that extends approximately 75 feet into the subject property from the cul-de-sac, which was installed prior to the Applicant's purchase of the property. The driveway runs along the southern property line. *Exhibit 1.K; Testimony of Kraig Chalem and Zachary Bates.*
6. Based on evaluation by a wetland scientist, the subject property contains a Category III wetland. The wetland follows a seasonally flowing stream that originates from a culvert at the western site boundary and flows northeast along the toe of a slope to (and beyond) the northern site boundary. The pipe is thought to have been installed at the time the private road serving the subject property was installed (2005) or during later road maintenance. Although the pipe is a manmade feature, the wetland scientist submitted that it is "fed by what is assumed to be a ground fed spring". *Exhibit 1.C, page 6.* The flow of water from the pipe has created a defined channel, and the wetland extends several feet from the channel. *Exhibit 1.C; Testimony of Kraig Chalem and Zachary Bates.*
7. The Category III wetland has a habitat score of 7, requiring a standard buffer width of 240 feet. Pursuant to TCC 24.30.050, the 240-foot buffer may be administratively reduced to 180 feet with mitigation. *Exhibits 1 and 1.C; TCC Table 24.30-2; TCC 24.01.035.*
8. With respect to buffer quality, the inner portion of the buffer (i.e., nearest the wetland) is in a forested condition, with tree species primarily consisting of red alder and bigleaf maple. However, there is an 11,130 square foot previously cleared area adjacent to the existing graveled driveway along the south boundary of the property (shown as "bare

area” on the mitigation plan). There is a vegetated slope between the bare area and the forested area. *Exhibit 1.J; Zachary Bates Testimony.*

9. The wetland buffer encumbers the entire western portion of the property. Although with an administrative buffer reduction there is ample area to construct a single-family residence, well, and septic system in the southeastern portion of the property, access to the property is from the west via the existing private road. There is no alternate access to the public road network; the subject property is surrounded by private parcels. *Exhibits 1.J and 1.K; Zachary Bates Testimony.*
10. The Applicant proposes to widen the existing driveway to 14 feet and extend it to the proposed building site, generally following the existing corridor along the southern property line, which is the location that is as far from the wetland as possible. Built in the footprint of the existing driveway, when completed the proposed driveway would impact a total of 2,800 square feet of wetland buffer. The distance between the wetland edge and the driveway would be approximately 60 feet at its closest point. *Exhibits 1.I, 1.J, and 2; Zachary Bates Testimony.*
11. The Applicant submitted a mitigation plan for the proposed buffer reduction, which addresses the driveway that is the subject of the RUE application as well as future residential construction within the outer 25% of the buffer. The plan has been reviewed and approved by the County’s environmental planner. The Applicant proposes to restore 14,910 square feet of degraded buffer between the wetland and the project area (including the 11,130 square foot bare area and 3,780 square feet adjacent to it) by planting a total of 30 western red cedar and vine maple trees and several hundred shrubs and ferns; the proposed planting would enhance the vegetated slope with shrubs, ferns, and western red cedar trees to reduce erosion and improve the buffer’s water quality functions, and enhance the inner forested buffer with western red cedar and western hemlock trees. The increased plant density and plant species diversity would improve the habitat value of the buffer and reduce the potential for sediment to reach the stream, thus ensuring no net loss of wetland functions and values as a result of the project. *Exhibits 1 and 1.J.*
12. Although species of wildlife listed as threatened are potentially located in the vicinity of the subject property, none are known to inhabit the subject property and the subject property does not contain designated critical habitat. *Exhibits 1 and 1.C.*
13. The future residence would be served by an on-site septic system and well. As of the virtual hearing, the Applicant had received approval of the septic design from the Thurston County Environmental Health Division. A comment memorandum prepared by Environmental Health in December 2021 included a recommended condition that the site plan be revised to show the location of proposed utilities. The Applicant has since submitted the requested revised site plan (Exhibit 2), and Environmental Health confirmed that the site plan satisfies the condition recommended in 2021 and that no conditions are needed to ensure compliance with Environmental Health requirements. *Exhibits 1.G and 2; Dawn Peebles Testimony.*

14. The proposed development is categorically exempt from review under the State Environmental Policy Act. *Exhibit 1; Washington Administrative Code (WAC) 197-11-800; TCC 17.09.055(B)*.
15. The Nisqually Indian Tribe and the Squaxin Island Tribe commented that they have no issues of concern; however, both requested to be notified if there are any inadvertent discoveries of archaeological resources or human burials. County Planning Staff incorporated the request into the recommended conditions of RUE approval. *Exhibits 1, 1.E, and 1.F*.
16. Notice of the open record hearing was mailed to property owners within 500 feet of the site on December 8, 2022 and published in *The Olympian* on December 9, 2022. There was no public comment on the application. *Exhibits 1 and 1.A*.
17. At hearing, County Staff maintained their recommendation that the conditions listed in the staff report be imposed if approval is granted. *Kraig Chalem Testimony*. The Applicant waived objection to the recommended conditions. *Zachary Bates 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. No other reasonable use of the property as a whole is permitted by the critical areas ordinance. Given the size and zoning of the parcel and the character of development in the surrounding neighborhood, single-family residential use is the only reasonable use of the property, and the proposed driveway is necessary to establish access to the residential use. Criterion A of TCC 24.45.030 is satisfied. *Findings 3 and 4.*
2. As conditioned, no reasonable use with less impact on the critical area or buffer is possible. The driveway would be as far from the wetland as possible, and placed in an already-impacted (cleared) area; there are no alternative points of access. The conditions of approval require erosion control measures to be installed prior to building permit issuance and the buffer mitigation plan to be implemented prior to final building permit inspection. Criterion B of TCC 24.45.030 is satisfied. *Findings 5, 9, 10, and 11.*
3. As conditioned, the proposal 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 conditions incorporate the comments submitted by the Nisqually and Squaxin Island Tribes with respect to cultural resources. Environmental Health has approved the septic system, and no other issues relating to public health, safety, or welfare were identified during the application review process. Criterion C of TCC 24.45.030 is satisfied. *Findings 13, 14, 15, and 17.*
4. The proposal is the minimum encroachment necessary to prevent denial of all reasonable use of the property. The wetland buffer covers the entire western site boundary, preventing access to the site. The proposed driveway would be as far from the wetland as possible. Criterion D of TCC 24.45.030 is satisfied. *Findings 4, 9, 10, and 17.*
5. As conditioned, the proposal would result in minimal alteration of the critical area. No direct impacts to the wetlands are proposed. The proposed mitigation plan includes dense native plantings within the reduced buffer to control erosion and protect against water quality impacts. Criterion E of TCC 24.45.030 is satisfied. *Findings 10 and 11.*
6. Conditioned to require implementation of the buffer mitigation plan, credible evidence in the record supports a conclusion that the proposal can ensure no net loss of critical area functions and values. Criterion F of TCC 24.45.030 is satisfied. *Findings 8 and 11.*

7. The use would not result in unmitigated adverse impacts to any known species of concern. Criterion G of TCC 24.45.030 is satisfied. *Finding 12.*
8. This decision is not based on the location and scale of existing development. Criterion H is therefore satisfied. As described in Conclusions 2 and 4, the decision to approve the RUE is based on the Applicant's inability to establish the access needed to make reasonable residential use of the parcel without intrusion into the wetland buffer. *Findings 5, 7, 9, and 17.*

DECISION

Based on the preceding findings and conclusions, the request for a reasonable use exception to construct a private driveway within a Category III wetland buffer at 10626 KatieAnn Lane 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. The Applicant is responsible for compliance with other jurisdictional permitting requirements.
- C. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. It is the Applicant's responsibility to obtain this permit if required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>.
- D. The Applicant shall complete all buffer mitigation and monitoring as proposed in the "Bates Wetland Buffer Planting Plan" dated February 4, 2022 (Exhibit 1.J), prior to final building permit inspection. A surety shall be required in place of mitigation completion prior to final building permit inspection, per TCC 24.70.
- E. Critical area signs shall be installed along the reduced buffer edge, subject to standards of TCC 24.60. Sign locations shall be verified and staked by the biologist and installed prior to final building permit inspection.
- F. Construction fencing and erosion control shall be placed outside the buffer alongside proposed development. This fencing and erosion control shall be inspected prior to building permit issuance.
- G. Best management practices (BMPs) such as completing work during the dry season and maintaining proper working order of equipment, as well as temporary erosion and sediment control (TESC) methods including silt fencing and/or coir logs shall be implemented. All disturbed areas shall be promptly backfilled and reseeded following installation, and TESC measures shall remain in place until site conditions are restored.

- H. Approval of this and other County permits may be superseded by federal law. If any protected species are found during construction, the Applicant should contact the US Fish and Wildlife Services.
- I. The Applicant 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 Tribe and the State Department of Archaeology and Historic Preservation.
- J. 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 December 29, 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 at 3000 Pacific Ave SE, Suite 100 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___.