

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF

RIPV 20-002  
Tarbert

RECEIVED )  
SEP 18 2020 )  
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 September 16, 2020. The Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law, Decision and Conditions of Approval as follows:

**I. FINDINGS OF FACT**

1. This is an application for a Riparian Variance submitted to reduce the required riparian buffer setback for the construction of an accessory structure. The riparian variance request is to reduce the required 150 ft. buffer setback to 70 ft. from the ordinary high water mark (OHWM) of a fish-bearing (type F) stream.
2. The owner is Dennis Tarbert, 3750 Number 1 Canyon Rd., Wenatchee, WA 98801.
3. The project location is 3750 Number 1 Canyon Rd., Wenatchee, WA 98801.
4. The parcel number of the subject property is 22-19-01-440-100.
5. The legal description of the subject property is: SE ¼ of the SE ¼ of the SE ¼ of Section 1, Township 22N, Range 19 E.W.M.
6. The subject property is located outside of an Urban Growth Area.
7. The Comprehensive Plan designation is Rural Waterfront (RW).
8. The zoning designation is Rural Residential/Resource 5 (RR5).
9. The subject property is currently developed with a residence with an attached garage and a pole building. The following permits are on file with the County:
  - 9.1 BP940112 – Garage
  - 9.2 BP980030 – Addition to existing SFR via finished basemen.
10. The subject property is intersected by the subject F-typed stream and an access easement. The property is relatively flat near the existing development but has step slopes to the north of the easement and south of the existing structures.
11. The subject property is 10.75 acres according to Chelan County Assessor's records.

12. The property to the north is undeveloped and is zoned Rural Residential/Resource 5 (RR5).
13. The property to the south is undeveloped and is zoned Rural Residential/Resource 20 (RR20).
14. The property to the east is residential use and is zoned Rural Residential/Resource 2.5 (RR2.5).
15. The property to the west is undeveloped and zoned Rural Residential/Resource 20 (RR20).
16. The Aquifer Recharge form was completed with the variance application. Pursuant to Chelan County Code (CCC), Section 11.82.060(2)(A), residential dwelling units and their accessory uses are exempt from the aquifer recharge area regulations under this chapter.
17. The subject creek is not considered a shoreline of the state and the subject property is not located within shoreline jurisdiction. Therefore, the provisions of the CCSMP would not apply to the subject property.
18. According to the Washington State Department of Fish and Wildlife, Priority Habitat and Species Maps, the subject property contains mule deer habitat, a Class II Priority Habitat Species. Therefore, the provisions of CCC Chapter 11.78 as it relates to Class II habitat would apply. Pursuant to the Washington State Department of Natural Resources FPARS stream typing map and conducted stream typing by Chelan County Natural Resources dated March 25, 2020, the subject property is bisected by an F-typed stream. Therefore, the provisions of CCC Chapter 11.78 for riparian areas, would apply, except as amended per this application.
19. Based on WA Dept. of Ecology mapping system, the subject property does not contain wetlands nor are wetlands identified on adjacent properties. Therefore, the provisions of CCC Chapter 11.80 would not apply.
20. According to the Federal Emergency Management Agency, FIRM panel # 5300150625C, there are no indications of flooding on or near the subject property. Therefore, the provisions of CCC Chapter 11.84 and CCC Chapter 3.20 would not apply.
21. According to the Chelan County GIS mapping, the subject property is located within a geologically hazardous area for known erosion and landslide. Therefore, the provisions of CCC 11.86 would apply. A geological site assessment would be required with building permit application for the proposed accessory structure.
22. Pursuant to RCW 27.53.020, if the applicants or their 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.
23. Construction Phasing/Timing: Construction will begin upon issuance of all necessary permits and within the appropriate work window.
24. Access: The subject property is Number 1 Canyon Road, a county road, ends at the east property line of the subject property.

25. **Water:** The subject property would be provided water by a private well.
26. **Sanitation:** The subject property has an existing septic system.
27. **Power:** Chelan County PUD No. 1.
28. **Fire protection:** The property is located within Chelan County Fire District #1.
29. **Noise:** Noise from construction, typically associated with a single-family residence. Construction noise is regulated by CCC, Section 11.88.190, which states no construction activity shall be permitted within one thousand feet of an occupied residence between the hours of 10:00 p.m. to 7:00 a.m.
30. Due to the nature of the large property and the proposed location of the accessory building, visual impacts are expected to be minimal.
31. The Notice of Application was referred to surrounding property owners within 300' (excluding 60' of right-of-way), jurisdictional agencies and departments of the County. These agencies and surrounding property owners were notified on August 6, 2020, with comments due August 20, 2020. No public comments were received for the application. Agency comments are considered in the staff report and, when appropriate, associated recommended Conditions of Approval. The following is a list of Agencies who received notice and the date comments were received:
32. The following are agencies that were notified:

<b>Agencies Notified</b>	<b>Response Date</b>	<b>Nature of Comment</b>
Chelan County Fire Marshal	No Comment	
Chelan County Building Official	No Comment	
Chelan County PUD	August 10, 2020	Proposed building shall maintain clearance from PUD easement.
Chelan County Fire District No. 1	No Comment	
Wenatchee School District	No Comment	
WA Dept. of Archaeology and Historic Preservation	No Comment	
Yakama Nation	No Comment	
Confederated Tribes of Colville	August 6, 2020	Based on the proposal, an inadvertent discovery plan is requested.
WA Dept. of Ecology	August 19, 2020	Comments regarding ground water withdrawals and surface water diversions.
WA Dept. of Fish & Wildlife	No Comment	

33. No public comment letters were received.
34. 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.

35. The application materials were submitted on June 30, 2020.
36. A Determination of Completeness was issued on August 4, 2020.
37. The Notice of Application was provided on August 6, 2020.
38. The Notice of Public Hearing was provided on September 4, 2020.
39. The Comprehensive Plan has been reviewed for consistency with the goals and policies related to Rural Designations including the specific criteria for the Rural Residential/Resource 5 (RR5) zoning designation as it relates to rural residential development. Pursuant to the Chelan County Comprehensive Plan, page 8-9 of the Rural Element, states the purpose of the RR5 designation is to:

“Provide opportunities for small scale agricultural activities, and rural development consistent with the rural character and rural development provisions outlined in goals and policies of the comprehensive plan. These areas may provide opportunities for protecting sensitive environmental areas and open space typical of a rural setting... appropriate for these areas include: open space; residential; agriculture; and forestry. Additional uses may be considered with supplemental provisions. These provisions shall address performance standards, impacts to the surrounding area, and be consistent with the goals and policies of the comprehensive plan. Such uses may include: intensification of existing development.”
- 39.1 The Hearing Examiner finds that the proposed variance, as conditioned, would be consistent with the Chelan County Comprehensive Plan.
40. Chelan County Code 11.14.020: Standards for the RR5 Zoning District:
  - 40.1 Minimum Lot Size: 5 acres:
    - 40.1.1. The applicant is not requesting to modify the lot size.
    - 40.1.2. This requirement does not apply.
  - 40.2 Minimum Lot Width: 150 ft. at the front building line:
    - 40.2.1 The lot exceeds 150 ft. at the front building line.
    - 40.2.2 The lot complies with the required building width.
  - 40.3 Maximum Building Height: 35 ft.
    - 40.3.1 Building height would be calculated during building permit review.
    - 40.3.2 Building height would be determined during review of the building permit application. As conditioned, the proposed residence will not exceed 35 feet.
  - 40.4 Maximum Lot Coverage: Buildings and structures shall not occupy more than 35% of the lot area.
    - 40.4.1 According to Chelan County Assessor’s records, the property is 10.75 acres, this would allow for over 163,894 sq. ft. of lot coverage.
    - 40.4.2 Lot coverage would be reviewed at time of building permit application.
  - 40.5 Minimum Setback Distances: Front yard 25 ft. from the front property line or 55 ft. from the street centerline, whichever is greater; Side yard 5 ft. from side property line; Rear yard 20 ft. from rear property line.

- 40.5.1 Based on the site plan of record, the proposed accessory structure would meet the applicable zoning setbacks.
  - 40.5.2 As conditioned, the proposed accessory structure would meet the setbacks, except as modified by this application.
41. The project is consistent with CCC Section 11.95.030 Variance Evaluation Criteria in the following manner:
- 41.1 No variance shall be granted unless it can be shown that all of the following conditions exist:
    - 41.1.1 The variance is necessary for the preservation of a property right of the applicant substantially the same as is possessed by owners of other property in the same neighborhood or district and shall not constitute a grant of a special privilege.
    - 41.1.2 Based on imagery of the parcels located along the stream and Number 1 Canyon Road, there are many residences and accessory structures located within the 150 ft. riparian buffer.
    - 41.1.3 The applicant's project is similar to the residential development on the surrounding properties. The variance is necessary to preserve a right substantially the same as possessed by owners within the same area and would not grant special privilege.
  - 41.2 The plight of the applicant is due to unique circumstances such as topography, lot size or shape, or size of buildings, over which the applicant has no control.
    - 41.2.1 Although the parcel is listed as 10.75 acres, the portion north of the creek is steep, unusable hillside that includes seasonal drainage channels. Therefore, the portion south of the creek is the area that is more desirable for residential development. Additionally, a portion of the parcel south of the creek has steep slopes that include seasonal drainage ways that lead to the F-typed stream downhill. The proposed building area appears to be relatively flat with a minimal slope down to the creek.
    - 41.2.2 The variance request is based on the presence of critical areas that are located on and adjacent to the subject properties which the applicant has no control over in addition to the creation of the subject property.
  - 41.3 The hardship asserted by the applicant is not the result of the applicant's or the owner's action.
    - 41.3.1 The hardship asserted by the owners appears to not be of their own actions. The hardship stems from the application of Chelan County Title 11. This includes the location of the F-typed creek with its associated 150 ft. protective buffer. Based on Warranty Deed, recorded November 11, 1993, the property owners have owned the subject property since 1993, which pre-dates the adoption of the Chelan County Critical Areas Ordinance.
    - 41.3.2 The hardship of the 150 ft. buffer encumbering the entirety of the subject property is a result of the application of Title 11 and not of the owner's actions.
  - 41.4 The authorization of the variance shall not be materially detrimental to the public welfare and safety, to the purposes of this title, be injurious to property in the same district or

neighborhood in which the property is located, or be otherwise detrimental to the objectives of the comprehensive plan.

- 41.4.1 The proposal is to construct an accessory structure, specifically, a pole building for equipment storage. Accessory uses and structures are permitted in the RR5 zoning district as well as outlined in the Chelan County Comprehensive Plan.
- 41.4.2 In order to ensure the protection of the F-type stream, pursuant to CCC Section 11.78.090(3) all riparian buffers shall be temporarily fenced between the construction activity and the riparian buffer with a highly visible and durable protective barrier, such as filter fencing and straw bales, during construction to prevent access and protect the riparian buffer.
- 41.4.3 The proposal satisfies the objectives of the comprehensive plan for the RR5 zone and critical areas. The proposal is not anticipated to be materially detrimental to the public welfare and safety or injurious to property in the neighborhood.
- 41.5 The hardship asserted by the application results from the application of this title to the property.
  - 41.5.1 The hardship relates to the application of the protective F-typed stream buffer to the subject property. The application of the required setbacks of CCC Title 11 creates a small and challenging building envelope due to other topographical features on site.
  - 41.5.2 The hardship is a result of the application of CCC Title 11 to the subject property, which does not factor in historically created lots prior to the establishment of critical areas or zoning restrictions.

42. The granting of a variance should not:

- 42.1 Be substantially based upon precedent established by illegal or nonconforming circumstances.
  - 42.1.2 The variance request is based on the subject property's encumbrances due to the application of the Title 11 critical areas for riparian areas. The parcel was legally established pursuant to CCC Section 14.98.1090 definition of legal lot of record being as it was referenced in recorded deeds dating prior to October 17, 2000.
  - 42.1.3 The proposed variance is based on the application of the Chelan County critical areas ordinance of Title 11 as it relates to the associated riparian buffers.
- 42.2 Be substantially based upon lack of reasonable economic return or a claim that the existing/proposed structure is too small.
  - 42.2.1 The applicant indicates that the request is not based on economic return, but rather a reasonable use of the property in way similar to properties in the proximity.
  - 42.2.2 There is no claim of economic return. The reduced buffer would provide a building area for the proposed accessory structure.
- 42.3 Be based on the fact that the condition, for which the variance is requested, existed at the time the applicant acquired the property.

- 42.3.1 The owners acquired the property in 1993, which pre-dates the County's adoption of the Critical Areas Ordinance.
- 42.3.2 The lot encumbrances existed at the time the applicant acquired the property; however the lot was legally created as a residential lot prior to the county's adoption of zoning codes and critical areas regulations.
- 42.4 Result in a de facto zone reclassification.
  - 42.4.1 The proposed variance would not change the permitted land uses.
  - 42.4.2 This would not apply.
- 42.5 Be substantially for the purpose of circumventing density regulations.
  - 42.5.1 The proposed variance would not affect density.
  - 42.5.2 This would not apply.
- 43. Chelan County Code 11.78.230: Riparian Variance Provisions:
  - 43.1 In addition to the requirements of Chapter 11.95 of this title as amended, a variance shall not be granted unless it can be shown that all of the following conditions exist:
    - 43.1.1 Significant impacts to the fish and wildlife habitat functions as stated in Section 11.06.020 would be mitigated by the applicant by addressing with conditions of approval where practical.
    - 43.1.2 The area proposed for development has been historically cleared and does not provide much ecological function. The area near the stream that have greater ecological riparian function are not proposed to be impacted.
    - 43.1.3 The project, as conditioned, would not result in significant impacts to fish and wildlife habitat.
  - 43.2 No other reasonable use with less impact is possible.
    - 43.2.1 Although the subject property is fairly large in size, majority of the parcel would not be feasible for development as it would require more ground disturbance within the associated buffers. The area proposed for development is vacant of riparian vegetation and is relatively flat, ensuring minimal surface water run off would occur. Additionally, no riparian vegetation disturbance would result from the proposed development.
    - 43.2.2. Any other location on the site would require more ground disturbance up-slope from the creek and seasonal drainages. As conditioned, the proposed development would not be anticipated to pose a significant impact to the creek.
  - 43.3 Impacts to fish and wildlife habitat cannot be lessened through location or design changes to the proposed use.
    - 43.3.1 The Hearing Examiner anticipates the time where the highest potential of impact would occur is during the construction of the accessory structure. Pursuant to CCC Section 11.78.090, filter (or silt) fencing to protect against run off would be required during construction.
    - 43.3.2 The Hearing Examiner finds, as conditioned, the proposed development would have a minimal impact on fish and wildlife habitat.

44. The proposed variance to reduce the associated riparian buffer of the F-typed stream is not anticipated to constitute the granting of a special privilege as other properties in close proximity are developed residentially. Based on the application materials and as conditioned, the proposed development is not anticipated to result in adverse effects to the F-typed stream. The proposed development is to occur in an area that is relatively flat and free of any riparian vegetation, which in turn is anticipated to minimize the impact to the typed stream and would not result in a net loss of ecological function.
45. An open record public hearing was held on September 16, 2020.
46. The staff report, application materials, agency comments and the entire file of record were admitted into the record.
47. Dennis Tarbert, owner and applicant, appeared and testified that he had no objection to the proposed conditions of approval. In an email to staff on September 16, 2020, the applicant confirmed he is seeking a variance to reduce the riparian setback to 70 feet for the proposed new structure.
48. No member of the public appeared at this hearing.
49. The Chelan County Hearing Examiner considered all evidence within the record in rendering this decision.
50. Any Conclusion of Law that is more correctly a Finding of Fact is incorporated herein as such by this reference.

## **II. 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. As conditioned, this proposal does comply with Comprehensive Plan, the zoning code and other land use regulations, and SEPA.
7. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

## **III. DECISION**

Based upon the above noted Findings and Fact and Conclusions of Law, RIPV 20-002 is hereby **APPROVED**, subject to the conditions noted below.

## **IV. CONDITIONS OF APPROVAL**

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.



1. Pursuant to CCC 11.95.040, the construction shall be in substantial conformance with the site plan of record, dated June 30, 2020.
2. Pursuant to CCC Section 11.95.040 and the International Building Code, Section 105, the applicant shall obtain a building permit for the construction of the residence.
  - 2.1 At time of building permit, it shall be demonstrated that the proposed structure would maintain clearance from all Chelan County PUD easements.
3. Pursuant to CCC Chapter 11.86, a geologic site assessment is required. The applicant is required to comply with any recommendations identified within this report. The assessment shall be submitted to Chelan County Community Development with building permit submittal.
4. Pursuant to CCC Section 11.78.090(3), all riparian buffers shall be temporarily fenced between the construction activity and the riparian buffer with a highly visible and durable protective barrier, such as filter fencing and straw bales, during construction to prevent access and protect the riparian buffer. The administrator may waive this requirement if an alternative to fencing which achieves the same objective is proposed and approved.
5. Pursuant to CCC Section 11.88.190, no construction activity shall be permitted within 1,000 ft. of an occupied residence between the hours of 10 p.m. to 7 a.m.
6. 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.
7. Pursuant to CCC 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.
8. Pursuant to CCC Section 11.95.060, the granting of a variance and the conditions set forth runs with the land; compliance with the conditions of the variance is the responsibility of the current owner of the property, whether that is the applicant or a successor.
9. Pursuant to CCC Section 11.95.070, upon final action of the hearing examiner as set forth in the provisions of this chapter, the department of building/fire safety and planning shall not accept filing of an application for substantially the same matter within one year from the date of the final denial of the application.
10. Pursuant to CCC 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.

Approved this 16 day of September, 2020.

CHELAN COUNTY HEARING EXAMINER



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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.