



Notice of Hearing Examiner Decision

09/13/2021

To: Interested Parties and Parties of Record

RE: Project Name: Roth Critical Area Variance
 Applicant: Madalyn Roth and Justin Hutchinson
 5180 SW Daisy St
 Port Orchard, WA 98367
 Application: Critical Area Variance
 Permit Number: 20-02620

The Kitsap County Hearing Examiner has **APPROVED** the land use application for **Permit #20-02620 Roth Critical Area Variance** subject to the conditions outlined in this Notice and included Decision.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS TIMELY APPEALED, AS PROVIDED UNDER WASHINGTON LAW.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review by contacting the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to Noon, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Owner: Madalyn Roth & Justin Hutchinson, madalynaroth@gmail.com
Ecological Land Services: Joanne Bartlett: Joanne@eco-land.com
Kitsap County Public Works
Kitsap County Parks & Recreation
Kitsap Public Health District
Kitsap Transit
DCD
DSE
Central Kitsap Fire District

Central Kitsap School District
Bremerton School District
Puget Sound Energy
City of Port Orchard Planning Director
Point No Point Treaty Council
Suquamish Tribe
Port Gamble S'Klallam Tribe
Skokomish Tribe
Squaxin Island Tribe
Puyallup Tribe
WA State Dept of Ecology-Wetland Review
WA State Dept of Fish & Wildlife
DCD Staff Planner: Roxanne Robles
Interested Parties: None

**BEFORE THE HEARING EXAMINER
FOR KITSAP COUNTY**

In the Matter of the Application of)	No. 20-02620
)	
Madalyn Roth and Justin Hutchinson)	Roth Critical Area Variance
)	
For a Critical Area Variance)	FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The request for approval of a Critical Area Variance to reduce the standard buffer associated with an on-site fish-bearing stream by 35 percent, from 150 feet to 97 feet, to allow for the construction of a single-family residence and associated appurtenances on a 5.01-acre property at 13031 NW Taterbug Court, is **GRANTED**. Conditions are necessary to address specific impacts of the proposal.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on August 26, 2021, using remote access technology.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Roxanne Robles, County Senior Planner
Scott Diener, County Development Services and Engineering Manager

Exhibits:

The following exhibits were admitted into the record:

1. Required Permit Questionnaire – Critical Area/Shoreline Buffer Reductions or Variance, received June 29, 2020
2. Critical Areas Report and Habitat Management Plan, Ecological Land Services, Inc., dated March 17, 2020
3. Drainage Plans:
 - a. Engineered SWPPP, Grading, and Drainage Plan, dated May 4, 2020
 - b. Engineered Post-Construction Soil Amendment Plan, dated May 4, 2020
 - c. Engineered Notes and Details, dated May 5, 2020
4. Drainage Analysis Report, MAP, Ltd., dated May 4, 2020
5. Stormwater Worksheet, received June 29, 2020
6. Notice of Application, dated July 23, 2020
7. Project Narrative, received November 18, 2020
8. Septic Design Letter, Allied Design, Inc., dated November 17, 2020

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9. Site Plan Detail, received November 18, 2020
10. Revised Site Plan, received November 18, 2020
11. Email from Roxane Robles to Tom Weaver, dated August 2, 2021
12. Notice of Public Hearing, published August 11, 2021
13. Certification of Public Notice, undated
14. Staff Report, dated August 17, 2021
15. County Staff Presentation Slides, dated August 26, 2021

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

1. Madalyn Roth and Justin Hutchinson (Applicant), request a Critical Area Variance from Kitsap County Code (KCC) 19.300.315.A to reduce the standard buffer associated with an on-site Type F fish-bearing stream by 35 percent, from 150 feet to 97 feet, to allow construction of a 1,721 square foot single-family residence with associated appurtenances. A required 15-foot building setback from the reduced buffer edge would be maintained. The 5.01-acre undeveloped property is located at 13031 NW Taterbug Court.¹ *Exhibit 1; Exhibit 2; Exhibit 7; Exhibit 9; Exhibit 10; Exhibit 14, Staff Report, pages 1 and 2.*
2. Kitsap County (County) determined the application was complete on July 9, 2020. On July 23, 2020, the County provided notice of the application consistent with the requirements of KCC 21.04.210 by publishing notice in the County's publishing newspaper of record and by mailing notice to property owners within 800 feet of the site and to reviewing departments and agencies, with a comment deadline of August 6, 2020. On August 11, 2021, the County mailed notice of the associated open record hearing to property owners within 800 feet of the site, published notice in the County's publishing newspaper of record, and posted notice on the property. The County did not receive any comments on the proposal from members of the public in response to its notice materials. *Exhibit 6; Exhibit 12; Exhibit 13; Exhibit 14, Staff Report, page 6.*

State Environmental Policy Act

3. The County determined that the proposal is categorically exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). Under Washington Administrative Code (WAC) 197-11-800(2)(b)(i), projects involving the construction or location of up to four detached single-family residential units are categorically exempt from SEPA environmental review. In addition, under WAC 197-11-800(6)(e), variance applications based on special circumstances applicable

¹ The subject property is identified by Kitsap County Assessors Tax Account No. 052401-1-045-1009. *Exhibit 1.* A legal description of the property is included with the Drainage Plans. *Exhibit 3.a.*

to the property, such as size, shape, topography, location, or surroundings, that would not result in any change in land use or density are exempt from SEPA environmental review. *Exhibit 14, Staff Report, page 2.*

Comprehensive Plan and Zoning

4. The property is designated “Rural Residential” by the County Comprehensive Plan. County staff identified the following Comprehensive Plan policies as relevant to the proposal:

- Limit the designated rural area to low residential densities that can be sustained by minimal infrastructure improvements, cause minimal environmental degradation, and that will not cumulatively create the future necessity or expectation of urban levels of service. [Land Use Policy 50].
- Permit residential uses in rural areas consistent with the planned rural character of the surrounding area. [Land Use Policy 51].
- Outside of the Type III Limited Area of More Intensive Rural Development (LAMIRD), limit development only to that which serves rural residential or resource needs and does not draw population from Urban Growth Areas. This policy is implemented through Comprehensive Plan Land Use designations, zoning designations, and zoning code provisions. [Land Use Policy 53].
- Compensatory mitigation shall be the last option of resort in mitigation sequencing, following documentation of avoidance and minimization of any impact to the natural environment that triggers compensatory mitigation. Replacement of altered or displaced natural environments (including critical areas and buffers) must be mitigated either on-site, within the watershed, or service area as defined through an approved mitigation bank or in-lieu fee program. [Environment Policy 18].

Exhibit 14, Staff Report, pages 2 and 5.

5. The subject property and all surrounding properties are zoned “Rural Residential” (RR). The RR zone “promotes low-density residential development consistent with rural character. It is applied to areas that are relatively unconstrained by environmentally sensitive areas or other significant landscape features. These areas are provided with limited public services.” *KCC 17.130.010*. Development of detached single-family residential dwellings with associated appurtenances is a permitted use within the RR zoning district. *KCC 17.410.042*. County staff reviewed the Applicant’s site plans and determined that the proposed single-family residence would meet or exceed RR zoning requirements for minimum front, side, and rear setbacks. *KCC 17.420.052*. The Applicant would provide three off-street parking spaces in accord with the off-street parking requirements of *KCC 17.490.030*. Under *KCC 17.500.010*, single-family residential lots are exempt from County landscaping standards. The County would conduct further review of the proposal to ensure compliance with applicable development

regulations during the site development or building permit stage. *Exhibit 9; Exhibit 10; Exhibit 14, Staff Report, pages 2, 3, and 7.*

Existing Property and Proposed Development

6. The 5.01-acre subject property is currently undeveloped apart from some clearing activity and storage sheds at the southeast corner of the site near the property's access point from NW Taterbug Court. The northern portion of the property is rectangular and narrow, and the southern third of the property widens to the east, resulting in an L-shaped lot. The irregular shape of the lot was the result of a Category III wetland that was previously delineated in the southwest corner of the property in 2008. As discussed in further detail below, a Type F fish-bearing stream with a standard 150-foot buffer flows through the center of the property from the north to the south. The Applicant proposes to construct a 1,721 square foot single-family residence with an associated septic system in the southeast corner of the property, which would require the standard 150-foot stream buffer to be reduced to 97 feet at one location to accommodate the proposed location of the house and patio, while maintaining a required 15-foot building setback from the edge of the buffer, and to be reduced to 104 feet at a second location to accommodate the proposed location of the septic system. *Exhibit 2; Exhibit 10; Exhibit 14, Staff Report, pages 1 and 2.*
7. MAP, Ltd., prepared a preliminary drainage analysis for the Applicant, dated May 4, 2020. The drainage analysis determined that the proposed development would result in 4,932 square feet of new impervious surface area. A stormwater tightline with catch basins would collect stormwater runoff from the rooftop and from the 955 square feet of driveway surface located upgradient from a flow dispersion trench that would be placed at the 150-foot stream setback. The County would review the Applicant's final stormwater drainage design for compliance with the County's 2016 Stormwater Design Manual at the building permit stage. *Exhibits 3 through 5; Exhibit 14, Staff Report, page 11.*

Critical Areas

8. Ecological Land Services, Inc., prepared a Critical Areas Report and Habitat Management Plan for the Applicant, dated March 17, 2020. The report identified the on-site stream as a Type F fish-bearing stream with a standard 150-foot protective buffer and additional 15-foot building and impervious surface setback from the edge of the buffer. The report determined that a previously delineated wetland at the property's southwest corner no longer meets the current criteria for classification as a wetland. The report also determined that the proposed project would result in approximately 6,213 square feet of permanent impacts to the on-site stream buffer and that it could not avoid such impacts due to site topography, noting that the proposed location of a gravity septic system would not be possible at any other location on-site. County staff confirmed with the Applicant's septic system designer that the proposed location of the septic system would be the only feasible option and would avoid pumping septic effluent across the on-site stream. The report further determined that the proposal would minimize impacts to the stream buffer

by constructing the house in an area that has already been cleared and by utilizing best management practices during construction. To mitigate for the 6,213 square feet of permanent impacts to the on-site stream buffer, the Applicant would plant 6,213 square feet of native trees and shrubs in the cleared area of buffer west of the house. The report determined that the proposed mitigation plan would provide functional ecological lift on-site, create habitat, shield light and noise from the stream, and filter runoff from upslope areas. No other critical areas were identified on-site. *Exhibit 2; Exhibits 7 through 11; Exhibit 14, Staff Report, pages 1, 2, 4, 9, and 10.*

Critical Areas Variance

9. Type F streams are classified as fish and wildlife habitat conservation areas that are required to be protected with a standard 150-foot buffer and additional 15-foot building setback from the buffer edge. *KCC 19.300.310; KCC Table 19.300.315.* As noted above, the Applicant is requesting a critical areas variance to reduce the standard stream buffer by 35 percent, from 150 feet to 97 feet, while including the additional 15-foot building setback, to accommodate the residential structure and associated appurtenances. *Exhibit 7; Exhibit 10; Exhibit 14, Staff Report, pages 1 and 2.*

10. County staff analyzed the proposal and determined that, with conditions, it would meet the specific criteria for a critical areas variance under KCC 19.100.135.A, noting:
 - Development on the 5.01-acre property is constrained due to a fish-bearing stream that bisects the property. The proposed single-family dwelling and associated septic system must be placed in the proposed location at the southeast corner of the lot to avoid pumping septic effluent across the stream.
 - The site conditions were not created by the Applicant or by the previous property owner, and the site is currently undeveloped. The environmental constraints necessitating a variance are not the result of the Applicant's actions.
 - The request is to reduce the standard 150-foot buffer to 97 feet to accommodate the patio of the proposed residence, and to reduce the buffer to 104 feet to accommodate the associated septic drainfield. The standard buffer would be retained elsewhere on the site. Because 6,213 square feet of standard buffer area would be permanently impacted by the proposed development, the proposal includes 6,213 square feet of mitigation plantings to offset these impacts.
 - The proposed development could not be achieved using buffer averaging. An administrative 25 percent buffer reduction would not create enough area to accommodate the proposed single-family residence and associated septic drainfield.
 - The proposed 35 percent buffer reduction to allow for development of a home in the southeast portion of the lot is a preferable alternative to other options because it would avoid direct stream impacts. The Applicant's septic designer verified that the proposed location of the septic system is the only practical option and would avoid pumping septic effluent across the stream. A variance request for a

home at another location on the property could result in a greater impact to habitat function and water quality.

- The Applicant's critical areas report and habitat management plan characterizes the stream buffer functions as well as upland areas outside of the buffer. The report states that avoidance is not possible and lists various minimization methods. The report notes that the project would result in 6,213 square feet of buffer reduction and that the Applicant would provide an equivalent amount of native plantings as compensation for the impacts. The mitigation plan has been approved for the proposed buffer reduction, and County staff has recommended conditions ensuring that the project would adhere to recommendations provided in the report.

Exhibit 14, Staff Report, pages 8 and 9.

Testimony

11. County Senior Planner Roxanne Robles testified generally about the proposal and how it would meet the requirements for a Critical Areas Variance. She noted that the 5.01-acre subject property is an L-shaped lot and is currently vacant and undeveloped apart from a few storage sheds. Ms. Robles stated that property is forested with evergreen trees in the northern and western portions of the site, with deciduous trees and shrubs located throughout the remainder of the site, and that a fish-bearing stream with a standard 150-foot buffer flows north to south through the center of the property. She noted that the southeastern portion of the property where the proposed development would be located appears to have been cleared sometime between 2018 and 2019. Ms. Robles stated that the property is within the RR zoning district and that the proposed development would meet density and dimensional standards applicable to the RR zone. She explained that a seasonally inundated depression in the southwest corner of the property was previously categorized as a wetland during a 2008 investigation but was later determined not to meet wetland criteria during a later 2020 investigation. Ms. Robles stressed that the proposed location of the single-family residence, garage, and associated septic system at the southeast corner of the property would be necessary to avoid pumping septic effluent across the on-site stream. She noted that the requested variance would result in permanent impacts to 6,213 square feet of standard buffer area, which the Applicant would offset through 6,213 square feet of on-site mitigation plantings. *Testimony of Ms. Robles.*
12. County Development Services and Engineering Manager Scott Diener explained that the County adopted a stormwater design manual in 2016 that resembles the 2012 Department of Ecology Stormwater Management Manual for Western Washington, as amended in 2014, but contains additional provisions addressing local conditions. *Testimony of Mr. Diener.*

Staff Recommendation

13. County staff recommends approval of the critical areas variance, with conditions. *Exhibit 14, Staff Report, pages 11 and 12.*

CONCLUSIONS

Jurisdiction

The Kitsap County Hearing Examiner is authorized to hear and decide requests for a critical areas variance. *KCC 2.10.070; KCC 19.100.135.B; KCC 21.04.080; KCC Table 21.04.100.*

Criteria for Review

The Hearing Examiner may grant a variance from the regulations or standards of the County's critical areas ordinance to a particular piece of property when the application meets all of the following criteria:

1. Because of special circumstances applicable to the subject property, including size, shape, or topography, the strict application of this title is found to deprive the subject property of rights and privileges enjoyed by other properties in the vicinity; provided, however, the fact that those surrounding properties have been developed under regulations in force prior to the adoption of this ordinance shall not be the sole basis for the granting of a variance;
2. The special circumstances referred to in subsection [1 above] are not the result of the actions of the current or previous owner;
3. The granting of the variance will not result in substantial detrimental impacts to the critical area, public welfare or injurious to property or improvements in the vicinity and area in which the property is situated or contrary to the goals, policies and purpose of [the County's critical areas ordinance];
4. The granting of the variance is the minimum necessary to accommodate the permitted use;
5. No other practicable or reasonable alternative exists (See Definitions, Chapter 19.150); and
6. A mitigation plan (where required) has been submitted and is approved for the proposed use of the critical area.

KCC 19.100.135.A.

The criteria for review adopted by the Kitsap County Board of Commissioners are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusion Based on Findings

With conditions, the proposal would meet the specific criteria for approval of a critical areas variance under KCC 19.100.135.A. The County provided reasonable notice and opportunity to comment on the proposal. The County did not receive any comments on the proposal from members of the public in response to its notice materials. The County determined that the proposal is categorically exempt from SEPA environmental review. The proposal would be consistent with several policies of the County Comprehensive Plan that allow low-density, residential uses in rural areas while adequately mitigating for impacts to critical areas and buffers. Detached, single-family residential dwellings are a permitted use in the RR zoning district, and the proposal would comply with all applicable zoning code requirements. The County would review the project's final stormwater drainage design at the building permit stage to ensure that it would comply with the County's 2016 Stormwater Design Manual.

A critical areas variance is required due to the location of a Type F fish bearing stream that flows through the center of the property from the north to the south, which limits the developable area of the site. This special circumstance is not the result of action by the Applicant or previous property owner. Ecological Land Services, Inc., prepared a Critical Areas Report and Habitat Management Plan for the Applicant, which determined that the proposal would result in 6,213 square feet of permanent impacts to the on-site stream buffer, that these impacts could not be avoided because there is no other suitable location on-site for the proposed septic system that would serve the single-family residential development, and that the requested variance would be the minimum necessary to allow construction of the proposed 1,721 square foot single-family residence and associated septic system. Siting the septic system in the proposed location on the property would avoid potentially greater impacts that could occur from pumping septic effluent across the on-site stream. As mitigation for the 6,213 square feet of permanent impacts to the on-site stream buffer, the Applicant would plant 6,213 square feet of native trees and shrubs in the cleared area of buffer west of the house. Ecological Land Services determined that the proposed mitigation would provide a functional lift on-site, create habitat, shield light and noise from the stream, and filter runoff from upslope areas. Accordingly, as conditioned, the proposed variance would not result in substantial detrimental impacts to critical areas or the public welfare, would not be injurious to surrounding residential properties, and would be consistent with the purpose of the County's critical areas ordinance.

Conditions, as detailed below, are necessary to ensure: the Applicant obtains all necessary permits, the development is consistent with the Applicant's submitted plans; the remaining critical area buffer is permanently identified with appropriate signage and/or fencing; the remaining critical area buffer and required setbacks maintain or enhance natural vegetation; the project adheres to the mitigation measures and recommendations of the critical areas report and habitat mitigation plan; and the project complies with all other applicable requirements of the County code. *Findings 1 – 13.*

DECISION

Based upon the preceding findings and conclusions, approval of a Critical Area Variance to reduce the standard buffer associated with an on-site fish-bearing stream by 35 percent, from 150 feet to 97 feet, to allow for the construction of a single-family residence and associated appurtenances on a 5.01-acre property at 13031 NW Taterbug Court, is **GRANTED**, subject to the following conditions:²

1. All required permits shall be obtained prior to commencement of land clearing, construction, and/or occupancy.
2. The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition to the approval granted and is a continuing requirement of such approval. By accepting this approval, the Applicant represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the Applicant agrees to promptly bring such development or activities into compliance.
3. The decision set forth herein is based upon representations made and exhibits contained in the project application Permit #20-02620. Any change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to further review and approval of the County and potentially the Hearing Examiner.
4. Building permit applications are subject to Kitsap County Code Title 12 Stormwater Drainage and shall include a stormwater design in compliance with the provisions of the Kitsap County Stormwater Design Manual.
5. The Applicant shall record a Notice to Title for the proposed preservation area in the northwest of the site. The Notice to Title shall be submitted with the associated building permit and is required prior to approval of the building permit.
6. Prior to occupancy, the common boundary between the wetland buffer and the adjacent land shall be permanently identified with critical area buffer signs. Critical Area Ordinance (CAO) signs shall be placed along the designated boundary spaced approximately 50-feet apart, visual from sign to sign. Signs must be attached to existing trees with diameter breast height greater than four (4) inches. Alternative methods include 4x4 posts, metal posts, or split-rail fencing.
7. Stage construction equipment in the previously cleared area in the west of the proposed building. Avoid staging further within the critical area buffer.

² This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by the County code.

8. Permit application approval is subject to Chapter 19.300.315 of Kitsap County Code, which states that buffers or setbacks shall remain undisturbed natural vegetation areas except where the buffer can be enhanced to improve its functional attributes. Refuse shall not be placed in buffers.
9. Clearing and tree removal within the established wetland buffer shall be the minimum necessary to support the proposed improvements. Clearing limits must be clearly shown on the site plan with the associated building permit and clearing outside of the approved limits will require prior County approval.
10. Unless otherwise allowed through this variance, a 150-foot native vegetation buffer must be maintained along the boundary of the unnamed stream as depicted on the approved plans. In addition, a building or impervious surface setback line of 15 feet is required from the edge of the buffer, unless otherwise approved by this variance.
11. The variance to the stream buffer shall be the minimum necessary to accommodate the proposed development and in no case may exceed 35 percent of the required buffer.
12. The project shall adhere to the mitigation measures and recommendations within the approved Critical Areas Report and Habitat Mitigation Plan, dated March 2020.
13. At building permit application, submit KCPW Form 1601 for issuance of a concurrency certificate, as required by KCC Section 20.04.030, Transportation Concurrency.

DATED this 10th day of September 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center