

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF

RECEIVED

FINDINGS OF FACT,

JUN 13 2019

CONCLUSIONS OF LAW AND

RipV 2019-002

DECISION

WA Dept. of Fish & Wildlife

CHELAN COUNTY  
COMMUNITY DEVELOPMENT

THIS MATTER, having come on for hearing in front of the Chelan County Hearing Examiner on June 5, 2019, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law and Decision as follows:

**FINDINGS OF FACT**

1. The applicant is Anna Sample, WA Dept. of Fish & Wildlife, 600 Capital Way North, Olympia, WA 98501
2. The location of the project is NNA Swakane Canyon Rd., Wenatchee, WA 98801
3. The parcel number for the subject property is 24-20-22-865-003
4. The property is legally described as Lots 1 to 14 of Block 1, Swakane Valley Orchards recorded July 13, 1908 under AFN: 23410.
5. The proposed development is to take place on a parcel that has been historically treated as one concurrent lot but is actually 14 separate legal lots.
6. The property is 126 total acres.
7. The subject site is located in Chelan County, outside of an Urban Growth Area
8. The Comprehensive Plan designation and zoning for the subject property is Rural Residential/Resource—1 Dwelling Unit per 20 Acres (RR20).
9. The current use of the property is an agriculture and wildlife area support by a public agency.
10. Permits issued to the property include:
  - 10.1 FM 2019-003—demolition permit issued by Chelan County Fire Marshal on January 31, 2019
11. The property to the north of the subject property is a wildlife area and is zoned Rural Residential/Resource—1 Dwelling Unit per 20 Acres (RR20).
12. The property to the south of the subject property is a wildlife area and is zoned Rural Residential/Resource—1 Dwelling Unit per 20 Acres (RR20).
13. The property to the east of the subject property is in agricultural use and is zoned Rural Residential/Resource—1 Dwelling Unit per 20 Acres (RR20).

14. The property to west of the subject property is a wildlife area and is zoned Rural Residential/Resource—1 Dwelling Unit per 20 Acres (RR20).
15. According to the Washington State Department of Fish and Wildlife, Priority Habitat and Species Maps, the subject site is associated with protected species, including bighorn sheep, mule deer, Lewis woodpecker, and riparian zones. Therefore, the project is subject to the requirements of CCC, Chapter 11.78.
16. According to the Federal Emergency Management Agency, FIRM panel # 5300150400B, there is no floodplain on the subject parcel. CCC, Chapters 11.84 and 3.20 do not apply to the project.
17. The County GIS data map shows known geologically hazardous conditions on the subject site. Therefore CCC, Chapter 11.86 Geologically Hazardous Areas Overlay District, does apply to the project. A geological site assessment will be required with building permit submittal.
18. Swakane Creek runs through the property. A recent stream typing designated the stream as a non-fish bearing stream which reduces the riparian buffer to 50 feet. Although the building will be outside of the 50 foot buffer, there will still be a portion of the parking area within this 50 foot buffer.
19. According to the National Wetlands Inventory (NWI) Map, prepared by the US Department of Fish and Wildlife Services, the subject site does not contain wetlands.
20. There are no known cultural resources on the subject property. Pursuant to CCSMP Section 27, developers shall notify local governments of any possible archaeological materials uncovered during excavation.
21. Construction is to begin upon receipt of all permits with the work being completed by summer 2019.
22. The property is intersected by Swakane Canyon Road, a county roadway.
23. There will be noise from equipment during construction. Compliance with CCC, Chapter 7.35, Noise Control is required.
24. The structure will be larger in size than the demolished storage building. However, due to the size of the parcel, visual impacts are to be minimal to none from neighboring parcels.
25. The Notice of Application was referred to surrounding property owners within 300 feet (excluding 60 feet of right of way), jurisdictional agencies and departments of the County. These agencies and surrounding property owners were notified on March 12, 2019, with comments due March 26, 2019. Agency comments are considered in the staff report and, when appropriate, Conditions of Approval. The following is a list of Agencies who received notice and did not respond:
  - 25.1 Chelan County Building Department
  - 25.2 WA Dept. of Natural Resources
  - 25.3 WA Dept. of Ecology
  - 25.4 WA Dept. of Fish and Wildlife
  - 25.5 US Fish and Wildlife
  - 25.6 US Army Corps of Engineers
  - 25.7 WA Dept. of Archaeology and Historic Preservation
  - 25.8 Yakama Nation
  - 25.9 Confederated Tribes of the Colville Reservation

25.10 Chelan County Natural Resources

26. No public comments were received.
27. Application materials were submitted on January 28, 2019.
28. A Determination of Completeness was issued on March 6, 2019.
29. The Notice of Application was issued on March 12, 2019.
30. The Notice of Public Hearing was provided on April 5, 2019.
31. Pursuant to WAC 197-11-800(6)(a) and (e), land use decisions for exempt projects and the granting of a variance based on special circumstances, not including economic hardship, applicable to the subject property, such as size, shape, topography, location or surroundings and not resulting in any change in land use or density, are categorically exempt from the environmental review process.
32. The Comprehensive Plan was reviewed. Specifically, the goals and policies related to the Rural Residential/Resource 20 (RR20) Comprehensive Plan designation.
33. The Hearing Examiner finds that the project, as conditioned, is not consistent with the Comprehensive Plan.
34. The project is consistent with CCC Section 11.95.030 (1)(A) in the following respects:
  - 34.1 The applicant is requesting to construct a parking lot to serve a storage building which will replace a timeworn storage building which has since been demolished.
  - 34.2 The proposed structure is to store agricultural equipment that is used to maintain and support the agriculture and wildlife area. Per CCC Chapter 11.04, agricultural structures are a permitted use in the RR20 zoning district.
  - 34.3 The variance does not grant special privilege.
35. The project is not consistent with CCC Section 11.95.030 (1)(B) in the following respects:
  - 35.1 The parcel does contain multiple critical areas including geologically hazardous areas and riparian zones. The property has Swakane Creek running through it with the required 50 ft. buffer and steep slopes (geologically hazardous area) north of the road, which limits the buildable area of the site.
  - 35.2 However, the subject site is approximately 126 acres. Based on the GIS contours maps, the property terraces down from the steep upland slopes towards the creek, creating natural benches that could potentially be built on.
  - 35.3 The plight of the applicant is not due to the steep topography. The Hearing Examiner finds that there are other potential areas for development that could meet the required riparian buffer setbacks.
36. The project is not consistent with CCC Section 11.95.030 (1)(C) in the following respects:
  - 36.1 The lots were legally created in 1908 via the Plat of Swakane Valley Orchards. The subdivision was created years prior to critical areas regulations and the required riparian setback. As stated above, the claimed hardship is due to the steep topography and the proximity of the building site in relation to the OHWM of Swakane Creek.
  - 36.2 The hardship is the result of the applicant or owner's actions in their desire to replace the building in the proposed location, which requires the parking area to be in the riparian buffer.
37. The project is consistent with CCC Section 11.95.030 (1)(D) in the following respects:

- 37.1 The proposal is for construction of a storage building on publically owned property for private public agency use.
- 37.2 The existing storage building has been demolished as submitted pictures demonstrate. The footprint of the previous storage building is proposed to be filled and graded to match the existing grade.
- 37.3 Chelan County Comprehensive Plan, Policy LU 4.2 aims to promote the use of land preserves and conservation areas to protect important natural area from inappropriate development. The rationale is that natural resource conservation areas are important for preservation of natural features.
- 37.4 The proposed structure is to be placed on an existing gravel parking area. No new disturbance is anticipated as the areas may be used as travel corridors for wildlife. No removal of vegetation is proposed with the new construction.
- 37.5 The proposal will not be materially detrimental to the public welfare and safety or injurious to property in the neighborhood. Furthermore, the proposed development is consistent with Chelan County Comprehensive Plan, which allows for nature preserving activities.
- 38. The project is not consistent with CCC Section 11.95.030 (1)(e) in the following respects:
  - 38.1 The hardship relates to the required riparian setback. The building will be located outside of the required riparian setback. However, the proposed parking area will infringe upon this setback area. The Applicant states that while there is certainly room on the property to place this storage building and parking area outside of the riparian setback, the design of the building, with the doors opening into the building, require that it be located so that the access point is on the riparian side of the building. Making the access point on the non-riparian portion of the building can be done but this is not the Applicant's desired configuration on the property.
  - 38.2 As previously stated, the location outside of the riparian setback may not be the ideal placement for the new parking, but due to the size of the property, there is potential for other parking areas outside of the required 50 ft. setback.
- 39. The project is consistent with CCC Section 11.78.230 (2)(A) in the following respects:
  - 39.1 For the proposed project, no work is proposed in water or below the OWHM. Erosion could occur as a result of grading the building site and the excavation/demolition activities. Best Management Practices, such as straw wattles and silt fencing, is proposed to be used as necessary.
  - 39.2 The Applicant has, within the Applicants discretion, the ability to determine the location of this storage site and parking area on the Applicants 126 acres. The Hearing Examiner agrees that there are constraints with the development of this property, including topography. However, the Applicant has not demonstrated that they cannot reasonably use this property unless the variance is granted.
- 40. The project is not consistent with CCC Section 11.78.230 (2)(B) in the following respects:
  - 40.1 The Hearing Examiner agrees that the construction of the parking area is a reasonable use. However, the Applicant has failed to demonstrate that no other reasonable use with less impact is possible.
- 41. The project is consistent with CCC Section 11.78.230 (2)(C) in the following respects:

- 41.1 Based on the CCC definition of buffer, this portion of land is designated to remain permanently vegetated in an undisturbed and natural condition to protect adjacent aquatic site from impacts.
- 41.2 The location of the proposed parking area within the riparian buffer has been historically used for equipment and machinery storage. Although this area has been previously used for the proposed use, it would still be considered a nonconforming use. Pursuant to CCC 11.95.030(3)(A), a variance should not be granted based upon precedent established by nonconforming circumstances.
- 41.3 However, Swakane Creek has recently been classified as non-fish bearing therefore the parking area would not be expected to have impact on fish habitat.
- 42. The project is not consistent with CCC Section 11.95.030 (3)(A) in the following respects:
  - 42.1 The variance request is based on the historic location of equipment storage and parking within the Swakane Creek riparian buffer.
  - 42.2 The variance request is based on nonconforming circumstances.
- 43. The project is not consistent with CCC Section 11.95.030 (3)(B) in the following respects:
  - 43.1 The request is based upon the chosen location which is in proximity to the existing storage building footprint and the previously disturbed location for ease of construction as well as the cost efficiency to stay within budget.
  - 43.2 The variance request is partially based upon lack of reasonable economic return.
- 44. The project is not consistent with CCC Section 11.95.030 (3)(C) in the following respects:
  - 44.1 The property was acquired by Washington State Dept. of Game in 1967. It is unknown whether the property conditions were existing at the time of ownership. Based on the information regarding the condition of the demolished storage building, it is presumed that the structure was present or constructed at that time.
- 45. The project is consistent with CCC Section 11.95.030 (3)(D) in the following respects:
  - 45.1 The proposed variance does not change the permitted land uses.
  - 45.2 This does not apply.
- 46. The project is consistent with CCC Section 11.95.030 (3)(E) in the following respects:
  - 46.1 The proposed variance does not affect density.
  - 46.2 This does not apply.
- 47. Based on the review of the application, the Hearing Examiner agrees that the equipment and machinery on site do need a covered storage area. However, based on the size of the parcel and the distance from the OHWM of Swakane Creek to the access road, there are other areas that would be better suited for the storage of equipment and machinery. The Hearing Examiner does not disagree that the topography is sloped, but there are natural benches that could be excavated, outside of the riparian buffer, that could support the proposed structure. Additionally, the Applicant has not demonstrated that the new storage building configuration couldn't be altered to allow access from outside of the riparian buffer.
- 48. A basis of a variance should not be granted on a lack of economic return of a project or that a precedent has been established for an illegal or nonconforming circumstance. Protective riparian



buffers, historically used or not, should not be used for storage of potential contaminants that could cause negative effects to the habitat area.

49. Within CCC, Chapter 11.78, there are tools that allow riparian buffer reduction (CCC, Section 11.78.130; CCC, Section 11.78.140; CCC, Section 11.78.090). These tools require mitigation planting to offset the impact to the buffer. Staff is recommending a Condition of Approval that mitigation planting shall be submitted with building permit application.
50. An open record public hearing after legal notice was provided was held on June 5, 2019.
51. The File of Record, Chelan County Department of Community Development Staff Report, and exhibits were received, admitted into the record and considered by the Hearing Examiner.
52. Appearing and testifying on behalf of the applicant was Anna Sampler. Ms. Sampler testified that she was an agent authorized to appear and speak on behalf of the property owner. Ms. Sampler testified that new stream typing had been completed which changed Swakane Creek to a non-fish bearing stream which allowed the buffer to be reduced to 50 feet. The proposed graveled parking area is within this 50 foot buffer. She described this parking area as the "best location" but did not discuss any alternative locations. She stated that the parking area is actually an access ramp into the proposed new storage building. She stated that the proposed storage building could not be redesigned so that the access to the storage building could be from an area outside of the riparian buffer because of the additional excavation and other ground disturbance on the property.
53. No member of the public testified at this hearing.
54. The Chelan County Hearing Examiner considered all evidence within the record in rendering this decision.
55. Any Conclusion of Law that is more correctly a Finding of Fact is incorporated herein as such by this reference.

### **CONCLUSIONS OF LAW**

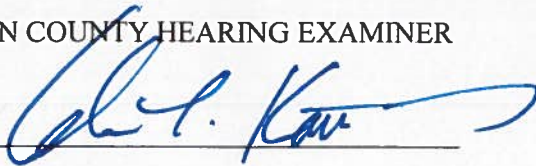
1. The Hearing Examiner has authority to render this Decision.
2. Referral agency comments were received and considered in the review of this proposal.
3. The site of the subject proposal is in the Chelan County Comprehensive Plan Rural / Residential 2.5 land use designation. As described, the proposal is not consistent with the Chelan County Comprehensive Plan.
4. The subject proposal is not consistent with the Chelan County Code, Title 11.
5. Any Finding of Fact that is more correctly a Conclusion of Law is incorporated herein as such by this reference.

### **DECISION**

Based upon the above noted Findings and Fact and Conclusions, RipV 2019-002, is hereby **DENIED**.

Denied this 12<sup>th</sup> day of June, 2019.

CHELAN COUNTY HEARING EXAMINER



Andrew L. Kottkamp

**Anyone aggrieved by this decision (for the riparian variance) has twenty-one days from the issuance of this decision to file an appeal with the Chelan County Superior Court as provided for under Judicial Review of Land Use Decisions, RCW 36.70C.040(3).**

**Chelan County Code Section 1.61.130 provides that any aggrieved party or agency may make a written request for reconsideration by the Hearing Examiner within ten (10) days of the filing of the written record of decision. The request for reconsideration shall be submitted to the Community Development Department. Reconsideration of the decision is wholly within the discretion of the Hearing Examiner. If the Hearing Examiner chooses to reconsider, the Hearing Examiner may take such further action deemed proper and may render revised decision within five (5) days after the date of filing of the request for reconsideration. A request for reconsideration is not a prerequisite to filing an appeal under Section 1.61.160.**

The complete case file, including findings, conclusions, and conditions of approval (if any) is available for inspection during the open office hours at Chelan County Department of Community Development. Their address is 316 Washington Street, Suite 301, Wenatchee, WA 98801. Their telephone number is (509) 667-6225.