

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
THURSTON COUNTY, WASHINGTON

In Re the Matter of

High Definition Homes LLC

For a Reasonable Use Exception

No. 202110576

DECISION

THIS MATTER came before the Board of County Commissioners (Board) on August 31, 2023 due to an appeal filed by High Definition Homes LLC (HD) of the Hearing Examiner's Decision dated July 13, 2023. This decision denied HD a second reasonable use exemption (RUE) for the subject property located at 5747 Capitol Forest Loop SW, Olympia WA 98512.

The original owner of the subject property, Mr. Bitmar, applied for and received a RUE (Bitmar RUE), in June 2020, to reduce the wetland buffer from the required 160 feet to 50 feet for development of a single-family residence, driveway and septic system (SF Residence). Six months later before any development occurred on the property, HD bought the property from Mr. Bitmar and proceeded to construct a SF Residence in the location approved in Mr. Bitmar's RUE.

The current HD RUE is requested because when the single-family residence was constructed in 2023 by HD, it encroached into the 50-foot buffer required in the Bitmar RUE, leaving a 26-foot wetland buffer instead of the 50-foot buffer between the SF Residence and the wetland.

Before a reasonable use exemption can be approved, HD must demonstrate that leaving the constructed house with a 26-foot buffer in place is the only reasonable use of the property with *less* impact on the wetland.

The Hearing Examiner determined that HD's property *already* enjoyed reasonable use of his property because of the previously approved RUE which allowed a 50-foot buffer to accommodate the proposed SF Residence with *less* encroachment in the wetland buffer.

HD challenges the Hearing Examiner's, decision arguing that:

- First, the Hearing Examiner erred by finding and concluding that a reasonable use of the property—other than the existing residential home—“is possible.” No evidence, let alone substantial evidence, supports this finding or this conclusion. The only evidence produced, demonstrated that removal or modification of the existing home would result in severe detrimental environmental impact to critical areas and buffers. [sic] Harming critical areas contrary to TCC 24.45.030 and the purpose of environmental review.
- Second, the Hearing Examiner correctly found and concluded that the only reasonable use of the property is a single-family residence. However, she erred by finding and concluding that the proposed use of the property “is not limited to the minimum encroachment necessary to prevent denial of all reasonable use of the property.” This was in error because removal or modification of the existing home would result in severe detrimental environmental impact to critical areas and buffers. Under TCC 24.45.030, it is not “reasonable” in this case to require an increase in the length of an existing setback from the existing home, nor is it in line with the purpose of environmental review to require such action. This is because all evidence demonstrated that the work required to increase the present set back would cause severe detrimental environmental impact to critical areas and buffers.

- Third, similarly, the Hearing Examiner's interpretation of TCC 24.45.030 produces absurd or strained consequences and results. Nothing in Title 24, nor in any environmental review authority, supports denying a reasonable use exception *to cause a severe and detrimental impact to critical areas and buffers in the name of somehow protecting them*. Rather, TCC 24.45.030 imposes necessary and often costly mitigation conditions that must be met. The Hearing Examiner had authority to require such mitigation conditions, and even costly conditions as required, but she had no authority to deny this application that met all the elements of TCC 24.45.030.

The Board reviewed the Hearing Examiner's decision and the evidence presented to the Hearing Examiner. Nobody objected to Commissioner participation in the case.

The issue before the Board is whether the evidence presented to the Hearing Examiner demonstrated that HD's RUE application complied with the RUE review criteria set forth in TCC 24.45.030 (A-H) as follows:

**24.45.030 Review criteria.**

The hearing examiner shall approve, or approve with conditions, 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.

(Ord. No. 14773, § 3(Att. B), 7-24-2012).

The Hearing Examiner concluded that HD's RUE application complied with criteria A, C, E, F, G, and H, as highlighted above. *See* Hearing Examiner's Conclusions Nos. 2, 4, 6, 7, 8 and 9. The Hearing Examiner, however, concluded that HD did not comply with criteria B. and D for the following reasons:

A reasonable use with less impact on the critical area or buffer is possible. The site plan approved through [the Bitmar] RUE . . . provided a 50-foot buffer for Wetland B . . . while allowing for a reasonable residential use of the property . . . The as-built plan shows that the residence is 26 feet from the edge of Wetland B . . . Although the Hearings Examiner is mindful of the applicant's arguments regarding the environmental impact of removing existing illegal development, as well as significant unbudgeted expense . . . ***Because it would have been possible to establish a reasonable use of the property with less encroachment into critical area buffers,*** the criterion [TCC 24.45.030 (B)] is not satisfied and the RUE must be denied. Hearing Examiner Conclusion No. 3. Emphasis Supplied.

As described in Conclusion No. 3, ***the proposed use*** is not limited to the minimum encroachment necessary to prevent denial of all reasonable use of the property [as required by



criterion TCC 24.45.030(D)]. Hearing Examiner Conclusion No. 5.

Based on the findings of fact and conclusions adopted, a majority of the Board finds that the Hearing Examiner erred in adopting Conclusions 3 and 5 because she did not apply Criteria B and D to the *existing SF Residence as currently built*. Because of this error, she also disregarded that any required modifications or removal of the existing SF Residence would result in *more impacts* to critical areas than maintaining the residence in its present location and that the proposed additional mitigation “would ensure no net loss of critical area functions and values.”

3. A reasonable use with less impact on the critical area or buffer is not possible. The site plan approved through [the Bitmar] RUE . . . provided a 50-foot buffer for Wetland B. . . while allowing for a reasonable residential use of the property . . . The as-built plan shows that the residence is 26 feet from the edge of Wetland B. . . Although the Hearings Examiner is mindful of the applicant’s arguments regarding the environmental impact of removing existing illegal development, as well as significant unbudgeted expense . . . Because it would have been possible to establish a reasonable use of the property with less encroachment into critical area buffers, the criterion [TCC 24.45.030 (B)] is not satisfied and the RUE must be denied

5. As described in Conclusion 3, the actual use is limited to the minimum encroachment necessary to prevent denial of all reasonable use of the property [as required by criterion TCC 24.45.030(D)].

### **FINDINGS**

The Board adopts and incorporates all the Findings of Fact in the Hearing Examiner’s decision.

### **CONCLUSIONS**

1. The Board adopts and incorporates by reference the Hearing Examiner’s Conclusions Based on Findings Nos. 2. 4. 6. 7. 8. and 9. These conclusions held that the HD RUE application complied with criteria TCC 24.45.030 A, C, E, F, G, and H.

2. The Board also adopts and incorporates by reference the Hearing Examiner’s

Conclusions Based on Findings No. 1. This conclusion acknowledges that TCC 24.45.025 authorizes “any property owner” to “apply for a reasonable use exception to carry out a use or activity not permitted by this title.”

3. HD recognized that the location and use of the as built SF Residence was not permitted by this Title (Chapter 24.45 TCC) and exercised his right to apply for a new RUE. HD’S application and testimony before the Hearing Examiner established that (1) there is not any *reasonable* use of his property other than the current SF Residence with additional mitigation, and (2) that the existing SF Residence with additional mitigation is limited to the minimum encroachment into the buffer necessary to prevent the denial of all reasonable use of the property.

4. The Hearing Examiner erred in not applying the RUE criteria to the existing as built SF Residence with additional mitigation and therefore the Hearing Examiner’s Conclusions 3 and 5 are not supported by the evidence in the record.

5. When the RUE criteria are applied to the existing SF Residence – all criteria can be met.

6. The fundamental purpose of the Reasonable Use Exemption criteria is to balance a property owner’s right to reasonable use of his property against the government’s interest in protecting the public and the environment.

7. To deny the Applicant’s use of his existing SF Residence, considering the significant additional mitigation improvements to the existing critical area buffers and functions and values, and the negative impact to the critical areas if a portion of the house were to be removed, it would be an unreasonable and unnecessary infringement on the property owner’s right to the reasonable use of his property.

### **DECISION**

Based on the preceding findings and conclusions, the request for a reasonable use exception is approved.

#### **IT IS HEREBY ORDERED AS FOLLOWS:**

Upon review of the Hearing Examiner's Findings cited above, and the Board of County Commissioners' Conclusions, discussed above, the Hearing Examiner's Decision is reversed, and the RUE application is approved subject to the following conditions:

1. The project shall be in compliance with the mitigation plan submitted as part of the original RUE application (Staff Report, Attachment h).
2. Additional mitigation must also be completed, as recommended by the Hearing Examiner, Conclusion 4, p. 8, to address the new location of the SF Residence. This additional mitigation requires the planting of Cyprus trees, or similar fast-growing trees, capable of completely screening the home from the McClane nature Trail immediately to the north. HD must submit a planting plan to the Thurston County Community Planning and Economic Development Department (CPED) within sixty (60) days of this decision.
3. All mitigation plantings must be started within one year of this decision.
4. Within sixty (60) days of this decision, a bond or irrevocable assignment of savings in the amount of 125% of all mitigation plantings shall be submitted to CPED pursuant to Chapter 24.70 (Thurston County Code). All plantings and other forms of mitigation shall be completed and maintained for a period of three (3) years of this decision, and the surety must specify a period of project completion for the same three (3) year period.
5. A wetland buffer fencing and signage plan shall be submitted to CPED staff for review and approval within thirty (30) days following this decision.
6. Mitigation monitoring shall follow the recommendations contained in the wetland report (Staff Report, Attachment h).
7. Erosion and storm water control Best Practices meeting Thurston County standards; Chapter 15.05 TCC shall be employed during all phases of the project. Proper erosion and sediment control practices shall be used on the construction site and adjacent areas to prevent upland sediments from entering the shoreline environment. All areas disturbed or newly created by

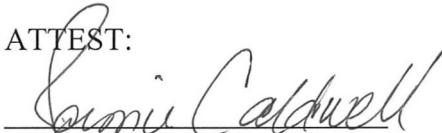
construction activities shall be seeded, vegetated, or given some other equivalent type of protection against erosion.

8. The applicant shall remove all construction related debris to an approved site (landfill or recycling center) outside of critical areas and their buffers.
9. If archaeological artifacts are observed during any phase of the project, all work shall be immediately halted. The State Department of Archaeology and Historic Preservation, CPED and affected Tribes shall be contacted assess the situation prior to resumption of work.

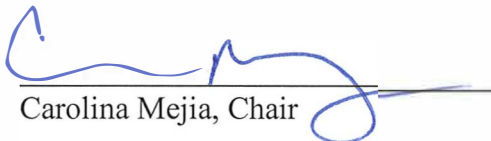
DATE:

September 15, 2023

ATTEST:

  
Clerk of the Board

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