

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF)	
)	
WV 20-003 / VAR 20-002 / VAR 20-003)	FINDINGS OF FACT,
WILLEMS)	CONCLUSIONS OF LAW,
)	CONDITIONS OF APPROVAL,
)	AND DECISION

THIS MATTER, having come on before the Chelan County Hearing Examiner on December 15, 2021, 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 wetland variance, a front yard setback variance, and an agricultural setback variance was submitted to create a building envelope for the future construction of a single-family residence and detached garage on the subject parcel. The subject property is intersected by Brender Creek and an unnamed tributary, both F-typed streams. The property also contains a Category I slope wetland, which holds a protective buffer of 200 ft. The applicant is requesting a variance to reduce the wetland buffer from 200 ft. to a minimum width of 5 ft. in order to accommodate future construction of a residence and detached garage. As part of the proposed project, the applicant included a Revised Habitat Management and Mitigation Plan for the installation of roughly 2,898 sf of native mitigation plantings within both the buffer and wetland areas that are currently degraded due to historic human influences. The applicant is also requesting a reduction to the front yard setback from 55 ft. to 35 ft. from the centerline of Brender Canyon Road, and a reduction of the agricultural setbacks from 100 ft. to 24 ft. on the western property boundary and from 100 ft. to 65 ft. on the northern property boundary in order to construct the proposed residence and detached garage as far from the documented Category I wetland as possible.
2. The applicants and owners are James and Siegrid Willems, 951 Willems Road, Cashmere, WA 98815.
3. The agent is Grette Associates, LLC, Attn: Ryan Walker, 151 South Worthen Street, Suite 101, Wenatchee, WA 98801. Attorneys for Applicant are Speidel and Bentsen, Wenatchee, WA.
4. The project location is 7925 Brender Canyon Road, Cashmere, WA 98815.
5. The parcel number of the subject property is 23-18-02-440-055.
6. The legal description of the subject property is Parcel A of BLA 2005-045A, recorded on January 3, 2006 under AFN: 2217911. The subject property is 2.50 acres.
7. The project location is outside of an Urban Growth Area.
8. The Comprehensive Plan designation is Commercial Agricultural Lands (AC).

9. The subject property is currently developed with an old packing shed that was built back in 1920 that currently is within the right-of-way of Brender Canyon Road, and a domestic well, power, and below-ground septic tanks. A building permit (BP-170201) for a single-family residence and detached garage was originally approved on May 22, 2017. However, the building permit was revoked when it was discovered that wetlands were present on the property and had been disturbed by the applicant. No other development is present on the subject property, although much of the wetland buffer has been historically mowed and maintained as a yard surrounding the historic packing shed.
10. The subject property is an undeveloped lot with a historic packing shed on the northeastern corner. An unnamed tributary, an F-typed stream flows across the property from the west into Brender Creek, also an F-typed stream flows northward across the southern portion of the property. Approximately 2/3 of the subject property is designated as a Category I slope wetland and is vegetated with riparian species.
11. The property to the north is Brender Canyon Road and zoned Commercial Agricultural Lands (AC).
12. The property to the south is zoned Commercial Agricultural Lands (AC).
13. The property to the east is zoned Commercial Agricultural Lands (AC).
14. The property to the west is zoned Commercial Agricultural Lands (AC).
15. 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.
16. According to the Washington State Department of Fish and Wildlife, Priority Habitat and Species Maps, the subject property does not contain WDFW Priority Habitat Species. Therefore, the provisions of CCC 11.78 as it relates to priority habitat would not apply. Pursuant to the Washington State Department of Natural Resources FPARS stream typing map, the subject property is located where an unnamed tributary flows into Brender Creek. Both streams are typed as fish-bearing streams, which hold a 150 ft. protective buffer. Therefore, the provisions of CCC 11.78 for riparian areas would apply for both streams.
17. As stated, the subject property contains a Category I slope wetland. Therefore, the provisions of CCC Chapter 11.80 would apply.
18. The Category I slope wetlands along with the F-typed streams are not considered shorelines of statewide significance. Therefore, the provisions of the Chelan County Shoreline Master Program would not apply.
19. According to the Federal Emergency Management Agency, FIRM Panel No. 5300150800A, no flooding is indicated on the subject property. Therefore, the provisions of CCC 11.84 and 3.20 would not apply.
20. The County GIS data map does indicate there are known geologically hazardous conditions on the subject property for erosive soils. Therefore, the provisions of CCC Chapter 11.86 would

apply. Pursuant to CCC 11.86.020(3), the risk of hazard is unknown and the subject property may be potentially unstable due to groundwater seepage and springs. The administrator may require a geologic site assessment and/or geotechnical report to determine the actual presence or absence of a geologically hazardous area. Therefore, staff recommended a condition of approval that the applicant is required to submit a geological site assessment with building permit application.

21. 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.
22. Pursuant to WAC 197-11-800(6)(b), variance applications that do not result in an increase in density are categorically exempt from the environmental review process.
23. Construction will begin upon issuance of all necessary permits. The historic packing shed will be removed prior to construction of the proposed single-family residence and detached garage.
24. The subject property is accessed off of Brender Canyon Road, a county right of way that is 60 ft. in width.
25. Domestic water would be provided by a single private well that has already been installed per the site plan of record dated September 30, 2020. An irrigation pump house is located adjacent to Brender Canyon Road along the eastern property boundary.
26. Power is provided by Chelan County PUD No. 1.
27. An on-site septic system has already been installed. The on-site septic system is located outside of the existing 50 ft. well head protection area found on the site plan of record dated September 30, 2020. The drain field for the existing septic system is located off-site on the neighboring parcel to the north.
28. The subject property is located within the boundaries of Fire District #6.
29. Noise from construction, typically associated with a residential construction. 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 ten p.m. to seven a.m.*
30. Being as the proposed development is to be residential, the visual impact is anticipated to be minimal.
31. The application was submitted on September 30, 2020.
32. The Determination of Completeness was issued on October 8, 2020.
33. 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 November 5, 2020, with comments due November 19, 2020. The Notice of Public Hearing was published on March 27, 2021. Agency comments

were considered by the Hearing Examiner and, when appropriate, and set forth in the Conditions of Approval. The following is a list of Agencies who received notice and the date comments were received:

Agencies Notified	Response Date & Nature of Comment
Washington State Department of Fish and Wildlife (WDFW)	November 19, 2020 - If the current wetland and wetland buffer conditions are degraded due to the wetland and wetland buffer being sparsely vegetated, mowed, or vegetated with non-native, invasive species, it should to be planted with native wetland species prior to a conversion in land use. WDFW recommends Chelan County request a revised Habitat Management and Mitigation Plan (HMMP) that details how mitigation sequencing is employed per Chelan County Code 11.80.015 to avoid, minimize and compensate for impacts to a Category I wetland. To avoid and minimize impacts associated with construction, a vegetated buffer must be in place prior to construction. In addition, the Habitat Management and Mitigation Plan must compensate for the indirect impacts the category I wetland will incur due to the permanent loss of category I wetland buffer by reducing from 200 feet to 5 feet. If it is not feasible to mitigate on-site then off-site mitigation should be considered.
Chelan-Douglas Health District	December 7, 2020 - The proposed single-family home will still be required to have a permitted onsite septic system and meet all current requirements per WAC 246-272A.
Department of Archaeology & Historic Preservation	November 13, 2020 – The subject property is located in an area of high-risk potential for archaeological resources; an inadvertent discovery plan is requested.
WA Dept. of Ecology	November 17, 2020 – recommends the buffer width should be vegetated prior to construction. Future indirect impacts from construction of the SFR and garage have not been accounted for. Recommends a revised mitigation plan. Revised comments were issued on March 23, 2021 – Upon reviewing the revised HMMP, Ecology still does have concerns with the amount of mitigation proposed and the lack of buffer planting within the existing lawn area.
Confederated Tribes of the Colville Reservation	November 5, 2020 – As the project moves forward, please adhere to the following 3 conditions. Condition 1 – Inadvertent Discoveries, Condition 2 – Post-Review Discoveries; Condition 3 – Activities outside specific project area.

Chelan County Fire Marshal	No comments received
Chelan County PUD	
Chelan County Public Works	
Fire District No. 6	
WA Dept. of Natural Resources	
Chelan County Building Official	
Yakama Nation	

34. One public comment was received from Ludger and Julie Szmania on November 14, 2020, who disagree with the proposed variances.
35. The Comprehensive Plan has been reviewed. Specifically, the goals and policies related to the Commercial Agricultural Lands (AC) Comprehensive Plan designation and Critical Areas, for consistency with the proposed residential development.
36. The project is consistent with the Commercial Agricultural Lands (AC) purpose statement: “assure the long-term conservation of commercial agricultural lands; to protect and preserve the farmers ability to farm; encourage existing and future agricultural land uses as a viable land use and a significant economic activity within the community; and, to protect agricultural land of long term commercial significance not already characterized by urban development from encroachment and incompatible uses...appropriate uses include: agriculture; open space; residential; and forestry.”
37. Additionally, the project is consistent with Goal CL 1 of the Resource Element: Identify and protect critical areas from adverse environmental impacts while providing for reasonable use of the property.
38. Chelan County Code 11.30.020: Standards for the AC Zoning District:
- 38.1 Minimum Lot Size: 10 acres
 - 38.1.2 The applicant is not requesting to modify the lot size.
 - 38.1.3 This requirement does not apply.
 - 38.2 Minimum Lot Width: 150 ft. at the front building line
 - 38.2.1 The lot exceeds 150 ft. at the front building line.
 - 38.2.2 The lot complies with the required building width.
 - 38.3 Maximum Building Height: 35 ft.
 - 38.3.1 Building height would be calculated during building permit review.
 - 38.3.2 Building height would be determined during review of the building permit application. As conditioned, the proposed accessory structure will not exceed 35 feet.
 - 38.4 Maximum Lot Coverage: Buildings and structures shall not occupy more than 35% of the lot area.
 - 38.4.1 According to Chelan County Assessor’s records, the property is 2.5 acres, which would allow for over 38,115 sq. ft. of lot coverage. Based on the site plan of record, dated September 30, 2020, the total lot coverage upon completion of the project would be approximately 1,928 sf.
 - 38.4.2 The project meets the requirement for maximum lot coverage.

- 38.5 Minimum Setback Distances: Front yard 25 ft. from the front property line or 55 ft. from the street centerline, whichever is greater. Side yard 10 ft. from side property line. Rear yard 20 ft. from rear property line.
- 38.5.1 As indicated on the site plan of record, the proposed structures would not meet the required setbacks of 55 ft. from the street centerline or the 100 ft. agricultural buffer for residences. A request for variances from these setback requirements were included in the application submitted on September 30, 2020 and include the front yard setback being reduced to 35 ft. from the centerline of Brender Canyon Road. Except as modified with this application, the proposed residence and garage would meet the applicable zoning setbacks.
- 38.5.2 As conditioned, the proposed residence would meet the setbacks, except as modified by this application.
- 38.6 Setbacks from Agriculture.
- 38.6.1 No dwelling unit shall be placed within one hundred feet of a property zoned as commercial agricultural lands (AC). However, the entire width of any public right-of-way may be used as part of the setback area. In no case shall the setback from a public right-of-way be less than fifty-five feet from centerline or twenty-five feet from the front property line, whichever is greater.
- 38.6.2 Administrative Modifications. For lots/parcels legally created prior to the effective date of these provisions (September 9, 1997), the administrator may modify the required setback from land in agricultural use up to twenty percent. The granting of a modification request must be necessary for the reasonable use of the land or building and the modification as granted by the administrator shall be the minimum necessary to accomplish this purpose. The decision of the administrator shall be appealable to the Chelan County hearing examiner.
- 38.6.3 These additional setbacks for dwelling units may be waived on an existing parcel within or adjacent to the commercial agricultural zoning district when a written waiver, signed by both the subject property owner and the adjacent property owner, is notarized, reviewed and approved by the department and recorded with the Chelan County auditor's office (resulting in a notice to title). Where such a waiver is implemented, the setbacks identified within this chapter shall be utilized as the minimum standards.
- 38.6.4 The applicant is requesting to reduce the required 100 ft. setbacks from commercial agriculture (AC zoning) in order to construct a single-family residence. The western property line (side) and the northern property line are where the 100-ft. agriculture setbacks from the neighboring parcels exists. According the applicant, neither the property owners to the north or the west would sign a waiver to reduce the 100-ft. setbacks from agriculture; therefore, the applicant is seeking a reduction of the agricultural setbacks from 100 ft. to 24 ft. on the western property boundary and from 100 ft. to 65 ft. on the northern property boundary, in order to construct the proposed residence and detached garage as far from the documented Category I wetland as possible.
- 38.6.5 The applicant has applied for a variance to reduce the required agricultural setbacks in order to create a building envelope to construct a single-family residence.
- 38.7 Off-street parking requirements in this district shall be as follows: (A) Two spaces per single-family dwelling.
- 38.7.1 Based on the site plan of record, a detached garage is proposed along with the single-family residence.

38.7.2 The proposed garage would satisfy the off-street parking requirement for two spaces.

39. Chelan County Code 11.95.030: Variance Evaluation Criteria. No variance shall be granted unless it can be shown that all of the following conditions exist:

39.1 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.

39.1.1 The proposed single-family residence and accessory structure are similar in size and appear to be compatible with other structures in proximity to the project location. With the presence of Brender Creek and the unnamed tributary as well as the Category I wetland, there is no area to build that is located outside of the 200 ft. wetland buffer or the front yard setback from Brender Canyon Road. The granting of a front yard setback variance and an agricultural setback variance would allow development to occur as far as possible from the existing wetland.

39.1.2 The applicant's project is similar to the rural residential development on the surrounding properties. The variances appear to be necessary to preserve a right substantially the same as possessed by owners within the same area and would not grant special privilege.

39.2 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.

39.2.1 Due to the Category I wetland that encumbers approximately 2/3 of the subject property along with two F-Typed streams that converge on the subject property, without a wetland buffer reduction, there would be no feasible building location on the property. In addition, the unusual shape and location of the lot, the configuration makes for a challenging building area. By utilizing the already modified portion of the property for the proposed development, the applicant appears to avoid further significant impacts to the wetland buffer and entirely avoids any direct impacts to the wetland itself. In addition, the granting of a front yard setback variance and an agricultural setback variance would allow development to occur as far as possible from the existing wetland. Although the parcel was "created" in 2005 through a Certificate of Exemption, the parcel technically already existed upon the construction of Brender Canyon Road in 1952 (Quit Claim Deed to the County recorded under Auditor's File No. 464774) pursuant to CCC 12.14.050(4), division by intervention, a lot created or reconfigured by a public road.

39.2.2 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 when the subject property was created in 2005. Furthermore, the required setbacks from agriculture make the already constrained building envelope smaller. The design of the proposed structure is consistent with the Comprehensive Plan.

39.3 The hardship asserted by the applicant is not the result of the applicant's or the owner's action.

39.3.1 The hardship asserted by the owners appears to not be of their own actions in regards to the critical areas located on the property. The hardship stems from the application of the critical areas as outlined in Chelan County Title 11, this includes the location of the Category I wetland and its associated 200 ft.

protective buffer as well as the required front yard setback and agricultural setbacks. Prior to 2005, the legal description of the parent parcel was:
“The West half of the Northeast quarter of the Southeast quarter, and the West half of the Southeast quarter of the Southeast quarter of Section 2, Township 23 North, Range 18, E.W.M., Chelan County, Washington.

Except that portion conveyed to Chelan County for road purposes under Auditor’s File No. 464774, a rerecording of Auditor’s File No. 464736.”

39.3.2 In 2005, the applicant split this lot into 2 separate lots using the Certificate of Exemption provision found in CCC 12.14.050(4). These lots were 16.02 acres (parent parcel) and 1.5 acres (subject property) in size respectively. This was recorded under Auditor’s File No. 2197643. Brender Canyon Road, which divided the property, was created in 1952 (Quit Claim Deed to the County recorded under Auditor’s File No. 464774). No comments were received from Public Works regarding the proposed front yard setback of 35 ft. from the centerline of Brender Canyon Road.

39.3.3 The current lot configuration was created through a Boundary Line Adjustment 2005 when the subject property’s boundaries were enlarged from 1.5 acres to its current existing size of 2.5 acres to create a larger buildable footprint on the property. This Boundary Line Adjustment was recorded under Auditor’s File No. 2217911.

39.3.4 On the 2017 building permit application, the applicant noted that no wetlands were present on the subject property and according to Chelan County GIS mapping, this is accurate. However, County and agency investigation of subsequent code enforcement complaints found that the subject property was actually the site of a Category I wetland and this finding was confirmed in a wetland delineation report issued by Grette Associates on October 10, 2019.

39.3.5 The hardship of the 200 ft. wetland buffer encumbering the entirety of the subject property is a result of the application of Title 11 and not of the owner’s actions. In addition, the applicant’s hardship was also not a result of the applicant’s actions as the lot, in its current configuration, technically existed prior to the current zoning since construction of Brender Canyon Road occurred in 1952.

39.4 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.

39.4.1 The proposal is to create a building envelope for a future single-family residence and garage. The on-site septic drainfield is located outside of the riparian buffers of the F-typed streams and is located as far away from the wetland as possible on the neighboring property to the north.

39.4.2 The proposed structures would be required to meet building code requirements and as proposed, would meet the required setbacks from property lines pursuant to the CCC Section 11.30.020 except as modified per the site plan dated September 30, 2020.

39.4.3 Additionally, with the application, a Revised Habitat Management and Monitoring Plan was submitted on March 3, 2021. The plan proposes the planting of approximately 2,898 sq. ft. of native vegetation to provide a 1.5:1 mitigation ratio in order to create a more diverse habitat area. These plantings would mostly be located in the portion of the subject property that has been historically mowed and maintained as a lawn..

- 39.4.4 The proposal satisfies the objectives of the comprehensive plan for the AC zone and critical areas. As conditioned, the proposal would not be materially detrimental to the public welfare and safety or injurious to property in the neighborhood.
- 39.5 The hardship asserted by the application results from the application of this title to the property.
 - 39.5.1 Due to the presence of a Category I wetland with an associated buffer of 200 ft., as well as the F-typed streams with protective buffers of 150 ft., the entirety of the subject property is encumbered by unbuildable areas. The application of the required setbacks of CCC Title 11 creates an overlapping building restriction.
 - 39.5.2 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. Additionally, 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 since the nearest land being used for farming is located over 250 ft. away from the subject property boundaries.
- 39.6 The granting of a variance should not:
 - 39.6.1 Be substantially based upon precedent established by illegal or nonconforming circumstances.
 - 39.6.1.1 The variance request is based on the property's encumbrances due to the application of the Title 11 critical areas for riparian areas and wetlands. The parcel was legally established pursuant to CCC Section 14.98.1090 definition of legal lot of record being as it was created through an approved Certificate of Exemption in 2005 as a result of being divided by Brender Canyon Road, which was created in 1952.
 - 39.6.1.2 The proposed variance appears to be based on the application of the Chelan County critical areas ordinance of Title 11 as it relates to the associated riparian and wetland buffers. The variance request is not based on illegal or nonconforming circumstances.
 - 39.6.2 Be substantially based upon lack of reasonable economic return or a claim that the existing/proposed structure is too small.
 - 39.6.2.1 Currently, the subject property only contains a dilapidated packing shed built that was built in 1920. The applicant indicates that the request is not based on economic return, but rather a reasonable use of the property in ways similar to properties in the proximity.
 - 39.6.2.2 There is no claim of economic return. The reduced buffers would provide a building area for a single-family residence and detached garage.
 - 39.6.3 Be based on the fact that the condition, for which the variance is requested, existed at the time the applicant acquired the property.
 - 39.6.3.1 The owners acquired the parent parcel from which the subject property was split from on July 9, 1999. The lot was legally created in 2005, which was after the establishment of critical areas regulations.
 - 39.6.3.2 The lot encumbrances existed at the time the applicant acquired the property; however, the lot was not legally created as a residential lot prior to the county's adoption of zoning codes and critical areas regulations.
 - 39.6.4 Result in a de facto zone reclassification.

38.6.4.1 The proposed variance does not change the permitted land uses.

38.6.4.2 This does not apply.

39.6.5 Be substantially for the purpose of circumventing density regulations.

39.6.5.1 The proposed variance does not affect density.

39.6.5.2 This does not apply.

40. Chelan County Code 11.80.120: Wetland Variance Provisions. 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:

40.1 The analysis of the proposal's impact on wetland and wetland buffer areas determines that there would not be a significant impact to the wetland and wetland buffer functions as stated in CCC Section 11.06.020 or that significant impacts would be mitigated by the application.

40.1.1 The applicant submitted a Habitat Management and Mitigation Plan that proposes to install approximately 2,898 sf of native vegetation within both the wetland buffer as well as the wetland in areas that are currently degraded due to the historic human and land uses, or are dominated by the presence of grass and other weedy herbaceous species. The area proposed for development has been historically cleared and does not provide ecological function. Best Management Practices (BMPs) as required have been proposed in order to alleviate erosion and water run-off. The proposed developments would be located on the highest ground possible within the wetland buffer but outside of the wetland boundary. The developing of the area would not result in removal of wetland vegetation, but rather grass and herbaceous species. The Hearing Examiner sets as a condition of approval that a temporary erosion and sediment control (TESC) plan must be submitted and approved prior to the commencement of the proposed development.

40.1.2 The potential impact to the wetland and wetland buffer was assessed via the application materials, wetland delineation, and the revised habitat management and mitigation plan. Staff finds, as conditioned, that the potential impacts to the wetland and associated wetland buffer could be mitigated through the implementation of the revised habitat management and mitigation plan. The project, as conditioned, would not result in significant impacts to fish and wildlife.

40.2 No other reasonable use with less impact is possible:

40.2.1 Based on the application materials and site plan of record, the proposed single-family residence and garage appear to be designed in a manner that avoids significant impacts to the wetland and associated buffer to the greatest extent possible. In order to allow for a reasonable use of the property, via residential development, it is difficult to avoid all potential impacts to the riparian buffer as the buffer expands beyond the subject property. However, no new riparian vegetation disturbance would result from the proposed development.

40.2.2 The Hearing Examiner finds, as conditioned, that the proposed development would result in a minimal impact to the wetland and associated buffer while allowing reasonable use of the subject property.

40.3 Impacts to critical lands cannot be lessened through locational or design changes to the proposed use.

40.3.1 Based on the applicant's narrative, the proposed development has been designed to avoid the Category 1 wetland as well as the F-typed streams and their

associated buffers to the greatest extent possible. The proposed mitigation plantings would enhance the function of the wetland by providing a more diverse habitat than that of grass and herbaceous species. As previously states, the project appears to be designed in a manner that would avoid significant impacts to the wetland and associated buffer to the greatest extent possible.

40.3.2 The Hearing Examiner finds, as conditioned, that the proposed development would be located and designed in a manner to avoid significant impacts to the wetlands and associated buffer.

41. The proposed wetland variance to reduce the associated wetland buffer would not be anticipated to constitute the granting of a special privilege as other properties in close proximity are developed residentially. Due to the application of the zoning and the critical areas ordinance of Title 11, the subject property is entirely encumbered by protective buffers associated with the wetland present on site as well as the required front yard setback and agricultural setback. The proposed mitigation plantings are anticipated to alleviate potential impacts that could be associated with the proposed residential development. Based on the application materials and as conditioned, the proposed development is not anticipated to result in adverse effects to the Category I wetland or the F-typed streams located on the subject property. The development is to occur in an area that has been historically cleared and with the implementation of the mitigation measures the development should not result in a net loss of ecological function.
42. The proposed front yard setback variance is requested to reduce the required front yard setback from 55 feet from the centerline of Brender Canyon Road to 35 feet from centerline of Brender Canyon Road. The application and site plan submitted on September 30, 2020 identifies the proposed location of the single-family residence and detached garage. The proposed location of the detached garage allows for adequate backing of vehicles prior to entering of the right-of-way. Therefore, based upon the foregoing facts and analysis, staff concludes the proposal is consistent with Chelan County Zoning Resolution and Comprehensive Plan.
43. The proposed agricultural setback variance is requested pursuant to Chelan County Code Section 11.30.020(6)(A) "No dwelling unit shall be placed within one hundred (100) feet of a property zoned Commercial Agricultural Lands (AC)." The subject property abuts commercial agricultural zoning along its all of its borders. The adjacent land owners will not sign agricultural setback waivers as described in Section 11.30.020(6)(C). The proposed structure with the setback reduction is an approximately 1,928 sf building envelope for a future single-family residence and detached garage. Without the setback reductions, based upon the site plan provided, building would not be viable without significant impacts to the Category 1 wetland and its buffer located on the subject property. In addition, the closest agricultural activities take place over 250 feet away from the boundaries of the subject property. Therefore, based upon the foregoing facts and analysis, staff concludes the proposal is consistent with Chelan County Zoning Resolution and Comprehensive Plan.
44. This matter was originally heard before the Hearing Examiner at an open record public hearing on April 7, 2021.
45. The Hearing Examiner approved the requested variances by written decision dated April 9, 2021.

46. Ludger Szmania, Julie Szmania, Sherry Trammel-Schauls, Robert Schauls, and Richard Brender filed an appeal of the Hearing Examiner's decision with Chelan County Superior Court under Cause No. 21-2-00226-04.
47. As a result of this appeal, the Honorable Robert E. Jourdan issued an Order on Remand to the Hearing Examiner dated October 27, 2021.
48. An open record public hearing held in this matter on December 15, 2021 was in response to the Order on Remand.
49. This Order on Remand specifically directed that the Hearing Examiner ". . . must consider the Easements and Maintenance Agreement of August 3, 2006 . . ." which was attached to the Court's Order.
50. The Court further stated in its Order that the Easements and Maintenance Agreement appears not to have been considered by the Hearing Examiner at the time of the prior hearing. The Court further ordered, "in particular, the Hearing Examiner must consider what affect, if any, the one hundred (100) foot well head protection radius in the Agreement has on these variance applications."
51. Finally, the Court ordered that if the variances were proved, that the notice required for development permits in Chelan County Code 11.30.020(9) must be included in the decision of the Hearing Examiner.
52. An open record public hearing was held on December 15, 2021.
53. The staff report, application materials, agency comments, Order of Remand, Easement and Maintenance Agreement of August 3, 2006, and the entire file of record were admitted into the record.
54. Appearing on behalf of the Applicant was David Bentsen of Speidel and Bentsen. Mr. Bentsen stated that he was the attorney for the Applicant. Mr. Bentsen's argument was that while the Hearing Examiner may "consider" the Easement Agreement, the Hearing Examiner has no authority to "construe" the Easement Agreement. The Hearing Examiner questioned Mr. Bentsen as to the language in Order that the Hearing Examiner was directed to "consider what affect, if any" the wellhead protection radius in the Agreement had upon the variance applications. Mr. Bentsen's response was that the language, "if any" was controlling, that the Hearing Examiner does not have authority to determine what affect the Agreements have on the variance applications and therefore, the Hearing Examiner should limit his decision to merely saying that the Agreement was "considered."
55. Appearing on behalf of the LUPA Appellants was Julie Norton, attorney at law. Ms. Norton's primary position was that the requested variances must be denied because the application materials failed to include the Easement Agreement, therefore, the easement area within the site plan of record. She stated that County staff was required to have the Agreement before them to be able to analyze it before making a staff recommendation. She also stated that the Easement Agreement may impact agency comments, because the agencies were not allowed to review the Easement Agreement before making their comments.

56. The Hearing Examiner finds that the Court has ordered the Hearing Examiner to consider the effect of the Easement and Maintenance Agreement upon the various variance applications before the Hearing Examiner.
57. The Hearing Examiner would also note that the Hearing Examiner has not been granted authority by the Chelan County Code to administer, interpret, or otherwise construe private agreements such as this Easement Agreement. However, the Hearing Examiner does have the authority pursuant to the Court's Order to require that any development be consistent with, and not violate the Easements and Maintenance Agreement of August 3, 2006. The Hearing Examiner has done so in the Conditions of Approval.
58. No member of the public appeared at the hearing.
59. Pursuant to the Court's Remand Order, the Hearing Examiner has duly considered the Easements and Maintenance Agreement. Further, regarding the 100 ft. wellhead protection radius set forth in the Easements and Maintenance Agreement, the Hearing Examiner has conditioned approval of these permits upon Applicant demonstrating that the Applicant's project will not violate any provision of the Easements and Maintenance Agreement.
60. 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. The Hearing Examiner has not been granted authority by the Chelan County Code to administer, interpret, or otherwise construe private agreements such as this Easement Agreement. However, the Hearing Examiner does have the authority pursuant to the Court's Order to require that any development be consistent with, and not violate the Easements and Maintenance Agreement of August 3, 2006. The Hearing Examiner has done so in the Conditions of Approval.
8. 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, WV 20-003 / VAR 20-002 / VAR 20-003 is hereby **APPROVED**, subject to the following Conditions of Approval.

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

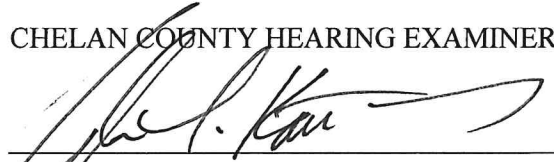
1. Pursuant to CCC Section 11.95.040, the construction shall be in substantial conformance with the site plan of record, dated September 30, 2020.
2. Pursuant to CCC Section 11.95.040 and the International Building Code, Section 105, the applicant shall obtain a building permit for the construction of the single-family residence and garage.
3. Pursuant to CCC 11.95.040 and RCW 90.48, a temporary erosion and sediment control plan (TESC) shall be submitted with building permit application.
 - 3.1. No ground disturbing activities shall commence until the implementation of the TESC plan.
4. 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.
5. Pursuant to CCC 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.
6. 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.
7. Pursuant to RCW 27.53.020, if the applicant 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 notify the appropriate tribal and state representatives and the Chelan County Department of Community Development of the finding for local, state and tribal coordination.
 - 7.1. An inadvertent discovery plan must be submitted with the building permit application and kept onsite during all land disturbing activities.
8. Pursuant to CCC 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 11.80.050(3), the location of the outer extent of the wetland buffer, the wetland boundary and the areas to be disturbed shall be marked in the field, and such field markings shall be approved by the administrator prior to the commencement of permitted

activities. The location of these areas shall be clearly identified on the site plan. Such field markings shall be maintained throughout the duration of the permit.

9. Pursuant to CCC Section 11.80.060(4), all wetland buffer areas shall be temporarily fenced between the construction activity and the buffer area with a highly visible and durable protective barrier(s) during construction to prevent access and sedimentation from disturbed areas from entering the wetland or its buffer. This requirement may be waived by the administrator if an alternative to fencing which achieves the same objective is proposed and approved.
 - 9.1. Prior to final inspection for the garage, a wildlife passable fence shall be permanently installed at the edge of the wetland and mitigation plantings to demark areas to be retained in natural conditions.
10. Pursuant to CCC Section 11.80.110 and the Revised Habitat Mitigation and Management Plan (Exhibit A), date stamped March 3, 2021, the proposed plantings shall be completed prior to the final inspection of the building permit; if at such time the plantings cannot be completed prior to final inspection, bonding as outlined in CCC Chapter 14.16 shall be required.
11. 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.
12. 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.
13. 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.
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.
16. Pursuant to Chelan County Superior Court Judge, the Honorable Robert E. Jourdan, Order on Remand, dated October 27, 2021, the Hearing Examiner hereby conditions this development upon demonstration that the development, and does not interfere with any provision of the Easement and Maintenance Agreement dated August 3, 2006. The Hearing Examiner further conditions project upon a new site plan, if necessary, to demonstrate that the development does not interfere with any provision of the Easements and Maintenance Agreement dated August 3, 2006.
17. The Applicant shall comply with all provisions of CCC 11.30.020(9), including adding to the plat note a provision in compliance with this notice requirement.

Dated this 21st day of December, 2021.

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.