

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

In The Matter of the Application of)	No. PLN-50996
)	
)	
Jason Galbreath)	Galbreath RUEX and Variances
)	
For Approval of a Reasonable Use)	FINDINGS, CONCLUSIONS,
<u>Exception and Variances</u>)	AND DECISION

SUMMARY OF DECISION

The request for a reasonable use exception and variances from setbacks and maximum lot coverage to allow the construction of a single-family residence on a nonconforming lot containing a stream buffer on property identified as Lot 69 Phelps Road NE is **APPROVED**. 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 January 10, 2019.

Testimony:

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

Annie Hillier, City Planner
Jason Galbreath, Applicant

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report
2. Letter from Annie Hillier to Jason Galbreath, dated November 27, 2017, with Memo from Assistant Chief Fire Marshal Luke Carpenter to Annie Hillier, dated October 22, 2017
3. Memorandum from Peter Corelis, P.E., to Annie Hillier, dated March 8, 2018
4. Master Land Use Application, unsigned
5. Owner/Agent Agreement, dated September 5, 2017
6. Memo from Jason Galbreath to COBI, dated April 12, 2018
7. Conceptual Utility Plan (No. C1, Sheet 1 of 2), dated April 12, 2018
8. Email from Ann Hillier to Jason Galbreath, dated May 23, 2018

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9. Master Land Use Application, received September 20, 2018
10. Memo from Jason Galbreath to The City of Bainbridge Island, dated September 5, 2018
11. Notice of Application, undated
12. Notice material
 - a. Invoice, #BIR829403, *Bainbridge Island Review*, dated October 12, 2018
 - b. Affidavit of Publication, *Bainbridge Island Review*, dated October 12, 2018
 - c. Classified Proof, *Bainbridge Island Review*, published October 12, 2018
 - d. Mailing list, dated October 12, 2018
 - e. Certificate of Posting, dated October 12, 2018
13. Email from Haiyan Zhao to PCD, dated October 14, 2018
14. Survey, dated January 19, 2017
15. Letter from Annie Hillier to Jason Galbreath, dated November 11, 2018, with Mitigation Planting Plan (Figure 8), dated July 17, 2018
16. Conceptual Utility Plan (Nos. C1 and C2, Sheets 1 and 2 of 2), dated September 5, 2018
17. Email from Jason Galbreath to Ann Hillier, dated December 12, 2018
18. Sketches (Sheet No. A10:02); Plans (Sheet No. A20:01), undated; Plans (Sheet A20:02), undated
19. Critical Areas Report and Stream Buffer Mitigation Plan, Ecological Land Services, dated November 26, 2018
20. Memorandum from Peer Corelis, P.E., to Annie Hiller, dated October 22, 2018
21. Letter of Transmittal, Kitsap Public Health District, dated October 30, 2018
22. Memo from Deputy Chief Fire Marshal Jared Moravec to Annie Hillier, dated April 26, 2018
23. City PowerPoint (7 slides), dated January 10, 2019

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

FINDINGS

Application, Notice & Public Comment

1. Jason Galbreath (Applicant) requests approval of a reasonable use exception and variances from front and side setbacks and maximum lot coverage to allow the construction of a single-family residence on a vacant, nonconforming lot containing a stream buffer.¹ The property is identified as Lot 69 Phelps Road.² A reasonable use exception is needed to allow for development of a single-family house on the property that is covered with critical area buffers; variances are needed to allow for a building envelope larger than 653 square feet due to the smaller, non-conforming size of the lot

¹ City Planner Annie Hillier speculated that the smaller nonconformity of the lot, at only 6,534 square feet, may be because it is an abandoned plat right-of-way. *Testimony of Ms. Hillier.*

² The property is identified by tax parcel number 03250210692008. *Exhibit 1, Staff Report, page 1.*

and the coverage of it by stream buffers. *Bainbridge Island Municipal Code (BIMC) 16.20.080.F.6*. The City of Bainbridge Island (City) staff report estimates that the proposed project would increase the allowed lot coverage from 653 square feet to 1,020 square feet within the stream buffer. As mitigation for the impacts of the proposed development, the stream buffer on-site would be enhanced as recommended in the mitigation plan. *Exhibit 1, Staff Report, pages 1, 5, 11, 12, and 19; Exhibit 4; Exhibit 9; Exhibits 16 through 19.*

2. The application was complete on September 20, 2018. The City published the Notice of Application, SEPA exemption notice, and Public Hearing notice in the *Bainbridge Island Review* on May 18, 2018. The City published a revised Notice of Application, posted notice on-site, and mailed notice on October 12, 2018, with a with a comment deadline of November 2, 2018. The City received several agency responses to this notice. The Bainbridge Island Fire Department requested that the project comply with the adopted Fire Code. The City's Department of Public Works Development Engineer submitted comments, which have been incorporated into the permit conditions, about access, underground utilities, low-impact development, and surface water management. Haiyan Zhao submitted an email with concerns about the SEPA exemption and stormwater runoff, and stated his opinion that the development does not fit into the City's general development plan.

In the staff report, City staff responded to comments. The report notes that the development of a single-family house at this site is exempt from SEPA review by state statute and that the Applicant's Critical Areas Report determined that, with mitigation, the proposal would result in no net loss of ecological functions and values. City staff also noted that a reasonable use exception may be granted to balance private property rights to develop a parcel of land with the public interest in protecting critical areas on that land. Finally, City staff pointed out that the variances requested would allow for a shorter driveway with less impervious surface, and therefore have fewer adverse impacts on the stream buffer. *Exhibit 1, Staff Report, pages 4, 5, 20, and 21; Exhibit 13; Exhibit 20; Exhibit 21; Exhibit 22.*

State Environmental Policy Act

3. The City determined that the proposal is except from review by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), under WAC 197-11-800(1)(b)(ii).³ *Exhibit 1, Staff Report, pages 1 and 5.*

³ Ms. Hillier testified that the SEPA exemption cited on page 1 of the staff report should have been WAC 197-11-800(1)(b)(i), which provides:

- (b) The following types of construction shall be exempt:
 - (i) The construction or location of four detached single-family residential units.

Testimony of Ms. Hillier.

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Comprehensive Plan, Zoning, and Surrounding Property

4. The property is designated Residential District under 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, 5, and 6.*
5. The 6,534 square foot (0.15-acre) lot is within the "R-0.4" zoning district under the City code. The purpose of the R-0.4 zoning district is to provide low-density housing in an environment with special Bainbridge Island character consistent with other land uses, such as agriculture and forestry, and the preservation of natural systems and open space. The low density of housing allowed in this zone does not require the full range of urban services and facilities. *BIMC 18.06.020.A*. Single-family dwellings are a permitted use in the R-0.4 zone, at one unit per 2.5 acres. *BIMC 18.06.010; Table 18.09.020*. The R-0.4 zone minimum lot area is 100,000 square feet, with a minimum lot depth and width of 110 feet. Maximum allowed lot coverage is 10 percent. Setback requirements include front setbacks of 25 feet, side setbacks of 15 feet, and rear setbacks of 25 feet.⁵ *Table BIMC 18.12.020-2*. The lot is 50 feet wide and 130 feet deep. The lot is nonconforming in lot area and lot width. The surrounding area is designated and zoned Residential District and contains 2.5-acre lots with lot coverage maximums over 10 times the Applicant's request of 1,020 square feet. *Exhibit 1, Staff Report, pages 3, 6, 7, and 17; Exhibit 23.*

Critical Areas Regulation

6. The purpose of the City's Critical Areas, Chapter 16.20 BIMC, is to designate and classify ecologically sensitive and hazardous areas in order to protect, maintain, and restore such areas; achieve no net loss of the functions and values of the areas; and allow for reasonable use of property. The trapezoid-shaped property is currently undeveloped. The property slopes up from Phelps Road NE to a relatively level plateau. It contains a mixed forest canopy and semi-dense understory of shrubs and herbaceous plants. All of Bainbridge Island is classified as an aquifer recharge area. The City determined that,

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 Table 18.12.020-2 requires 25-foot rear setbacks in the R-0.4 zone. The staff report states that the rear-setback requirements are 15 feet. No variance from the rear setback is requested so the difference in setback requirement is not addressed in this decision. *Exhibit 1, Staff Report, page 7.*

because the lot contains less than 12,500 square feet, it is not required to designate an Aquifer Recharge Protection Area. Stormwater on the site would be dispersed into the stream buffer.

7. The Applicant submitted a Critical Areas Report and Stream Buffer Mitigation Plan (CAR) prepared by Ecological Land Services, Inc. (ELS), dated November 26, 2018. ELS biologists conducted a site visit on August 3, 2017, and determined the property is within a portion of the 200-foot buffer of a Fish and Wildlife Habitat Conservation Area (FWHCA) containing Coho Creek. *BIMC 16.20.110*. Coho Creek is a Type F water and flows from east to west approximately 50 feet south of the property. The creek is confined to a narrow channel and there are no wetlands on-site. Wildlife using the stream and buffer include deer, coyotes, and some bird species. The CAR noted that Coho Creek has limited, if any, use by fish because of downstream culverts that partially or fully block spawning salmon or cutthroat trout. The report states that the creek flows through a ditch along the east side of Phelps Road NE, which also may present a fish passage barrier. The on-site stream buffer is undeveloped and functions to protect the water quality of Coho Creek by removing sediment and nutrients from runoff. The Washington Department of Fish and Wildlife has not identified any priority habitat on or near the property or the presence of any endangered, threatened, or sensitive fish species occurring within this section of the stream. *Exhibit 1, Staff Report, pages 13 and 21; Exhibit 19.*

The CAR determined that the entire property is within the 200-foot stream buffer and that the project cannot avoid buffer impacts.⁶ The project would minimize adverse impacts to the buffer by placing the house and drainfield as far from the stream as possible by requesting variances to the side- and front-yard setbacks. The variances would also help minimize the number of on-site trees that would need to be removed in order to construct the house. The CAR includes a Buffer Mitigation Plan (BMP). The project would impact 3,835 square feet of buffer to construct the proposed residence, driveway, and septic drainfield. Buffer mitigation would include removal of invasive species, installation of native plants, and placement of woody mulch or organic compost around plants after installation. The Applicant would install temporary fencing prior to any construction activity around areas marked on plans as “retain native vegetation.” The Applicant would also install a split-rail type fence along the edge of the buffer mitigation area and erect a minimum of two signs indicating the presence of a protected stream buffer on the fence. The Applicant would submit a final stream buffer mitigation plan and a final planting plan with the building permit application. The BMP includes a five-year maintenance and monitoring plan, as well as a contingency plan. All plantings would be installed prior to final building permit inspection. *BIMC 15.20.160*. The

⁶ City staff also determined that the 200-foot stream buffer covers the majority of the lot. *Exhibit 1, Staff Report, page 17.*

Applicant would file a notice of critical area buffer with the Kitsap County Auditor. *BIMC 16.20.070.G*. The CAR determined that the project would not directly affect federal or state listed endangered plants or animals, would not directly affect the condition of habitat available within the Coho Creek watershed, would not remove or reduce habitat features available to local wildlife species, and would not have a negative effect on the stream system or its use by potential fish species. The City noted that the CAR did not adequately address stream water temperature, stream bank integrity, or large-wood requirements. A proposed condition that requires a final stream buffer mitigation plan be submitted to the City with the building permit application was recommended by City staff at the hearing. *Exhibit 1, Staff Report, page 19; Exhibit 19.*

Reasonable Use Exceptions

8. The City code provides for a reasonable use exception (RUEX) if the proposed use meets the following criteria: (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.⁷ *BIMC 16.20.080.F. Exhibit 1, Staff Report, pages 8 through 13.*
9. City staff determined that the proposal, with conditions and approval of variances, would meet the RUEX criteria. City staff also determined that the proposal is consistent with other applicable BIMC regulations and standards and that the inability to derive reasonable use of the property is not the result of actions by the Applicant or a predecessor after February 20, 1992. The City found no evidence in the record that there would be an unreasonable threat to public health, safety, or welfare if the proposal is approved. *Exhibit 1, Staff Report, pages 8 through 13; Exhibit 6; Exhibit 16; Exhibit 17.*

Minor Variances

10. The Applicant requests variances to reduce the front setback from 25 feet to five feet, the north side setback from 15 feet to five feet, and increase the allowed lot coverage from

⁷ Any proposal to alter any critical area or required buffer shall require a critical area permit, unless a reasonable use exception is requested. *BIMC 16.20.070.A and B.*

653.4 square feet to 1,020 square feet. The setback variance would allow the proposed residence to be located as far away from Coho Creek as possible and reduce the driveway length. The request for an increase in allowed lot coverage is due to the small, nonconforming lot size in the R-0.4 zone. *Exhibit 1, Staff Report, page 1; Exhibit 16; Exhibit 17.*

Hearing Testimony

11. City Planner Annie Hillier testified about her review of the proposal, referencing a PowerPoint presentation (Exhibit 23). She noted that a smaller house footprint without the variance request would require a longer driveway, resulting in more on-site disturbance: 988.44 square feet to 1,028.4 square feet. She explained that proposed Conditions 1.d and .e, where “removal of native vegetation shall be minimized to the extent possible” and “removal of significant trees shall be minimized to the extent possible,” are shown as “retained native vegetation” on Figure 4 (Mitigation Planting Plan) of the staff report, page 12, and Exhibit 23, slide 7. *Testimony of Ms. Hillier.*
12. Applicant Jason Galbreath testified that he has been working on this proposal for over two years. He has cooperated with the City to find the balance between the public interest and private rights. He testified that the stream is dry from June through September. He noted that the stream eventually flows into a ditch and that fish have only been seen 1,000 feet downstream. He agreed that there is a legitimate concern about polluted water entering the stream. He agreed that the conditions are reasonable and acceptable to help prevent pollution of the stream, as long as it is understood that Condition 9, which would limit pesticide, herbicide, or fertilizer use, is not intended to apply to the house itself, which may require treatment of bug infestations. *Testimony of Mr. Galbreath.*

Staff Recommendation

13. City Staff determined that, with conditions, the proposal is consistent with the City’s Comprehensive Plan goals and policies and conforms to all applicable regulations in the Bainbridge Island Municipal Code. *Exhibit 1, Staff Report, page 17.*

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.* The department director has authority to approve, approve with conditions, or deny a request for a minor variance. *BIMC 2.16.060.* The reasonable use exception and minor variance applications have been consolidated for review before the Hearing Examiner. *BIMC 2.16.170.; Exhibit 1, Staff Report, page 1.*

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Criteria for Review

Reasonable Use Exception

Criteria for review and approval of reasonable use exceptions are as follows:

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;
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

Minor Variance

1. A minor variance may be approved or approved with conditions if:
 - a. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is located; and
 - b. The variance is requested because of special circumstances related to the size, shape, topography, trees, groundcover, location or surroundings of the subject property, or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access; and
 - c. The need for a variance has not arisen from previous actions taken or proposed by the applicant; and
 - d. The variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same

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vicinity and zone, but that is denied to the property in question because of special circumstances on the property in question, and will not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity in which the property is located; and

- e. The variance is consistent with all other provisions of this code, except those provisions that are subject to the variance, and is in accord with the comprehensive plan.
2. A variance may be approved with conditions. If no reasonable conditions can be imposed that ensure the application meets the decision criteria in subsection D.1 of this section, then the application shall be denied.

BIMC 2.16.060.D.

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

Reasonable Use Exception

1. **The application of the critical areas code would deny all reasonable use of the property.** The applicable ordinances of the City require a 200-foot buffer for Coho Creek, an off-site stream. The stream buffer covers all or a majority of the property, making it impossible to build a single-family residence on the property without approval of a reasonable use exception. *Findings 1-7.*
2. **There is no reasonable alternative to the proposal with less impact to the critical area or its required buffer.** The City's ordinances governing reasonable use exceptions state that "proposed total lot coverage does not exceed 1,200 square feet for residential development." With the proposed variances, the allowed total lot coverage would be 1,020 square feet, less than the maximum allowed. Although other permitted uses in the zone, such as a passive recreation park, may have less impact, the small site offers little in the way of recreational opportunities and provides no unique viewpoints. *Findings 1-13.*
3. **The proposal would minimize the impact on critical areas in accordance with mitigation sequencing (BIMC 16.20.030).** City staff reviewed the Applicant's Critical Areas Report and Stream Buffer Mitigation Plan. The City determined that, due to the stream buffer on-site, avoidance is not possible. With variances, the impact on the stream buffer would be reduced, and buffer enhancement is proposed to minimize impacts as part of mitigation sequencing. *Findings 7, 13.*

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4. **The proposed impact to the critical area would be the minimum necessary to allow reasonable use of the property.** The property is proposed for residential use by building a house. This is a reasonable use of the property, as the property 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).* The proposal for a lot coverage total of 1,020 square feet is less than the maximum allowed. *Findings 1-13.*
5. **The inability of the Applicant to derive reasonable use of the property is not the result of actions by the Applicant, or by the Applicant's predecessor, that occurred after February 20, 1992.** There is no evidence in the record that the Applicant or a predecessor took action after 1992 that would cause the property to become covered with a stream buffer. *Findings 1-13.*
6. **The proposed total lot coverage would not exceed 1,200 square feet for residential development.** The proposed site plan depicts a total lot coverage of 1,020 square feet. *Finding 1.*
7. **The proposal would 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. *Findings 1-13.*
8. **With conditions, any alterations permitted to the critical area are mitigated in accordance with mitigation requirements applicable to the critical area altered.** The City's Critical Areas ordinance is intended to protect, maintain, and restore critical areas; achieve no net loss of the functions and values of such areas; and allow for reasonable use of property. The Applicant submitted a Critical Areas Report and Stream Buffer Mitigation Plan, which included mitigation sequencing. The project would impact 3,835 square feet of stream buffer. Mitigation would include removal of invasive plants on the property and replacement with native plants, for a total of 3,835 square feet of mitigation, including installation of a stream buffer fence and signs. Conditions are necessary, including those to ensure that the Applicant submits a final stream buffer mitigation plan and final planting plan with the building permit application, constructs the required fence and signs, and completes work in compliance with the submitted design and specifications. *Findings 1-13.*
9. **With conditions, 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 Applicant submitted a Critical Areas Report and Stream Buffer Mitigation Plan, which included mitigation sequencing consistent with current science. The project would impact 3,835 square feet of stream buffer. The CAR concluded that the proposed stream buffer mitigation would remove invasive plants on

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the property and replace them with native plants for a total of 3,835 square feet of mitigation and result in no net loss of buffer functions and values. Conditions are necessary, including those to ensure that the Applicant submits a final stream buffer mitigation plan and final planting plan with the building permit application, constructs the required fence and signs, and completes work in compliance with the submitted design and specifications. *Findings 7, 13.*

10. With conditions, the proposal addresses cumulative impacts of the action. The City considered the impact of the proposed activities and reviewed the cumulative impacts of granting several reasonable use exceptions in the same area. The City determined that this lot is the only lot near this section of Coho Creek that would require a REUX for development. As long as the City insists upon strict compliance with the criteria for a reasonable use exception and also considers a 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. Conditions are necessary, including those to ensure that the Applicant submits a final stream buffer mitigation plan and final planting plan with the building permit application, constructs the required fence and signs, and completes work in compliance with the submitted design and specifications. *Findings 1-13.*

11. With conditions, 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 other than the need for variances to allow for a reduced total lot coverage. A building permit and inspection is required before construction of the proposed house can begin. Conditions are necessary, including those to ensure that the Applicant submits a final stream buffer mitigation plan and final planting plan with the building permit application, constructs the required fence and signs, and completes work in compliance with the submitted design and specifications. *Finding 13.*

Minor Variances

12. With conditions, the granting of the variances would not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is located. The Applicant requests a reduction of the front setback from 25 feet to five, the north side setback from 15 feet to five feet, and to increase the allowed lot coverage from 653.4 square feet to 1,020 square feet. Granting the variance requests would allow the residence to construct a shorter driveway, reducing the on-site disturbance. Conditions are necessary, including those to ensure that the Applicant submits a final stream buffer mitigation plan and final planting plan with the building permit application, constructs the required fence and signs, and completes work in compliance with the submitted design and specifications. *Findings 1, 7.*

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13. **The variances are requested because of special circumstances related to the size, shape, topography, trees, groundcover, location or surroundings of the subject property, or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access.** Here, the special circumstances concern Coho Creek, located off-site, with a 200-foot stream buffer covering the property. The lot coverage variance is requested because of the nonconforming lot size. *Finding 1.*

14. **The need for variances has not arisen from previous actions taken or proposed by the Applicant.** As noted above in Conclusion 5, there is no evidence in the record that the Applicant or his predecessor took action that would cause the property to become almost completely covered with a stream buffer. *Findings 1-13.*

15. **The variances are necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and zone, but that is denied to the property in question because of special circumstances on the property in question, and will not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity in which the property is located.** Use of property would be denied without a RUEX due to the presence of a stream buffer. The requested variances would allow the proposed residence to be located farther away from the stream and would reduce the length of the driveway. The property is designated Residential District and zoned R-0.4, as are surrounding properties, with 2.5-acre lots and lot coverage maximums over 10 times the Applicant's request of 1,020 square feet. Single-family residences are a permitted use in the R-0.4 zone. *Findings 1-13.*

16. **The variances are consistent with all other provisions of this code, except those provisions that are subject to the variances, and are in accord with the comprehensive plan.** *Finding 13.*

DECISION

Based upon the preceding findings and conclusions, the request for a reasonable use exception and variances from front and side setbacks and maximum lot coverage to allow the construction of a single-family residence on a vacant nonconforming lot containing a stream buffer on property identified as Lot 69 Phelps Road, is **APPROVED**, with the following conditions:⁸

1. Work shall be completed in substantial compliance with the design and specifications included in the RUEX/VAR file, including:

⁸ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

- a. Total lot coverage shall be limited to 1,020 sq. ft. The building permit application shall contain lot coverage calculations.
 - b. The total disturbed area shall not exceed 3,835 sq. ft., including the portion of driveway located within the ROW.
 - c. The mitigation area shall total 3,835 sq. ft. and shall be clearly marked on the site plan.
 - d. Removal of native vegetation shall be minimized to the extent possible as shown by Figure 4 of the staff report, page 12. Areas on RUEX/VAR application materials labeled “retain native vegetation,” to the south of the SFR and to the east of the primary drainfield, shall be labeled on building permit application materials.
 - e. The removal of significant trees shall be minimized to the extent possible as shown by Figure 4 of the staff report, page 12. Significant trees shall be clearly marked on the site plan, with those proposed for removal clearly labeled.
2. Prior to commencing any construction activity, the Applicant shall have the areas indicated on plans as “retain native vegetation,” to the south of the proposed SFR and to the east of the primary drainfield, temporarily fenced. The fence shall be clearly marked on any construction or clearing plans submitted with the building permit application. The fence shall be made of durable material and shall be highly visible. The fence shall be inspected as part of the building permit. The temporary fencing shall be removed once the construction activity is complete and replaced with permanent fencing (see Condition No. 3, below).
 3. A split-rail type fence shall be installed along the edge of the buffer mitigation area. 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 indicating the presence of a protected stream 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 final stream buffer mitigation plan, including a complete description of the relationship between and among structures and functions sought (BIMC 16.20.180.G.3.b.v) and the likelihood of the ability of the created or restored critical area to provide the functions and values of the original critical area (BIMC 16.20.180.G.3.b.viii), shall be submitted with the building permit application and approved prior to final building inspection.

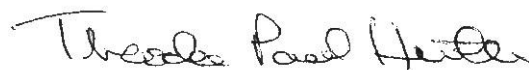
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6. A final planting plan shall be submitted with the building permit application. The planting plan shall be approved by the City prior to building permit issuance.
7. All plantings shall be installed prior to final building permit inspection, or an assurance device shall be provided in accordance BIMC 16.20.160.
8. 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.
9. No pesticides, herbicides, or fertilizers may be used in fish and wildlife conservation 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.
10. The Applicant shall record a notice to title to document the presence of the stream buffer with the Kitsap County auditor. Such notice shall provide notice in the public record of the presence of a critical area buffer and the application of this chapter to the property, and notice that some limitations on actions in or affecting such areas may exist. The notice must be recorded prior to the issuance of the building permit.
11. 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.
12. No refuse, including but not limited to household trash, yard waste and commercial/industrial refuse, shall be placed in the buffer.
13. The Applicant shall comply with the following conditions to the satisfaction of the City Engineer:
 - a. In order to protect the ground water and the stream 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 stream flora and fauna functions and values are maintained/enhanced.
 - b. New access to the COBI ROW shall be improved to the standard paved residential driveway approach detail DWG. 8-170.
 - c. All underground utilities such as the KPUD water service line, telecom, and power shall be routed in the footprint of the driveway improvement to minimize

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- site disturbances. The water meter box and setter shall be placed at the edge of the right-of-way and the property line.
- d. Use of soil sterilant to construct the driveway shall be strictly prohibited.
 - e. 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 critical areas. 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.
 - f. Areas outside the building footprint, driveway, septic components and field and any necessary construction setbacks shall be protected from soil stripping, stockpiling, and compaction by construction equipment through installation of resilient clearing limits fencing to be inspected by the City prior to clearing and construction.
 - g. Hardscaping should be constructed of permeable materials or contain wide permeable jointing where feasible to allow infiltration or shallow subsurface filtration of surface stormwater.
 - h. 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 stream buffer where full-infiltration on-site is not feasible, including point discharges from any rain garden overflow and underdrain system.
 - i. Stormwater runoff from driveways shall be controlled with waterbars, trench drains, and/or berms spaced to disperse flow through neighboring vegetation per BMP T5.11 or T5.12.
14. This approval does not authorize the removal of any landmark trees (Chapter 16.32 BIMC) without prior approval of a 'removal of a landmark tree permit' by the Department of Planning and Community Development.

Decided this 22nd day of January 2019.



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center