



Notice of Hearing Examiner Decision

11/01/2018

To: Interested Parties and Parties of Record

RE: Project Name: Foster Shoreline Variance
Applicant: Jeremy Foster
P.O. Box 521
Hansville, WA
Application: Shoreline Variance – Type III
Permit Number: 18-02700

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

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

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.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: Applicant: Jeremy Foster, Jeremy.foster@live.com
Owner: Jeremy Foster
Engineer: Mike Wnek; mike@wnekeng.com
Project Representative: Robbyn Myers, BGE Environmental
Kitsap County Health District, MS-30
Kitsap County Public Works Dept., MS-26
DCD Staff Planner: Candace Vickery, Stormwater/Traffic
DCD Staff Planner: Steve Heacock
Misty Blair, Department of Ecology; misty.blair@ecy.wa.gov
Christine Raczka, Port Gamble S'Klallam tribe; craczka@pgst.nsn.us

**KITSAP COUNTY HEARING EXAMINER
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

**Shoreline Variance No. 18-02700
(Foster)**

October 24, 2018

1. FINDINGS OF FACT

1.1 Proposal. The Applicants request a Shoreline Variance from shoreline buffer/setback requirements to allow a single-family residence to be built. The Applicants/property owners and location are:

Applicants/Property Owners: Jeremy Foster, PO Box 521, Hansville, WA 98340

Location: 37665 NE Teel Lane, Hansville, WA 98340,
Assessor No. 4261-000-015-0009

1.2 Hearing. An open record public hearing was held on October 10, 2018. The Kitsap County Department of Community Development ("DCD"), through Mr. Heacock, testified on how the proposal conforms with shoreline variance requirements. The Applicant also testified, expressing agreement with DCD's proposal summary. The Applicant's biologist, Ms. Myers, PWS, of BGE Environmental, LLC, also provided sworn testimony supporting the proposal, elaborating on the environmental analysis she prepared for the project.

1.3 Administrative Record. The Hearing Examiner admitted Exhibits 1-19, which included the Staff Report, revised Site Plans, and Power Point presentation. DCD described the contents of the supplemental No Net Loss Report (Exhibit 19), which was presented and admitted, and as addressed above, described by the qualified professional who prepared it.

1.4 SEPA. The proposal is exempt from SEPA.¹

1.5 Public Notice and Comment. Publication and mailing was provided for both the notice of application and public hearing, with hearing notice also posted at the site.² No public comments were received either in writing or at the hearing. To ensure adequate notice and comment opportunities, the hearing record was kept open through October 19. No comments were submitted.

1.6 Agency/Tribe Comment. The proposal was circulated within the County, and comment was received regarding regulatory compliance. Within the County, there were no objections to approval, as long as requirements are met. In response to comment from Ecology

¹ WAC 197-11-800(6)(a) and (e); KCC Title 18.04.

² Exhibits 14 and 15.

and the S'Klallam Tribe,³ the Applicant prepared a supplemental No Net Loss Report,⁴ which addresses earlier permitting activity at the site and outlines required mitigation.

No comment on cultural resources was received, but DCD proposed a standard condition (Condition 8) providing for notification to DCD, the Washington State Office of Archaeology and Historic Preservation, and affected tribes if archaeological resources are uncovered during excavation.⁵

1.7 Zoning/Plan Designations. The Comprehensive Plan and zoning designations are Rural Residential, which allows one dwelling unit per five acres.⁶ Subdivided under older requirements, the lot is .21 acres. It is 75 feet wide, or roughly half the 140 feet now required. With the tidal area, the lot is 190 feet long, but when measured from the ordinary high water mark, this figure changes to 135, just under the 140 foot code minimum.⁷

1.8 Surrounding Properties. Similarly sized lots surround the proposal. They have the same zoning and shoreline designations, and are developed with single family residences, generally built in the mid-1980's, although construction dates range from 1977-2010. Neighboring homes have a 1,700 square foot median footprint, ranging from 1,600-4,400 square feet, not including additional associated uses. The project is one of the last lots to be developed.

1.9 Shoreline Setback. The site abuts the Coon Bay shoreline along Hood Canal and is within the Shoreline Residential designation, with a standard 85 foot buffer and additional 15 foot building setback. A Reduced Standard Buffer of 50 feet, with a 15 foot building setback is authorized, if no net loss of shoreline ecological functions is demonstrated and KCC 22.400.120(B)(3) requirements are met.⁸ Due to the site's physical constraints, the reduced buffer and building setback cannot be met, and a Type III Variance allowing a vegetated 20 foot buffer and five foot building setback was requested.

1.10 Site Characteristics. Topography is immediately steep from the ordinary high water mark, but the proposed building area is generally flat. There is little to no vegetation on the vacant lot. The near shore is a benched area with mixed native grasses, forbs and shrubs, required from the associated mitigation for the dock project. The condition of this vegetation is degraded. Due to slope movements in the bay, to protect the dock, an adjacent bulkhead was constructed.

1.11 Project Characteristics. The applicant is proposing a 3-bedroom, 1-story single-family residence with associated driveway, small garage parking area for 3 cars (as required), deck, and walkway to the existing pier ramp and float on the Coon Bay shoreline.

³ Exhibits 12 and 13.

⁴ Exhibit 19.

⁵ See KCC 22.400.130.

⁶ KCC 17.130.010 (the zone "promotes low-density residential development ... consistent with rural character.").

⁷ Due to its small size, the Urban Restricted zoning setbacks may be applied. Exhibit 16 (Staff Report), pg. 3. These required 20 foot front yard setback, and five foot side yard setbacks.

⁸ KCC 22.400.120(B)(2)

A portion of the proposed structure will be 25 feet from Ordinary High Water Mark, which is more than a 25% reduction of the 50 foot Reduced Standard Buffer. 1625 square feet of building coverage are proposed for placement waterward of the 50 foot buffer (1,205 square feet for the residence and 420 square feet for the deck). A Shoreline Mitigation Plan and No Net Loss Report were provided, which assess environmental conditions and mitigation supporting the proposed 20 foot restored shoreline buffer and five foot building setback.

1.12 Views. There are no view blockage concerns.⁹ The proposed residence will be located landward of the adjacent neighboring properties view line and will not exceed the County's 35 foot height requirements.¹⁰

1.13 Utility and Public Services.

- **Water:** PUD 1
- **Power:** Puget Sound Energy
- **Sewer:** On-Site Septic (proposed)
- **Police:** Kitsap County Sheriff
- **Fire:** North Kitsap Fire & Rescue
- **Schools:** North Kitsap School District

1.14 Access. Site access is off NE Teel Lane, a County-maintained right of way.

1.15 Environmental Site Constraints. The site has no wetlands or streams. A geotechnical report addresses the Geologically Hazardous Areas (Ch. 19.400 KCC). The structure is sited primarily adjacent to the dock pathway, as far from the shoreline slope as practicable. The project was designed to meet geotechnical engineer safety recommendations for the shoreline slopes, and to not require additional shoreline or bluff stabilization. With the residence located outside the shoreline slopes and flood zone,¹¹ no flood zone impacts are anticipated. The project has been reviewed under Title 12 (Stormwater Drainage), and Engineered Drainage Plans must be submitted with the building permit.

1.16 Habitat Assessment and Shoreline Mitigation. The No-Net-Loss Report¹² finds there will be no net loss of habitat and mitigation will offset shoreline buffer impacts.

A minimum area of 1,570 sq ft of the established shoreline buffer will be planted from the delineated boundary of the shoreline protection mitigation area. Buffer restoration is applied to the greatest extent available immediately adjacent the residence, deck, and garage. Low growing accessible species are recommended for ease to and around the established structure as full coverage is recommended with the planting schedule, see Exhibit E.¹³

⁹ KCC 22.400.135.

¹⁰ Due to covenants, the structure is subject to a 22 foot height limitation. DCD hearing testimony.

¹¹ See e.g., Exhibit 8 and DCD hearing testimony.

¹² Exhibit 19.

¹³ Exhibit 19 (Supplemental No Net Loss Report), pg. 9.

Review of the Stormwater Pollution prevention Plan (SWPPP) by Wnek Engineering dated 16 May 2018, indicates that all stormwater is to be directed to the ditch along the right-of-way to Teel Ln Ne. Our understanding of the necessary conditions is that the structures are likely to be built up from the existing grade, therefore, stormwater to the existing ditch is the reasonable alternative. There are no reasonably anticipated adverse impacts with the directed stormwater, in fact, the ditch alternative provides a greater buffer advantage than available on-site detentions or distributions.¹⁴

Buffer planting mitigation is coupled with performance standards, planting details and specifications, construction mitigation, monitoring, maintenance, and details on contingency planning. The approach follows SMP mitigation policies.¹⁵ The Examiner incorporates the Staff Report findings detailing the County's SMP policies and elaborating on the proposed mitigation.

1.17 Building Site Options. Due to the physical lot constraints, the project has been sited in the most appropriate location and the size minimized to fit the building site. The proposed building site is the only suitable location due to the slopes and need to site the drainfield further landward due to health district setback regulation from surface water bodies.

1.18 Conditions. DCD proposed conditions to ensure project development consistent with SMP requirements, and with the above findings. The Examiner finds they should be applied to the project largely as written, but has: (1) clarified Condition 7 to clarify that the project is subject to both the original and updated No Net Loss Report, with any inconsistencies resolved in favor of the later analysis; and (2) clarified Condition 6 to reference the three exhibits containing drainage and geotechnical plans and analysis (Exhibits 5-7).

2. CONCLUSIONS OF LAW

2.1 Hearing Examiner Review of a Shoreline Variance. The Hearing Examiner reviews this type of Shoreline Variance permit application.¹⁶ The Hearing Examiner decides and may approve, approve with conditions, or deny a Shoreline Variance permit, with final approval by the Department of Ecology.¹⁷

2.2 Code Requirements Specific to a Shoreline Variance.

2.2.1 SMP Setbacks. The Shoreline Residential designation provides for an 85 foot buffer and 15-foot building setback, unless a reduced buffer is authorized per KCC 22.400.120(B)(2) with a no-net-loss report analysis and an associated mitigation plan, "to achieve no net loss of shoreline ecological functions." With the No-Net-Loss Report and Mitigation Plan, the Applicants met these criteria. However, as the lot is constrained by size and

¹⁴ Exhibit 19 (Supplemental No Net Loss Report), pg. 8.

¹⁵ KCC 22.400.105; KCC 22.400.110.

¹⁶ KCC 22.500.100(E)(2) and KCC 21.04.100.

¹⁷ See e.g., KCC 21.04.080, KCC 22.500.100(E)(8).

topography, coupled with health district requirements, it cannot support a minimally sized home with the reduced buffer.¹⁸ A Shoreline Variance is required.

2.2.2 Shoreline Variance Criteria, KCC 22.500.100(E). 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."¹⁹ A variance "should be granted ... where denial ... would result in a thwarting" of a RCW 90.58.020 policy.²⁰ "In all instances, extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect."²¹ Variances landward of the OHWM must meet these 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;
- 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.²²

DCD's analysis found these criteria were met, and detailed the reasons in the Staff Report,²³ which were elaborated on at the hearing. The Hearing Examiner concurs with and incorporates DCD's analysis. Strict application of the SMP setbacks would preclude reasonable use of this property. Unless a variance is granted, reasonable economic use of the property will not be feasible.

¹⁸ KCC 22.400.120(B)(2) and (3).

¹⁹ KCC 22.500.100(E)(1).

²⁰ KCC 22.500.100(E)(3).

²¹ KCC 22.500.100(E)(3).

²² KCC 22.500.100(E)(4).

²³ Exhibit 16.

This hardship is specifically related to the property itself, not Applicant actions. The variance request is due to the existing non-conforming setting of the property. The most restrictive element is the site's steep topography and relatively small size, including width and depth limitations, which constrains the buildable area. Due to these factors, and Kitsap County Health drainfield requirements, the Shoreline Residential reduced buffer cannot be achieved. Relief to the standard and reduced buffer are necessary to allow reasonable development.

The project design is compatible with the other authorized residential uses within the area and with planned uses, will not cause net loss to shoreline ecological functions, and does not conflict with existing water-dependent uses. Impacts are mitigated consistent with KCC Ch. 22.800, Appendix B. Zoning is Rural Residential and the parcel use and design is compatible with the locale.

The variance will not constitute a grant of special privilege not enjoyed by other properties in the area. The neighboring parcels are already similarly built out with single family residences, with the project being on the smaller end of what has been built in the area.

The variance requested is the minimum necessary to afford relief. Site plan design reflects compliance with other titles, including zoning setbacks and Kitsap Public Health District standards. Once these requirements were applied to the site and geotechnical concerns considered, and with the structure setback landward to the greatest extent feasible, the proposed footprint area is the most practical.

The public interest will suffer no substantial detrimental effect. The proposed development retains the residential use, with shoreline buffer restoration to ensure no net loss of shoreline ecological function.

To deny the variance would thwart SMA's central policies, which give "priority for single-family residences," and protect "private property rights consistent with the public interest," while also ensuring the shoreline functions and values are protected.²⁴ As detailed in the Staff Report, and elaborated on at the hearing, the proposal is consistent with SMP policies, including those protecting residential development, the environment, and property rights.²⁵

In summary, the variance allows the property owners reasonable use of their property while also mitigating impacts. The variance should be granted as it is consistent with SMA and SMP policies, and the County's shoreline variance criteria.

DECISION

The Hearing Examiner, pursuant to the above Findings of Fact and Conclusions of Law, approves the requested Shoreline Variance, provided these 13 conditions are adhered to.

²⁴ RCW 90.58.020.

²⁵ See Exhibit 16 detailing consistency with SMP policies, which is incorporated.

Development Engineering

1. 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 said plan acceptance.
2. The information provided demonstrates this proposal is a Small Project as defined in Kitsap County Code Title 12, and meets the criteria to require a Simplified Drainage Review-Engineered level of drainage review. Engineered drainage plans are required to be submitted with the building permit.
3. Stormwater quantity control, quality treatment, and erosion and sedimentation control shall be designed in accordance with Kitsap County Code Title 12 effective at the time the Shoreline Variance application was deemed complete, March 6, 2018. 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 building permit application.
4. The Washington State Department of Fish and Wildlife may require a Hydraulic Project Approval if any associated project work is required on the shoreline.
5. If the project proposal is modified from that shown on the submitted site plan, Development Services and Engineering will require additional review and potentially new conditions.

Environmental

6. This project shall follow the recommendations of the Subsurface Exploration and Geotechnical Engineering Evaluation report (Resolve Environmental, 5/22/18), including Exhibits 5-7.
7. This project will comply with the No Net Loss and Mitigation Plan (BGE Environmental, LLC; 5/22/18 and 10/8/18).²⁶ Planting must be completed, inspected and approved prior to the final inspection of the building permit. There will be a 5-year monitoring period with annual reports provided to Kitsap County DCD demonstrating compliance with the mitigation plan in this report.
8. If archaeological resources are uncovered during excavation, the contractor and property owners must immediately stop work and notify Kitsap County Department of Community Development, the Washington State Office of Archaeology and Historic Preservation and affected tribes.

²⁶ Any inconsistencies shall be resolved in favor of the later analysis.

Traffic and Roads

9. Submit an Application for Concurrency Test (KCPW Form 1601) as required by Chapter 20.04.030, Transportation Concurrency, of the Kitsap County Code. The KCPW 1601 form reserves road capacity for the project.

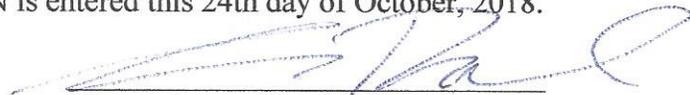
10. With the building permit application, submit plans for construction of the road approach between the edge of existing pavement and the right-of-way line at all intersections with county rights-of-way. Approaches shall be designed in accordance with the Kitsap County Road Standards as established in Chapter 11.22 of the Kitsap County Code. Existing approaches may need to be improved to meet current standards.

11. 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 building permit. The need for and scope of bonding will be determined at that time.

12. If this project includes the construction of rock walls or other retaining facilities that either exceed four feet in height or sustain a surcharge, a separate building permit with an engineered design is required for such walls. This note shall be placed on the face of the final construction drawings.

13. Rock and retaining walls shall meet all applicable setback requirements of Vol. II, Chapter 9.4.4 of the Kitsap County Stormwater Design Manual.

THIS DECISION is entered this 24th day of October, 2018.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond