



## Notice of Hearing Examiner Decision

11/30/2021

To: Interested Parties and Parties of Record

RE: Project Name: PORTOLA LLC - Rebuild in legal non-conforming footprint and allow continued use of one existing off-street parking space in lieu of zoning requirement for three off-street  
Applicant: PORTOLA, LLC  
9175 SE Fragaria Rd  
Port Orchard, WA 98367  
Application: ZVAR-HE  
Permit Number: 20-05785

The Kitsap County Hearing Examiner has **APPROVED** the land use application for 20-05785: PORTOLA LLC - Rebuild in legal non-conforming footprint and allow continued use of one existing off-street parking space in lieu of zoning requirement for three off-street – ZVAR-HE, **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 at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. 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: Portola, LLC  
Project Representative: Kurt A Smithpeters w/ Portola, LLC: [xuijrt@outlook.com](mailto:xuijrt@outlook.com)  
Kitsap County:  
Project Lead: Colin Poff

DCD DSE Manager: Scott Diener  
Prosecutor's Office  
Assessor's Office  
DCD Director  
DCD Assistant Director

Health District  
Public Works  
Parks  
Navy  
Kitsap Transit  
South Kitsap Fire District  
South Kitsap School District  
Puget Sound Energy  
Water Purveyor – N/A  
Point No Point Treaty Council  
Suquamish Tribe  
Port Gamble  
S'Klallam Tribe  
Squaxin Island Tribe  
Puyallup Tribe  
WA Dept of Fish & Wildlife  
Kitsap Sun

Interested Parties:

Joe Kopta, joerkopta@gmail.com  
Holly Kerr, hollykerr@gmail.com  
Judy Arbogast, judy.arbogast@gmail.com

**BEFORE THE HEARING EXAMINER  
FOR KITSAP COUNTY**

In the Matter of the Application of	)	No. 20-05785
	)	
<b>Portola, LLC</b>	)	<b>Portola Zoning Variance</b>
	)	
	)	
	)	
<u>For a Zoning Variance</u>	)	DECISION ON CLARIFICATION REQUESTS

**SUMMARY OF DECISION**

On November 4, 2021, the Kitsap County Hearing Examiner issued a decision in the above referenced matter conditionally approving a request for zoning variances associated with redevelopment of the property. Specifically, Portola, LLC (Applicant) sought approval of a zoning variance from the setback requirements of Kitsap County Code 17.420.052 to reduce the required front setback from 20 feet to 0 feet, to allow construction a new single-family residence *substantially* within the same building footprint as an existing structure on the property, and to reduce the required side setback from 5 feet to 2 feet, to allow for an outdoor stairway and landing associated with the new single-family residence to be located within the required setback area, on a 0.27-acre parcel located at 9175 SE Fragaria Road.

After the decision was issued, property owner Kurt Smithpeters (of Portola, LLC) and Attorney Jane Koler, representing the Applicant, both requested clarification of the decision. Specifically, Mr. Smithpeters and Attorney Koler both sought clarification on language in the decision describing the new proposal as being developed “within the same building footprint as an existing structure on the property.” Both parties pointed out that, during the back-and-forth review that occurred with County staff during the application process, the proposal was modified such that development would occur substantially within the same building footprint (as opposed to entirely within the same building footprint) and that this change was necessitated by the Applicant’s willingness to locate three parking spots at ground level of the new structure. This change was reflected in the submitted plans.

Under Rule 1.8.4 of the Kitsap County Hearing Examiner’s Rules of Procedure, any party of record may request clarification of a decision at any time and the Hearing Examiner shall have discretion to provide such clarification. Moreover, such “clarification shall not stay the effect of a decision or change or amend the conclusions of the Hearing Examiner’s decision.”

Here, the Hearing Examiner has reviewed the clarification requests submitted by Mr. Smithpeters and Attorney Jane Koler and concurs that clarification is appropriate. Accordingly, a revised decision has been attached to the present decision on the clarification requests incorporating the suggested change. In brief, the decision clarifies that the new structure will be

*Decision on Clarification Requests  
Kitsap County Hearing Examiner  
Portola Zoning Variance, No. 20-05785*

constructed *substantially* within the same building footprint as the existing structure on the property, consistent with submitted plans. This clarification does not alter the Hearing Examiner's conclusions or the substantive determinations or conditions made in the initial decision. Accordingly, consistent with Rule 1.8.4, the revised decision does not stay the effect of the decision for purposes of any related appeal deadlines.

DECIDED this 29<sup>th</sup> day of November 2021.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center

**BEFORE THE HEARING EXAMINER  
FOR KITSAP COUNTY**

In the Matter of the Application of	)	No. 20-05785
	)	
<b>Portola, LLC</b>	)	<b>Portola Zoning Variance</b>
	)	
	)	
	)	FINDINGS, CONCLUSIONS,
	)	AND DECISION
<u>For a Zoning Variance</u>	)	<i>(Corrected November 29, 2021)</i>

**SUMMARY OF DECISION**

The request for approval of a zoning variance from the setback requirements of Kitsap County Code 17.420.052 to reduce the required front setback from 20 feet to 0 feet, to allow construction a new single-family residence substantially within the same building footprint as an existing structure on the property, and to reduce the required side setback from 5 feet to 2 feet, to allow for an outdoor stairway and landing associated with the new single-family residence to be located within the required setback area, on a 0.27-acre parcel located at 9175 SE Fragaria Road, 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 October 14, 2021, using remote access technology. Pursuant to an April 1, 2020, temporary emergency rule addressing the COVID-19 pandemic, the record was left open until October 21, 2021, to provide additional time for the submission of written comments on the proposal in lieu of live testimony.

Testimony:

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

Colin Poff, County Planner  
Kurt Smithpeters, Property Owner  
Bradford Drew, P.E.  
Judy Arbogast  
Joseph Kopta  
Jean McCleary

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\* This decision was corrected, following review of clarification requests received by the Applicant and the Applicant's attorney. The corrections merely clarify language concerning the scope of development in relation to the footprint of the existing structure on the site. The corrections have not resulted in any substantive change to the decision or the approved development proposal or conditions.

*Findings, Conclusions, and Decision  
(Corrected November 29, 2021, Following Clarification Requests)  
Kitsap County Hearing Examiner  
Portola Zoning Variance, No. 20-05785*

Attorney Jane Koler represented the Applicant at the open record hearing.

Exhibits:

The following exhibits were admitted into the record:

1. Engineered Drainage Report, Migizi Group, Inc., dated April 14, 2020
2. Site Photograph, undated
3. Geotechnical Report, Associated Earth Sciences, Inc., dated September 23, 2019
4. Kitsap Public Health District Building Site Application, received December 14, 2020
5. Declaration of Kurt Eckard, dated November 23, 2020.
6. Building Plans (4 Sheets), dated June 17, 2021
7. Project Narrative, dated August 10, 2021
8. Topographic Survey (2 Sheets), dated July 2, 2019
9. Required Permit Questionnaire – Zoning Variance, received December 14, 2020
10. Notice of Application, dated February 11, 2021
11. Nine (9) Site and Area Photographs, received May 7, 2021
12. Response to Request for Information, received May 7, 2021
13. License for Use of County Right-of-Way, dated May 12, 2021
14. Response to Request for Information, received August 11, 2021
15. Site Plan, dated February 7, 2019
16. Notice of Public Hearing, published September 29, 2021
17. Public Comments:
  - a. Comments from Judy and Jim Arbogast, dated February 11 and 17, 2021
  - b. Comment from Holly Kerr, dated February 22, 2021
  - c. Applicant Response to Comments from Judy and Jim Arbogast, dated February 23, 2021
  - d. Comment from Jeff Bartz, dated February 25, 2021
  - e. Comment from Jean McCleary, dated February 23, 2021
  - f. Comment from Miles Yanick, dated February 23, 2021
  - g. Comment from the Colvos family, dated April 2, 2021
  - h. Comment from Judy and Jim Arbogast, dated October 1, 2021
  - i. Applicant Response to Comment from Judy and Jim Arbogast, dated October 2, 2021
18. Certification of Public Notice, dated September 29, 2021
19. Staff Report, dated October 6, 2021
20. County Staff Presentation, received October 14, 2021
21. Hearing Sign-in Sheet
22. Applicant Attorney Hearing Memorandum, received October 13, 2021
23. County Staff Additional Recommended Conditions, dated October 14, 2021
24. No Net Loss Report, Ecological Land Services, dated August 30, 2021

*Findings, Conclusions, and Decision  
(Corrected November 29, 2021, Following Clarification Requests)  
Kitsap County Hearing Examiner  
Portola Zoning Variance, No. 20-05785*

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. Portola, LLC (Applicant), requests approval of a zoning variance from the setback requirements of Kitsap County Code (KCC) 17.420.052 to reduce the required front setback from 20 feet to 0 feet, to allow construction a new single-family residence substantially within the same building footprint as an existing structure on the property, and to reduce the required side setback from 5 feet to 2 feet, to allow for an outdoor stairway and landing associated with the new single-family residence to be located within the required setback area. The 0.27-acre property is located at 9175 SE Fragaria Road.<sup>1</sup> *Exhibit 4; Exhibits 6 through 9; Exhibit 11; Exhibit 12; Exhibit 14; Exhibit 15; Exhibit 19, Staff Report, pages 1 and 2.*
  
2. Kitsap County (County) determined the application was complete on December 14, 2020. On or before December 31, 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. The County's notice materials stated that written comments on the proposal should be submitted at least seven days before the date of the open record hearing associated with the application. On September 29, 2021, the County provided notice of the open record hearing associated with the application by publishing notice in the County's publishing newspaper of record, mailing notice to property owners within 800 feet of the site, and posting notice on the property. The County received several comments on the proposal from members of the public in response to its notice materials, which are discussed in detail later in this decision. *Exhibit 10; Exhibits 16 through 18; Exhibit 19, Staff Report, pages 6 and 7.*

### 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

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<sup>1</sup> The subject property is identified by Kitsap County Assessors Tax Account No. 4775-000-038-0100. *Exhibit 19, Staff Report, page 1.* A legal description of the property is included with the Topographic Survey. *Exhibit 8.*

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 19, 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, [that] 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].

*Exhibit 19, Staff Report, pages 2, 4, 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 is a permitted use within the RR zoning district. *KCC 17.410.042*. Dimensional standards applicable to properties in the RR zone typically require 50-foot front setbacks and 20-foot rear and side setbacks. *KCC 17.420.052*. *KCC 17.420.060(A)(42)(b)* provides, however, that any single-family lot of record that has a smaller width or lot depth than required by the zoning code, or measuring less than one acre, may use the residential zoning classification most closely corresponding with the lot’s dimensions for purposes of establishing required property line setbacks. The 0.27-acre subject property qualifies for this exception from the standard setback requirements of the RR zone because it measures less than one acre and has lot width of approximately 18 feet at its narrowest point and 41 feet at its widest point, well under the 140-foot minimum lot width requirement of the RR zoning district. County staff determined that the “Urban Restricted” (UR) zoning classification most closely corresponds with the dimensions of the subject property and, therefore, that the setback requirements of the UR zone should apply. The UR zone requires 20-foot front setbacks, 10-foot rear setbacks, and 5-foot front setbacks. *KCC 17.420.052*. As noted above, the Applicant



seeks a variance to reduce the required front setback to zero feet and to reduce the required north side setback to two feet. The proposed developed would be required to provide three off-street parking spaces. *KCC 17.420.030.F; KCC 17.490.030*. The Applicant originally requested a variance from this off-street parking requirement but later revised the project plans to include three off-street parking spaces within a carport located under the proposed single-family residential structure. *Exhibit 8; Exhibit 9; Exhibit 19, Staff Report, pages 1, 3, and 4.*

#### Existing Property and Proposed Development

6. The 0.27-acre property is located in a historic neighborhood (the Fragaria Neighborhood) of Kitsap County and consists of a narrow rectangular lot that fronts on SE Fragaria Road and extends west over undeveloped and heavily vegetated steep slope areas. The eastern portion of the site is relatively flat and is developed with a three-story structure that was originally constructed as a carriage house in the 1940s, prior to the County's adoption of lot standards and building permit requirements. The existing structure has more recently been used as a shop building since at least 1975. The existing structure is located approximately four feet within the SE Fragaria Road right-of-way. On May 21, 2021, Kitsap County Public Works recorded a license for use of the right-of-way that would allow the Applicant to replace the structure within the existing encroachment. Properties in the vicinity of the subject property along SE Fragaria Road are largely developed with single-family residences that are also nonconforming with current County dimensional standards for the RR zoning district, including required setbacks. Properties to the west, across SE Fragaria Road, are located along the shoreline of Puget Sound (Colvos Passage). *Exhibit 1; Exhibits 3 through 5; Exhibits 7 through 9; Exhibits 11 through 15; Exhibit 19, Staff Report, pages 1 through 3, and 11.*
  
7. As noted above, the Applicant requests a variance from the required front and side setback requirements to allow for the construction of a single-family residence within the same footprint of the existing, nonconforming structure on the property, which would be removed. The proposed development would also include a new septic tank and associated drain field that would be located at the top of the hill on the western portion of the property, which have both received approval from the Kitsap Public Health District. Associated Earth Sciences, Inc., prepared a Geotechnical Report for the proposal, dated September 23, 2019, which determined that the proposal would not result in an increased risk of erosion or landslides from on-site steep slope areas and that no mitigation measures would be required to retain existing site conditions apart from constructing the proposed residence with a deep (pile) foundation system. *Exhibit 3; Exhibit 4; Exhibit 15; Exhibit 19, Staff Report, pages 4 and 7.*

8. Migizi Group, Inc., prepared a Drainage Report for the proposal, dated April 14, 2020, which determined that the proposed development would not result in any increase of impervious surfaces. Ecological Land Services prepared a No Net Loss Report for the proposal, dated August 30, 2021, which determined that the proposed development would not result in any detrimental impacts to the Puget Sound shoreline or to the Puget Sound shoreline buffer, especially given the extensive development within both the shoreline area and buffer that already exists within the Fragaria Neighborhood. *Exhibit 1; Exhibit 24.*

#### Variance Request

9. The purpose of a zoning variance is to provide property owners with relief from the numerical standards of the zoning code, excluding housing density standards, when unusual circumstances relating to the property cause an undue hardship. *KCC 17.560.010.* KCC 17.560.010 authorizes the Hearing Examiner to grant a variance from the numerical standards of the zoning code only when certain criteria are met. The Applicant submitted a project narrative asserting that the proposal would satisfy these criteria, noting:
  - Special circumstances apply to the property that do not apply to other properties in the area. The lot has extreme physical constraints. The flat, developable area of the property measures only 1,250 square feet and is located between the edge of SE Fragaria Road and steep slope areas to the west. The Applicant did not create the significant physical constraints associated with the property, and none of the 18 parcels containing homes and carports on SE Fragaria Road along the shoreline comply with current front yard setback requirements.
  - The requested variance is necessary for the preservation and enjoyment of a substantial property right of the Applicant possessed by other property owners in the same zone and vicinity. Other property owners on SE Fragaria Road have been allowed to build, remodel, and reconstruct homes and accessory structures on their land that do not comply with current code requirements. Restricting the Applicant from upgrading their 1940's-era carriage house would prevent the Applicant from using the property in the same manner as neighboring property owners.
  - The variance would not be materially detrimental to the public welfare or injurious to property in the same zone and vicinity as the subject property. The proposed reconstruction project would, for the most part, use the existing building footprint, parking slab, and retaining walls, and thus the proposed new residential structure would not exceed the impacts of the existing building. In addition, the project would include removal of impervious concrete from the east and south sides of the existing building, resulting in a reduction of imperious surface on the parcel. The proposed new residential structure would promote the public health and safety by providing a strong, more resilient design meeting current building

code requirements and would incorporate design elements to ensure compatibility with the neighborhood's historic character.

- The requested variance is the minimum necessary to grant relief to the Applicant. There is no other suitable location on the property for the proposed residential structure due to steep slope areas on the western portion of the site. Reconstruction on the flat area of the lot would avoid the risk of disturbing the slope.

*Exhibit 7.*

10. County staff analyzed the proposal and determined that, with conditions, it would meet the specific criteria for a zoning variance under KCC 17.560.010, noting:
  - The required setbacks for this lot are 20 feet for the front, 5 feet for the sides, and 10 feet for the rear. This lot is in one of Kitsap County's historic settlements and is physically constrained by slopes, giving it a flat, usable area of approximately 1,250 feet. Additionally, a portion is occupied by an easement to the property directly to the south. Due to steep slopes to the west of the site area, a variance is necessary to the front setback to allow for an area with enough depth that it is possible to develop a residence. The Applicant has proposed a wider structure to accommodate the limited developable depth area of the lot, and the side setback variance is the result of the unusual shape and topography of the parcel.
  - The only allowable use on this lot in the RR zone is single-family residential. Many constrained lots in the vicinity are also developed with single-family structures. The Applicant redesigned their structure to accommodate three parking stalls, as required by code. The Applicant is requesting a variance in order to continue to occupy the front setback and a portion of the right-of-way to allow for an adequate footprint for a single-family dwelling. The Applicant is also requesting a variance from the side setback requirement to accommodate a wide enough structure to support three carport stalls underneath the residence, with an external stairway serving as primary access to the home. The variance request is intended to allow for a use of property similar to others in the same vicinity and zoning designation.
  - The setback variance would allow the Applicant to generally maintain the existing building footprint that is already nonconforming to the front setback. Because this is a historic neighborhood with several constrained lots, the variance would allow for a use that is similar to others in the vicinity. The proposal does not request a significant additional reduction of setbacks beyond what exists with the existing structure on this lot, and no additional detrimental impacts are expected by the proposal. In addition, the proposed structure would remedy the current structure's encroachment over the northern property line and, accordingly, the proposed variance to the side setback requirement would be less than what currently exists.

- The current footprint of the existing structure is nonconforming with setback requirements, and the Applicant does not propose to make them more nonconforming than what currently exists. This results in a reduction of the required front setback by 24 feet (4 feet of which are within County Right-of-Way). Given the physical constraints on this lot and the highly limited lot depth, this is the minimum necessary to accommodate the proposed use. In addition, the home must be designed to allow enough length to park cars underneath the home, which would not be possible without a front setback variance. The requested side setback variance would allow construction of an external stairway necessary to provide primary access to the home.

*Exhibit 19, Staff Report, pages 7 through 10.*

#### Written Comments

11. As noted above, the County received several comments on the proposal from members of the public:

- Jim and Judy Arbogast raised concerns that the proposed new residential structure would be used as a bed and breakfast. They also raised concerns that the original proposal had included only one off-street parking space, noting existing issues with adequate parking in the area. In addition, the Arbogasts raised concerns about the impacts of locating the proposed septic drainfield at the top of the hill on the western portion of the property. Following revisions of the project plans to include a three-vehicle carport, the Arbogasts submitted additional comments that expressed approval of the revisions but raised additional concerns about the proposed septic system.
- Holly Kerr raised concerns that the original proposal had included only one off-street parking space, noting that overflow parking along SE Fragaria Road would impede traffic. She requested that the Applicant redesign the structure to include a carport at ground level that would satisfy off-street parking requirements.
- Jeff Bartz raised concerns about parking and traffic impacts of the original proposal, noting that SE Fragaria Road is narrow roadway.
- Jean McCleary raised concerns about the original proposal's parking impacts and impacts to existing septic and water lines.
- Miles Yanick raised concerns that application materials label the existing structure as a residence, noting that the structure has not historically been used as a residence.
- The Colvos Family raised concerns about the environmental impacts of existing septic holding tanks on the property.

*Exhibit 17.*

12. The Applicant provided responses to the public comments, especially those of the Arbogasts. Specifically, the Applicant’s response memorandum (in Exhibit 17) notes that the proposal is to construct a single-family residence, not a bed and breakfast establishment, and that the proposed septic system would be located at the top of a hill, not on a steep slope, and has received approval from the Kitsap County Health Department. County staff also provided responses to the concerns raised by members of the public, which note:
- The record reflects that the existing building was constructed as a carriage house prior to the County’s adoption of the zoning code, has been previously occupied, and is therefore a legal conforming use.
  - The project design has been changed to provide three parking stalls under the proposed house, reducing pressure on street parking in the area.
  - The on-site septic drain field is proposed to be located at the top of the hill to the west. The project has received septic approval from the Health Department.
- Exhibit 17; Exhibit 19, Staff Report, pages 6 and 7.*

13. Attorney Jane Koler, on behalf of the Applicant, also submitted a legal memorandum in advance of the open record hearing. In the memorandum, Attorney Koler argues:
- Like the Smithpeters’ lot, none of the lots in the immediate vicinity conform to current zoning requirements and all or nearly all of the nearby nonconforming lots have been developed with single-family residences.
  - Kurt Eckard provided a declaration explaining that the lot was developed with a carriage house in the 1940s, prior to the County adopting zoning regulations. His father, later, used/converted the carriage house into a shop.
  - Washington law confers the Smithpeters’ an “unequivocal vested right to develop a home on the nonconforming lot.”
  - Although some neighboring property owners, the Arbogasts in particular, have expressed opposition to the proposal, several other property owners – as evinced by an attached petition signed by several nearby property owners – support the development.
  - The proposal would meet the requirements/criteria for a variance. Of particular note, of the 18 properties with homes and carports on Fragaria Road along the shore, not one meets the front yard setback requirement. Accordingly, denying the variance would actually impose a unique condition on the Smithpeters’ property.
  - The request to build a single-family residence is reasonable and consistent with precedent from the U.S. Supreme Court.
- Exhibit 22.*

### Testimony

14. County Planner Colin Poff testified about the history of the property, the constrained nature of the site, and how the proposal would comply with the County's Comprehensive Plan, environmental ordinances, and the specific criteria for approval of two variances under the municipal code. Specifically, Mr. Poff stressed that the existing 3-story structure has been used as a carriage house in the past and, regardless, constitutes a pre-existing nonconforming structure. The Applicant would not increase nonconformities with development (and, in fact, would decrease some of the nonconformities associated with the existing structure) because the proposed residence would be built almost entirely within the existing building footprint. He further stressed that, initially, project plans called for a parking variance but—in response to concern expressed by area residents—the Applicant altered its plans to ensure that three required on-site parking spaces would be available for the proposed residence. The two variance requests related to setbacks would be necessary to accommodate such parking on-site. In addition, Mr. Poff explained that the only allowable use of the property, as a primary use, would be as a single-family residence. Finally, Mr. Poff noted that the Kitsap Public Health District already approved the proposed septic system for the site and noted that further review of the septic system and building design—including any requirements associated with the County's Shoreline Master Program—would occur during review of submitted building permits. *Testimony of Mr. Poff.*
  
15. Attorney Jane Koler represented the Applicant at the hearing and argued that evidence in the record demonstrates that the variance criteria have been met. Specifically, she stressed that the Applicant is not asking for any development rights that are unusual or unique for the area but, instead, simply seeks the ability to redevelop the property with a single-family residence, an allowed use in the zone. Ms. Koler also noted that the Applicant submitted a “No Net Loss” report showing that the proposal would have no detrimental impacts on the shoreline environment and buffer, along with a geotechnical report and preliminary drainage report showing that the development would not have detrimental impacts on the abutting steep slope or other properties in the vicinity. Finally, she stressed that the Smithpeters are simply seeking to do what the rest of the property owners (approximately 17 or 18) in the vicinity have already done: construct a single-family residence. *Argument of Attorney Koler.*
  
16. Property Owner Kurt Smithpeters concurred with Attorney Koler's assessment and explained that the entire project has been engineered to ensure the abutting slope is protected. This includes designing the septic system so that it can be installed, by hand, without heavy equipment and ensuring that it is metered such that it will have no detrimental impacts on the slope. He also stressed that piles would be used under all the foundation walls to provide added stability and backfill will be used to solidify the toe of the hillside. *Testimony of Mr. Smithpeters.*

17. Bradford Drew, P.E., testified that he served as the geotechnical engineer for the proposal and prepared the geotechnical study for the new residence. He determined that, given the proposed design, there would be no additional or increased risk of landslides or erosion hazards. Mr. Drew also provided additional details about how the septic system on-site would function and how it would be installed. *Testimony of Mr. Drew.*
18. Area resident Judy Arbogast testified about the concerns she expressed in her submitted written comments. Specifically, she emphasized the concerns over how the septic system on-site would work and its potential detrimental impacts on slope stability in the area. Ms. Arbogast stressed, in particular, that she has concerns with how the Kitsap Public Health District makes its decisions concerning septic permits because such decisions do not seem to her to be consistent over time. Finally, she reiterated her concern that the existing structure has not been used as a carriage house (at least for the last 40 year) and, instead, has been used simply for storage. *Testimony of Ms. Arbogast.*
19. Joseph Kopta testified that he has property along Fragaria Road but, also, owns property upland where the easement exists that would allow for the Applicant's septic drainfield to be installed. Mr. Kopta explained that use of heavy machinery could be a problem and, in addition, he would prefer to have some notice before people access his property to install or inspect the system. *Testimony of Mr. Kopta.*
20. Area resident Jean McCleary noted that she has a septic pipeline running up the slope, like that proposed here, and is concerned about how installation would work to ensure that no impacts to existing septic systems occur. *Testimony of Ms. McCleary.*
21. Mr. Smithpeters responded to the concerns about the septic system and explained that all materials would be carried, by hand, from the easement on Mr. Kopta's land but no heavy equipment would be brought to the site. He further noted that he and the septic engineer have reviewed the upland area and are aware of where the preexisting systems and pipes are such that they are confident they can avoid damaging such systems. Finally, he noted that he would be happy to work with Mr. Kopta to ensure installation and maintenance of the system does not cause any issues. Mr. Kopta responded to this by noting that he believes Mr. Smithpeters and he can sort out the installation. *Testimony of Mr. Smithpeters; Testimony of Mr. Kopta.*
22. Mr. Poff noted, following public testimony, that the Kitsap Public Health District approved the septic design in 2019. *Testimony of Mr. Poff.*
23. Attorney Jane Koler argued, in closing, that the Smithpeters simply want the same rights as their neighbors and that the project has been carefully designed to ensure that it will have no adverse impacts on the environment. *Argument of Attorney Koler.*

### Staff Recommendation

24. County staff recommends approval of the zoning variance, with conditions. Attorney Jane Koler stated that the Applicant concurs with the County's assessment and would comply with the recommended conditions of approval. *Exhibit 19, Staff Report, pages 12 and 13; Statement of Attorney Koler.*

## **CONCLUSIONS**

### Jurisdiction

The Kitsap County Hearing Examiner is authorized to hear and decide requests for a zoning variance. *KCC 2.10.070; Chapter 17.560 KCC; KCC 21.04.080; KCC Table 21.04.100.*

### Criteria for Review

The Hearing Examiner may grant a variance from numerical standards of the County's zoning code, excluding housing density, only when unusual circumstances relating to the property cause undue hardship in the application of the zoning code. The granting of a zoning variance shall be in the public interest and shall only be made when all the following conditions and facts exist:

- A. There are special circumstances applicable to the subject property, including size, shape, topography, location, or surroundings, that were not created by the Applicant and do not apply generally to other property in the same vicinity or zone;
- B. Such variance is necessary for the preservation and enjoyment of a substantial property right or use of the Applicant possessed by owners of other properties in the same vicinity or zone;
- C. The authorization of such variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or zone in which the property is located; and
- D. The variance is the minimum necessary to grant relief to the Applicant.

*KCC 17.560.010.*

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

- 1. There are special circumstances applicable to the subject property, including size, shape, topography, location, or surroundings, that were not created by the Applicant and do not apply generally to other property in the same vicinity or zone.** The 0.27-acre property consists of a narrow rectangular lot with a small, approximately 1,250 square foot developable area at the property's eastern edge along the SE Fragaria

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Road right-of-way due to the presence of steep slope areas in the remaining western portion of the property. The property was created prior to the County's adoption of lot standards and, like other properties in the historic neighborhood along SE Fragaria Road, does not comply with current dimensional standards for the Rural Residential (RR) zoning district, including standards related to minimum lot size and width. In addition, all or nearly all other properties in the vicinity developed with single-family residences do not comply with front yard setback requirements. The circumstances restricting the developable area of the site are the result of the property's unique size, shape, and topography and were not created by the Applicant. *Findings 1, 4 – 22.*

- 2. The variances are necessary for the preservation and enjoyment of a substantial property right or use of the Applicant possessed by owners of other properties in the same vicinity or zone.** The subject property and all surrounding properties are located in the RR zone, which promotes low-density residential development consistent with rural character. Development of detached single-family residences is a permitted use in the RR zoning district and the only primary use allowed on the site. As discussed above in Conclusion 1, the developable area of the 0.27-acre property is limited to approximately 1,250 square feet due to the property's unique narrow shape and the presence of steep slopes on-site. The Applicant proposes to construct a single-family residence within the building footprint of an existing structure that was constructed on the property in the 1940s as a carriage house. The existing structure does not comply with current setback requirements and, accordingly, variances from the current setback requirements are necessary to construct a new residence. Specifically, the Applicant requests a variance to reduce the required 20-foot front setback to 0 feet to accommodate siting the new single-family residence within the existing structure's building footprint, as well as a variance to reduce the required five-foot north side setback to two feet to allow an external stairway and landing providing primary access to the residence to be located within the setback area. This proposed external stairway is necessary to provide sufficient width for a three-vehicle carport underneath the residential structure that would comply with applicable off-street parking requirements and thereby avoid adverse parking impacts to the area. Due to the limited developable area of the property, the variances are necessary to provide a sufficient building footprint for a single-family residence with associated off-street parking space, a substantial property right and use enjoyed by other owners of property in the vicinity and within the RR zone. *Findings 1, 4 – 24.*
- 3. With conditions, authorization of the variances would not be materially detrimental to the public welfare or injurious to property in the vicinity or zone in which the subject property is located.** The proposal is exempt from SEPA environmental review. The County provided reasonable notice and opportunity to comment on the proposal. The County received several comments on the proposal from area residents in advance of the hearing, which generally raised concerns about the proposal's parking impacts. The Applicant, however, revised the project design to include three carport spaces underneath

the proposed residence, in accord with the County's off-street parking requirements, eliminating this concern. Later, the Applicant submitted a hearing memorandum with an attached petition signed by several area residents supporting the proposal following the change in parking design.

Some residents still expressed concern, in writing and at the hearing, about the potential impacts from the proposed location of the septic drainfield. The Applicant's proposed drainfield would be located at the top of the hill on the western edge of the property (on a relatively flat area) and has already been approved by the Kitsap Public Health District. Accordingly, thorough analysis of the septic design is beyond the scope of this decision and any appeal of the Health District's decision would need to be pursued in another forum. That said, Ecological Land Services prepared a No Net Loss Report for the proposal, which determined that the proposed development would not result in any adverse impacts to the Puget Sound shoreline or associated buffer. Associated Earth Sciences, Inc., prepared a Geotechnical Report for the proposal, which determined that the proposed construction of a single-family residence would not result in an increased risk of erosion or landslides from on-site steep slope areas. Both reports considered potential impacts from installation of the proposed septic system and both determined such system would not have detrimental impacts to area slopes (or the shoreline).

Granting the variance to allow construction of a single-family residence within the limited developable area of the property would promote Comprehensive Plan policies permitting residential uses in rural areas while minimizing environmental degradation. Conditions, as detailed below, are necessary to ensure that the Applicant obtains all required permits; the development is consistent with the Applicant's submitted plans; the approved variances are limited almost entirely to the proposed structure's footprint and right-of-way encroachment and does not allow for additional encroachment by decks, balconies, or other structures within the right-of-way airspace; stormwater management for the site complies with the provisions of the Kitsap County Stormwater Design Manual; the Geotechnical Report is updated to address any potential impacts of the proposed septic drain field; development of the site follows the findings and recommendations of the Geotechnical Report; and the Applicant adheres to all other applicable federal, state, and local laws, regulations, and ordinances. *Findings 1 – 24.*

- 4. The variances are the minimum necessary to grant relief to the Applicant.** The requested variances from applicable front and side setback requirements are the minimum necessary to allow a single-family residence to be constructed on the property, while meeting applicable off-street parking requirements and avoiding adverse impacts to steep slope areas on-site. The Applicant does not request any other deviation from applicable development standards. *Findings 1, 6 – 24.*

## DECISION

Based upon the preceding findings and conclusions, the request for approval of a zoning variance from the setback requirements of KCC 17.420.052 to reduce the required front setback from 20 feet to 0 feet, to allow construction a new single-family residence substantially within the same building footprint as an existing structure on the property, and to reduce the required side setback from 5 feet to 2 feet, to allow for an outdoor stairway and landing associated with the new single-family residence to be located within the required setback area, on a 0.27-acre parcel located at 9175 SE Fragaria Road, is **GRANTED**, subject to the following conditions:<sup>2</sup>

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 #20-05785. 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. This approved variance is limited to the footprint and right-of-way encroachment on the approved site plan and does not allow for additional encroachment by decks, balconies, or other structures into the right-of-way airspace. The building design at the time of building permit may not include any projection beyond what is covered in the recorded License for Use of Right-of-Way.
5. 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.

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

6. The findings and recommendations of the Geotechnical Report prepared by Associated Earth Science, Inc., will be reviewed and shall be incorporated with any future permits for development activity.
7. The Geotechnical Report shall be resubmitted for review at the time of building permit and shall be updated to address any potential impacts of the proposed septic drain field.

DATED this 4<sup>th</sup> day of November 2021.

CORRECTED on November 29, 2021, following a request for clarification.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center