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HEARING EXAMINER

Creating Solutions for Our Future

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THURSTON COUNTY

REPORT AND DECISION

PROJECT NO.: 2023103576
Halpin Reasonable Use Exception

SEQUENCE NO.: 23 109246 XI

TAX PARCEL NO.: 21734240101

LOCATION ADDRESS: 12910 118th Ave SE
Rainier, WA 98576

LEGAL DESCRIPTION: Section 34 Township 17 Range 1E Quarter SE
NW LL020063TC LT 1 Document 3453363

APPLICANT/OWNER: Cale Halpin
12910 118th Ave SE
Rainier, 98576

COUNTY STAFF: Heather Tschaekofske, MES
Associate Planner/Biologist

SUMMARY OF DECISION

The request for a Reasonable Use Exception (RUE) to construct a shop within a fish and wildlife habitat is GRANTED, subject to conditions.

SUMMARY OF RECORD

Request:

The Applicant requests approval of a Reasonable Use Exception (RUE) for permitting of a proposed shop within an important fish and wildlife habitat (Oregon white oaks trees). This is an after- the-fact

RUE request for Oregon white oak impacts due to preliminary site work. The subject property zoning is Rural Residential Resource-One Dwelling Unit per Five Acres (RRR 1/5) in unincorporated Thurston County.

Public Hearing:

After reviewing the Community Planning and Economic Development Department Report and examining available information on file with the application, the Examiner conducted an open record public hearing on the request on November 14, 2023. The hearing was opened at 10:00 a.m. and was concluded at 10:45 a.m. The record was closed at adjournment of the hearing.

Testimony:

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

Staff

Heather Tschaekofske, MES
Associate Planner/Biologist

Applicant

Cale Halpin

Exhibits:

At the open record public hearing, the following exhibits were submitted and made a part of the record:

EXHIBIT 1	Community Planning and Economic Development Staff Report
Attachment A	Notice of Public Hearing
Attachment B	Zoning Map
Attachment C	Master Application and Reasonable Use Exception Application
Attachment D	Applicant's Reasonable Use Exception Narrative
Attachment E	Site Plan
Attachment F	Notice of Application
Attachment G	Comment Memorandum from Lisa Christensen, Thurston County Public Health and Social Services Department
Attachment H	Comment email from Shaun Dinubilo, Squaxin Island Tribe
Attachment I	Applicant photos
Attachment J	Public comments submitted and County responses
Attachment K	Applicant's email responses to public comments and County response
Attachment L	Applicant's additional mitigation information and photos
Attachment M	Comment letter from Brad Beach, Nisqually Indian Tribe

EXHIBIT 2 Email from the applicant clarifying the number of existing structures

Based upon the record developed at the open record hearing, the Pro Tem Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Cale Halpin (Applicant) filed a Master Application (Application) and Supplemental Application for a Reasonable Use Exception (RUE) on July 31, 2023, requesting approval to construct an accessory shop building within an Oregon white oak habitat located at 12910 118th Ave SE, Rainier, WA, 98576, parcel number 21734240101 and within Section 34 Township 17 Range 1E Quarter SE NW LL020063TC LT 1 Document 3453363. Access to the property is currently provided by 118th Ave SE, a public roadway; however, the Applicant is proposing to modify the access to utilize Eagleview Ln SE, which is an existing private easement road. The Applications were deemed complete for purpose of beginning project review on August 11, 2023. (Exhibits 1C, 1D, and 1E)
2. This is an after-the-fact RUE request due to impacts to two Oregon white oak trees during preliminary site work on the proposed project area. The Applicant did not realize he had impacted a critical area until after he submitted a building permit application for the proposed accessory shop on June 26, 2023. In July, during the initial County site visit, it was discovered that the Applicant's preliminary site work had removed a mature Oregon white oak tree without benefit of permit and partially impacted a second mature oak by soil disturbance under the drip line. As the Oregon white oak is a protected tree pursuant to Thurston County Code (TCC) 24.25.065(B.4), the removal of it without the requisite permit was a violation of Code. As to the second tree, the Applicant was able to remedy the impact by replacing soils and constructing a landscape wall that will retain the soils in place at grade level. (Exhibits 1C, 1D, 1E, 1I and 1K)
3. The Applicant has a possessory interest in the 5.16-acre subject property which has an existing 1,428-square foot residence that was built in 1940 and one small shed. The property has variable topography with a depressional area in the center and is partially forested. Oregon white oak trees are present on the property. The subject property was created through a 2002 large lot subdivision, as Lot 1 (Auditor File Number 3453363), and meets legal lot standards provided in Thurston County Code (TCC) 18.04.045. (Exhibits 1, 1C and 1D)
4. The proposed accessory pole building has a footprint of 48-feet by 60-feet and is a replacement of dilapidated horse stalls and a small storage shed/pump house near the residence. Within the proposed structure will be a mechanical room to include a water pressure tank and filtration system. The structure will have a concrete floor in the main building which consists of a 36-feet by 48-foot area with 16-foot eaves and an attached 12-foot lean-to structure on each side that will have gravel floors for parking (Exhibits 1D and 1E)
5. The Notice of Application was issued on August 11, 2023, with the comment period expiring on August 31, 2023, and sent to all property owners within 500-feet of the site. (Exhibit 1F)
6. Written notice of the public hearing was mailed to all property owners within 500-feet of the site on October 27, 2023, and was published in The Olympian on November 3, 2023, at least ten (10) days prior to the hearing. (Exhibit 1A)

7. The construction of appurtenances to a single-family residence such as an accessory building is exempt from review under the State Environmental Policy Act (SEPA) (WAC 197-11-800(1)(b)(i)).
8. The Thurston County Comprehensive Plan designation for the subject property is Rural Residential Resource which was created primarily to maintain the rural character of the County and to buffer environmentally sensitive areas and resource management areas from incompatible activities. A primary land use is low density residential including one dwelling per 5-acres with associated appurtenances which is limited due to physical land capability constraints, including the presence of critical areas. As proposed and conditioned, the proposed project is consistent with the Plan designation. (Comp. Plan 2-17 to 2-18)
9. Pursuant to TCC 20.09A, the subject property zoning classification is Rural Residential Resource-One Dwelling Unit per Five Acres (RRR 1/5) in unincorporated Thurston County. TCC 20.02A.020 provides the RRR 1/5 zoning allows certain primary uses including single family residences (SFR) and associated appurtenances, such as accessory structures, subject to applicable design standards noted in TCC 20.09A.040. The minimum property line setbacks for all structures larger than 200-square feet are 20-feet from the front property line (or private road easement), 5-feet from the side property lines, and 5-feet from the rear property line. The maximum impervious surface limit for the subject property is 10 percent. As proposed and conditioned, the proposed project is consistent with the zone classification. (Exhibits 1C, 1D, 1E and 1K)
10. The subject property contains Oregon white oak trees and is within the DNR Critical Oak Habitat and Grasslands Mapping Layer (Natural Heritage Program). Pursuant to TCC 24.25.065(B.4, the individual Oregon white oak tree that the Applicant removed qualifies as a protected tree. TCC 24.25.065 and TCC 24.25.070 prohibit clearing, grading, filling or other development activities within a tree protection area for Oregon white oak trees. The property is also mapped within Category 1 and 2 critical aquifer recharge areas which are characterized by extreme and high aquifer sensitivity (Exhibits 1, 1C and 1D)
11. The property is also mapped within a Mazama pocket gopher soil area and within an Oregon vesper sparrow area which are defined and protected as Habitat Conservation Plans pursuant to TCC 17.40 (Exhibit 1)
12. The Applicant submitted a lengthy, detailed and articulate narrative regarding the family need for the proposed accessory building and the sequential decisions regarding the site selection, structure plan and the preliminary site preparation. (Exhibit 1K)
13. The Applicant submitted a mitigation plan which included maintaining the existing native species habitat, removing the imperious driveway and replanting with native species, protecting the impacted white oak tree with a retaining wall, providing one hundred (100) tree starts to his middle school students and maintaining a natural diverse property by planting and maintaining species diversity. After such submittal, the Applicant planted three hundred (300) Oregon white oak acorns on the subject property. (Exhibits 1D and 1I)

14. In an email dated October 24, 2023, Lisa Christensen, Thurston County Public Health and Social Services, commented that the department had reviewed the request and did not object to the proposal on the condition that the proposed shop building projection must be located a minimum of five (5) feet from the exiting well. (Exhibit 1G)
15. In an email dated August 21, 2023, Shaun Dinubilo, Archaeologist, Squaxin Island Tribe, stated they had reviewed the Application and had no specific cultural resource concerns but would concur if the Washington State Department of Archaeology and Historical Preservation (DAHP) requested a cultural survey. If not, in the event that any archaeological or cultural resources is uncovered, the Tribe requested that work be halted and the Tribe be informed. (Exhibit 1H)
16. In a letter dated August 24, 2023, Brad Beach, THPO, Nisqually Indian Tribe, stated they had reviewed the Application and did not have any specific comments or concerns but did request the Tribe be informed if there are any "Inadvertent Discoveries of Archaeological Resources/Human Burials." (Exhibit 1M).

CONCLUSIONS OF LAW

Jurisdiction:

The Hearing Examiner has the jurisdiction to decide this Reasonable Use Exception application pursuant to Thurston County Code provisions 2.06.010 and 24.45.030.

Analysis:

1. The Notice of the Public Hearing was appropriate. (Finding of Fact 6))
2. The proposed project is consistent with the Thurston County Comprehensive Plan. (Finding of Fact 8)
3. The proposed project is consistent with the Thurston County Zoning Code. (Finding of Fact 9)
4. Pursuant to TCC 17.40, the location of the subject property within the mapped areas for Mazama pocket gopher soils as well as within the Oregon vesper sparrow areas requires the Applicant to apply for and have approval of "Habitat Conservation Plans" (HCP) regarding impacts to the Mazama pocket gopher soils and to the Oregon vesper sparrow areas prior to building permit issuance. (Finding of Fact 11)
5. Pursuant to TCC 24.45, the presence of the protected Oregon white oak trees, as well as the removal of the one tree, and the Category 1 and 2 critical aquifer recharge areas on the subject property require the Applicant to apply for and have approval of a Reasonable Use Exception to construct the proposed accessory building.
6. Pursuant to TCC 24.45.020, the reasonable use exception is generally required when adherence to the provisions of the critical areas regulations would deny all reasonable use of the subject property as a whole due to the property's size, topography, or location relative

to the critical area and any associated. Herein, the Examiner finds the application for the RUE is due to the characteristics of the subject property.

7. TCC 24.45.020 mandates that certain properties are not eligible for an RUE:

The inability of an applicant to derive reasonable use shall not be a result of a self-created hardship such as subdividing the property, adjusting a boundary line, or other actions thereby creating the undevelopable conditions after July 24, 2012

The Examiner concludes that the necessity for the RUE herein is not due to the Applicant's self-created hardship but simply due to the presence of the two critical areas on the subject property.

8. Pursuant to TCC 24.45.030, the examiner shall approve, or approve with conditions, the reasonable use exception if the Application is consistent with all of the following criteria:

- A. No other reasonable use of the property as a whole is permitted by this title;

Pursuant to TCC 20.09A.020, the primary permitted uses in the RRR 1/5 zoning district are single-family residences and agriculture. Herein, the Applicant has limited accessory structures on site and the proposed pole building provides for necessary residential usage adjacent to the residential use area. Therefore, no other reasonable use of the property is permitted. (Findings 3,4,8,9)

- 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.

The Applicant has provided a full and complete explanation regarding the determination that the proposed site plan and structure plan was the minimum necessary to make a reasonable use of the property with minimum impact on the Oregon white oak trees and the critical areas. (Finding of Fact 11)

- 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;

The Applicant's proposed construction will not result in damage to other property nor threaten the public health, safety or welfare on or off the development proposal site nor increase public safety risks on or off the subject property for the following reasons:

- Stormwater will be maintained on site in accordance with the Thurston County Stormwater Manual.
- No change to septic or water usage, thus no impacts to " Waters of the State" will occur offsite due to this project.

- The impacts will be limited onsite and the construction site will use best management practices (BMP's) to maintain water and air quality.
- The mitigation plan should maintain the overall integrity of the important habitat onsite and prevent damage to nearby properties as well.
- As proposed and conditioned, the use will not result in damage to other properties and should not threaten the health, safety, or welfare on or off the site.
- The change in access point will benefit both the existing oak habitat on site as well as provide for greater public safety.
- The development is proposed consistent with regulations intended to protect the environment and public health. (Exhibit 1)

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;

The impact of the project has been limited to the removal of a single mature oak tree within the proposed development area, as well as clearing and grading within the development footprint, some of which was in an area of existing impervious surfaces. As noted above, the Applicant provided details outlining the site configuration and the development limitations that dictated the location for the proposed development footprint. (Finding of Fact 12)

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;

The impact to the Oregon white oak tree protected area was minimal as only one tree was removed and, on the Applicant's count, the property currently has fifty (50) white oak trees which will be protected and not be affected by the project. The impacts to the protected Mazama pocket gopher soil area and Oregon vesper sparrow area will be mitigated by the approval herein being conditioned to adhere with the County Habitat Conservation Plans code provisions. (Findings of Fact 11 and 12)

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;

The Applicant's mitigation plans include but are not limited to:

- Maintain appropriate habitat for existing native species such as oak trees;
- Remove existing driveway and replanting with native species;
- Provide an existing mature oak tree with a protective retaining wall;
- Maintain and protect the 50 Oregon white oak trees existing on the property and planting 300 more Oregon white oak acorns on the property.
- Provide 100 oak tree starts to his middle school students to plant at their homes;
- Maintain a naturally diverse property by planting and protecting native species and mechanically manage weeds while avoiding chemical control;

- Maintain aesthetics of existing trees and species diversity. (Finding of Fact 13)

G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern;

As noted above, the proposal shall mitigate for any impacts to the listed species and areas of concern regarding the Mazama pocket gopher and Oregon vesper sparrow pursuant to compliance with the HCP application process. (Finding of Fact 11)

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.

The Applicant has not listed the location and scale of existing development on surrounding properties as a reason supporting the request for the RUE.

DECISION: The Applicant/Owner has demonstrated that the proposal will be consistent with all applicable codes. Therefore, based on the preceding Findings of Fact and Conclusions of Law, the request for a Reasonable Use Exception to construct a proposed shop within an important fish and wildlife habitat (Oregon white oaks) at 12910 118th Ave SE, Rainier, WA 98576.E. 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 proposed shop building projection must be located a minimum of five-feet from the existing well.
- C. Applicant is responsible for compliance with other jurisdictional permitting requirements.
- D. HCP application and approval for impacts to Mazama pocket gopher and Oregon vesper sparrow is required prior to building permit issuance.
- E. A Construction Stormwater Permit from the Washington State Department of Ecology may be required. Information about the permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>. It is the applicant's responsibility to obtain this permit if required.
- F. The Applicant shall complete mitigation prior to final building permit inspection. A surety will be required in place of mitigation completion prior to final building permit inspection, per TCC 24.70.
- G. A critical area affidavit shall be signed and recorded with the Thurston County Auditor's office, prior to final building inspection for the proposed shop.

- H. Construction fencing and erosion control shall be placed outside the buffer alongside proposed development areas. This fencing and erosion control shall be inspected prior to building permit issuance.
- I. 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.
- J. 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.
- K. 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.

ORDERED this 5th day of December, 2023.



STEPHEN R. SHELTON
Pro Tem Hearing Examiner

TRANSMITTED this 5th day of December, 2023, to the following:

**APPLICANT/
OWNER:**

Cale Halpin
12910 118th Ave SE
Rainier, 98576

COUNTY STAFF:

Heather Tschaekofske, MES
Associate Planner/Biologist
Thurston County Development Services
3000 Pacific Ave SE
Olympia WA 98501

OTHERS:

Parties Of Record

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____.