

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW, CONDITIONS OF APPROVAL
Rip V 2022-023 Michael)	AND DECISION
)	

THIS MATTER, having come on for hearing in front of the Chelan County Hearing Examiner on April 6, 2022, the Hearing Examiner having been directed by Court Order to approve this Riparian Variance, hereby submits the following Findings of Fact, Conclusions of Law and Decision as follows:

I. FINDINGS OF FACT

1. The applicants are Mark and Jill Michael, 5643 Locust Lane, Cashmere, WA 98815.
2. The location of the project is 5643 Locust Lane, Cashmere, WA 98815.
3. The parcel number for the subject property is 23-19-05-230-700.
4. The property is legally described as T 23N R 19EWM S 05 Lot 1 SP 2397.
5. The subject property is 0.55 acres according to Chelan County Assessor's records.
6. The project is located in the Cashmere Urban Growth Area.
7. The Comprehensive Plan designation and zoning for the subject property is Suburban Residential (SR).
8. The subject property is currently developed with a 960 sq.ft. detached garage and a 288 sq.ft. shop that were both built in 1977. A single-family residence was demolished in 2021 under BP-210476.
9. The property to the north of the subject property is in residential use and is zoned Suburban Residential (SR).
10. The property to the south of the subject property is in residential use and contains Brender Creek and is zoned Suburban Residential (SR).
11. The property to the east of the subject property is in residential use and is zoned Suburban Residential (SR).
12. The property to west of the subject property is Locust Lane and is zoned Suburban Residential (SR).
13. The Aquifer Recharge form was completed with the variance application. Pursuant to Chelan County Code (CCC), Section 1 1.82.060(2)(A), residential dwelling units and their accessory

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uses are exempt from the aquifer recharge area regulations under this chapter.

14. Brender 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 do not apply to the subject property.
15. Pursuant to the Washington State Department of Natural Resources FPARS stream typing map, the subject property is adjacent to Brender Creek, an F-typed stream. Therefore, the provisions of CCC Chapter 11.78 for riparian areas apply, except as amended by this decision.
16. 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.
17. 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.
18. According to the Chelan County GIS mapping, the subject property is not located within a geologically hazardous area. Therefore, the provisions of CCC Chapter 11.86 would not apply.
19. 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.
20. Construction may begin upon issuance of a building permit for the new residence.
21. Locust Lane, a county road, ends at the east property line of the subject property.
22. The site is served by a shared private well.
26. Power is provided by Chelan County PUD No. 1.
27. The site is served by an existing septic system.
28. The property is located within the boundaries of Fire District #3.
29. Due to the residential nature of the subject property and the proposed location of the residence, visual impacts are expected to be minimal.
30. 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 1,000 ft. of an occupied residence between the hours of 10 pm to 7 am.
31. The Notice of Application was referred to jurisdictional agencies, adjacent 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 February 1, 2022, with

comments due February 15, 2022. The following agencies provided comments:

Agencies Notified	Response Date	Nature of Comment
Chelan County Fire Marshal	No Comment	
Chelan County Building Official	No Comment	
Chelan County PUD	February 16, 2022	If the applicant moves the existing service point or upgrades their service size, they will need to submit an application in order to do so. If there are any changes to the existing service, it will need to be brought up to current standards.
Chelan County Fire District No. 6	No Comment	
City of Cashmere	No Comment	
WA Dept. of Archaeology and Historic Preservation	No Comment	
Yakama Nation	No Comment	
Confederated Tribes of Colville	No Comment	
WA Dept. of Ecology	February 15, 2022	There are multiple Total Maximum Daily Load (TMDL's) listings for the Brender Creek Watershed. Any construction and reduction of riparian area within the watershed should consider the impacts to this local watershed and to downstream users.
WA Dept. of Fish & Wildlife	February 16, 2022	Recommends a Habitat Management and Mitigation Plan be required to demonstrate No Net Loss of riparian habitat.

32. No public comments were received.
33. Application materials were submitted on January 24, 2022.
34. A Determination of Completeness was issued on January 28, 2022.
35. The Notice of Application was issued on February 1, 2022.
36. The Notice of Public Hearing was provided on February 15, 2022.
37. Pursuant to WAC 197-11-800(6)(6), variance applications that do not result in an increase in density are categorically exempt from the environmental review process.
38. The Comprehensive Plan has been reviewed for consistency with the goals and policies related to the City of Cashmere Urban Growth Area (UGA) Designations including the

specific criteria for the Suburban Residential (SR) zoning designation as it relates to residential development. Pursuant to the City of Cashmere Comprehensive Plan, page 17, states the General Goal for lands in the UGA is “to create an orderly and efficient transition from rural to urban land in areas where adequate public utilities and services exist or can be provided in an efficient manner.” Furthermore, the unique characteristics of the SR designation in the UGA on page 18 include “Maintain rural character, livestock is allowed, manufactured homes on individual lot with performance criteria, generally located outside City limits, inside UGA 2-story height limit”. The Hearing Examiner finds that the proposed variance, as conditioned, would be consistent with the City of Cashmere Comprehensive Plan.

39. Chelan Municipal Code 17.24.030: Development Standards for the SR Zoning District:
- 39.1 Minimum Lot Size: 10,000 sq.ft.
 - 39.1.1 Finding of Fact: The applicant is not requesting to modify the lot size.
 - 39.1.2 Conclusion: This requirement does not apply.
 - 39.2 The maximum building height: two stories, or in any event not greater than 30 feet.
 - 39.2.1 Finding of Fact: Building height would be calculated during building permit review.
 - 39.2.2 Conclusion: Building height would be determined during review of the building permit application. As conditioned, the proposed residence will not exceed 30 ft.
 - 39.3 The maximum lot coverage including all accessory buildings: 35 percent of the total lot area.
 - 39.3.1 Finding of Fact: According to Chelan County Assessor’s records, the subject property is 0.55 acres. This would allow for approximately 8,385 sq.ft. of lot coverage.
 - 39.3.2 Conclusion: Lot coverage would be reviewed at time of building permit application.
 - 39.4 Minimum Setback Distances: Front yard 25 ft. from the front property line or 50 ft. from the street centerline, whichever is greater; Side yard 5 ft. from side property line; Rear yard 10 ft. from rear property line.
 - 39.4.1 Finding of Fact: Based on the site plan of record, the proposed residence would meet the applicable zoning setbacks.
 - 39.4.2 Conclusion: As conditioned, the proposed residence would meet the setbacks, except as modified by this application.

40. Chelan County Code 11.95.030: Variance Evaluation Criteria:

- 40.1 No variance shall be granted unless it can be shown that all of the following conditions exist:
 - 40.1.1 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.
 - 40.1.1.1 Finding of Fact: The adjacent property located to the southeast of subject project is owned by Rob Todd (Parcel# 23-19-05-230-720) and has a pole building that is 27.8 feet away from Brender Creek. The property located to the east of subject property is owned by Miguel Marron-Cortez (Parcel# 23-19-05-230-670) has a garage that is 56.4

feet from Brender Creek as well as a residence, which is 50 feet from Brender Creek. The proposed use is not considered a granting of special privilege since the two closest properties on either side of the property have structures that are closer to Brender Creek.

40.1.1.2 Conclusion: 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.

40.1.2. 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.

40.1.2.1 Finding of Fact: The parcel is listed as 0.55 acres in size and has historically been used for residential purposes. The property currently has a shared well, septic system, outbuilding and garage. Due to the lot size and shape, the construction of the proposed residence is limited to the southern half of the property. The proposed building envelope has been created to fit adjacent to these buildings within property line setbacks and be placed as far away from the riparian buffer of Brender Creek as possible. No native riparian habitat would be disturbed as a result of the proposed residence construction since the subject property was previously developed.

40.1.2.2 Conclusion: The variance request is based on the presence of critical area buffers that are located on and adjacent to the subject property which the applicant has no control over. The subject property was previously developed prior to the adoption of the County's Critical Area Ordinances.

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

40.1.3.1 Finding of Fact: 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 Brender Creek with its associated 150 ft. protective riparian buffer.

40.1.3.2 The applicants have owned the subject property since September 22, 2006 based on the recorded Warranty Deed. The property currently has a shared well, septic system, outbuilding and garage that were built and installed by a previous owner prior to the adoption of the County's Critical Area Ordinances. The proposed residence footprint has to fit adjacent to these buildings and be placed as far away from the riparian zone as possible. The applicant has no control over these elements and has not caused them by their own actions.

- 40.1.3.3 Conclusion: The hardship of the 150 ft. riparian buffer as it applies to the subject property is a result of the application of Title 11 and not of the owner's actions.
- 40.1.4 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.
- 40.1.4.1 Finding of Fact: The proposal is to construct a new residence in a similar location where a previous manufactured home was. Residential uses and structures are permitted in the SR zoning district as well as outlined in the Chelan County Comprehensive Plan. The authorization of this variance would not be materially detrimental to the public welfare and safety since the proposed residence would be built to current building code. No riparian habitat would be removed since the subject property was previously developed prior to the adoption of the County's Critical Area Ordinance.
- 40.1.4.2 Conclusion: The proposal satisfies the objectives of the City of Cashmere's Comprehensive Plan for the SR zoning district within the UGA. As conditioned, the proposal is not anticipated to be materially detrimental to the public welfare and safety or injurious to property in the neighborhood.
- 40.1.4.3 In order to ensure the protection of the F-type stream, pursuant to CCC Section 11.78.040(3)(A)(iii) all riparian buffers shall be temporarily fenced between the construction activity and the riparian buffer as required by CCC Section 11.77050(3)(A).
- 40.1.5 The hardship asserted by the application results from the application of this title to the property.
- 40.1.5.1 Finding of Fact: The hardship asserted by this application is that when the riparian buffer is applied to the subject property by Chapter 11.78 of the Chelan County Code, it precludes a new residence from being constructed on the subject property due to the imposed 150 ft riparian buffer from the OHWM of Brender Creek. The 150 ft. riparian buffer creates an undue hardship for the applicant when the required building setbacks of CMC Chapter 17 are applied by creating an unbuildable property.
- 40.1.5.2 Conclusion: 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.
- 40.2 The granting of a variance should not:

40.2.1 Be substantially based upon precedent established by illegal or nonconforming circumstances.

40.2.1.1 Finding of Fact: 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 created through a short plat prior to October 17, 2000. The proposed residence would conform with all Chelan County building code requirements and City of Cashmere setbacks. The granting of the requested riparian variance is within the legal right of the applicant, conforms with the designated zoning requirements, and does not encourage the establishment of any illegal or nonconforming circumstances.

40.2.2.2 Conclusion: 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.

40.2.2 Be substantially based upon lack of reasonable economic return or a claim that the existing/proposed structure is too small.

40.2.2.1 Finding of Fact: The applicant indicates that the request is not based on economic return, but rather a reasonable use of the property in a way similar to properties in the proximity.

40.2.2.2 The proposed project would be construction of a new residence that is of a modest size. Currently a shared well, septic system, outbuilding and garage exist on the property. The variance request is not based on an economic return, but due to the application of Chapter 11.78 of the Chelan County Code and the undue hardship through the implementation of the required riparian buffer, which precludes the use of the property as a residential legal lot of record.

40.2.2.3 Conclusion: There is no claim of economic return. The reduced buffer would provide a building area for the proposed residence.

40.2.3 Be based on the fact that the condition, for which the variance is requested, existed at the time the applicant acquired the property.

40.2.3.1 Finding of Fact: The application is not based on the fact that the condition for which the variance is requested existed at the time the applicants acquired the property. It is based on the fact that the hardship currently exists and the property is not able to build a new residence without the approval of the variance. The applicant is simply asking to have the same rights as other adjacent residential property owners. The property has a shared well and well house, out building, septic system and garage that exist on the property as a legal residential lot of record.

40.2.3.2 Conclusion: 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.

40.2.4 Result in a de facto zone reclassification.

40.2.4.1 Finding of Fact: The proposed variance would not change the permitted land uses.

40.2.4.2 Conclusion: This would not apply.

40.2.5 Be substantially for the purpose of circumventing density regulations.

40.2.5.1 Finding of Fact: The proposed variance would not affect density.

40.2.5.2 Conclusion: This would not apply.

41. Chelan County Code 11.77.080: Variance Provisions:

41.1 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:

41.1.1 Significant impacts to the critical area and buffer functions as stated in Section 11.06.020 would be mitigated by the applicant by addressing with conditions of approval where practical; and

41.1.1.1 Finding of Fact: The subject property has been historically cleared for residential use and does not provide much ecological function. The areas near Brender Creek that have greater ecological riparian function are not on the subject property and are not proposed to be impacted.

41.1.1.2 Conclusion: The project, as conditioned, would not result in significant impacts to fish and wildlife habitat.

41.1.2 Impacts to critical areas and their buffers cannot be lessened through location or design changes to the proposed use

41.1.2.1 Finding of Fact: The subject property would not be feasible for development as it would require more ground disturbance within the associated buffers and required building setbacks. 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 since the subject property was previously developed for residential use.

41.1.2.2 The property currently has a shared well, septic system, outbuilding and garage. The lot size and shape limits the construction of the a new residence because it has to fit within existing structures and be placed

as far away from Brender Creek as possible. The applicant has no control over these elements.

41.1.2.3 Conclusion: Any other location on the site would require the removal of existing buildings and variances to the required building setbacks. As conditioned, the new residence would not be anticipated to pose a significant impact to the Brender Creek.

42. The proposed variance to reduce the associated 150 ft. riparian buffer of the Brender Creek is not anticipated to constitute the granting of a special privilege as other properties in close proximity are developed residentially.
43. Based on the application materials and as conditioned, the proposed development is not anticipated to result in adverse effects to the Brender Creek. The proposed residence would be built 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 result in a no net loss of ecological function.
44. An open record public hearing after legal notice was provided was held via Zoom on April 6, 2022.
45. The File of Record, Chelan County Department of Community Development Staff Report, and exhibits were received, admitted into the record and considered by the Hearing Examiner.
46. Appearing and testifying on behalf of the Applicant was Jill Michael. Ms. Michael testified that she was the property owner and the Applicant. Ms. Michael testified that they did not build the garage and that the garage was there when they bought the property. She agreed that they would prepare an HMMP pursuant to the recommendation of the Washington State Department of Fish & Wildlife and will be prepared according to the requirements of the Chelan County Code and the Washington State Department of Fish & Wildlife. Ms. Michael testified that all the proposed Conditions of Approval were acceptable.
47. Testifying from the public was Amanda Barg. Ms. Barg was testifying as a representative of the Washington State Department of Fish & Wildlife. Ms. Barg questioned whether or not the applicant can satisfy the variance criteria. In the event the variance criteria can be met, then she requested that an HMMP be required to be prepared by the applicant and submitted to the County and to the Washington State Department of Fish & Wildlife. She also testified that vegetation within the remaining riparian buffer and the impaired riparian buffer, not include lawn grasses or other vegetation that will require fertilization.
48. 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 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 incorporated herein as such by this reference.

III. 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 January 24, 2022.
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.
3. Pursuant to CCC Section 11.78.040(3)(A)(iii) the resulting 75 ft. riparian buffer shall be temporarily fenced between the construction activity Brender Creek as required by CCC Section 11.77050(3)(A).
4. 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.
5. 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 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.

6. 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.
7. 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.
8. 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.
9. 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.
10. The applicant shall prepare a Habitat Management and Mitigation Plan pursuant to CCC 11.78.060, and comply with all recommendations set forth therein.

IV. DECISION

Based upon the above noted Findings and Fact and Conclusions, Rip V 2022-023 is hereby **APPROVED**.

Dated this 11th day of April, 2022.

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

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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.