



## Notice of Hearing Examiner Decision

03/07/2023

To: Interested Parties and Parties of Record

RE:           Project Name: Klinker Detached Garage Shop  
                  Applicant: Klinker Family Legacy LLC  
                                  13205 8TH AVE NW  
                                  SEATTLE, WA 98177  
                  Application: Critical Area Variance (CVAR)  
                  Permit Number: #21-03118

The Kitsap County Hearing Examiner has **DENIED** the land use application for Klinker Detached Garage Shop – Critical Area Variance (CVAR), **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://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; if you wish to view the case file or have other questions, please contact [help@kitsap1.com](mailto:help@kitsap1.com) or (360) 337-5777.

CC: Applicant/Owner: Klinker Family Legacy LLC, 13205 8<sup>th</sup> Ave NW Seattle WA 98177  
Authorized Agents: Robbyn Myers, [robbyn@bgeenvironmental.com](mailto:robbyn@bgeenvironmental.com); Arthur Langleie, [aklangleie@comcast.net](mailto:aklangleie@comcast.net)  
Health District  
Public Works  
Parks  
Navy  
DSE  
North Kitsap Fire District  
North Kitsap School District

Puget Sound Energy  
 Water Purveyor  
 PUD No 1  
 Sewer Purveyor  
 Point No Point Treaty Council  
 Suquamish Tribe  
 Port Gamble S'Klallam Tribe  
 Squaxin Island Tribe  
 Puyallup Tribe  
 WA Dept of Fish & Wildlife  
 WA Dept of Transportation/Aviation  
 WA State Dept of Ecology – SEPA  
 WA State Dept of Transportation  
 Interested Parties:

Beverly Ford, tthumbs33@yahoo.com ; Beverly Parsons, bevandpar@gmail.com; Carol Ann Price, carol9price@comcast.net; Lisa J Hurt, lisa@evanlenz.net; Margaret Tufft, margaret@qord.cc; Brock Robinson, P.O. Box 606 Indianola WA 98342; Frankye Jones, frankyejones@gmail.com; Bert Jackson, berthj@centurytel.com; Melissa Blanchard, melb16@comcast.net; Zann Jacobbrown, zanyajacob@gmail.com; Reed Garrett Blanchard, reed.blanchard@gmail.com; Steve T Walker, steve.t.walker@gmail.com; David & Susan Walker, walkers@ourwalkerhome.com; Neva Welton, neva.welton@gmail.com; Janice Gutman & Tina Gianoulis, janicegutman@gmail.com; Peggy Thurston, peggythemidwife@gmail.com; Craig Jacobbrown, cjacobbrown@gmail.com; Niki Quester, nikiquester@gmail.com; Rod Malcom - Suquamish Tribe, rmalcom@suquamish.nsn.us; Alison O'Sullivan – Suquamish Tribe, aosullivan@suquamish.nsn.us; Shar Willis, shar\_willis\_1@hotmail.com; Elizabeth Nichols, Dbnichols@centurytel.net; Sharla Willis, sharwillis020@gmail.com; Kerrie Deck, PO BOX 495 INDIANOLA, WA 98342-0495; Melinda J & Paul R West, PO BOX 323 INDIANOLA, WA 98342; Katherine L Haug, melandkathyhaug@gmail.com; David Ian McIlvena & Lindsey Rapp Smith, mcilvena@gmail.com; A. Stevens Quigley, quigley@attorneydude.com; Lisa Lenz, lisa@evanlenz.net; Laura Rotegard, Lmrotegard@gmail.com; Katherine E Dickerson, katherine.e.dickerson@gmail.com; Doug Hayman, seattleguitarman@hotmail.com; Susan Hancock, scrhancock@aol.com; Eir Cheeka, eirquester2@hotmail.com; Brian Murphy, craftbuilt@yahoo.com; Cy & Pamela Dassel, pamdassel@hotmail.com; Tina Gianoulis, tgianoulis@gmail.com; Michael T Dillon, miked7003@gmail.com; Karen J Kinnaird, kjk98342@gmail.com; Judith Drew, beljd@aol.com; Colleen Crowley-Vlahovich, vdoubleplay@comcast.net; Susan Henry, susanhenry@centurytel.net

**BEFORE THE HEARING EXAMINER  
FOR KITSAP COUNTY**

In the Matter of the Application of	)	No. 21-03118
	)	
<b>Klinker Family Legacy, LLC</b>	)	<b>Klinker Critical Areas Variances</b>
	)	
	)	FINDINGS, CONCLUSIONS,
<u>For Critical Areas Variances</u>	)	AND DECISION

**SUMMARY OF DECISION**

The request for approval of a critical areas variance to reduce the standard buffer associated with an on-site fish-bearing stream up to 76 percent, from 150 feet to a variable buffer width of between 36 and 65 feet, and for approval of a critical areas variance to reduce the standard top-of-slope setback of 25 feet and the additional 15-foot building setback to six feet—to allow for the construction of a two-story detached garage on a 0.37-acre property at 9077 NE Shore Drive, in the Indianola area of unincorporated Kitsap County—is **DENIED**.

Specifically, insufficient information exists to determine whether the proposal is consistent with the County’s critical areas ordinances, as required by Kitsap County Code (KCC) 19.400.440; whether adequate provisions have been made to ensure that the granting of the variances would not result in substantial detrimental impacts to the subject critical areas, public welfare, or injurious to property in the vicinity, as required by KCC 19.100.135.A.3; and whether no practicable or reasonable alternative exists as to the potential location of the proposed structure, as required by KCC 19.100.135.A.5.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on January 26, 2023, utilizing a hybrid approach allowing for live participation or participation by remote access technology. The record was left open until February 10, 2023, to allow any member of the public having difficulty connecting to the hearing to submit written comments in lieu of live testimony; and to allow for additional materials to be submitted. The County received additional materials, including comments on the proposal from members of the public and the Suquamish Tribe, and a letter from the Applicant’s geotechnical engineer. The record subsequently closed on February 10, 2023.

Testimony:

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

Carla Lundgren, County Planner  
Amanda Walston, County Clerk

*Findings, Conclusions, and Decision  
Kitsap County Hearing Examiner  
Klinker Critical Areas Variances  
No. 21-03118*

Robbyn Myers, Applicant Representative and Project Biologist  
Doug Hayman  
Elizabeth Nichols  
Arthur Quigley  
Kathy Dickerson  
Reed Blanchard  
Jeff Kanyer

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated January 18, 2023
2. Indianola Beach Plat Map, dated May 1, 1916
3. Project Narrative, dated June 2, 2021, with Site Photographs (6 Photographs)
4. Limited Geological Reconnaissance, Resolve Environmental & Geotechnical, Inc., dated September 7, 2020
5. Site Improvement Plan, received June 4, 2021
6. Simplified Drainage Review, Site Engineering, PLLC, dated March 30, 2021
7. Required Permit Questionnaire, dated June 4, 2021
8. Septic Site Plan, revised May 20, 2021
9. Habitat Management Plan, BGE Environmental, LLC, dated March 22, 2021
10. Agent Authorization Form, dated June 1, 2021
11. SEPA Environmental Checklist, dated June 10, 2021
12. Notice of Application, dated July 6, 2021
13. Public Comments from July 12, 2021 to December 20, 2021:
  - a. Comment from Kathlene Barnhart, Suquamish Tribe, dated July 12, 2021
  - b. Comment from Eir Cheeka, dated July 16, 2021
  - c. Comment from Susan Hancock, dated July 16, 2021
  - d. Comment from Doug Hayman, dated July 16, 2021
  - e. Comment from Dave Mcilvena, dated July 17, 2021
  - f. Comment from Brian Murphy and Karen Murray, dated July 17, 2021
  - g. Comment from Sharla M. Willis, dated July 18, 2021
  - h. Comment from Beverly Ford, dated July 18, 2021
  - i. Comment from Tina Gianoulis and Janice Gutman, dated July 18, 2021
  - j. Comment from Zann and Craig Jacobbrown, dated July 18, 2021
  - k. Comment from Kitsap Environmental Coalition, dated July 19, 2021
  - l. Comment from Pam Dassel, dated July 19, 2021
  - m. Comment from Lisa Lenz, dated July 19, 2021
  - n. Comment from Laura M. Rotegard, dated July 19, 2021
  - o. Comment from Melina and Paul West, dated July 19, 2021
  - p. Comment from A.S. Quigley, dated July 16, 2021
  - q. Comment from Washington State Department of Ecology, dated July 20, 2021
  - r. Comment from Kerrie Deck, dated July 19, 2021

*Findings, Conclusions, and Decision*  
*Kitsap County Hearing Examiner*  
*Klinker Critical Areas Variances*  
*No. 21-03118*

- s. Comment from Melina and Paul West, dated July 19, 2021
- t. Comment from Richard Blanchard, dated December 20, 2021
- 14. Site Plans, dated October 28, 2021
- 15. Applicant Response Letter to DCD, dated October 28, 2021
- 16. Applicant Response Letter to Kathy Dickerson, dated October 28, 2021
- 17. Applicant Information Request Checklist Response, dated April 12, 2022, with Klinker Family Legacy, LLC Annual Business Report, filed May 1, 2021, and Site Plans, revised October 28, 2021
- 18. County Health Building Site Application Decision, dated October 28, 2022
- 19. Determination of Nonsignificance, dated December 8, 2022
- 20. Surrounding Properties with Detached Structures Map, dated December 14, 2022
- 21. Geotechnical Report Addendum, Resolve Environmental & Geotechnical, Inc., dated January 4, 2023
- 22. Notice of Public Hearing, dated January 11, 2023
- 23. Certification of Public Notice, dated January 16, 2023
- 24. Critical Areas Map
- 25. Public Comments from June 13, 2022 to January 19, 2023:
  - a. Comment from Reed Blanchard, dated June 13, 2022
  - b. Comment from Reed Blanchard, dated December 20, 2021
  - c. Comment from Reed Blanchard, dated December 13, 2022
  - d. Comment from Reed Blanchard, dated August 23, 2022
  - e. Comment from Reed Blanchard, dated December 20, 2022
  - f. Comment from Doug Hayman, dated January 17, 2023
  - g. Comment from Mike and Sydni Dillon, dated January 18, 2023
  - h. Comment from Doug Hayman, dated January 18, 2023, with Site Photographs (3 Photographs)
  - i. Comment from Bob and Karen Kinnaird, dated January 18, 2023
  - j. Comment from Elizabeth Nichols, dated January 17, 2023
  - k. Comment from Lisa Sibbett, dated January 18, 2023
  - l. Comment from Colleen A. Crowley-Vlahovich, dated January 19, 2023
  - m. Comment from Judith Drew, dated January 19, 2023
- 26. County Staff Presentation
- 27. Hearing Sign-in Sheet
- 28. County Development Services and Engineering Memorandum, dated November 16, 2022
- 29. Public Comments from July 16, 2021 to January 26, 2023:
  - a. Comment from Reed Blanchard, dated January 20, 2023
  - b. Comment from Susan Hancock, dated January 19, 2023
  - c. Comment from Elizabeth Nichols, dated January 20, 2023
  - d. Comment from A.S. Quigley, dated January 20, 2023
  - e. Comment from A.S. Quigley, dated July 16, 2021
  - f. Comment from Matt McGinnis, dated January 21, 2023
  - g. Comment from Pam Dassel, dated January 22, 2023

*Findings, Conclusions, and Decision*  
*Kitsap County Hearing Examiner*  
*Klinker Critical Areas Variances*  
*No. 21-03118*

- h. Comment from Elizabeth Nichols, dated January 22, 2023
  - i. Comment from Kathy Dickerson, dated January 23, 2023
  - j. Comment from Jeff Kanyer, dated January 24, 2023
  - k. Comment from Greg Trueb, dated January 23, 2023
  - l. Comment from Elizabeth Nichols, dated January 23, 2023
  - m. Comment from Elizabeth Nichols, dated January 20, 2023
  - n. Comment from Elizabeth Nichols, dated January 22, 2023
  - o. Comment from Roderick Malcom, Suquamish Tribe, dated January 23, 2023
  - p. Comment from Billy and Sarah Runnels, dated January 26, 2023
  - q. Comment from Niki Quester, dated January 25, 2023
30. Additional Materials:
- a. Comment from A.S. Quigley, dated January 26, 2023
  - b. Comment from Ally Power, dated January 30, 2023
  - c. Applicant's Supplemental Information re: Septic, dated January 30, 2023
  - d. Geologic Summary Statement, dated February 1, 2023
  - e. Comment from Susan Henry, dated February 9, 2023
  - f. Comment from Laura Rotegard, dated February 10, 2023
  - g. Comment from Reed Blanchard, dated February 9, 2023

The Hearing Examiner enters the following findings and conclusions based upon the admitted testimony and exhibits:

## **FINDINGS**

### Application and Notice

1. Klinker Family Legacy, LLC (Applicant) requests a critical areas variance from KCC 19.300.315.A to reduce the standard buffer associated with an on-site Type F fish-bearing stream by up to 76 percent, from 150 feet to a variable buffer width of between 36 to 65 feet. The Applicant also requests a critical areas variance from KCC 19.400.435.A.2 to reduce the standard top-of-slope setback of 25 feet and the additional 15-foot building setback to six feet. The Applicant requests the variances to allow for the development of a two-story, 800 square foot detached garage on a 0.37-acre lot. The 150-foot buffer associated with a Type F stream—Indianola Creek—just east of the property extends over and impacts the entire property. In addition, a 40 percent slope along the eastern portion of the property extends downslope to Indianola Creek. The property is currently developed with a single-family residence and a shed. The shed would be demolished and replaced with the detached garage, if approved. The garage would contain a work room and home office. To mitigate for impacts to critical areas and/or critical area buffers from development, the Applicant would remove invasive species where practicable and

plant some native vegetation on-site. The property is located at 9077 NE Shore Drive.<sup>1</sup> *Exhibit 1, Staff Report, pages 1, 2, and 12; Exhibit 3; Exhibit 7; Exhibit 9; Exhibit 14.*

2. Kitsap County (County) determined that the application was complete on June 16, 2021. On July 6, 2021, 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 or emailing notice to property owners within 800 feet of the site and to reviewing departments and agencies. The notice materials stated that the comment period would remain open until seven days before the date of the open record hearing. On January 11, 2023, the County provided notice of the open record hearing associated with the application by publishing notice in the County's publishing newspaper of record, posting notice at the subject property, and mailing notice to interested parties and to property owners within 800 feet of the site. *Exhibit 1, Staff Report, pages 1 and 7; Exhibit 12; Exhibit 22; Exhibit 23.*
3. The County received approximately 50 comments on the proposal from area residents in response to its notice materials. These comments are discussed in greater detail below. The County also received a comment from the Suquamish Tribe expressing concerns about the size of the proposed development; the adequacy of the mitigation measures proposed; the potential impacts from runoff associated with the development of additional impervious surfaces, especially the potential impacts that may occur on water quality, and impacts to fisheries resources important to the Tribe. The Tribe contends that denial of the application would not deprive the Applicant of any rights or privileges. In addition, the Tribe requested clarification about how stormwater onsite would be addressed with further development. *Exhibit 13.a; Exhibit 29.o.*

#### State Environmental Policy Act

4. The County acted as lead agency and analyzed the environmental impacts of the project as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The County used the optional DNS process under Washington Administrative Code (WAC) 197-11-355 and provided notice of the threshold determination with the notice of application, issued July 6, 2021. The County's notice materials indicated that the County expected to issue a Determination of Nonsignificance (DNS) for the proposal and provided a SEPA comment deadline of 14 days from the date of the notice of application. The County received a comment from the Washington State Department of Ecology (DOE), which provided a general comment that if underground storage tanks (UST) are encountered during construction, they must be decommissioned in accordance with local fire department regulations and if soil or

---

<sup>1</sup> The subject property is identified by Kitsap County Assessors Tax Account No. 4360-001-024-0006. *Exhibit 1, Staff Report, page 1.*

groundwater contamination is encountered during UST decommissioning, the contamination must be characterized and cleaned up in accordance with DOE regulations.

After analyzing the Applicant's environmental checklist, received comments, and other available information, the County determined that—with mitigation—the project would not have a probable significant adverse impact on the environment. Accordingly, the County issued a Determination of Nonsignificance with mitigation measures (MDNS) on December 8, 2022. The MDNS requires that: the proposal comply with the Habitat Management Plan, including monitoring requirements, provided by BGE Environmental LLC, on March 22, 2021; and that the Applicant obtain a Hydraulic Project Approval (HPA) permit for the proposed stormwater system, if necessary. The MDNS was not appealed. *Exhibit 1, Staff Report, page 2; Exhibit 11; Exhibit 12; Exhibit 13.q; Exhibit 19.*

#### Comprehensive Plan and Zoning

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

- Promote health in the built environment. [Land Use Goal 2]
- Examine health and equity impacts of land use decisions to all populations. [Land Use Policy 13]
- Direct development to designated Urban Growth Areas consistent with projected population growth, Growth Management Act and Countywide Planning Policies while considering development patterns that reduce sprawl, use urban land more efficiently, and that incorporate feasible, innovative and sustainable practices. [Land Use Goal 6]
- Through application of Growth Management goals, increase density in urban areas and limit sprawl in rural lands. [Land Use Policy 29]
- Protect Kitsap County's unique rural character. [Land Use Goal 13]
- 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 51]
- Outside of the Type II Limited Area of More Intensive Rural Development (LAMIRD), limit development only to that which serves rural residential or resources 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]



- In accordance with RCW 36.704A.070(5c):
  - To preserve rural character of the County, emphasize controlling rural development; assuring visual compatibility of rural development with the surrounding rural area,
  - Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area,
  - Protect critical areas, as provided in RCW 36.70A.060, surface water, and groundwater resource, and,
  - Protect against conflicts with the use of agricultural, forest, and mineral resource lands designated in RCW 36.70.170.

This policy is implemented through Comprehensive Plan Land Use designations, zoning designations, and zoning code provisions. [Land Use Policy 54]
- Encourage development practices and design standards for the rural area, such as minimizing changes in grade from pre-development site conditions in order to maximize native vegetation retention. [Land Use Policy 55]
- Reduce the risk of damage to life, property and the natural environment through appropriate regulatory and incentive-based approaches in land use, transportation and development engineering programs. [Environment Goal 3]
- Use the best scientific information available to direct how functions and values of critical areas are preserved and enhanced. [Environment Policy 13]

*Exhibit 1, Staff Report, pages 3 through 6.*

6. 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*. Detached single-family residential dwellings with accessory uses or structures<sup>2</sup> are a permitted use within the RR zoning district. *KCC 17.410.042*. *Exhibit 1, Staff Report, page 3*.
7. Under *KCC 17.420.060.42.b*, any single-family residential lot of record<sup>3</sup> that has a smaller width or lot depth than that required by the zoning district, may use that residential zoning classification that most closely corresponds to the dimension or

---

<sup>2</sup> *Accessory use or structure* means an activity or structure that is commonly associated with but subordinate to any principal use or structure. *KCC 17.110.030*.

<sup>3</sup> *A lot of record* is a “lot which created in accordance with the laws and regulations in effect at the time it was created and is shown on the records of the county assessor or county auditor.” *KCC 17.110.450*.

dimensions of the lot of record for the purpose of establishing setbacks from the property lines. The lot width of the subject property is 75 feet, which is below the minimum lot width standards for the RR zoning district. Accordingly, the Urban Low (UL) zoning district setbacks may be applied to the subject property. Development standards for residential development within the UL zoning district generally require minimum front yard setbacks of 20 feet, minimum rear yard setbacks of ten feet, and minimum side setbacks of five feet on each side. The Applicant's project plans demonstrate that the proposed development would comply with the setback standards for the UL zone. *Exhibit 1, Staff Report, pages 3 and 4.*

#### Existing Property, Proposed Development, and Surrounding Area

8. The 0.37-acre rectangular property is currently developed with a single-family residence and shed. The residence is served by an on-site septic system, with a primary septic drainfield on the southern portion of the property and a reserve drainfield on the northern portion of the property. The property generally slopes down from the north to the south. The central and western portions of the property consist of typical residential landscaping. The eastern portion of the property contains scattered large conifers and English ivy. As discussed in further detail below, Indianola Creek, a Type F stream is located east of the subject property, with a standard 150-foot protective buffer that extends over the entire property, at the base of a 15-foot ravine with a 40 percent slope. Access to the property is provided by NE Shore Drive. All adjacent properties are developed with single-family residences. County staff identified 45 other properties in the immediate vicinity of the subject property with detached structures built near or around a critical area. Kitsap Public Health District reviewed and approved the proposal. *Exhibit 1, Staff Report, pages 2, 3, 11, 15, and 25; Exhibit 3; Exhibit 8; Exhibit 20.*

#### Critical Areas

9. Site Engineering, PLLC, prepared a Simplified Drainage Review for the Applicant, dated March 30, 2021. As proposed, runoff would be conveyed to a tightline roof drain system with a sediment control structure and "T" type energy dissipator that would convey runoff through a flex pipe to be dispersed through native vegetation near Indianola Creek. The report also recommends that the Applicant install a silt fence, utilize Best Management Practices (BMPs) for site stabilization, and implement a temporary erosion and sediment control plan for use during site development. The County Development Services and Engineering Department reviewed the Applicant's conceptual stormwater management proposal and determined that the concept would be supportable in its approach to civil site development. The Development Services and Engineering Department provided a memorandum recommending conditions related to stormwater management and other aspects of the proposed development, which have been incorporated into County staff's recommended conditions of approval. *Exhibit 1, Staff Report, pages 8, and 11 through 13; Exhibit 6; Exhibit 28.*

10. Resolve Environmental and Geotechnical, Inc., prepared a Limited Geotechnical Reconnaissance (“Limited Reconnaissance”) for the Applicant, dated September 17, 2020. The Limited Reconnaissance identifies the property as having a High Critical Hazard potential, a potential Shallow Landslide Hazard, and a potential High Erosion Hazard area. However, the report indicates that construction site slopes would be less than 10 percent, potentially impacted slopes appear to be stable, and no signs of erosion rills or established erosion pathways are observed. The report also determines that it is not likely that materials on the construction site would undergo substantial weathering and that draining and vegetating the property properly would mitigate local, potential sliding or sloughing. The report indicates that erosion would occur at a very low rate if appropriate stormwater drainage measures are implemented and that erosion in the proposed garage area would likely occur along all streambeds and beach shorelines. The Limited Reconnaissance also recommends that the Applicant install footings in the subsurface and states that drainage of the property could be accomplished with existing systems or with newer developed systems such as splash blocks. Finally, the report determined that proposed development would likely not have an adverse effect on slopes and that a full-scale geotechnical engineering investigation would not be necessary.

On January 4, 2023, Resolve Environmental and Geotechnical, Inc., submitted an addendum to the Limited Reconnaissance (“Reconnaissance Addendum”). The addendum indicates that, although the proposed developed would not impact the slope, it may be prudent to place the footings and foundation deeper in the subsurface. The addendum also states that the depth of the recommended footings and foundation would have to be engineered. It determines that, with an engineered footing/foundation design, the proposed development would not require the standard setback. *Exhibit 1, Staff Report, page 12; Exhibit 4; Exhibit 21; Exhibit 24.*

11. BGE Environmental, LLC, prepared a Habitat Management Plan (“HMP”) for the Applicant, dated March 22, 2021. The HMP identified a Type F fish-bearing stream with a standard 150-foot protective buffer and an additional 15-foot building and impervious surface setback from the edge of the buffer on the subject property. The HMP also identified a moderate seismic hazard associated with the crossing of the Type F stream to NE Shore Drive. The HMP further notes that, according to the Washington State Department of Fish and Wildlife Priority Habitat and Species mapping resource, five state candidate, priority, threatened, or endangered species are located within close proximity to the site. These species include Coho (*Oncorhynchus kisutch*), chum (*Oncorhynchus keta*), cutthroat (*Oncorhynchus clarki*), residential coastal cutthroat (*Oncorhynchus clarki*), and big brown bat (*Eptesicus fuscus*). The report determines that, due to the size, shape, existing use, and natural features, there is no alternative location for the proposed garage on the property. The HMP determines that eradication of English ivy, an invasive species, is not practical. The report recommends a five-year

mitigation plan that includes removal of English ivy where practicable and planting of a 10-by-100-foot area with native vegetation, including Western red cedar, salal, snowberry, huckleberry, and sword fern. *Exhibit 1, Staff Report, page 12; Exhibit 9; Exhibit 24.*

12. The subject property is also located in the vicinity of the 100-year flood plain of Puget Sound and Puget Sound itself, but is outside of the buffers associated with these critical areas. *Exhibit 1, Staff report, page 2; Exhibit 24.*
13. Dave's Septic Services, Inc., provided supplemental materials regarding the existing on-site septic system. The materials state that a new sewage disposal system was installed and approved by the health district on May 6, 1991, for the existing single-family residence, and that testing of the septic system in August 2022 demonstrated that there were no issues with the existing system. *Exhibit 30.c.*

#### Critical Areas Variance

14. Under the County's critical areas ordinances, 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 an additional 15-foot building setback from the buffer edge. *KCC 19.300.310; KCC Table 19.300.315.* In addition, top-of-slopes require a standard 25-foot setback with an additional 15-foot building setback. *KCC 19.400.435(2).* As noted above, the Applicant is requesting a critical areas variance to reduce the standard stream buffer by up to 76 percent, from 150 feet to a variable buffer width of between 36 and 65 feet to accommodate the proposed garage structure. The Applicant is also requesting a critical areas variance to reduce the top-of-slope buffer from 25 feet to six feet to accommodate the proposed structure. *Exhibit 1, Staff Report, pages 1 and 2; Exhibit 3.*
15. The Applicant provided a narrative addressing the requirements for approval of the requested critical areas variances under KCC 19.100.135.A, which asserts:
  - The site is limited in area as half of its width is defined as a steep slope ravine to a Type F stream. Due to the size of the property, the location of the critical areas, and the standard buffer requirements, strict application of all standards results in no alternatives for expansion outside of the standard stream buffer. The surrounding neighborhood tends to have a variety of parcel acreages and irregular property boundaries. Most of the properties have several outbuildings which include, but are not limited to, garages, boat houses, cabins, and general-purpose buildings. Strict application of the standard critical areas buffers deprives the Applicant of the property rights and privileges enjoyed by other property owners in the vicinity.
  - The property is a legal parcel.
  - Employing the highest sequential order of buffers and setbacks is not feasible given site constraints. Significant vegetation removal would not be necessary

with new construction and the implementation of the geotechnical report. Construction provisions would ensure that no adverse or substantial detrimental impacts would occur. Mitigation measures to promote and protect stream buffer function and value are included in the planting plan. Both the geotechnical report and Habitat Management Plan consider adverse or potential detrimental impacts to adjacent critical areas, public welfare, and the integrity of the property long-term.

- The proposed stream buffer is the minimum necessary to complete the project in conformance with Title 19 KCC and other provisions of the County code, where applicable.
- Due to the size and shape of the parcel, location of the ravine, existing parcel use and fluency, and other County provisions, including setbacks and drain field requirements, the proposal is the only reasonable alternative for the detached garage.
- A mitigation plan with a five-year maintenance and monitoring plan has been provided. The ravine along the top-of-slope and the immediate ravine face would be enhanced. Restrictions would apply for safety and slope face disturbances. The mitigation plan emphasizes invasive species removal.

*Exhibit 3.*

16. County staff analyzed the proposal and determined that, with conditions, it would meet the specific criteria for approval of the requested critical areas variances under KCC 19.100.135.A, noting:

- The subject site was platted in 1916 prior to stream buffer requirements and, therefore, the stream was never considered as a constraint to the plat or property. The Type-F stream buffer of 150 feet encompasses the entire property. Due to the size of the property, location of critical areas, and standard buffer requirements, strict application of Title 19 KCC would result in no possibility to develop the legally established, platted parcel. In addition, there are 45 other properties in the immediate vicinity with detached structures built near or around a critical area
- The circumstances restricting development of the property without a critical areas variance are not the result of the actions of the current or previous property owners. The lot is a legal lot of record created by way of a plat in 1916. The existing 1,298 square foot single-family residence on the property was built in 1925.
- The Applicant provided a habitat management plan that adequately demonstrates that this proposal, with mitigation, would not result in substantial detrimental impacts. The report recommends enhancement of the stream corridor with infill of native trees and shrubs, as well as the eradication of invasive Himalayan blackberry, Japanese knotweed, Scot's broom, and English ivy from the established stream corridor. The report also outlines a five-year monitoring plan. County staff recommends that hand and mechanized eradication methods be

deployed due to the proximity of the creek to Indianola Creek. The Applicant also provided a geotechnical assessment of the proposed reduced top-of-slope setback that indicates a “very low risk” to the stability of the slope and provides building recommendations and requests for inspection of the footings and foundation at the time of placement to further confirm slope stability.

- The granting of the variance would be the minimum necessary to accommodate the reasonably sized, 800 square foot detached use. Siting the proposed structure in any other location on the property would result in impacts to the required zoning setbacks or cause further critical area buffer encroachment.
- KCC 19.150.510 defines reasonable alternative as “an activity that could feasibly attain or approximate a proposal’s objectives, but at a lower environmental cost or decreased level of environmental degradation.” Alternative locations for the proposed residence would require encroaching into other required setbacks.
- The Applicant has submitted a mitigation plan that meets the goals and standards outlined in Chapter 19.300 KCC, and the project would be required to follow the recommendations of that report, including recommendations related to mitigation and five-year monitoring.

*Exhibit 1, Staff Report, pages 12 through 14.*

#### Written Comments

17. As noted above, the County received approximately 50 written comments on the proposal from members of the public in response to its notice materials in advance of the open record hearing. These comments generally related to the following topics:
- **Environmental Impacts:** Comments on this topic generally expressed concerns of the environmental impacts of the proposed development, particularly related to the critical areas. Numerous commenters expressed concerns that the reduced buffers would be inadequate to protect the stream and ensure slope stability. Several members of the public commented that the reduced buffers would not be consistent with County code or the County’s goal of protecting the environment. Several commenters raised concerns about increased impervious surfaces, on-site drainage, slope stability, and erosion and sedimentation control. Several commenters expressed concerns that the proposed development would impact water quality and negatively affect wildlife habitat, including habitat fish habitat. Several members of the public stated that the mitigation measures proposed by the Applicant would be insufficient to address impacts from the proposed development on the environment. A couple of commenters also questioned the adequacy of the geotechnical report and requested that the report be reviewed by a third party.
  - **Tribal Rights:** Comments on this topic generally expressed concerns that the subject property is on Port Madison Reservation Land and the proposed development would negatively impact the fishing rights of the Suquamish Tribe.

- **Intensity of the Proposed Use:** Comments on this topic generally expressed concerns that the proposed use would be too intense for the property and the nearby critical areas. Several commenters stated that the size of the proposed garage exceeded those in the area and should be reduced to limit impacts to critical areas. Several members of the public also expressed concerns about installing plumbing in the proposed structure and the adequacy of the existing on-site septic system. Numerous members of the public also raised concerns that the Applicant would turn the proposed structure into an accessory dwelling unit (ADU).
- **Alternatives:** Comments on this topic generally raised concerns that the Applicant had not fully analyzed alternative placements of the proposed structure on the property. Specifically, several commenters stated that the structure could be placed further west, further from the critical areas.
- **Support of Proposal:** Comments of this topic generally expressed support of approval of the requested variance. Several commenters stated that similar structures with similar variances exist on numerous properties in the vicinity of the subject property. Several members of the public also noted that the Applicant has been a steward of the land on their properties in the area.
- **Notice:** Comments on this topic generally raised concerns that the public had not received proper notice of the application. Several commenters stated that the public was not given enough time to review the application materials prior to the open record hearing.
- **Precedent:** Comments on this topic generally raised concerns that approval of the proposed variances would set precedent in the area for similar variances.
- **Adjacent Property Ownership:** Comments on this topic generally raised concerns that the Applicant owns other properties in the immediate vicinity of the subject property where the Applicant could build the proposed structure.
- **Addressing Public Concerns:** Comments on this topic generally raised concerns that the Applicant and County staff did not adequately address public concerns.

*Exhibit 13; Exhibit 25; Exhibit 29; Exhibit 30.*

#### Testimony

18. County Planner Carla Lundgren testified generally about the proposal and how, with conditions, it would comply with the requirements for approval of the requested critical areas variances. Ms. Lundgren noted that a detached garage is considered a right of having a single-family residence. She explained that the property contains a steep slope, a seismic hazard, and the buffer associated with a Type F-stream and that the Applicant requests a reduction of the top-of-slope and Type F stream setback buffers. She noted that County staff recommends conditions restricting structural and/or building components indicative of an ADU, including restrictions on kitchen, plumbing and electrical components. Ms. Lundgren also stressed that approval of an ADU would require additional permitting. She commented, however, that a guest house is permitted

outright in the zoning district. Ms. Lundgren explained that the existing shed would be demolished to accommodate the proposed structure. She noted that the Applicant submitted a habitat management plan that demonstrate the proposal would not result in substantial detrimental impacts. She explained that the Applicant would enhance the stream corridor with infill of native trees and shrubs and the removal of invasive English ivy. She noted that the mitigation plan includes a five-year mitigation plan and use of hand removal mechanisms. Ms. Lundgren explained that the geological assessment concluded that the proposed development would be a low risk to slope stability and that a full geotechnical report would be required at the time of building permit issuance. She stated that alternative locations would result into movement into other required setbacks. *Testimony of Ms. Lundgren.*

19. Applicant Representative and Project Biologist Robbyn Myers clarified that the Applicant intends to use the proposed structure as a garage. She noted that the Applicant has resided on the property for a long time and is interested in enhancing the area around Indianola Creek. She explained that that the Applicant cannot build in the area of the on-site reserve drain field. Ms. Myers noted that adjacent property ownership is not relevant to the criteria for a critical areas variance. She noted that the proposal is supported by a geologic assessment. *Testimony of Ms. Myers.*
20. Doug Hayman testified that the Applicant owns property north of the subject property and has not made efforts to remove English ivy on that property. He expressed concerns about of the adequacy of the existing on-site septic system. He also raised concerns about the County's enforcement of maintenance and monitoring plans. Mr. Hayman also expressed concerns about road stability and noted that the road is currently unstable and has been sloughing off. *Testimony of Mr. Hayman.*
21. Elizabeth Nichols expressed concerns that the proposed buffer reduction would not adequately protect the Type F stream and is not consistent with the County code. She stated that approval of the requested variance would set precedent for similar structures that would harm the stream and water quality. She stressed that the County needs to consistently enforce the environmental codes in place. She echoed concerns about the adequacy on the existing septic system and commented that most people do not have bathrooms and "wet bars" in accessory structures. *Testimony of Ms. Nichols.*
22. Arthur Quigley commented that the Applicant's ownership of adjacent properties should be taken into account. He requested clarification about the portion of the site plan marked "reserve." He expressed concerns that the Applicant has not adequately considered alternatives to the proposed development. *Testimony of Arthur Quigley.*
23. Kathy Dickerson expressed concerns about runoff and sedimentation into the stream and impacts to shellfish and other wildlife. She stated that it did not make sense to build on



the very steep on-site ravine. She also echoed concerns about water quality impacts and that the proposed development would be developed into an ADU. *Testimony of Ms. Dickerson.*

24. Reed Blanchard stressed that the individuals expressing concerns about the proposal include wetland biologists and professional engineers. He explained that people living in the vicinity of the proposed development are well aware of the existing sloughing and sedimentation issues near Indianola Creek. Mr. Blanchard echoed concerns that the proposal would be part of a piecemeal approach to install an ADU and that most people do not have “wet bars” in their garages. He stressed that there is risk involved with placing a structure on top of a ravine. *Testimony of Mr. Blanchard.*
25. Jeff Kanyer expressed his support for the proposed development and noted that the Applicant’s family has resided in the area since 1916. He stressed that the Applicant is aware of the issues associated with the stream and has always been respectful of the land and environmental concerns. He noted that he works for a civil construction company and is aware of the environmental concerns associated with the proposal. *Testimony of Mr. Kanyer.*
26. County Clerk Amanda Walston explained that additional comments could be submitted via email and that anyone could request a copy of the application materials through a public records request. *Testimony of Ms. Walston.*

#### Additional Materials

27. Several members of the public submitted additional written comments after the conclusion of the open record hearing, reiterating the many concerns with the proposal that have already been discussed. *Exhibit 30.*
28. Roderick Malcom, a biologist/ecologist with the Suquamish Tribe, submitted a comment on behalf of the Tribe on January 24, 2023. Mr. Malcom stated that the proposed mitigation measures were insufficient and reductions in setbacks from property boundaries should occur prior to the reduction of critical area buffer widths. He stressed that the Tribe prefers reductions of zoning setbacks over reductions of critical area buffers. He expressed concerns about impacts to juvenile salmonids, stormwater management, erosion, increased runoff, and the vagueness of the mitigation plan. Mr. Malcom suggested that the proposed garage should be located further west than proposed. *Exhibit 29.o.*
29. On February 1, 2023, Resolve Environmental and Geotechnical, Inc., provided a geologic summary statement (“Geologic Summary”) on behalf of the Applicant. The Geologic Summary states that the depth to dense and adequate soils is still to be determined, and that discussion in previous geologic assessments that the streambank is greater than 40

feet from the construction site were only an estimate. The Geologic Summary explained that the crest of the slope can only be noted as being relatively close to the construction site and that final setback recommendations would be made following preparation of a “Geotechnical Engineering Investigation” prior to site development, which would include appropriate geological parameters for construction, including conclusions and recommendations for soil boring logs and lab evaluations; seismic profile; liquefaction potential; temporary excavation details; site preparation; structural fill; erosion and sediment control; groundwater influence on structures/construction; utility trench backfill; floor slabs; foundations; lateral earth pressures and retaining walls; pavement design; and, testing and inspection. *Exhibit 30.d.*

#### Staff Recommendation

30. County staff recommends approval of the critical areas variances, with conditions. *Exhibit 1, Staff Report, pages 11 through 13.*

### **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

**Insufficient information exists to determine whether the proposal is consistent with the County’s critical area ordinances; whether adequate provisions have been made to ensure that the granting of the requested variances would not result in substantial detrimental impacts to subject critical areas, the public welfare, or injurious to property in the vicinity; and whether no practicable or reasonable alternative exists to locate the proposed structure.** The approximately 0.37-acre property contains a multitude of critical areas regulated by the County. These include a seismic hazard area, erosion hazard area, and landslide hazard area, as well as the buffer associated with a Type F fish-bearing stream (Indianola Creek) located off-site, at the bottom of a ravine with a 40 percent slope located on the subject property. Understanding and mitigating the impacts of the proposed development on these various critical areas is not just prudent but necessary to ensure that the proposed development would not result in substantial detrimental impacts as required by the code. While the Applicant has provided a Habitat Management Plan and Limited Geologic Reconnaissance and associated addenda, these materials are insufficient to conclude that the proposed development would meet the criteria for approval of the requested variances. In addition, the Applicant has not adequately demonstrated that no practicable or reasonable alternatives to the location of the proposed development exist.

KCC 19.400.440.B provides that a “geological assessment” is required when a proposed activity is located within a potential geologically hazardous area (including erosion, landslide, and/or seismic hazard areas). As noted above, the subject property contains all three types of geologically hazardous areas. KCC 19.400.440.D prescribes the type of geological assessment that should be submitted based on the circumstances of the proposed development. Relevant here, KCC 19.400.440.D.3 requires a geotechnical report “[w]hen the geotechnical engineer finds that a geologically hazardous area exists within two hundred feet of the site, and will require engineering design recommendations or other mitigation measures necessary in order to construct or develop within the geologically hazardous area.” During the early stages of the application process, Resolve Environmental submitted a “Limited Geotechnical Reconnaissance” (identified above as the “Limited Reconnaissance”) which determined that the proposal did not warrant a full-blown geotechnical investigation and accompanying submission of a geotechnical

*Findings, Conclusions, and Decision  
Kitsap County Hearing Examiner  
Klinker Critical Areas Variances  
No. 21-03118*

report, as defined in and required by KCC 19.700.725.D. After the conclusion of the open record hearing, however, Resolve Environmental submitted additional comments reversing course, and stating that a geotechnical engineering investigation (a much more thorough report as detailed in KCC 19.700.725.D) should be completed for the project. Accordingly, by the Applicant's own admission, a geotechnical report should be provided in compliance with municipal code requirements.

The post-hearing statement from Resolve Environmental seems to propose a "wait and see" approach, suggesting that the "final setback recommendations" can be made when the Applicant proceeds with the acquisition of permits or other requirements for construction after the approval of the requested variances. In the statement, Resolve Environmental admits to only estimating the distance between the crest of the slope and the construction site and the depth to dense and adequate soils. These gaps suggest, as Resolve Environmental admits, that further geotechnical investigation is necessary to determine what the proposal looks like, and subsequently, what its impacts would be. Accordingly, there is currently insufficient information to determine whether the proposal would have substantial detrimental impacts on the subject geologically hazardous areas and on other surrounding properties without further review and evaluation – as would occur with submission of an actual geotechnical report.

It is important to note that the on-site landslide and erosion hazard areas associated with the slope are not stand-alone hazards but may impact a downslope fish-bearing stream. Besides the potential impacts to erosion and water quality, as noted by the Suquamish Tribe and many members of the public, the subject property is on the Port Madison Reservation and impacts to the stream could impact the fishing rights of the Suquamish Tribe. The Applicant has submitted a Habitat Management Plan, but it does not offer the assurance lacking in the limited geological reconnaissance letter and addenda that proposed development would not have adverse impacts on the stream and the species it supports. Moreover, the Applicant's HMP fails to sufficiently describe impacts to wildlife. The HMP notes that several Washington State Department of Fish and Wildlife (WDFW) Priority Habitat Species have habitat in Indianola Creek, but it then fails to describe what the impact on those species would be in relation to development or how such impacts would be appropriately mitigated.

In addition, the Applicant has failed to demonstrate that no other practicable or reasonable alternative exists in relation to the proposed location of the structure. Both County staff and the Applicant point to the reserve septic drainfield, existing development, and encroachment into zoning setbacks as limitations on the property that dictate where any structure could be sited. That said, while the proposed development could not encroach into the reserve septic drainfield on the northern portion of the property as this would have de facto detrimental impacts, it is not clear why the proposed development could not be sited closer to the western property line. Although this area is currently developed with a driveway and any further development would encroach into zoning setbacks, a zoning variance allowing for such encroachment would be preferable to reducing required critical areas setbacks. Put differently, it is not uncommon in

situations like this for a required (but somewhat arbitrary) zoning setback be reduced in lieu of seeking a reduction from the vitally important critical areas setbacks that are necessary to protect sensitive environmental resources. This precise sentiment was articulated by the Suquamish Tribe when they noted that reduction of a zoning buffer is preferred over reduction of a critical areas buffer. *Findings 1 – 30.*

### DECISION

Based upon the preceding findings and conclusions, the request for approval of the requested critical areas variances to reduce the standard buffer associated with an on-site fish-bearing stream by up to 76 percent, from 150 feet to a variable buffer width of 36 to 65 feet, and to reduce the standard top-of-slope setback of 25 feet and the additional 15-foot building setback to six feet—to allow for the construction of a two-story detached garage on a 0.37-acre property at 9077 NE Shore Drive, in the Indianola area of unincorporated Kitsap County—is **DENIED**. The record reflects that further information is necessary (including the submission, review, and evaluation of a geotechnical report) to ensure proposed development would not have detrimental impacts on the environment. In addition, it is unclear from the record why a zoning variance could not be obtained in conjunction with the current request to site any further development as far from critical areas and critical areas buffers as possible.

DECIDED this 7<sup>th</sup> day of March 2023



---

ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center