

1 **Exhibits**

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3 The twelve exhibits identified on Page 14 of the staff report were admitted into the record during the
4 January 22, 2021 hearing. Speakers provided the following testimony in the transcript (page numbers
5 refer to transcript pages):

6 **FINDINGS OF FACT**

7 **Procedural:**

- 8 1. Applicant. James Howard, represented by Phil Becker, PO Box 1224, Puyallup, WA 98371.
- 9 2. Hearing. A virtual hearing was held on the subject applications on January 22, 2021 via the
10 Zoom application, Meeting ID No. 969 0869 8123. The record was left open through January 25,
11 2021 for the submission of written comment from persons who were not able to attend the virtual
12 meeting due to technical issues. No additional comments were submitted.

13 **Substantive:**

- 14 3. Project Description. The Applicant has applied for a shoreline conditional use permit and
15 zoning code variance to construct a single-family home within the Conservancy shoreline
16 environment and to have it encroach within the front yard and garage setbacks of the R2 zoning
17 district for a lot located off of Edgewater Drive, SW. The setback variances are to LMC
18 18A.60.030(A), which imposes a 25 foot front yard setback and a 30 foot garage setback. The
19 proposed home will be in the shoreline jurisdiction (within 200 feet of the ordinary high water mark)
20 of Chambers Creek, but will be located just outside of the creek’s 150 foot shoreline buffer that is set
21 by Table II of the City’s Shoreline Master Program (“SMP”). The proposed height of the home is
22 less than 32 feet.

23 In order to construct the proposal, the Applicant also requests a reduction of the critical area building
24 and impervious area setback from 8-feet to 0-feet. The modification of the critical area setback can
25 be approved by staff in conjunction with building permit review as authorized by the reasonable use
26 waiver process governed by LMC 14.142.090. The staff recommended conditions of approval,
adopted by this Decision, require the Applicant to acquire approval of an LMC 14.142.090
reasonable use wavier for the requested setback reduction.

- 27 4. Surrounding Area. The project site is bounded by to the north and west by a Washington State
28 Department of Fish and Wildlife hatchery facility, to the south by existing single family development
29 and to the east by Edgewater Road SW. The shoreline buffer to Chambers Creek extends about 85
30 feet into the project site from the western property boundary.

- 31 5. Adverse Impacts. There are no significant adverse impacts associated with the project.
32 Pertinent impacts are addressed as follows:

1 A. Ecological Function. As outlined in the conclusions of law, an important requirement of the
2 City's Shoreline Master Program is that shoreline development result in no net loss of
3 ecological function. It is determined that this standard is met.

4 Assessment of impacts to ecological function is challenging because the staff report doesn't
5 address impacts to ecological function. However, the site characteristics of the property
6 strongly suggest there will be no adverse impact to ecological function. As testified by Ms.
7 Bell, the proposed home will be located outside the 150 foot critical areas buffer to Chambers
8 Creek. This fact in itself, absent any other consideration, is sufficient to make a finding of no
net loss given that the width of the critical areas buffer is legislatively tailored to protect the
ecological functions of the creek. As further testified by Ms. Bell, the proposed home will be
further separated from the creek by a service/driveway to a nearby fish hatchery.

9 B. Endangered Species. The project will not adversely affect any protected species. The two
10 public comment letters submitted for the proposal assert that blue heron have been seen in the
11 vicinity of the project area. The authors of the letters were not present for questioning and it's
12 unclear whether blue heron have been seen on the lot under review as opposed to adjoining
13 areas and also when the blue heron were last seen in the area. The letters were not presented
14 under oath. As noted by staff, the proposed development will be located more than 150 feet
15 from the shoreline and is separated by the fish hatchery road. As further noted by staff,
Washington State Department of Fish and Wildlife ("WDFW") data have no sighting of blue
heron at the project site. The WDFW data is taken as a rebuttable presumption there is no blue
heron at the project site. The public comment letters are not sufficiently compelling to
overcome this presumption.

16 WDFW online database "PHS on the Web", indicates that Chambers Creek has habitat for the
17 State Endangered Western Pond Turtle. The proposal does not include impacts to Chambers
18 Creek or associated buffer. Additionally, the subject site does fall within the Pacific Flyway
19 which is a flight corridor for migrating waterfowl and other avian fauna. This corridor extends
from Alaska to South America. Proposed site improvements are localized and not expected to
impact this flight path.

20 C. Geological Hazards. Mitigation measures recommended in the Applicant's geotechnical report
21 sufficiently protect the property from slope failure and other hazards. The property is
22 significantly encumbered by geological hazard areas that have been identified as landslide
23 hazard areas. The Applicant has submitted a Geotechnical Engineering Report (Exhibit 10) and
24 Geotech Slope Letter (Exhibit 11) that reviewed the onsite conditions. Based on the results of
25 these reports, it is the geotechnical engineer's opinion that the subject site is suitable for the
26 proposed development provided that deepened engineered foundation elements are utilized. The
Geotech Slope Letter specifically states that the use of deep foundations, retaining walls, and
collection and management of stormwater will improve the stability off the site. City
Engineering will review and approve the geotechnical reports prior to site development permit
(Condition 5). One of the neighbor's identified slope stability as a concern, referencing some
recent landslide activity. However, no expert opinion has been provided contesting the
expertise of the Applicant and City experts responsible for ensuring slope stability. Given these

1 factors, it is concluded that the slopes of the project site will be adequately engineered to
2 prevent slope failure.

3 D. Views. The proposal will not unreasonably affect views. The record does not contain much
4 information on view impacts. From the maps and aerial photographs included in Ex. 9, the
5 proposed home appears to be positioned further landward than the home to the south and there
6 is no home adjoining the home to the north. It's quite possible that the home may obstruct
7 water views of two homes located to the east across Edgewater Dr. SW, however, short of
8 displacing the home into the Chambers' Creek buffer or prohibiting the home altogether, there
9 is no reasonable way to materially avoid this impact. Neither action would be legally defensible
10 to protect the views of the homes to the east, as prohibition of development would violate the
11 constitutional rights of the Applicant and protecting the ecological functions of
12 Chambers Creek takes precedence over protecting private views. Further, it must also be
13 recognized that the SMP authorizes heights up to 35 feet and the proposal is less than 32 feet.

14 E. Navigation. There will be no impact on navigation of public waters. All proposed development
15 and structures are proposed 150 feet or more from the ordinary high water mark of Chambers
16 Creek.

17 F. Compatibility. The proposed home use is compatible with surrounding uses. As outlined in
18 Finding of Fact No. 4, surrounding uses are single-family residential and a fish hatchery. The
19 size of the proposed home is consistent with the size of surrounding homes. The Applicant is
20 proposing an approximately 2,817 square foot single-family residence with approximately 433
21 square foot attached 2-car garage. The City measured a building footprint of 2,027 square foot.
22 The size of nearby buildings ranges from 936 square feet to 3,136 square feet.

23 The proposed setbacks for the variance are also compatible with surrounding use. The
24 surrounding developed area is inconsistent with the required 30-foot setback. The parcel
25 directly to the south (Parcel 0220341143) currently has a garage and main dwelling unit setback
26 20-feet. The parcel to the southwest (Parcel 0220341146) currently has a garage setback 22-
feet.

27 G. Cumulative Impacts. The proposal will not create any significant cumulative impacts. All
28 properties near the proposed project, excluding the fish hatchery, have been developed with
29 single-family residences. If the existing single-family residences require replacement or
30 redevelopment, they will be subject to RCW 90.58.020 and SMP development regulations. Any
31 new proposed single-family residence within conservancy environment shoreline designation
32 will be subject to RCW 90.58.020 and the SMP policies and regulations. These policies and
33 regulations ensure that single-family residential projects do not impact the ecological function
34 of the shoreline or public's normal enjoyment of the shoreline. Therefore, the granting of this
35 proposed conditional use permit, and all similar CUP's within the area, will be compliant with
36 RCW 90.58.020 and SMP.

37 H. Trees. The proposal will not adversely affect trees. Both public comment letters to the project
38 expressed concern over loss of trees. Lakewood development standards regulate the retention

1 of trees and compliance with those standards is deemed to sufficiently protect trees. ?As
2 required by those development standards, the Applicant has submitted a Tree Inventory Plan
3 (Plan Drawings Sheet TR-1). The Tree Inventory Plan identifies which trees will be removed or
4 retained and associated condition of the trees to be removed. Per this plan, the single Oregon
5 White Oak located on the project site will be retained and all trees to be removed have been
6 determined unhealthy. Per LMC 18A.90.200, a tree removal permit is required for tree removal.
The City shall review the specific tree removal once the Applicant has applied for tree removal
permit as conditioned

6 6. Necessity for Variance. The setback variance is necessitated by the natural development
7 constraints of the property, specifically Chambers Creek. As testified by Ms. Bell, the variance is
8 necessary to build a reasonably sized single-family home while staying outside of the 150 foot critical
9 areas buffer to Chambers Creek. The home is built right up to the 150 buffer and as such is as far
10 from the frontage road as conditions allow without encroaching into the buffer. Encroaching into the
11 zoning code setbacks as opposed to the critical areas setback was deemed by staff to be most
12 appropriate for this project since many homes in the surrounding area are located well within the
13 front and garage setbacks. As noted in the staff report and the Applicant’s geotechnical
14 memorandum, the site is also severely constrained by geological hazard areas and the home has been
15 located to avoid these areas as well.
16 Given (1) the stream buffer, (2) the geologically hazardous areas, and (3) the reasonableness of the
17 proposed home size as documented in Finding of Fact No. 5E, the proposed setback encroachments
18 are unavoidable and necessary for reasonable development of the property.

15 **Conclusions of Law**

16 1. Authority. The hearing examiner is authorized to issue a final decision for the City of
17 Lakewood on consolidated shoreline conditional use and zoning code variance applications. LMC
18 18A.20.080 classifies zoning code variances as Type III applications and shoreline conditional use
19 permits as Type II applications. LMC 18A.20.040 provides that applications involving two or more
20 process types may be consolidated under the highest numbered procedure, which is Type III for this
21 proposal. LMC 18A.20.080 authorizes the hearing examiner to issue a final decision on variance
22 applications after receiving a recommendation from planning staff.

21 2. Zoning and Shoreline Designations. Residential 2 (R2) zoning district and Conservancy
22 shoreline environment.

23 3. Review Criteria. Table 1 of Chapter 4 of the SMP requires a conditional use permit for
24 single-family residences in the shoreline Conservancy designation. Chapter 6(D)(2) of the SMP
25 adopts the shoreline conditional use review criteria of WAC 173-27-160. Variances to setback
26 standards are governed by LMC 18A.30.880. Applicable review criteria for the shoreline
conditional use permit and zoning code variance are quoted below in italics and applied via
associated conclusions of law. Pertinent Shoreline Master Program polices and regulations are
separately addressed below as compliance with the SMP is one of the criteria for shoreline

1 conditional use permits. The staff analysis of consistency with shoreline master program bulk and
2 dimensional standards, Section E4 of the staff report, is adopted by reference.

3 **Shoreline Master Program Policies and Use Regulations**

4 **SMP 3B4c1:** *All shoreline uses and developments shall be located, designed, constructed, and*
5 *mitigated to result in no net loss of ecological functions necessary to sustain shoreline natural*
6 *processes.*

7 4. The policy is met for the reasons identified in Finding of Fact No. 5A.

8 **SMP 4D6b1:** *Residential development should be permitted only where there are adequate*
9 *provisions for utilities, circulation, and access.*

10 5. The criterion is met. The home is located in an established residential neighborhood. Given
11 this factor, the project site is presumed to have adequate utilities, circulation and access.

12 **SMP 4D6b2:** *New development should provide adequate setbacks and natural buffers from the*
13 *water and ample open space among structures to protect natural features, preserve views and*
14 *minimize use conflicts.*

15 6. The criterion is met. The proposed home will be built outside the 150 shoreline buffer of
16 Chambers Creek.

17 **SMP 4D6b4:** *Residential development should be designed to preserve shoreline aesthetic*
18 *characteristics, views, and minimize physical impacts to shoreline ecological functions.*

19 7. The criterion is met for the reasons identified in Finding of Fact 5A.

20 **SMP 4D6b5:** *Residential development should be designed to preserve existing shoreline vegetation,*
21 *control erosion, protect water quality, and utilize LID BMPs where feasible.*

22 8. The criterion is met. The City's clearing and grading regulations and stormwater regulations
23 are designed to control erosion and protect water quality. The project is conditioned to utilize LID
24 BMPs where feasible.

25 **SMP 4D6b8:** *At a minimum, development should achieve no net loss of ecological functions*
26 *necessary to sustain shoreline natural resources, even for exempt development.*

9. The criterion is met for the reasons identified in Finding of Fact No. 5A.

SMP 4D6c1: *Structures or other development accessory to residential uses are permitted in*
shoreline jurisdiction, if allowed under all other applicable standards in this SMP and subject to the
provisions of the City's zoning code.

1 10. The criterion is met. Table I of the City’s shoreline master program permits single family
2 homes as a conditional use, which is the basis for the conditional use permit under review. The
3 proposal is consistent with all applicable SMP policies and regulations for the reasons outlined in
4 Conclusions of Law 3-12. The proposal is consistent with all applicable zoning regulations, subject
5 to the variance under review and the reasonable use application required as a condition of approval as
6 outlined in Section E2 of the staff report.

7 **SMP 4D6c7:** *To protect views and vistas maximum height limits have been established for each*
8 *shoreline environment designation as indicated in Chapter 4, Table II.*

9 11. The proposal complies with the height limits of Table II. Table II authorizes heights up to 35
10 feet in the Conservancy environment. The proposal will be less than 32 feet in height.

11 **SMP4D6c10:** *Residential development, including land subdivision, shall result in no net loss of*
12 *shoreline ecological functions. This includes meeting the no net loss standard at full build out of a*
13 *subdivision or other development. Mitigation shall be provided as necessary to meet this*
14 *requirement. Failure to meet this standard will result in permit denial. The City may request*
15 *necessary studies by qualified professionals to determine compliance with this standard.*

16 12. The criterion is met for the reasons identified in Finding of Fact 5A.

17 **CONDITIONAL USE**

18 **WAC 173-27-160(1):** *Uses which are classified or set forth in the applicable master program as*
19 *conditional uses may be authorized provided that the applicant demonstrates all of the following:*

20 (a) *That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;*

21 13. The criterion is met. It is consistent with the policies of the SMP for the reasons identified in
22 Conclusions of Law No. 3-12. The applicable policies of RCW 90.58.020 generally require
23 protection of shoreline ecological resources and public rights of navigation. Both values are fully
24 protected for the reasons identified in Finding of Fact No. 5.

25 (b) *That the proposed use will not interfere with the normal public use of public shorelines;*

26 14. The criterion is met for the reasons identified in Finding of Fact No. 5E.

(c) *That the proposed use of the site and design of the project is compatible with other authorized*
uses within the area and with uses planned for the area under the comprehensive plan and shoreline
master program;

15. The criterion is met for the reasons identified in Finding of Fact No. 5 and the fact that the
residential development is authorized by both the SMP and the City’s comprehensive plan for the
location of the proposal.

1 *(d) That the proposed use will cause no significant adverse effects to the shoreline environment in*
2 *which it is to be located; and*

3 16. The criterion is met for the reasons identified in Finding of Fact No. 5.

4 *(e) That the public interest suffers no substantial detrimental effect.*

5 17. The criterion is met for the reasons identified in Finding of Fact No. 5.

6 *(2) In the granting of all conditional use permits, consideration shall be given to the cumulative*
7 *impact of additional requests for like actions in the area. For example, if conditional use permits*
8 *were granted for other developments in the area where similar circumstances exist, the total of the*
9 *conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not*
produce substantial adverse effects to the shoreline environment.

10 18. The criterion is met for the reasons identified in Finding of Fact No. 5F.

11 **VARIANCE**

12 **LMC 18A.30.880A:** *Before any variance is granted, the Hearing Examiner shall find that the*
13 *following circumstances exist:*

14 1. *The proposed variance will not amount to a rezone or constitute a change in the district*
15 *boundaries shown on the official zoning map.*

16 19. The criterion is met. As previously noted, single-family homes are authorized by the zoning
code for the proposed location.

17 2. *Special circumstances relating to the size, shape, topography, location, or surroundings of the*
18 *subject property the variance is necessary to provide it with use rights and privileges permitted to*
19 *other properties in the vicinity and in the zone in which the subject property is located.*

20 20. The criterion is met. As detailed in Finding of Fact No. 6, the 150 foot shoreline buffer to
Chambers Creek and the steep slopes of the project site are special circumstances that necessitate the
variance. As further detailed in Findings of Fact No. 5E and 6, the Applicant is requesting the
variance to build a home of comparable size to other homes in the vicinity. Without the variance it
would not be possible to build a home of the size proposed, which would deprive the Applicant of
use rights and privileges enjoyed by other property owners in the vicinity and zone of the project site.

24 3. *The special conditions and circumstances do not result from the actions of the applicant.*

25 21. The criterion is met. As identified in Conclusion of Law No. 20, the circumstances
necessitating the variance are Chambers Creek and the steep slopes of the project site. These
26 circumstances are not attributable to the actions of the Applicant.

1 4. *Granting of the variance will not constitute a grant of special privilege inconsistent with the*
2 *limitation upon uses of other properties in the vicinity and zone in which the property is located*

3 22. The criterion is met. As identified in Conclusion of Law No. 20, the variance is necessary to
4 build a home that is comparable in size to other homes in the vicinity and zone of the project site.

5 5. *The granting of the variance will not be materially detrimental to the public welfare or*
6 *injurious to the property or improvements in the vicinity and zone in which subject property is*
7 *situated.*

8 23. The criterion is met. As identified in Finding of Fact No. 5F, the proposed home and garage
9 setbacks are consistent with those of other homes in the vicinity. Given these circumstances, there is
10 no discernable adverse impact associate the proposed modest setback encroachments.

11 6. *The variance is the minimum variance necessary to provide the rights and privileges*
12 *described above.*

13 23. The criterion is met for the reasons identified in Finding of Fact No. 6.


14 **DECISION**

15 As conditioned below, Shoreline Conditional Use Permit and Variance Application No. LU-20-
16 00113 & -00116 satisfy all applicable criteria as determined in the Conclusions of Law of this
17 decision and are therefore approved subject to the following conditions:

- 18 1. The entire project shall be constructed in substantial conformance with the project plans
19 illustrated in Exhibit H. Any substantive changes to the design, terms, or conditions of
20 the project from that is approved in this report will require a permit modification
21 consistent with the SMP, CAO, WAC, RCW and municipal codes.
- 22 2. The Site Plans shall be revised to clearly identify the landslide hazard area boundaries as
23 part of future site development and building permit submittals.
- 24 3. A Reasonable Use Permit Alternative shall be approved by the City of Lakewood
25 Community Development Director prior to issuance of any site development or building
26 permits.
4. A Tree Removal Permit shall be approved by the City prior to starting site development
work.
5. Pursuant to the City of Lakewood Site Development Regulations, a Site Development
Permit, drainage review, geotechnical review, and erosion control plan shall be approved
by the City Engineer prior to issuance of building permits. The measures called for in the
plan shall be implemented on site prior to and during site development.

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- 2 6. Hold on Construction. Each permit issued by the City shall contain a provision that
- 3 construction pursuant to the permit shall not begin and is not authorized until twenty-one
- 4 (21) days from the date of filing with Ecology, per WAC 173-27-190 or as subsequently
- 5 amended. "Date of filing" of the City's final decision on Substantial Development
- 6 Permits differs from date of filing for a CUP or variance. In the case of a variance or
- 7 CUP, the "date of filing" means the date that Ecology's final decision on the permit is
- 8 transmitted to the City.
- 9
- 10 7. Construction, or the use or activity, shall commence within two (2) years after the
- 11 effective date of the permits. Authorization to conduct development activities shall
- 12 terminate within five (5) years after the effective date of a shoreline permit. The
- 13 Shoreline Administrator may authorize a single extension before the end of either of
- 14 these time periods, with prior notice to parties of record and Ecology, for up to one (1)
- 15 year based on reasonable factors.
- 16
- 17 8. Construction activities associated with these shoreline permits shall not commence until
- 18 expiration of the 21-day appeal period to the City of Lakewood Hearing Examiner.
- 19
- 20 9. Please note that other federal, state and/or outside agency permits may be required in
- 21 addition to these permits.
- 22
- 23 10. The proposal shall utilize LID BMPs where feasible.

24 DATED this 5th day of February, 2021.

25 
Phil A. Olbrechts

26 Hearing Examiner for Lakewood

Appeal Right and Valuation Notices

For the variance decision, LMC 18A.20.080 provides that the decision of the Hearing Examiner on variance applications is final with no further administrative appeal. Appeals of final land use decisions are appealable to superior court and are governed by the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. LUPA imposes short appeal deadlines with strict service requirements. Persons wishing to file LUPA appeals should consult with an attorney to ensure that LUPA appeal requirements are correctly followed. The shoreline conditional use permit is subject to approval from the Washington State Department of Ecology. Appeal rights to the Department of Ecology decision are governed by Chapter 90.58 RCW.

1 Affected property owners may request a change in valuation for property tax purposes
2 notwithstanding any program of revaluation.

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