



COUNTY COMMISSIONERS

John Hutchings

District One

Gary Edwards

District Two

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District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE THURSTON COUNTY
HEARING EXAMINER**

In the Matter of the Application of)	Project No. 2015103999
)	RUEX Sequence No. 15 111670 XI
)	SSDP Sequence No. 15 111671 XC
)	
Nicholas and Jan Kovach)	
)	
)	FINDINGS, CONCLUSIONS,
For Reasonable Use Exception and)	AND DECISION
<u>Shoreline Substantial Development Permit</u>)	

SUMMARY OF DECISION

The requested reasonable use exception to replace an existing, legally non-conforming small home and detached garage with a larger single-family home and garage in a Conservancy shoreline buffer and geologic hazard area is **APPROVED** subject to conditions.

The requested shoreline substantial development permit for improvements including a shoreline stair tower providing beach access, a planted sitting area, an open storage rack for kayaks and associated equipment and for grading, filling, and excavation for the foundation, parking, and developed area within the shoreline jurisdiction is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request

Nicholas and Jan Kovach (Applicants) requested a reasonable use exception to construct a 3,520 square foot home and 880 foot garage replacing an existing legally non-conforming 980 square foot home and 448 square foot detached garage within a Conservancy shoreline buffer and geologic hazard area. Also requested is a shoreline substantial development permit for improvements including a shoreline stair tower to provide beach access from the house down the marine bluff, a landscaped landing at the toe of the proposed stair tower, an open storage rack for kayaks and associated equipment on the lower stair tower landing, and grading, filling, and excavation in excess of 250 cubic yards for the proposed foundation, parking, and developed area within 200 feet of Puget Sound.

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on December 19, 2016.

Testimony

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

Scott McCormick, Thurston County Resource Stewardship Department, Associate Planner
Dawn Peebles, Thurston County Environmental Health
Arthur Saint, P.E., Public Works Development Review
Andrew Kovach, Applicant Representative

Exhibits

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

- Exhibit 1 Land Use and Environmental Review Section Report, with the following attachments:
- A. Notice of Public Hearing
 - B. Zoning Map
 - C. Master Application (Reasonable Use Exception), received May 14, 2015
 - D. Reasonable Use Exception Application and Narrative, received May 14, 2015
 - E. Master Application (Shoreline Substantial Development Permit), received May 14, 2015
 - F. JARPA Application, received May 14, 2015
 - G. Site Plans, dated October 20, 2016 (revised)
 - H. Notice of Application and Adjacent Property Owners List (APO list dated August 6, 2015)
 - I. Applicant Response to Comments and Updated Narrative with Site Plans, dated February 18, 2016
 - J. Engineered Drainage Plan/Report by Development Engineering, PLLC, received October 21, 2015
 - K. Geotechnical Engineering Memorandum from Nelson Geotechnical Associates (regarding septic system), dated August 21, 2015
 - L. Septic Design by Eco-Nomic, dated June 26, 2014
 - M. Geotechnical Engineering Evaluation by Nelson Geotechnical Associates, received May 14, 2015
 - N. Cultural Resources Report, dated September 20, 2015 by Pacific Northwest Archaeological Services
 - O. Wetland Report by Environmental Design LLC, dated January 19, 2016

- P. Copy of originally approved Site Plan with a 250-foot buffer, approved October 3, 2014
- Q. Geotechnical Report Review Comments from Mark Biever, L.G., L.E.G., Thurston County Water Resources, dated July 13, 2016
- R. Washington State Department of Ecology Comments, dated December 22, 2015
- S. Letter to Applicants from Thurston County Resource Stewardship, dated December 15, 2015
- T. Letter to Applicants from Thurston County Resource Stewardship, dated December 1, 2015
- U. Approval Memo from Arthur Saint, P.E., Thurston County Public Works, dated November 5, 2015
- V. Washington State Department of Ecology Comments, dated June 15, 2015
- W. Comment Letter from Nisqually Indian Tribe, dated June 9, 2015
- X. Comment Email from Kerby Macrae, dated December 28, 2015
- Y. Comment Letter from Martin D. Meyer, dated December 26, 2015

- Exhibit 2 Photos of the site
- Exhibit 3 Memo from Brad Sangston, Environmental Health, December 13, 2016
- Exhibit 4 Updated Wetland Report, January 19, 2016
- Exhibit 5 Approved Site Plan, December 1, 2016
- Exhibit 6 Applicant's Exhibit 9, which was an attachment to Exhibit 1.I, above¹
- Exhibit 7 Resource Stewardship memorandum requested by post-hearing order, dated January 9, 2017
- Exhibit 8 Applicant representative's (email) comments in response to post-hearing order, dated January 10, 2017

A post-hearing order, issued January 9, 2017, reopened the record for additional information; it is also included in the record of this matter.

¹ In response to questions regarding whether the size of the proposed house was the minimum encroachment necessary to provide reasonable use of the property, the Applicant representative made reference to a document not offered in the record prior to hearing: a compilation of assessor information about improvements on surrounding parcels. Upon request for the document known as "Exhibit 9" to the Applicant's updated narrative (Exhibit 1.I), he offered to submit all attachments that narrative, and permission to do so was granted. The Applicant representative timely submitted a Google drive folder with many documents in it, a majority of which were already provided in the County's exhibits. After receiving them, the undersigned determined that only "Exhibit 9" would be admitted.

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Background

1. The Applicants requested a reasonable use exception to construct a 3,520 square foot single-family home and an 880 square foot detached garage approximately 100 feet from a marine bluff that is considered a landslide hazard and is in a Conservancy shoreline environment. Also requested is a shoreline substantial development permit to allow construction of a stair tower to provide beach access from the house down the marine bluff. The proposed stair tower would include an open storage rack for kayaks and other water recreation equipment. The proposal requires grading, filling, and excavation in excess of 250 cubic yards for the proposed foundation, parking, and developed areas within 200 feet of Puget Sound. The subject property is located at 7913 Kerbaugh Road, Olympia, Washington.² *Exhibits 1, 1.B, 1.D, and 1.E*
2. The 3.42-acre subject property is located on Henderson Inlet, which forms the parcel's western boundary. In its present condition, the site contains an approximately 14,000 square foot "homesite" at the top of the bluff developed with a house, detached garage, well, septic system, utilities, access/driveway, parking areas, beach access trail, stairs down the bluff, and 137 linear feet of concrete bulkhead, all developed prior to the adoption of the County's critical areas ordinance. According to Thurston County Assessor's data, the existing 980 square foot single-story home and attached 144 square foot covered porch were built in 1927. The house is located 85 landward of the ordinary high water mark (OHWM) and 35 feet from the top of the marine bluff. A 448 square foot detached garage was built on-site in 1952. The residence and garage are accessed by a long, winding gravel driveway connecting to Kerbaugh. *Exhibits 1, 1.F, 1.I, and 1.Q.*
3. Vegetation on-site is dominated by native plants and mature evergreen trees. Weeds, ivy, and blackberry occupy the parcel landward of the bulkhead to the top of the marine bluff/steep slope. The developed portion of the site contains gardens, ornamental landscaping, and an orchard. Upland from the residence, the land is steeply sloped and forested with native species. There is a large, relatively flat area east of the homesite that contains wetlands. *Exhibits 1 and 1.F.*
4. The existing stairs to the beach consist of 314 square feet of on-grade creosote railroad ties and gravel, and are in poor condition. *Exhibit 1.F.*
5. The subject property contains several features regulated pursuant to the County's critical areas ordinance (CAO) including: the Conservancy designated marine shoreline regulated pursuant to Thurston County Code (TCC) Chapter 24.25; the 50-foot high marine bluff, which is regulated as a marine bluff hazard area pursuant to TCC Chapter 24.15; upland

² The legal description of the property is a portion of Section 8, Township 19 North, Range 1 West; also known as Tax Parcel No. 11908410200. *Exhibit 1.*

landslide hazard areas throughout much of the site; and a wetland near the central, sloped portion of the site regulated under TCC Chapter 24.30. *Exhibits 1 and 1.G, Sheets A1.3 and A1.7.* Additionally, pursuant to the Shoreline Master Program for the Thurston Region (SMPTR), the subject property's marine shoreline has a Conservancy shoreline environment designation. A 100-foot setback from the ordinary high water mark is currently required for development adjacent to Conservancy shorelines under the SMPTR. *Exhibits 1 and 1.F.* Because the Conservancy shoreline marina habitat area requires a larger buffer than the marine bluff hazard area, the following findings related to the placement of the proposed residence will focus on the Conservancy shoreline buffer of 250 feet. *TCC 24.25.050; TCC 24.15.015.*

6. The densely forested parcel is within an area shown on the Washington State Department of Fish and Wildlife Priority Habitats and Species mapping to provide habitat for the Little Brown myotis and Yuma myotis bat species. The site's wetland and forested areas provide habitat generally for birds, bats, amphibians, and other mammals. *Exhibit 4.*
7. The property is located in unincorporated Thurston County and has a Residential LAMIRD³ One Dwelling Unit Per Two Acres (RL 1/2) zoning designation. *Exhibit 1.* Single-family residences are a permitted use in the RL 1/2 zone. Other permitted uses include agriculture, duplexes, home occupations, and farm housing in conjunction with a farm residence on-site. *Thurston County Code (TCC) 20.09A.020.* The minimum required zoning setbacks for all structures larger than 120 square feet are: 20 feet from the front property line, six feet from side lot lines, and 10 feet from rear property line. *TCC 20.07.030.*
8. The adjacent 16.47-acre parcel to the north is undeveloped; it has a Rural Residential Resource Five Acre minimum zoning designation, as do abutting properties to the east and further to the north. The 9.9-acre parcel adjacent to the south shares the subject property's RL 1/2 zoning designation and is developed with an approximately 888 square foot single-family residence (558 square foot footprint). The nearest nonadjacent residentially developed property, a three-acre parcel to the north contains a 1,080 square foot single-family residence built in 1937. Other lots in the vicinity contain existing single-family residences in similar proximity to the bluff. *Exhibits 1 and 1.B.*

Reasonable Use Exception

9. The County's CAO (TCC Chapter 24.45) establishes a reasonable use exception (RUE) process for a property owner to apply for permit to carry out a land use or activity that is prohibited by the Ordinance. Replacement of the existing residence (85 feet from the OHWM) and detached garage with a new, larger residence and detached garage 100 feet from the Conservancy shoreline in the marine riparian habitat area requires an RUE. The Application was submitted May 14, 2015. *Exhibits 1, 1.C, and 1.D.*

³ LAMIRD - Local Area of More Intensive Rural Development

10. The proposed residence would be two stories comprising 3,520 square feet and have a detached 880 square foot garage proposed within the previously disturbed homesite. All existing structures would be removed. The new structures are proposed to be set back 15 feet farther from the OHWM than the existing structures, for a minimum setback of 100 feet. The proposal would also remove the existing septic drainfield, which is currently at the top of the 50-foot marine bluff, and replace it with a new drainfield located outside of all critical areas. Despite the significantly larger house, the proposal would increase impervious surface within the marine riparian habitat area by only approximately 740 to 786 square feet, through use of the existing developed area. Except for that located within the footprint and immediately adjacent to the proposed residence and septic drainfield, the project would retain the majority of existing native vegetation and trees. A small number of trees around the periphery of the proposed home site are proposed to be removed to reduce the likelihood of future hazard tree falls. The proposal includes a revegetation plan to mitigate the impacts of the limited proposed tree and vegetation removal. An engineered storm drainage plan would be required. *Exhibits 1, 1.F, 1.G (Sheets A1.1, A1.2, A1.4, A1.5, and A1.6), and 1.I.*
11. Professionally prepared geotechnical study was presented to support the proposed improvements. The reports concluded that the site soils are generally competent for the proposed development but emphasized that proper drainage design around the proposed improvements is required to prevent sloughing on the marine bluff. The reports recommended that driveway runoff be managed. The location of the proposed primary and reserve septic drainfields was found to contain stable slopes and competent soils. *Exhibits 1, 1.J, 1.K, and 1.M.*
12. The majority of proposed development would be contained within the existing building area, which is the largest previously cleared and level open space available on-site. This site selection represents the intention to minimize site disturbance to the maximum extent possible, reducing grading, excavation, tree removal, and groundwater/drainage management requirements over any other possible location. *Exhibits 1, 1.G, 1.I, and 1.M; Kovach Testimony.*
13. The existing well and septic system are proposed to be decommissioned and abandoned per sanitary codes. The new well and septic components are proposed further from the shoreline than those serving the existing development. The proposed on-site sewage system was reviewed and conditionally approved by the Thurston County On-Site Sewage Program. *Exhibits 3 and 5.*
14. The existing structures have not been properly maintained and are in various stages of deterioration, with Assessor's condition ratings of poor to fair. The existing residence is too small to accommodate the Applicants' accessibility and aging in place requirements, which include single floor living, area to ambulate indoors, and future in-home care. *Exhibits 1, 1.I, and 1.Q.*
15. The first proposal to place the new residence in the existing cabin's footprint (May 2015) was for a 4,094 square foot residence and an 893 square foot detached garage setback 90 feet from the ordinary high water mark. After comments from County Staff, the Applicant

modified the proposal to reduce the size of the residence and to set it back 100 feet from the shoreline. Similarly, the shoreline improvements initially included a boat shed/boat house structure, but this was reduced to a unenclosed storage rack for kayaks and gear. *Exhibits 1.F and 1.I; Kovach Testimony.*

16. An even earlier iteration (October 2014) of the proposal called for replacement of the residence at approximately 250 feet the Conservancy shoreline. This proposal was fairly far along in development before the on-site wetlands were discovered. *Exhibits 1, 1.I, and 1.P.*
17. The Applicants' wetland consultant delineated Category III Wetland A on the southeastern side of the site, requiring a buffer of 220 feet. The existing driveway travels near to the northern edge of the wetland. *Exhibit 4.* No improvements are proposed within the wetland or its 220-foot buffer, although the Applicants would continue to use the existing driveway. The wetland report concluded that the project would not result in impacts to the wetland or required 220-foot buffer. *Exhibits 1 and 1.G.*
18. The proposed plans and geotechnical information were reviewed by the County engineering geologist, who visited the site and found the Applicants' consultant reports to be adequate and consistent with site conditions. The County's geologist confirmed that significant areas of the upland portion of the property are encumbered by various critical area conditions including: indications of past landslide activity (trees that are leaning or curved at the base, showing soil movement over time) and saturated soils. The County engineering geologist noted that the "multiple iterations of building designs and homesite relocations [are] the result of the undulating topography and the considerable amount of groundwater and spring activity that punctuates the site in multiple locations at multiple elevations." Having reviewed the various plans and visited the site, he concluded that "there are essentially no other locations outside of the current cabin footprint that would allow the new house, the drainfield/septic, parking areas, and water supply to be located within close to medium proximity of each other." The County geotechnical engineer concluded that due to the complex nature of the property, the proposed location (existing building site) is the best location for redevelopment on-site. *Exhibit 1.Q.*
19. There is a 1,798 square foot area near Kerbaugh Road that it is relatively unconstrained by critical areas. However, in order to place a residence there, mature vegetation removal and impacts to critical areas outside this space to allow connection to the existing driveway and to water and septic utilities would be required. The Applicants contended that these impacts would far exceed the impacts of allowing construction on the previously cleared homesite. The Applicants asserted that a residence that could be built in this unconstrained space would be too small to accommodate their aging in place and accessibility concerns. *Exhibit 1.I.* Planning Staff agreed that impacts of construction in this location would exceed impacts of construction as proposed. *McCormick Testimony.*
20. The Applicants submitted information about residential development in the vicinity of the subject property, including homes on Kerbaugh, Fernwood, and 86th Avenue. Residential development on these lots over the course of the last 26 years has included homes ranging in area from 1,650 to 4,768 square feet, with an average size of 3,032 excluding garages.

Garages averaged 768 square feet. The residences were built on lots ranging from 0.38 to 5.07 acres, with an average lot size of just over two acres. *Exhibit 6; Kovach Testimony.*

21. In support of the RUE, the Applicants asserted that the existing residence is not sufficient in size or quality for long term residence, that there is no other buildable area on-site, and that the following mitigation measures would mitigate impacts from construction of the proposed improvements: decommissioning the existing drainfield and well at the top of the marine bluff and relocating them outside the marine riparian habitat area buffer; demolishing the existing residence and accessory structures; building a reduced size home (as compared to the initial proposal) in the footprint of the previous residence; restoring all previously disturbed areas surrounding the building envelope (totaling 7,975 square feet) with native species plantings; removing 5,515 square feet of invasive species from the marine bluff and replacing them with native species; implementing a drainage and erosion control plan; and limiting construction to the driest months of the year (May through September). The project would only increase impervious surface by 786 feet and it would move the residence back 15 feet from its present proximity to the OHWM. The Applicants asserted that building the residence in the existing homesite foot print would retain native mature trees, avoiding impacts to priority bats species and all wildlife. According to the project narrative, a smaller residence would not accommodate the Applicant's aging in place plans and accessibility concerns. Given the location and extent of the marine riparian habitat area, the landslide hazard area, the wetland, and all associated buffers, the Applicants argued that only 2,069 square feet of the site are not encumbered, and this unencumbered area is not whole/contiguous; therefore construction in the existing homesite footprint should be allowed. *Exhibits 1.G and 1.I; Kovach Testimony.*

Shoreline Substantial Development Permit

22. Upland areas within 200 feet of the ordinary high water mark of Henderson Inlet are subject to the jurisdiction of the Washington Shoreline Management Act as implemented through the SMPTR. Again, the subject shoreline is designated as a Conservancy shoreline environment. Single-family residences and typical appurtenances are permitted within the Conservancy shoreline, subject to development standards established in the SMPTR. Those standards include a minimum 100-foot setback from the shoreline and 30% maximum impervious area per SMPTR residential development standards. *Exhibit 1.*
23. A shoreline project with a fair market value exceeding \$6,416 triggers shoreline substantial development permit (SSDP) review. The proposed beach access shoreline stair tower, with a projected total cost of \$15,000, requires SSDP approval. The application was submitted May 14, 2015. *Exhibit 1.F.*
24. The project would remove the existing creosote railroad tie and gravel path down the bluff and replace it with 600 square feet of prefabricated metal stairway secured to the slope with pin piles. A planted sitting area measuring 10 feet deep by 17 feet wide is proposed at the toe of the stair tower, and an open storage rack for kayaks and associated equipment is proposed on the lower stair tower landing. *Exhibits 1, 1.F, and 1.G, Sheet A7.2.* Native trees, shrubs, and ground cover are proposed to be planted on the slope to remediate removal of the

existing path and installation of the new stair tower, and small portions of retaining wall are proposed for protection of the slope. *Exhibit 1.G, Sheets A7.2, A1.10 and A1.12.*

25. State regulations, at WAC 173-27-040 (2)(g), exempt grading up to 250 cubic yards related to single-family residential development from the requirement to obtain SSDP approval. The total volume of proposed fill for the entire project is 928 cubic yards and total proposed excavation is 344 cubic yards. Shoreline substantial development permit approval is required for the requested permit for grading in excess of 250 cubic yards is requested to allow grading, excavation, and filling related to foundation and site preparation for the proposed home and parking area within 200 feet of the shoreline. *Exhibits 1, 1.F, and 1.G.*
26. The marine bluff is vertical in many locations and scarred in many places by sloughs that have occurred over many years. *Exhibit 1.Q.* The Coastal Zone Atlas of Washington shows the subject bluff as unstable. Planning Staff acknowledged that these maps are dated and based on general geological information rather than site specific study. *Exhibit 1; McCormick Testimony.* A stair tower in a marine bluff hazard and landslide hazard area is allowed subject to compliance with specific regulations, which require design and construction to avoid adverse impacts to existing slope conditions. *TCC Table 24.15-1 and 24.15.160.*
27. All work is proposed landward of the ordinary high water mark. The stair way would be designed by a licensed civil engineer. *Exhibit 1.F.* A condition is necessary to ensure vegetation would be removed only within the boundaries of the constructed access pathway. *Exhibit 1.*
28. There would be minimal visual impact to surrounding shoreline properties from the proposed stair way due to existing vegetation and topography. *Exhibits 1, 1.F, and 1.I.*
29. The Applicant calculated that total existing impervious area within the shoreline jurisdiction is 5,239 square feet. With the proposal, total impervious surface within 200 feet of the OHWM would increase by 786 feet to 6,025 square feet. The site contains 27,270 square feet of area within shoreline jurisdiction. The proposed 6,025 square feet of impervious surface area equals less than the 30% maximum allowed. *Exhibit 1.F, Narrative.*
30. According to the Applicant's geotechnical information, although the slope is steep, the over-consolidated soils in the shoreline are relatively stable and capable of supporting a stair way. While surficial sloughing is present along the face of the marine bluff, there are no apparent indications of deep seated instability. Resource Stewardship Staff determined that the submitted geotechnical information, reviewed and approved by the County geological engineer, satisfies minimum requirements and opined that the stairway can be built safely on the bluff. *Exhibits 1, 1.K, and 1.M.*
31. The County's CAO geological hazard area regulations allow vegetation removal to the extent necessary for development in marine bluff hazard areas. *TCC 24.15.230.* Resource Stewardship Staff noted that the Applicants' revegetation plan appears to adequately restore vegetation and trees proposed to be removed during stairway construction. Staff

recommended conditions requiring: planting of native species of similar size and type as those removed suited to growing on the subject shoreline; avoidance of removing woody, deep rooted vegetation to the extent possible; completion of revegetation prior to final occupancy of all future building permits; and securing the revegetation plan with a bond or irrevocable assignment of savings in the amount of 125% of the revegetation cost. *Exhibit 1.*

32. Upon review of the proposed excavation and grading in the shoreline management area, the Public Works Department required a drainage scoping report and engineered drainage plan to be submitted for review and approval prior to building permit issuance if the RUE is approved. The Applicant asserted and Staff concurred that the stair tower would not adversely impact stormwater runoff conditions because it does not create new impervious surface coverage and would not disturb enough soil or vegetation, or alter existing drainage patterns, in a way that would warrant independent drainage, erosion, or grading plans. *Exhibits 1 and 1.U; Saint Testimony.*

General Findings

33. The Development Review Division of the Thurston County Public Works Department reviewed the project for residential development standards include erosion and stormwater control requirements, and recommended approval subject to conditions. *Exhibit 1.U.*
34. The Thurston County Environmental Health Division (EHD) review of the proposal is discussed in finding 11, above. EHD Staff recommended approval with conditions. *Exhibit 3 and 5; Peebles Testimony.*
35. The Washington State Department of Ecology submitted comments relating to toxic cleanup if contamination is suspected, discovered, or occurs during the project, and to water quality protection through erosion and stormwater management regulations. *Exhibits 1 and 1.V.*
36. As requested by the Nisqually Indian Tribe, a professionally prepared cultural resources survey was submitted, which concluded that although the subject property is in an area of high likelihood for archeological findings, the site does not contain significant cultural or archeological resources. The Nisqually Tribe requested that an inadvertent discovery plan be put in place to address the potential for discovery of archeological resources or human remains during site development. Planning Staff agreed to a condition requiring an inadvertent discovery plan. *Exhibits 1, 1.N, and 1.W; McCormick Testimony.*
37. Reasonable use exceptions are non-project actions that are exempt from the requirements of the State Environmental Policy Act (SEPA). WAC 197-11-800. Resource Stewardship Staff submitted that the proposed stair tower beach access is also exempt from SEPA review as an accessory use to a SEPA exempt use (single-family residence) that is not being constructed wholly or in part on lands covered by water. WAC 197-11-800 (1)(a)(i); *Exhibit 7.*

38. Notice of application was issued December 8, 2016. Notice of hearing was published in The Olympian, posted on-site and mailed to all property owners within 500 feet of the site on December 9, 2016. *Exhibits 1, 1.A, and 1.H.*
39. Public comments from the owner of the adjacent residence to the south included concerns regarding stormwater impacts and slope stability as a result of the proposed new residence being placed only six feet from the joint property boundary. He requested a condition to increase the minimum side yard building setback on the south side from six feet to at least 10 feet to reduce impacts to adjacent properties. *Exhibit 1.Y.* Comments from another area resident related to the history of development in the vicinity, stormwater, slope stability, water quality impacts, and the proposed scale of the new development. *Exhibit 1.X.*
40. In part because the site is substantially larger at 3.42 acres than the minimum lot size in RL 1/2 zone, Resource Stewardship Staff submitted the position that a residence is necessary to allow reasonable use of the parcel. Having reviewed the proposal in its entirety, Staff opined that the size and topography of the property, the location and extent of critical areas and associated buffers, and the very limited area suitable for a septic system are factors that work together to restrict the potential location for a single-family residence to the existing homesite. In response to these public concerns, Resource Stewardship Staff recommended a condition requiring a ten foot minimum side yard setback from the south property boundary, should approval be granted. With the remaining conditions, Staff submitted that the proposal would comport with the applicable provisions of the CAO and the SMPTR and recommended approval. *Exhibit 1; McCormick Testimony.*
41. The Applicant representative agreed with Staff's analysis and waived objection to both the recommended conditions in the staff report and those discussed on the record at hearing. *Kovach Testimony.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exception pursuant to Chapter 36.70.970 of the Revised Code of Washington and Chapters 2.06 and 24.45 of the Thurston County Code.

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline substantial development permits pursuant to RCW Chapter 36.70, WAC 173-27, and Section One, Part V of the Shoreline Master Program for the Thurston region.

Reasonable Use Exception Criteria for Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant the reasonable use exception if all of the following specific findings can be made:

- 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.

Shoreline Substantial Development Permit Criteria for Review

Shoreline Substantial Development Permit (WAC 173-27-150)

To be approved by the Hearing Examiner, the proposed shoreline substantial development permit must be consistent with:

- A. The policies and procedures of the Shoreline Management Act;
- B. The provisions of applicable regulations; and
- C. The Shoreline Master Program for the Thurston Region.

A. Shoreline Management Act

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses (in the following order of preference) that: recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

B. Applicable regulations from the Washington Administrative Code

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

C. Shoreline Master Program for the Thurston Region

Section Three—Policies and Regulations for Use Activities

Chapter XVI. Residential Development.

C. General Regulations

Pursuant to Title 24, Table 24.15-1 a stair tower is allowed within a marine bluff hazard and landslide hazard area. Section 24.15.160 – Stair tower, stairway, and mechanical lift provides the following standards:

- A. Stair towers, stairways, and mechanical lifts may be permitted consistent with the Shoreline Master Program for the Thurston Region (1990), as amended, and TCC 24.25.110.

- B. Stair towers, stairways, and mechanical lifts shall be designed and constructed to avoid adverse impacts to existing slope conditions.

Section Three – XIV.C.8 and XVI.C.11 provides:

...

11. All stair towers meeting one of the following conditions must be designed by a licensed civil engineer:
 - a. The location proposed is mapped as "unstable" or "Intermediate Stability" in the Washington Coastal Zone Atlas prepared by the State Department of Ecology.
 - b. All stair towers 24 feet in height or greater.
 - c. Other instances where the building official determines that site conditions dictate the preparation of plans by a licensed civil engineer.
12. Stair towers shall be designed to minimize obstructing the views enjoyed by adjoining residences.

Chapter XVI. Residential Development

D. Environmental Designations and Regulations

3. Rural Environment

...

- d. Land clearing and grading is permitted after obtaining a shoreline permit, an exemption from the Administrator, or a land clearing permit from the local jurisdiction for preparation of new building sites. A buffer of existing ground cover must be maintained in the area between the ordinary high-water mark and twenty (20) feet from the structure. The ground cover in the buffer may be disturbed only after approval of the Administrator where one or more of the following conditions apply:
 1. A building site has been approved in the buffer area and an erosion control and vegetation protection plan has been approved by the Administrator.
 2. The applicant wishes to landscape the area with other vegetation and has an erosion control plan approved by the Administrator.
 3. When the construction of access pathway is proposed for to the shoreline, vegetation will be removed only within the boundaries of constructed access pathway.

Conclusions Based on Findings

Reasonable Use Exception

1. The subject property is too encumbered by critical areas to be effectively used for agriculture or timber management. Given the site's size, residential zoning, and history of residential use predating the zoning ordinance, requiring the site to revert to passive recreational use would not be reasonable. Considering the uses allowed by the zoning ordinance, the size of the parcel, surrounding existing residential development, and the

encumbrance by critical areas, there are no reasonable uses of the property besides residential development. *Findings 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 14, 18, 19, 21, and 39.*

2. There is no other reasonable use of the property that would have less impact on the marine riparian habitat area or marine bluff hazard area buffer. With residential use as the sole reasonable use, the inquiry shifts to whether other proposals for residential use would be more reasonable due to lower impacts. The proposed development would be placed in the previously disturbed portion of the property, minimizing clearing and grading impacts in terms of vegetation removal and erosion potential. Reducing the residential footprint within the existing disturbed area would not reduce the impacts of allowing residential redevelopment, since the site is already cleared. The proposed residence is consistent in size with others built in the vicinity in the last 26 years. *Findings 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 14, 18, 19, 21, and 40.*
3. There is no evidence of potential hazard to other properties, public health, safety, or welfare. The use would be similar in nature and intensity to the use of surrounding residences. The proposed placement is set farther back from the Conservancy shoreline and from the marine bluff hazard area than the existing residence. In relocating the septic system farther from the marine bluff, and building a new residence farther from the top of the bluff in compliance with current stormwater management requirements, the proposal should reduce impacts to surrounding properties and the marine riparian habitat area. *Findings 10, 11, 12, 13, 17, 18, 19, 21, 32, 39, and 40.*
4. Locating the proposed new residence outside of the marine riparian habitat area and buffer would result in significant impacts to mature vegetation on slopes that show signs of instability. The proposed placement within the existing homesite prevents encroachment into critical areas, rather than causing it. The new residence would be set back approximately 15 feet farther from the shoreline than the existing residence, and the septic drainfield would be removed from the marine riparian habitat area. Based on comments from staff, the size of the initially proposed structures was reduced and the shoreline setback increased. Unavoidable impacts of development would be mitigated through planting. As proposed, the project minimizes encroachment to the extent possible. *Findings 2, 3, 5, 6, 10, 11, 12, 13, 17, 18, 19, 21, 32, 39, 40, and 41.*
5. Given the site's constraints, placement of the redevelopment within the existing homesite would result in the minimal possible alteration of all on-site critical areas. By not requiring significant clearing of mature vegetation, the use of the homesite retains habitat for priority bat species. In using the homesite, the proposal avoids significant clearing and grading to create a new flat area on the sloping parcel, avoiding potential impacts to fish and wildlife resources, hydrological conditions, and geologic conditions. *Findings 2, 3, 5, 6, 10, 11, 12, 13, 17, 18, 19, 21, 32, 39, 40, and 41.*
6. According to the wetland study presented, the project would have no impact on wetlands functions and values. The geotechnical information submitted, including County engineering geologist concurrence, demonstrates no impacts to site slopes or the marine bluff if construction complies with geotechnical recommendations. A condition would

ensure compliance with the recommendations of the geotechnical studies in the record. In using the previously disturbed homesite, removing the existing septic drainfield from the top of the marine bluff and relocating it outside the marine riparian habitat area, and increasing the structure setback by 15 feet, the proposal would reduce existing impacts over the current condition. A condition would ensure that a full drainage scoping review is conducted at time of building permit, preventing construction and post-construction impacts to the marine bluff from stormwater runoff of the new improvements. According to Staff, the submitted revegetation plan adequately mitigates impacts of construction and protects the marine bluff in the vicinity of the proposed stair tower. The record supports a conclusion that the proposal as conditioned would not negatively impact critical area functions and values. *Findings 10, 11, 12, 13, 17, 18, 19, 20, 21, and 32.*

7. As conditioned, there project would not result in impacts to species of concern. Mature forest and wetland habitat is retained to the maximum extent possible. Vegetation clearing is limited to the development footprint. All disturbed vegetation within critical areas would be restored with native species plantings. Conditions of approval requiring erosion control and drainage design consistent with County standards would reduce construction impacts to the extent possible. *Findings 2, 3, 6, 10, 11, 12, 13, 32, and 40.*
8. The location and scale of existing development on surrounding properties was not a primary factor in determining approval of an RUE to allow the location of a replacement for the existing, poorly aging residence, although it was considered in determining the reasonableness of the proposed size of the residence. *Findings 8, 10, 15, 16, 19, and 20.*

Shoreline Substantial Development Permit

9. As conditioned, the proposal would be consistent with the policies and procedures of the Shoreline Management Act. The proposed residential development within the shoreline management jurisdiction is allowed outright. The proposed grading in excess of 250 cubic yards, in the context of the instant project and as conditioned, would support a reasonable use of the shoreline property. The proposed beach access stair tower is allowed in the SMPTR in the Conservancy shoreline and would be a “reasonable and appropriate use” of the on-site shorelands. Conditions would ensure that minimal disruption to the shorelands would occur and that disturbed areas are replanted with native species. The project was reviewed by the County’s Health Department and no public health impacts were identified. The project on private property would not impact public shoreline access. *Findings 1, 2, 5, 10, 11, 13, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 40.*
10. As conditioned, the proposed grading in excess of 250 cubic yards and the stair tower comply with applicable regulations in the Washington Administrative Code. There would be no significant impact to views of nearby residences because of existing site topography and vegetation, which would be retained to the maximum extent possible, and because of the conditions requiring revegetation. A condition of approval would ensure compliance with the requirements of WAC 173-27-190. *Findings 10, 11, 13, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 40.*

11. The proposal is consistent with the applicable SMPTR policies and regulations. The residential use of the site is allowed outright, and the stair tower is allowed in the Conservancy shoreline subject to standards and SSDP review. All work would be landward of the ordinary high water mark. The stair tower has been conceptually designed to avoid adverse impacts to the marine bluff, which is shown to be stable on-site by the geotechnical reports submitted. Conditions would ensure its final design would be completed by a licensed engineer. The site topography and existing and proposed vegetation would sufficiently screen the tower from the view of surrounding properties. Conditions would ensure the required building site plan is completed and approved prior to construction; it has not yet been done because approval of the RUE is first necessary. The proposed revegetation plans were accepted by Resource Stewardship Staff as adequately protective of the slope. Conditions would ensure that marine bluff vegetation is only removed from the foot print of the access path. Public Works determined that no drainage plan was required for the stair tower due to its minimal area. The required geotechnical reports were submitted and accepted by the County's engineering geologist. Proposed impervious surface areas within the shoreline jurisdiction would occupy less than 30% of the site. Conditions would ensure the project would remove construction debris and the remnants of the former access path from the subject property for proper off-site disposal. *Findings 10, 11, 12, 13, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 40.*

DECISION

Based on the preceding findings and conclusions, the requested reasonable use exception to replace an existing, non-conforming small home and detached garage with a larger single-family home and garage in a conservancy shoreline buffer and geologic hazard area is **APPROVED** subject to the conditions below.

Based on the preceding findings and conclusions, the requested shoreline substantial development permit for improvements including a shoreline stair tower providing beach access, a planted sitting area, an open storage rack for kayaks and associated equipment along with grading, filling, and excavation for the foundation, parking, and developed area is **APPROVED** subject to the following conditions:

- A. Prior to or in conjunction with the issuance of any building permit for the site, all applicable regulations and requirements of the Thurston County Public Health and Social Services Department, Public Works Department, Fire Marshal and Thurston County Resource Stewardship Department shall be met.
- B. Based on the amount of impervious surface proposed, a drainage scoping review will be required prior to building permit issuance.
- C. Prior to building permit issuance the Applicants shall submit an engineered stormwater drainage and erosion control plan specific to the proposed future residence which meets all of the requirements of the Thurston County Drainage and Erosion Control Manual. The engineered storm water drainage and erosion control plan shall be reviewed and

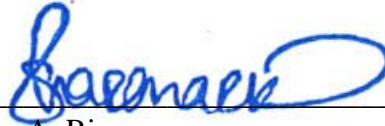
approved by Thurston County Public Works, Thurston County Resource Stewardship and Thurston County geotechnical staff prior to issuance or approval of any future building permits or permits for clearing, grading or excavation.

- D. The stair tower shall be designed by a licensed civil engineer per the standards of the Shoreline Master Program for the Thurston Region.
- E. During stair tower construction, vegetation shall be removed only within the boundaries of the proposed beach access stair tower and all remnants of the former creosote railroad tie and gravel path to the shoreline shall be removed and disposed of at an appropriate, approved upland refuse disposal location.
- F. Any newly disturbed areas must be revegetated with native species of similar size and type as removed and suited to growing on this south facing marine bluff. Removal of vegetation, particularly woody, deep rooted vegetation shall be avoided to the maximum extent possible.
- G. Site clearing, grading, and excavation activities shall be conducted during dry weather to the extent possible.
- H. A Washington State licensed Engineering Geologist or Civil Engineer shall be on site during site clearing, grading, filling and excavation activities to ensure all work is done in compliance the approved plans, conditions and approved geotechnical and engineering recommendations in the record at Exhibit 1, Attachments G, J, K and M.
- I. More than half of the proposed revegetation shall be completed prior to final occupancy of any future building permits. A bond or irrevocable assignment of savings in the amount of 125% of the total revegetation plan cost is required until revegetation is completed and has achieved an 85% survival rate within three years. Annual monitoring reports of the revegetation status and survival rate shall be submitted during the three year monitoring period.
- J. All improvements shall maintain a minimum side yard setback of 10 feet.
- K. Erosion control measures must be installed in the field prior to any clearing, excavation, grading or construction and must be reviewed and approved by the Thurston County Resource Stewardship Land Use and Environmental Review Section. These measures must be effective to prevent soil from being carried into surface water by storm water runoff. Sand, silt, and soil will damage aquatic habitat and are considered pollutants.
- L. A Construction Stormwater Permit from the Washington State Department of Ecology may be required for the project. Information about this permit and the application can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html> . It is the Applicants' responsibility to obtain this permit if required.

- M. The project shall comply with all Thurston County Environmental Health conditions and requirements related to drinking water and the proposed on-site septic system and drain field. The proposed septic system being reviewed under Project no. 2016100300 (folder sequence no. 16 100815 HD) shall be approved and all applicable pre-construction conditions complied with prior to building permit issuance.
- N. All development shall comply with the Shoreline Master Program for the Thurston Region.
- O. In the event that ground disturbing activities reveal cultural, historical, or archeological artifacts or human remains, construction in the area shall immediately cease and the Applicants shall immediately notify the Resource Stewardship Department and the Washington State Department of Archaeology and Historic Preservation (DAHP). Work outside the discovery location may continue while documentation and assessment of the cultural resources proceed. Work may continue at the discovery location only after DAHP, any affected tribes, Ecology (and the federal agencies, if any) determine that compliance with state and federal law is complete.

DECIDED January 11, 2017.

By:



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 Resource Stewardship 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 **\$669.00** for a Request for Reconsideration or **\$890.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance 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 ☐ \$669.00 for Reconsideration or \$890.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____, 20__.

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