

April 27, 2017

**CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER**

REPORT AND DECISION

Subject: Rural Day America Reasonable Use Exception and
Zoning Major Variance Applications

File number: PLN15354RUE & VAR

Location: 2075, 2105 and 2137 Soundview Drive NE

Request: Reasonable Use Exceptions (RUE) and major zoning variances in
order to construct three single-family residences on three
contiguous vacant lots under single ownership, each residence not
to exceed 1,200 square feet. Each lot requests a zoning variance
to reduce the front yard setback from 25 feet to 5 feet and an RUE
to authorize construction on parcels fully encumbered by a
Category III wetland and its associated regulatory buffer.

**Zoning/Plan
Designations:** R-2/OSR-2, Open Space Residential, two residential units per
acre.

**Environmental
Review:** A Mitigated Determination of Non-significance (MDNS), in accordance with the
State Environmental Policy Act (SEPA) was issued on February 27, 2017. No
appeals were filed.

Applicant: Amy L. Duerr Day
14329 Komedal Road NE
Bainbridge Island, WA 98110

Owner: Rural American Properties, Inc.
21241 Ventura Blvd., #276
Woodland Hills, CA 91364

FINDINGS OF FACT

A. Site Characteristics

1. **ASSESSOR'S DATA:**
 - a. Tax Lot Numbers: 4146-004-002-0007 (Lot 2), 4146-004-003-0006 (Lot 3), 4146-004-004-0005 (Lot 4)
 - b. Owners of record: Rural American Properties Inc.
 - c. Lot sizes: .188 ac (Lot 2), .202 ac (Lot 3), .202 ac (Lot 4)
 - d. Land use: Vacant
2. **TERRAIN:** Relatively flat, with a five foot contour change across the property.
3. **SITE DEVELOPMENT:** The lots are undeveloped.
4. **ACCESS:** Primary vehicular access to the area is from the south via Soundview Drive NE.
5. **PUBLIC SERVICES:**
 - a. Police: Bainbridge Island Police Department.
 - b. Fire: Bainbridge Island Fire District.
 - c. Sewer: Sewer District 7
6. **SURROUNDING USES:**
 - a. North: Undeveloped
 - b. East: Single Family Residential
 - c. South: Undeveloped
 - d. West: Single Family Residential
7. **ONSITE AND SURROUNDING ZONING:** R-2, two units per acre.
8. **ONSITE AND SURROUNDING COMPREHENSIVE PLAN DESIGNATION:** Open Space Residential two units per acres (OSR-2).

B. Procedural Background

9. A pre-application conference was held on October 20, 2015, and the applicant submitted Reasonable Use Exception and zoning variance applications on June 7, 2016. Staff issued a notice of incomplete application on July 5, 2016, which the applicant appealed. This appeal was put on hold while the applicant submitted additional information.
10. The application was deemed complete on November 25, 2016, at which time a public comment period commenced. Additional wetland information was received on December 12, 2016. The City issued a SEPA Mitigation Determination of Non-significance on February 27, 2017, for which no appeals were filed. A public hearing on the applications was held by the Hearing Examiner on April 19, 2017.

11. This proceeding is somewhat unusual in that single applications were submitted to approve a variance and RUE affecting three legal lots collectively, instead of requesting approvals for each lot individually. Pursuing collective approvals both saves the applicant time and money and is appropriate from a technical standpoint because the protection of and mitigation for impacts to a single wetland and its buffer are primarily at issue. The applicant stated an expectation that the three lots will remain under single ownership through the development phase, but legally nothing prevents each lot from being sold to new owners for separate construction. If single ownership is in fact maintained throughout the entire development phase, the wetland mitigation process should prove to be a relatively manageable exercise.

12. A further procedural complication arises from the fact that the wetland mitigation concept for the three lots has changed significantly since the initial application and its subsequent conditioning by the City pursuant to its SEPA authority. The original application proposed setting aside the wetland and its buffer within a compact, easily defined tract located along the eastern side of the three lots demarcated by a natural boundary of dense native vegetation and to be protected by a split rail fence. The new mitigation concept envisions extending the mitigation tract westward into the side yards that will remain between the proposed new residences after construction.

13. This will reduce the amount of offsite compensatory wetland mitigation required but will also make implementation of the onsite mitigation plan more complicated. These new side yard mitigation areas do not contain existing viable native vegetation that can simply be set aside and preserved. New plantings will be required as well as coordination of such planting with adjacent construction. A single side yard mitigation area will lie between lots 2 and 3 to be divided equally between them; its planting will need to be coordinated even though construction on the two lots may take place within different time frames.

14. This revision of the wetland mitigation concept constitutes a substantial change to the proposal within the meaning of WAC 197-11-340(3)(a)(i). Accordingly, the City as lead agency under SEPA is legally authorized to withdraw the MDNS issued February 27, 2017, and perform a new environmental review based on the revised applications if such appears to be necessary to address the new issues raised. It seems almost certain that the MDNS conditions dealing with the wetland mitigation process would have approached these matters somewhat differently if the revised wetland mitigation concept had been reviewed under SEPA instead of the much simpler concept set forth in the original applications.

15. The Examiner has modified the proposed staff conditions in an effort to accommodate within the existing procedural framework the new issues raised by the revised wetland mitigation concept. But if this effort fails to produce a satisfactory result when the three lots are under actual construction, the City's responsible official is advised to withdraw the MDNS and make any needed modifications to the SEPA conditions resulting from the recently revised wetland mitigation proposal.

C. Regulatory Review

16. There are no disputed issues regarding the basic need for both a zoning variance and an RUE if the three lots are to be developed in any manner. The Category III wetland and its 150 foot regulatory buffer occupy the entirety of all three lots; no development of any kind would be possible without an

RUE. The front yard setback reduction requested under the variance application would allow residential development on the three lots to be removed further from the wetland and thus afford it a greater degree of protection. Since the narrow developed travel lane for Soundview Drive is located near the western boundary of the 60-foot right-of-way, reducing the front setback to 5 feet would still leave more than 40 feet of actual physical separation between the proposed residences and the travel lane. The questions raised by these applications thus relate to the need to minimize impacts and provide adequate mitigation to the wetland and its buffer, not to the essential request for regulatory relief.

17. BIMC 16.20.080.G states the criteria for granting a reasonable use exception from the City's critical areas regulations:

- 1. The application of this chapter would deny all reasonable use of the property;*
- 2. There is no reasonable alternative to the proposal;*
- 3. The proposed impact to the critical area is the minimum necessary to allow reasonable use of the property;*
- 4. 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;*
- 5. The proposed total lot coverage does not exceed 1,200 square feet;*
- 6. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property;*
- 7. Any net loss of critical area functions and values, as determined by a qualified consultant through the application of best available science, will be mitigated on-site to the extent feasible if off-site options are not available. If off-site options, such as a fee-in-lieu or mitigation banking program, are available, the mix of on-site and off-site mitigation should be based on recommendations of the consultant;*
- 8. A habitat management plan has been prepared pursuant to BIMC 16.20.060, unless it is determined through the applicable review process that such a plan is unnecessary; and*
- 9. The proposal is consistent with other applicable regulations and standards.*

18. The City uses the Department of Ecology's (DOE's) Washington State Wetland Rating System for Western Washington for the purpose of establishing wetland buffer widths, wetland uses and replacement ratios for wetlands. The wetland at issue is rated Category III. The wetland and its buffer fully encumber all three lots.

19. The staff report at pages 6 through 13 contains a thorough discussion of zoning code dimensional requirements as they relate to the RUE standards, various strategies explored for minimizing impacts to wetland resources, mitigation plan requirements, and staff's ultimate conclusion

that application of the “*minimum necessary*” criterion mandated extension of the protected buffer zone westward into the lot side yards. Based on the applicant's revising the wetland mitigation concept to include side yard mitigation plantings, staff concluded that the requirements of BIMC 16.20.080.G could be met. This element of the staff report is found to be correct and adopted herein by reference as findings for this decision.

20. Besides initially submitting an overly truncated proposal for the retained buffer area, a second major shortcoming of the applicant's original approach was the attempt to piecemeal the drainage analysis. That is, the drainage plan undertook to deal with stormwater management requirements separately for each lot in an attempt to avoid a more demanding menu of standards that would otherwise apply to the project as a whole if its impacts were aggregated. The City's Development Engineer essentially rejected this strategem in recommending a SEPA condition based on compliance with the 2012 DOE Manual, and one of the Examiner's new project conditons further elaborates on this requirement. WAC 197-11-060(3)(b) clearly mandates that the environmental impacts of the proposed co-ordinated development of the three lots be analyzed as a “*single course of action.*”

21. BIMC 2.16.120.E states the decisional criteria for issuance of a major zoning variance:

1. A major variance may be approved or approved with conditions if:

a. 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;

b. The need for a variance has not arisen from previous actions taken or proposed by the applicant;

c. 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;

d. 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

e. 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.

2. If no reasonable conditions can be imposed that ensure the application meets the decision criteria of the BIMC, then the application shall be denied. (Ord. 2011-02 § 2 (Exh. A), 2011)

22. The zoning variance application's compliance with the germane approval standards is discussed at pages 13 through 16 of the staff report. Except for incorrectly citing the relevant code section (major variances are treated at BIMC 2.16.120, not .060), the staff discussion is generally adequate and

adopted herein by reference as findings for this decision.

23. The major concern raised in the public comments process for the variance application was the current sorry state of Soundview Drive NE adjacent to the site. Neighborhood residents described its poor travel surface conditions, including drainage and ponding problems. But since Rural Day America is not seeking to create more lots or authorize additional uses within this proceeding, its current application does not raise new access or traffic impact issues in a form subject to present mitigation. Evaluation of construction traffic impacts will become an appropriate subject for review and mitigation when building permit applications for the houses are submitted.

24. The neighbors also wistfully speculated that some day the City might actually undertake to substantially upgrade Soundview Drive NE, in which case it could opt to locate the travel lane nearer to the center of the right-of-way. In such case, the effective distance between the three Rural Day America lots and the eastern edge of the travel lane would be reduced to about 20 feet from its present 40 feet, thus potentially changing the variance analysis.

25. While anything is surely possible in these wondrous times, the record offers no credible indication that upgrading Soundview Drive NE is currently on the City's capital improvement project radar. For the foreseeable future the most likely scenario is that the City will continue to occasionally fill the larger potholes on Soundview Drive NE and the travel lane will remain in its current location adjacent to the western edge of the right-of-way. Moreover, even if some day the road were in fact to be centered, the front yard setback would still remain at about 25 feet in width and thus continue to meet the effective zoning requirement.

26. The zoning variance and RUE procedures often work in tandem, and in a perfect world this fact would be recognized by the regulatory scheme and the two procedures would be fully integrated. But that is not the case here, so some creative regulatory fancy-dancing is mandated. The implicit assumption underlying the relationship between the RUE and a zoning variance is that preserving critical areas from unnecessary disturbance ranks as a higher public priority than merely preserving a lot line setback. This means that reducing a zoning setback should be justifiable simply on the basis that such a variance will better protect a wetland and its buffer.

27. But the code scheme doesn't explicitly say that. So the trick becomes one of shoehorning an implicit critical areas protection policy priority into the conventional zoning variance criteria. The logical candidate for this extra duty is the broad language found within BIMC 2.16.120.E(1)(d) specifying that the "*granting of the variance will not be materially detrimental to the public welfare.*" If one views the public welfare as entailing provision of the maximum practicable protection to critical areas, then reducing a zoning setback of lesser public importance in order to attain such an end can be validated under the variance standards. It is not a truly ideal fit because "detriment" implies a harm to be avoided while the actuality is more in the nature of a benefit to be gained. But the rationale described above is consistent with the City's indisputably strong commitment to environmental protection and thus is clearly warranted on policy grounds. See, e.g., BIMC 16.20.010.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction over this reasonable use exception and zoning variance application proceeding. Standard notice and SEPA procedural requirements have been met.
2. Based on the evidence of record, the applicant has complied with the requirements of BIMC

2.16.120.E for the issuance of a major zoning variance. As conditioned, the granting of the variance will not be materially detrimental to the public welfare nor injurious to property or improvements in the vicinity and zone in which the property is located.

3. The Rural Day America application also meets the requirements of BIMC 16.20.080.G for granting a reasonable use exception from the City's critical areas regulations. These regulations, if strictly applied, would deny all reasonable use of the applicant's property. No reasonable alternative to the proposal approved hereunder exists. Other applicable standard regulatory requirements can be met, and, as conditioned, the proposal does not pose a threat to the public health, safety or welfare.

DECISION

The zoning variance and reasonable use exception applications of Rural Day America (file no. PLN15354RUE & VAR) to reduce the front yard setbacks on three contiguous lots on Soundview Drive NE to 5 feet from the eastern right-of-way edge and to establish a minimal building envelopes thereon are APPROVED, subject to the following conditions:

SEPA CONDITIONS:

1. In order to protect the ground water and the wetland flora and fauna from the proposed development, the roofing shall be of a non-leaching material that is not harmful to wetlands. Examples of non-leaching materials are, but not limited to, metal and tile roofs. Asphalt may be allowed if an alternative method to treat the run off is proposed by the applicant. An alternative method must address BIMC water quality standards, Chapter 13.24 and to assure that wetland flora and fauna functions and values are maintained/enhanced. An Alternative method may include rain gardens as found in the Rain Garden Handbook for Western Washington, June 2013; provided, that a Washington State Department of Ecology and the Washington Stormwater Center LID Design and LID Operation and Maintenance certified practitioner, or equivalent, approves the rain garden design and maintenance provisions, and the City grants final approval.
2. Prior to commencing any construction activity, the applicant shall have the wetland buffer temporarily fenced between the areas of construction activity, a maximum of 15 feet from the proposed residence. The fence shall be made of durable material and shall be highly visible. The fence shall be inspected as part of the building permit. The temporary fencing shall be removed once the construction activity is complete and replaced with permanent fencing (see condition #3 below).
3. A split-rail type fence shall be installed along the edge of the 15' setback from the single family home. The fence may contain gates to access the restoration area and shall provide a clear distinction between native vegetation buffer area and any future landscaped area. The rails shall be high enough to allow small mammals and wildlife to pass through. The fence shall be indicated on the building permit application and in place prior to final inspection of the building permit.
4. Prior to issuing a final on a building permit for a single family residence, a minimum of two

signs per lot indicating the presence of a protected wetland buffer shall be placed on the fence. Signs shall be made of metal or similar durable material and shall be between 64 and 144 square inches in size.

5. The applicant has indicated that they will provide buffer enhancement as mitigation. The proposal shall be modified to provide a minimum of 1:1 buffer enhancement for the buffer impacted. Enhanced equivalent areas or alternative, conservation easements or mitigation banking may be considered as appropriate mitigation; provided, that areas equivalent to those altered are achieved and approved by the City.
6. With the first building permit, the applicant shall submit a stormwater management plan that meets the minimum requirements 1-9 of the 2012 SWMMWW, BIMC 15.20.
7. With the submittal of the building permit application, the applicant shall provide a discussion of applicable and utilized Low Impact Development Best Management Practices.
8. Prior to final building inspection, the applicant shall submit a revised wetland mitigation plan including mitigation goals and objectives, performance standards, maintenance and monitoring measures and contingency actions. The mitigation plan shall be in substantial compliance with BIMC 16.20.110 – Mitigation Plan Requirements – and may incorporate previously completed reports for the subject property and use guidance provided in Wetland Mitigation in Washington State: Part 2 - Developing Mitigation Plans (Version 1, March 2006, Publication #06-06-011b). The mitigation plan shall provide sufficient information, clarity and detail to demonstrate the proposed mitigation actions and maintenance and monitoring measures are adequate to achieve established mitigation goals and objectives. The Department of Planning and Community Development shall approve the revised wetland mitigation plan as part of the building permit review and plantings shall be installed prior to final building permit inspection.
9. The applicant shall submit a maintenance and monitoring plan with their building permit application and shall submit an annual monitoring report for up to seven years, as applicable.
10. To reduce the impacts on the wetland, the applicant shall limit the amount of lighting on the exterior of the residence to the minimum necessary, shall install motion sensor lights to the rear of the house facing the wetland, plant dense vegetation around the buffer and record a covenant to limit the use of pesticides.

PROJECT CONDITIONS:

11. The proposed residence shall meet the setback and height requirements for the R-.2 zoning district, with the exception of the twenty-five foot front yard setback. To ensure the five foot front yard setback is met, the applicant shall have the setback marked and inspected by planning staff prior to commencing construction.
12. The wetland buffer area to be protected shall extend westward into the interior side yards between the proposed residences, more specifically along the south side of lot 4 and between lots 2 and 3. Building permit and wetland mitigation plans shall be revised to provide for this

continuation of the wetland buffer between the three lots and to depict the boundaries for such extensions, as approved by the City. The buffer extension boundary between the lots shall also be fenced and include the signage described in conditions nos. 2 through 4 above.

13. The boundaries of the entire revised wetland buffer area to be protected shall be identified prior to the first building permit submittal for the three lots. The total onsite buffer area to be protected shall provide the basis for determining the amount, if any, of offsite mitigation area required. This calculation shall include an accurate staking of the western boundaries of the three lots based on reliable survey data.
14. The revised wetland mitigation plan required by condition no. 8 shall contain an element identifying the extent of any offsite mitigation areas required, their locations, and the types of offsite mitigation actions proposed, such element also to be submitted and approved before the first final building permit inspection. Offsite mitigation actions may be implemented subsequent to the first final building permit inspection, as approved by the City based on bonding posted in a satisfactory form and amount.
15. Prior to the first final building permit inspection for any of the three lots, the applicant shall record a notice on title for each lot, in a form approved by the City, specifying the presence of the wetland, its buffer and the requirements of the wetland mitigation plan.
16. Regarding implementation of condition no. 6, the stormwater management plan shall be based upon an analysis of the impacts of all three lots cumulatively. Any regrading or soil amendment proposed for areas within or draining to the wetland or its buffer shall be completed before submittal of the revised wetland mitigation plan, with their effects assessed within such plan.
17. The project SEPA conditions were issued on the basis of a simpler wetland mitigation concept originally proposed by the applicant that did not contemplate westward extension of the mitigation area to incorporate the side yards between the residences. This later modification of the wetland mitigation concept constitutes a substantial change to the proposal that could warrant withdrawal of the February 27, 2017, MDNS for reevaluation of the environmental impacts of the proposal as reconfigured. The staff's proposed project conditions have been modified within this decision in an effort to accommodate these changed circumstances within the existing procedural framework. But if staff later determines that further review and analysis, including modified SEPA conditions, are indeed required to adequately mitigate the project's environmental impacts, it may withdraw the MDNS pursuant to WAC 197-11-340(3) (a)(i) and revise its conditions to adequately address the changes made to the proposal and their consequences.
18. The proposed single-family residences are subject to the Fort Ward Overlay design guidelines and shall be reviewed for compliance with the guidelines at building permit submittal.

ORDERED April 27, 2017.

/s/ Stafford L. Smith

Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The Hearing Examiner makes the City of Bainbridge Island's final decision regarding zoning variance and RUE applications. A party with standing may seek judicial review of this decision by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.