

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF )

VAR 2019-003 )

Sexauer )

RECEIVED

JUN 13 2019

CHELAN COUNTY  
COMMUNITY DEVELOPMENT

FINDINGS OF FACT,  
CONCLUSIONS, DECISION  
AND CONDITIONS OF  
APPROVAL

THIS MATTER, having come on before 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, Decision and Conditions of Approval as follows:

**FINDINGS OF FACT**

1. This is an application requesting a variance to reduce 100 foot setbacks from commercial agriculture zoning to 55 ft. in order to create a building envelope for a single family residence.
2. The Applicants and owners are Eric & Tonie Sexauer, 14794 Bear Creek Road NE, Woodinville, WA 98077.
3. The agent is Grette Associates LLC, Attn: Anne Hessburg, 151 South Worthen Street, Suite 101 Wenatchee, WA 98801.
4. The project location is 11350 US Highway 2, Leavenworth, WA 98826.
5. The parcel number of the subject property is 24-18-07-240-250.
6. The legal description of the property is a portion of Gov. Lot 10 of S 7, T 24 N, R 18 EWM and is 2.11 acres.
7. The proposed development is not within an Urban Growth Area.
8. The Comprehensive Plan designation is Rural Residential/Resource—1 Dwelling Unit Per 5 Acres (RR5).
9. The zoning designation is Rural Residential/Resource—1 Dwelling Unit Per 5 Acres (RR5).
10. The property is currently vacant.
11. The Wenatchee River borders the northern boundary of the property and US Highway 2 borders the southern boundary. Portions of the property steeply slopes down to the river. The location that is being proposed as the building envelope levels out and is flat with a minimal grade. The property is heavily wooded and is currently vacant of structures.
12. The property to the north is the Wenatchee River and orchard and is zoned Commercial Agricultural (AC).

13. The property to the south is US Hwy 2 and residential and is zoned Rural Residential/Resource 5 (RR5).
14. The property to the east is orchard and is zoned Commercial Agricultural (AC).
15. The property to the west is in residential use and is zoned Rural Residential/Resource 5 (RR5).
16. Pursuant to the Washington State Department of Fish and Wildlife Priority Habitat and Species Maps, the subject property does contain identified riparian zones. Therefore, the provision of Chelan County Code Chapter 11.78, Fish and Wildlife Habitat Conservation Areas Overlay District do apply.
17. Pursuant to the Department of Natural Resource stream typing map, no stream is present on the subject site. Therefore, the provision of Chelan County Code Chapter 11.78, Fish and Wildlife Habitat Conservation Areas Overlay District do not apply.
18. The subject property is within the jurisdiction of the Chelan County Shoreline Master Program (CCSMP). The subject property has a shoreline environmental designation of 'urban' on the Wenatchee River, a shoreline of statewide significance. Developments landward of the ordinary high water mark are required to be placed behind the common line setback.
  - 18.1 The required setback for the 'urban' designation is 75 feet from the OHWM of the Wenatchee River.
  - 18.2 The proposed building envelope is 152' landward of the OHWM of the Wenatchee River. Therefore, the setback provisions of the CCC Shoreline Master Program have been met.
19. Pursuant to the Federal Emergency Management Agency, panel # 5300150800A of the FIRM maps, there is no floodplain on the subject property. Therefore, the provisions of Chelan County Code Chapters 11.84 Frequently Flooded Areas Overlay District and CCC 3.20 Flood Hazard Development do not apply.
20. This property is not located within a wellhead protection area.
21. Pursuant to Chelan County Code Chapter 11.86, the subject site does contain geological hazards for erosion hazards. Therefore, the provisions of Chelan County Code Chapter 11.86 Geologically Hazardous Areas Overlay District do apply. A geologic site assessment will be required at the time of building permit application.
22. Pursuant to the National Wetlands Inventory Map prepared by the US Department of Fish and Wildlife Services, the subject property does not contain a wetland area associated with this property. Therefore, the provisions of Chelan County Code Chapter 11.80 Wetland Areas Overlay District do not apply.
23. Pursuant to an email letter from the Washington Department of Archaeology and Historic Preservation (DAHP) dated May 16, 2019, a cultural resource survey is not required for this property. DAHP also recommended consultation with the concerned Tribes' cultural committees and staff regarding cultural resource issues.
24. Construction would begin upon receipt of a building permit.
25. The subject property is accessed from US Hwy 2.
26. Water will be provided by a single private well.
27. Power is provided by Chelan County PUD.

28. Sanitation will be provided by an on-site septic proposed with construction of residence.
29. The property is located within Fire District #3
30. The noise will be similar to other residential and agricultural uses in the area.
31. A single family residence will not be out of character for the surrounding area. Due to the steep slope of the property, visual impacts would be from the water looking land ward and by the surrounding property owners to the east and west.
32. 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 22, 2019 with comments due April 5, 2019. Agency comments were considered by the Hearing Examiner. The following agencies received notice for comments:
  - 32.1 Chelan County Building and Fire Safety responded on April 1, 2019.
  - 32.2 Chelan-Douglas Health District responded on April 2, 2019.
  - 32.3 Chelan County Public Works responded on April 4, 2019.
33. The following agencies were notified but did not respond:
  - 33.1 Chelan County Assessors
  - 33.2 Chelan County PUD
  - 33.3 WA State Dept. of Natural Resources
  - 33.4 WA State Dept. of Ecology
  - 33.5 WA State Dept. of Fish and Wildlife
34. One public comment was received on April 2, 2019 from the law firm of Ogden Murphy Wallace PLLC on behalf of Rudy Prey, Jr., the owner of the property directly to the east of the proposed variance. In this comment, the law firm outlines their client's objection to the proposed variance and interpretations of the Chelan County zoning and variance code that a variance is not appropriate in this situation.
35. Pursuant to WAC 197-11-800(6) (b), variance requests that do not result in an increase in density are categorically exempt from the environmental review process.
36. The application materials were submitted on February 27, 2019.
37. A Determination of Completeness was issued on March 03, 2019.
38. The Notice of Application was published on March 22, 2019.
39. The Notice of Public Hearing was provided May 24, 2019.
40. The Comprehensive Plan has been reviewed. Specifically, the goals and policies related to the Commercial Agricultural (AC) and Rural Residential/Resource 5 (RR5) zoning districts for consistency with the proposed project which permits residential uses. The Hearing Examiner finds that the project, as conditioned, is consistent with the Comprehensive Plan.
41. The project is consistent with Chelan County Code (CCC) Section 11.04 in the following respects:

- 41.1 The proposed development is associated with the Rural Residential/Resource—1 Dwelling Unit per 5 Acres (RR5) zoning district which permits single family dwellings and accessory structures as permitted uses.
- 41.2 The future proposed use is consistent with the code.
- 42. The project is consistent with Chelan County Code (CCC) Section 11.30.020(6)(C) in the following respects:
  - 42.1 The applicant is requesting to reduce the required 100 foot setbacks from commercial agriculture (AC zoning) in order to construct a single family residence. The east property line (side) is where the 100 foot agriculture setbacks from the neighboring parcel exists. The property owners to the east would not sign a waiver to reduce the 100 foot setbacks from agriculture.
  - 42.2 The applicant has applied for a zoning variance to reduce the required setbacks in order to create a building envelope to construct a single family residence.
- 43. The Chelan County Code requires that all five criteria set forth in CCC 11.95.030(1)(A)-(E) be proven by the Applicant in order for a variance to be approved.
- 44. The project is consistent with CCC Section 11.95.030(1)(A) in the following respects:
  - 44.1 The 100 foot setback from commercial agriculture (AC) zoning only applies to residential structures. The applicant is requesting to reduce the required 100 foot setback to 55 feet in order to construct a single family residence. The parcel to the south (Phipps) has an existing single family residence less than 100 feet from AC zoning. However, this residence was constructed before the new zoning code was enacted in 2000.
  - 44.2 This variance will not constitute a special privilege as property owners within the same area have residences within AC zoning buffer areas.
- 45. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(1)(B) in the following respects:
  - 45.1 The building area of the lot is severely restricted due to the steep topography of the parcel, and the unique lot design along the highway. The parcel has an average slope of 29.5% and minimal level grade on which to build. A front yard slope reduction has already been granted to reduce the front yard setback by 10 feet. The application of the 100 ft agriculture setback further restricts the buildable area.
  - 45.2 The proposed single-story building would be located upon an existing bench above the water. This is the only significant area of flat ground located on the property.
  - 45.3 Additionally, the Rural Element of the Chelan County Comprehensive Plan promotes the use of natural topographic features for building, stating in Policy RE 2.7: Protect local environmental and visual resources in hillside areas by encouraging development to locate on existing benches and terraces and by applying appropriate development standards and performance criteria.
  - 45.4 The plight of the applicant is due to the steep topography throughout subject property together with the unique lot shape which creates an obstacle for building. Furthermore, the restrictive setbacks from agriculture make the already restricted building envelope smaller. The design of the proposed structure is consistent with the Comprehensive Plan.

46. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(1)(C) in the following respects:
- 46.1 Pursuant to CCC 11.30.020(6)(C), additional agricultural setbacks may be waived if a written waiver is signed by both the property owner and the adjacent property owners. However, upon learning of the restrictive setbacks, the applicant approached the neighboring AC zoned property owner (Prey) who refused to sign the waiver.
  - 46.2 Pursuant to Statutory Warranty Deed recorded July, 5 2018 (AFN: 2480686), the current boundaries of the lot were legally created in 1942. Therefore, due to the property being created prior to September 9, 1999, the provision in CCC 11.30.020(6)(B) allowing the administrator to modify the required setback from land in agricultural use up to twenty percent, does apply.
  - 46.3 The applicant's hardship was not a result of the applicant's actions as the lot, in its current configuration, existed prior to the current zoning. However, the Applicant admits that they can build a 500 sq foot home on the property but that this home is too small for their purposes. The Hearing Examiner agrees that, in this particular circumstance, a 500 sq foot home is very small and is not a reasonable use of the property.
47. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(1)(D) in the following respects:
- 47.1 The authorization of this variance would not be materially detrimental to the purposes of Title 11. The authorization of this variance would promote the goals and objectives of Title 11 and the Comprehensive Plan. Policies RE 2.3 and 2.7 of Goal 2 of the Rural Element found within the Comprehensive Plan addresses development in agricultural resource lands.
    - 47.1.1 RE 2.3: Ensure that rural development (residential, commercial and industrial) near designated resource lands occurs in a manner that minimizes potential conflicts and reduces conversion of farm and forest land to non-resource uses. Develop mitigating measures to provide adequate protection against potential conflicts.
    - 47.1.2 RE 2.7: Protect local environmental and visual resources in hillside areas by encouraging development to locate on existing benches and terraces and by applying appropriate development standards and performance criteria.
  - 47.2 Additionally, per the Comprehensive Plan, the uses that are found appropriate in RR5 zones include: *open space; residential; agriculture; and forestry.*
  - 47.3 The authorization of this reduced setback variance would promote residential development which per Title 11 of Chelan County Code and the Comprehensive Plan, is an appropriate use in RR5 zoning. The authorization of this variance would not be injurious to property in the same district or neighborhood in which the property is located. This application is requesting approval of the preservation of a property right the same as is enjoyed by other properties in the neighborhood. The authorization of this variance would avoid injury to the applicant's property rather than cause injury to other property in the neighborhood. The authorization of this variance would not be detrimental to the objectives of the comprehensive plan.
48. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(1)(E) in the following respects:



- 48.1 The application of the agricultural setback of 100 ft to this property further restricts an already restricted building envelope.
- 48.2 The hardship is a result of the application of the Chelan County Code to the subject property based on site specific conditions, which does not factor in protecting farming practices.
- 49. CCC 11.95.030 provided that the variance "should not" be based upon certain factors. The Hearing Examiner finds that the use of the term "should not" provides some discretion to the Hearing Examiner to allow a variance even though one or more of these factors may exist. However, the Hearing Examiner further finds that this discretion should be used only in the rarest of cases, such as exists in this matter.
- 50. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(3)(A) in the following respects:
  - 50.1 The variance request is based on topography and site specific conditions.
  - 50.2 The variance request is not based on illegal or nonconforming circumstances.
- 51. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(3)(B) in the following respects:
  - 51.1 The variance is based upon topography and unique shape of the lot in conjunction with the 100 ft. agricultural setback. With a twenty percent reduction of the commercial agriculture setback through an administrative modification pursuant to CCC 11.30.020(6)(B)(i), based upon the site plan provided, a 1,505 sq. ft. building would potentially be viable.
  - 51.2 The variance is not based upon the lack of reasonable economic return. The Hearing Examiner does agree that the topography and unique design of the lot is restrictive of where structures may be placed on the lot however, based on the site plan provided. A smaller structure could potentially be built without the variance but such a structure would be of a minimal size which is not reasonable under the specific circumstances of this application.
- 52. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(3)(C) in the following respects:
  - 52.1 Pursuant to Statutory Warranty Deed recorded July, 5 2018 (AFN: 2480686), the current boundaries of the lot were legally created in 1942. I should also note the current zoning code was enacted in 2000. Both of these events happened well before the applicant acquired the property. Therefore, the conditions creating the claimed hardship that being the topography, the lot configuration and the agricultural setback, did exist at the time the Applicant acquired the property. The language in the Code indicates that a variance should not be based upon a condition that existed at the time the Applicant acquired the property. The Hearing Examiner is utilizing his discretion in this unique case to find that this factor does not outright prohibit the granting of the requested variance.
  - 52.2 The lot in its current configuration existed prior to the adoption of zoning code by the County.

53. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(3)(D) in the following respects:
  - 53.1 The proposal would not result in any changes to the requirements of the RR5 zone or change density.
  - 53.2 This criterion does not apply.
54. The project is consistent with Chelan County Code (CCC) Chapter 11.95.030(3)(E) in the following respects:
  - 54.1 The proposed variance does not affect density.
  - 54.2 This criterion does not apply.
55. An open record public hearing was held on June 5, 2019.
56. The staff report, application materials, agency comments and the entire file of record were admitted into the record.
57. Also admitted into the record were the following exhibits:
  - 57.1 Exhibit 1: Email from Eric Sexauer to Anne Hessburg dated April 18, 2019.
  - 57.2 Exhibit 2: Updated Site Plan.
  - 57.3 Exhibit 3: Email communication from Eric Sexauer to Anne Hessburg regarding overhead lines.
  - 57.4 Exhibit 4: Four photographs of this site.
  - 57.5 Exhibit 5: Email from Dennis Wardlaw to Scott Kugel.
  - 57.6 Exhibit 6: Ten aerial photographs of the property.
  - 57.7 Exhibit 7: Chelan County Assessor information regarding property owned by Kenneth Phipps.
  - 57.8 Exhibit 8: June 5, 2019 letter from Ken and Joyce Phipps to Chelan County Department of Community Development.
  - 57.9 Exhibit 9: Copy of Chelan County Code 11.93.030(1)-(3).
  - 57.10 Exhibit 10: Hearing notes from Anne Hessburg.
58. Appearing and testifying on behalf of the applicant was Anne Hessburg and Eric Sexauer. Ms. Hessburg submitted testimony consistent with her Exhibit 10. Mr. Sexauer testified that he only became aware of the setbacks after he purchased the property and that it would be very expensive to build on the lot without the variance.
  - 58.1 Also testifying on behalf of the Applicant was Todd Smith. Mr. Smith stated that he was the Applicants architect. Mr. Smith testified that except for the limited area where they intended to build the home, the slopes on the property were between 40% and 100%. He testified that the building envelope is approximately 1,500 square feet and that it is not possible to build a 2 story home because of the overhead lines. He stated that with compliance of the agricultural setback, they could build a home of 500 square feet. However, Ms. Hessburg commented during this portion of his testimony that such a house is simply too small for the Applicant's needs.

59. Testifying from the public were the following individuals:
- 59.1 Julie Norton. Ms. Norton is an attorney with Ogden Murphy Wallace and represents Rudy Prey. Mr. Prey is the owner of agriculturally zoned property adjacent to the Applicants property. Ms. Norton's comments were consistent with her written comments submitted to the record prior to the hearing. She argued that the facts do not support the granting of a variance because the Applicants cannot comply with all of the variance criteria set forth within the Chelan County Code. Mr. Prey also testified that in his experience spray drifts can go down in elevation as well as up in elevation. He further testified that the conifer trees the Applicant claims are a buffer or screen from the sprays, is actually not a perfect screen.
  - 59.2 Joyce Phipps and Kenneth Phipps. Mr. and Mrs. Phipps generally objected to the Applicant using their home as an example of a home that was built within the 100 foot agricultural setback. They stated that their home was built long before the new zoning code was adopted in 2000. They objected to using his house as an example of a prior home being built within the agricultural setback.
  - 59.3 Randy Sexauer. Mr. Sexauer is a former member of the Chelan County Planning Commission. He testified that when creating the 100 foot agricultural setback, the Planning Commission did not consider steep sloped property adjacent to agriculturally zoned property.
60. The Chelan County Hearing Examiner considered all evidence within the record in rendering this decision.
61. 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 been granted authority to render this Decision.
- 2. As conditioned, the proposed use is consistent with the intent, purposes and regulations of the Chelan County Code and Comprehensive Plan.
- 3. As conditioned, the proposal will conform to the standards specified in the Chelan County Code.
- 4. As conditioned, the use will comply with all required performance standards as specified in the Chelan County Code.
- 5. As conditioned, the proposed use will not be contrary to the intent or purposes and regulations of either the Chelan County Code or the Comprehensive Plan.
- 6. The use of the term "should not" in CCC 11.95.030(3) sets forth discretionary as opposed to mandatory criteria.
- 7. As conditioned, this proposal does comply with Comprehensive Plan, the Shoreline Master Program, the zoning code and other land use regulations, and SEPA.
- 8. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.



## DECISION

Based upon the above noted Findings and Fact and Conclusions of Law, request for variance, VAR 2019-003, Sexauer, is hereby **APPROVED**, subject to the conditions noted below.

## CONDITIONS OF APPROVAL

1. All conditions imposed by this decision shall be binding on the applicant, which includes the owner or owners of the properties, heirs, assigns, and successors.
2. The project shall be in compliance with the Chelan County Zoning Resolution, in addition to all other applicable local, state and federal regulations.
3. The project shall proceed in substantial compliance with the application of record and site plan date stamped February 27, 2019.
4. Pursuant to Chelan County Code Section 11.02.040, prior to commencement of construction, the applicant shall obtain all required and necessary building permits.
5. Pursuant to Chelan County Code Section 11.95.050, in any case where a variance is granted under the terms of this title, no building or other permit shall be issued until after the end of the appeal period allowed in Title 14 of this code. An appeal of the decision shall automatically stay the issuance of building or other permits until such appeal has been completed.
6. Pursuant to Chelan County Code Section 11.95.060, the granting of a variance and the conditions set forth runs with the land; compliance with conditions of the variance is the responsibility of the current owner of the property, whether that is the applicant or a successor.
7. Pursuant to Chelan County Code Section 11.95.080, a variance shall become void three years after approval if no substantial construction has taken place or such other time period as established by the Hearing Examiner.
8. Pursuant to Chelan County Code Section 11.95.090, action by the Hearing Examiner is final unless within twenty-one days of issuance of the decision, an appeal to the superior court is filed in accordance with the provisions contained in Chapter 14.12, Development Permit Procedures and Administration, Title 14 of this code.
9. Pursuant to Chelan County Code Section 11.86.020, a geologic site assessment shall be required at the time of building permit application
10. Pursuant to the Washington State Department of Fish and Wildlife Priority Habitat and Species Maps, the subject site contains riparian zones, a Class II wildlife habitat conservation area; therefore, the project development shall comply with Chelan County Code Chapter 11.78.
11. Pursuant to Chelan County Code Section 11.88.190, no construction activity shall be permitted within one thousand feet of an occupied residence between the hours of 8:00 p.m. to 6:00 a.m., Monday through Friday, and 8:00 p.m. to 7:00 a.m. on weekends.
12. Pursuant to RCW 27.53.020, if the applicant or his agents discover previously unknown historic or archaeological remains/artifacts while conducting the development activities authorized by this permit, the applicant/agent shall immediately stop work and notify the appropriate tribal and state

representatives and the Chelan County Department of Community Development of the finding for local, state and tribal coordination.

13. The Pursuant to RCW 27.53.060, the owner/developer/contractor shall contact the Confederated Tribes of the Colville Reservation and the Washington State Department of Archaeology and Historic Preservation prior to any ground disturbing activities to arrange for a Secretary of Interior-qualified archaeologist to be present on site. If any Native American grave sites or archaeological resources are discovered or excavated, work shall stop immediately.
14. For all easements, Chelan County assumes no liability whatsoever for the existence, status, location, nor nature of said easements.
15. Chelan County is not responsible for notification or enforcement of covenants or deed restrictions affecting use or title. Any permit issued does not acknowledge or recognize any covenants or deed restrictions or reservations that may burden or otherwise affect this property. Applicant/owner assumes all risks and liability for any claims and liabilities for covenants or deed restrictions or reservations.

Approved this 13<sup>th</sup> day of June, 2019.

CHELAN COUNTY HEARING EXAMINER



Andrew L. Kottkamp

**Anyone aggrieved by this decision has twenty-one (21) days from the issuance of this decision to file an appeal with Chelan County Superior Court, as provided for under the Judicial Review of Land Use Decisions, RCW 36.70C.040(3). The date of issuance is defined by RCW 36.70C.040(4)(a) as “(t)hree days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available” or if this section does not apply, then pursuant to RCW 36.70C.040(3)(c)” ..the date the decision is entered into the public record.” Anyone considering an appeal of this decision should seek legal advice.**

**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.