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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. 2022106177
)	
Trevor Irish)	FINDINGS, CONCLUSIONS,
)	AND DECISION
For a Reasonable Use Exception)	
_____)	

SUMMARY OF DECISION

The request for a reasonable use exception is **GRANTED** with conditions.

SUMMARY OF RECORD

Request

Trevor Irish requested a reasonable use exception to construct a single-family residence and associated appurtenances within a wetland buffer. The subject property is located at 7125 Libby Road NE, Olympia, Washington.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the application on December 26, 2023. The record was held open through December 28, 2023 to allow members of the public to comment, with time scheduled for responses from the parties. No post-hearing comments were submitted, and the record closed on December 28, 2023.

No in-person site visit was conducted, but the undersigned viewed the subject property on Google Maps.

Testimony

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

Heather Tschaekofske, Associate Planner/Biologist, Thurston County Community Planning and Economic Development Department

Findings, Conclusions, and Decision
Thurston County Hearing Examiner
Irish RUE, No. 2022106177

Trevor Irish, Applicant

Alex Callender, Principal Biologist, Land Services Northwest (Applicant representative)

Exhibits

The following exhibits were admitted in the record:

- Exhibit 1 Community Planning and Economic Development Report including the following attachments:
- A. Notice of Public Hearing
 - B. Zoning Map
 - C. Master Application, received December 20, 2022
 - D. Reasonable Use Exception Application and Narrative, revised September 11, 2023
 - E. Figure 2 and Figure 5 site plans from critical area reports
 - F. 1970 Deed, Auditor File Number 830045
 - G. Wetland Delineation and RUE Analysis Report, Land Services NW, dated June 15, 2023
 - H. Restoration and No-Net-Loss Wetland Buffer Enhancement Plan, Land Services NW, dated June 15, 2023
 - I. Comment email from Department of Archaeology and Historic Preservation, dated January 26, 2023
 - J. Notice of Application, dated January 13, 2023
 - K. Comment Memorandum from Dawn Peebles, Thurston County Public Health and Social Services Department, dated November 9, 2023
 - L. Comment letter from Brad Beach, Nisqually Indian Tribe, dated January 23, 2023
 - M. Comment email from Shaun Dinubilo, Squaxin Island Tribe, dated January 20, 2023
 - N. Inadvertent Discovery Plan for Thurston County
 - O. Stormwater project summary, dated August 31, 2023
 - P. Stormwater civil site plans, dated August 31, 2023
 - Q. Impact versus mitigation quantities, submitted September 11, 2023
 - R. Stormwater Plan, submitted September 11, 2023
 - S. Stormwater Agreement and Maintenance Checklist, submitted September 11, 2023
 - T. Public comments

U. Applicant responses to public comments, submitted September 11, 2023
Exhibit 2a Email from April Scharer and Dennis Brown, dated December 17, 2023
Exhibit 2b Email from Diane Audiss, dated December 21, 2023

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

FINDINGS

1. Trevor Irish (Applicant) requested a reasonable use exception (RUE) to construct a single-family residence and associated appurtenances within a wetland buffer. The subject property is located at 7125 Libby Road NE, Olympia, Washington.¹ *Exhibits I, I.C, and I.D.*
2. The RUE application was received on December 20, 2022 and deemed complete for purposes of commencing project review on January 13, 2023. *Exhibit I.J.*
3. The subject property is 4.56 acres in area and is undeveloped. Although historically the subject property was in a forested condition, the Applicant recently cleared 27,825 square feet from the east-central portion of the property - not knowing it consisted of regulated wetland buffer - to create recreation space. The Applicant is now seeking to remedy the violation through the RUE permit process. *Exhibits I, I.G, and I.H; Alex Callender Testimony.*
4. Surrounding land uses consist of single-family residences and undeveloped forest land. *Exhibit I.*
5. The subject property is within the rural portion of the County and is zoned Rural Residential Resource One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit I.* The purpose of the RRR 1/5 zone is “to encourage residential development that maintains the county’s rural character; provides opportunities for compatible agricultural, forestry and other rural land uses; is sensitive to the site’s physical characteristics; provides greater opportunities for protecting sensitive environmental areas and creating open space corridors; enables efficient road and utility systems; and does not create demands for urban level services.” *Thurston County Code (TCC) 20.09A.010.* Primary permitted uses in the RRR 1/5 zone include single-family and two-family residences, agriculture, accessory farm housing, and home occupations. *Exhibit I; TCC 20.09A.020.* Although slightly smaller than five acres in area, the subject property has existed in its current configuration since 1970 and the County considers it to be a legal building lot. *Exhibits I and I.F.*

¹ The staff report states that the legal description of the subject property is a portion of Section 13, Township 19, Range 2W SE-SE-NE LESS S 315F LESS N 30F LESS CO RD; also known as parcel 12913140200. *Exhibit I.*

6. Based on evaluation by a professional wetland scientist, the subject property contains three wetlands (Wetlands A, B, and C) and one unnamed Type Ns stream.² Wetland A, which is approximately 967 square feet in area, is below the County threshold for buffer requirements. Wetland A is near the northeast corner of the subject property, in an area where no development is proposed. Wetland B, which has an on-site area of approximately 2.2 acres, is classified as a Category III wetland with a habitat score of 8 (MHH), requiring a 280-foot standard buffer pursuant to TCC Table 24.30-1. Wetland B covers most of the western portion of the subject property. Wetland C, which is approximately 1,177 square feet in area, is also a Category III wetland with a habitat score of 8 (MHH), requiring a 280-foot buffer. For both wetlands, the standard buffer may be administratively reduced by 25% to 210 feet if mitigation is provided. The stream runs through Wetland B, bisecting the subject property from north to south. The stream is less than five feet wide, requiring a 150-foot buffer pursuant to TCC Table 24.25-1. This buffer is wholly contained within the Wetland B buffer. In addition to the wetland and stream buffer requirements, structures requiring a permit must be set back 15 feet from the buffer edges unless the Applicant demonstrates that the proposed construction would not encroach into the buffer. *Exhibit 1.G; TCC Table 24.30-1; TCC 24.01.035; TCC 24.30.050.*
7. Both the 280-foot standard wetland buffers and 210-foot reduced wetland buffers encompass the entire parcel; it would not be possible to develop the subject property without encroaching into the inner 75% of a wetland buffer. *Exhibits 1.E and 1.G.*
8. The Applicant proposes buffer impacts totaling 9,715 square feet including 3,000 square feet for the residence, 2,955 square feet for the driveway, 900 square feet for the detached garage, 2,620 square feet for the septic and reserve drainfields, and 240 square feet of additional clearing for the driveway and garage. Development would be clustered in the eastern portion of the property adjacent to Libby Road, largely within the previously cleared area. The Wetland B buffer would be reduced to 117 feet at its narrowest point adjacent to the proposed residence, and the Wetland C buffer would be reduced to 49 feet at its narrowest point adjacent to the septic drainfields. (The Wetland C buffer would be reduced to 51 feet adjacent to the residence.) A four-foot construction setback is proposed around the residence and garage, a setback the County considers to be the minimum feasible based on equipment sizes. *Exhibits 1.E, 1.H, and 1.Q; Heather Tschaekofske Testimony.*

² Of note, both the Staff Report (Exhibit 1, page 3) and the wetland delineation report at (Exhibit 1.G, page 17) state that the onsite stream is fish bearing or Type F; however, in the charts in the wetland delineation report, it is identified as a Type Ns (non-fish bearing) stream. In his testimony, the Applicant's biologist stated that it is a non-fish bearing stream and also that it is the same stream as was present on the Brown Sharer property, *Brown/Scharer RUE, No. 2021104988*, which at Finding 6 identifies a Type Ns stream. Of further note, a Type Ns stream and a Type F stream less than five feet wide carry the same buffer, so for the purposes of these findings, the question of the stream's classification raises no regulatory questions that require resolution prior to RUE issuance. *See TCC Table 24.25-1.*

9. As mitigation for the previous clearing, the Applicant proposes to restore 19,961 square feet of previously disturbed wetland buffer. The residence, driveway, and garage would occupy the remainder of the previously disturbed area. As mitigation for impacts from the proposed residential development, the Applicant proposes to enhance 9,715 square feet of buffer, with the enhancement plantings split between two locations.³ A portion of the enhancement would occur between Wetland C and the septic drainfields, so as to prevent contaminants from entering the wetland, and a portion would occur between Wetland B and the residence and restoration area. Any invasive non-native species would be removed from the planting areas. *Exhibits 1.H and 1.E; Alex Callender Testimony.*
10. The density of restoration plantings within the cleared area would mimic previous conditions, with trees planted 10 to 15 feet on center and shrubs planted five to eight feet on center. The restoration work would be completed after residential construction is complete, as the plantings would be installed up to the inner edge of the proposed four-foot construction setback. A 10-year monitoring plan is proposed. *Alex Callender Testimony; Exhibit 1.H.*
11. With the restoration and enhancement plantings specified in the mitigation plan, buffer functions relating to screening, nutrient uptake, structure and diversity, surface roughness, temperature attenuation, and organic matter production are expected to increase, ensuring no net loss of buffer functions. In particular, the nutrient uptake function is expected to contribute to improved water quality in Henderson Inlet, where the on-site stream outfalls. *Exhibit 1.H; Alex Callender Testimony.*
12. No species listed as endangered by federal or state agencies are known to inhabit the site. Although the state Priority Habitat and Species database indicates the potential presence of big brown bat and little brown bat in the vicinity of the subject property, the subject property does not contain bat habitat features. *Exhibit 1.G.*
13. The Applicant has not yet obtained Thurston County Environmental Health Division approval of a septic system design. A soil evaluation conducted in 1994 concluded that the soils on site are not suitable for a septic system. Consequently, Environmental Health recommended that approval of the RUE be conditioned to indicate that all future development must comply with the Thurston County Sanitary Code, and that approval of the RUE does not represent approval of the septic system indicated on the site plan. *Exhibit 1.K.*
14. Consistent with the comments of the Washington State Department of Archaeology and Historic Preservation, the Squaxin Island Tribe and the Nisqually Indian Tribe Planning

³ This number is from page 2 of the mitigation plan (Exhibit 1.H), which is consistent with the mitigation quantities indicated in Exhibit 1.Q. The mitigation plan map (Exhibit 1.E, Figure 2) indicates 21,005 square feet of restoration. For the sake of conservative analysis, these findings assume the lesser area is accurate. There would be no impact to the instant analysis if more restoration was provided.

Staff recommended as a condition of approval that an inadvertent discovery plan be implemented during construction. *Exhibits 1, 1.I, 1.L, 1.M, and 1.N.*

15. Stormwater runoff from proposed improvements would be managed through full dispersion best management practices, as infiltration is not feasible on site. Sheet flow dispersion through a grass filter strip would be used for driveway runoff. *Exhibit 1.R.*
16. The proposed development is categorically exempt from review under the State Environmental Policy Act. *Washington Administrative Code (WAC) 197-11-800; TCC 17.09.055(B).*
17. Notice of the open record hearing was mailed to property owners within 500 feet of the site on December 6, 2023 and published in *The Olympian* on December 15, 2023. *Exhibits 1 and 1.A.*
18. Public comment was submitted regarding the past clearing on the property, expressing concern about wetland impacts and the adequacy of mitigation. In addition, two neighboring property owners submitted public comment in support of the application. *Exhibits 1.T, 2a, and 2b.* The Applicant consultant responded directly to the neighbor who expressed concerns about the adequacy of mitigation. *Exhibit 1.U.* There was no further comment by that neighbor.
19. Having heard all testimony, County Planning Staff maintained their recommendation that if the RUE criteria are found to be satisfied, that the conditions in the staff report should be imposed. *Exhibit 1; Heather Tschaekofske Testimony.* The Applicant waived objection to the recommended conditions. *Testimony of Trevor Irish and Alex Callender.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for reasonable use exceptions pursuant to TCC 2.06.010.F and TCC 24.45.030.

Criteria for Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if:

- A. No other reasonable use of the property as a whole is permitted by this title; and
- B. No reasonable use with less impact on the critical area or buffer is possible. At a minimum, the alternatives reviewed shall include a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design. This may include a variance for yard and setback standards required pursuant to Titles 20, 21, 22, and 23 TCC; and

- C. The requested use or activity will not result in any damage to other property and will not threaten the public health, safety, or welfare on or off the development proposal site, or increase public safety risks on or off the subject property; and
- D. The proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property; and
- E. The proposed reasonable use shall result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources, hydrological conditions, and geologic conditions; and
- F. A proposal for a reasonable use exception shall ensure no net loss of critical area functions and values. The proposal shall include a mitigation plan consistent with this title and best available science. Mitigation measures shall address unavoidable impacts and shall occur on-site first, or if necessary, off-site; and
- G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern; and
- H. The location and scale of existing development on surrounding properties shall not be the sole basis for granting or determining a reasonable use exception.

Conclusions Based on Findings

1. No other reasonable use of the property as a whole is permitted by the critical areas Ordinance. Considering the RRR 1/5 zoning designation, the size of the parcel, the intent of the zone to encourage residential development that maintains the County's rural character, and the character of surrounding development, single-family residential use with appurtenances typical to the rural area is the only reasonable use of the property. *Findings 3, 4, and 5.*
2. As conditioned, no reasonable use with less impact on the critical area or buffer is possible. The entire parcel is encumbered by wetland or wetland buffer. The proposed development footprint, which is reasonable in area, would be situated as far from the largest of the wetlands – Wetland B – as possible and would largely coincide with the previously cleared area. *Findings 6, 7, and 8.*
3. As conditioned, the proposal would not threaten the public health, safety, or welfare on or off the development site, or increase public safety risks on or off the subject property. Stormwater runoff would be managed on site consistent with County requirements. The conditions of approval require compliance with the Thurston County Sanitary Code and implementation of an inadvertent discovery plan during development. *Findings 13, 14, 15, 18, and 19.*
4. For the reasons described in Conclusion 2, the proposal is the minimum encroachment necessary to prevent denial of all reasonable use of the property. *Findings 6, 7, and 8.*

5. As conditioned, the proposal would result in minimal alteration of the critical area. No direct impacts to the wetland or stream are proposed. Buffer impacts (including those associated with past clearing) would be mitigated through plantings within the reduced buffer area. Erosion control measures would be implemented during construction, and the buffer boundary would be delineated with critical area signs. *Findings 8, 9, and 10.*
6. As conditioned to require implementation of the buffer mitigation plan, the record demonstrates that the proposal would ensure no net loss of critical area functions and values. *Findings 10, 11, 18, and 19.*
7. The use would not result in unmitigated adverse impacts to known species of concern. *Finding 12.*
8. This decision is not based solely on the location and scale of existing development. Approval of the RUE is based on the Applicant's inability to make reasonable use of the parcel without intrusion into the wetland buffer. *Finding 7.*

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. 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.
- D. The Applicant shall complete all buffer restoration, and mitigation enhancement and monitoring as proposed in the Restoration and No-Net-Loss Wetland Buffer Enhancement Plan by Land Services NW dated June 15, 2023 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.
- E. Mitigation/enhancement shall be monitored at minimum for five years, if project is self-sustaining by that time, and a maximum of 10 years if goals are not met per the mitigation plan, per TCC 24.35.017(B.6.).

- F. Critical area signs shall be installed along the reduced buffer edge, subject to standards of TCC 24.60. Sign locations shall be verified and staked by the biologist and installed prior to final building permit inspection.
- G. 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.
- H. 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.
- I. An inadvertent discovery plan must be posted on site prior to and during all construction (Exhibit 1.N).
- 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 Tribes 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.
- L. All future development must meet the requirements of the Thurston County Sanitary Code and associated policies. Approval of the RUE in no way represents approval of the proposed on-site septic system as shown on the site plan or suitability of the site to support an on-site septic system.

DECIDED January 8, 2024.



Sharon A. Rice
Thurston County Hearing Examiner

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 **\$861.00** for a Request for Reconsideration or **\$1,174.00** 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 ☐ \$861.00 for Reconsideration or \$1,174.00 for Appeal. Received (check box): Initial _____ Receipt No. _____
Filed with the Community Planning & Economic Development Department this _____ day of _____, 20____.