

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

In The Matter of the Application of	)	Nos. PLN-50850A/PLN-50850B
	)	
<b>Julian Prosser, on behalf of</b>	)	Soundview Drive Lots 5 and 6
<b>Inhabit, LLC</b>	)	
	)	
For Approval of Reasonable Use	)	FINDINGS, CONCLUSIONS,
<u>Exceptions and Variances</u>	)	AND DECISION

**SUMMARY OF DECISION**

The request for reasonable use exceptions and major variances to allow the construction of a single-family residence on each of two undeveloped lots, Lots 5 and 6 (Block 4) of Fort Ward Estates, adjacent to 2171 Soundview Drive NE, is **APPROVED**. Conditions are necessary to address specific impacts of the proposal.

**SUMMARY OF RECORD**

Hearing Date:

The Hearing Examiner held an open record hearing on the request on June 28, 2018. The hearing record was kept open until July 2, 2018, to receive additional information from the City.

Testimony:

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

Annie Hillier, City Planner  
Julian Prosser, Applicant Representative  
Mary Dombrowski  
Eileen Safford

Exhibits:

The following exhibits were admitted into the record:

1. Letter from Annie Hillier, dated June 23, 2017; Memorandum from Janelle Hitch, P.E., to Annie Hillier, dated June 19, 2017; Memorandum from Assistant Chief Luke Carpenter, Fire Marshal, to Annie Hillier, dated June 9, 2017; Kitsap Public Health District, Pre-Application Checklist, dated June 12, 2017
2. Master Land Use Application, received November 14, 2017
3. Wetland Delineation Report and Buffer Mitigation Plan, Ecological Land Services, Inc., dated September 13, 2017
4. Letter from Michael Staten, Envirotech Engineering, to Julian Prosser, dated October 9, 2017

*Findings, Conclusions, and Decision*  
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*Reasonable Use Exceptions and Variances*

5. Environmental Checklist, dated November 14, 2017
6. Project Narratives, dated November 14, 2017
7. Site Assessment Review Application, dated November 14, 2017
8. Site Plans (four sheets), undated
9. Notices of Complete Application, dated December 12, 2017
10. Information Request, dated December 15, 2017
11. Email from Brandon Clinton to Annie Hillier, dated December 19, 2017, with email string
12. Notice of Application/SEPA Comment Period, dated December 22, 2017; Affidavit of Publication, *Bainbridge Island Review*, dated December 22, 2017
13. Public Comments:
  - a. Email from Rob Furwell to Annie Hillier, dated December 30, 2017
  - b. Email from Carolyn Siscoe to Annie Hillier, dated January 5, 2018
  - c. Letter from Mary Victoria Dombrowski, dated December 26, 2017
  - d. Letter from Eileen Hurley Safford, undated
  - e. Letter from Eileen Hurley Safford to Christy Carr, dated December 1, 2016
14. Wetland Delineation Report and Buffer Mitigation Plan, Ecological Land Services, dated January 17, 2018
15. Notice of Mitigated Determination of Nonsignificance (MDNS), dated May 15, 2018
16. Public MDNS Comments:
  - a. Letter from Mary Victoria Dombrowski to Annie Hillier, dated May 16, 2018
  - b. Email from Carolyn Siscoe to Annie Hillier, dated May 29, 2018
17. Notice of Public Hearing, published June 1, 2018; Affidavit of Publication, *Bainbridge Island Review*, dated June 1, 2018; Certificate of Posting, dated June 1, 2018
18. Public Comments and Staff Response:
  - a. Email from Brian Berdan, dated June 8, 2018
  - b. Email from Carolyn Siscoe to Annie Hillier, dated June 1, 2018, with email string
  - c. Additional Email from Carolyn Siscoe to Ann Hillier, dated June 1, 2018, with email string
  - d. Email from Carolyn Siscoe to Ann Hillier, dated June 6, 2018, with email string
  - e. Email from Ann Hillier to Carolyn Siscoe, dated June 7, 2018, with email string
19. Wetland Delineation Report and Buffer Mitigation Plan, Ecological Land Services, revised June 14, 2018
20. Buffer Impact Map, Figure 3, dated June 15, 2018; Email from Julian Prossor to Annie Hillier, dated June 18, 2018, with email string
21. Staff Report, dated June 28, 2018
22. City PowerPoint Presentation (eight slides)
23. Excerpts from 2016 Comprehensive Plan, pages LU-22 and LU-23
24. City's Proposed Revisions to Conditions of Approval, dated June 28, 2018
25. Fort Ward Action Plan Excerpts, dated November 1996
26. *Safford v. Inhabit LLC*, Kitsap County Superior Court, No 18-2-01783-18, Complaint to Quiet Title for Adverse Possession, and Summons, dated June 26, 2018

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27. Email from Carolyn Siscoe to Annie Hillier, dated June 28, 2018

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

## **FINDINGS**

### Application and Notice

1. Julian Prosser, on behalf of Inhabit, LLC (Applicant), requests approval for reasonable use exceptions (RUEX) and major variances to allow construction of a single-family residence on each of two undeveloped lots, Lots 5 and 6 (Block 4) of Fort Ward Estates, adjacent to 2171 Soundview Drive NE. Both lots are completely encumbered by wetland buffers. The RUEXs would allow for development not to exceed 1,200 square feet on each lot and the Applicant has proposed building envelopes of 1,179 square feet for each lot. The variances would allow for a reduction in the required front yard setbacks, from 25 feet to 5 feet, to ensure that the proposed development envelopes are located as far as possible from a Category III wetland east of the project sites. As mitigation for the proposal, the Applicant would enhance the wetland buffer on-site and replace an improperly installed culvert off-site to restore the natural hydrology of the area wetlands system.<sup>1</sup> *Exhibit 2; Exhibit 6; Exhibit 8; Exhibit 20; Exhibit 21, Staff Report, pages 1 through 9.*
2. The City of Bainbridge Island (City) determined that the applications were complete on December 12, 2017. On December 22, 2017, the City provided notice of the application as required by Bainbridge Island Municipal Code (BIMC) 2.16.020.K, including mailing notice to property owners within 500 feet of the property and to government agencies and departments, publishing notice in the *Bainbridge Island Review*, and posting notice on the property and at the City's other official posting locations. On June 1, 2018, the City provided notice of the open record hearing associated with the application by publishing notice in the *Bainbridge Island Review*, posting notice on-site and at the City's other official posting locations, and mailing notice of the hearing to property owners within 500 feet of the property and to government agencies and departments. As discussed in detail below, the City received comments from applicable government agencies and departments related to its notice materials as well as several comments from area residents on the applications. *Exhibit 9; Exhibit 12; Exhibit 17; Exhibit 21, Staff Report, pages 6 and 7.*

### State Environmental Policy Act

3. The City acted as lead agency and analyzed the environmental impacts of the proposal, as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code

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<sup>1</sup> The property contains two contiguous lots identified as tax parcel numbers 4146-004-005-0004 (Lot 5) and 4146-004-006-0003 (Lot 6). *Exhibit 12.* A legal description of the lots is provided with the site plan. *Exhibit 8.*

of Washington (RCW). The City initially used the optional Determination of Nonsignificance (DNS) process, under Washington Administrative Code (WAC) 197-11-355, and issued notice of the threshold determination with the notice of application. At that time, the City stated that it expected to issue a DNS for the proposal but noted that mitigation measures may be required. The City reviewed the Applicant's Environmental Checklist and other information on file and determined that, with mitigation, the proposal would not have a probable significant adverse impact on the environment. Accordingly, the City issued a Mitigated Determination of Nonsignificance (MDNS) on May 15, 2018, with 16 mitigation measures. The mitigation measures require the Applicant to:

- Protect groundwater and wetland flora and fauna by ensuring that roofing materials are made of a non-leaching material that is not harmful to the environment.
- Temporarily fence the wetland buffer prior to commencing any construction activity.
- Install a split-rail fence along the edge of the native vegetation buffer area.
- Install at least two signs per lot indicating the presence of a protected wetland buffer.
- Obtain approval of the final wetland mitigation plan prior to building inspection.
- Obtain appropriate hydraulic and hydrologic analysis prior to any modification to the culvert.
- Obtain all required permits and approvals prior to culvert replacement, including a right-of-way (ROW) permit and a Critical Areas Permit from the City, and a Hydraulic Project Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW).
- Install the replacement culvert prior to final building permit inspection or provide a surety consistent with BIMC 16.20.180.
- Submit an alternative mitigation proposal if the culvert replacement proves infeasible or the proposal is withdrawn.
- Submit a contingency plan to the City, for approval, addressing impacts from performance standards in the mitigation plan not being met.
- Limit the amount of lighting on the exterior of the residences, install motion sensor lighting on the exterior of the house, and record a covenant limiting the use of pesticides on the properties.
- Restore any disturbances to the ROW from construction activities.
- Submit a bid comparison/analysis to demonstrate that minimal excavation foundation systems have been considered.
- Ensure that surface stormwater from driveways and parking spaces receives treatment prior to being discharged or leaving the site.
- Utilize permeable materials or permeable jointing, where feasible, for hardscaping to allow infiltration.

- Use diffuse flow methods to discharge roof surface stormwater into the wetland where full infiltration on-site is not feasible.

*Exhibit 15.*

4. Despite using the Optional DNS process, the City provided for a comment and appeal deadline for the MDNS of May 29, 2018. The City received two comments specific to its SEPA determination: Mary Dombrowski commented that, with the potential for disturbance to Soundview Drive NE, it would be beneficial to all area residents to have the roadbed moved to the center of the 60-foot ROW; Carolyn Siscoe submitted an email expressing strong opposition to the proposal, noting concerns with wetland protection, traffic, and aesthetic impacts from the proposed development. The MDNS was not appealed. *Exhibit 5; Exhibit 12; Exhibit 13; Exhibit 15; Exhibit 16; Exhibit 21, Staff Report, page 6.*

#### Comprehensive Plan, Zoning, and Surrounding Property

5. Lots 5 and 6 are undeveloped and located on the east side of Soundview Drive NE, in the Fort Ward Estates area of Bainbridge Island. City Planner Annie Hillier testified that the property is designated Open Space Residential, two units per acre (OSR-2), under the City Comprehensive Plan. City staff analyzed the proposal for consistency with the Comprehensive Plan and identified goals and policies applicable to the proposal, including: preserving and enhancing the Island's natural systems, natural beauty, and environmental quality; encouraging sustainable development; and protecting and enhancing wildlife, fish resources, and ecosystems.<sup>2</sup> *Exhibit 21, Staff Report, pages 8 and 9; Exhibit 23; Testimony of Ms. Hillier.*
6. The property is within the "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." Single-family dwellings are a permitted use in the R-2 zone. *BIMC 18.06.020.C*. The proposed single-family residences would be subject to the Fort Ward Overlay design guidelines and would be reviewed against such guidelines at the time of building permit submittal. The lots do not meet the minimum lot dimensions of *BIMC 18.12.010*. Under *BIMC 18.30.050*, however, nonconforming lots that were lawfully created and recorded with the county auditor's office, as occurred here, may be used for permitted purposes notwithstanding the minimum lot area, width, or depth requirements of the municipal code. *Exhibit 21, Staff Report, pages 4 and 9.*

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<sup>2</sup> 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. *Exhibit 21, Staff Report, pages 8 and 9.*

7. Surrounding properties are also designated OSR-2 and zoned R-2. Properties to the west and north contain single-family residences. Three properties to the south each received similar RUEXs and major variances in 2017 for the development of single-family residences. Properties to the east are undeveloped and contain a Category III wetland and its associated buffer. *Exhibit 21, Staff Report, pages 4 and 5.*

#### Critical Areas

8. As noted above, a wetland buffer associated with the Category III wetland to the east extends over the entirety of the property. Ecological Land Services (ELS) prepared a Wetland Delineation Report and Buffer Mitigation Plan (Wetland Report) for the Applicant, dated September 13, 2017. ELS later revised the Wetland Report on January 17 and June 14, 2018, as additional project information became available. The Wetland Report<sup>3</sup> delineated a Category III wetland (Wetland A), east of Lot 6 and extending south along the eastern edge of Lot 5, requiring a 150-foot buffer. *BMC 16.20.160.* Because wetland buffers do not extend beyond improved roads, however, the Wetland Report determined that the effective wetland buffer would be 110 feet, extending across both properties and up to Soundview Drive NE. Wetland A receives direct precipitation and surface water runoff from adjacent properties. During winter and spring, Wetland A flows north through a culvert under Belfair Avenue, into a wetland north of Belfair Avenue, and then northerly through a series of wetlands into a stream that flows into Blakely Harbor. The Wetland Report observed that the culvert under Belfair Avenue was improperly installed and only allows water to travel between Wetland A and the greater wetland system beyond the culvert during high precipitation events. *Exhibit 3; Exhibit 14; Exhibit 19.*
9. The municipal code provides that wetland buffers must remain undisturbed or as enhanced vegetation areas for the purpose of protecting the integrity, function, and value of wetland resources. Any buffer modification proposed must be through an approved buffer enhancement plan meeting the requirements of *BIMC 16.20.180*, including a buffer enhancement plan. *BIMC 16.20.140.* As described below, the Wetland Report includes a buffer enhancement plan. In addition, the Applicant would provide permanent wetland buffer and fencing. *BIMC 16.20.140.I. 6. Exhibit 19; Exhibit 21, Staff Report, page 2.*
10. The Wetland Report evaluated mitigation sequencing and determined that, although no work would take place in Wetland A, wetland buffer impacts would be unavoidable because the wetland buffer encumbers both lots. The Wetland Report indicated, however, that siting the two residences as close to Soundview Drive NE as possible, through reducing the front yard setback, would alleviate wetland buffer impacts. The Wetland Report noted that developing the two proposed residences, with driveways,

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<sup>3</sup> All references to the “Wetland Report” are intended to refer to the third iteration of the report, dated June 14, 2018.

would result in permanent impacts to 5,308 square feet of the wetland buffer. As on-site mitigation to mitigate for impacts to the wetland buffer, the Applicant would remove approximately 11,221 square feet of non-native shrubs and grass from the wetland buffer, and plant approximately 5,913 square feet of native, replacement vegetation. The Applicant would also install a line of lower growing conifer trees and a split-rail fence along the buffer edge to further protect the wetland buffer. The mitigation plan also requires maintenance of the planting areas and monitoring of the buffer mitigation area for seven years, and includes a contingency plan if performance standards are not met. The Bainbridge Island Land Trust was contacted, but no opportunities for additional wetland restoration or enhancement on other area properties were identified. *Exhibit 19; Exhibit 21, Staff Report, pages 11 through 17.*

11. The Wetland Report also identified off-site mitigation measures that the Applicant would employ to mitigate for impacts to the wetland buffer. The wetlands in the Fort Ward Estates are part of one large system that has been divided into smaller individual wetland areas by roads. The Wetland Report determined that the culvert under Belfair Avenue was placed at an elevation that does not allow the continued flow of water into the northern wetland areas, which expanded the wetland size south of Belfair Avenue and altered the natural hydrology of the wetland system. As off-site mitigation, the Applicant would replace the improperly installed culvert. The Wetland Report noted that doing so would restore the hydrologic continuity of the area wetlands system, improve wildlife passage, and increase diversity within the northern wetlands. The Applicant would need to obtain all required permits for a culvert replacement, including a ROW permit from the Department of Public Works, an HPA from WDFW, and a Critical Areas Permit from the Department of Planning and Community Development prior to commencing construction. *Exhibit 19; Exhibit 21, Staff Report, pages 11 through 17.*
12. Planting native trees and shrubs around each proposed home would mitigate stormwater generated on the developed lots. Low Impact Development (LID) techniques would also be used, including pervious pavement to allow stormwater to infiltrate. Rooftop rainwater would be discharged toward the wetland buffer via splash blocks. The wetland buffer would provide filtration before discharging to the wetland. Envirotech Engineering prepared a Soils Report for the Applicant, dated October 9, 2017. The Soils Report determined that stormwater infiltration facilities would not be feasible, due to seasonal groundwater and permanent groundwater existing at shallow depths of less than one foot beneath potential drainage facilities. The Report recommends dispersion or other stormwater management means for the residential developments. The Soils Report also determined that the existing bearing soils and conditions are not suitable for traditional foundation construction. The report recommends removal of topsoil, with imported and engineered fill of a compacted depth of at least 20 inches placed and compacted within the project area. The Applicant would submit a stormwater management plan meeting minimum requirements 1 through 9 of the 2014 Stormwater

Management Manual for Western Washington (SWMMWW), as adopted by the BIMC, at the time of building permit application. *Exhibit 4; Exhibit 19; Exhibit 21, Staff Report, page 4.*

13. The City code identifies aquifer recharge protection areas (ARPAs). BIMC 16.20.100.E.2(b) provides that an ARPA must include all existing native vegetation on a site, up to a maximum of 65 percent of the total site area. A lower percentage is allowed if necessary to achieve a development area of at least 12,500 square feet on a parcel. The City determined that, because the two lots do not contain 12,500 square feet, an ARPA designation is not required. *Exhibit 21, Staff Report, pages 17 and 18; Exhibit 24.*

#### Reasonable Use Exceptions

14. As noted above, the Applicant proposes to construct a single-family residence, with 1,179 square feet of lot coverage, on each of two lots entirely covered by wetland buffers. The City code provides for reasonable use exceptions (RUEXs) where the City's critical areas ordinance (Chapter 16.20 BIMC) would deny all reasonable use of the property; where there are no reasonable alternatives with less impact to the critical area or its required buffer; where the proposal minimizes the impact through mitigation sequencing; where the proposed impact is the minimum necessary; where the inability to derive reasonable use of the property is not the result of actions by the Applicant; where the proposed total lot coverage does not exceed 1,200 square feet for residential development; where the proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the property; and where any alterations are mitigated. *BIMC 16.20.080.*
15. 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:
  - The wetland buffer encumbers the entire property. Because of the small size of the lots, other techniques such as buffer averaging would not be sufficient to create a functional building envelope. Obtaining a RUEX is the only way to create buildable lots.
  - The wetland and buffer were existing conditions and not created by the Applicant or the previous owner.
  - Strict application of the critical areas code would deny all reasonable use of the lots.
  - One single-family residence would be built on each lot and each residence would have a total footprint of less than 1,200 square feet. Additionally, through careful architectural design each residence would blend with the existing neighborhood. The proposed residences would be modest in scope and have the minimum necessary impacts on the wetland buffer.
  - ELS provided a sensible mitigation plan that, to the maximum extent feasible, mitigates the impacts on-site as well as provides off-site mitigation through

replacing the culvert under Belfair Avenue. Replacing the culvert would provide a functional lift for the existing wetland system. Replanting native vegetation and removing invasive vegetation would also enhance the existing habitat.

- The proposal would not pose an unreasonable threat to public health, safety, or welfare on or off the site and would be consistent with other building and zoning regulations.

*Exhibit 6.*

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

- The Applicant would not be able to develop the lots without the requested RUEX. With lot areas of 6,970 and 8,712 square feet, the zoning code would support approximately 1,394 and 1,742 square feet, respectively, on the two lots. Lot coverage of 1,200 square feet, however, is considered reasonable on lots completely encumbered by critical areas or associated buffers. The Applicant has proposed lot coverage of 1,179 square feet of lot coverage on each lot.
- The project avoids impacts to the wetland by locating the development within the buffer and outside of the wetland itself, in areas dominated by grasses and non-native shrubs. The project would minimize impacts by locating the development as far away from the wetland as possible, in a portion of the buffer with low function. The associated variance request, if granted, would further ensure development does not impact the wetland. The project would use pervious pavement to reduce stormwater impacts.
- The proposal would include compensatory mitigation for permanent buffer impacts through installation of native plants around the development and protection of the buffer with a line of conifer trees and a fence.
- Replacing the culvert under Belfair Avenue would reconnect a historically connected wetland system on both sides of the right-of-way that was disrupted due to improper culvert installation.
- The Applicant met with staff on May 10, 2018, and further reduced the area of impact on Lot 6. With these changes, the proposal would be the minimum necessary to allow for reasonable use of the property.
- The land was approved for division on 1960 as part of the For Ward Estates Division 1 Plat, long before the Applicant or the Applicant's predecessor purchased the property.
- The wetland delineation report and mitigation plan indicates that the size of Wetland A has continued to increase since the culvert under Belfair Avenue was first improperly installed. Replacing the culvert would improve hydrologic connectivity and wildlife passage, and increase diversity within the northern wetlands. This would also allow for greater plant diversity to spread throughout the wetland system, improving water quality. Although replacing the culvert may

shrink the boundary of the wetland over time, it would not shrink the wetland beyond its original boundary as delineated in 1992. In addition, the water quality and habitat functional lifts would outweigh the impacts from the reduced size of Wetland A.

- The wetland delineation report and mitigation is based on best available science and would adequately compensate for impacts to the critical area, resulting in no net loss of critical area functions and values. Replacing the culvert may, in fact, result in net ecological gains for the critical area, as the wetland would regain its history hydrologic connectivity.

*Exhibit 21, Staff Report, pages 10 through 16.*

#### Major Variances

17. *Variances* are the mechanism by which the City may grant relief from the provisions of the zoning ordinance where practical difficulty renders compliance with certain provisions of the code an unnecessary hardship, where the hardship is a result of the physical characteristics of the subject property and where the purpose of the comprehensive plan is fulfilled. *BIMC 2.16.120*. Here, a wetland buffer covers the entirety of both lots. The lots were created in 1960, prior to the enactment of the critical areas ordinances. The Applicant requests a variance from the required 25-foot front yard setback to five feet in order locate each proposed residence as far away from the wetland as possible. With the variance, the future residences would still be located approximately 40 feet from the developed portion of Soundview Drive NE. *Exhibit 21, Staff Report, pages 19 through 21.*
18. City staff analyzed the proposal for compliance with the variance criteria under *BIMC 2.16.120* and determined:
  - The requested variance to reduce the front yard setback from 25 feet to 5 feet would be consistent with all other provisions of the municipal code.
  - The need for a variance has not arisen from previous actions taken or proposed by the Applicant.
  - Reasonable use of the property would be denied without a RUEX because of the presence of wetland buffers encumbering the entire property. Granting the variance would allow less intrusion into the wetland buffers by locating the proposed single-family residences as far from the wetland edge as possible.
  - Denying the variance would increase impacts to the wetland. Additionally, the ROW for Soundview Drive NE is 60-feet wide and the developed portion of the ROW is approximately 20-feet wide, located on the western edge of the ROW. Accordingly, despite the reduced front yard setback, the single-family residences would be located approximately 40 feet from the developed portion of Soundview Drive NE, providing a physical separation from the developed portion of the ROW exceeding the 25-foot setback requirement.

*Exhibit 21, Staff Report, pages 18 through 21.*

### Written Comments

19. The City received written comments from applicable departments and agencies reviewing the proposal, including:
- Department of Public Works Development Engineer Janelle Hitch noted that a stormwater management plan would be required, that a shared driveway between lots should be assessed to minimize hard surfacing, and that low impact development techniques should be considered. She also noted that all work would be subject to transportation impact fees under Chapter BIMC 15.30 and that a ROW permit would need to be obtained prior to any work being performed within the City's ROW.
  - Fire Marshal and Assistant Fire Chief Luke Marshal commented that the project must comply with all provisions of the municipal fire code and that future development may require the installation of fire hydrants or residential fire sprinklers.
  - Kitsap Public Health District noted that a Building Clearance for Sewered Properties (Sewered BC) permit would be required prior to building permits being issued.
  - The U.S. Army Corps of Engineers (Army Corps) provided an email, dated December 19, 2017, detailing the circumstances that would require an Army Corps permit for the work replacing the culvert.

*Exhibit 1; Exhibit 11.*

20. The City also received several comments from area residents in response to its notice materials. Specifically:
- Rob Fulwell wrote the City expressing opposition to the proposal. He stressed that wetlands and their associated buffers exist for good reason, that protected areas in the neighborhood are already under siege, and that any residence developed on the property would likely have continual water and pest problems.
  - Brian Berdan wrote expressing opposition to the proposal, also noting that wetland buffers should be respected.
  - Carolyn Siscoe provided several comment letters in opposition to the proposal. Specifically, she expressed concern that reducing front yard setbacks would decrease front gardens and natural sound barriers and create a "blight" in the neighborhood inconsistent with other properties. Ms. Siscoe also expressed concern over: the proposed home sizes the aesthetic impacts from development, the lack of consideration of wildlife and wildlife corridors, and the need for additional study related to wetland impacts and impacts to area wildlife.
  - Mary Dombrowski wrote the City with concerns about the alignment of the paved portion of Soundview Drive NE and associated safety issues. She also expressed concern over potential wetland impacts, aesthetic impacts from the buffer

reduction, and the possibility that title to the lots in question is clouded because other residents have used the lots continuously for approximately 30 years.

- Eileen Safford provided several comment letters in opposition to the proposal. Specifically, she expressed concern over the wetland and wetland buffers associated with the property being “chipped away at since the current sewer system made building on surrounding lots possible.” She also reiterated Ms. Dombrowski’s concerns about the alignment of Soundview Drive NE.

*Exhibit 13; Exhibit 18.*

#### Testimony

21. City Planner Annie Hillier testified generally about the history of the property and the process that occurred in reviewing the proposal. She stressed that, in reviewing the proposal, the City sought to ensure that the off-site wetland received the greatest protection and that the current proposal would achieve that. Ms. Hillier noted that three lots south of the subject property received similar RUEs and variances in 2017. She explained that, due to the small lot sizes, opportunities for on-site mitigation to wetland buffer impacts would be limited but the Applicant would also provide off-site mitigation through replacing the improperly installed culvert under Belfair Avenue. Ms. Hillier noted that additional approvals would be required prior to culvert replacement and that, if culvert replacement were deemed infeasible, the approved RUE would need to be modified. She explained that the City requested additional information throughout the review process and that resulted in the Applicant submitting three iterations of the Wetland Report. She noted that the wetland delineation did not change between the three versions of the Wetland Report, that the second version added information about the culvert replacement, and that the third version incorporated changes that the Applicant proposed to further reduce wetland buffer impacts on Lot 6. Ms. Hiller explained that the City independently reviewed the Wetland Report (one of the City’s long-range planners was trained as a wetland biologist) and concurred with its assessment. She also noted that the City has no plans to realign Soundview Drive NE. *Testimony of Ms. Hillier.*
22. Applicant Representative Julian Prosser testified that he plans to live with his family in one of the two residences and use the other residence as an investment property. He noted that, currently, Soundview Drive NE is not well maintained and that the proposal would enhance the streetscape and be an asset to the neighborhood. Mr. Prosser explained that he is an architect and would ensure that appropriate engineering and construction practices are used during project development. *Testimony of Mr. Prosser.*
23. Mary Dombrowski testified about the history of the Fort Ward area. She noted that the area is part of a national historic district and that, several years ago, interested stakeholders came together to develop the Fort Ward Action Plan. The City later adopted much of the plan and the group received accolades for producing the plan. Ms. Dombrowski stressed that she would like to see development comply with the Fort Ward

Action Plan, especially in relation to garage location and the potential for a shared driveway serving both lots. She also reiterated the concerns she raised in the written comments she previously submitted to the City and stressed that now would be the time to move Soundview Drive NE south of Belfair to the center of the ROW. There is significant traffic in the area, especially related to school bus stops, and either having the ROW of corrected or clearly demarcating where the property line for the proposal ends and the ROW of begins would be beneficial. *Testimony of Ms. Dombrowski.*

24. Eileen Safford testified that she is a long-time neighboring property owner and that she and her husband believe they have a legitimate claim to these properties through adverse possession. At the hearing, Ms. Safford brought a copy of a lawsuit she filed in superior court, the day before the hearing, further bolstering this argument. In addition to the adverse possession claim, Ms. Safford reiterated many of the concerns she previously expressed in written comments submitted to the City, including concerns about wetland impacts, inappropriate development, and the alignment of Soundview Drive NE. In addition, she expressed the belief that, because the Applicant was aware that the property was encumbered by wetlands when he purchased it, a RUEX should not be granted. *Testimony of Ms. Safford.*
25. In response to public testimony, Ms. Hillier noted that the proposal would be reviewed against the Fort Ward Design Guidelines at the building permit stage and that traffic impacts would also be evaluated when the Applicant applies for building permits. *Testimony of Ms. Hillier.*
26. Mr. Prosser testified that a shared driveway for the two lots was considered early on during the review process. It was determined, however, that the Applicant could achieve a project design with fewer impacts to the wetland buffer without a shared driveway than would be possible with a shared driveway. Mr. Prosser also stated that the Applicant would agree to a condition requiring that a clear demarcation between the property line and the ROW on Soundview Drive NE be provided, such as through use of a split-rail fence. *Testimony of Mr. Prosser.*

#### Staff Recommendation

27. Ms. Hillier testified that City staff reviewed the proposal and recommend approval with the 16 SEPA mitigation conditions, and several additional conditions. Mr. Prosser testified that the Applicant would comply with the City's recommended conditions. *Exhibit 21, Staff Report pages 1 through 4; Testimony of Ms. Hillier; Testimony of Mr. Prosser.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has authority to hear and approve, approve with conditions, deny, or remand a request for a Reasonable Use Exception or Major Variance. *BIMC 2.14.030; BIMC 2.16.100; BIMC 2.16.120; BIMC 16.20.080.E.*

### Criteria for Review

#### *Reasonable Use Exceptions*

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*

#### *Major Variance*

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;

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- 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.

*BIMC 2.16.120.E.1.*

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 meet the Reasonable Use Exception criteria of BIMC 16.20.080.F.** The City provided reasonable notice and opportunities to comment on the applications and the City's SEPA determination. The City determined that, with mitigation, the proposal would not have a significant adverse impact on the environment. The MDNS was not appealed. A wetland buffer covers both Lots 5 and 6, and strict application of the City's critical areas ordinances would deny all reasonable use of the property. Neither the City nor public comments suggested any alternative uses for the property. The Applicant is proposing lot coverage of 1,179 square feet on each lot. The Applicant submitted a Wetland Report setting out mitigation sequencing that would minimize the impact on critical areas. The Wetland Report also determined that the proposal would be the minimum necessary to allow reasonable use of the property. The lots were created in 1960, prior to the adoption of the City's critical area ordinances, and are not the result of any action of the Applicant. Public comment was received in support of protecting wetlands and wetland buffers, as well a neighborhood character and concerns about additional traffic. No evidence, however, was presented that the proposal would pose an unreasonable threat to the public health, safety, or welfare on or off the property. The Applicant's Wetland Report contains monitoring and contingency plans,

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along with enhancement of the remaining wetland buffer on the two lots. The Applicant would replace a culvert under Belfair Avenue to restore the natural flow of water and better connect the wetlands north and south of Belfair Avenue. The City determined that the Wetland Report and mitigation plan is based on the best available science and would result in no net loss of critical area functions and values. The Wetland Report and mitigation plan address the cumulative impacts of the action on both lots. No information was provided about whether additional RUEXs in the area would be required. With conditions, the proposal would be consistent with the City's other applicable regulations and standards, except for the requirement for a 25-foot front yard setback.

Conditions are necessary to ensure that the proposal complies with the 16 conditions required by the MDNS. In addition, conditions are necessary to ensure that the proposal would be subject to the Fort Ward Overlay design guidelines; the proposed residences would meet all setback and height requirements for the zoning district (apart from the 25-foot front yard setback); the Applicant submits a stormwater management plan at the time of first building permit application; building permits comply with the City's adopted Fire Code; the Applicant records a notice to title of the presence of the wetland, wetland buffer, and mitigation plan; and the Applicant obtains all other required permits, including an HPA for replacement of the culvert. In addition, in light of the pending litigation involving the adverse possession claim, the Applicant shall sign a "Hold Harmless Agreement," prepared in conjunction with the City, clearly indicating that: the matter involves a civil dispute between the Applicant and the adverse possession claimant; that by granting the RUEXs and variances the City in no way is involving itself in the dispute between the parties; and that the Applicant proceeds at its own risk in moving forward with the proposal prior to adjudication of the adverse possession claim in superior court.<sup>4</sup> *Findings 1 – 27.*

2. **With conditions, the proposal would meet the Major Variance criteria of BIMC 2.16.120.E.** The variance is consistent with all other provisions of the BIMC, except the front yard setback. It is consistent with the Comprehensive Plan, which encourages sustainable development, as well as preservation and enhancement of the city's natural systems, natural beauty, and environmental quality. The need for a variance has not arisen from previous actions taken or proposed by the Applicant. The variance is necessary for the preservation and enjoyment of a substantial property right, possessed by other property in the same vicinity and zone, i.e., the ability to construct a single-family residence on a buildable lot. This property right would be denied because of the special circumstances on the property in question, due to the wetland buffer covering the property. Granting the variance would not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the

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<sup>4</sup> Although not directly on point, *Halverson v. Bellevue*, 41 Wn. App. 457 (1985), cautions against moving forward with development with an adverse possession claim pending.

property is located. The variance is requested because of special circumstances related to the presence of a nearby Category III wetland and a wetland buffer that covers the two lots. As noted above in Conclusion 1, conditions are necessary to ensure that the proposal complies with the MDNS and all other federal, state, and local requirements as well as requirements unique to this proposal. *Findings 1 – 27.*

### **DECISION**

Based upon the preceding findings and conclusions, the request for reasonable use exceptions and major variances to allow construction of a single-family residence on each of two lots, Lots 5 and 6 (Block 4) of Fort Ward Estates, adjacent to 2171 Soundview Drive NE, is **APPROVED**, with 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 the environment. Examples of non-leaching materials are, but are not limited to, metal and tile roofs. Any alternative method proposed requires approval by the City, prior to final building permit issuance, and must address BIMC water quality standards, Chapter 13.24 BIMC, to ensure that wetland flora and fauna functions and values are maintained/enhanced.
2. Prior to commencing any construction activity, the Applicant shall have the wetland buffer temporarily fenced between the areas of construction activity, a maximum of 15 feet from the proposed residence. The fence shall 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 native vegetation buffer area. The rails shall be high enough to allow small mammals and wildlife to pass through. The fence shall be indicated on the building permit application and in place prior to final inspection on the building permit.
4. A minimum of two signs per lot indicating the presence of a protected wetland buffer shall be placed on the fence, prior to final inspection on the building permit. Signs shall be made of metal or a similar durable material and shall be between 64 and 144 square inches in size.
5. The wetland mitigation plan, including mitigation goals and objectives, performance standards, maintenance and monitoring measures, and contingency actions, shall be submitted with the building permit application and approved prior to final building

inspection. All plantings shall be installed prior to final building permit inspection, or a surety shall be provided in accordance BIMC 16.20.180.

6. Any modification to the culvert must be supported with a hydraulic and hydrologic analysis consistent with the Department of Ecology's 2014 Stormwater Management Minimum Requirement #8 (MR #8), Wetlands Protection and must include a quantitative downstream analysis of the downstream system. The quantitative downstream analysis shall demonstrate that the storage of stormwater and attenuation of peak flows will not be altered to the detriment of the downstream property owners, wetlands, and drainage channels and conveyances. The Wetlands Protection analysis must demonstrate compliance with Guide Sheet 3B to maintain the existing hydroperiod of the wetlands; the analysis shall demonstrate that daily and monthly inputs to the adjacent wetland and downstream wetlands do not vary by more than 20% and 15% respectively, compared to existing conditions. Any anticipated impacts to landowners or downstream flow increases must be mitigated up to the 100-year storm discharge. These analyses shall be submitted with the Critical Areas permit (Condition #7).
7. All required permits and approvals shall be obtained prior to culvert replacement, including a Right-of-Way (ROW) Permit from the Department of Public Works, a Hydraulic Project Approval (HPA) from the Department of Fish and Wildlife, and Critical Areas Permit from the Department of Planning and Community Development. A copy of the HPA shall be included in the materials submitted with the Critical Areas Permit application and ROW Permit application.
8. The replacement culvert shall be installed prior to final building permit inspection for the first SFR, or an assurance device shall be provided in accordance with BIMC 16.20.180.
9. If the required analyses (Condition #6) prove the culvert replacement infeasible or the Applicant decides to retract the culvert replacement proposal, an amendment to the RUEX with an alternative mitigation proposal shall be approved prior to building permit issuance, and conditions 6-8 do not apply.
10. 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.
11. To reduce impacts to the wetland, the Applicant shall limit the amount of lighting on the exterior of the residence to the minimum necessary, shall install motion sensor lights to the rear of the house facing the wetland, and record a covenant to limit the use of pesticides on the properties.

12. Disturbance to the 60-foot-wide right-of-way (ROW) from construction activities shall be restored in accordance with the Public Works ROW restoration requirements. Disturbed road shoulders and vegetation strips shall be replaced with the standard 3-foot-wide crushed surfacing top course gravel ballast shoulder. Disturbed areas beyond the road prism shall be regraded to provide drainage via grassed swales and/or replanted. The house construction shall allow drainage from the ROW to continue to the wetlands along the side yards to match existing drainage patterns, where it occurs.
13. Each lot shall submit a bid comparison/analysis to demonstrate that the Applicant has considered utilizing the minimal excavation foundation systems per the 2012 Low Impact Development Guidance Manual for Puget Sound as a means of minimizing impacts to the site and adjacent wetlands. The bid/comparison analysis shall demonstrate that the Applicant has engaged with the appropriate design and construction professionals to explore this foundation system option. The bid shall be obtained from a designer or installer with previous experience building with this technology.
14. Surface stormwater from driveway and parking spaces shall receive pre-treatment prior to discharging to the wetlands or leaving the site by directing stormwater to vegetated dispersion strips, rain gardens where soils allow, or the use of permeable pavement (outside of the ROW only), or other alternatives consistent with MR #5, On-Site Stormwater Management of the stormwater manual.
15. Hardscaping shall be constructed of permeable materials or contain wide permeable jointing where feasible to allow infiltration or shallow subsurface filtration of surface stormwater.
16. Diffuse flow methods (i.e., BMP C206: Level Spreader, or BMP T5.10B: Downspout Dispersion Systems) shall be used to discharge roof surface stormwater into the wetland where full infiltration on-site is not feasible.

**Project Conditions:**

17. The proposed residence shall meet the setback and height requirements for the R-2 zoning district, with the exception of the 25-foot front setback. To ensure the 5-foot front yard setback is met, the Applicant shall have the setback marked and inspected by planning staff prior to commencing construction.
18. The Applicant shall record a notice to title of the presence of the wetland, wetland buffer, and mitigation plan, prior to the issuance of the building permits.
19. 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.

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20. A stormwater management plan is required and must meet minimum requirements 1 through 9 of the 2014 SWMMWW as adopted by the Bainbridge Island Municipal Code at the time of the first building permit application.
21. A building clearance for Sewered Properties (Sewered BC) is required prior to the issuance of the building permits.
22. The proposal and future building permits shall comply with all provisions of the adopted Fire Code. Future development may require the installation of fire hydrant(s) or residential fire sprinklers to meet fire flow requirements.
23. The Applicant shall clearly demarcate the boundary between the properties and the undeveloped ROW associated with Soundview Drive NE through use of a split rail fence, landscaping, or other such visual device.
24. In light of the pending litigation involving the adverse possession claim, the Applicant shall sign a "Hold Harmless Agreement," prepared in conjunction with the City, clearly indicating that: the matter involves a civil dispute between the Applicant and the adverse possession claimant; that by granting the RUEs and variances the City in no way is involving itself in the dispute between the parties; and that the Applicant proceeds at its own risk in moving forward with the proposal prior to adjudication of the adverse possession claim in superior court.

Decided this 17<sup>th</sup> day of July 2018.



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ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center