

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

In the Matter of the Application of)	No. PLN-50583A RUE
)	
Vance Rehder)	
)	
)	
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, with associated improvements, on a 4.75-acre lot containing critical areas, off of NE Pine Way, 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 14, 2021, using remote meeting technology in light of the ongoing COVID-19 pandemic.

Testimony:

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

Kelly Tayara, City Senior Planner
Aaron Pool, City Code Compliance Officer
Vance Rehder, Applicant
Paul Nylund, P.E., City Development Engineer
Christopher Detter

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated December 28, 2020
2. Site Assessment Review, dated July 13, 2020
3. Letter from Kelly Tayara to Vance Rehder, dated July 29, 2020; Memorandum from Deputy Fire Marshal Jackie Purviance to Kelly Tayara, dated July 8, 2020; Memorandum from Kelly Tayara to Paul Nylund, dated July 28, 2020
4. Master Land Use Application, received August 12, 2020
5. Notice of Incomplete Application, dated August 12, 2020
6. Notice of Complete Application, dated August 28, 2020
7. Notice of Application and Hearing, with attached materials:

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- a. Postcard Mailer, published September 2, 2020
- b. Mailing List
- c. Affidavit of Publication, dated September 4, 2020
- d. Certificate of Posting, dated September 4, 2020
8. SEPA Checklist, with Staff Annotations, dated September 2, 2020
9. Wetland Delineation Report, Ecological Land Services, Inc., dated October 2015
10. Geotechnical Evaluation, Cobalt Geosciences, LLC, dated August 12, 2020
11. Stormwater Management Worksheet; Stormwater Pollution Prevention Plan Narrative, received August 12, 2020
12. Applicant Project Narrative, received August 27, 2020
13. Revised Site Plan, received December 16, 2020
14. Comment from Linda Wohlsen, received September 17, 2020
15. Comment from Linda Blevins, received September 18, 2020
16. Water Availability Letter, Kitsap Public Utility District, dated September 18, 2016; Letter from Island Utility Company, dated June 18, 2015
17. Kitsap Public Health District, Notice of Pending Building Site Application, dated October 16, 2018
18. Memorandum from Paul Nylund, dated November 4, 2020
19. Applicant Response to Staff Report, received January 14, 2021

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

FINDINGS

Application and Notice

1. Vance Rehder (Applicant) requests approval of a reasonable use exception (RUEX) to allow construction of a single-family residence and associated improvements, including septic facilities, on a 4.75-acre lot containing a wetland and an associated wetland buffer. The unaddressed property is off of NE Pine Way in the Eagledale area of Bainbridge Island, and an existing gravel driveway already provides access to the proposed development area.¹ The RUEX would allow for development of a single-family residence and associated improvements, not to exceed 1,200 square feet in lot coverage. As mitigation for the proposal, the Applicant would remove invasive species throughout the wetland buffer area and would install a variety of native vegetation in a 22,239 square foot mitigation area within a maintained 50-foot buffer area, including installing 180 trees and 305 shrubs. Over 80 percent of the property would be protected in perpetuity following development. *Exhibit 1, Staff Report, pages 1 and 7 through 9; Exhibit 7; Exhibit 9; Exhibit 10; Exhibit 19.*
2. The City of Bainbridge Island (City) determined that the application was complete on August 28, 2020. On September 4, 2020, the City provided notice of the application and

¹ The property is identified by tax parcel number 022402-1005-2007. *Exhibit 1, Staff Report, page 1.* A legal description of the property is included within the Wetland Delineation Report. *Exhibit 9.*

the associated open record hearing, with a comment deadline of September 18, 2020, by mailing or emailing notice to property owners within 500 feet of the subject property and to reviewing government departments and agencies, and by publishing notice in the *Bainbridge Island Review*. The same day, notice of the application and associated hearing was also posted at the project site. *Exhibit 6; Exhibit 7*.

3. The City received no comments from reviewing government agencies in response to its notice materials. Two comments from the public, however, were received. Linda Wohlsen wrote the City about previous construction activity on the project site and requested additional information about the maximum allowable lot coverage and building height for the proposal, about whether any restrictions on the type of foundations that would be allowed would be imposed, and about stormwater impacts from the proposal. Linda Blevins requested information about stormwater impacts from the proposal as well as information about the type of foundation that would be used for the proposed residence. *Exhibit 14; Exhibit 15*.

State Environmental Policy Act

4. The City determined that the proposal is exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), and Washington Administrative Code (WAC) 197-11-800(1)(b)(i), because it would involve minor new construction.² *Exhibit 1, Staff Report, page 1*.

Comprehensive Plan, Zoning, and Surrounding Property

5. The property is designated “Residential District-1” under the City Comprehensive Plan. The purpose of the City’s Residential District designation is to promote low-impact residential development that reconciles development and conservation. *City Comprehensive Plan, LU-22*. City staff analyzed the proposal for consistency with the Comprehensive Plan and identified goals and policies applicable to the proposal, including:
 - Using mitigation sequencing to develop properties adjacent to or adjoining critical areas to account for the present and future need to reduce the potential for personal injury, loss of life, or property damage due to flooding, erosion, landslides, seismic events, climate change, or soil subsidence.
 - Employing conservation design methods and principles such as low-impact development techniques for managing stormwater and wastewater, and using green building materials and high-efficiency heating and lighting systems.

² Notice materials prepared by the City indicated that SEPA review of the proposal would be necessary. Staff later determined, however, that the proposal would be exempt from SEPA review, as detailed above. The City did not receive any comments specific to SEPA from reviewing government agencies or the public. Accordingly, inadvertently including information about SEPA review in the notice materials was harmless. *Exhibit 1, Staff Report, page 2; Exhibit 6; Exhibit 7*.

- Protecting wetlands and riparian areas.³
Exhibit 1, Staff Report, pages 4 and 5.
6. The 4.75-acre property is within the “Residential 1” (R-1) zoning district. The purpose of the R-1 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.” *Bainbridge Island Municipal Code (BIMC) 18.06.020.B*. Single-family dwellings are a permitted use in the R-1 zone. *BIMC Table 18.09.020*. Development of the property would occur within an area that is approximately 36,500 square feet, resulting in the remaining 3.9 acres of the property being preserved as protected wetland and buffer. *Exhibit 1, Staff Report, pages 5 and 6.*
 7. Within the R-1 zoning district, certain dimensional standards require a minimum lot area of 40,000 square feet per dwelling unit; a minimum lot depth and width of 80 feet; and a maximum lot coverage of 15 percent. *BIMC Table 18.12.020-2*. Setback requirements include front lot line setbacks of 25 feet and side lot line setbacks of at least 10 feet. *BIMC 18.12.020*. Maximum building height in the R-1 zoning district is limited to 25 feet. *BIMC Table 18.12.020-2*. Two parking spaces are required for each primary dwelling. *BIMC 18.15.020.C*. *Exhibit 1, Staff Report, pages 6 and 7.*
 8. Project plans show that the parking requirements, minimum width and depth requirements, maximum lot coverage requirements, and minimum setback requirements would be satisfied. Because a RUEX is proposed, lot coverage would be limited to 1,200 square feet, as required by *BIMC 16.20.080.F*. Given the large size of the property (4.75 acres), development would entail lot coverage of less than one percent, far less than the maximum lot coverage of 15 percent typically allowed under the municipal code. In addition, the proposed development area would be set back over 300 feet from the adjacent right-of-way to the north and approximately 100 feet from the adjacent right-of-way to the east, satisfying front lot line setback requirements. An existing shed on the property is set back 10 feet from the west property line and 12 feet from the south property line, satisfying side lot line setback requirements. The proposed residence would be set back 20 feet from the south property line, and the proposed septic drainfield would be located 10 feet from the south property line, also satisfying municipal code requirements. Structure height would be reviewed and verified during building permit review. *Exhibit 1, Staff Report, pages 2 through 6; Exhibit 2; Exhibit 12; Exhibit 13.*
 9. The property is bounded to the north and east by NE Pine Way. All surrounding properties are also zoned for residential development and generally contain single-family residences. *Exhibit 1, Staff Report, page 2; Exhibit 13.*

³ City staff specifically identified the following goals and policies of the Comprehensive Plan as relevant to the proposal: Environmental Element Policies EN-1.2, EN-4.1, and EN-5.6; Land Use Element Policy LU-14.1. *Exhibit 1, Staff Report, pages 5 and 6.*

Critical Areas

10. The site is generally undeveloped, although there is an existing shed (discussed in more detail below) on the property and a gravel driveway that provides access to the site development area. Site topography is generally level, with sloping upland forest to the east. Ecological Land Services, Inc. (ELS), prepared a Wetland Delineation Report, dated October 2015, addressing on-site critical areas.⁴ ELS biologists visited the site to collect data on vegetation, hydrology, and soils, and identified a Category III depressional wetland occupying a majority of the subject property. ELS determined the wetland is composed of both forested and scrub/shrub vegetation communities with a seasonally flooded hydroperiod in the low depressional area of the property and saturated hydroperiod on the gradual eastern slope. The forested portion of the wetland is dominated by red alder and western cedar, and dominant shrub species include salmonberry, red huckleberry, Indian plum, and evergreen blackberry. Upland areas around the wetland are dominated by a mixed deciduous and coniferous forest, with a sparse shrub layer (including salmonberry, salal, and holly) and a dense herbaceous layer dominated by blackberry and various fern species. ELS determined that the wetland is seasonally flooded from a perched water table and a culvert that discharges to the property. There are no streams or other critical areas associated with the site. ELS determined that the Category III wetland would, in normal circumstances, require a 110-foot buffer, with an additional 15-foot building and impervious surface setback. The wetland and associated buffer would cover the entirety of the subject property. Accordingly, ELS determined that buffer modifications (i.e., buffer width averaging or buffer reduction) would not be feasible for the project site. *Exhibit 9.*
11. City staff reviewed the Wetland Delineation Report through the site assessment review process, as required by BIMC 16.20.080.A, and concurred that use of buffer averaging or an administrative buffer reduction of up to 25 percent would still result in insufficient space being available to construct a single-family residence with necessary infrastructure, including a proposed on-site septic system, especially when accounting for the required 15-foot building setback from the edge of the wetland buffer. Accordingly, City staff determined that developing the property with a single-family residence would only be possible through the reasonable use exception process. *Exhibit 1, Staff Report, pages 8 and 9; Exhibit 2; Exhibit 9.*
12. The City code identifies aquifer recharge protection areas (ARPAs) as critical areas that must be protected. BIMC 16.20.100.E.1 generally states that any proposed development or activity requiring a site assessment review located within the R-1 zone requires designation of an ARPA. Under BIMC 16.20.100.E.1.d, however, if 65 percent of a property would be protected in perpetuity by a legal instrument acceptable to the City

⁴ Senior Planner Kelly Tayara testified that, under the municipal code, wetland delineations are valid for a 5-year period and that the City deemed the application complete on August 28, 2020. *Testimony of Ms. Tayara.*

attorney and would otherwise meet the requirements for an ARPA, no such designation is required. Here, the proposed wetland and remaining wetland buffer would occupy over 80 percent of the site and be protected in perpetuity. Accordingly, the City determined that an ARPA need not be designated. Under BIMC 16.20.070.G, the Applicant would field-verify the presence of the critical area and buffer and record this information with the Kitsap County Auditor, along with any limitations on actions related to the protected area. This notice would run with the land and would serve as a legal instrument acceptable to the City attorney. *Exhibit 1, Staff Report, page 9.*

Reasonable Use Exception

13. The City code provides for a reasonable use exception (RUEX) where the City's critical areas ordinance (Chapter 16.20 BIMC) would deny all reasonable use of the property; where there are no reasonable alternatives with less impact to the critical area or its required buffer; where the proposal minimizes the impact through mitigation sequencing; where the proposed impact is the minimum necessary; where the inability to derive reasonable use of the property is not the result of actions by the Applicant; where the proposed total lot coverage does not exceed 1,200 square feet for residential development; where the proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property; and where any alterations are mitigated. *BIMC 16.20.080.F.*
14. The Applicant proposes construction of a single-family residence with an on-site septic system. To minimize adverse impacts to the wetland and buffer, the residence would be constructed in the southwestern corner of the property, which represents the largest upland area on the property, and is furthest from the wetland. Low Impact Development (LID) techniques would be employed to minimize ground disturbance activity and excavation, especially within the wetland buffer. Because the property is not located within the City's sewer service area, an on-site septic system would be installed east of the residence, along with a septic drainfield. As proposed, the single-family residence would be located entirely within the required 110-foot buffer area. As noted, however, a 50-foot buffer area would be maintained adjacent to the homesite area, the proposal would result in less than one percent of lot coverage, and the majority of the site would be protected in perpetuity. *Exhibit 1, Staff Report, pages 9 and 10; Exhibit 7; Exhibit 13; Exhibit 15; Exhibit 19.*
15. Cobalt Geosciences, LLC, prepared a Geotechnical Evaluation, dated August 12, 2020, for the Applicant. The Geotechnical Evaluation determined that construction of a residence in the proposed site development area would be feasible and provided recommendations related to use of a shallow spread footing foundation system. The Geotechnical Evaluation did not address alternatives to traditional foundation design that would have fewer impacts on the disturbed wetland buffer. *Exhibit 10.*

16. The Applicant submitted City Form #B109, addressing stormwater management, with the application materials. Conceptually, the Applicant intends to infiltrate all stormwater on-site. All hardscaping would be constructed of permeable materials or contain wide permeable jointing, where feasible, to allow infiltration. Finally, diffuse flow methods would be used to discharge surface stormwater into the wetland buffer, to provide for increased hydrological recharge. The Applicant would submit a final Stormwater Site Plan for review and approval prior to development. *Exhibit 12.*
17. Paul Nylund, the City's Development Engineer, reviewed the proposal and determined that it would be consistent with applicable stormwater regulations and that the proposal would protect the critical area functions and values consistent with the best available science as it pertains to the incorporation of LID techniques for the purpose of handling of stormwater, retaining vegetation, and mimicking natural hydrology to the maximum extent feasible. Furthermore, he determined that the site plan conforms to the City's Design and Construction Standards and Specifications. Mr. Nylund provided several recommendations about site development and construction that City staff determined should be incorporated as conditions of approval for the RUEX. *Exhibit 18.*
18. Jackie Purviance, the City's Deputy Fire Marshal, reviewed the proposal and noted that the future development must comply with all provisions of the City's adopted Fire Code. Ms. Purviance also provided information on requirements related to fire apparatus access roads and noted that residential fire sprinklers or a fire hydrant may be required to meet fire flow requirements. *Exhibit 3.*
19. The Kitsap Public Health District reviewed the proposal and provided preliminary approval for the proposed septic system. It also determined that an existing well on the property must be decommissioned. Kitsap County Public Utility District #1 has indicated that water is available to serve the site, and the Island Utility Company would provide electricity to the property. *Exhibits 15 through 17.*
20. The Applicant provided a Habitat Management Plan, based on recommendations provided by ELS in the Wetland Delineation Report, addressing impacts that would result from reducing the wetland buffer around the single-family residence and addressing the compensatory mitigation that would be necessary to ensure the integrity, function, and value of the Category III wetland on-site and to ensure that no net loss of wetland function would result from construction of a single-family residence. To mitigate for permanent impacts to the wetland buffer from development of a 1,200 square foot residence partially within the buffer area, the Applicant would:
 - Remove low-lying invasive vegetation throughout the buffer area.
 - Install appropriate sedimentation and control measures, during construction, such as silt fencing.
 - Install a variety of native vegetation in a 22,239 square foot mitigation area within a maintained 50-foot buffer area, including installing 180 trees and 305 shrubs. A

15-foot structure/hard surface setback between the buffer and the homesite area would be maintained as well.

- Monitor the re-established area for no less than 7 years to ensure long-term survival of installed vegetation.

Exhibits 12 and 13.

21. The Applicant submitted a project narrative addressing the criteria for a RUEX under BIMC 16.20.080. The project narrative suggests that the proposal would meet the criteria for a RUEX because:

- Due to the size and location of the on-site wetland, there are no areas available on the property to avoid impacting the required wetland buffer to construct a single-family residence.
- The proposed residence would be situated in the southwest corner of the property, which is the largest upland area of the property and is furthest from the wetland.
- The proposal would minimize impacts on the wetland and buffer through appropriate mitigation sequencing and use of best management practices during construction.
- The impact to the critical area is the minimum necessary to allow reasonable use of the property, and the site layout, as proposed, would allow reasonable use of the property with fewest impacts to the wetland buffer. Minimal lawns and use of native plants in landscaping will further ensure minimal habitat impacts.
- The wetland and buffer were existing conditions and not created by the Applicant or the previous property owner.
- One single-family residence would be built on the lot, and the total lot coverage would be no more than 1,200 square feet. This would result in lot coverage of less than one percent of the entire property.
- The proposal would not pose an unreasonable threat to public health, safety, or welfare on or off the site and would be consistent with other building and zoning regulations.
- All other adjacent parcels have been developed. No adverse cumulative impacts are anticipated from development of the site.

Exhibit 12.

22. City staff also analyzed the proposal for compliance with the RUEX criteria from BIMC 16.20.080 and generally concurred with the Applicant's assessment. Staff specifically noted:

- The Applicant would not be able to develop the lot without the requested RUEX. Lot coverage of 1,200 square feet is considered reasonable on lots encumbered by critical areas or associated buffers.
- Given the size of the on-site wetland and associated buffer, there do not appear to be any other reasonable alternatives to the proposed use that would achieve the same purpose for the Applicant with less impact to the critical area buffer.

- The proposed residence and associated improvements would be located within an area that is approximately 36,500 square feet, allowing for approximately 3.9 acres of the property to be preserved in perpetuity.
- The proposal minimizes impacts on the wetland buffer in accordance with mitigation sequencing requirements under BIMC 16.20.030. Specifically: the residence would be located outside of the wetland itself and sited on an upland area of the property as far from the wetland as possible; the proposal would account for natural topography, and minimal grading would be necessary, allowing for the maintenance of natural drainage; the project avoids grading within the wetland buffer by incorporating natural topography into the site design; low-impact construction techniques would be considered to minimize ground disturbance and excavations; the Applicant would remove invasive species throughout the wetland buffer area and would install a variety of native vegetation in a 22,239 square foot mitigation area within a maintained 50-foot buffer area, including installing 180 trees and 305 shrubs; fencing and signing would be provided along the wetland buffer edge, to prevent encroachment; light would be directed away from the wetland and buffer, and the Applicant would restrict the use of pesticides on-site; and site monitoring would occur for at least 7 years.
- The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property. The City considers 1,200 square feet of lot coverage reasonable when a lot is encumbered by critical areas, provided enough mitigation is proposed to adequately compensate for impacts. Site alternatives were considered and deemed infeasible.
- The inability of the Applicant to derive reasonable use of the property is not the result of actions by the Applicant or the Applicant's predecessor.
- Proposed total lot coverage would not exceed 1,200 square feet.
- The proposal would not pose an unreasonable threat to the public health, safety, or welfare on or off the property.
- The proposal would result in no net loss of critical area functions and values and would incorporate protective measures consistent with best available science, including LID measures, best management practices (BMPs) for stormwater, and protective fencing to avoid wetland impacts during and after construction.
- Development would occur in a manner that minimizes impacts to the wetland and mitigates the reduction of the wetland buffer through the planting of dense, diversified plantings in the remaining buffer. Temporary impacts would be addressed through protective measures, such as construction fencing, and future impacts would be addressed through monitoring, to ensure the success of compensatory mitigation, and through the installation of protective fencing along the boundary of the reduced buffer area.
- The proposal would be consistent with zoning requirements and other applicable regulations and standards.

Exhibit 1, Staff Report, pages 10 through 16.

Testimony

23. City Senior Planner Kelly Tayara testified generally about the property, the process of reviewing the proposal, and how the proposal would comply with the City Comprehensive Plan, zoning ordinances, and requirements associated with a RUEX. She explained the way that mitigation sequencing was addressed and stressed that the need for a septic drainfield has driven the need for a RUEX on the property. *Testimony of Ms. Tayara.*

24. City Code Enforcement Officer Aaron Pool testified that he received a complaint about a structure being built on the property without permits and investigated the complaint. He met with the Applicant and determined that a permit would be required for site development. Mr. Pool noted that the Applicant immediately began working with City staff to address obtaining necessary permits and that the code enforcement investigation associated with the property would be closed once necessary permits are obtained. *Testimony of Mr. Pool.*

25. City Development Engineer Paul Nylund testified about stormwater requirements associated with the proposal and the review that engineering staff conducted related to the project. He explained that the proposal would have to comply with the Department of Ecology's 2012 Stormwater Manual, with updates in 2014 and 2018, but an engineered stormwater plan would not be required given that less than 5,000 square feet of new impervious surface would be created through site development. Mr. Nylund clarified that the driveway leading toward the proposed homesite need not be addressed with the final stormwater plan because it already serves the site and is a preexisting site condition. He also explained that, normally, the portion of a driveway apron within the municipal right-of-way must "match" the road surface to which it connects. Here, because NE Pine Way is paved, the apron within the right-of-way connecting to the Applicant's gravel driveway would normally need to be paved. Mr. Nylund noted, however, that because the apron is within a wetland buffer area, it is possible that the City will waive this requirement through administrative review of the site development permit associated with the project. *Testimony of Mr. Nylund.*

26. Applicant Vance Rehder testified that the current proposal has been designed to have the fewest impacts on the wetland and its buffer. He stressed that he grew up on Bainbridge Island, several of his family members still live in the area, he is a birder and an Eagle Scout, and he purchased the property with the intent of maintaining as much of it as possible in a natural condition. Mr. Rehder explained that he did not realize the shed he constructed (an appurtenant structure) could not be built before construction of the residence (a primary structure) and that is what ultimately lead to the code compliance issue. He noted that the shed was constructed on pads and beams such that it has very little impact on the environment, is outside the wetland buffer area, and was constructed in a portion of the property that previously contained a garbage mound as well as the well that is being decommissioned. Mr. Rehder requested that the shed not be calculated as

part of the 1,200 square feet associated with site coverage under the RUEX because properties are normally allowed such appurtenant structures and site coverage on his property would still only be around one percent of the total site, even accounting for the shed. Mr. Rehder also addressed several of the approval conditions recommended by the City, noting: he would like the ability to begin removing invasive species from the mitigation area and trees from the homesite while waiting on building permits; two different septic companies have reviewed the suitability of soils for the septic drainfield and further evaluation seems unnecessary; and a geotechnical evaluation has already occurred such that further evaluation seems unnecessary. Finally, Mr. Rehder explained that he paid an additional \$20,000.00 for the property because the previous property owner had already gone through the preliminary stages of the land use review process and he was under the impression that all that would be required for site development would be the submission of appropriate site development and building permits.
Testimony of Mr. Rehder.

27. Area resident Christopher Detter testified that he owns property to the southwest and does not object to the proposal but wanted to ensure that stormwater from the proposal would not impact his own property and that discharged stormwater would be appropriately addressed. *Testimony of Mr. Detter.*
28. In response to Mr. Detter's testimony, Mr. Nylund explained that the City understands the drainage patterns associated with the area and he believes the majority of stormwater from new impervious surfaces on the site would drain toward the wetland buffer. He noted that stormwater would not be allowed to sheetdrain toward the septic drainfield proposed for development east of the homesite. Finally, Mr. Nylund explained that there may be existing drainage issues in the area but that those are likely problems associated with capital infrastructure. He stated that the current proposal would not have detrimental impacts on adjacent properties but that the proposal would likely not assuage any existing drainage issues in the area. Finally, in response to Mr. Rehder's comments, Mr. Nylund explained that another geotechnical report is not necessarily required but that some additional information may be necessary, including information on the feasibility of alternative approaches to constructing the foundation. He stressed that the City would not require that Mr. Rehder employ an alternative approach to construction if it is prohibitively expensive but documentation of the feasibility of alternative approaches is a standard requirement when an Applicant seeks a RUEX. *Testimony of Mr. Nylund.*
29. Ms. Tayara also responded to Mr. Rehder's testimony. She explained that, while soil analysis has occurred in terms of the proposed septic system, the City believes additional analysis is appropriate addressing the location of the drainfield and stormwater elements, including their relationship to each other and the relationship of the drainfield to stormwater improvements on the adjacent property to the south, to ensure that the proposed systems provide for public health, safety and welfare both on and off the property. Ms. Tayara also explained that a permit would not normally be required for a

shed that is under 200 square feet (subject to certain height restrictions). *Testimony of Ms. Tayara.*

Staff Recommendation

30. Ms. Tayara testified that City staff recommends approval of the application, with conditions. Mr. Rehder testified that he would adhere to the conditions of approval. *Exhibit 1, Staff Report, pages 13 through 15; Testimony of Ms. Tayara; Testimony of Mr. Rehder.*

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 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.

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

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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

With conditions, the proposal would comply with the reasonable use exception criteria of BIMC 16.20.080.F. The City provided reasonable notice and opportunity to comment on the application. The City determined that the proposal was exempt from SEPA review. A wetland and wetland buffer cover the entirety of the Applicant's property such that that strict application of the City's critical areas ordinances would deny all reasonable use of the property. Neither the City nor public comments suggested any alternative uses for the property. The Applicant is proposing lot coverage of no more than 1,200 square feet. The Applicant submitted a wetland delineation and a mitigation plan setting out mitigation sequencing that would minimize the impact on critical areas. The wetland delineation also determined that the proposal would be the minimum necessary to allow reasonable use of the property. City staff determined that the present proposal would have the fewest impacts on the wetland and its buffer. The lot was created prior to the adoption of the City's critical area ordinances and is not the result of any action of the Applicant.

The Applicant proposes construction of a single-family residence on the property that would result in total lot coverage of no more than 1,200 square feet. To minimize adverse impacts to the wetland and buffer, the residence would be constructed in the southwestern corner of the property, in an upland area that is as far from the wetland as possible. Low Impact Development (LID) techniques would be employed to minimize ground disturbance activity and excavation, especially within the wetland buffer. Because the property is not located within the City's sewer service area, an on-site septic system would be installed east of the residence, along with a septic drainfield. As proposed, the site layout would result in a reduction of the required wetland buffer around the single-family residence, but a 50-foot buffer would be maintained between the homesite and the on-site wetland. In addition, the Applicant would remove invasive species throughout the wetland buffer area and would install a variety of native vegetation in a 22,239 square foot mitigation area within the maintained 50-foot buffer area, including installing 180 trees and 305 shrubs. Over 80 percent of the property would be protected in perpetuity following development.

The Applicant's mitigation plan contains monitoring and contingency plans, along with enhancement of the remaining wetland buffer. The City determined that the wetland delineation and mitigation plan are based on the best available science and would result in no net loss of critical area functions and values. The mitigation plan addressed the cumulative impacts of the proposed development and determined that there would be no negative cumulative impacts if the request is approved.

Especially given the size of the property in question, Mr. Rehder's point about the reasonableness of not including the shed in the lot coverage calculation is well taken. It would

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appear that the major problem with the shed is temporal in nature: had Mr. Rehder received the RUEX and constructed the residence on the 1,200 square feet of the homesite, as proposed, no further permitting would seemingly be required associated with him then placing a 200 square foot shed on the property (subject to height restrictions). That the shed is not allowed to remain because it happened to be built prior to the residence or, alternatively, must be calculated as part of the allowed 1,200 square feet of the homesite – on a 4.75-acre property of which 80 percent would be protected in perpetuity – does create an absurd result. Ultimately, however, the Hearing Examiner will defer to City staff’s analysis of its own municipal code. If City staff determines during the site development and building permit stages of review that the shed need not be calculated as part of the allowable 1,200 square feet of total lot coverage associated with the RUEX, nothing more need be done.

Conditions are necessary, including those to ensure that work is completed in substantial compliance with submitted plans; total lot coverage does not exceed 1,200 square feet; a 50-foot wide buffer and 15-foot hard surface/structure setback is maintained between the homesite area and the edge of the on-site wetland and the full wetland buffer width is maintained outside the homesite area; all necessary permits are obtained prior to construction activity; additional geotechnical information is provided assessing the location of the proposed drainfield and stormwater elements; a construction fencing plan is submitted; compensatory mitigation area monitoring occurs; a split-rail fence is installed for the entire length of the common boundary between the wetland buffer and the hard surface structure setback; appropriate signage is installed indicating the presence of a protected wetland buffer; all holly (*Ilex opaca*) is removed within the compensatory mitigation area; all work within the compensatory mitigation area is performed with hand labor or hand-held equipment; all mitigation plantings are installed prior to occupancy; a notice to title documenting the presence of the wetland, buffer, and compensatory mitigation planting area is recorded; and that all requirements of the City Engineer are satisfied (as further detailed below). *Findings 1 – 30.*

DECISION

Based upon the preceding findings and conclusions, the request for a reasonable use exception to allow the construction of a single-family residence, with associated improvements, on a 4.75-acre property off of NE Pine Way, containing a wetland and wetland buffer, is **APPROVED**, with the following conditions:⁵

1. Except as provided in these conditions of approval, all construction plans and constructions activities shall substantially comply with the plans approved through this Reasonable Use Exception.
2. Total lot coverage is limited to 1,200 square feet. Lot coverage is measured as the total lot area covered by buildings, excluding up to 24 inches of eaves on each side of a building. Any portion of a slatted or solid deck located more than five feet above grade

⁵ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

shall be counted towards lot coverage. City staff shall have the discretion to determine whether the existing shed on the property must be included in the allowable lot coverage calculation without further review by the Hearing Examiner.

3. The homesite area, which includes the dwelling and necessary infrastructure, shall provide a 50-foot wide buffer from the edge of the wetland and 15 foot hard surface / structure setback from the buffer. Outside of the homesite area, the full wetland buffer width shall be provided and the homesite area shall not extend east of the reserve drainfield.
4. Prior to any construction activity, including any development, vegetation removal, land clearing, or grading, the Applicant shall obtain an applicable permit from the City, except as otherwise allowed by BIMC 16.20.090.B.3.
5. Permit application for any construction activity shall include a geotechnical assessment of the location of the drainfield and stormwater elements, including their relationship to each other and the relationship of the drainfield to stormwater improvements on the adjacent property to the south, to ensure that the proposed systems provide for public health, safety and welfare both on and off the property. This requirement may be satisfied through submission of an addendum to the existing geotechnical report prepared for the proposal.
6. Permit application for any construction activity shall include a construction fencing plan which, at a minimum, delineates the north and east clearing limits. The fence shall be made of durable material and shall be highly visible. Once the fencing plan is approved by the City, the fencing shall be installed and installation approved by the City prior to any other construction activity.
7. Permit application for any construction activity shall include a compensatory mitigation area monitoring program which is consistent with the requirements of BIMC 16.20.180.G and an estimate for the cost of completion of the monitoring. Monitoring reports shall be submitted annually for a period of seven years. Once the monitoring plan and estimate is approved by the City, and prior to occupancy, the applicant shall provide a surety ensuring fulfillment of the monitoring program, in an amount not less than 50 percent of the approved estimate.
8. Prior to occupancy of the residence, a split-rail fence shall be installed for the entire length of the common boundary between the buffer and the hard surface structure setback. The fence shall be depicted on the submitted building permit plans.
9. Prior to occupancy of the residence, two signs indicating the presence of a protected wetland buffer shall be placed on the fence (north and east). Signs shall be made of metal or a similar durable material and shall be between 64 and 144 square inches in size.

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10. All holly (*Ilex opaca*) within the compensatory mitigation area shall be removed.
11. All work within the compensatory mitigation area, including planting and invasive species removal, shall be performed with hand labor or hand-held equipment.
12. All mitigation plantings shall be installed prior to occupancy. At the discretion of the Department of Planning and Community Development, if deemed necessary to ensure plantings are accomplished during an optimal season, a planting performance assurance device shall be provided in accordance BIMC 16.20.160.
13. The Applicant shall submit a recorded notice to title to document the presence of the wetland, buffer and compensatory mitigation planting area. The notice shall be recorded with the Kitsap County Auditor prior to the issuance of construction permit for the residence.
14. The Applicant shall comply with the following conditions to the satisfaction of the City Engineer:
 - A. Existing access to the Pine Way right-of-way shall be improved to the standard paved residential driveway approach detail (City of Bainbridge Island Design and Construction Standards) DWG 8-170. A waiver to this condition may be requested during building permit review if the Applicant demonstrates to the City Engineer's satisfaction that the adverse effect of additional hard surface from a paved road approach in a wetland buffer would justify overriding City policy on paved road approaches in the public right of way. In this case, the existing gravel approach could remain but would be subject to potential grading requirements to ensure a standard road approach connection that protects/ballasts the existing City-maintained asphalt roadway surface in the Pine Way right-of-way.
 - B. All underground utilities (well water, septic transport, power, etc.) shall be routed to minimize site disturbances to the maximum extent feasible.
 - C. Use of soil sterilant to construct the driveway shall be strictly prohibited.
 - D. 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 proposed home site and the adjacent wetland and its buffer. 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(s) shall be obtained from a designer or installer with documented experience building with minimal excavation technology and

submitted with the building permit for City Development Engineer review prior to building permit review, approval, and issuance.

- E. Areas outside the building footprint, driveway, septic components and associated drain field and any necessary construction setbacks shall be protected from soil stripping, stockpiling, and compaction by construction equipment through installation of resilient, high visibility clearing limits fencing or equivalent, subject to inspection by the City prior to clearing and construction.
- F. Hardscaping should be constructed of permeable materials or contain wide permeable jointing where feasible to allow infiltration or shallow subsurface filtration of surface stormwater.
- G. In addition to complying with BIMC 15.20 and 15.21, surface stormwater from the proposed structures and the developed driveway shall discharge and disperse at a location and in a manner consistent with BMP T5.10B – Downspout Dispersion Systems and BMP T5.12 – Sheet Flow Dispersion. Strong priority shall be given to diffuse flow methods (i.e. BMP C206: Level Spreader, pop-up emitters, diffuser tee or engineered equivalent) to minimize point discharges of surface stormwater into or towards the wetland on site.

DECIDED this 29th day of January, 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center