

July 28, 2014

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

**REPORT AND DECISION**

**Subject:** Hamilton Reasonable Use Exception/Variance  
Julian SEPA Threshold Determination Appeal

**File number:** RUE/VAR12063

**Location:** 5961 Rose Loop NE

**Request:** A Reasonable Use Exception (RUE) to eliminate the minimum buffer requirement and building setback from the steep slope on the property to construct a single-family residence with total lot coverage not to exceed 1,200 square feet; also a major variance to reduce the front yard building setbacks from 25 feet to 15 feet to accommodate the future house on the property.

**Environmental Review:** A Mitigated Determination of Non-significance (MDNS), in accordance with the State Environmental Policy Act (SEPA) was issued on November 5, 2013, and timely appealed.

**Applicant:** Thomas Hamilton  
5967 Rose Loop NE  
Bainbridge Island, WA 98110

**Appellant:** Mark Julian  
5955 Rose Loop NE  
Bainbridge Island, WA 98110

*Represented by*  
Aaron M. Laing, Attorney  
1420 5<sup>th</sup> Avenue, Suite 3400  
Seattle, WA 98101

## FINDINGS OF FACT

### A. Site Characteristics

1. Assessor's Record Information:

- a. Tax Lot Number: 342502-1-024-2004
- b. Owners of record: Thomas and Karen Hamilton
- c. Lot size: 0.23 acres or 10,018 square feet
- d. Land use: The property is developed with portions of a deck, stairs and seawall associated with the property adjacent to the east, also owned by Thomas and Karen Hamilton. Waterward of the ordinary high water mark the property is developed with a dock, pier and float used by the Hamiltons. A boat house is located on the dock. On the south side of the property, the Hamiltons have installed a series of holding tanks for their septic system in accordance with plans approved by the Kitsap County Health District.

2. TERRAIN:

The property has a relatively flat bench running north from the street for a distance of approximately 53 feet. After this point the property slopes toward Eagle Harbor with inclinations exceeding 40%. The slope is vegetated with a combination of ground cover and trees, including fir, alder, cherry and cedar.

3. SITE DEVELOPMENT:

The site is developed with a septic tank, dock and pier, a seawall, stairs and portions of two decks. One of the decks is attached to the adjacent house to the east, with a portion of the deck extending from the adjacent property west onto the project site.

4. ACCESS:

Vehicular access to the site is from Rose Loop.

5. PUBLIC SERVICES:

- a. Police: Bainbridge Island Police Department.
- b. Fire: Bainbridge Island Fire District.
- c. Septic: System is located on a separate lot east of the project site.
- d. Water: Rose Avenue Water Association

6. SURROUNDING USES:

- a. North: Eagle Harbor.
- b. East: Single-family residential.
- c. South: Single-family residential.
- d. West: Single-family residential.

7. EXISTING ZONING:

The site is zoned R-2, two units per acre.

8. SURROUNDING ZONING:

Properties east and west of the project site, on the north side of Rose Loop, are zoned R-2. Properties south of the project site are zoned R-1, one unit per acre.

9. EXISTING COMPREHENSIVE PLAN DESIGNATION:

The City Comprehensive Plan Land Use Map designates the site Open Space Residential two units per one acre (OSR-2).

10. SURROUNDING COMPREHENSIVE PLAN DESIGNATION:

Properties to the east and west of the project site are also designated OSR-2. Properties to the south are designated Open Space Residential one unit per acre (OSR-1).

**B. Procedural Background**

11. A pre-application conference was held on November 27, 2012. RUE and variance applications were submitted on May 29, 2013, and deemed complete on June 25, 2013. A Notice of Application and SEPA comment period was sent to all adjoining property owners and appropriate agencies and published in the paper of record June 28, 2013, with a comment period ending on July 12, 2013. Comments were received from 11 property owners in the vicinity of the project site, six of whom were in support of or unopposed to the proposed project. Many of the concerns expressed by the other five commenters focused on the insufficiency of the application information to support an adequate analysis of the proposal's potential impacts. A preliminary geotechnical assessment letter issued by Aspect Consulting on July 24, 2013, (Exhibit 7) had merely opined that the project was "feasible" and recommended a more complete evaluation based on site-specific subsurface data and a detailed slope stability analysis.

12. A Mitigated Determination of Non-significance (MDNS) was issued and sent to the requisite agencies on November 5, 2013. It was timely appealed by the neighboring property owner to the west, Mark Julian, on November 26, 2013. The primary issues raised by the SEPA appeal targeted the timing of the geotechnical study required to assess the stability of the steep slope lying immediately north of the applicant's proposed residential building site, the results of which will inform both the variance and reasonable use exception (RUE) applications. City staff's proposed conditions deferred the geotechnical study to the building permit application stage; appellant Julian argued that it should be performed as part of the initial application package.

13. A consolidated public hearing on the above-referenced applications and SEPA appeal was opened by the Hearing Examiner on January 16, 2014. After some preliminary discussion, the Examiner ruled that both BIMC 16.20.090.A and common sense mandated that the full geotechnical study be issued before the public hearing in order to obtain the essential facts needed to perform the regulatory analysis. Accordingly, the Hamilton RUE/variance applications were remanded to the Planning and Community Development Department for performance of the required geotechnical critical area report and subsequent reconsideration of the MDNS in the light of the geotechnical study's findings and recommendations. The consolidated public hearing on the applications and SEPA appeal was continued pending completion of the critical area report and its staff review, to be rescheduled thereafter at the applicant's request.

14. The continued hearing was reopened on July 17, 2014, and additional exhibits and testimony were received. Because City staff had only revisited its prior analysis in a rather minimal way, the Examiner ruled that the SEPA appeal remained in effect to the extent of authorizing further review of the adequacy of the MDNS conditions in the light of the new information received.

15. At midmorning of the reopened hearing, since most of the contested appeal issues had now devolved into a detailed rehearsal of controversies of marginal public import existing along the common boundary between the Hamilton and Julian properties, the Examiner instituted an extended hearing recess to allow the two neighboring parties to attempt to negotiate a resolution of these particular questions. This resulted in a stipulation between Hamilton and Julian regarding the setbacks to be observed by new construction along their common boundary (Exhibit 25). The record was also left open post-hearing for the receipt generally of further written comments on proposed project conditions.

### **C. New Information and Scope of Review**

16. Despite the somewhat elaborate legal framework, the RUE and variance regulatory two-step is mostly about trying to find a practical way to squeeze development into a constrained location in a manner that avoids unacceptable impacts to critical areas, the surrounding neighborhood and the public interest. By definition, the situation is challenging and no outcome is likely to make all problems disappear. The realistic target is to come up with an imperfect solution that completely satisfies no one but everybody can live with.

17. The major item of new information generated by the remand and continuance process was a geotechnical report dated May 8, 2014, by Aspect Consulting (Exhibit 14) based on site investigations featuring two borings on the western half of the parcel. B-1 at about 50 feet south of Rose Loop was bored to a depth of 61.5 feet, while B-2 nearer the road was drilled to 16.5 feet. Both holes terminated in stable and undisturbed Pre-Vashon deposits. The flat southern portion of the site has been filled to depths reaching 11 feet. Downslope from a partially developed area traversed by rockeries lies a small, isolated perched perennial groundwater spring. The slope showed no evidence of recent slide activity, but the steepest lower portions were designated as presenting a moderate surficial slide risk. The fine-grained soils are considered erosional.

18. Based on its investigations, Aspect defined an acceptably stable building footprint area at the parcel's southwest corner. A nearly square Foundation Zone 1 contains perhaps a little more than 2000 square feet, while a smaller trapezoidal Foundation Zone 2 extending further waterward along the parcel's western boundary adds another nearly 400 square feet. Construction within Zone 1 can employ a structural slab or mat foundation, while the less stable Zone 2 would require a deep foundation. If Foundation Zone 1 is reduced on its southern side by 15 feet to accommodate a road setback and by 5 feet on its western edge for a side yard, a building envelope of about 1350 square feet would remain. The maximum footprint that can be approved under a RUE is 1200 square feet. When the Aspect envelope is compared with the applicant's original May 8, 2013, site plan, the effect of the geotechnical study is primarily to require the eastern wall of the house to be relocated further west. Based on an adequate development area existing in Foundation Zone 1, only deck construction should be authorized in Zone 2, which both less stable and closer to the steep slope.

19. In addition to defining the two types of foundation zones, the Aspect study also contained recommendations for aggressively planting the slope with deep-rooted shrubs to increase soils stability, compaction of existing fill or its removal down to the Pre-Vashon substrate, and tightlining both site runoff and the slope groundwater seep down to a shore outfall. The staff's supplemental memorandum (Exhibit 15) summarized Aspect's findings, which it regarded as supportive of the front yard setback variance request, and proposed modifying a permit condition to require compliance with Aspect's

recommendations.

20. Throughout this process the most specific and persistent critic of the Hamilton house proposal has been the neighbor to the west, Mark Julian. Even though he and the Hamiltons agreed at the hearing to a condition of approval specifying a setback regime along their shared property line, this stipulation does not purport to resolve all the issues raised by Mr. Julian over the course of the RUE review. The Hamiltons own two contiguous lots of about 10,000 square feet each, with the easterly accommodating their current residence and the westerly subject to the present RUE and variance applications. It is clear that historically the two lots were developed as a single parcel, and the scheme to now treat them as discrete development sites raises some tricky questions about how to allocate the existing facilities that straddle the present boundary line between them.

21. These questions affect the RUE primarily in terms of calculating respective levels of lot coverage and the establishment of setbacks. The original staff report alluded to the possibility of resolving some of these questions in the framework of a boundary line adjustment (BLA). Some of Mr. Julian's various letters to the City thus undertook to analyze the full range of BLA issues in some detail and identified a number of additional review questions, including compliance with zoning lot dimensional requirements and shoreline setbacks. But these questions can only be addressed in this proceeding to the extent that they specifically relate to the RUE and variance determinations presently before the Examiner. For example, the conditions of RUE approval can require a process that includes compliance with shoreline regulations but cannot undertake to anticipate and determine the specific outcome of any future shoreline review. No shoreline permit application has been brought before the Examiner in this proceeding.

22. The same limitations apply to the BLA currently pending before the City. The RUE conditions can define and frame a role for the BLA but may not mandate the specific technical findings that its staff review and approval entail. In a similar vein, a number of comment letters focused on the history of development on the eastern Hamilton parcel, going back a number of years to detail alleged earlier noncompliance with regulatory requirements. Whatever their merit, these allegations are not subject to review within the current proceeding. But one neighborhood criticism that is both relevant and apparent from the record points out the discrepancies that exist among the various site plan documents that purport to locate and indicate the size of structures on the two Hamilton lots. To the extent that this information is necessary to determine coverage and setback issues, it should be based on a formal site survey.

#### **D. Zoning Variance**

23. BIMC 2.16.120.E states the decision criteria for issuance of a major 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)*

24. The applicant's variance request to reduce the size of the front setback required by BIMC 2.16.120 would result in a forty (40) percent encroachment. Because it exceeds the minor variance threshold of 25%, the request must be processed as a major variance. The applicant seeks a variance because of existing site topographical constraints, which are special circumstances contributing to a very limited building site. This request, combined with the RUE, would allow the applicant to construct a single-family residence with a maximum lot coverage for the entire property of 1,200 square feet. The conditions of approval will require provision of adequate off-street parking spaces for house residents. Staff recommends maintaining a minimum 20 foot setback for a single garage in order to accommodate parking a vehicle in front of it on the property, in compliance with off-street parking standards.

25. A review of historical maps places the creation of the Hamilton lot sometime prior to 1952, well before the current R-2 zoning was established. Reducing the front roadside and rear steep slope setbacks will produce a building envelope that can accommodate the 1200 square foot development window that the BIMC deems the minimum necessary to permit reasonable construction of a single-family residence. Failure to grant the variance would deny the applicant the ability to enjoy a right possessed by similar but unencumbered properties in the same vicinity and zone. Residential development of this site is a use authorized by the BIMC, Comprehensive Plan and Shoreline Master Program.

26. Some years before receiving the Hamilton request to reduce the front setback to 15 feet, the City received and approved similar variance requests for the two adjoining properties to accommodate a garage and a garage/bedroom and office. The lot immediately west of the project site was issued a variance in 1996 to reconstruct an existing non-conforming carport into an enclosed garage within the building setbacks. The findings approving the variance cited the steeply sloping yard and location of the drainfield as factors warranting reduction of the setbacks. The lot immediately east of the site received a variance in 2003 to construct a 30' x 30' garage/studio to be built within the front and side yard setbacks. These two prior adjacent variances established, among other things, that Rose Loop can function adequately with a 15 foot setback and that such reduction is not injurious to the public welfare.

With respect specifically to the Julian property to the west, reducing the road setback will provide a tangible benefit because it decreases the need to push the Hamilton development further west or north.

#### **E. Reasonable Use Exception**

27. 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; and*
- 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.*

28. The property is constrained due to its nonconforming lot size, a steep slope and its associated buffer, and zoning building setbacks. The lot is 75 feet wide and has an average depth of about 140 feet from the south property line adjacent to Rose Loop north to the shoreline. The majority of the 140 foot distance is comprised of a slope in excess of 40%. There is a flat bench overburdened with fill approximately 53 feet long and 49 feet wide located on the south side of the lot. Although it meets the minimum width requirement for a shoreline lot zoned R-2, at 10,018 square feet the parcel only possesses slightly more than half the minimum square footage normally required in the zoning district.

29. The sole critical area of concern is a steep slope. The applicant is not proposing to alter this slope but only to eliminate its buffer, thus obviating any regulatory need for a habitat management plan or to analyze critical areas functions and values. Under BIMC Section 16.20.150 the steep slope

requires a minimum 50 foot buffer from the top of the slope plus a 15 foot building setback. BIMC Section 16.20.150.E(2) allows the steep slope buffer to be reduced to ten feet. But the combination of a ten foot slope buffer, a 15 foot building setback from the buffer, and a reduced front yard setback along Rose Loop at 15 feet still would effectively preclude building a house on the level portion of the lot. The remaining unencumbered construction space would be a strip about two feet wide. The requested RUE will provide a minimally adequate 1200 square foot area to accommodate a house within the footprint delineated by the Aspect Consulting geotechnical study. No alternative building location is available on the site.

## **CONCLUSIONS**

1. The Hearing Examiner has jurisdiction over this reasonable use exception, zoning variance and SEPA threshold determination appeal 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 Hamilton application 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. Applicable regulatory requirements can be met, and, as conditioned, the proposal does not pose a threat to the public health, safety or welfare.
4. With regard to the SEPA appeal, the record for this proceeding in its totality demonstrates satisfactory actual consideration of relevant environmental factors based on information sufficient to evaluate the impacts of the Hamilton proposal. But since the key element of this information was the Aspect Consulting geotechnical study performed after the MDNS was issued, the original MDNS cannot be accorded substantial weight on review, and compliance with SEPA can only be assured by further modification of the MDNS conditions through this hearing review to conform them to the record. As revised hereunder, the MDNS conditions are adequate to assure that the Hamilton proposal will not cause unmitigated adverse impacts to the environment.

## **DECISION**

The SEPA threshold determination appeal of Mark Julian is **GRANTED** to the extent that the original MDNS conditions issued by the City on November 5, 2013, are revised as specified below; the appeal is **DENIED** in all other respects. The zoning variance and reasonable use exception applications of Thomas Hamilton (file no. RUE/VAR12063) to reduce the front yard setback to 15 feet from Rose Loop NE and establish a minimal building envelope are **APPROVED**, subject to the following conditions:

## **SEPA Conditions:**

### General:

1. Site development shall be pursuant to a revised site plan based on the requirements of this decision containing the following elements:
  - A recorded survey showing the locations and square footage of all existing development on the two Hamilton lots (5961 and 5967 Rose Loop NE) proposed to be retained, plus the legally existing lot boundaries. If a boundary line adjustment is contemplated, its approval shall be obtained prior to submission of the revised site plan.
  - Depiction of the recommended building envelope Foundation Zones illustrated in figure 2 of the Aspect Consulting geotechnical report dated May 8, 2014 (Exhibit 14).
  - Plans for residential construction within the Foundation Zones, with total lot coverage not to exceed 1,200 square feet. Construction within Foundation Zone 2 shall be limited to decks only.
  - Shoreline setbacks as required by the City's Shoreline Management Program.
  - A zoning front yard setback from Rose Loop NE at 15 feet. Side yard setbacks meeting zoning requirements and consistent with the Julian/Hamilton stipulation (Exhibit 25); provided that, if no construction is proposed for Foundation Zone 2 and less than 1200 square feet of development area (including existing coverage) remains on the lot after imposition of all other required setbacks, the five-foot setback described in paragraph 1 of Exhibit 25 may be extended northward a distance sufficient to create a 1200 square foot development area.
2. The garage on the property shall be setback from the front setback as follows:
  - A one car garage shall be set back a minimum of 20 feet.
  - A two car garage may be constructed up to the 15 feet from the front setback line.
3. The property owner or contractor shall obtain a right-of-way permit prior to commencement of construction activities.
4. The height of the residence and attached garage shall not exceed 30 feet to the top of the building from average grade as defined in the Shoreline Master Program.

### Prior to issuance of a building permit:

5. An executed indemnification agreement for construction in a geologically hazardous area and related buffers shall be provided to the city for recording.
6. Plans for implementing the recommendations of the geotechnical analysis (Exhibit 14) shall be submitted, including a plan for planting deep-rooted vegetation to stabilize the steep slope and for tightlining runoff and from the mid-slope seep.
7. A site plan shall be submitted identifying all proposed and existing structures that are planned to remain on the property, which would count towards the property's lot coverage at the time a building permit is submitted. The lot coverage shall not exceed 1,200 square feet, which is the maximum allowable under a Reasonable Use Exception.

8. A site plan shall be submitted showing all proposed and existing structures and impervious surfaces and their associated areas. The plan shall identify how the 30% side yard setbacks are or will be met with the building permit application. If additional permits and/or actions are needed to meet or vary the required 30% side yard setback requirement, the building permit shall not be issued until such permits or approvals are issued.
9. With the building permit application the owner shall submit a planting plan for the replanting of any vegetation anticipated to be removed or disturbed during construction activities. The planting plan shall be reviewed and approved by Planning Department staff.
10. The building permit shall be reviewed by the Fire Marshal for compliance with all applicable provisions of the adopted Fire Code.

Prior to issuance of a certificate of occupancy:

11. A geotechnical engineer shall verify footing depths to prescribed bearing strata prior to City footing inspection, to verify proper compaction of any structural fill and proper installation of footing drains. Documentation of the geotechnical inspections shall be submitted to City/inspector for our records.
12. The owner shall plant the disturbed slope in accordance with the approved planting plan, or an assurance device provided and approved by the Planning Department.
13. A maintenance assurance shall be provided to the Planning Department to cover the cost of monitoring the new plantings for 3 years after replanting has occurred. The monitoring report must include an inventory of plant species survival, percent survival of planted species, and images from established points. The planted area shall achieve 90% survival in 3 years. Vegetative coverage of mitigated area should show an increase over time, and cover not less than 100% of vegetated area after 3 years.

ORDERED July 28, 2014.



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 and SEPA appeals. 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.

**EXHIBIT LIST**  
*Julian Appeal of SEPA MDNS*  
*Hamilton RUE12063 and VAR12063B Application*

Staff Contact  
 Sean Conrad, Planner

Continued Public Hearing: 07/17/14 at 9:00 AM  
 Location: City of Bainbridge Island  
 City Hall Council Chamber

Hearing Examiner: Stafford Smith

EX NO.	DOCUMENT DESCRIPTION	DATE
1	Application (with Site Plans)	05/29/2013 (Received)
2	Bainbridge Island Fire Department Review	06/05/2013 (Dated)
3	COBI Development Engineer Project Review	06/25/2013 (Dated)
4	Notice of Application/SEPA Comment Period (with City Staff SEPA checklist and Affidavit of Mailing and Posting)	06/28/2013 (Dated)
5	Citizen Emailed Comments	06 & 07/2013
6	Comment from Mark Julian (with attachments)	07/25/2013 (Received)
7	Preliminary Geotechnical Assessment	09/26/2013 (Received)
8	Notice of Mitigated Determination of Nonsignificance (MDNS)	11/13/2013 (Dated)
9	Appeal of SEPA MDNS for Reasonable Use Exception and Variance	11/26/2013 (Received)
10	Certification of Distribution and Posting	12/26/2013 (Dated)
11	Staff Report	11/05/2013 (Dated)
12	Order Remanding Applications and Continuing Hearing	01/23/2014 (Dated)
13	Notice of Continued Hearing, Certification of Distribution and Certificate of Posting Signs	06/27/2014 (Published)
14	Aspect Geotechnical Recommendations and Critical Area Considerations (Dated 03/20/14)	05/08/14 (Revised)
15	Planner Memorandum	07/11/14 (Dated)
16	Summary of Appellant's Arguments in Support Appeal of SEPA MDNS and in Opposition to Reasonable Use Exception and Variance	11/16/2013 (Dated)
17	Comments in Support of SEPA Appeal from Mark Julian	01/16/2014 (Dated)
18	Comments and Attachments from Mark Julian	07/16/2014 (Dated)
19	Emailed Comments from Christine Davis	07/10/2013 (Dated)
20	Site Map	07/17/2014 (Admitted)
21	Emailed Comment from Christine Davis	01/16/2014 (Dated)
22	Photo of House Showing Parking Areas	07/17/2014 (Admitted)
23	Emailed Comment from Kris Finnigan	07/21/2014 (Dated)
24	Comment Letter from Christine Davis	07/22/2014 (Dated)
25	Agreed Project Condition for RUE 12063	07/22/2014 (Dated)