



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. 2021102035
)	
Scott B. Gustafson)	FINDINGS, CONCLUSIONS
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to add a deck to an existing nonconforming garage within a geologic hazard area is **GRANTED** subject to conditions.

SUMMARY OF RECORD

Request

Scott Gustafson requested a reasonable use exception to add a deck to an existing nonconforming garage within a geologic hazard area. The subject property is located at 9948 Johnson Point Road NE, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on January 24, 2023. The record was held open through January 26, 2023 to allow members of the public who experienced technology-based barriers to 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 January 26, 2023.

Testimony

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

Kraig Chalem, Compliance Unit Supervisor, Thurston County

Dawn Peebles, Senior Environmental Health Specialist, Thurston County

Arthur Saint, Civil Engineer, Thurston County

Chris Bonds, Bonds Construction, Applicant Representative

Exhibits

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

- Exhibit 1 Community Planning and Economic Development Staff Report including the following attachments:
- A. Notice of Public Hearing, dated December 21, 2022
 - B. Master and Reasonable Use Exception Application forms, received April 22, 2021
 - C. Original Project Narrative, dated April 20, 2021
 - D. "Residential Project Review" letter from Abbie Adams, Assistant Planner, dated February 5, 2021
 - E. Comment letter from Brad Beach, Nisqually Indian Tribe, dated, July January 3, 2023
 - F. Comment email from Shaun Dinubilo, Squaxin Island Tribe, dated May 10, 2021
 - G. Comment Memorandum from Amy Crass, Thurston County Public Health and Social Services Department, dated June 2, 2021
 - H. Email from Mark Biever re: acceptance of Geotechnical Report, dated December 2, 2022
 - I. Geotechnical Report by All American Geotechnical, dated May 2, 2019
 - J. Architectural 3-D rendering of proposed deck(s), dated January 5, 2020
 - K. Site Plan, date stamp, received July 27, 2020
 - L. Site Plan, date stamp, received April 22, 2021
 - M. Residential Permit #19106978, issued August 13, 2019
 - N. Plat of Johnson Point, Auditor File number 752928

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

FINDINGS

1. Scott Gustafson (Applicant) requested a reasonable use exception (RUE) to add a deck to an existing nonconforming garage within a geologic hazard area. The subject property is located at 9948 Johnson Point Road NE, Olympia, Washington. *Exhibits 1, 1.B and 1.C.*
2. The RUE application was received on April 22, 2021 and determined to be complete for the purpose of commencing project review on January 11, 2022. *Exhibit 1.H.*

3. The subject property is 0.43 acres in area and is located on the Puget Sound shoreline. The property slopes down from its western boundary on Johnson Point Road to its eastern boundary at the shoreline. The elevation change from west to east is approximately 80 feet. Existing structures on the site include a bulkhead that forms the ordinary high water mark, a single-family residence, and a detached garage. The garage is west of the residence at the top of a steep slope. A tram and staircase connect the garage to the residence, which is east of the toe of the slope near the bulkhead. The garage is separated from the shoreline by the bulkhead and residence. Due to the long, narrow dimensions of the subject property, the structures are in near alignment and occupy most of the parcel width. *Exhibits 1.K and 1.I.*
4. The subject property is zoned Residential LAMIRD – One Dwelling Unit per Acre (RL 1/1), a zone which identifies single-family and two-family residential, agriculture, and home occupation land uses as primary permitted land uses and which requires a minimum lot area of 0.75 acres. *Exhibit 1; Thurston County Code (TCC) 20.11A.040.* Although the subject property is smaller than the minimum required in the RL 1/1 zone, the subject property is considered a legal building lot pursuant to TCC 18.04.045 because it was lawfully created through the Johnson’s Point Plat recorded in 1967. *Exhibits 1 and 1.N.*
5. The Shoreline Master Program for the Thurston Region (SMPTR) designates the subject property shoreline as a Rural environment. Single-family residential development and accessory buildings are allowed in the Rural shoreline environment subject to the development standards contained in the SMPTR. In relevant part, these standards require a minimum 50-foot building setback from the ordinary high water mark (OHWM). *SMPTR, Section Three (XVI)(D)(3).* The proposed deck would be approximately 155 feet from the ordinary high water mark. *Exhibit 1.K.*
6. For marine shorelines with a Rural designation, the Thurston County critical areas ordinance (CAO) does not require protection of a 250-foot a marine riparian habitat area like it does for marine shorelines of other designations. The only buffer that applies is the shoreline setback specified in the SMPTR. *TCC 24.25.050.A; Exhibit 1.* Consequently, the requested RUE does not address the marine riparian habitat area.
7. The staff report indicates the presence of a wetland within the mudflats of the subject property shoreline. This wetland was not delineated and is not shown on any maps. Planning Staff submitted that the wetland is not subject to buffers due to its lack of facultative function, given its separation from the remainder of the parcel by the bulkhead. *Exhibit 1; Kraig Chalem Testimony.* Because Staff’s testimony is generally consistent with TCC 24.30.050.B, which allows reduced wetland buffer widths for isolated buffers, the Hearing Examiner will assume for purposes of this decision that the buffer is effectively reduced and that the RUE need not address potential impacts to the wetland buffer.
8. The slope between the garage and the residence is classified as a landslide hazard area because it exceeds 40% in gradient and 15 feet in height. *TCC 24.03.010; Exhibits 1.D*

and 1.K. Landslide hazards are regulated in CAO Chapter 24.15 . The standard buffer required for landslide hazard areas is the greater of the following: (1) 50 feet from the toe and top of slope; or (2) the distance measured from the toe of slope upward at a slope of 2:1 horizontal to vertical to a point that intersects with the existing topography of the site; or (3) the minimum distance recommended by a geotechnical professional. *TCC 24.15.015.* The distance from the garage to the top of slope is not clear from the submitted site plan, but the Applicant’s project narrative suggests a setback of approximately 20 feet. The proposed deck would extend 14 feet from the waterward of the garage towards the top of the slope. This is a slight reduction from what is indicated on the site plan (Exhibit 1.K) (16 feet) and what is indicated in the project narrative (20 feet). The deck would be 36 feet wide. *Exhibit 1.C; Kraig Chalem Testimony; Chris Bonds Testimony.* It is not clear in the record submitted whether the deck is proposed to extend beyond the top of the landslide slope, or assuming not, how close the waterward edge of deck would be to the top of slope.

9. The Applicant submitted a geotechnical report prepared by a qualified professional who evaluated the site and provided development recommendations. The report was prepared in 2019 in preparation for replacement of the garage after it was destroyed by fire in 2018; it does not specifically address the proposed deck addition. *Exhibit 1.I.* A reasonable use exception was not required for the garage replacement because the CAO allows legally nonconforming structures destroyed by fire to be rebuilt. *TCC 24.50.040.*
10. The conclusion of the Applicant’s geotechnical report was that the site was suitable for replacement of the garage in the original location, as the foundation was still in place and there was no evidence of landslide activity on or near the building area. *Exhibit 1.I.* The geotechnical engineer noted that the required 50-foot buffer “goes through the pre-existing footing,” but that because “vegetation will not be disturbed and Factors of Safety are acceptable, the buffer should be waived.” *Exhibit 1.I, page 9.* The County’s engineering geologist, Mr. Mark Biever, reviewed the report and concluded that it meets the requirements of the CAO. Mr. Biever identified no issues of concern. *Exhibit 1.H.* The report does not address the location of the proposed deck footings and does not provide geotechnical recommendations as to their placement and construction. While Planning Staff apparently read the geotechnical report to mean that zero buffer is required for any development of the slope, the undersigned reads it as meaning whatever buffer previously existed between top of slope and rear of previous garage - which was less than the standard 50 feet, but was apparently more than zero - is adequate based on their calculations for rebuilding on the existing foundation. Of note, the geotechnical report doesn't include a copy of the site plan on which the report was based.
11. Impervious surface calculations on the submitted site plan (which was based on a slightly larger deck area) suggest that with other proposed site improvements, including removing an existing greenhouse, there would be no net increase in impervious surfaces within the shoreline as a result of the proposal. *Exhibit 1.K.*
12. The deck would be elevated above the ground an average height of eight feet. Existing grass would be retained beneath it, but invasive species would be removed and replaced

with native plants. This mitigation is expected to improve slope stability. Planning Staff recommended that an enhancement and maintenance plan prepared by a landscape architect or biologist be submitted for approval prior to building permit issuance. *Exhibit 1; Chris Bonds Testimony.*

13. The Thurston County Environmental Health Division has reviewed the proposal against the requirements of the Thurston County Sanitary Code and recommended approval. The recommended condition set forth in Environmental Health's June 2, 2021 memorandum is no longer applicable as the Applicant no longer seeks to use the space as part of his veterinary practice. *Exhibit 1.G; Testimony of Dawn Peebles and Kraig Chalem.*
14. No protected or priority listed wildlife species have been identified in the project area. *Exhibit 1.*
15. The construction of a single-family residence and accessory structures is exempt from review under the State Environmental Policy Act. *Exhibit 1; TCC 17.09.055; WAC 197-11-800.*
16. The Applicant designed the replacement garage with a door facing the water specifically for the purpose of adding a deck. The Applicant submitted that enjoyment of the view was a factor in rebuilding the garage, and expressed the desire to provide secondary egress from the building in the event of fire. The Applicant originally sought to build the deck at the same time as the garage, but rebuilt the garage without the deck when the County determined that the addition of a deck within the critical area required a RUE. *Exhibits 1, 1.C, and 1.D; Chris Bonds Testimony.* Water-facing decks are a common feature of residential development in the vicinity. Planning Staff submitted that approval of the RUE provides the County the opportunity to require the removal of invasive species and replanting with native species, which would enhance slope stability and safety on and off the subject property. *Kraig Chalem Testimony.*
17. Notice of the application and open record hearing was mailed to property owners within 500 feet of the subject property on or before December 23, 2022, emailed to agencies on December 23, 2022, and published in *The Olympian* on January 13, 2023. *Exhibits 1 and 1.A.* There was no public comment on the application.
18. At the conclusion of the hearing, having heard all testimony, Planning Staff maintained their recommendation that if RUE approval is granted, the conditions in the staff report should be imposed. *Kraig Chalem Testimony.* The Applicant representative waived objection to the conditions in the staff report. *Chris Bonds 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. Based on the uses allowed in the RL 1/1 zone and the character of the subject property and of surrounding development, single-family residential use is the only reasonable use of the property. Because they are common in the neighborhood, it would appear that the proposed water-facing deck is a reasonable addition to the existing accessory structure. *Findings 3, 4, 16, and 18.*
2. According to the Applicant's geotechnical report, the proposed deck would not impact the critical area. With professional consultant assertion of no impact, which was accepted by the County, the RUE criterion requiring the Applicant to demonstrate there could be no lesser impact cannot be satisfied (there is no quantity of impact less than zero). The replacement garage is already within the landslide hazard critical area buffer, such that a deck extending from the garage would necessarily be within the buffer. The depth of the deck has been revised from the original proposal to be narrower, reducing the proposed intrusion into the standard buffer. Conditions of approval require a

landscape enhancement and maintenance plan to be implemented on the site, and require the edge of the critical area to be delineated with fences or signs, each of which would potentially improve the safety of the landslide slope both on and adjacent to the subject property. *Findings 8, 12, and 18.*

3. As conditioned, the requested residential development would not result in damage to other property nor 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 of approval require erosion control measures and a landscape enhancement and maintenance plan to be implemented on the site. The Environmental Health Division did not identify issues of concern with respect to the deck addition. If the deck surfacing generates stormwater runoff, its management consistent with the County's drainage standards would be reviewed at the time of building permit issuance. *Findings 10, 11, 12, and 13.*
4. The proposed reasonable use is limited to the minimum encroachment necessary to prevent denial of all reasonable use of the property. As described in Conclusion 2, it would not be possible to establish a water-facing deck without encroachment into landslide hazard area buffer. *Finding 8.*
5. With conditions, the proposed deck would result in minimal alteration of the critical area. The evidence suggests that the construction would avoid the face of the steep slope and would not impact its stability. A condition of approval is needed to ensure that the Applicant revises the site plan to clarify the relevant distances and dimensions. *Findings 8, 9, 10, and 18.*
6. As conditioned, the proposal ensures no net loss of critical area functions and values. The only critical area function that is relevant to the application is slope stability. The removal of invasive species and addition of native plantings in the project area would ensure that there is no net loss of this critical area function. *Finding 12.*
7. The use would not result in unmitigated adverse impacts to species of concern. *Finding 14.*
8. The location and scale of existing development on surrounding properties is not the sole basis for granting the reasonable use exception, although it was submitted by Staff as a factor in favor of approval. *Finding 16.*

DECISION

Based on the preceding findings and conclusions, the request for a reasonable use exception 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. The Applicant shall remove all construction related debris to an approved site (landfill or recycling center) outside of subject property. No fill is allowed on site.
- D. An enhancement and maintenance plan for the property shall be prepared in accordance with TCC Title 24, by a landscape architect and/or biologist and approved by Thurston County Staff before building permits can be issued.
- E. Plantings shall be installed prior to final occupancy approval, or a bond or irrevocable assignment of savings in the amount of 125% of the cost of mitigation plantings shall be submitted and shall be retained by Thurston County until the plantings are properly installed.
- F. 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>.
- 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 will be promptly backfilled and reseeded following installation, and TESC measures will remain in place until site conditions are restored.
- H. Spaced split rail fencing sections and critical area signage shall be placed along the uphill side of the top of the landslide hazard slope.
- I. 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.
- J. 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 U. S. Fish and Wildlife Services.
- K. 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 Nisqually Indian and Squaxin Island Tribes and the State Department of Archaeology and Historic Preservation.
- L. Prior to building permit issuance, the site plan must be revised to depict the accurate dimensions of the deck and accurate setbacks of the deck from the top of slope and from

the ordinary high water mark. The revised site plan must be approved by the Community Planning and Economic Development Department prior to permit issuance.

- M. All development on the site shall be in substantial compliance with the approved reasonable use exception application, including the approved revised site plan, as conditioned herein. 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 February 8, 2023.



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 **\$821.00** for a Request for Reconsideration or **\$1,112.00** 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 \$821.00 for Reconsideration or \$1,112.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
 Filed with the Community Planning & Economic Development Department this _____ day of _____, 20___.