



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. 2021103621
)	
Penn Nelson)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception to construct a single-family residence and driveway within a wetland buffer is **GRANTED** subject to conditions.

SUMMARY OF RECORD

Request

Penn Nelson (Applicant) requested a reasonable use exception (RUE) to construct a 1,400 square foot single-family residence and 826 square foot driveway within a Category 1 wetland buffer. The proposed residence would be set back at least 55 feet from the wetland edge. The subject property is located at 17636 Vine Lane, Yelm, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on November 23, 2021. The record was held open through November 29, 2021 to allow members of the public who had 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 November 29, 2021 due to November 25 and 26 being County holidays.

Testimony¹

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

Sharon Lumbantobing, Senior Planner, Thurston County Community Planning & Economic Development Department

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

Penn Nelson, Applicant

Alex Callender, MS, PWS, Land Services Northwest

Exhibits

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

- Exhibit 1 Community Planning and Economic Development Staff Report including the following attachments:
- A. Notice of Public Hearing, dated November 4, 2021
 - B. Master Application received July 13, 2021, revised October 8, 2021
 - C. Reasonable Use Exception application, received July 13, 2021, revised October 8, 2021
 - D. Revised site plan, received July 13, 2021, revised October 8, 2021
 - E. Wetland Delineation Report, dated April 28, 2021
 - F. Wetland Buffer Enhancement Plan, received July 13, 2021, revised October 8, 2021
 - G. Additional Responses to support application, received October 8, 2021
 - H. Notice of Application for Reasonable Use Exception dated July 30, 2021
 - I. Approval memo from Amy Crass with Thurston County Environmental Health, dated October 13, 2021
 - J. Comment letter from the Nisqually Tribe, dated July 22, 2021
 - K. Comment email from the Squaxin Tribe, dated July 27, 2021

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

¹ Thurston County Public Works Staff was present at the hearing in case of questions but did not offer any testimony.

FINDINGS

1. Penn Nelson (Applicant) requested a reasonable use exception (RUE) to construct a 1,400 square foot single-family residence and 826 square foot driveway within a Category 1 wetland buffer. The proposed residence would be set back at least 55 feet from the wetland edge. The subject property is located at 17636 Vine Lane, Yelm, Washington.² *Exhibits 1, 1.B, 1.C, 1.D, and 1.G.*
2. The RUE application was received on July 13, 2021 and deemed complete for purposes of commencing project review on July 27, 2021. *Exhibit 1.H.*
3. The subject property is in the rural portion of the County and is zoned Residential LAMIRD Two Dwelling Units per Acre (RL 2/1). Primary permitted uses in the RL 2/1 zone include single-family and two-family residences, agriculture, and home occupations. *Exhibit 1; Thurston County Code (TCC) 20.13A.020.*
4. The 11,325 square foot subject property is legally nonconforming with respect to the 12,500 square foot minimum lot area requirement of the RL 2/1 zone. The property is undeveloped except for a three-bedroom septic system that was installed in 1969 in apparent preparation for construction of a residence that was never built. Surrounding land uses are primarily single-family residential on lots that are similar in size to the subject property. *Exhibits 1 and 1.I; Dawn Peebles Testimony.*
5. There is an approximately 35-acre Category 1 wetland offsite to the southeast of the subject property. The wetland has a habitat score of 7 (MMH), requiring a standard buffer width of 240 feet, which width may be administratively reduced to 180 feet with mitigation. *Alex Callender Testimony; Exhibit 1.E; TCC Table 24.30-2.* Both the 240-foot standard buffer and the 180-foot reduced buffer encompass the entire parcel, leaving no area available for development. *Exhibits 1.D and 1.E.*
6. The subject property is wedge-shaped, with the narrowest dimension fronting Vine Lane to the west. The proposed 1,400 square foot residence would be located in the north-central portion of the property, providing a 55-foot setback from the wetland at its closest point (southeast corner of the residence). The residence would be placed in a previously cleared area (cleared by previous owner) to minimize tree removal, and the proposed 826 square foot driveway from Vine Lane would be west of the residence. The existing septic drainfield is east of the proposed building footprint, approximately 27 feet from the wetland at its closest point, and the reserve drainfield is south of the proposed building footprint, approximately 10 feet from the wetland at its closest point. The Applicant submitted that the residence could not be placed farther from the wetland while maintaining existing vegetation so as to minimize the development's impact. The driveway would be graded slightly away from the wetland. Stormwater runoff from the

² The legal description of the subject property is a portion of Section 31 Township 16 Range 3E Quarter SW NW Plat CLEARWOOD DIV 4 LT 270 Document 015/092; also known as Tax Parcel Number 41180027000. *Exhibits 1 and 1.B.*

proposed driveway would be collected in an infiltration trench along the driveway, where it would be treated cooled before reaching the wetland. The total proposed development envelope would encompass 5,617 square feet, which was already cleared as noted above. Excluding yard area, the actual development footprint proposed is 2,226 square feet. Of note, when the existing septic drainfields and components are included, the total development envelope is 8,589 square feet. *Exhibits 1.D, 1.F, and 1.G; Alex Callender Testimony.*

7. As mitigation for the proposed development, the Applicant proposes to enhance 2,205 square feet of buffer between the residence and the wetland, including along the southern and eastern edges of the septic drainfields. The plantings would be set back 15 feet from the residence to allow for a small yard area. The plantings, which would include quaking aspen, mock orange, snow berry, and red flowering currant, would improve buffer functions with respect to screening, invasive species control, nutrient uptake, habitat, structure, and temperature attenuation. They would also denitrify the effluent from the septic drainfields. Because the plantings would be native species, they would not require fertilizer that might impact the wetland. The plantings would be monitored for five years, with the results reported to the County. Existing mature trees on site would be retained. The Applicant's wetland consultant submitted, and Planning Staff concurred, that the proposed mitigation would result in no net loss of wetland functions and values. *Alex Callender Testimony; Exhibits 1 and 1.F.* There was no discussion on the record of why the proposed mitigation represents less than the 1:1 ratio required by TCC 24.30.080.A by 21 square feet.
8. Based on field observation and review of the Washington Department of Fish and Wildlife Priority Habitats and Species database, there are no federally listed or priority species of wildlife known to occur on site. *Exhibit 1.E.*
9. The residence would be served by the Clearwood Group A Public Water System and by the existing septic system. The septic system is in sound condition based on inspection by a certified pumper. The Thurston County Environmental Health Division has reviewed and approved a Building Site Application for the project (permit no. 2020105783). Environmental Health recommended that extreme caution be taken during construction to prevent vehicle or equipment travel over septic system components, and that no staging of materials or vehicle parking occur over any portion of the septic system. *Exhibit 1.I; Dawn Peebles Testimony.*
10. The proposed development is categorically exempt from review under the State Environmental Policy Act. *Exhibit 1; WAC 197-11-800; TCC 17.09.055(B).*
11. The Nisqually Indian Tribe and the Squaxin Island Tribe submitted comments indicating 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. This request was incorporated into the recommended conditions of RUE approval. *Exhibits 1, 1.J, and 1.K.*

12. Notice of the open record hearing was mailed to property owners within 500 feet of the site on November 4, 2021 and published in *The Olympian* on November 12, 2021. Notice of the application was mailed to property owners within 500 feet of the site on July 30, 2021. There was no public comment on the application. *Exhibits 1, 1.A, and 1.H.*
13. Having heard all testimony, Planning Staff maintained their recommendation for approval of the RUE with the conditions stated in the staff report. *Exhibit 1; Sharon Lumbantobing Testimony.* The Applicant waived objection to the recommended conditions. *Testimony of Alex Callender and Penn Nelson.*

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.

Additional Applicable Provisions

TCC 24.30.080 - Wetland mitigation—Ratios.

- A. Mitigation Ratios. The ratio of impacted wetland acreage to mitigation acreage shall be determined using the ratios specified in Table 24.30-3. Buffer mitigation shall occur at a 1:1 ratio of buffer impact to mitigation impact. The approval authority, in consultation with Ecology, shall establish the ratio of impacted wetland acreage to mitigation acreage on a case by case basis, based on the factors listed in subsection (B) below. The ratio of impacted wetland and buffer acreage to mitigation acreage shall not be less than 1:1, provided that buffers for created wetlands are sized consistent with TCC 24.30.035 - 24.30.065.

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 surrounding development, single-family residential use is the only reasonable use of the property. *Findings 2 and 3.*
2. No reasonable use with less impact on the critical area or buffer is possible. The proposed residence is modest in scale, such that it would not be reasonable to require a reduced building area. Because the wetland buffer encumbers the entire parcel, it would not be possible to reduce the area of impacted buffer by relocating the residence. The residence would be located in a previously cleared area in the northern portion of the parcel to minimize the impact of the use. *Findings 5 and 6.*
3. As conditioned, the requested development would not result in damage to other property and would not threaten the public health, safety or welfare on or off the development site, or increase public safety risks on or off the subject property. The conditions of approval incorporate the comments submitted by the Environmental Health Division with respect to the septic system, and by the Nisqually and Squaxin Island Tribes with respect to cultural resources. No other issues relating to public health, safety, or welfare were identified during the application review process. *Findings 9 and 11.*
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 reduce the wetland buffer encroachment while still providing for reasonable use of the property. *Findings 5 and 6.*
5. As conditioned, the proposed reasonable use would result in minimal alteration of the critical area. The residence would be sited to avoid tree removal. Conditions of approval address storm drainage and erosion control requirements. *Finding 6.*

6. The Applicant's consultant opined, and Planning Staff accepted, that a mitigation area of 2,205 square feet would result in no net loss of wetland functions and values. While this may in fact be true, it fails to comply - without stating grounds - with the 1:1 mitigation to impact ratio required by TCC 24.30.080.A. While it is a small lot, 21 additional square feet of enhancement plantings should be able to be fit within the site, possibly adjacent to the reserve drainfield. Alternatively, the proposed development envelope could be reduced by 21 square feet. Conditioned to require a 1:1 buffer impact mitigation ratio, the proposal would be consistent with TCC Chapter 24.30 and would ensure no net loss of critical area functions and values. The mitigation plan would result in improvement in several critical area functions. The conditions of approval require a surety agreement and bond, consistent with CAO provisions, to ensure that the mitigation plan is implemented as proposed and approved. *Findings 6 and 7.*
7. The use would not result in unmitigated adverse impacts to any known species of concern. *Finding 8.*
8. The location and scale of existing development is not the sole basis for granting the reasonable use exception. The RUE is needed because a wetland buffer encumbers the entire parcel and there is no reasonable use for the parcel aside from residential development. *Finding 5.*

DECISION

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

1. Prior to building permit issuance, the Applicant shall provide a surety agreement and bond, in compliance with TCC 24.70, to ensure the proposed implementation, monitoring and maintenance portion of the proposed Wetland Buffer Enhancement Plan (Exhibit 1.F) is completed successfully.
2. Extreme caution must be taken during construction to prevent any vehicle or equipment travel over the existing septic system components and designated drainfield reserve area. There shall be no staging of materials and no parking of vehicles or equipment over any portion of the septic system.
3. Buffer impacts shall be mitigated at a 1:1 ratio for the total footprint of the residence and the driveway. The Applicant shall complete all buffer mitigation, monitoring, and reporting as outlined in the Wetland Buffer Enhancement Plan (Exhibit 1.F) modified to ensure a 1:1 mitigation to impact ratio.
4. A storm drainage and erosion control plan shall be submitted to Thurston County CPED for review and approval prior to building permit issuance.
5. Prior to building permit issuance, erosion control shall be installed and inspected by Thurston CPED Staff. Erosion and storm water controls, i.e. silt fencing and / or straw

wattles must be installed landward of the reduced buffer such that uncontrolled storm water cannot reach the adjacent wetlands.

6. Erosion and storm water control best management practices satisfying the requirements of Thurston County Code Chapter 15.05 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.
7. Prior to building permit issuance, a wetland buffer fencing and signage plan shall be submitted to CPED Staff for review and approval.
8. Prior to final occupancy approval, all wetland buffer fencing and critical area signage shall be installed subject to standards of TCC 24. 60. The Applicant shall contact CPED staff for a site inspection upon completion of the wetland buffer fencing and signage.
9. The Applicant shall remove all construction related debris to an approved site (landfill or recycling center) outside of critical areas and their buffers.
10. 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, the Thurston County Community Planning & Economic Development Department (CPED), and affected Tribes shall be contacted to assess the situation prior to resumption of work. The Inadvertent Discovery Plan for Thurston County shall be implemented for the project as necessary.
11. All development on the site shall be in substantial compliance with the approved reasonable use exception application, as conditioned. Any alteration to the proposal shall 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.
12. 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.

DECIDED December 13, 2021.



Sharon A. Rice
Thurston County Hearing Examiner

NOTE: Pursuant to TCC 22.62.020(C)10, affected property owners may request a change in valuation for property tax purposes.

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Community Planning & Economic Development Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$777.00** for a Request for Reconsideration or **\$1,054.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Building Development Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____ Appeal Sequence No.: _____

Check here for: **RECONSIDERATION OF HEARING EXAMINER DECISION**

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

Check here for: **APPEAL OF HEARING EXAMINER DECISION**

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
 on this _____ day of _____, 20___, as an APPELLANT in the matter of a Hearing Examiner's decision rendered on _____, 20___, by _____ relating to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

 APPELLANT NAME PRINTED

 SIGNATURE OF APPELLANT

Address _____

 Phone _____

Please do not write below - for Staff Use Only:

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