

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

SUMMARY

Applicant: David Hawkins
36719 Hood Canal Drive
Hansville, WA 98340-7767

File No: RUE18035

Request: Reasonable Use Exception to allow minor expansion of existing residence on lot encumbered by landslide hazard.

Location: 10800 Broomgerrie Road, situated within a portion of Government Lot 3, Sec. 23, T25N, R2E, W.M. in Kitsap County, WA

Comprehensive Plan/Zoning: Comprehensive Plan: OSR-2
Zoning: R-2

Summary of Proposal: Increase present lot coverage by 135 square feet by expanding existing residence and constructing garage in place of carport and well house on a lot encumbered by landslide hazard.

Public Hearing: After reviewing the report of Planning and Community Development, the Hearing Examiner Pro Tem conducted a public hearing on March 28, 2013.

Decision: The Reasonable Use Exception is approved, subject to conditions.

FINDINGS OF FACT

1. David Hawkins seeks approval of a modest residential remodel on property encumbered by landslide hazard.
2. The subject property is a .69 acre lot (32,025 square feet) bisected by Broomgerrie Road, located on the east side of the island adjacent to Puget Sound. The parcel is within a portion of Government Lot 3, Sec. 23, T25N, R2E, W.M. in Kitsap County, WA.
3. The Comprehensive Plan designation for the property is OSR-2. The zoning is R-2.
4. The property is a "flag" lot with only the "pole" section within shoreline jurisdiction. The structures which are the subject of this application are inland of the shoreline area.
5. With the exception of an undeveloped lot to the northeast, all of the surrounding properties contain single-family residential development. The other houses in the vicinity are considerably larger than the residence on the subject property.
6. The existing residence on the subject lot was built in 1931, well before the adoption of the Critical Areas Ordinance (CAO). Under the CAO, the property is within a landslide hazard area which is a type of geologically hazardous area. As a general rule, new residences may not now be built in geologically hazardous areas.
7. The existing structures on the property include the house (with entry), a carport and a well house. The terrain slopes up steeply to the west of Broomgerrie Road. East of the road where the house and ancillary structures are located, the slope is less than 40 percent and is termed moderate. Below the house toward the Sound the slope is moderate to steep.
8. Although land movement was observed in the surrounding area as recently as 2001, on the subject site there is no record of landslide damage to any structure and there are no signs of any such damage. The mature trees on the eastern slope show little or no trunk curvature. However, the generally desired factor of safety for landslide occurrences is not met.
9. The total present footprint of the structures on the lot is 1,065 square feet. The house occupies 710 square feet with a 47 square foot entry. The carport takes up 264 square feet; the well house 44 square feet.
10. The proposal is: (1) to remove the entry, a concrete deck and steps at the house and then add a new study; (2) to replace the carport and well house with a new garage. The result will be a net increase of 135 square feet in impervious surface, bringing the total footprint up to 1,200 square feet (house-880 square feet, garage-320 square feet).

11. A Geological Investigation and Slope Reconnaissance report, dated May 6, 2010, and addenda, dated June 3, 2011, and October 11, 2012, were prepared by Aspect Consulting. Notwithstanding the lack of significant landslide activity on the site, the report said that evidence of landslides in the surrounding areas indicate that the site has a relatively high risk of being affected by large-scale rotational slide activity. The report stated that generally the site would be considered a poor location for any type of new construction, but said that changes to the existing structures could improve the present situation in terms of safety and impacts on slope stability.

12. The report concluded that the proposed development is feasible with the understanding and acceptance of the risk of some earth movement during the life of the proposed improvements. To reduce the hazard, the report recommended "the use of a structural slab foundation and the inclusion of automatic shutoff systems on key utilities to help limit the potential damage from any earth movement."

13. In addition, the report set forth detailed recommendations for reducing impacts of shallow debris slides including provisions for site preparation, structural fill, floor support, basement walls, and drainage. If all the report's recommended measures are implemented, the consultants concluded that the project "will improve the safety of the site and structure, while creating a net positive geotechnical impact on the site and surrounding areas."

14. Stormwater runoff is presently conducted to a tightline that runs through the "pole" section of the "flag" and empties into the Sound. After the remodel, site drainage will be routed to this same tightline which is expected to be adequate to accommodate the flow. Thus the instant project anticipates no construction within the shoreline. Should such construction ever become necessary, the required shoreline approvals will need to be sought.

15. A condition of approval requires the applicant to provide a detailed stormwater drainage plan incorporating the recommendations of the geotechnical engineer.

16. The Comprehensive Plan calls for avoiding land uses in landslide hazard areas, but does not prohibit development that can be designed to prevent damage. Analysis of any development by a geotechnical engineer is required. Increases in the rate of surface water discharge and decreases in slope stability are to be avoided.

17. The CAO severely limits development in landslide hazard areas. Alteration to existing structures is allowed only where the alteration does not increase the existing structural footprint. BIMC 16.20.150(F)(1). Because the subject proposal modestly increases the existing structural footprint (by 135 square feet), the standard requirements for development are not met.

18. However, the CAO provides for granting a Reasonable Use Exception in situations where its application would otherwise deny all reasonable use of the property. (See definitions, BIMC 16.20.030(42).) The instant application is for a Reasonable Use Exception.

19. Under BIMC 16.20.080.(G), the Hearing Examiner is to review such an application for conformity with the following criteria:

- (1) The application of this chapter [CAO] 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 made 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.
- (9) The proposal is consistent with other applicable regulations and standards.

20. In the factual situation presented, the Examiner finds that Criteria (7) and (8) do not apply.

21. The Staff Report analyzes the application in light of the applicable Reasonable Use Exception criteria and determines that the proposal, as conditioned is consistent with them. The Examiner concurs with this analysis. He supplements that Staff evaluation as follows:

- (1) Denial of reasonable use. The term "reasonable use" is not defined in the municipal code. Given BIMC 16.20.080(5) (above), the Staff's apparent interpretation is that where the proposal expands the existing structural footprint, "reasonable use" means that lot coverage may be allowed up to the 1,200 square-foot limit. In this sense, denial of such a limited expansion would deny "reasonable use." The Examiner adopts this interpretation.
- (2) No reasonable alternative. The property is totally encumbered by the landslide hazard. The applicant wants to preserve the historic cottage while updating and improving some features. Completely replacing the existing structures with new ones would not meet his objectives. To achieve the objectives of the proposal, there are no other available options. Buffer averaging, habitat management plans and CAO variances do not apply in this situation.
- (3) Minimum necessary. The proposed remodel will only bring development up to the 1,200 square foot "reasonable use" limit.

(4) Present lack of "reasonable use" not the result of actions of applicant or predecessor (post February 20, 1992). The present level of development was the result of building done long ago, prior to adoption of the CAO. The physical condition of the property is the result of natural processes.

(5) Lot coverage limit. The proposal matches, but does not exceed the 1,200 square foot limit. The project is conditioned not to exceed this limit.

(6) No unreasonable threat to public health or welfare. The project, as conditioned, will have a positive geotechnical impact, improving the safety of the site and the surrounding area.

(7) and (8) Not applicable.

(9) Consistency with other regulations and standards. As noted, the project complies with the Comprehensive Plan and applicable zoning requirements. As proposed, the project does not intrude on the shoreline zone. As discussed below, the proposal meets the CAO's general development standards for geologically hazardous areas.

22. The Staff analysis of the proposal in light of the general development standards for geologically hazardous areas determines that the proposal, as conditioned, is consistent with such standards, as set forth in BIMC 16.20.15(E)(1) and (2). The Examiner concurs in this analysis and adopts the same. The Staff Report is by this reference incorporated herein as though fully set forth.

23. The Examiner notes that the factor of safety for landslide occurrences is not met by existing conditions on the property. However, the relevant development standard requires only that the proposal shall not decrease the factor of safety below stated limits. BIMC 16.20.150(E)(1) and (2). This proposal will not cause any decrease in the factor of safety. In fact, the geotechnical analysis is that, if recommendations are followed, the resulting development will improve the safety of the site and structures and have an overall positive impact on the site and surrounding areas.

24. Earlier the applicant submitted a building permit application for expansion of the home and replacement of the carport with a garage. The City alleges that, subsequently, at least four significant trees were removed from the area downslope of the carport without permission. An enforcement action was initiated in connection with the tree removal (City File No. COD-0001038).

25. The applicant's consultant contended at hearing that the tree removal which occurred involved taking down one dead tree and the removal of two others in order to accommodate the proposed construction. In his view, no tree replacement is necessary or appropriate.

26. The City has attempted to resolve the enforcement matter through conditions of approval for the Reasonable Use Exception. The Examiner is persuaded that this approach

is appropriate and that any differences about the precise actions now needed can be resolved in discussions between the applicant and the City about what a mitigation plan must contain. See BIMC 16.20.110.

27. Only one member of the public commented on the application, asking about the setback from an access easement. The Staff provided an adequate response. There was no public testimony at the hearing

28. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding.
2. The proposal is categorically exempt from the procedural requirements of the State Environmental Policy Act. WAC 197-11-800(6)(b)
3. The proposal as presented does not occur within the jurisdictional area of the Shoreline Management Act and local Master Program. Should any development be needed within the shoreline jurisdiction, additional approvals may be required.
4. The proposal, as conditioned, is consistent with the general critical area development standards. BIMC 16.20.150(E)
5. The proposal, as conditioned, is consistent with the criteria for approval of a Reasonable Use Exception. BIMC 16.20.080(G)
6. The proposal, as conditioned, is consistent with the applicable mitigation plan requirements. BIMC 16.20.110
7. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. The project shall be constructed in accordance with the application materials, except as the same may be modified by these conditions.
2. Prior to any construction activities, the applicant shall obtain the appropriate additional approvals from the City, including but not limited to, clearing, grading and building permits.
3. The applicant shall follow the recommendations of a professional geotechnical engineer licensed in the State of Washington for site preparation, structural fill, foundation, vegetation, project design and construction monitoring.
 - a. Upon submittal for construction permit, the applicant shall provide a stormwater drainage plan incorporating the recommendations of the geo-

technical engineer. Installation of any stormwater facilities shall minimize disturbance to the slope and vegetation. Any work within shoreline jurisdiction may require a Shoreline Substantial Development Permit; an additional outfall may require Washington State Department of Fish and Wildlife approval prior to construction.

b. Upon submittal for construction permit, the applicant shall submit City Geotechnical Forms "Step 1 and 2."

c. Prior to occupancy of any structure, the applicant shall provide certification from the geotechnical engineer that the improvements were constructed as intended or modified with the geotechnical engineer's approval based on field conditions (City Geotechnical Form "Step 3").

4. Prior to start of construction, the applicant shall provide to the City a geologic hazard area indemnification agreement in conformance with BIMC 16.20.150.

5. Lot coverage (BIMC 18.12.050.K) of the subject property shall not exceed 1,200 square feet.

6. At the time of building permit application, the applicant shall submit an approved mitigation plan in accordance with BIMC 16.20.110. The contents of the plan shall be worked out in consultation with the Planning Department. In addition to Planning Department approval, the plan shall contain the approval of the Code Compliance Division in relation to trees removed without required approvals.

a. The plan shall meet applicable restoration requirements for compliance and enforcement (BIMC 16.20.200.D).

b. If tree replacement is required, the plan shall meet the tree replacement provisions of BIMC 16.20.150.F. Any replacement trees shall be native species and indigenous to the vicinity.

c. The plan shall incorporate mitigation measures, as needed, to address erosion hazard and surficial landslide hazard. The plan shall include all areas disturbed by construction.

d. Landscaping, to the extent required, shall be installed in the year of construction and prior to building permit final inspections (occupancy); alternately, accompanied by the geotechnical engineer's recommendation, the applicant may provide an assurance device in accordance with BIMC 16.20.180.

e. The landowner shall ensure 100 percent survival of any replacement trees required. If replacement trees are planted, a landscape maintenance assurity in conformance with BIMC 16.20.110 and BIMC 16.20.180 shall be provided prior to building permit final inspection (occupancy).

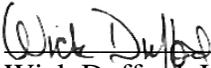
7. The property owner shall record notice of the presence of the critical area in conformance with BIMC 16.20.190 prior to final inspection (occupancy).

8. This approval shall expire and become void if the applicant fails to file for a building permit within three years of the effective date of this decision, unless a one year extension is granted in accordance with BIMC 2.16.020.

DECISION

The requested Reasonable Use Exception (RUE 18035) is approved, subject to the conditions set forth above.

DONE, this 15th day of April, 2013.



Wick Dufford, Hearing Examiner Pro Tempore

RECONSIDERATION/APPEAL

A Request for Reconsideration may be filed within 10 days of this decision. The decision may be appealed to the Superior Court pursuant to Chapter 36.70 RCW within 21 days of the date of decision or decision on reconsideration if applicable.