

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BAINBRIDGE ISLAND**

In The Matter of the Application of)	No. PLN-51183 RUE
)	
Crosby Olsen and Amy Butler)	
)	
For Approval of a Reasonable Use)	FINDINGS, CONCLUSIONS,
<u>Exception</u>)	AND DECISION

SUMMARY OF DECISION

The request for a reasonable use exception to allow the construction of a single-family residence on a vacant lot containing a wetland and associated wetland buffer, at 2222 Belfair Avenue SE, 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 November 8, 2018. At the conclusion of the hearing, the record was kept open until November 16, with an agreement of the Applicant and City to discuss alternative site plans and submit a report on those discussions, and to allow the City time to respond to a memorandum submitted by the Applicant during the hearing. Following the hearing, the Applicant requested additional time to prepare his own report. That request was granted, and the record closed on November 19.

Testimony:

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

Annie Hillier, City Planner
Crosby Olsen, Applicant
Amy Butler, Applicant
Bernie Thompson
Mary Victoria Dombrowski
James Olsen
Joanne Bartlett, Wetland Biologist for Applicant

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report

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2. Letter from Annie Hillier to Crosby Olsen, dated July 24, 2018, with email from David Greetham to Ann Hillier, dated July 18, 2018; Memorandum from Peter Corelis to Annie Hillier, dated July 27, 2018; Memo from Deputy Chief Fire Marshal Jared Moravec to Annie Hillier, dated July 10, 2018
3. Master Land Use Application, dated July 1, 2018
4. SEPA Environmental Checklist, dated August 5, 2018
5. RUE Narrative, undated
6. Site Plan (Sheet A1), dated July 31, 2018
7. Notice of Complete Application, dated August 27, 2018
8. Notice of Application/SEPA Comment Period
9. Mailing list; Legal Invoice, *Bainbridge Island Review*, #BIR823584, dated August 31, 2018; Affidavit of Publication, *Bainbridge Island Review*, dated September 4, 2018, with ad proof, published August 31, 2018; Certification of Posting, dated August 30, 2018, with photo printed September 4, 2018
10. Public comments
 - a. Email from PCD to Carla Lundgren, dated September 13, 2018, with email string
 - b. Email from PCD to Carla Lundgren, dated September 17, 2018, with email string
 - c. Letter from Eileen H. Safford to Department of Planning & Community Development, dated September 13, 2018, with five (5) photos
 - d. Letter from Julian Prossor to Annie Hillier, dated September 14, 2018
11. City of Bainbridge Island, Information Request, dated September 17, 2018
12. City of Bainbridge Island, Information Request, dated September 17, 2018, response
13. Email from Ann Hillier to Crosby Olsen, dated October 9, 2018
14. Wetland Delineation Report and Buffer Mitigation Plan, Ecological Land Services, dated October 12, 2018
15. Memorandum from Peter Corelis, P.E., to Annie Hillier, dated October 17, 2018
16. Notice of Mitigated Determination of Nonsignificance (MDNS), issued October 19, 2018
17. Letter from Mary Victoria Dombrowski to Annie Hillier, dated September 21, 2018
18. City's PowerPoint presentation (13 slides), dated November 8, 2018
19. Personal Statement of Crosby Olsen, dated November 8, 2018
20. Drawings
 - a. Site Plan (Sheet A1), dated July 31, 2018
 - b. North Elevation
21. Email from Tim Hemphill to Crosby Olsen, dated November 7, 2018, with email string; email from Charlie and Kate Vasicek to Annie Hillier, dated November 7, 2018, with email string; letter from Julian Prosser to Annie Hillier, dated September 14, 2018; Letter from Mary Victoria Dombrowski to Annie Hillier, dated September 21, 2018
22. Memo from Joanne Bartlett to Crosby Olsen, dated November 1, 2018
23. Personal Statement of Amy Butler, dated November 8, 2018
24. Memo from Annie Hillier to Hearing Examiner, dated November 16, 2018
25. Memo from Crosby Olsen and Amy Butler to Hearing Examiner, dated November 18, 2018

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

FINDINGS

Application and Notice

1. Crosby Olsen and Amy Butler (Applicant) request approval of a reasonable use exception (RUEX) to allow the construction of a single-family residence on a vacant lot containing a wetland and associated wetland buffer. The property is located at 2222 Belfair Avenue NE.¹ The RUEX application includes a proposal for a driveway, walkways, porches, parking areas, a retaining wall and a residence with a 1,200 square foot footprint. The City of Bainbridge Island (City) ordinances allow for approval of a RUEX if, among other requirements, total lot coverage does not exceed 1,200 square feet of residential development.² *Bainbridge Island Municipal Code (BIMC) 16.20.080.F.6*. The City staff report estimated that the proposed project would impact 5,697 square feet of wetland buffer.³ As mitigation for the impacts of the proposed development, the Applicant proposes to enhance the wetland buffer by removing invasive species and planting a variety of native plants. *Exhibit 1, Staff Report, pages 1, 13, and 14; Exhibit 3; Exhibit 5; Exhibit 6*.

2. The City determined that the application was complete on August 27, 2018. The City provided notice of the application, SEPA comment period, and public hearing by posting notice on two signs on the property on August 29, 2018, and mailing notice and publishing notice in the *Bainbridge Island Review* on August 31, 2018, with a comment deadline of September 14, 2018. In response to the notice, the City received several comments about impacts to wetlands, street intersection safety, and runoff and waterflow from a separate culvert repair project, as well as two letters in support of the project. City staff responded to the comments prior to the hearing, stating that the City code allows residential development with lot coverage not to exceed 1,200 square feet; that the project is conditioned to use permeable paving materials and non-toxic construction materials; that mitigation for any traffic-related impacts is not required; and that a separate culvert repair project would not

¹ The property is identified by tax parcel number 41480030100007. *Exhibit 1, Staff Report, page 1*.

² The Bainbridge Island Municipal Code does not appear to define “residential development.” City staff apparently interprets the term to apply to the building footprint of a residence only, not including any associated development such as walkways, parking areas, driveways or retaining walls. It may be helpful for review of future applications if the City clarified this term, as it appears to allow for a broader definition than merely the footprint of a house.

³ The City’s PowerPoint presentation identified a total impact area of 5,697 square feet (including grasses and rain garden), and the City’s Memo of November 16, 2108, also references 5,697 square feet. Therefore, the Hearing Examiner assumes that the staff report reference, on page 13, to “5,967” square feet is an inadvertent transposition of numbers. *Exhibit 1, Staff Report, page 13; Exhibit 18; Exhibit 24*.

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impact the on-site wetlands. *Exhibit 1, Staff Report, pages 5 and 6; Exhibit 7; Exhibit 8; Exhibit 10; Exhibit 17.*

State Environmental Policy Act

3. The City acted as lead agency to analyze the environmental impacts of the proposal, as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The City reviewed the Applicant's environmental checklist and other information on file and determined that the proposal would not have a probable significant adverse impact on the environment. The Applicant's Environmental Checklist identified deer, frogs, and songbirds as observed or known to be on or near the site. No threatened or endangered species are known to be on or near the site. The City consolidated the SEPA Determination of Nonsignificance (DNS) and the application comment periods under the "Optional DNS process" provided for by the Washington Administrative Code (WAC) 197-11-355. The City issued a Notice of Mitigated Determination of Nonsignificance (MDNS), with 15 conditions, on October 19, 2018, and a comment and appeal deadline of November 2, 2018. The conditions included use of non-leaching roofing material, construction fencing of the wetland buffer, wetland buffer protection signage, submittal of a wetland mitigation plan with the building permit application, limited exterior lighting and use of pesticides, use of minimal excavation foundation systems, retaining public enjoyment and use of the Belfair right-of-way, pre-treatment of surface stormwater from driveway and parking surfaces, use of permeable pavement for hardscaping, and use of diffuse flow methods to discharge roof surface stormwater into the wetland. The MDNS was not appealed. *Exhibit 1, Staff Report, page 5; Exhibit 8; Exhibit 16.*

Comprehensive Plan, Zoning, and Surrounding Property

4. The property is designated Residential District in the Comprehensive Plan. The Residential District area is designated for less intensive residential development and a variety of agricultural and forestry uses. City staff analyzed the proposal for consistency with the Comprehensive Plan and identified goals and policies applicable to the proposal, including preserving and enhancing the Island's natural systems, natural beauty, and environmental quality; encouraging sustainable development; and protecting and enhancing wildlife, fish resources, and ecosystems.⁴ *Exhibit 1, Staff Report, pages 3 and 6.*

⁴ City staff specifically identified the following goals of the Comprehensive Plan as relevant to the proposal: Environmental Element Goals EN-1, EN-4, and EN-5, and Land Use Element Policy LU 14.1. *Exhibit 1, Staff Report, page 6.*

5. The 0.46-acre (20,038 square foot) property is within the “R-2” zoning district.⁵ The purpose of the R-2 zoning district is “to provide residential neighborhoods in an environment with special Island character consistent with other land uses such as agriculture and forestry, and the preservation of natural systems and open space, at a somewhat higher density than the R-1 district.” *BIMC 18.06.020.C*. Single-family dwellings are a permitted use in the R-2 zone, at two units per acre. *BIMC 18.09.010*. The R-2 minimum lot area is 20,000 square feet, with a minimum lot depth and width of 80 feet. Maximum allowed lot coverage is 20 percent. Setback requirements include front yard setbacks of 25 feet; side yard setbacks of 5 feet, minimum, and 15 feet, total; and rear setbacks of 15 feet. *BIMC 18.12.020*. Two parking spaces are required for each primary dwelling. *BIMC 18.15.020.B.5*. The lot is located in the Fort Ward Overlay District and subject to the Fort Ward Design Guidelines. The project would be reviewed for compliance with the design guidelines at the time of building permit application. Surrounding properties contain single-family residences that are also designated Residential District and zoned R-2. *Exhibit 1, Staff Report, pages 3 and 7*.

Critical Areas Regulation

6. The purpose of Chapter 16.20 BIMC, the City’s critical areas code, is to designate and classify ecologically sensitive and hazardous areas in order to protect, maintain, and restore these areas; achieve no net loss of their functions and values; and allow for reasonable use of property. If some reasonable use of regulated property is not allowed, it may be considered an unconstitutional taking of property, and compensation for that taking could be required.

Ecological Land Services prepared a Wetland Delineation Report and Buffer Mitigation Plan (WDR) for the Applicant, dated October 12, 2018. The WDR identified a Category III depressional forested and emergent wetland on the eastern portion of the property, requiring a 60-foot buffer. *BIMC 16.20.140.I.4*. A structure or hard surface setback line of 15 feet is also required from the edge of any wetland buffer. *BIMC 16.20.140.I.7*. These regulations embrace most of the subject property to the extent that no reasonable use of the property could occur without the approval of a reasonable use exception.

The critical areas code regulates what may occur on property that contains wetlands and buffers. The code provides that wetland buffers must remain undisturbed or be enhanced for the purpose of protecting the integrity, function, and value of wetland resources. Any buffer modification proposed must be through an approved buffer enhancement plan which meets the requirements of BIMC 16.20.180. *BIMC 16.20.140.I*. In addition, permanent wetland buffer signage may be required. *BIMC 16.20.140.I.6*. All development, uses, and activities proposed to impact wetlands must be mitigated

⁵ The lot was created as part of the Fort Ward Estates Division 3Plat in 1962. *Exhibit 1, Staff Report, page 12*.

according to BIMC 16.20.140.J and the mitigation sequencing steps outlined in BIMC 16.20.030. *BIMC 16.20.080.F.3.*

The City does not have prescriptive mitigation requirements for wetland buffers. Compensatory mitigation is required for development, uses, or activities that result in the loss of wetland acreage or in the reduction of wetland functions or values. Where mitigation is required under the sequencing in the critical areas code, a mitigation plan is a required component of a critical areas report, which must meet the requirements in BIMC 16.20.180. *BIMC 16.20.140.J.1 through .3; Exhibit 1, Staff Report, page 13; Exhibit 14.*

Reasonable Use Exceptions

7. The City code allows for reasonable use exceptions (RUEX) if 11 criteria are met. These are: (1) where the City's critical areas ordinance would deny all reasonable use of the property; (2) where there are no reasonable alternatives with less impact to the critical area or its required buffer; (3) where the proposal minimizes the impact through mitigation sequencing; (4) where the proposed impact is the minimum necessary; (5) where the inability to derive reasonable use of the property is not the result of actions by the Applicant; (6) where the proposed total lot coverage does not exceed 1,200 square feet for residential development; (7) where the proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property; (8) where any alterations are mitigated; (9) where the proposal protects the critical area functions and values consistent with best available science and results in no net loss of critical area functions and values; (10) when the proposal addresses cumulative impacts of the action; and (11) when the proposal is consistent with other applicable regulations and standards. *BIMC 16.20.080.F.*

8. With the application, the Applicant submitted a statement addressing the criteria for approval of a RUEX enumerated above. The statement asserts that the proposal would meet the criteria for a RUEX because the western portion of the property is the buildable area of the lot and is entirely within the wetland buffer and building setback, leaving no space for a building footprint. The statement asserts that placement of the house on the southern portion of the property is not possible due to lack of room for building access or a driveway. The Applicant estimated that the project would impact 2,900 square feet of wetland buffer for the single-family residence and driveway. City staff estimated that the entire project would impact 5,697 square feet of wetland buffer. The Applicant's Wetland Delineation Report estimates that the single-family residence, driveway, and outdoor boardwalks would impact approximately 3,476 square feet of wetland buffer. *Exhibit 1, Staff Report, page 13; Exhibit 5; Exhibit 14; Exhibit 18.*

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9. Upon receiving a complete application for the proposed RUEX, City staff analyzed the application for compliance with the criteria for approval listed in BIMC 16.20.080, enumerated above. City staff determined that the proposal would not meet RUEX review criteria 3, 4, 8, and 9 for the following reasons:
- (3) The proposal does not minimize impacts in accordance with mitigation sequencing because additional measures could be taken, such as shifting the single-family residence to the west to increase the amount of buffer between the development and the wetland, and minimizing the amount of hard services and land/grass area.
 - (4) The proposed impact to the critical area is not the minimum necessary. The site plan submitted for the pre-application conference showed slightly smaller decks than the site plan submitted with the RUEX application. In addition, no change of location was proposed, and efforts to minimize the driveway were not provided.
 - (8) Additional mitigation measures should be considered to prevent future encroachment into the wetland, such as installation of shore pines or other higher stature, densely planted trees or shrubs along the buffer edge, and may require additional area between the single-family residence and the wetland edge to prevent human and pet intrusion.
 - (9) The wetland report and mitigation plan does not reference the Department of Ecology's most recent guidance "Update on Wetland Buffers: The State of the Science" (October 2013).

Exhibit 1, Staff Report, pages 9 through 14.

Open Record Application Hearing

10. An open record hearing was convened on November 8 in the City Council Chambers to allow an opportunity for the City to present its recommendation, for the Applicant to present information in support of the application, and for the public to testify on the application. Annie Hillier, City Planner, was the first to testify at the hearing. She presented information about her review of the application using a PowerPoint presentation (Exhibit 18). She focused on the criteria in the municipal code that must be met in order for a reasonable use exception to be approved. She stated that the application, as presented, does not meet the criteria for approval primarily because the proposal does not adequately compensate for the amount of intrusion into the wetland buffers, and is not the minimum necessary to allow reasonable use of the property. She ultimately recommended approval of the application, but with 26 conditions, including a requirement to submit a revised site plan that shows a reduced impact on the critical area and additional mitigation for intrusion into the critical area.

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Under questioning by the Hearing Examiner, Ms. Hillier testified to her understanding of the code language that states that a residence within a critical area may “not exceed 1,200 square feet” as meaning it may be a minimum as well as a maximum of 1,200 square feet. She agreed that the language allows for a smaller footprint (below 1,200 square feet) if necessary for compliance with the code, but noted that the City has not previously interpreted the code in that way. *See BIMC 16.20.080.F.6*. Ms. Hillier stated that revisions to the proposed site plan would be necessary for the application to meet the code criteria and suggested several ways in which the impact on the wetland buffer could be reduced and how mitigation could be increased. She also testified about the need for additional information to assess the application, including a need for better support of the “no net loss” conclusion reached by the Applicant’s wetland biologist and a need to determine compliance with the latest Department of Ecology Wetland Manual. *Exhibit 18; Testimony of Ms. Hillier.*

11. Crosby Olsen testified as the Applicant. He began his testimony by sharing how he had grown up in the Fort Ward area and had often played in those wetland areas as a youth. He has also been involved in removing invasive plants, and planting appropriate trees in the area. He testified that the lot he purchased is one of the few affordable lots on the island, where he wishes to live with his wife and children to be near his parents and to return to the land he loved as a youth. He also testified that a member of his family suffers from an unspecified medical condition that requires certain walkway and driveway widths to accommodate entry and exit from vehicles.

Mr. Olsen presented three slides of the site plan he proposes for development of his property (Exhibit 20) as well as a personal narrative in support of his application (Exhibit 19) and public comments in support of his application (Exhibit 21). He made the point in his testimony that the proposed house with a 1,200 square foot footprint could not be moved further west or south without an unacceptable reduction in the width of the driveway because, then, the handicapped member of the family could not get in and out of certain vehicles. He noted how the width of the lot tapers from 65 feet wide to 40 feet wide, which complicates moving the house to the south because the wetland buffer would then occupy more of the property. He also mentioned the need to move equipment around the proposed house to maintain it, which he believes would require a 12-foot minimum pathway for a boom lift, which he stated is safer than a ladder.

Mr. Olsen also testified about his concerns with the process for reviewing his application. He noted that a variance from the front yard setback might be possible, but that the cost for requesting one would exceed \$5,400, which he considers too much, and that it would also reduce the front yard play area to about five feet. He stated his opinion that the City promoted applying for a setback variance as one method to meet the critical areas code, but that he believes it is not appropriate for his property. He testified to some changes he’s made to his proposed development, including using some pervious surface for

walkways instead of concrete, but that he believes he's done all he can to reduce impacts from the proposed 1,200 square foot residence.

Mr. Olsen also requested some changes in the wording of the conditions if his application is approved. Specifically, he asked that the word "must" be changed to the word "should" in Condition 17, because the Fort Ward Overlay is a guideline and not a requirement; that the last clause of Condition 19, following the conjunction "or," be deleted as too open ended; that Condition 23 be changed so that walkways can be 12 feet wide as the maximum allowed; and that Condition 26 be deleted because his revised mitigation plan meets the "no net loss" to buffer function requirement.

Exhibits 19, 20, and 21; Testimony of Mr. Crosby Olsen.

12. Amy Butler also testified as the Applicant. She explained that she is very excited about living in the Fort Ward area because of the fact that Crosby grew up there and because the schools are known to be good ones. She testified that, in her opinion, the proposed location of the house is in the best location because it would allow for a play space in the front of the house. She also noted that there is a well-used footpath to the south that should be kept as a footpath and that the house thus needs to be as far north as possible to be kept separate from that footpath. Finally, she testified that she is aware of other properties in the vicinity that have been approved for reasonable use within a critical area and that this application should also be approved because the Applicant is requesting no more than the other properties. *Testimony of Ms. Butler.*
13. Mr. Bernie Thompson testified to his concern about the proposed fence within the right-of-way of Belfair. He noted that the location of a fence often connotes ownership of the land within the fenced area so that the right-of-way could be lost to the public. He suggested that the existence of the right-of-way be noted clearly on the proposed site plan for development, and also that it be filed as a matter of public record. He noted that the right-of-way may be needed in the future, so it should be protected. He also expressed a second concern about how the proposed driveway might connect to a public road that is paved. He suggested that the driveway be paved so that mud and debris would not be tracked onto the public road. *Testimony of Mr. Thompson.*
14. Mary Victoria Dombrowski testified, as one of Crosby Olsen's parents, in support of the Applicant. She related how dedicated her son is to environmental protection and enhancement and urged approval of the application so that the family of five would have an affordable place to live on the island. *Testimony of Ms. Dombrowski.*
15. James Olsen also testified, as Crosby Olsen's father, in support of the Applicant. He noted how Crosby is an Eagle Scout and a steward of the environment. He expressed concern about how "the goal posts keep shifting" as to what might be required in order to

be granted a reasonable use exception. He urged approval of the application. *Testimony of Mr. James Olsen.*

16. Joanne Bartlett, a Wetland Biologist with Ecological Land Services, Inc., testified as an expert witness for the Applicant. She testified that the plants she recommends for mitigation could be “moved around as the City desires” to provide the buffer enhancement needed. She admitted in her testimony that she “rested on her laurels” when she used an outdated Ecology Wetland Manual, but she also testified that the current manual is “not significantly different” than the manual she used. Finally, she noted in her testimony that the 40-foot buffer line depicted on Figure 3, Site Plan, as part of her Wetland Delineation Report is incorrect. She agreed with the City that a 60-foot buffer is required. She testified to her belief that this line on the site plan did not impact her written analysis because she is aware that a 60-foot buffer is required.

Ms. Bartlett testified that she also authored the ELS “Wetland Delineation Report and Buffer Mitigation Plan” (WDR), dated October 12, 2018, (Exhibit 14). The WDR report followed the U.S. Army Corps of Engineers Routine Determination Method, as set out in the Corps’ 1987 “Wetland Delineation Manual” and the U.S. Army Engineer Research and Development Center’s 2010 “Regional Supplement.” ELS biologists conducted a site visit on March 23, 2018, and delineated a Class III depressional forested and emergent wetland in the east portion of the property requiring a 60-foot wetland buffer. The WDR report estimated that the single-family residence, driveway, and outdoor boardwalks would permanently impact approximately 3,476 square feet of wetland buffer.

The WDR referenced a buffer mitigation ratio of 1:1 to ensure that the area of mitigation equals the area of impact. The WDR proposes wetland buffer enhancement mitigation, including removal of invasive plant species from 5,161 square feet of property, installation of native trees and shrubs, buffer enhancement between the home and the wetland boundary, enhancement of a narrow strip of wetland nearest the home site, and installation of a split-rail fence along the edge of the designated buffer area. The WDR proposes the removal of invasive plants and planting of native plants, so that a total of 4,426 square feet of wetland buffer mitigation would be provided. The buffer mitigation area would be monitored for a five-year period following plant installation. The WDR determined that the no-net-loss of functions and values requirement would be met by providing 5,161 square feet of wetland and wetland buffer improvement.⁶ The WDR

⁶ BIMC 19.20.190.A.59 provides:

“No net loss” means the maintenance of the aggregate total of the city’s critical areas functions and values over time. The no net loss standard requires that the impacts of a proposed use and/or development, whether permitted or exempt from permit requirements, be identified and mitigated on a project-by-project basis, so that as development occurs critical areas functions and values stay the same.

notes that the lot is located within Fort Ward Estates, established in the 1960's along Belfair Avenue. As the last undeveloped lot, the study concludes that no additional cumulative impacts would occur from future similar approvals.

Ms. Bartlett provided a Memo to Crosby Olsen, dated November 1, 2018, stating that an addendum to the WDR would be prepared to include best available science with regard to buffer functions and that the no-net-loss assessment would be expanded in the mitigation plan addendum to update best available science with regard to buffer functions. *Exhibit 14; Exhibit 22; Testimony of Ms. Bartlett.*

17. Annie Hillier responded to the Applicant and the public at the open record hearing. In response to the comments of Mr. Thompson, she stated that the fence within the right-of-way would have breaks in it so it would not look like it was enclosing private property. She also noted that there can be no adverse possession to take public property into private ownership. In response to the testimony of Crosby Olsen, she testified that Condition 19 relating to monitoring of wetland mitigation could not be changed because the language is straight from the municipal code. She also noted that the City would accept permeable boardwalks, as proposed by Mr. Olsen, but does not believe that these walkways should be within the wetland buffer area. She also requested time to review the memorandum submitted by Ms. Bartlett at the hearing, noting that it was just received by the City at the hearing.⁷ *Testimony of Ms. Hillier.*
18. At the conclusion of the open record hearing, the Hearing Examiner stated he would leave the record open so that the City could review and comment on the memorandum submitted by Ms. Bartlett at the hearing. The Applicant and the City also agreed to discuss possible alterations to the proposed site plan to better meet the criteria for approval of a reasonable use exception. The Hearing Examiner announced he would keep the record open until noon on November 16 to receive a report from the City Planner.⁸ The hearing was then adjourned.

Post-Hearing Memorandum

19. The Hearing Examiner received separate memoranda from the City and the Applicant following the close of the hearing. The memoranda explain that the City and the Applicant met on November 14th to discuss what might be done to reduce impacts to the critical area and to mitigate for the impacts that remain. City Planners Annie Hillier and

⁷ Although the memorandum from Ms. Bartlett is dated November 1, Ms. Bartlett later clarified that the date should be November 8, the date the memorandum was released.

⁸ A "Post Hearing Guidance" order was issued by the Hearing Examiner on November 15, 2018, to describe in writing what might be expected in a report. Subsequent to receiving the post-hearing guidance, the Applicant requested, by a phone call to the Clerk to the Hearing Examiner, an extension of time to file a separate report. An extension was granted, as requested, until noon on November 19, without objection from the City.

Heather Wright were present for the City, and Amy Butler and Crosby Olsen were present for the Applicant.

The City memo explains that it requested a reduction in buffer impact to 3,320 square feet in order to meet its interpretation of what is required in the code. The City suggested shifting the house to the west and south to reduce driveway length, or to shift the house 1 to 2 feet to the west (away from the wetland edge), remove the proposed boardwalks on the north and east sides of the house and replace with buffer enhancement, and reduce the walkway that leads from the eastern driveway to the south entrance of the house and replace with buffer enhancement. The City determined that these actions would result in a reduction in total buffer impact to 5,102 square feet (from the initial 5,697 square feet) and a gain buffer enhancement of 685 square feet. The City also indicated that the Applicant proposed a permeable driving surface on the eastern portion of the proposed driveway.

In the memo, the City shared the Applicants' position that they would not consider reducing the footprint of the house, or a reduction in the driveway width of 12 feet. The City also shared its determination that the discrepancy in the buffer width between the project biologist and the City code "does not affect the proposal or the analyses prepared by the project biologist or City Staff." The City attached a separate memo from the project biologist with additional explanation. The City's memo concluded with a recommendation from City staff that Conditions 25 and 26 of the staff report be attached to any approval of the request for a reasonable use exception to allow for additional review of the proposal at the time of building permit review. *Exhibit 22; Exhibit 24, and Exhibit 25.*

20. The Applicant submitted a separate memorandum following the meeting with the City. That memo consists of 86 pages of material, including emails and sketches of revisions to the initial site plan. On pages 2 and 3 of the memo, the Applicant describes seven amendments to the site plan that the City and Applicant agreed upon to reduce impacts to the buffer and provide additional mitigation. These are: removal of eastern boardwalk, reduction in width of southern entry walkway, placement of the rain garden in the wetland buffer, adjustment of the wetland buffer to the west, movement of the proposed structure 1 to 2 feet to the west, use of permeable pavers for a portion of the driveway, and adjustment in the number of plantings to address the increases in wetland buffer area.

In the memo, the Applicant shared his view that not all lots are the same in the vicinity, so the five lots south of the Applicant's lot that have received RUEX approval are not the same as the lot he owns. Specific reasons are given for why this is the case, mostly having to do with the unique character of the Applicant's lot. The Applicant states his opinion in the memo that no minimum or maximum square footage of buffer impact, or

averaging of impacts on those five lots, should be used to determine what should apply to the Applicant's lot.

The Applicant concludes the memo by a reference to Attachment 9 to the memo, which is a refinement of the initial proposed site plan, with the following revisions: the eastern boardwalk is removed, the southern walkway is reduced, the rain garden is included in the wetland buffer, and the structure is shifted one foot to the west. The Applicant measured the increase in wetland buffer at 1,001 square feet and a reduction in permanent wetland buffer impacts by 386 square feet. The Applicant estimates a permanent impact area of 3,086 square feet and temporary impact area of 1,613 square feet. Total mitigation area and mitigation measures would be calculated and addressed in the final Ecological Land Services report, to be submitted with an application for a building permit and to be approved by the City prior to issuance of that permit. The Applicant asks the Hearing Examiner to approve the Attachment 9 site plan as the plan allowed for a reasonable use exception. *Exhibit 25.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and approve, approve with conditions, deny, or remand a request for a reasonable use exception. *BIMC 2.14.030; BIMC 2.16.100; BIMC 16.20.080.E.*

Criteria for Review

Criteria for review and approval of reasonable use exceptions require that the following determinations be made:

1. The application of this chapter would deny all reasonable use of the property;
2. There is no reasonable alternative to the proposal with less impact to the critical area or its required buffer;
3. The proposal minimizes the impact on critical areas in accordance with mitigation sequencing (BIMC 16.20.030);
4. The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property;
5. The inability of the applicant to derive reasonable use of the property is not the result of actions by the applicant, or of the applicant's predecessor, that occurred after February 20, 1992;
6. The proposed total lot coverage does not exceed 1,200 square feet for residential development;
7. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property;
8. Any alterations permitted to the critical area are mitigated in accordance with mitigation requirements applicable to the critical area altered;

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9. The proposal protects the critical area functions and values consistent with the best available science and results in no net loss of critical area functions and values;
10. The proposal addresses cumulative impacts of the action; and
11. The proposal is consistent with other applicable regulations and standards.

BIMC 16.20.080.F

The criteria for review adopted by the City of Bainbridge Island City Council 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 City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

1. **The application of the critical areas code would deny all reasonable use of the property.** The applicable ordinances of the City require a 60-foot buffer around the wetland on the property. The wetland and buffer cover nearly all of the subject property, making it impossible to build a single-family residence on the property without approval of a reasonable use exception. *Findings 1, 6 - 8.*
2. **There is no reasonable alternative to the proposal with less impact to the critical area or its required buffer.** The ordinances governing reasonable use exceptions state that the proposed total lot coverage must not exceed 1,200 square feet for residential development. The City Planner testified that the City's current interpretation of those words is that a structure with a 1,200 square foot footprint is the minimum allowed for a reasonable use exception, as well as the maximum allowed. The Applicant also appears to have this understanding. It is the opinion of the Hearing Examiner, however, that this may not a correct interpretation of the code. The common meaning of the words "does not exceed" means that something less than that would also qualify. It appears the intent of the City Council when adopting the ordinance was to allow for a footprint of a residence smaller than 1,200 square feet. In a two-story house, this means up to 2,400 square feet of living space. It seems appropriate for the City, in the future, to consider an interpretation of the ordinance to require a smaller footprint than 1,200 square feet in appropriate situations. This application may have presented that situation, but it would not be appropriate for the Hearing Examiner to impose his interpretation of the ordinance at this time, because both the City and the Applicant both believed the 1,200 square foot reference meant both the minimum and maximum square footage allowed. This interpretation should be revisited by the City, but it would be unfair to the Applicant to impose a revised interpretation at this stage in the review process when the building footprint has already been designed with a 1,200 square foot footprint in reliance upon the current interpretation. *Finding 5, 10.*

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It would also be appropriate for the City to review what was intended by the City Council when it limited “residential development” to 1,200 square feet. The City Council could have stated that a residential structure must be limited to a 1,200 square foot footprint, but it did not do so. It appears probable that something other than the current interpretation would be more consistent with the intent of the City Council. Yet, the City to date has applied an interpretation that allows for a minimum of a 1,200 square foot building footprint for a residence as well as additional development associated with that residence such as walkways, driveways, parking areas, porches and retaining walls greater than 1,200 square feet. It would be inappropriate to apply a different interpretation to this application, as the Applicant relied upon the current interpretation by City staff that allows a minimum of a 1,200 square foot footprint for a residence as well as additional components of residential development. The City, however, may wish to review its interpretation for future applications. *Hearing Examiner Recommendation, supported by Findings 1-20.*

3. **The proposal minimizes the impact on critical areas in accordance with mitigation sequencing (BIMC 16.20.030).** City staff determined that additional measures should be explored to minimize impacts as part of mitigation sequencing. The Applicant provided a revised site plan that removes the proposed boardwalk and adjusts the southern walkway, includes the rain garden in the buffer, and moves the residence one foot west, as depicted in Attachment 9, the revised site plan. The wetland report will be updated at the time of a building permit application to account for the revised site plan. As proposed by the Applicant, this updated report will be submitted to the City for approval prior to issuance of a building permit. It is not anticipated that any significant revisions will be included in the updated report: it is to focus on impacts to the critical area, as addressed in the Attachment 9 site plan, and on specific mitigation to offset those impacts. Conditions of approval are necessary to ensure that this criterion is met prior to issuance of a building permit. *Findings 6, 7, 19, 20.*
4. **The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property.** There are many uses of property that may be considered as “reasonable” in addition to residential use. This property, however, is not suitable for camping or merely sitting and looking at the view, as it might be if located on Hood Canal or in another unique area that offers unique recreational opportunities. *See Buechel v. Department of Ecology, 125 Wn.2d 196 (1994).* Once it was determined by the City that the lot could be developed with a single-family residence with a 1,200 square foot footprint, there could be no consideration of a smaller footprint consistent with the City’s current interpretation of its ordinance. *See Conclusion 2.* Thus, the proposal for a residence with a 1,200 square foot footprint, designed in advance of the application, is the minimum necessary to make reasonable use of the property for

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this application. The City may wish to consider its interpretation of its ordinance allowing for residential development “not to exceed” 1,200 square feet for future applications. *Findings 1-20.*

5. **The inability of the Applicant to derive reasonable use of the property is not the result of actions by the Applicant, or of the Applicant’s predecessor, that occurred after February 20, 1992.** There is no evidence in the record that the Applicant or his predecessor took action after 1992 that would cause the property to become almost completely covered with wetlands and buffer areas. *Finding 5.*
6. **The proposed total lot coverage does not exceed 1,200 square feet for residential development.** All proposed site plans, from the initial plan to the one proposed post-hearing, depict a residence with a 1,200 square foot footprint, as well as associated components of residential development, such as driveways, walkways, porches, and retaining walls. The City focused on the proposed 1,200 square foot footprint of the residential structure as the minimum allowed in the critical area, and did not object to any additional square footage of associated development as exceeding 1,200 square feet. Thus, the interpretation of the City for this application means there is compliance with these criteria. *Findings 1, 19, 20.*
7. **The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property.** There is no evidence in the record that there would be an unreasonable threat to public health, safety, or welfare if the proposal is approved. *Finding 9.*
8. **Any alterations permitted to the critical area are mitigated in accordance with mitigation requirements applicable to the critical area altered.** The City and Applicant provided varying figures about the square footage of impact on the wetland buffer. The City’s presentation at the hearing estimated a total impact of 5,697 square feet (including grasses and a rain garden). The Applicant’s Wetland Delineation Report and Buffer Mitigation Plan (WDR) determined that the project would permanently impact approximately 3,476 feet of wetland buffer and that 4,426 square feet of wetland buffer would be enhanced as mitigation.

On November 14, 2018, the Applicant and City met to discuss the Applicant’s proposal to reduce and mitigate the impacts of the proposed project. At that meeting, the City informed the Applicant that a total buffer impact area of approximately 3,320 square feet would be acceptable. In response, the Applicant submitted a revised plan with an estimated 3,086 square feet of permanent impact area and 1,613 square feet of temporary impact area.

The City’s critical areas ordinance is intended to protect, maintain, and restore critical areas; achieve no net loss of their functions and values; and allow for reasonable use of

property. The Applicant's expert witness, Ms. Bartlett, supervised the preparation of the WDR as a Senior Biologist and Professional Wetland Scientist. It is her professional opinion that, although an addendum would be prepared to update best available science and expand the no-net-loss assessment, the proposed mitigation plan achieves a no-net-loss of buffer functions and values. Although the City may disagree with this opinion, the City did not provide any contradictory expert opinion or report that refutes the opinion of the Applicant's expert. Ms. Hillier correctly admitted she was not a wetland expert and, although she referred to others on staff that may have that expertise, no one from City staff with expertise in wetland delineation analysis or mitigation plans was present at the hearing. It also appears that no one on City staff with expertise in wetland delineation analysis or mitigation plans was present at the post-hearing meeting where additional reduction and mitigation of wetland buffer impacts was discussed. Thus, the only expert opinion available to the Hearing Examiner is that of the Applicant's expert. She concluded that the 4,426 square feet of wetland buffer mitigation and 735 square feet of wetland mitigation would provide a high quality native wetland buffer with no-net-loss of buffer functions or values. With a condition of approval to ensure this report is reviewed and approved by the City prior to building permit issuance, this criterion will be met. *Findings 16, 20.*

9. **The proposal protects the critical area functions and values consistent with the best available science and results in no net loss of critical area functions and values.** The Wetland Delineation Report by Ecological Land Services concluded that 4,426 square feet of wetland buffer mitigation and 735 square feet of wetland mitigation would provide a high quality native wetland buffer with no-net-loss of buffer functions and values. As described above, in Conclusion 8, the report will be updated at the time of a building permit application to account for the Applicant's revised Attachment 9 site plan. As proposed by the Applicant, this updated report will be submitted to the City for approval prior to issuance of a building permit. It is not anticipated that any significant revisions will be included in the updated report: it is to focus on impacts to the critical area, as addressed in the Attachment 9 site plan, and on specific mitigation to offset those impacts. Because the City does not have a prescriptive approach to wetland mitigation, the methodology used and outcomes determined by the Applicant's expert in the updated report should not be unilaterally rejected by the City in absence of any independent review by one with expertise in wetland mitigation who may find specific reason to object. To date, such review has not occurred. *Findings 16, 20.*
10. **The proposal addresses cumulative impacts of the action.** The City considered the impact of approval of reasonable use exceptions on at least five separate properties in the area. Although the City conducted this review to determine the average amount of critical area impacted by the proposed development, the review also constituted a review of the cumulative impacts of granting several reasonable use exceptions in the same area. As long as the City insists upon strict compliance with the criteria for a reasonable use exception and also considers a

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reduction in footprint as one way to reduce the impact on a critical area, the cumulative impacts of several reasonable use exceptions in the area will be addressed as required by the City Council. *Findings 1-20.*

- 11. The proposal is consistent with other applicable regulations and standards.** No evidence was presented that would suggest the proposal is not consistent with other applicable standards and regulations. A building permit is required before construction of the proposed house can begin, and additional alterations may be necessary for that permit to be approved at the time it is reviewed, including a consideration of Attachment 9 to Exhibit 25 where a revised site plan is proposed by the Applicant. *Findings 1-18, 20.*

DECISION

Based upon the preceding findings and conclusions, the request for a reasonable use exception to allow the construction of a single-family residence on a vacant lot containing a wetland and associated wetland buffer, adjacent to and south of 15035 Sunrise Drive NE, is **APPROVED**, with the following conditions:^{9,10}

SEPA Conditions:

1. In order to protect the ground water and the wetland flora and fauna from the proposed development, the roofing shall be of a non-leaching material that is not harmful to the environment. Examples of non-leaching materials are, but not limited to, metal and tile roofs. Any alternative method proposed requires approval by the City prior to final building permit issuance, and must address BIMC water quality standards, Chapter 13.24 BIMC, to assure that wetland flora and fauna functions and values are maintained/enhanced.
2. Prior to commencing any construction activity, the Applicant shall have the wetland buffer temporarily fenced between the areas of construction activity, a maximum of 15 feet from the proposed residence. The fence shall not be located in the wetland. The fence shall be clearly marked on any construction or clearing plans. The fence shall be made of durable material and shall be highly visible. The fence shall be inspected as part

⁹ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

¹⁰ This decision is an approval of development of the property with a single-family residence as a reasonable use of the property. The residence must comply with applicable building code and development regulations of the City, which this decision does not specifically address. During the course of review for a building permit, minor adjustments to the proposed residence may be necessary to meet applicable codes. In other words, this decision is an approval of the proposed use of the property, but does not constitute approval of specific structures proposed by the Applicant.

of the building permit. The temporary fencing shall be removed once the construction activity is complete and replaced with permanent fencing (see Condition #3, below).

3. A split-rail type fence shall be installed along the edge of the reduced wetland buffer. The rails shall be high enough to allow small mammals and wildlife to pass through. The fence shall be indicated on the building permit application and in place prior to final inspection on the building permit.
4. A minimum of two signs per lot indicating the presence of a protected wetland buffer shall be placed on the fence, prior to final inspection on the building permit. Signs shall be made of metal or a similar durable material and shall be between 64 and 144 square inches in size.
5. The wetland mitigation plan, including mitigation goals and objectives, performance standards, maintenance and monitoring measures, and contingency actions, shall be submitted with the building permit application and approved prior to final building inspection. All plantings shall be installed prior to final building permit inspection, or an assurance device shall be provided in accordance BIMC 16.20.160.
6. If the performance standards in the mitigation plan are not met, a contingency plan shall be submitted to the Department of Planning and Community Development for approval. Any additional permits or approvals necessary for contingency actions shall be obtained prior implementing the contingency plan.
7. To reduce impacts to the wetland, the Applicant shall limit the amount of lighting on the exterior of the residence to the minimum necessary, shall install motion sensor lights to the rear of the house facing the wetland, and record a covenant to limit the use of pesticides on the properties.
8. No pesticides, herbicides, or fertilizers may be used in wetland areas or their buffers except those approved by the U.S. Environmental Protection Agency (EPA) and Washington Department of Ecology and applied by a licensed applicator in accordance with the safe application practices on the label.
9. Consideration shall be given to utilizing minimal excavation foundation systems per the 2012 Low Impact Development Guidance Manual for Puget Sound as means of minimizing impacts to the site and the adjacent wetlands. A bid comparison/analysis shall be submitted demonstrating the Applicant has engaged an appropriate design and construction professional to explore alternative foundation systems including stilts, helical piers, and pin piles with grade beams. The bid shall be obtained from a designer or installer with previous experience building with this technology and shall be reviewed by the City prior to building permit issuance.

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10. Preparation and construction of the driveway subgrade and base shall be performed without the use of soil sterilant.
11. Public enjoyment and use of the Belfair right-of-way (ROW) shall remain unobstructed and unobtrusive. Fencing placed in the ROW to delineate the 10-foot wide vegetated buffer strip shall be no taller than 48 inches, have a natural finish (no opaque paint), be see-through (i.e. cedar split rail – solid board fencing shall not be permitted), and shall contain 3-foot breaks in the fencing every 20 to 30 feet. Fencing shall not encroach west of the projected Soundview Drive NE ROW eastern boundary.
12. Ditch construction between the driveway vegetated dispersion buffer strip and the existing dirt walking path in the right-of-way shall be undertaken as necessary to prevent the path from becoming saturated, undermined, eroded, flooded, or washed out.
13. Surface stormwater from driveway and parking surfaces shall receive pre-treatment prior to discharging to the wetlands or leaving the site by directing stormwater to vegetated dispersion strips, rain gardens where soils allow, or the use of permeable pavement (outside of the ROW only), or other alternatives consistent with MR #5, On-Site Stormwater Management of the stormwater manual.
14. Hardscaping should be constructed of permeable materials or contain wide permeable jointing where feasible to allow infiltration or shallow subsurface filtration of surface stormwater.
15. Diffuse flow methods (i.e. BMP C206: Level Spreader, or, BMP T5.10B: Downspout Dispersion Systems) should be used to discharge roof surface stormwater into the wetland where full-infiltration on-site is not feasible, including point discharges from a rain garden overflow and underdrain system.

Project Conditions:

16. The Applicant shall record a notice to title to document the presence of the wetland and buffer with the Kitsap County auditor. Such notice shall provide notice in the public record of the presence of a critical area and buffer, the Application of this chapter to the property, and that limitation on actions in or affecting such areas may exist. The notice must be recorded prior to the issuance of the building permit.
17. The proposed single-family residence should meet the Fort Ward Overlay design guidelines and shall be reviewed for compliance with these design guidelines during review of the building permit application.

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18. A building clearance for Sewered Properties (Sewered BC) is required prior to the issuance of the building permits.
19. The Applicant shall provide monitoring reports on an annual basis for a minimum of five consecutive years or until the director determines the mitigation project has met the performance standards as specified in the mitigation plan, as required by city ordinance.
20. The proposed SFR shall be relocated as far as possible from the wetland edge, as depicted on Attachment 9 to Exhibit 25.
21. To prevent encroachment and disturbance of the wetland, the mitigation proposal must include the installation of shore pines or other higher stature, densely planted trees or shrubs along the buffer edge.
22. Any permitted porches/boardwalks must be limited in size to that of minimum impact on the critical area and minimum required for use (as determined by the City), elevated over existing grade, and constructed to minimize topsoil stripping and grading to the maximum extent practicable. Railings must be placed on any permitted boardwalk edge facing the wetland to prevent intrusion.
23. As indicated in Exhibit 25, Attachment 9, the Applicant shall submit final report review and approval by the City prior to issuance of a building permit. The plan shall specifically address the buffer and wetland impacts from the proposed development depicted in Attachment 9 to Exhibit 25, and propose mitigation to offset those impacts to accomplish a no net loss of wetland function and value. Attachment 9 to Exhibit 25 may meet the requirements for final City approval, but further review by the City during the building permit application process may result in the need for minor modifications, which must occur before final building permit approval. The City must agree that the plan will result in no net loss of wetland function and value before a building permit may issue, which agreement shall not be unreasonably withheld.

Decided this 30th day of November 2018.



THEODORE PAUL HUNTER

Hearing Examiner
Sound Law Center

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