

BEFORE THE CHELAN COUNTY HEARINGS EXAMINER

IN THE MATTER OF)

VAR 23-294)

Boyd)

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FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION
AND CONDITIONS OF
APPROVAL

THIS MATTER, having come on before the Chelan County Hearing Examiner on November 1, 2023. 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 to vary a 32-ft front yard setback reduction, to 2 ft from the Cedar Brae Road right-of-way, for the construction of a 2-story detached structure (43 '2" x 46' roofline) with a 2-car garage and tram cover on the street level and an approximate 725 sq ft lower level ADU with 390 sq ft built in garage. The required front yard setback is 55 ft from centerline of Cedar Brae Road, which equates to 34 ft from the front property line.
2. The Applicant/Owners are Boyd Family Cabin, LLC, PO Box 158, Leavenworth, WA 98826.
3. The project location is 15580 Cedar Brae Road, Lake Wenatchee, WA 98826.
4. The parcel number of the subject property is 27-17-29-510-210.
5. The legal description of the subject property is: Cedar Brae Lot 39 Inc Shoreland; 0.80 acres.
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 Waterfront (RW).
9. The subject property is currently developed with a single-family residence and unpermitted funicular tram with an access platform.
10. The subject property is vegetated with mature trees and has a 40 percent downward slope towards Lake Wenatchee.
11. The site size is 0.80 acres.
12. The property to the north is Lake Wenatchee.
13. The property to the south is Cedar Brae Road and is zoned Rural Waterfront (RW).
14. The property to the east is residential and is zoned Rural Waterfront (RW).

15. The property to the west is residential and is zoned Rural Waterfront (RW).
16. The Aquifer Recharge is exempt pursuant to Chelan County Code Section 11.82.060(2)(A).
17. Pursuant to the Washington State Department of Fish and Wildlife Priority Habitat and Species Maps, the subject property does not contain any known fish or wildlife habitats. Therefore, the provision of Chelan County Code (CCC) Chapter 11.78, Fish and Wildlife Habitat Conservation Areas Overlay District do not apply.
18. The subject property is within the jurisdiction of the Chelan County Shoreline Master Program (CCSMP); therefore, the provisions of the CCSMP do apply. However, the proposed development is for a zoning variance that is not within shoreline jurisdiction.
19. Pursuant to the Federal Emergency Management Agency, FIRM Panel No. 5300150775B, the subject property is not within identified flood hazard. Therefore, the provisions of Chelan County Code Chapters 11.84 Frequently Flooded Areas Overlay District and CCC 3.20 Flood Hazard Development do not apply.
20. Pursuant to Chelan County Code Chapter 11.86, the subject property contains geological hazards. Therefore, the provisions of Chelan County Code Chapter 11.86 Geologically Hazardous Areas Overlay District do apply. A geologic site assessment would be required at the time of building permit application.
21. Pursuant to the National Wetlands Inventory Map prepared by the US Department of Fish and Wildlife Services, the subject property does not contain a wetland area. Therefore, the provisions of Chelan County Code Chapter 11.80 Wetland Areas Overlay District do not apply.
22. Pursuant to RCW 27.53.020, full cooperation among the Department of Archaeology and Historic Preservation and other agencies is required to ensure information regarding the possible impact of construction activities on the state's archaeological resource is maintained. The Hearing Examiner sets as a condition of approval the Applicant obtain an Inadvertent Discovery Plan.
23. Construction would commence once the variance is approved and a building permit is issued.
24. The subject property is accessed from Cedar Brae Road, which is a public road.
25. A water source was not identified in the application materials. The agent responded that this information was not relevant following County request. At the public hearing the Applicant's agent testified that water is from a private well.
26. Power: Chelan County PUD.
27. A sanitation disposal was not identified in the application materials; the agent responded that this information was not relevant following County request. At the public hearing, the Applicant's agent stated that sanitation is through the PUD No.1 of Chelan County.
28. Fire protection: The property is located within Chelan County Fire District #9.

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 pm to seven am.
30. The proposed accessory structure would be of a similar size and design as the existing residential development in the vicinity.
31. The Notice of Application was referred to surrounding property owners within 300 feet (excluding 60 feet of right-of-way), jurisdictional agencies and departments of the County. These agencies and surrounding property owners were notified on July 29, 2023 with comments due August 12, 2023. Agency comments are considered and, when appropriate, associated Conditions of Approval. The following summarizes responding agencies:
32. The following are agencies that were notified:

Agencies Notified	Response Date	Nature of Comment
Chelan County Fire Marshal		No comment
Chelan County Public Works	October 17, 2023	Public Works will require a hold harmless agreement to be recorded with the County. Additionally, the proposed support walls must be approved by the County Engineer. If approved, the applicant must enter into a Right-of-Way use agreement prior to construction along with a Work in Right-of-Way permit.
Chelan County Building Official		No Comment
Fire District #5		No comment
WA State Dept. of Archaeology and Historic Preservation		No comment
Yakama Nation		No comment
Confederated Tribes of Colville	August 15, 2023	The subject property is not located within an area of high probability of archaeological resources given the slope of the hillside.
Chelan-Douglas Health District	August 8, 2023	Ensure building setbacks are maintained for the existing well and the sewer lines.
Chelan County PUD		No comment
WA State Dept. of Ecology		No comment

33. The following public comments were received:

Name(s)	Response Date	Nature of Comment
Donald King	8/11/2023	Concerns about the reason the variance is being applied for.

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 July 7, 2023.
36. A Determination of Completeness was issued on July 25, 2023.
37. The Notice of Application was provided on July 29, 2023.
38. The Notice of Public Hearing was provided on October 21, 2023.
39. The Comprehensive Plan has been reviewed. Specifically, the goals and policies related to the Rural Waterfront (RW) designation for consistency with the proposed development which permits residential uses. This designation is considered an implementation of a Type 1 LAMIRD as described above, consistent with the Growth Management Act. "This designation will provide the opportunity for the development, redevelopment and infill of existing intensely developed shoreline areas for residential, and water related/water dependent recreational and tourist development consistent with the rural character and rural development provisions outlined in the goals and policies of this comprehensive plan. These areas provide a distinct water related lifestyle. Potential impacts to the surrounding area, critical areas, and water quality shall be addressed. These areas must be clearly identifiable as existing intensely developed rural shorelines; where a logical boundary can be delineated and set by the built environment. Such a boundary shall not permit or encourage a new pattern of sprawling low density or urban type development." Uses appropriate for these areas include: Open space and developed 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 or new development of small-scale water related/water dependent recreational or tourist uses, including commercial facilities to serve those recreational or tourist uses, that rely on a rural location or setting but that do not include a new residential component; intensification of development on lots containing existing isolated nonresidential uses; home occupations; bed and breakfasts; and community facilities."
40. Chelan County Code, Chapter 11.04 District Use Chart:
 - 40.1 The proposed development is located within the RW zoning district, which permits accessory structures.
 - 40.2 The proposed use is consistent with Chelan County Code.
41. Chelan County Code, Section 11.18.020 Standards.
 - 41.1 The applicant is requesting to vary the front yard setback from 25 ft. from the property line to 2 ft. from the property line to construct a 2-story detached structure with a 2-car garage, tram cover and ADU, proximity to the location of the existing funicular tram (that received a permit from Labor & Industries in 1992, but apparently has no permit from Chelan County), and the application of Title 11 which was not in effect at the time the plat was created in 1928.
 - 41.2 Hearing Examiner Finding: Due to slope, access, existing structures, and the application of Title 11, the applicant is requesting a front yard setback of 2 ft. to construct a garage accessory to the existing single-family residence. The variance would allow the property owner to develop their property in a way that is consistent with Chelan County Code and the Comprehensive Plan.

42. Chelan County Code, Chapter 11.95 Variances - 11.95.030 Evaluation criteria:

- 42.1 No variance shall be granted unless it can be shown that all of the following conditions exist:
- 42.1.1 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.
 - 42.1.1.1 The applicant is requesting a zoning variance to construct a 2-car garage, tram cover and ADU to the existing single-family residence.
 - 42.1.1.2 Hearing Examiner Finding: The surrounding properties are developed with single-family residences and their appurtenances. This variance would allow the applicant to enjoy the same developmental rights as the surrounding property owners. The proposed accessory structure and ADU would be of similar size and design as the surrounding residential developments; therefore, this variance would not constitute a special privilege.
 - 42.1.2 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.
 - 42.1.2.1 The proposed accessory structure and ADU location is the only feasible location on the subject property due to the steep slope. Alternative locations are too steep for construction or are not accessible by vehicle. The only access point on the subject property is located within the side yard setback and is used to provide Chelan County PUD access and maintenance to a pump station, power pole, and existing well. The applicant is proposing a new access point that would avoid conflict with the utility and maintenance easement and provide safer access to the proposed garage.
 - 42.1.2.2 Hearing Examiner Finding: The plight of the applicant is due to the lot topography, which creates limited possible building sites for an accessory structure and ADU of which the applicant has no control.
 - 42.1.3 The hardship asserted by the applicant is not the result of the applicant's or the owner's action.
 - 42.1.3.1 The subject property was legally created via the Plat of Cedar Brae in 1928, before the adoption of setback requirements in Chelan County. Furthermore, the lot topography and limited access creates a lot that would make it difficult for the applicant to build an accessory structure in a reasonable location.
 - 42.1.3.2 Hearing Examiner Finding: The hardship does not appear to be the result of the owner's actions.

42.1.4 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.

42.1.4.1 The authorization of this variance would not be materially detrimental to the purpose of Title 11; this variance would promote the goals and objectives of Title 11 and the comprehensive plan. The proposed development for a garage is similar to other uses and structures within the same zoning district and neighborhood. Chelan County Code Chapter 11.04 District Use Chart permits accessory structures and ADU's within the Rural Waterfront (RW) zoning district. The issuance of this variance to allow for the construction of the proposed garage and ADU would not be injurious to property in the same neighborhood, or negatively impact the health and safety of the neighborhood, as the surrounding properties are developed with accessory structures of similar size and design.

42.1.4.2 Hearing Examiner Finding: The authorization of this variance would promote the development of the subject property for a garage and ADU and would not be injurious to property in the same neighborhood. The applicant is requesting approval of the preservation of a property right that is the same as is enjoyed by other properties in the neighborhood. The authorization of this variance for the construction of the proposed garage would promote the goals and objectives of Title 11 and the comprehensive plan.

42.1.5 The hardship asserted by the application results from the application of this title to the property.

42.1.5.1 The application of the 25 ft. front yard setback required by Title 11 results in the inability to construct an accessory structure on the subject property due to the 40 percent downward slope resulting in no feasible alternative building sites. Additionally, the Cedar Brae Plat was recorded in 1928, which predates the adoption and implementation of the zoning regulations per the current Chelan County Code.

42.1.5.2 Hearing Examiner Finding: The hardship is a result of the lot topography and the application of the Chelan County Code to the subject property based on property specific conditions.

43. The granting of a variance should not:

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

43.1.1 The hardship appears to be caused by site specific conditions such as topography and feasible access to the property. Based on the application materials, the applicant partially bases the need for the variance on the reasonable use of the existing tram. Without the variance, vehicles would be located in an uncovered

area and goods and passengers would not be easily loaded onto the tram for transport down to the primary residence. However, the existing tram is an unpermitted structure that is located within the front yard setback.

- 43.1.2 Hearing Examiner Finding: While the hardship does not appear to be substantially based upon precedent established by illegal or nonconforming structures, the applicant's variance request is partially based on the use of the tram structure, which is unpermitted as it currently stands.
- 43.2 Be substantially based upon lack of reasonable economic return or a claim that the existing/proposed structure is too small.
 - 43.2.1 The residential accessory structure is located in the most feasible location on the subject property. The structure is proposed to be the minimum size reasonable for a single-family garage and ADU. Based on the application materials, the applicant has stated that the proposed development is not for the purpose of economic return.
 - 43.2.2 Hearing Examiner Finding: The hardship does not appear to be based on lack of reasonable economic return or a claim that the proposed garage and ADU structure is too small.
- 43.3 Be based on the fact that the condition, for which the variance is requested, existed at the time the applicant acquired the property.
 - 43.3.1 The hardship created by the topography of the subject property existed at the time the property owners acquired the property; however, the 25 ft. front yard setback requirement did not exist at that time.
 - 43.3.2 Hearing Examiner Finding: The application of Title 11 precludes the property owner from constructing an accessory structure on the subject property, which did not exist at the time the applicant acquired the property.
- 43.4 Result in a de facto zone reclassification.
 - 43.4.1 The proposal would not result in any changes to the requirements of the Rural Waterfront (RW) zoning district.
 - 43.4.2 Hearing Examiner Finding: The proposal is consistent with this provision.
- 43.5 Be substantially for the purpose of circumventing density regulations.
 - 43.5.1 The proposal would not result in a change of density.
 - 43.5.2 Hearing Examiner Finding: The proposal is consistent with this provision.
- 44. An open record public hearing was held via Zoom on November 1, 2023.
- 45. The staff report, application materials, agency comments and the entire file of record were admitted into the record.

46. Appearing and testifying for the Applicant was Anne Hessberg. Ms. Hessberg testified that she is the agent for the property owner and the Applicant in this matter. She indicated that she did have some comments and concerns regarding the staff report and proposed Conditions of Approval. She testified that water is provided by a private well and that sanitation is provided by a lift tank to sanitation system of the PUD No. 1 of Chelan County. She stated that the tram was permitted by Labor & Industries in 1992. She argued that a 2015 administrative determination allows this tram. The Hearing Examiner asked that the administrative determination she is referencing be provided to the Hearing Examiner and Ms. Hessberg did provide that to the Hearing Examiner by email on November 1, 2023. She argued that based upon the administrative determination she referenced that the tram is a legal non-conforming use and no further permitting is required. She asked that proposed Condition of Approval No. 7.1 be amended to only apply to the permit for the garage and to remove proposed Condition of Approval No. 8.
47. The Hearing Examiner reviewed the administrative determination forwarded to him by the Applicant's agent. This is an administrative determination request, Chelan County File No. AD 2015-085 dated May 11, 2015. This administrative determination was limited in its applicability as the question presented was whether the replacement of a cabin and garage and the construction of residence and accessory structures were exempt from the critical area regulations pursuant to RCW 36.70A.480(3)(c)(i). The Hearing Examiner does not interpret this administrative determination to have the comprehensive effects argued by the Applicant's agent. The administrative determination is limited to the specific question presented. It is true that this administrative determination applied to the Applicant's property at 15580 Cedar Brae Road on Lake Wenatchee. The proposal by Mr. Lyman Boyd at that time was to replace a residence with attached decks which were destroyed by a fire.
48. It is true that this administrative determination states: "prior to 1994, the Department's building permit records may be incomplete; therefore, structures built prior to 1994 may or may not have received a building permit. If there is no record of a building permit found in the Department's files for a structure built prior to 1994, this structure may be considered a legally established structure." This administrative determination went on to characterize that such structures "may" be considered legally non-conforming.
49. The evidence before the Hearing Examiner is that the tram was partially destroyed in this same fire. Again, this administrative determination does not specifically reference the tram, but instead is limited to a proposed residence and attached decks.
50. The County has not provided any argument, either factually or legally, that the tramway was not a legal non-conforming use prior to its destruction. It is apparent that the tramway is to be reconstructed in the same footprint as the prior tramway. The Hearing Examiner finds this tramway to be a legally non-conforming use. However, this finding does not eliminate the requirement of the Applicant to obtain permits and approvals from other agencies, including Chelan County, that are required even though the tramway is a legal, non-conforming structure.
51. No members of the public testified at the hearing.
52. The Chelan County Hearing Examiner considered all evidence within the record in rendering this decision.

53. 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, VAR 23-294 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. The development shall be in substantial compliance with the Chelan County Zoning Resolution, in addition to all other applicable local, state and federal regulations.
2. The development shall proceed in substantial compliance with the application and site plan of record date stamped July 7, 2023.
3. Pursuant to Chelan County Code Section 11.95.050, in any case where a variance is granted under the terms of this title, no building or other permit shall be issued until after the end of the appeal period allowed in Title 14 of this code. An appeal of the decision shall automatically stay the issuance of building or other permits until such appeal has been completed.
4. Pursuant to Chelan County Code Section 11.95.060, the granting of a variance and the conditions set forth runs with the land; compliance with conditions of the variance is the responsibility of the current owner of the property, whether that is the applicant or a successor.
5. Pursuant to Chelan County Code Section 11.95.080, a variance shall become void three years after approval if no substantial construction has taken place or such other time period as established by the Hearing Examiner.

6. Pursuant to Chelan County Code Section 11.02.040, prior to commencement of construction, the applicant shall obtain all required and necessary building permits, from any agency with jurisdiction.
7. Pursuant to Chelan County Code Section 11.88.140, the proposed retaining walls shall not cross property lines without the permission of the property owner. This may include any entry into a County right-of-way.
8. Pursuant to Chelan County Code Section 11.86.020, a geologic site assessment shall be required at the time of building permit application.
9. Pursuant to Chelan County Code Section 11.88.190, no construction activity shall be permitted within one thousand feet of an occupied residence between the hours of 8:00 p.m. to 6:00 a.m., Monday through Friday, and 8:00 p.m. to 7:00 a.m. on weekends.
10. Pursuant to RCW 27.53.060, the owner/developer/contractor shall contact the Confederated Tribes of the Colville Reservation and the Washington State Department of Archaeology and Historic Preservation 10 days prior to any ground disturbing activities in order for an agency representative to be present on site. If any Native American grave sites or archaeological resources are discovered or excavated, work shall stop immediately.
 - 10.1. An inadvertent discovery plan shall be submitted with the building permit application and kept onsite during all land disturbing activities. A sample of this plan is attached as Exhibit A.
11. The applicant shall conform to the comments and conditions of approval as found in the Chelan County Public Works Department agency comment response dated June 3, 2021:
 - 11.1. A Hold Harmless Agreement shall be required to be recorded with the County, alleviating the County of any fault if there is damage to the structure(s) due to County maintenance or work on the roadway/right-of-way.
 - 11.2. The retaining walls in the County right-of-way shall be approved by the County Engineer. If approved, the applicant shall enter into a Right-of-Way Use Agreement prior to any construction within the right-of-way or permits being issued for access. Additionally, a Work in Right-of-Way permit must be obtained from Public Works prior to work being done in the right-of-way.
12. 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.

Dated this 8 day of November, 2023.

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.