



Notice of Hearing Examiner Decision

04/06/2017

To: Interested Parties and Parties of Record

RE: Project Name: WERTZ – Accessory Dwelling Unit
Applicant: JUDY WERTZ
6344 CHICO WAY NW
BREMERTON, WA 98312-1154
Application: Conditional Use Permit & Critical Area Variance
Permit Number: 16 01511 & 16 01513

Enclosed is the Decision issued by the Kitsap County Hearing Examiner for the aforementioned project.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

http://www.kitsapgov.com/dcd/lu_env/he/HE%20Rules%20for%20Kitsap%20County%20-%2006-23-09.pdf

The Decision of the Hearing Examiner is final, unless appealed, as provided under Washington law.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Owner: Judy Wertz judyjudyjw@aol.com
Engineer: Team 4 Engineering mark@team4eng.com
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**KITSAP COUNTY HEARING EXAMINER
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISIONS**

**Accessory Dwelling Unit Conditional Use Permit, File No. 16 01511
and Shoreline Variance, File No. 16 01513**

April 6, 2017

The Kitsap County Hearing Examiner makes the following findings, conclusions, and decisions on the proposed accessory dwelling unit (ADU) and shoreline variance.

1. FINDINGS OF FACT

1.1 Proposal. The Applicant is requesting Conditional Use Permit and Shoreline Variance approval to accord ADU status to an existing 876 square foot cabin, built in 1972, and to construct a single family residence. The Applicant/property owner and site location are: Judy A. Wertz, 6344 Chico Way NW, Bremerton, WA 98312 (Assessor No. 322501-2-053-2000).

1.2 Administrative Record. The Hearing Examiner reviewed Exhibits 1-30 before the hearing, which included the Staff Report. At the hearing, the Department of Community Development (DCD) proposed adding, as Exhibits 31-34, a power point, public comment, a DCD memo, and an updated site plan. The Applicant proposed adding an exhibit on landscaping as Exhibit 35. The Examiner admitted all exhibits.

1.3 SEPA. The SEPA comment period occurred concurrent with the Notice of Application.¹ A Mitigated Determination of Non-Significance (MDNS) was issued on February 27, 2017.² The MDNS included the following conditions: “The proposal will be conditioned for Stormwater Control per Kitsap County Code Title 12. The proposal will be conditioned to follow the corrected and updated Habitat Management Plan and No Net Loss Report by BGE Environmental, LLC dated December 30, 2016.” The MDNS was not appealed.

1.4 Notice. Notice was properly issued on the application. The notice of application was published and mailed to surrounding property owners, and the notice of hearing was also published and mailed, as well as posted at the site.³

1.5 Hearing. DCD, through Ms. Shaffer, addressed how the ADU meets applicable code and CUP requirements, while Mr. Heacock addressed how the proposal meets applicable shoreline requirements. DCD recommended approval of both the CUP and shoreline variance. The Applicant also provided sworn testimony, through both Ms. Wertz, and her representative from Team 4 Engineering, Mr. Kuhlman. Both provided additional background information on the proposal, including the need for reasonable use of the property and the mitigation proposed to address project impacts.

¹ Exhibit 14.

² Exhibit 20.

³ See e.g., Exhibit 29.

1.6 Public Comment. At the hearing, public comment was presented from two individuals addressing site access and proposal impacts on the creek which traverses the site.

A contractor in Kitsap County for about fifty years (Mr. Carlson), provided sworn testimony on property access. He has visited the site numerous times, and given his experience with building a number of properties in similar circumstances, did not view access as an issue.

A neighbor (Mr. Smith) provided comment, which supplemented his written comment (Exhibit 32). His concerns related to the creek and protective measures being taken to address project impacts. He expressed full support for Ms. Wertz's endeavor to build a home and emphasized that he was not at all opposed to construction of a residence. He did have concerns about not having reviewed current plans and application materials so, although he did not wish to delay the proceedings, he requested that he be "brought up to date" on the project file.⁴

A recess was taken to allow Mr. Smith to view the current site plan. Following the recess, both the Applicant and DCD discussed the retaining wall which will be constructed, and which the geotechnical report addressed. The wall requires building permit review and approval. During that review, a geotechnical engineer will review the retaining wall to ensure it meets code requirements and is consistent with the previously prepared geotechnical report.

Mr. Heacock is a licensed geologist with the state, and testified as to his familiarity with slope stability and geotechnical analysis. He analyzed the slope when he first viewed the property and has reviewed the geotechnical report. He observed that the substrate and glacial till on the site and beneath where the wall will be placed is quite solid and is, in his professional opinion, a suitable location for the retaining wall.

The Applicant further addressed site access, noting the chain link fence and cedar trees along the driveway. The trees will remain, and the access is over 16 feet wide, so construction equipment access is not an issue. The Applicant's representative stated that he had discussed the updated proposal and mitigation with Mr. Smith, along with how to obtain additional information, and believed Mr. Smith was satisfied with the information provided during the break. Mr. Smith confirmed that he was very satisfied with responses during the recess from DCD (including Ms. Shaffer and Mr. Heacock) and the Applicant, and appreciated the answers given to his questions.

1.7 Agency Comment. The proposal was circulated within the County, and comment was received regarding regulatory compliance. There were no objections to approval, as long as applicable requirements are met.

1.8 Utility and Public Services.

- **Water:** Silverdale Water District

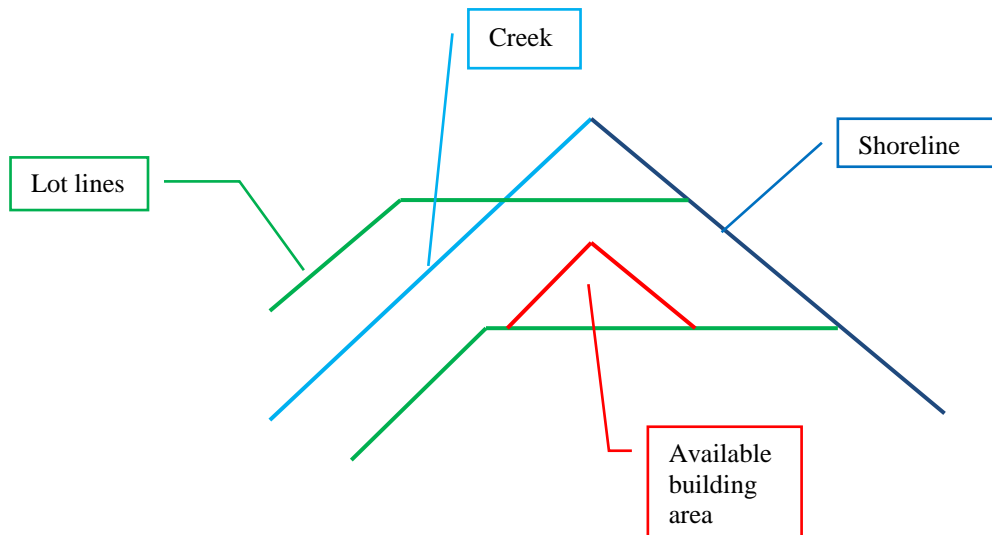
⁴ Notice was mailed to the owner of record. As DCD noted, Mr. Smith's mother apparently presently lives there, hence the delay in Mr. Smith being updated on the proposal.

- **Power:** Puget Sound Energy
- **Sewer:** On-site sewage
- **Police:** Kitsap County Sheriff
- **Fire:** Central Kitsap Fire District
- **Schools:** Central Kitsap School District 401

1.9 Access. Site access is off of Chico Way NW, a county maintained right of way.

1.10 Zoning, Plan, and SMP Designations. The Comprehensive Plan designation is Rural Residential – Density Residential, the Zoning designation is Rural Residential (RR), the same as the zoning on surrounding properties.⁵ With Dyes Inlet located to the east, the shoreline designation is Shoreline Residential. Before its down-zone in 2013, urban densities were authorized at the site. Consistent with this history, just to the west, and across Highway 3, the zoning changes to Urban Low (5-9 dwelling units per acre).

1.11 Site Features. The irregularly shaped 0.8 acre property (essentially two rectangles placed at odd angles) is located along a medium bank waterfront, which traverses the site's east side. To the north, a steep sloping area and associated non-fish bearing stream (Type N) cross the property. As a result, because of the lot's odd shape, coupled with a shoreline and creek on two sides, the lot's buildable area is limited to a small triangular shaped area. A site plan provides a more accurate rendering, but a rough illustration is below.⁶



⁵ Staff Report, and Exhibits 22 and 25.

⁶ For accurate, scaled depiction, *see* Exhibit 34.

1.12 Existing 1972 Cabin. Ms. Wertz has owned the property for 46 years. In 1970, after renting nearby, the original plan was to build a house. She was unable to achieve that at the time for financial and other reasons, but was able to build a cabin in 1972. At the time, the cabin was lawfully permitted, with review from the County, DNR, WDFW, and Ecology. The cabin has one bathroom, no garage, and no outbuildings. The cabin was always viewed as a secondary residence, which would be supplemented with a primary residence at a later date. This explains the cabin's small size. The cabin's first floor is 716 square feet, with a loft providing a 160 square foot sleeping area. As time unfolded, Ms. Wertz worked and lived elsewhere, including outside of Washington. However, she was born in Kitsap County and wishes to construct a house in which to reside in her retirement years

The Applicant desires reasonable residential use of the property, commensurate with the residential uses enjoyed by surrounding property owners. As such, she has proposed construction of what will serve as her retirement home. The proposed structure is considerably smaller and further set back from the shoreline than existing homes within the area. With a main floor footprint of 1,616 square feet and attached garage/shop of 580 square feet, the proposed primary residence is limited in size to minimize its impacts while allowing for reasonable residential use.⁷ The proposal also includes a small deck (321 square feet), and the property will be further improved to include a rain garden with native vegetation, along with mitigation outlined in analysis prepared by qualified professionals, as detailed below.⁸

1.13 Shoreline and Creek Setbacks. As the site is within shoreline jurisdiction, it is governed by SMP requirements. The SMP adopts setback requirements for both the shoreline and the creek traversing the property. Consistent with state law, under the County Code it is the SMA which governs shoreline and creek critical areas protection, as opposed to the Growth Management Act, Ch. 36.70A RCW.

Mr. Kuhlman, with Team 4 Engineering, has been working on the proposal for a couple years. He testified that a shoreline survey was completed to determine the exact OHWM location, along with a profile survey of the stream. The stream is Type N, and not fish bearing, due to a series of a geologic barriers (steep increases) along its course. The new home is proposed for location with a 75-foot shoreline buffer with a five-foot building setback, and a two-foot stream buffer, with a five-foot impervious surface setback. To meet code criteria for the setbacks, including variance requirements, the Applicant outlined mitigation prepared by qualified professionals to enhance ecological functioning of the site.⁹

1.14 Geotechnical Analysis. A Geotechnical Engineering Report was prepared by GeoResources, LLC. The report was based on a site visit, which included a geologic reconnaissance to assess soil, groundwater, and slope conditions. Test pits were excavated,

⁷ Staff Report and Exhibit 17.

⁸ Applicant hearing testimony.

⁹ The Applicant has been conservative in measuring the buffers and setbacks. For example, depending how the measurements are made, the buffering/setback area actually jumps to about 100 feet from the residence and OHWM. However, Mr. Kuhlman testified that the setback area was measured more conservatively.

regulatory requirements reviewed, and recommendations made for construction.¹⁰ The report concluded:

Based on our site observations and data review, subsurface explorations and our engineering analysis, it is our opinion that the proposed residential development is feasible from a geotechnical standpoint. It is also our opinion that a landslide hazard area does not exist on or within 300 feet of the site.¹¹

To come to this conclusion, the report outlines recommended approaches to site preparation and grading, structural fill, excavation work, and setbacks. The analysis also addresses retaining wall construction. If the engineer's recommendations are followed, "the proposed development will have minimal impacts to the site and adjacent properties."¹² The Applicant has agreed to follow the engineering recommendations and will be constructing a retaining wall, as addressed at the hearing. DCD also reviewed the proposal and recommended conditions to ensure compliance throughout project development.

1.15 Additional Tree Planting, per Ecology Consultation. The residence conforms to height and view line requirements, and does not present any view-shed encroachment issues for neighbors. Ms. Wertz has added Douglas fir trees as mitigation at Ecology's request. Ms. Wertz was initially concerned about the ultimate height of the trees and whether it would present, in future, concerns for neighbors regarding the view-shed. However, the Department of Ecology visited the site and expressed a preference for their inclusion. As a result of Ecology's request, Ms. Wertz is not objecting to including the trees. The planting plan showing the trees was added to the record as Exhibit 35.

1.16 Habitat Management Plan and No Net Loss Report. The Habitat Management Plan and No Net Loss Report (2016), prepared by BGE Environmental, LLC, evaluated the site and surrounding ecological conditions, and outlined mitigation for the proposal. The Applicant has agreed to this mitigation and DCD has proposed its inclusion as a requirement of approval.

The Habitat Management Plan describes the surrounding area as built out with single family homes. "Much of the surround[ing] residential use is constructed in the typical aligned pattern approximately 50 ft from the shoreline with lawn and landscape protected behind vertical concrete bulkheads."¹³ The site itself is forested, with native vegetation to the shoreline, but lacks important habitat. "With the absence of vegetation complexity ... both north and south of the parcel," the parcel was not found to support "significant populations of most native species, habitat or priority use."¹⁴ Due to the site's limited size and the fractured landscape, the "opportunity for ecological function is not optimal."¹⁵ "Species richness and productivity is compromised along the ground where invasives dominate and dense native stocks are absent."¹⁶

¹⁰ Exhibit 7.

¹¹ Exhibit 7, p. 4.

¹² *Id.*

¹³ Exhibit 8, p. 9.

¹⁴ Exhibit 8, p. 10.

¹⁵ Exhibit 8, p. 13.

¹⁶ Exhibit 8, p. 13.

With the proposal, "[t]ree removal is minimized" and "native complexity restoration is proposed to non-impacted areas."¹⁷ "No change to shoreline processes is anticipated" with the buffer reduction.¹⁸ Outlined mitigation includes:

- Restoration of buffers degraded from common and historic use.
- Removal of solid waste from stream bed.
- Stormwater [management] will mitigate impervious surfaces.
- Eradication of English ivy from the base of mature trees and along the ground with the exception of the ravine face upstream of the existing residence.
- Incorporate a minimum 25% of the residential landscaping as native vegetation.
- No fertilizer/pesticide use proposed for ongoing maintenance.
- Stormwater [management] will reduce erosion and pollution of discharge over time.
- Stream and shoreline buffer restoration, post construction.
- Restore buffer to dense native shrubs beneath existing canopy.
- Rain garden provides dual functional attributes meeting both stormwater compliance and habitat potential.¹⁹

The Habitat Management Plan also addresses best management practices, or BMP's. BMP's include:

- All access will be from the uplands. No machinery is permitted to work on the beach or in the water.
- All trees to remain will be marked in the field and protected from construction equipment and activities by tree protection fencing.
- Clearing limits will be established to avoid impacts outside project site.²⁰

Key areas for restoration are as follows:

- A 200 square foot shoreline buffer restoration area, and the "approximately 2,000" square feet which "shall be replanted with native shrubs, for which the Habitat Management Plan identifies planting practices, lists native species to be used in planting, and outlines a work plan."²¹
- The approximately 600 square feet which shall be replanted in the stream buffer.

With proper BMP implementation, "short-term impacts will be reduced and ... there will be no permanent impacts to functions and processes."²² And, the mitigation was determined to be "sufficient to protect or retain the existing ecological baseline of the species and habitat"

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Exhibit 8, p. 15.

²⁰ Exhibit 8, p. 16.

²¹ Exhibit 8, p. 19.

²² Exhibit 8, p. 16.

identified at the site.²³

1.17 Reasonable Use. The proposal has been through various iterations as a result of consultation with Ecology and DCD, and has been reduced to be the minimum possible to serve as a reasonable residential accommodation. The cabin does not serve this purpose. With its tight quarters, it is not of a size one expects in the area as a principal residence. It is not only small in size, but lacks a garage and the features everyone else in the area is afforded. It was constructed to serve as a cabin, and always intended to be a secondary use.

DCD, the Applicant, and the Applicant's representative provided testimony elaborating on these facts. Consistent with this, Ecology and public comment reflected understanding of the reasonableness of the request for a "real home" at this location. The present size is the minimum necessary to accomplish these objectives, with the structure being placed to maximize its distance from both the shoreline and creek traversing the property.

2. CONCLUSIONS OF LAW

2.1 ADU CUP.

The Hearing Examiner reviews this type of Conditional Use Permit.²⁴ The Hearing Examiner may approve, approve with conditions, or deny a Conditional Use Permit application.²⁵ The Hearing Examiner may also continue the hearing to allow for the addition of information which would be of substantial assistance in rendering a decision.

2.1.1 Code Requirements Specific to an ADU in the RR Zone.

An ADU located outside the urban growth area, and within the RR zone, must obtain a Conditional Use Permit and comply with requirements specific to the use.²⁶ Only one ADU is allowed per lot, on which no accessory living quarters are located, and the owner "must reside in either the primary residence or the ADU."²⁷ As only one ADU is being proposed on a lot located outside the urban growth area, no accessory living quarters or other ADU are located on the lot, and the property owner will live in the proposed new single family residence to be constructed on the property, these requirements are met.

The ADU cannot "exceed fifty percent of the square footage of the habitable area of the primary residence or nine hundred square feet, whichever is smaller."²⁸ The proposed primary residence's habitable area is 1,776 square feet.²⁹ Half that is 888 square feet. The existing cabin is 876 square feet,³⁰ which is compliant.

²³ Exhibit 8, p. 19.

²⁴ KCC Sections 17.410.010(C) and 21.04.100.

²⁵ KCC 17.550.030(A).

²⁶ KCC Table 17.410.040(A) Rural, Resource, and Urban Residential Zones, and Footnote 1, requiring ADU compliance with KCC 17.410.060. *See* KCC 17.410.060(B)(3).

²⁷ KCC 17.410.060(B)(3).

²⁸ *Id.*

²⁹ *See* Staff Report and Exhibit 17.

³⁰ Exhibit 11.

The ADU building will be approximately 30 feet from the primary residence, so complies with the requirement to be located "within one hundred fifty feet of the primary residence or ... be the conversion of an existing detached structure (i.e., garage)...."³¹

As for design, the primary residence and ADU will be similar in appearance. The buildings both have a pitched, type roof, type siding, type windows and are the same or similar color. The ADU's residential architectural design and building materials are similar and complementary to the appearance of the primary residence.³² As a result, the cabin was "designed to maintain the appearance of the primary residence."³³ Also, the cabin is stick built, so is not a "mobile home or recreational vehicle."³⁴

Due to the property's size, the KCC allows use of the zone that most closely relates, which is Urban Restrictive (UR). Required setbacks are as follows: front, 20 feet; side, 5 feet; rear, 5 feet. The front yard setback, along Chico Way, is approximately 65 feet, exceeding the front setback requirement. The side yard setback, along the northern property line, is approximately 17 feet to the building wall, and the other side yard, along the southern property line, is approximately 22 feet. The rear yard setback is governed by the shoreline designation setback. The ADU appears to be located only partly within shoreline jurisdiction, but in any case is set back well beyond the standard buffer and setback (85' + 15'). Thus, all required zoning setbacks as delineated for the ADU are in compliance with the KCC. As a result, the requirement that "[a]ll setback requirements for the zone in which the ADU is located shall apply"³⁵ is met. As to critical areas requirements, see below.

The Health District recommends approval of this project.³⁶ As such, the proposed ADU will "meet the applicable health district standards for water and sewage disposal."³⁷

Parking and entry requirements are met. The proposed ADU uses "the same side street entrance as the primary residence and shall provide additional off-street parking."³⁸ Both the primary residence and the ADU will use the same existing driveway from Chico Way NW. Two parking spaces are required for the single family residence, and could be accommodated on the existing driveway. One additional parking space is required for the ADU, which is available in front of the ADU building.³⁹

Based on the single family residence floor plan, the structure does not have accessory living quarters,⁴⁰ so the requirement that an "ADU is not permitted on the same lot where an

³¹ KCC 17.410.060(B)(3).

³² Exhibits 11 and 17, and Staff Report.

³³ KCC 17.410.060(B)(3).

³⁴ *Id.*

³⁵ KCC 17.410.060(B)(3).

³⁶ Exhibit 6.

³⁷ KCC 17.410.060(B)(3).

³⁸ *Id.*

³⁹ Exhibit 18 and Exhibit 34.

⁴⁰ Exhibit 17 and Staff Report.

accessory living quarters exists”⁴¹ is met. As a result, all requirements specific to the ADU use are met.

2.1.2 Critical Areas. A shoreline critical areas variance would be required, as the cabin is located over a Type N stream. However, as the 1972 cabin is a legal, non-conforming structure, no variance is required for the ADU, although required for the separately proposed residence.⁴² Nevertheless, a Habitat Management Plan and No Net Loss Report was prepared by qualified professionals. That report evaluates the totality of the site, including all proposed and existing improvements, and concludes that the proposal has no adverse critical areas impacts on the stream (or shoreline), and that existing ecological functions and values will be maintained, if not improved. For further detail, *see e.g.*, Findings 1.13-.16.

Due to the stream bank's steep slopes, a geohazards report was prepared, and mitigation imposed to ensure compliance with geologic hazard requirements. *See e.g.*, Finding 1.14, which provides factual background. DCD review included review by an in-house geological engineer. That engineer provided testimony stating DCD consensus with the findings and conclusions of the outside review and recommended mitigation, which the Applicant has agreed to. Both the DCD engineer and outside engineer based those conclusions on site visits, familiarity with the area, and their engineering expertise.

2.1.3 Stormwater. Stormwater is being managed consistent with KCC Title 12 requirements, a matter addressed during both the SEPA and ADU review processes. On site management is approved with the rain garden, as detailed in the Habitat Management Plan and No Net Loss Report, further described in Finding 1.16 above.

2.1.4 Conditional Use Permit Requirements.

A CUP must comply with the following:

1. The proposal is consistent with the Comprehensive Plan;
2. The proposal complies with applicable requirements of [Title 17];
3. The proposal will not be materially detrimental to existing or future uses or property in the immediate vicinity; and
4. The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing character, appearance, quality or development, and physical characteristics of the subject property and the immediate vicinity.⁴³

⁴¹ KCC 17.410.060(B)(3).

⁴² KCC Ch. 17.570; *see also*, Staff Report and Hearing Testimony from DCD, Applicant, and Applicant's representative.

⁴³ KCC 17.550.030(A).

These criteria are met. The Staff Report provided detail on applicable comprehensive plan policies. These policies provide for development at low residential densities that can be sustained without urban levels of service, will cause minimal environmental degradation, and provide for residential uses consistent with the existing and planned rural character of the surrounding rural area, while minimizing housing costs and providing for a range of housing types. The ADU does not have significant environmental impacts, does not require urban infrastructure extensions, is consistent with the character of the surrounding area, and serves a need to provide housing within this area. The proposal is consistent with the comprehensive plan.

The proposal is conditioned to ensure compliance with Title 17 and other applicable code requirements. No relevant code provision was identified which would not be complied with. Also, the proposal will not be materially detrimental to existing or future uses or property in the immediate vicinity. All impacts identified have been addressed and mitigated with appropriate mitigation and/or code requirements.

The proposal is compatible with surrounding existing and planned rural shoreline uses. It will be aesthetically consistent with the primary residence. The cabin's small size and setbacks provided ensure its consistency with the surrounding character, appearance, and quality of development on site and in the immediate vicinity. Based on hearing testimony and the record, with the landscaping improvements and new construction, overall property aesthetics will be improved. As conditioned and proposed, the ADU meets all CUP criteria.

2.2 Shoreline Variance.

The Hearing Examiner reviews this type of Shoreline Variance permit application.⁴⁴ The Hearing Examiner renders a decision and may approve, approve with conditions, or deny a Shoreline Variance permit, with final approval by the Department of Ecology.⁴⁵ The Hearing Examiner may also continue the hearing to allow for the addition of information which would be of substantial assistance in rendering a decision.

2.2.1 Puget Sound Shoreline Setback Requirements

With respect to the Puget Sound shoreline area, shoreline setback requirements are exceeded. The Shoreline Residential designation provides for an 85-foot buffer and 15-foot construction setback, unless a reduction is authorized per KCC 22.400.120. Through this criteria, and per KCC 22.400.120(B)(2)(b), buffers may be reduced to 50 feet with a Habitat Mitigation Plan and No Net Loss Report, which included a mitigation plan, "to achieve no net loss of shoreline ecological functions." Also, the building setback may be reduced if "the resulting setback is protective of existing vegetation within the buffer." KCC 22.400.120(B)(4).

With the Habitat Mitigation Plan and No Net Loss Report, and its own analysis, DCD determined the Applicants met these criteria.⁴⁶ The native plant rain garden and sewage

⁴⁴ KCC 22.500.100(E)(2) and KCC 21.04.100.

⁴⁵ See e.g., KCC 21.04.080, KCC 22.500.100(E)(8).

⁴⁶ See Exhibits 8 and 33, which were further addressed during DCD testimony.

treatment grinder pump will be located within the outer portion of a 75-foot buffer area, outside of the 50-foot reduced standard buffer, thus meeting SMP requirements. The buffer for the residence is 75 feet, with a modified five-foot construction setback line. The resulting buffering and setback fully protects existing vegetation and shoreline ecological functions. Thus, with the required mitigation, the residence and associated improvements exceed the SMP's reduced standard buffer requirements.

As for CAO buffering and setbacks (100-foot buffer and 15-foot setback),⁴⁷ reduced standard buffering and setbacks are also complied with. DCD is authorized to decrease the buffer by up to half, following WDFW consultation and Habitat Management Plan review, where "conditions are sufficient to protect the affected fish and wildlife habitat conservation area."⁴⁸ This review process occurred, and the records support DCD's conclusion that the conditions imposed adequately protect habitat functions and values. However, to the extent variance approval is required, these criteria are met, as addressed below.

2.2.2 Shoreline Variance

The primary residence requires a stream setback variance due to the limited triangular shaped building area described above.⁴⁹ The code requires a 50-foot stream buffer, coupled with a 15-foot building setback. "For streams in ravines with ravine sides ten feet or greater in height," the buffer is the greater of 25 feet from the slope top, or the standard stream buffer.⁵⁰ The Applicant is proposing a creek buffer of 25 feet, as measured from the OHWL (Ordinance High Water Line) at average bank-full width, with a five-foot construction setback. The buffer will be demarked with a split rail cedar fence, with buffer signs installed.

The purpose of a shoreline variance is to address "extraordinary or unique circumstances relating to the property such that the strict implementation of this master program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020."⁵¹ A variance "should be granted ... where denial ... would result in a thwarting" of a RCW 90.58.020 policy.⁵² "In all instances, extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect."⁵³ Variances landward of the OHWM must meet the following criteria:

- a. That the strict application of the bulk, dimensional or performance standards set forth in Chapters 22.400 and 22.600 precludes, or significantly interferes with, reasonable use of the property;

⁴⁷ Given the multiple layers of requirements, there is some ambiguity on which apply. The decision reviews all requirements.

⁴⁸ KCC 19.300.315(A)(4).

⁴⁹ The pre-existing cabin, constructed some 40 years ago, is a legal non-conforming structure, so requires no "after-the-fact" variance.

⁵⁰ KCC 19.300.315(A)(6).

⁵¹ KCC 22.500.100(E)(1).

⁵² KCC 22.500.100(E)(3).

⁵³ *Id.*

- b. That the hardship described in subsection (E)(1) of this section is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of this program, and for example, not from deed restrictions or from the actions of the applicant or a predecessor in title;
- c. That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and this program, will not cause net loss to shoreline ecological functions and does not conflict with existing water-dependent uses;
- d. That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
- e. That the variance requested is the minimum necessary to afford relief; and
- f. That the public interest will suffer no substantial detrimental effect.⁵⁴

DCD's analysis found that these criteria were met, and detailed the reasons why, which were elaborated on at the hearing.⁵⁵ The Habitat Mitigation Plan and No Net Loss Report, which outlines mitigation and includes a stream/shoreline buffer restoration plan, provided analysis relevant to the variance criteria. The Plan addresses the proposal in its totality, which DCD testified to at the hearing in detail. The Hearing Examiner concurs with DCD's analysis. Strict application of the SMP setbacks would preclude reasonable use of this property. Unless a variance is granted, reasonable residential use of the property will not be feasible.

This hardship is specifically related to the property itself, not the Applicant's actions. Due to its irregular shape and the water bodies traversing two sides, the site presents considerable development challenges. The Applicant did not create these conditions. The site's unusual triangular shaped construction area, created by the shoreline and creek setbacks on two sides, dramatically shrinks available building space. Due to these setbacks, as well as height restrictions, it is not possible to make reasonable residential use of the property and comply with all setbacks.

The project design is compatible with the other authorized residential uses within the area. It is of a more limited nature than the surrounding uses, with a smaller footprint, greater setbacks, and no shoreline armoring. No concerns were raised regarding proposal aesthetics and the structure was designed to ensure compliance with SMP view-shed requirements.⁵⁶ Concerns on protecting the stream have been addressed through the geo-technical report and Habitat Mitigation Plan and No Net Loss Report.

⁵⁴ KCC 22.500.100(E)(4). With the site's critical areas being located in the shoreline, the County uses its shoreline variance criteria to assess the request.

⁵⁵ See Staff Report, analysis in Exhibit 16 (prepared by the Applicant and concurred with by DCD), and Exhibit 33.

⁵⁶ Hearing testimony from DCD, Applicant, and the Applicant's consultant; *see also* KCC 22.400.135.

Granting the variance would not constitute a grant of special privilege. The use is exactly the type planned for under the County's comprehensive plan, zoning, and the SMP, and does not conflict with other uses along the shoreline, water dependent or not. Homes are already constructed on surrounding parcels. Many are closer to the water and larger in size. Residences range from 2,954 square feet to 11,326 square feet, and many homes have detached garages which alone are the size of the ADU. Photographs documenting these conditions were submitted into the record.⁵⁷ These photographs document heavy shoreline armoring on other lots, which is not occurring with this proposal. Also, most of these homes are not taking advantage of stormwater alternatives nor are they connected to the sewer system, which is planned for both the residence and ADU. Thus, not only is there no substantial detriment to the public interest, but the public interest is significantly served with the addition of this single family residence which will be connected to sewer (along with the ADU) and rain garden.

Also, the variance is the minimum necessary to afford relief. As addressed in the findings above and through DCD's analysis,⁵⁸ the residential footprint is the minimum necessary to accommodate reasonable living accommodations at this location, and was placed as far from the OHWM as possible, and farther from the shoreline than the reduced standard setbacks would otherwise require.

The proposal will not adversely impact the shoreline or creek's ecological functions. However, a qualified professional developed a Habitat Management Plan which details mitigation. The buffer improvements are detailed in the findings above, including Finding 1.16, but include invasive species removal, establishment of native vegetation, and ongoing maintenance. As detailed above, mitigation includes a 200 square foot shoreline buffer restoration area, with approximately 2,000 square feet which will be improved with native vegetation, along with 600 square feet of replanting in the stream buffer.⁵⁹ As a required component of approval, the mitigation will protect, and very likely improve upon, the site's existing ecological baseline.⁶⁰ Further, geological conditions were fully evaluated consistent with KCC 19.700.725, and mitigation imposed consistent with County requirements to maintain creek bank stability.

As addressed in the technical analysis prepared for this proposal, there are no cumulative impact concerns which could arise from similar actions in this area. The area is already built out with single family homes. This lot is an exception, with its one cabin, which lacks standard residential amenities, including even a garage. A report was prepared consistent with KCC 22.700.130,⁶¹ addressing the lack of cumulative impacts and the fact that this variance will not be combined with others so as to cause "substantial adverse effects to the shoreline environment."⁶² Further, the use proposed is authorized, and in fact is a preferred shoreline use.⁶³ As a result,

⁵⁷ Exhibit 16.

⁵⁸ See e.g., Staff Report, and hearing testimony.

⁵⁹ Exhibit 8, p. 19.

⁶⁰ *Id.*

⁶¹ See also KCC 22.500.100(E)(6).

⁶² KCC 22.500.100(E)(6).

⁶³ KCC 22.500.100(E)(7) and KCC 22.600.105.

with the limited nature of the proposal and mitigation designed by a qualified professional, the public interest will suffer no "substantial detrimental effects."

To deny the variance would thwart SMA's central policies, which give "priority for single-family residences," and are designed to protect "private property rights consistent with the public interest," while also ensuring the shoreline functions and values are protected.⁶⁴ As detailed in the Staff Report, and elaborated on at the hearing, the proposal is consistent with local SMP policies, including those addressing residential development, ecological conservation, and property rights.

The Examiner is concerned with a comment made early in proposal development, before added review and mitigation, regarding cabin removal as potential "mitigation." Given County SMP and Comprehensive Plan policy support for generating housing at sufficient levels to maintain affordability, removing a structure which provides housing, small though that cabin structure is, is not a measure which should be lightly taken. Certainly, such a measure is unnecessary to meet variance criteria, and as a legal non-conforming structure, the property owner has a legal right to cabin retention.

Ecological conditions are not adversely impacted with the proposal. Qualified professionals documented these facts through technical analysis and testimony, and there are no facts in the record refuting these conclusions. Thus, cabin removal, while significantly increasing property owner housing costs, would do so in a way which is not commensurate with impacts stemming from the proposal. Caution should be taken in such situations.⁶⁵ Also, County shoreline and comprehensive plan policy objectives include ensuring residents along shorelines are housed and such housing is affordable. The SMA was written to serve both economic and ecological goals,⁶⁶ and for it to be successfully implemented, the dual objectives must both be served.

In summary, the variance allows the property owner reasonable use of her property while also mitigating impacts and improving ecological functions through improved stormwater treatment, connecting to the sewer system, and extensive planting of native vegetation through the Habitat Mitigation Plan and No Net Loss Report prepared by qualified professionals. The approach is consistent with SMA and SMP policies, and the County's shoreline variance criteria, and should be granted.

DECISION

The Hearing Examiner, pursuant to the above Findings of Fact and Conclusions of Law, approves the requested ADU CUP and Shoreline Variance, provided the following 36 conditions are adhered to.

⁶⁴ RCW 90.58.020.

⁶⁵ See e.g., *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), rev. denied, 165 Wn.2d 1030 (2009) (while criticized for incorrectly importing federal constitutional analysis, the decision does address the importance of reasonably tailoring mitigation to address impacts).

⁶⁶ See e.g., RCW 90.58.020 (priority given to "single-family residences and their appurtenant structures....").

Planning/Zoning.

1. All required permits shall be obtained prior to commencement of land clearing, construction and/or occupancy.
2. The ADU is subject to the payment of impact fees. Impact fees must be paid at time of permit issuance, or if deferred, must be paid prior to final inspection. No certificate of occupancy will be granted until all impact fees are paid.
3. Any proposed modification (not including cosmetic work such as painting, papering and similar finish work), remodel or expansion of the ADU building, regardless of whether a building permit is required, shall be reviewed by DCD and granted approval prior to such modification, expansion, construction and/or issuance of a building permit.
4. Only one ADU shall be permitted on the subject property.
5. The property owner must reside in either the primary residence or the ADU and only one of the structures may be rented at any one time.
6. The ADU's habitable area shall not exceed 50% of the primary residence or 900 square feet, whichever is smaller. The proposed ADU is 876 square feet. Any future expansion of the ADU will require a building permit and would have to comply with all code requirements in place at the time of the new building permit application.
7. The ADU shall be designed to maintain the appearance of the primary residence.
8. This permit shall comply with all Kitsap Public Health District regulations and conditions of approval.
9. No mobile home or recreational vehicle shall be allowed as an ADU.
10. The ADU shall use the same side street entrance as the primary residence and shall provide one additional off-street parking space.
11. An accessory living quarters (ALQ) or guest house (GH) is not permitted on the same lot unless the ADU is removed and the ALQ or GH complies with all requirements imposed by the KCC.
12. A property with a primary residence and an ADU cannot be segregated to create two separate legal lots unless it complies with all subdivision, zoning and density requirements in place at the time of a complete subdivision application.
13. The ADU cannot be sold separately from the primary residence unless it has legally been segregated onto its own lot.
14. The recipient of any conditional use permit shall file a Notice of Land Use

Binder with the county auditor prior to any of the following: initiation of any further site work, issuance of any development/construction permits by the county, or occupancy/use of the subject property or buildings thereon for the use or activity authorized. The Notice of Land Use Binder shall serve both as an acknowledgment of and agreement to abide by the terms and conditions of the conditional use permit and as a notice to prospective purchasers of the existence of the permit. The Binder shall be prepared by the Department and recorded at the Applicant's expense. The Applicant shall provide recorded copies of the Binder to the Department immediately after recording. The Binder shall be recorded within 30 days of notification from the Department that the Binder is ready to be recorded.

15. The uses of the subject property are limited to the uses proposed by the Applicant and any other uses will be subject to further review pursuant to the requirements of the KCC. Unless in conflict with the conditions stated and/or any regulations, all terms and specifications of the application shall be binding conditions of approval. Approval of this project shall not be, and is not to be, construed as approval for more extensive or other utilization of the subject property.

16. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the Applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the Applicant agrees to promptly bring such development or activities into compliance.

17. The decision set forth herein is based upon representations made and exhibits contained in the project application (16 01511 and 16 01513). Any change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to further review and approval of the County and potentially the Hearing Examiner.

18. This CUP approval shall automatically become void if no development permit application is accepted as complete by DCD within three years of the Notice of Decision date or the resolution of any appeals.

19. Any violation of the conditions of approval shall be grounds to initiate revocation of this CUP.

Development Engineering.

20. At building permit application, submit KCPW Form 1601 for issuance of a concurrency certificate, as required by KCC Section 20.04.030, Transportation Concurrency.

21. Construction plans and profiles for all roads, storm drainage facilities and appurtenances prepared by the developer's engineer shall be submitted to Kitsap County for review and acceptance. No construction shall be started prior to plan acceptance.

22. The information provided demonstrates this proposal contains critical areas, and as such will require a Site Development Activity Permit (SDAP) from Development Services and Engineering.

23. Stormwater quantity control, quality treatment, and erosion and sedimentation control shall be designed in accordance with KCC Title 12 effective at the time the CUP application was deemed complete, April 13, 2016. The submittal documents shall be prepared by a civil engineer licensed in the State of Washington. The fees and submittal requirements shall be in accordance with Kitsap County Ordinances in effect at the time of SDAP application.

24. The Washington State Department of Ecology (Ecology) may require registration of the infiltration trench as a Underground Injection Control (UIC) well in accordance with the Underground Injection Control Program (Chapter 173-218 WAC). The Applicant shall contact Ecology to determine if the facility is regulated under the UIC program.

25. The design of the infiltration facilities will be in accordance with Section 7.3.4 of the Kitsap County Stormwater Design Manual.

26. The infiltration facilities shall remain off line until the drainage areas are stabilized and the water quality treatment facility is adequately established. Temporary erosion and sedimentation ponds shall not be located over infiltration facilities. In addition, retention ponds shall not be utilized as temporary erosion and sedimentation control ponds.

27. During the construction of the proposed infiltration facilities, the Project Engineer shall provide an inspection to verify that the facilities are installed in accordance with the design documents and that actual soil conditions encountered meet the design assumptions. The Project Engineer shall submit the inspection report properly stamped and sealed with a professional engineer's stamp to Development Services and Engineering.

28. All retention facilities shall be a minimum of 200 feet from any slope steeper than 30%. This distance may be reduced based on a geotechnical engineering report. That analysis will be prepared by a Civil Engineer licensed in the State of Washington, knowledgeable in the practice of soils engineering and mechanics. The analysis will address the effects of groundwater infiltration, seepage, potential slip planes, and changes in soil bearing strength. The proposed facilities will be designed following the recommendations of the geotechnical analysis.

29. Any work within the County right-of-way shall require a Public Works permit and possibly a maintenance or performance bond. This application to perform work in the right-of-way shall be submitted as part of the SDAP process (or building permit if no SDAP is required). The need for and scope of bonding will be determined at that time.

Environmental.

30. The Applicant shall follow the recommendations of the Habitat Management Plan and No Net Loss Report of BGE Environmental, LCC's March 16, 2016 report. Please provide

an addendum to the report to include tree species. The current plan only includes shrubs.

31. The mitigation plan will be monitored for a minimum of five years to ensure survival.

32. The Applicant shall submit a shoreline exemption for the trail, beach stairs, and deck within the shoreline buffer and show how these items are consistent with KCC 22.400.120(D)(1)(a), (b), and (c). The stair block system must be reconfigured for a more permanent solution.

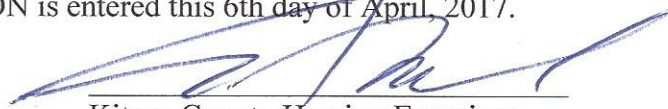
33. The newly created single family residence will be limited to 35 feet in height per KCC 22.500.100(A)(2). Building height is defined in KCC 17.110.140.

34. The application requires that no new shoreline armoring is proposed, and that no armoring will ever be needed for the protection of any facilities on site.

35. Permit approval is subject to KCC 19.300.315, which states that buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Refuse shall not be placed in buffers.

36. There shall be no clearing of vegetation or grading in the buffer area, as is depicted on the approved site plan. Prior to any clearing or development, please contact Development Services and Engineering Environmental staff at (360) 337-5777 to confirm buffer boundaries.

THIS DECISION is entered this 6th day of April, 2017.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond