

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

In the Matter of the Application of)	Nos. PLN51687 RUE & VAR
)	
Bill Broughton)	
)	
For Approval of a Reasonable Use)	FINDINGS, CONCLUSIONS,
<u>Exception & Variance</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 an undeveloped 0.39-acre lot that is impacted by critical areas and accessed from a private street off of Manitou Beach Drive NE, and the request for a variance to reduce the required front setback from 25 feet to 10 feet, allowing the proposed residence to be sited as far from the on-site wetland and associated buffer as possible, 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 28, 2021, using remote technology in light of the ongoing COVID-19 pandemic. The record was left open for the Applicant and interested parties to provide additional information on the proposal until January 29, 2021, and closed on February 1, 2021, after the City had an opportunity to provide a response to the additional materials.

Testimony:

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

Annie Hillier, City Associate Planner
Paul Nylund, P.E., City Development Engineer
Bill Broughton, Applicant
Tom Weaver, P.E.
Joanne Bartlett, Senior Biologist, Ecological Land Services
Keelin Lacey, Biologist, Ecological Land Services
Dennis Johnston
Leah Clark
Gary Palmer
Doug Mackenzie
Linda Sohlberg
Lisa Dunham
Marie Adan

*Findings, Conclusions, and Decision
City of Bainbridge Island Hearing Examiner
Manitou Reasonable Use Exception and Variance
Nos. PLN51687 RUE & VAR*

Roger Padgett
Nick Snyder, City Arborist

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated January 28, 2021
2. Land Use Application, received May 21, 2020 Owner/Agent Agreement, dated May 15, 2020
3. Preapplication Summary, dated March 10, 2020; Site Assessment Review (Complete), dated March 11, 2020
4. Geotechnical Report, Coastal Solutions, LLC, dated May 1, 2020
5. Notice of Incomplete Application, dated June 12, 2020
6. Supplemental Applicant Response, dated July 17, 2020
7. Conceptual Drainage Plan, Seabold Engineering, LLC, dated September 30, 2020
8. Notice of Complete Application, dated October 23, 2020
9. Notice of Application and Hearing, dated November 13, 2020
10. Notice Materials:
 - a. Mailing List
 - b. Affidavit of Publication, *Bainbridge Island Review*, dated November 13, 2020
 - c. Certificate of Posting, dated November 20, 2020
11. Public Comments:
 - a. Comments from Martha and Len Korslund, dated November 17, 2020
 - b. Comments from Dennis Johnston and Leah Clark, dated December 2, 2020 (including letter, emails, and photographs)
 - c. Comments from Douglass Mackenzie, dated December 2, 2020
 - d. Comments from Linda Sohlberg, dated December 3, 2020 (with several attachments)
 - e. Comments from Kate Rutledge Jaffe, dated December 4, 2020
 - f. Comments from Kirk Torren Smith, dated December 4, 2020
 - g. Comments from Luis Adan, dated December 4, 2020
12. City Staff Memorandum, dated November 25, 2020
13. Email from Annie Hillier to Bill Broughton, dated December 7, 2020, with email string
14. Email from Bill Broughton to Annie Hillier, dated December 7, 2020
15. Revised Wetland Report, Ecological Land Services, LLC, dated December 16, 2020
16. City Engineer Comments, dated November 23, 2020
17. City Arborist Comments, dated December 22, 2020
18. Kitsap Public Health District Comments, various dates
19. Staff PowerPoint Presentation, received January 28, 2021
20. Applicant's Suggested Modifications of Conditions of Approval, dated January 28, 2021
21. Additional Comments from Linda Sohlberg, dated January 29, 2021
22. Additional Site Drawing to accompany Exhibit 21

Findings, Conclusions, and Decision
City of Bainbridge Island Hearing Examiner
Manitou Reasonable Use Exception and Variance
Nos. PLN51687 RUE & VAR

23. City's Response to Applicant's Suggested Modifications of Conditions of Approval, dated February 1, 2021; Email from Bill Broughton to Annie Hillier, dated February 1, 2021, with email string

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

FINDINGS

Application and Notice

1. Bill Broughton (Applicant) requests approval of a reasonable use exception (RUEX) to allow the construction of a single-family residence with an approximately 880 square foot building footprint, and associated improvements, including a driveway and on-site septic system and drainfield, on an undeveloped 0.39-acre lot that is completely covered by a Category II wetland and its associated buffer. The Applicant also requests a variance from the requirements of Bainbridge Island Municipal Code (BIMC) 18.12.020 to reduce the required front setback from 25 feet to 10 feet to allow the proposed residence to be sited as far from the on-site wetland as possible. The unaddressed property is in the Murden Cove area of Bainbridge Island and would be accessed from an existing private street connecting to Manitou Beach Drive NE.¹ The RUEX would allow for development of a single-family residence and associated improvements within the wetland buffer on the property, not to exceed 1,200 square feet in lot coverage. As mitigation for the approximately 3,716 square feet of wetland buffer that would be permanently impacted by the proposal, the Applicant would enhance the remaining 5,027 square feet of on-site wetland buffer by removing invasive species and planting a variety of native vegetation. In addition, the Applicant would install permanent fencing along the remaining buffer edge adjacent to the development area and would record notice to title documenting the presence of critical areas to protect the on-site wetland and remaining buffer area in perpetuity. *Exhibit 1, Staff Report, pages 1 through 4, 17, 18, 23, and 25; Exhibit 2; Exhibit 6; Exhibit 7; Exhibit 15.*
2. The City of Bainbridge Island (City) determined that the application was complete on October 23, 2020. On November 13, 2020, the City provided notice of the application and the associated open record hearing by mailing or emailing notice to property owners within 500 feet of the subject property and to reviewing government departments and agencies, publishing notice in the *Bainbridge Island Review*, and posting notice at designated City locations, with a comment deadline of December 4, 2020. The Applicant posted notice on the property on November 20, 2020. The City received no comments from reviewing government agencies in response to its notice materials but received several public comments, which are discussed in detail below. *Exhibit 1, Staff Report, pages 4 and 5; Exhibits 8 through 11.*

¹ The property is identified by tax parcel number 14250230402005. *Exhibit 1, Staff Report, page 1.*

State Environmental Policy Act

3. 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 the construction of one detached single-family residence. *Exhibit 1, Staff Report, page 1.*

Comprehensive Plan, Zoning, and Surrounding Property

4. The property is designated as “Residential District-2” 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:
- Preserving and enhancing the City’s natural systems, natural beauty, and environmental quality.
 - Encouraging sustainable development that maintains diversity of healthy, functioning ecosystems essential for maintaining quality of life and economic viability into the future.
 - Protecting and enhancing wildlife, fish resources, and ecosystems.
 - Limiting development in the Residential District area to less intensive residential development and a variety of agricultural and forestry uses.²

Exhibit 1, Staff Report, pages 9 and 10.

5. The 0.39-acre subject property is within the “Residential 2” (R-2) zoning district. 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. *BIMC Table 18.09.020. Exhibit 1, Staff Report, page 3.*

6. Within the R-2 zoning district, certain dimensional standards require a minimum lot area of 20,000 square feet per dwelling unit, a minimum lot depth and width of 80 feet, and a maximum lot coverage of 20 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 5 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 10 and 11.*

² City staff specifically identified the following goals and policies of the Comprehensive Plan as relevant to the proposal: Environmental Element Goals EN-1, EN-4, and EN-5; Land Use Element Policy LU-14.1. *Exhibit 1, Staff Report, pages 9 and 10.*

7. Project plans show that the parking requirements, minimum lot depth and width requirements, side setback requirements, and maximum lot coverage requirements would be satisfied. The 16,988 square foot property is legally nonconforming with the minimum lot area requirement currently applicable to properties in the R-2 zoning district. *BIMC 18.30.050*. Because a RUEX is proposed, lot coverage would be limited to 1,200 square feet under *BIMC 16.20.080.F*, which is less than 3,397.6 square feet of maximum lot coverage that would be typically allowed for the 0.39-acre property under the 20 percent maximum lot coverage requirement. As noted above and discussed in detail below, the Applicant requests a variance from the 25-foot front setback requirement to allow the proposed residence to be sited as far from the on-site wetland as possible. *Exhibit 1, Staff Report, pages 10 and 11; Exhibit 2; Exhibit 6; Exhibit 7*.
8. All surrounding properties are also within the R-2 zone. Surrounding lots to the west, north, and east are developed with single-family residences, and the lot to the south is undeveloped. *Exhibit 1, Staff Report, page 3; Exhibit 15*.

Critical Areas

9. The 0.63-acre site is generally undeveloped, although a gravel driveway runs north from Manitou Beach Drive and provides access to the western side of the lot. Topography throughout the lot slopes gradually from the northwest to the southeast and is vegetated by mixed coniferous and deciduous forest. Invasive English ivy dominates the property. Ecological Land Services, Inc. (ELS), prepared a Wetland Delineation Report and Buffer Mitigation Plan (Wetland Report) for the Applicant on May 13, 2020, that it later revised on December 16, 2020, to address the removal of significant trees in order to accommodate site development. ELS Biologists Keelin Lacey and Joanne Bartlett visited the property and delineated a Category II forested depressional wetland on-site, "Wetland A." ELS determined that Wetland A receives water from groundwater discharge and from upslope runoff, and requires a 110-foot buffer under critical areas regulations of the municipal code. Wetland A covers the eastern half of the property and, with the associated 110-foot buffer, impacts the entirety of the site. ELS determined that development of a single-family residence, with associated appurtenances, including a septic system, would be possible while avoiding direct impacts to Wetland A. The Wetland Report details necessary mitigation sequencing for the proposal, as required by the City's critical areas ordinances. It notes that, to compensate for 3,716 square feet of permanent impacts to the wetland buffer from development, the Applicant would remove invasive vegetation through the remaining 5,027 square feet of the wetland buffer and plant native species throughout this area. ELS determined that, with proposed mitigation, the proposal would provide better buffer function for Wetland A. ELS also assessed whether the proposed single-family residence on the property could be realigned in a way that would provide for the retention or protection of additional significant trees on-site. ELS determined that realigning the residence would potentially add 350 square feet to the

buffer but would not improve buffer function significantly. Accordingly, ELS determined that realigning the residence would not be justified. In addition, ELS determined that removal of up to eight significant trees on-site would be necessary and that realigning the residence in an effort to protect more of these trees would be detrimental to the long-term function of Wetland A and its buffer. Placing the residence closer to the wetland buffer, for instance, would increase impacts from light and noise and reduce the ability of the buffer to flow and filter stormwater runoff. The mitigation plans call for 17 trees to be planted as mitigation for the 8 significant trees that would be removed (providing mitigation at 2.1:1 to ratio). *Exhibit 1, Staff Report, page 11; Exhibit 15.*

10. City staff reviewed the Wetland 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 to accommodate construction of a single-family residence with necessary infrastructure, including a proposed on-site septic system. 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, page 12; Exhibit 3; Exhibit 15.*
11. 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-2 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 attorney and would otherwise meet the requirements for an ARPA, no such designation is required. Here, the on-site wetland and remaining wetland buffer would occupy over 65 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 17.*

Reasonable Use Exception

12. 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; where any alterations are mitigated; where the proposal ensures no net loss of critical area functions and values consistent with best available science; where the proposal addresses cumulative impacts of the action; and where the proposal is consistent with all other applicable regulations and standards. *BIMC 16.20.080.F.*

13. The Applicant proposes construction of a single-family residence with an approximately 880 square foot building footprint, and associated improvements, including a driveway and on-site septic system. To minimize impacts to the wetland and buffer, the residence would be sited in the southwestern corner of the property, which represents the area on the property furthest from the edge of the on-site wetland. Because the property is not located within the City's sewer service area, an on-site septic system would be installed behind the residence, along with a septic drainfield to the north of the residence. As proposed, the single-family residence would be located entirely within the required 110-foot buffer area. As noted, however, the remaining 5,027 square feet of wetland buffer to the west of the homesite area would be enhanced through the removal of invasive species and planting of various native species, and a majority of the site would be protected in perpetuity. *Exhibit 1, Staff Report, pages 13 through 19; Exhibit 2; Exhibit 6; Exhibit 7; Exhibit 15.*
14. Coastal Solutions, LLC, prepared a Geotechnical Report for the Applicant, dated May 1, 2020. The Geotechnical Report determined that construction of a single-family residence in the proposed site development area would be feasible from a geotechnical standpoint and provided recommendations related to use of a spread footing foundation system. The Geotechnical Report addressed low-impact alternatives to traditional foundation design, such as the use of pin piles, but determined that such alternatives would not be feasible due to on-site soil conditions. *Exhibit 1, Staff Report, pages 12 and 13; Exhibit 4.*
15. 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 purposes 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 1, Staff Report, pages 25 and 26; Exhibit 16.*

16. The Bainbridge Island Fire District reviewed the proposal and did not indicate that it has any concerns or recommended conditions. The project would be required to comply with all provisions of the City's adopted Fire Code. *Exhibit 1, Staff Report, page 8; Exhibit 3.*
17. The Kitsap Public Health District reviewed the proposal and provided preliminary approval for the proposed septic system. It noted that there are no specific horizontal setbacks from drainfields but that the responsible party would be required to protect the on-site septic system from uses or situations that could adversely impact the system, including impacts from driveway installation, vehicular traffic, water diversion, or any other disruption to drainfield components and their soils. Final review and approval of the septic system would occur with the building permit application. *Exhibit 1, Staff Report, page 8; Exhibit 18.*
18. 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 and associated buffer, there are no areas available on the property to avoid impacting the required wetland buffer to construct a single-family residence, which is the least intensive reasonable use of the property.
 - The proposal would minimize impacts on the wetland and buffer through appropriate mitigation sequencing.
 - To minimize impacts to the on-site wetland in the eastern portion of the property, the proposed residence would be situated in the southwest corner of the property as close as possible to the access road.
 - The proposal for a residence with less than the 1,200 square foot footprint allowed under municipal code is the minimum necessary to allow reasonable use of the property.
 - The wetland and buffer were existing conditions and not created by the Applicant or the previous property owner. The Applicant and Applicant's predecessors did not take any action after 1992 that would have caused the property to become completely covered with wetlands and associated buffer areas.
 - The proposed site plan depicts a residence with a footprint of less than 1,200 square feet. The proposed driveways, walkways, and porches would not cause further encroachment into the wetland and buffer than that of the footprint itself. Therefore, the total footprint of the residential structure is less than the minimum allowed in critical areas.
 - The proposal would not pose an unreasonable threat to public health, safety, or welfare on or off the property.
 - The Applicant's wetland delineation report and buffer mitigation plan demonstrates that the proposal would protect the function and values of critical areas consistent with the best available science. No direct impacts to the on-site

wetland are proposed. On-site mitigation for impacts to the wetland buffer would include removal of all invasive species and planting of various native species in the remaining buffer area, with a five-year maintenance period.

- No adverse cumulative impacts are anticipated from development of the site.
- With approval of the requested front setback variance to accommodate siting the proposed residence as far as possible from the on-site wetland, the proposal would be consistent with all other applicable regulations and standards.

Exhibit 6.

19. 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:

- Because the property is entirely covered by a Category II wetland and its associated buffer, strict application of the City's critical areas ordinance would deny all reasonable use of the property.
- 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 Applicant considered use of a minimal excavation foundation system to lessen the impact to critical areas, but the Applicant's geotechnical report determined that the alternative foundation system would not be feasible due to soil conditions.
- 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 as far from the wetland as possible, the Applicant would remove invasive species and install a variety of native vegetation throughout the remaining wetland buffer area, and site monitoring would occur for at least 7 years.
- With conditions, the proposed impact to the critical area would be 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. City staff's recommended conditions would further ensure that impacts to critical areas would be minimized by requiring that light be directed away from the wetland; requiring covenants to restrict the use of pesticides, herbicides, and fertilizers; requiring that any temporary construction entrances be comprised of inert materials; requiring fencing along the edge of the primary drainfield, as opposed to the edge of the reserve drainfield; prohibiting the use of soil sterilant on the driveway; requiring significant trees within the wetland buffer to be retained to the greatest extent possible; and requiring non-leaching roofing.
- 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. There does not appear to be a record of any land use actions taken on the property.

- 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. No concerns about public health, safety, or welfare were raised during the comment period.
- A final mitigation plan would be reviewed with the building permit application to ensure there is no net loss of critical area functions prior to building permit issuance.
- Buffer enhancement is a typical type of mitigation for buffer impacts and could presumably protect a range of different functions and values. The Applicant's wetland delineation report and buffer mitigation plan states that the proposed mitigation would provide a functional lift for the existing buffer and would result in no net loss of ecological functions.
- With conditions, the project addresses cumulative impacts from development. The proposal addresses immediate impacts by siting the development as far away from the wetland edge as reasonably possible and by providing buffer enhancement to compensate for permanent impacts to the buffer. Future impacts would be addressed by restricting pesticide, fertilizer, and herbicide use; taking measures to prevent future encroachment into the critical area through the installation of fencing along the buffer; and maintaining the mitigation areas in perpetuity
- The proposal would be consistent with zoning requirements and other applicable regulations and standards.

Exhibit 1, Staff Report, pages 12 through 17.

Variance

20. As noted above, the Applicant also requests a variance to reduce the required front setback from 25 feet to 10 feet to allow the proposed residence to be sited as far from the on-site wetland as possible. The Applicant's project narrative addresses the criteria for a minor variance under BIMC 2.16.060.D, and suggests that the proposal would meet the variance criteria because:
- A variance to the front yard setback is requested so that the single-family residence can be constructed as far away from the critical areas as possible. Without the variance, the residence would need to be constructed closer to the wetland, resulting in a greater disturbance.
 - The variance is requested because of special circumstances related to the property. The property is entirely covered by a regulated wetland and associated buffer. Granting the variance would reduce the disturbance to on-site critical areas as much as possible.
 - The need for the variance has not arisen from previous actions taken or proposed by the Applicant. The property is undeveloped and is currently in its natural state.
 - The variance is necessary for the preservation and enjoyment of a substantial property right. The reasonable use exception under the City's critical areas

*Findings, Conclusions, and Decision
City of Bainbridge Island Hearing Examiner
Manitou Reasonable Use Exception and Variance
Nos. PLN51687 RUE & VAR*

ordinance recognizes the right of property owners to make reasonable use of property impacts by critical areas. Existing homes on adjacent properties were constructed before passage of the City's critical areas ordinance.

- The variance would be consistent with other provisions of the City code. Granting the variance would benefit the adjacent wetland and associated buffer, consistent with Comprehensive Plan goals to limit impacts of development adjacent to critical areas.

Exhibit 6.

21. City staff also analyzed the proposal for compliance with the variance criteria of BIMC 2.16.060.D and generally concurred with the Applicant's assessment. Staff specifically noted:

- Granting the variance would result in the proposed single-family residence being located 10 feet from the private street at its northwest corner. The distance to the private street would increase from 10 feet to over 30 feet at the southernmost corner of the residence. The variance would not affect the public welfare or result in injury to property or improvements in the vicinity and zone. Denying the variance would result in greater impacts to critical areas.
- The variance is requested because of special circumstances related to location of the subject property within a wetland system. The City has consistently encouraged applicants to apply for zoning variances to reduce setbacks to minimize impacts to critical areas, consistent with the RUEX decision criteria and the Department of Ecology's guidance on wetland impact avoidance measures.
- The variance has not arisen from actions taken or proposed by the Applicant. It does not appear that there have been any previous land use actions taken on this property.
- The City considers the reduction in the front setback, an impact minimization step, to be a significant part of the RUEX request. The variance is necessary for the enjoyment of a substantial property right possessed by other properties in the vicinity that are developed with single-family residences. Other properties in the vicinity that are undeveloped and encumbered by critical areas would similarly be encouraged by the City to seek reductions in zoning setbacks to reduce impacts to the critical areas and achieve reasonable use.
- The variance would be consistent with all other provisions of the municipal code and would be in accord with the Comprehensive Plan.

Exhibit 1, Staff Report, pages 19 through 21.

Written Public Comments

22. As noted above, the City received several comments from area residents that raised concerns about the proposal. Specifically:

- Len Korslund raised concerns generally about the City accommodating development proposals that impact wetlands.

*Findings, Conclusions, and Decision
City of Bainbridge Island Hearing Examiner
Manitou Reasonable Use Exception and Variance
Nos. PLN51687 RUE & VAR*

- Dennis Johnston and Leah Clark noted that they own the private road that would provide access to the proposed residence. They raised concerns that the proposed drainfield and temporary construction activity could impact their ability to effectively use the private access road. They also raised concerns about the proposal's impacts to critical areas and inquired about trees that would be removed to facilitate the proposed development.
- Douglas Mackenzie raised concerns that the proposed buffer mitigation plan would not be effective, noting that similar plans for properties in the area have not been successful.
- Linda Sohlberg raised concerns about the requested variance to reduce required front setback to 10 feet due to the potential for visitors to park on the narrow access road and for being out of character with other residences in the vicinity that conform with the 25-foot front setback requirement. She also raised concerns about landmark trees being removed from the property to facilitate the proposed development. In addition, Ms. Sohlberg attached to her comments a memorandum prepared by Riberiro Consultants that discusses protocols for tree protection during construction activity.
- Kate Jaffe raised concerns about trees that would be removed to facilitate the proposed development or that could be damaged from construction activity associated with the development. She also raised concerns that the requested variance could result in residents or visitors of the proposed residence parking on the narrow private access road.
- Kirk Torren Smith raised concerns about the proposal's impacts to existing trees on the property.
- Luis Adan raised concerns that the reduced front setback would result in a residence that would be out of character with other residences in the neighborhood.

Exhibit 11.

23. Following concerns about tree removal on the property from members of the public, the City arborist evaluated the site and provided the following comments:
- The proposed location for the primary drainfield is partially occupied by part of the access and driveway for properties further down the lane.
 - Depending on the specific septic design and final arrangement, switching the primary and reserve drainfields could help to retain the 42-inch fir and 10-inch cherry trees in this portion of the property. Above-ground, mound-type systems are usually minimally invasive to structural roots because they do not require much below-ground trenching. Typical trench style drainfields can cause significant damage to root systems during construction and, if that is the design here, swapping the fields would save the above ground portion of the tree but may still adversely impact the tree negatively. Retention of these two trees may be

possible, but it is difficult to determine definitively without seeing the actual septic design.

- The 44-inch cedar along the west line should be retained and have its root zone protected to the greatest extent possible during construction.
- The 28-inch alder along the west line should be removed. The proposed driveway and the current structure of the tree are concerning for the tree's long-term health and safety.
- The 18-inch fir is completely dead.
- The 30-inch fir will likely need to be removed for any development project.
- The 40-inch fir and 28-inch alder on the south line could likely be preserved if the proposed residence were rotated or rearranged/resized to accommodate the root zones of the trees. As designed, preservation is possible but not recommended without ensuring that a minimum 10-foot radius from the base of the tree is set aside as a tree protection area for the entire project.

Exhibit 17.

24. City staff also provided responses to the concerns raised by area residents, which note:
- The municipal code does not specifically regulate construction staging but, to minimize impacts to critical areas, the project would be conditioned to minimize construction staging areas within the development area, outside of the reduced critical area buffer. The Applicant also indicated that the 10-foot front setback is proposed, in part, to leave room for additional parking on the site while also reducing impacts to the wetland buffer.
 - If unanticipated damage from construction activity impacts the private road, the Applicant and the legal property owner of the driveway would need to determine the appropriate remediation measures. The Applicant would also be responsible for ensuring it has legal access to the private roadway and that it follows any specific terms of the access agreement. The City is not responsible for enforcing private easements, covenants, or other similar restrictions.
 - The proposal identifies eight significant trees for removal, one of which is hazardous and another of which is completely dead, as determined by the City arborist. 17 trees would be replanted within the buffer as part of the buffer enhancement plan. The City arborist reviewed the proposal and has recommended that tree protection measures be implemented and that healthy trees be retained to the extent practicable.
 - The City does not recommend shifting the development closer to the wetland edge and away from the eight significant trees because this would decrease buffer function and result in additional significant tree removal closer to the wetland edge. The proposal must represent the least impact to the buffer to qualify for a reasonable use exception.
 - Lot coverage is limited to 1,200 square feet in accordance with the City's critical areas code requirements. This is less than what is typically allowed in the R-2

zoning district, which allows for a maximum lot coverage of 20 percent. The size of the proposed single-family residence is not large relative to other residences in the vicinity, and the Applicant has provided a report that determined that the proposal would result in no net loss of critical area ecological functions.

- City code requires two parking spaces for single-family residences in residential zoning districts, and the proposal includes a two-car garage. The front setback is proposed to be reduced to 10 feet to balance the requirement to minimize impacts to the critical area with neighborhood concerns about parking and neighborhood character. The building footprint of the residence would be angled so the front setback from the northwest corner would increase to over 30 feet at the southernmost corner.
- A required component of the mitigation plan is a monitoring and maintenance plan, including contingency actions, in accordance with code requirements. Monitoring would be required for a period of no less than seven years.
- The City's landmark tree ordinance applies only within the Winslow Master Plan Study Area, and the subject property is located outside of that area.
- The reasonable use exception process is available when a property is encumbered to such an extent by critical areas and/or buffers that application of the critical areas ordinance would deny all reasonable use of the subject property, consistent with Comprehensive Plan policies balancing private property rights with necessary and reasonable regulations to protect the public health, safety, and welfare. A reasonable use exception requires that the development proposal demonstrates no net loss of critical area functions and values, as well as that it meets other decision criteria that are intended to protect the critical area. The proposal, as conditioned, is consistent with these regulations.

Exhibit 1, Staff Report, pages 5 through 8.

Testimony

25. City Associate Planner Annie Hillier 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 for approval of a RUEX and zoning variance. Ms. Hillier explained that the public reviewed ELS's revisions to the Wetland Report and concurs that moving or realigning the residence would have detrimental impacts on the wetland buffer. *Testimony of Ms. Hillier.*
26. City Development Engineer Paul Nylund testified that the proposal would be required to comply with the 2012 Department of Ecology (DOE) Stormwater Manual, with updates in 2014. He explained that, for a proposal that would add between 800 square feet and 5,000 square feet of new additional impervious surfaces, as would occur with the present proposal, a stormwater site plan is necessary but it need not be prepared by a licensed engineer. Mr. Nylund testified that the City has reviewed the Applicant's conceptual plans to address stormwater on-site and believes the plan is feasible. Further review of

stormwater impacts, however, will occur at the building permit stage. *Testimony of Mr. Nylund.*

27. In response to additional questions from the Hearing Examiner, Ms. Hillier explained that the City has determined that additional third-party review of the Applicant's Wetland Report is not necessary. She also explained that the City is not responsible for enforcing private agreements between property owners and, accordingly, the City would not be responsible for enforcing any "road maintenance agreement" (RMA) between the property owners using the private driveway off of Manitou Road. She explained that, because the road serves at least four properties, however, the City's setback requirements for streets are applicable, requiring a variance. *Testimony of Ms. Hillier.*
28. Applicant Bill Broughton testified that balancing site development with protection of the wetland and buffer is difficult for the project site, given site constraints. Mr. Broughton noted that neighbors have expressed concern about maintaining existing access to a driveway turnaround that encroaches on the subject property. He stressed that use of this driveway turnaround is "permissive" and that the Applicant would be willing to change the proposed location of the septic drainfield and reserve drainfield to accommodate continued use of the driveway turnaround by neighbors. In addition, reversing the locations of the drainfields would allow two additional significant trees to be preserved. Mr. Broughton also requested that the Hearing Examiner's decision determine that use of pilings for the site foundation not be required and that the driveway be allowed to remain as gravel. *Testimony of Mr. Broughton.*
29. Tom Weaver, P.E., testified on behalf of the Applicant about the septic design for the proposal. He explained that the type of septic system the Applicant would install would have little to no impacts on the wetland and buffer, and would only require approximately four inches of excavation for the septic drainfields. Mr. Weaver explained that reversing the septic drainfields would have no impacts on site development and would allow for protection of two additional significant trees. He also noted that the Applicant would install a fence, wherever the City would like, that would separate the drainfields from the wetland buffer. Finally, Mr. Weaver testified that the neighbors' continued access to their driveway turnaround from the "disputed" portion of the subject property would not have detrimental impacts on the septic drainfields. *Testimony of Mr. Weaver.*
30. Wetland Biologist Joanne Bartlett testified that the Applicant has worked with the City to reduce impacts to the on-site wetland and buffer as much as possible, stating that provided mitigation would improve the buffer function for Wetland A. She explained that the property is treed and shaded and that there is minimal understory, noting that increasing the shrub layer would therefore improve water quality for the wetland. Ms. Bartlett testified that relocating the proposed site would have detrimental impacts on the wetland buffer, but reversing the location of the septic drainfields would not

detrimentally impact on-site critical areas or buffers. She also explained that, in reviewing another project proposed in the vicinity of the site, ELS determined that Wetland A should be rated as a Category II, as opposed to Category III, wetland as detailed in the Wetland Report. Ms. Bartlett stressed that, in her view, additional third-party review of the Wetland Report is unnecessary. *Testimony of Ms. Bartlett.*

31. Wetland Biologist Keelin Lacey testified that reversing the septic drainfields would allow a large fir tree on-site, and possibly a cherry tree, to be preserved and protected. She stressed that the Applicant would employ a 7-year monitoring plan to ensure that the mitigation installed for the project succeeds and that the Applicant has selected “shade tolerant” species of trees and brush to increase the likelihood that the installed mitigation will thrive on-site. *Testimony of Ms. Lacey.*
32. Area resident Dennis Johnston testified that his primary concern about development of the property is that the Applicant did not take the time to reach out to neighboring property owners about the proposal in advance of the hearing. He explained that the private road serves his property at the end of the roadway and that he works to upkeep the road every year. Mr. Johnston noted that he has used the driveway turnaround for approximately 30 years and would like to have the septic drainfields reversed so that he can continue to use the turnaround and the two trees in the vicinity of the turnaround can be protected. Finally, Mr. Johnston stressed that he hopes the design of the home is compatible with existing neighborhood structures and that the Applicant ensures any impacts to the road from construction are timely fixed. *Testimony of Mr. Johnston.*
33. Leah Clark reiterated Mr. Johnston’s concerns and explained that their paperwork indicates that the private road serves their property. She stated she was unaware of there being an RMA for the private road. *Testimony of Ms. Clark.*
34. Doug Mackenzie testified that he owns property to the south of the subject property and that he would like to see trees on or near the adjoining property line between the properties protected. He also stressed that, in his experience, mitigation proposals in the area tend to fail, so that fact should be taken into consideration for the current project. *Testimony of Mr. Mackenzie.*
35. Gary Palmer testified that his family has lived in the area since the 1930s and owns property at the bottom of the private driveway. He explained that development in the area over the last 80-plus years has resulted in detrimental impacts on his property, including frequent flooding in his basement. He stressed that the private driveway needs to be protected during construction, perhaps through a bond of some kind, and that the Applicant should ensure that site development does not exacerbate drainage issues off-site. *Testimony of Mr. Palmer.*

36. Linda Sohlberg testified at length about the proposal and shared her ideas on site development, the location of the proposed residence, and how significant trees on-site should be protected in favor of increasing the protected area of the wetland buffer on-site. Ms. Sohlberg explained that she is an architect, and, in her view, protecting significant trees on-site would have greater positive impacts for the ecology of the site than moving the house closer to the private road to increase the wetland buffer. Ms. Sohlberg submitted comments in advance of the hearing that included the comments of an arborist that she thought should be considered. She also requested that the record be left open to allow for additional public comments and review of the proposal. The Hearing Examiner held that the record would be left open for additional public comments until the close of business on January 29, 2021, to allow the public to submit additional comments. Ms. Sohlberg submitted additional comments pursuant to the Hearing Examiner's ruling, reiterating the concerns she raised at the hearing. *Testimony of Ms. Sohlberg; Oral Ruling of the Hearing Examiner.*
37. Lisa Dunham testified that she is concerned with parking issues on the private roadway as well as impacts from construction. She requested that the Applicant submit a construction and parking plan in advance of construction. *Testimony of Ms. Dunham.*
38. Marie Adan testified that her family lives at the end of the line and only have pedestrian access to the private driveway. They would like to see as many of the trees on the property preserved as possible and ensure that the character of the neighborhood is preserved, despite construction. *Testimony of Ms. Adan.*
39. Roger Padgett testified that his family has owned the subject property for approximately 70 years and put the property on the market to allow someone else the opportunity to build a residence on it. He stressed that anyone could have bought the property as it was placed on the open market and that he attempted to contact neighboring property owners about selling the property, but these efforts were unsuccessful. *Testimony of Mr. Pagett.*
40. Applicant Bill Broughton responded to public testimony and explained that there is an existing RMA for the subject property. He explained that the Applicant would timely address any damage that occurs to the private driveway as a result of construction and that the site plan has been designed to allow off-street construction staging on the subject property. Mr. Broughton explained that fencing several of the trees on-site during construction would make site development impossible and requested that proposed conditions be amended to acknowledge the likelihood that trees along the southern property line may not be able to be protected in light of site development requirements. Mr. Broughton stressed that being a good neighbor is important and that a small but beautiful home, designed by a local architect, would be constructed on-site. Mr. Broughton acknowledged that he would send his requested changes to the conditions of

approval to the City by the end of the day on January 29, 2020. *Testimony of Mr. Broughton.*

41. Ms. Keelin also responded to public testimony and stressed that the critical areas code prioritizes wetland protection over significant tree protection and that ELS has determined that moving the site, per Ms. Sohlberg's requests, would not be feasible in light of the priorities expressed in the municipal code. Ms. Keelin further noted that employing a 7-year mitigation plan should ensure that installed mitigation is successful in providing intended benefits and that eliminating invasive species from the wetland buffer will have significant benefits to site ecology. *Testimony of Ms. Keelin.*
42. City Arborist Nick Snyder testified about the trees on the property and noted that he supports reversing the septic drainfields. Mr. Snyder stressed that a reasonable buffer between trees and construction activities is necessary to protect trees during construction. He explained that, based on site requirements, it is unlikely that trees along the southern property line would be successfully protected during construction. *Testimony of Mr. Snyder.*
43. Mr. Nylund also responded to public testimony and requested that the Hearing Examiner make a decision about whether tree protection would be required in relation to trees along the southern property line. He further explained that the City has determined that the Applicant's approach to stormwater is feasible and that the addition of 900 square feet of new impervious surface will have no significant impacts on existing drainage problems in the area. Mr. Nylund also requested that the Applicant provide the existing RMA to the City for its review. *Testimony of Mr. Nylund.*
44. Ms. Hillier responded to Mr. Broughton's additional comments and noted that use of pilings is not necessary for the site foundation and that the City supports reversing the septic drainfields. She also noted that the City would still like a final mitigation plan to be submitted to it prior to construction, but she stressed that the City's further review of that plan would not require additional review by the Hearing Examiner. *Testimony of Ms. Hillier.*
45. Mr. Broughton concurred with Mr. Nylund that it would be beneficial to have a final ruling on the trees along the southern property line prior to site development. *Testimony of Mr. Broughton.*

Additional Materials

46. At the conclusion of the hearing, the Hearing Examiner left the record open until February 1, 2021, to allow the City, interested parties, and the Applicant to submit additional information about the proposal. *Oral ruling of the Hearing Examiner.*

47. Linda Sohlberg submitted a comment that followed up on her previous concerns about tree removal in light of the testimony provided at the hearing and comments from the City arborist. Specifically, Ms. Sohlberg commented that she did not oppose the removal of a 36-inch diameter alder on the south property line, a large fir in the center of the building area, or an old alder on the west property line, but that the Applicant should preserve a large cedar tree on the west property line and two fir trees on the south property line. *Exhibit 21.*
48. The Applicant submitted a request for modifications to some of the City's recommended conditions and for a new condition that would allow the Applicant to reverse the primary and reserve septic drainfields as depicted on the site plan to address concerns raised by area residents and to incorporate the City arborist's assessment that reversing the drainfields could potentially result in the preservation of two additional trees on the property. The City submitted a response to the Applicant's request, which also provided suggestions for modifications to its original recommended conditions based on public concerns and testimony provided at the hearing. The City attached to its submittal the correspondence from the Applicant indicating that the Applicant concurs with the City's suggested modifications. *Exhibit 20; Exhibit 23.*

Staff Recommendation

49. Ms. Hillier testified that City staff recommends approval of the application, with conditions. Mr. Broughton testified that the Applicant would adhere to the conditions of approval. *Exhibit 1, Staff Report, pages 21 through 26; Testimony of Ms. Hillier; Testimony of Mr. Broughton.*

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 Hearing Examiner also has authority to hear and approve, approve with conditions, or deny a request for a minor variance under the City's consolidated project review process. *BIMC 2.16.060; BIMC 2.16.170.*

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

Criteria for review and approval of a minor variance are as follows:

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 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.

Findings, Conclusions, and Decision
City of Bainbridge Island Hearing Examiner
Manitou Reasonable Use Exception and Variance
Nos. PLN51687 RUE & VAR

2. A variance may be approved with conditions. If no reasonable conditions can be imposed that ensure the application meets the decision criteria [described above], 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

1. **With conditions, the proposal would comply with the reasonable use exception criteria of BIMC 16.20.080.F.** Because a wetland and wetland buffer cover the entirety of the Applicant's property, strict application of the City's critical areas ordinances would deny all reasonable use of the property. The City provided reasonable notice and opportunity to comment on the application. The City received several comments from area residents, which generally raised concerns about the proposal's impacts to existing trees on-site and to a shared private access road, about the availability of off-street parking related to the property, and about the long-term success of the proposal's wetland buffer mitigation plan. In response to concerns about tree removal, the Applicant has proposed to swap the locations of a primary drainfield and a reserve drainfield to maintain and protect an additional two trees on the property, in accord with the City arborist's assessment, as well as to address concerns about the private access road. The Applicant submitted a wetland delineation report and buffer mitigation plan setting out mitigation sequencing that would minimize the impact on critical areas. The wetland delineation determined that the proposal would be the minimum necessary to allow reasonable use of the property and that siting the proposed residence closer to the wetland edge to preserve additional trees in the western portion of the property would require the removal of significant trees closer to the wetland edge, resulting in decreased buffer function. City staff determined that the present proposal would have the fewest impacts on the wetland and its buffer and, with a condition requiring the Applicant to submit a final mitigation plan for City review prior to building permit issuance, would result in no net loss of critical area functions or values. The Applicant would provide two off-street parking spaces in accord with code requirements, and the Applicant would be responsible for addressing any damage caused to the private access road from temporary construction activity. The lot is undeveloped, 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 proposal is exempt from SEPA review.

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 area that is as far from the on-site wetland as possible. Because the property is not located within the City's sewer service area, an on-site septic system would be installed to the rear of the residence, along with associated septic drainfields to the north of the residence. As proposed, the site layout would result in a reduction of the required wetland buffer around the single-family residence, but the remaining buffer area on the property would be maintained between the homesite and the on-site wetland. In addition, the Applicant would remove invasive species and would install a variety of native vegetation in the remaining buffer area. Over 65 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, with conditions requiring submittal of a final mitigation plan, would ensure no net loss of critical area functions and values. The proposal addresses the cumulative impacts of the proposed development by siting the proposed residence as far as possible from the wetland edge and by providing buffer enhancement measures. Conditions restricting pesticide, fertilizer, and herbicide use and requiring measures to prevent future encroachment into the wetland buffer, such as permanent fencing and protection of the on-site critical areas in perpetuity, would ensure that there would be no negative cumulative impacts from development.

Conditions, as detailed below, are necessary to ensure that the proposal's impacts to critical areas are the minimum necessary to allow reasonable use of the property, to ensure that the proposal satisfies all other criteria for approval of a reasonable use exception, and to ensure that the proposal complies with all other applicable local, state, and federal requirements. *Findings 1 – 49.*

2. **With conditions, the proposal would comply with the minor variance criteria of BIMC 2.16.060.D.** The Applicant requests a reduction of the front setback from 25 feet to 10 feet to allow the proposed residence to be sited as far from the on-site wetland as possible. Several area residents provided comments in response to the City's notice materials that raised concerns about the proposal's impacts to existing trees on-site and to the shared access road. Members of the public also raised concerns that granting the variance would result in a residence that would be out of character with other residences in the vicinity. As addressed above in Conclusion 1, the variance would allow the proposed residence to be sited in an area resulting in the least impacts to on-site critical areas and is necessary to allow reasonable use of the property. In addition, the proposed residence would be oriented so that the setback increases from 10 feet at the northwest corner of the residence to over 30 feet at the southernmost corner of the residence. The need for the variance is not the result of any actions taken or proposed by the Applicant

but, instead, is due to the special circumstances of a Category II wetland and its associated buffer covering the entirety of the property. Granting the variance would allow the Applicant to construct a single-family residence on the property, a property right enjoyed by other properties in the vicinity and the R-2 zone, in a manner minimizing impacts to critical areas and thereby satisfying the criteria for a reasonable use exception. The proposal would comply with all other applicable development regulations and would be consistent with the Comprehensive Plan. Conditions, as detailed below, are necessary to ensure that the proposal satisfies the criteria for a variance, as well as all other applicable local, state, and federal requirements. *Findings 1 – 49.*

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 an undeveloped 0.39-acre lot that is impacted by critical areas and accessed from a private street off of Manitou Beach Drive NE, and the request for a variance, to reduce the required front setback from 25 feet to 10 feet to allow the proposed residence to be sited as far from the on-site wetland and associated buffer as possible, is **APPROVED**, with the following conditions:³

1. Work shall be completed in substantial compliance with the design and specifications included in the RUE/VAR file, including:
 - a. A building footprint of approximately 880 square feet and roof area of 935 square feet.
 - b. A two-car garage located within the building footprint.
 - c. A permanent impact area of 3,716 square feet.
 - d. A driveway of approximately 245 square feet.
 - e. A buffer enhancement area of 5,027 square feet.
 - f. Implementation of the avoidance and minimization steps provided in the wetland mitigation plan, including retaining existing native vegetation in the reserve drainfield area.
2. Minor changes to the site plan within the approved impact area may be authorized as a part of the building permit review, provided the square footages of structures and impacts in condition 1 do not increase. Minor changes that further reduce impacts to the critical area may be allowed, provided the wetland mitigation plan is updated and approved as a part of the building permit review.

³ This decision includes conditions designed to mitigate impacts of this proposed project as well as conditions required by City code.

3. To further minimize impacts to the wetland buffer and ensure there is no reasonable alternative to the proposal with less impact, the following shall be implemented:
 - a. 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. This shall be stated on the site plan and recorded with the Notice to Title.
 - b. Lighting on the exterior of the residence to shall be limited to the minimum necessary and shall be directed downward and away from the wetland.
 - c. Access of machinery shall be restricted to as few areas as possible, to reduce soil compaction. These areas shall be indicated on the site plan.
 - d. Construction shall take place during the dry season (May through September) to reduce impacts to aquatic resources.
 - e. Tall, dense evergreen vegetation shall be planted around the outside edge of the buffer to improve screening between development and the wetland.
 - f. The buffer enhancement area shall not be cleared or grubbed, except for the removal of invasive species. Downed woody debris shall be retained.
 - g. Plantings located outside of the buffer enhancement area and within the permanent impact area shall consist of native or native equivalent species.
 - h. The construction fencing and permanent split-rail fence shall be located between the primary drainfield and the reserve drainfield.
 - i. No refuse, including but not limited to household trash, yard waste (e.g. lawn clippings) and commercial/industrial refuse, shall be placed in the buffer.
 - j. Roofing shall be of a non-leaching material that is not harmful to the environment. Examples of non-leaching materials are 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, to assure that wetland flora and fauna functions and values are maintained/enhanced.

4. The following tree protection measures must be taken to minimize the removal of significant trees within the wetland buffer:
 - a. The building permit application shall indicate that the 44-inch cedar along the west lot line is not proposed for removal. The root zone of this tree shall be protected with fencing installed in a 10-foot radius from the base of the tree.
 - b. The building permit application shall indicate that the 42-inch fir and 10-inch cherry located in the vicinity of the drainfield are not proposed for removal. The root zones shall be protected during construction, as appropriate, to allow installation of the drainfield.
 - c. All significant trees proposed for removal within the permanent buffer impact area, including the 40-inch fir and the 28-inch alder along the south lot line, shall

be clearly marked on the site plan and construction plans submitted with the building permit application. Any significant trees that do not require removal to allow construction of the proposal shall be protected and retained.

Tree root protection measures are required for significant trees that will be retained including those identified above. The protection measures must be indicated on the site plan and construction plans submitted with the building permit application and in place prior to the start of construction.

5. A final mitigation plan shall be provided with the building permit application, in accordance with BIMC 16.20.180.G.3.b. The final mitigation plan shall include a quantitative or qualitative analysis, including supporting data, of buffer functions. Updated goals and objectives as a result of the original buffer functions shall also be provided. The City must agree that the final mitigation plan will result in no net loss of critical function and value prior to building permit issuance, and may require third-party review of the final mitigation plan, the cost of which shall be borne by the Applicant, should the Director deem such review necessary. Unless significant changes to the mitigation plan occur, no further review by the Hearing Examiner shall be necessary.
6. A final planting plan shall be submitted with the building permit application, consistent with the results of the updated mitigation plan. The Applicant shall give consideration to planting tall, dense evergreen vegetation around the outside edge of the buffer to improve screening between development and the wetland, if determined necessary as a result of the analysis. If existing native vegetation is located along the outside edge of the buffer, this shall be included on the planting plan and labeled as “existing.”
7. Lot coverage calculations must be provided with the building permit application.
8. A temporary five-foot-high chain link fence with tubular steel poles or “T” posts shall delineate the area of prohibited disturbance, which is the outer edge of the reduced wetland buffer and reserve drainfield, unless the director has approved the use of a four-foot-high plastic net fence as an alternative. The fence shall be indicated on the site plan. The fence shall be erected and inspected by City staff before clearing, grading, and/or construction permits are issued, shall remain in place until construction has been completed, and shall at all times have affixed to it a sign indicating the protected area.
9. Prior to final inspection of the building permit, the temporary fencing shall be replaced with the permanent split-rail fence.
10. A minimum of two signs indicating the presence of a protected wetland buffer shall be placed on the split-rail fence, prior to final inspection of 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.

11. All plantings shall be installed prior to final building permit inspection, or a performance surety shall be provided in accordance BIMC 16.20.160.
12. A monitoring report shall be submitted annually by December 31st each year, at a minimum, documenting milestones, successes, problems, and contingency actions of the mitigation plan. The mitigation plan shall be monitored for a period necessary to establish that performance standards have been met, but not for a period less than seven years.
13. 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.
14. A maintenance surety shall be provided prior to final building permit inspection, or upon release of the performance surety if plantings are not installed at the time of the final inspection, whichever is applicable. The director shall release the maintenance surety upon determining that performance standards established for evaluating the effectiveness and success of the structures, improvements, and/or compensatory mitigation have been satisfactorily met for the required period.
15. The Applicant shall record a notice to title with a site plan to document the presence of the wetland buffer with the Kitsap County auditor. Such notice shall provide notice in the public record of the presence of the critical area, the application of this chapter to the property, and that limitations on actions in or affecting such areas may exist. The notice must be recorded prior to the issuance of the building permit.
16. The Applicant shall comply with the following conditions to the satisfaction of the City engineer:
 - a. All underground utilities (well water, septic transport, power, etc.) shall be located/routed to minimize site disturbances to the maximum extent feasible.
 - b. Use of soil sterilant to construct the driveway shall be strictly prohibited.
 - c. 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.
 - d. Hardscaping shall be constructed of permeable materials, such as gravel driving surfaces, or contain wide permeable jointing where feasible to allow infiltration or

shallow subsurface filtration of surface stormwater. Building permit documentation shall include location and materials for proposed hard surface/hardscape, and plans shall include construction details for permeable surfaces and subgrades.

- e. In conjunction with BIMC 15.20 and 15.21 compliance, 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.

- 17. The Applicant is permitted to reverse the proposed location of the primary and reserve drainfields as depicted in the site plan.

DECIDED this 16th day of February 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center