



**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Application of	)	NO. 2024104669
	)	
<b>Mitch and Raneea Berndt</b>	)	FINDINGS, CONCLUSIONS,
	)	AND DECISION
For a Reasonable Use Exception	)	
_____	)	

**SUMMARY OF DECISION**

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

**SUMMARY OF RECORD**

**Request:**

Mitch and Raneea Berndt requested a reasonable use exception to construct a retaining wall and create a yard by backfilling the area behind the wall within a wetland buffer. The subject property is located at 7936 Johnson Point Road, Olympia, Washington.

**Hearing Date:**

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on April 8, 2025. The record was held open through April 10, 2025 to allow members of the public who had technology problems that prevented their participation in the virtual hearing to submit written comments, with time scheduled for responses from the parties. No post-hearing comments were submitted, and the record closed on April 10, 2025.

**Testimony:**

At the open record public hearing, the following individuals presented testimony under oath:<sup>1</sup>

Kraig Chalem, Senior Planner, Thurston County Community Planning and Economic Development Department

Chris Carlson, Planning Manager, Hatton Godat Pantier

Mitch Berndt, Applicant

Heidy Barnett, Senior Fish and Wildlife Biologist, West Fork Environmental

<sup>1</sup> Arthur Saint from County Public Works and Kyle Overton from County Public Health and Social Services attended the hearing but did not testify.

**Exhibits:**

The following exhibits were admitted to the record through the open record public hearing process:

- Exhibit 1 Community Planning and Economic Development Staff Report, with the following attachments:
- A. Notice of Public Hearing, dated March 27, 2025
  - B. Affidavit of Hearing - Notice Installation, posted March 25, 2025
  - C. Photo of Posted Notice Sign, received March 25, 2025
  - D. Application Materials, received November 5, 2024:
    - 1. Transmittal Memorandum, dated November 5, 2024
    - 2. Property Information Sheet
    - 3. Reasonable Use Exception Application
    - 4. Site Plan
    - 5. SEPA Application Cover Sheet
    - 6. SEPA Environmental Checklist, dated October 29, 2024
    - 7. Critical Area and Mitigation Report, West Fork Environmental, dated March 10, 2023, updated October 28, 2024
  - E. Notice of Application, issued January 22, 2025
  - F. Communication Matrix, issued March 6, 2025
  - G. Agency Comments:
    - 1. Email from Arthur Saint, Civil Engineer, Thurston County Public Works, dated November 14, 2024
    - 2. Memorandum from Kyle Overton, Environmental Health Specialist, Public Health and Social Services Department, dated December 17, 2024
    - 3. Letter from Brad Beach, Tribal Historic Preservation Officer, Nisqually Indian Tribe, dated January 27, 2025
    - 4. Email from Heather Tschaekofske, Thurston County Community Planning and Economic Development, dated March 3, 2025
    - 5. Email from Shaun Dinubilo, Archaeologist, Squaxin Island Tribe, dated January 31, 2025
  - H. Short Subdivision Auditor File # 3616374, recorded February 6, 2004
  - I. Corrected Notice of Application and Public Hearing, issued March 21, 2025
  - J. Additional photograph of notice board posted on-site, submitted March 27, 2025
  - K. Certificate of Occupancy, issued August 4, 2004

L. Communication Matrix, issued May 10, 2023

Exhibit 2 Email from Heidy Barnett, re: Corrections, dated April 8, 2025

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

### FINDINGS

1. Mitch and Raneea Berndt (Applicants) requested a reasonable use exception (RUE) to construct a retaining wall and create a yard by backfilling the area behind the wall within a wetland buffer. The subject property is located at 7936 Johnson Point Road, Olympia, Washington. *Exhibits 1 and 1.D.*
2. The RUE application was received on November 5, 2024 and deemed complete on December 3, 2024. *Exhibits 1.E and 1.I.*
3. The subject property is 19.11 acres in area and developed with a single-family residence (built by the Applicants in 2004), well, septic system, pole barn, shed, and forked driveway from Johnson Point Road. One segment of the driveway leads to the north side of the residence and the other segment runs along the south side of the residence to the pole barn. The structures are clustered in the northwest portion of the property. Johnson Point Road runs along a portion of the western property boundary. *Exhibits 1, 1.D.4, 1.D.7, and 1.K.*
4. The subject property is the designated resource parcel of a two-lot short plat that was recorded in 2004. It is substantially larger than all of the parcels in the immediate vicinity, and most of its acreage is undeveloped. Surrounding parcels are developed with single-family residences and accessory structures. *Exhibits 1, 1.D.4, 1.D.7, and 1.H.*
5. The portion of the subject property containing the residence is sloped such that there is no usable rear yard. The Applicants propose to construct the retaining wall on the north side of the existing gravel driveway that runs along the south side of the residence and backfill the area between the wall and the residence to create useable backyard space adjacent to the residence. The resulting yard would be more available, safer to use, and easier to maintain than the current condition of the area. The proposed retaining wall was contemplated and planned-for at the time the residence was constructed, as evidenced by an elevated deck on the south side of the residence and some rebar from which the wall was to be extended; however, due to budget constraints, its construction did not proceed at that time. *Exhibits 1.D.3 and 1.D.7; Testimony of Mitch Berndt and Chris Carlson.*
6. The subject property is in the rural, unincorporated portion of the County and zoned Rural Residential Resource One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit 1.* 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 1; TCC 20.09A.020.*

7. The subject property contains a Category III wetland (Wetland A) southeast of the residence with a habitat score of 6 (LHM), requiring a 220-foot standard buffer pursuant to TCC Table 24.30-1, which buffer may be administratively reduced by 25% to 165 feet if mitigation is provided. *Exhibit 1.D.7; TCC Table 24.30-1; TCC 24.01.035; TCC 24.30.050.*
8. The residence was lawfully constructed in its current location as the buffer applicable to the wetland at the time of construction was only 50 feet. The buffer averaging process was used to reduce the buffer for construction of the southern segment of the driveway, which runs between the residence and the wetland. The distance between the driveway and the wetland to the south is approximately 42 feet at the closest point. The retaining wall would be constructed on the north side of the driveway, approximately 60 feet from the wetland. Both the standard 220-foot and reduced 165-foot buffers encumber - and prevent further development of - the legally existing homesite and yard area proposed for development. *Exhibits 1, 1.D.7, and 2; Testimony of Chris Carlson, Mitch Berndt, and Heidi Barnett.*
9. The proposed development would impact approximately 8,800 square feet of buffer. The area of proposed impact is in a disturbed condition as it is adjacent to the residence and regularly mowed. No native vegetation would be impacted by the project. As mitigation for the impact, 10,000 square feet of buffer on the south side of the driveway (between the driveway and the wetland) would be enhanced through installation of native vegetation, including 44 trees and 200 shrubs. The enhancement area currently contains scattered shrubs, grass, and Himalayan blackberry. The enhancement project is expected to improve the shading, cover, roughness, nutrient uptake, large woody debris, and habitat functions of the buffer, thereby ensuring there would be no net loss of functions. In fact, a net lift in buffer functions is anticipated. The Applicants have already installed critical area signage and an irrigation system. The plantings would be monitored for five years. *Exhibit 1.D.7; Heidi Barnett Testimony.*
10. There are no threatened or endangered species of wildlife known to inhabit the project area. *Exhibits 1 and 1.D.7.*
11. The Thurston County Environmental Health Division reviewed the proposal for compliance with Sanitary Code requirements and did not identify any issues of concern. *Exhibit 1.G.2.*

12. The Thurston County Public Works Department had no comments on the project. *Exhibit 1.G.1.*
13. Consistent with the comments of the Squaxin Island Tribe and the Nisqually Indian Tribe, Planning Staff recommended as a condition of approval that the Applicants be required to stop work and notify the Tribes and the Department of Archaeology and Historic Preservation if cultural resources are discovered during construction. *Exhibits 1, 1.G.3, and 1.G.5.*
14. The proposed development is categorically exempt from review under the State Environmental Policy Act because the amount of fill would be less than 500 cubic yards. *Exhibits 1 and 1.D.6; TCC 17.09.055.F.*
15. Notice of the open record hearing was mailed to owners of property within 500 feet of the site on March 20, 2025, posted on-site on March 25, 2025, and published in *The Nisqually Valley News* on March 27, 2025. *Exhibits 1, 1.A, 1.B, 1.C, and 1.J.* There was no public comment on the application. *Exhibit 1; Kraig Chalem Testimony.*
16. Having heard all testimony, Planning Staff maintained their recommendation that the conditions of approval in the staff report be imposed if RUE approval is granted. *Exhibit 1; Kraig Chalem Testimony.* The Applicants waived objection to the recommended conditions. *Chris Carlson Testimony.*

## 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. The proposal represents a reasonable modification of an existing home site that was lawfully established consistent with previous wetland buffer regulations. The proposal would not change the residential use of the site. Although the resource parcel designation of the subject property suggests the potential for resource land uses, the project area is not suitable for such uses because it is immediately adjacent to the residence and separated from the remainder of the site by a driveway. Development of a yard is therefore the only reasonable use of that portion of the property. *Findings 3, 4, 5, and 6.*
2. No reasonable use with less impact on the critical area or buffer is possible. Because the wetland buffer encompasses the home site, it would not be possible to establish a level back yard adjacent to the home without impacting the buffer. The yard created by the project would be reasonable in light of the large size of the parcel, and the amount of fill that would be required is below the environmental review threshold. The project area is already maintained as yard and is separated from the wetland by a lawfully established driveway. No native vegetation would be removed. *Findings 3, 4, 5, 7, 8, 9, and 14.*
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. No health or safety concerns were identified during the review process. The conditions of approval address erosion control and cultural resource protection. There was no public comment on the proposal. *Findings 11, 12, 13, 14, 15, and 16.*
4. For the reasons described in Conclusion 2, the proposal is the minimum encroachment necessary to prevent denial of reasonable use of the property. *Findings 3, 4, 5, 7, 8, 9, 14, and 16.*
5. As conditioned, the proposal would result in minimal alteration of the critical area. No direct impacts to the wetland are proposed. The conditions of approval require use of

construction fencing and erosion control to protect the wetland during development.  
*Findings 8 and 16.*

6. As conditioned to require implementation of the buffer mitigation plan, the proposal would ensure no net loss of critical area functions and values and would likely result in a net lift of buffer functions and values. *Findings 9 and 16.*
7. The use would not result in unmitigated adverse impacts to species of concern.  
*Findings 9 and 10.*
8. This decision is not based on the location and scale of existing development. There is already a residence on-site. The scale of yard proposed is reasonable considering the large site area. *Findings 3, 4, and 5.*

### **DECISION**

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

1. Prior to 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.
2. The Applicants are responsible for compliance with other jurisdictional permitting requirements.
3. A construction stormwater permit from the Washington State Department of Ecology may be required. It is the Applicants' responsibility to obtain this permit if required. Information about the permit and the application can be found at <http://www.ecy.wa.gov/programs/wq/stormwater/construction/permit.html>.
4. The Applicants shall complete all buffer mitigation and monitoring as proposed in the "Wetland Report Addendum & Buffer Mitigation Plan" (Exhibit 1.D.7) 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.
5. Prior to building permit issuance, an application for a critical area review permit (CARP) (Chapter 24.40 TCC) must be applied for and processed as a Type I permit, consistent with Chapter 24.05.
6. Critical Area signs shall be installed south of the existing driveway, 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.

7. Construction fencing and erosion control shall be placed outside the buffer alongside proposed development. This fencing and erosion control shall be inspected prior to building permit issuance.
8. 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.
9. Approval of this and other County permits may be superseded by federal law. If any protected species are found during construction, the Applicants should contact the U. S. Fish and Wildlife Services.
10. The Applicants must comply with all requirements of state and/or federal law to avoid disturbance and alteration of artifacts, remains, or other cultural resources discovered on-site during development. In the event of inadvertent disturbance or alteration, the Applicants must immediately stop work and contact the Tribes and the State Department of Archaeology and Historic Preservation.
11. All development on the site shall be in substantial compliance with the approved reasonable use exception application, as conditioned. Any alteration to the proposal 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.

**DECIDED** April 18, 2025.



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Sharon A. Rice  
Thurston County Hearing Examiner

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

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

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

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

**The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K). The Hearing Examiner decision on Innocent Purchaser determination for a project action is final and may only be appealed to Superior Court in accordance with TCC 18.48.030.**

**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 or Innocent Purchaser determination)**

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 **\$1,496.00** for a Request for Reconsideration or **\$1,216.00** 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.



<b>Project No.</b> _____ <b>Appeal Sequence No.:</b> _____
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**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  \$1,496.00 for Reconsideration or \$1,216.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
 Filed with the Community Planning & Economic Development Department this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_.