

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of

**CAPSTONE PARTNERS LLC
“Wing Point Patio Homes”**

CUP13719

for a Conditional Use Permit

Background

The Applicant seeks a Conditional Use Permit to construct eleven houses on one parcel in the zone. The Director, Department of Planning and Community Development, reviewed the application and has recommended approval with conditions. The Hearing Examiner held a public hearing on May 4, 2006. Parties represented at the hearing were: the Director, Planning and Community Development (Department or PCD), by Tom Bonsell, Planner; and, the Applicant, Capstone Partners LLC, by Don Audleman and Charlie Wenzlau.

On May 9, 2006, noting that it was essential to establishing a proper buffer and setback, the Hearing Examiner ordered that the record be supplemented with evidence regarding the location of the “*top of the ravine bank*” [Exhibit 52] . The applicant was directed to provide mapped information so that the Hearing Examiner could determine whether the “*top of the ravine bank*” had been accurately located. The applicant’s response [Exhibits 51, 53-59] was submitted and subject to review and comment at a reconvened hearing held on June 22, 2006. Bob Katai represented the Director at the reconvened hearing. The record was closed at the conclusion of the reconvened hearing.

After due consideration of all the evidence in the record, the following constitutes the findings, conclusions, and decision of the Hearing Examiner on this application.

Findings

Site and Vicinity

1. The 3.92-acre (170,755 sq. ft.) site is located on the north side of Wing Point Way NE, east of Ferncliff Avenue NE and south of the Wing Point Golf and Country Club. (The Wing Point Golf and Country Club is the present owner of the subject property; Capstone Partners seeks to purchase and develop the property; see Exhibit 25) Assessor's tax parcel number is 262502-1-005-2008 [abbreviated legal description: NE 1/4, Sec.26,

T.25N., R.2E., W.M. [Exhibit 40, Sheet A1 and Sheet 1/1; Staff Report, Exhibit 39, page 6]

2. The site is generally a narrow rectangle with its shorter dimension (149 ft.) fronting Wing Point Way (see Exhibit 40, Sheet 1/1) and a north-south dimension extending north approximately 1,000 ft. from Wing Point Way (northern boundary, east-west dimension, is approximately 180 ft.). [Exhibit 40, Sheet A1 and Sheet 1/1]

3. The site is undeveloped and covered with mature forest except for an area of past clearing at the west side of the site at its southern end. (The project architect estimated that 166,000 sq. ft. of the site is currently forested.) Vegetation includes mature alder, maple, cedar, and fir trees, with a dense understory of woody shrubs, blackberry, salal, and sword fern. [Exhibit 6; Exhibit 27; Exhibit 40, Sheet L1]

4. A ravine containing a Class 4 stream is to the east. The stream itself is almost entirely on the property adjacent to the east, but the western slope of the ravine forms the east side of the subject site. Except where it enters a 12" culvert in the southeastern corner of the subject site [see Exhibit 55], the centerline of the stream (also referred to as "Hawley Creek" [Exhibit 26]) is within Lots 11-22 of the "Wing Point Greens" plat [see Exhibit 40]. Near the southeastern corner of the subject site the stream enter the culvert, flows through the culvert under Wing Point Way, and then south to a wetland located near the shore of Eagle Harbor [Exhibit 8; Exhibit 55]. There is no fish migration to the stream reach north of Wing Point Way [Exhibit 26]. There are also wetlands north of the site that feed the stream [Exhibit 8].

5. The site slopes from north-to-south (overall elevation change of approximately 50 ft. in 1,000 ft.) [see Exhibit 55 and existing grade profile, Sheet C1, Exhibit 40], with an overall slope on the order of 4-6% [Exhibit 8], and maximum slope of 12% [Exhibit 5].

6. The ravine slopes down steeply on the order of 20-40 ft. to the base of the stream. [Exhibit 6; Exhibit 26; Exhibit 27; Exhibit 54] (Estimates of ravine depth would vary depending upon where the "top of ravine" is located and the accuracy of available topographic information.) The 2005 Aspect Consulting geologic reconnaissance report [Exhibit 6] assumed that the line labeled "top of slope" on the site plan [Figure 2] was accurately located and all references in the report are inferred from that line. The depth of the ravine would be greater if measured from the "top of 15% slope" [see Exhibit 54]. (Note: A third figure (by Tanner Consulting Group), that was not an attachment to the original document, is included in Exhibit 6; that figure is in this record as Exhibit 58 and is not properly part of Exhibit 6.)

7. The SEPA Checklist [Exhibit 5] identifies the steepest slope of the ravine to be 50% and the geotech report [Exhibit 6, page 2] states that: "Slopes along the ravine...generally ranged from approximately 3H:1V (Horizontal:Vertical) (33 percent) to approximately 1H:1V (100 percent, with isolated areas up to 0.5H:1V (200 percent)."

8. The ravine has been identified as a potentially geologically hazardous area due to the presence of slopes greater than 40%. A geotechnical study would be needed to confirm that. Figure 1 in Environmental Element of the Comprehensive Plan maps the ravine as “Unstable”; this term is applied broadly and the specific geotech report did not find the site unstable. Removal of vegetation (“clearing”) can destabilize steep slopes. [Exhibit 6, page 4; Exhibit 41; Testimony of Bonsell; Testimony of Hathaway; Testimony of Morse]

9. The geologic reconnaissance conducted by Aspect Consulting in 2005 [Exhibit 6], found curvature of tree trunks, toppled trees, loose soil and bare patches as evidence of ongoing shallow and surficial landsliding on the ravine slopes. The steep slope angles and soil types “indicate that the site has a high potential for ongoing, surficial landslide activity. This type of slide activity typically affects the top 1 to 3 feet of soil. There is low potential for deep-seated rotational slides under existing conditions, but the report cautions that if “slope and runoff conditions are changed in an adverse manner, the potential for slope damage could increase.” The report concludes that: the project is feasible from a geotechnical perspective; a 40 ft. setback for the houses “from the top of the steep ravine” would be adequate; and, based on “the inferred slopes from the structures to the toe of the slope...the slope will have adequate stability for both the static and seismic basis of design. [Exhibit 6, page 2-4]

10. For the slope reconnaissance, the applicant noted to Aspect Consulting that the underlying topography for the Site Plan did not accurately depict some of the site features [Exhibit 6, page 1]. However, as it had been “agreed upon” by the applicant and the City, Aspect Consulting relied upon the “top of slope” line given and all of Aspect’s references from top of slope were “inferred” from that line.

11. Except for the Wing Point Golf and Country Club to the north, all uses in the immediate vicinity are residential. Azalea Avenue, developed with two dozen residences, is approximately 200 ft. to the east and extends north from Wing Point Way, terminating at a cul-de-sac at the northern boundary shared with the Wing Point Golf and Country Club. On the west side of Azalea Avenue, Lots 11-22 of the “Wing Point Greens” plat are adjacent along the entire length of the subject site’s eastern boundary. The single-family residences on these lots are generally located back from the ravine; at considerably distance from the stream. Immediately to the west of the southern third of the subject site is developed residential property; north of it is undeveloped residentially-zoned property. The Wing Point Golf and Country Club extends north of that property and north of the subject property. There are also single-family residences to the south, across Wing Point Way. [Exhibit 40, Sheet 1/1; aerial photo, Exhibit 48; Exhibit 58]

12. The zoning of the subject site is residential (R-2.9, one dwelling per 15,000 sq. ft.). Single-family dwellings are permitted outright in this zone; multifamily dwellings are permitted as conditional uses. The Comprehensive Plan designation is SUR (Semi-Urban Residential). Zoning in all directions surrounding the subject site is R-2.9 (with

corresponding SUR-2 Comprehensive Plan designation). [Staff Report, Exhibit 39, page 6; Testimony of Bonsell]

Proposal

13. The Applicant, Capstone Partners LLC, proposes to construct 11 single-family detached residences with access from Wing Point Way via a 12-ft. wide “private lane”. The 3 bedroom homes would have maximum height of 25 ft. (two stories facing the private lane, with one-story to the rear). Each house would have a patio and landscaped front, side and rear yards. Each house would be approximately 2,300 sq. ft., have a courtyard and a two-car garage (with space in the driveway for two vehicles). Four additional parking spaces would be available in the turn-around near the north end of the site and three spaces would be located at south end of the private lane. [Exhibit 5; Exhibit 12; Exhibit 25; Staff Report, Exhibit 39; Exhibit 40, Sheet A1, L; Testimony of Wenzlau; Testimony of Bonsell]

14. Approximately 125 ft. of the northern end of the site (across its entire width) would be designated open space; the southernmost approximately 120 ft. would be similarly treated. Along the east side of the property, a 25-ft. wide stream buffer (measured from the top of the ravine) would be required, with a 15-ft. wide building setback beyond that. No buildings would be allowed to be constructed within the building setback, but nearly all of the setback area is within the “limit of work” line [see Sheet L1] to be cleared and landscaped. No cutting of trees would be allowed within the designated open space and buffer, but a pedestrian path is proposed, extending the length of the site from the north property boundary shared with Wing Point Golf and Country Club, south to near Wing Point Way. [Exhibit 40, Sheet L1]

15. There would be a 50-ft. wide open space setback along Wing Point Way and a landscape screen approximately 9-ft. wide with plants 6-8 ft. tall, would be provided along the western perimeter between the private lane and the western property boundary. [Exhibit 25; Exhibit 40, Sheet L1]

16. Development would occur on 62% of the site; 38% would remain undeveloped [Exhibit 12, page 9].

17. The proposal includes a landscaping plan [see Sheet L1, Exhibit 40]; approximately 31% of the site would be landscaped [Exhibit 12, page 9]. Some existing trees would be retained [see Finding 18], and the cleared areas would be replanted as indicated in the landscape plan. [Exhibit 40, Sheet L1; Exhibit 31; Testimony of Wenzlau; Testimony of Bonsell]

18. Approximately 38% (64,000 sq. ft.) of the existing 166,000 sq. ft. “tree canopy” would be retained (30% is the minimum required to be retained). The existing trees in the northern portion of the site would be retained as open space [see Finding 14]; the rest

of the retained canopy would be located east of the “limit of work” shown in the landscape/canopy retention plan [see Sheet L1, Exhibit 40]. Many mature trees would be removed to during construction (including those in much of the 15-ft. “building setback” area). The applicant did not provide an inventory or count of significant trees or an estimate of how many significant trees would be removed during construction. As evidenced by the landscape plan, much the site would have to be cleared from the western property line to within 15 ft. to 50 ft. of eastern property line. After development, approximately 31% of the total site would be covered with impervious surfaces. [Exhibit 12; Exhibit 40, Sheet L1; Testimony of Goss]

19. No open space management plan was offered into this record nor was any draft covenant language proposed that would serve to advise (and bind) future owners as to the nature and extent of their responsibility for open space protection and the maintenance of the stormwater drainage system and other facilities owned in common.

20. City water and sewer would serve the project [Exhibit 7]. Stormwater would be detained on-site as required and conveyed to existing stormwater drainage facilities in the Wing Point Way right-of-way. The drainage plan includes several underground, concrete detention vaults (12 ft. X 50 ft. X 6 ft. deep) in the southern portion of the site, east of the interior road. Neighbors commented about past instances of existing stormwater drainage facilities not functioning adequately. Information/analysis addressing the remaining capacity or need for improvement in existing facilities was not provided. [Exhibit 8; Exhibit 40, Sheets A1 and C1] Also, recent changes in the drainage regime on the golf course [Exhibit 60] need to be considered in the drainage plan.

21. The applicant has agreed to “construct and install street improvements and make dedications” according to City standards as required by the Public Works Director [Exhibit 9]. Improvements agreed to by the applicant are referenced to a letter from PCD (dated November 4, 2005 and including a Public Works memo dated October 24, 2005), that is not in this record. The Director’s Recommended Condition 23 [Exhibit 39, page 4] would require right-of-way improvements along the frontage of the subject property in the form of: 1) a class II bicycle lane on both sides of Wing Point Way; 2) a 6-ft. wide sidewalk on the south side of Wing Point Way; and, 3) upgrading the existing water main (from 6 in. AC to 8 in. DI). The right-of-way improvements in Recommended Condition 23 conflict with the Staff Report discussion on page 8, which indicates that “half street” improvements directly adjacent to the site would be required by Public Works.

22. The Public Works Department would allow the proposed access road on the subject property to be private [Exhibit 9 and 15]. Section 7 of the City’s adopted Design and Construction Standards and Specifications, notes that: “New proposed private streets shall not serve more than four residences.” It was not explained at hearing how this proposed “private lane” (to serve 11 residences) would be allowed. The design standards are the same for both private roads and public roads. The “residential optional suburban” design standards call for a 30-ft. wide right-of-way with a minimum 12-ft. wide paved roadway, 3-ft. wide shoulders, and drainage ditch. The proposed “private lane” [Exhibit

40, Sheet C1] would have 1-ft. wide shoulders and total width (including shoulders and drainage ditch) of 20-ft. Except for the final 20 ft. approaching Wing Point Way, where the “landing” would be 5%, the southern 180 ft. of the proposed road would have a 12% grade (the maximum allowed for a road serving this many residences).

23. The property would be owned as a condominium. Individuals would own their residences and would share common ownership and responsibility for the remainder of the property. The applicant asserts that, except for the manner of ownership, the project would be “identical” to a single family development. [Exhibit 10; Exhibit 12, pages 11-12; Exhibit 25; Testimony of Audleman] However, the project would not meet the likely requirements for development as an eleven lot single family subdivision [see Findings 56 and 57].

24. The proposed houses would be single-family structures (*i.e.*, one dwelling unit per structure), but they fit within the BIMC definition of “*multifamily dwellings*” because the houses would all be on one lot [see BIMC 18.06.320, Finding 45.] In the R-2.9 zone, multifamily dwellings may be allowed as a Conditional Use [see BIMC 18.30.030.J, Finding 46] if they meet all the criteria [see BIMC 18.108.040.A, Finding 53].

25. A CUP would not be necessary to subdivide the site into individual residential lots and develop with one dwelling unit per lot (single-family dwellings are permitted outright). The R-2.9 zoning [see BIMC 18.30.040] allows a maximum of one dwelling unit per every 15,000 sq. ft. of land. At this density, a maximum of 11 lots could result (*i.e.*, 170,775 sq. ft. divided by 15,000 sq. ft. per lot = 11.3 lots). In October of 2005, the applicant apparently contemplated subdivision of the subject site and development of 11 single family lots (including a “private driveway” in common ownership, no landscape buffer on the west perimeter, and some encroachment into the building setback area) [see “Concept Site Plan in Exhibit 41]. In 1990, a 4-lot short plat was contemplated with three lots in the northern third of the site, each less than ½ acre, and the fourth lot, nearly 2 acres, comprising the southern two-thirds of the site [see “David Cass Short Plat” in Exhibit 41].

Director's Review and Recommendation

26. The application for the Conditional Use Permit (CUP) was submitted to PCD on December 5, 2005 [Exhibit 12] and deemed complete on December 7, 2005 [Exhibit 13].

27. On December 14, 2005, PCD published notice of the application and of the SEPA Comment Period [Exhibit 18]. Several concerned neighbors submitted comments [Exhibit 20, Leatherman/Miller; Exhibit 21, Smith; Exhibit 22, Miller; Exhibit 23, Peters; Exhibit 24, Atkinson] to the Director during the SEPA comment period. The Staff Report [Exhibit 39, pages 7-8] includes a discussion of the “major themes” of the comments (*i.e.*, critical area protections and improvements needed for safety on Wing Point).

28. The Director referred the application to various City departments for review and comment [Exhibit 11]. The Public Works Department reviewed the application and advised that the location is served by City water and sewer [Exhibit 7] and that the stormwater drainage system must be designed by a civil engineer. The Fire Department specified that new hydrant(s) must be installed in accordance with City standards and that the on-site access road must have a minimum width of 12 ft. and include a fire department turnaround [Exhibit 16].

29. The Public Works Department provided a Certificate of Concurrency, attesting that existing transportation facilities would not be unduly burdened by development of the proposal [Exhibit 38]. The Certificate of Concurrency is premised upon 9.5 Average Daily Trips (ADT) for each of the 11 proposed residences, anticipates 105 ADT Peak Hour Trips and Wing Point Way and Ferncliff Avenue were the transportation facilities considered. The project was exempt from the traffic study requirement because the applicant agreed to make right-of-way improvements [BIMC 15.40.060].

30. On March 29, 2006, the Director issued a SEPA Mitigated Determination of Nonsignificance (MDNS) [Exhibit 36]. The MDNS was not appealed.

31. The Director determined that the project would be consistent with the Comprehensive Plan and the applicable sections of the Bainbridge Island Municipal Code, including the criteria for Conditional Use Permit approval [see Staff Report, Exhibit 39, pages 8-12]. The Director recommended approval with numerous conditions [Exhibit 39, page 2-5].

Public Hearing

32. Notice of the public hearing on the Conditional Use Permit was properly given and complete as of April 15, 2006 [Exhibit 37]. At the hearing was held on May 4, 2006, the Applicant described and explained the proposal [Testimony of Wenzlau; Testimony of Audleman] and the Director presented the staff report and Recommended Conditions [Testimony of Bonsell].

33. During the public comment portion of the hearing on May 4, 2006, several members of the public spoke [Testimony of: T. Williams; M. Smith; S. Atkinson; N. West; F. Gace; K. Peters; J. Miller; T. Cain; R. Cartmell]. Concerns included: public stormwater management facilities already inadequate, would not be able to handle stormwater from the project; Wing Point Way is dangerous now, project would increase problems; additional right-of-way should be required to accommodate future Wing Point Way design; traffic problems would be created by the access road, a “blind driveway” at the bottom of a hill; development would have adverse environmental impacts to stream and habitat; the proposed “density” would be out of character with existing neighborhood development; there is no mechanism (*e.g.*, covenant) to ensure future maintenance and proper functioning of stormwater facilities; and no mechanism (*e.g.*, covenant) to ensure

that the ravine slope would be monitored for changes as recommended in the geotech report; geotech report is ambiguous, should have definitive stability assessment.

34. Maps in the record after the May 4th hearing had conflicting information relevant to the location of the “top of the ravine” (see below with regard to distance from property line). The use of different scales and different (or no) contour intervals, made comparing and reconciling the data presented untenable. Also, at some locations [see Exhibit 44, west of Lots 13-15] the “top of slope” is marked, relative to the topography given, on the slope, not at the top of it. The impression that the “top of slope” was incorrectly located is supported by photos and public testimony indicating that some stakes to mark the “top”, were actually located on the slope [Exhibit 41; Testimony of Atkinson]. Conflicting information included:

Exhibit 43: Browne Engineering 5/25/99 Scale 1 in. = 40 ft. 5 ft. contours
Notes: “top of ravine” is based on “estimate of location of flags identified in field” and “topography based on city laser mapping”.
“Top of slope” at southwest corner of “Lot 16” approx. 50 ft. from property line.
“Top of slope” at northwest corner of “Lot 16” approx. 70 ft. from property line.

Exhibit 44: Adam & Goldworthy 11/28/05 Scale 1 in = 40 ft. 2 ft. contours
NOTES: “top of slope was staked and reviewed by the City as the top to be used for determining setbacks to the Class IV stream to the east” and “contours shown are publicly available and were not field verified.”.
“Top of slope” at southwest corner of “Lot 16” is at the property line.
“Top of slope” at northwest corner of “Lot 16” approx. 7-8 ft. from property line.

Exhibit 48: Bainbridge Map Guide (computer) Scale 1 in. = 2,732 ft. No contours
“Slopes 40%+” on east side of subject property (adjacent to Lots 13-17 & 20-22).

Exhibit 41: 1990 Short Plat (MacLearnsberry survey) Scale 1 in. = 100 ft. No contours
“Top of ravine” at southwest corner of “Lot 16” is approx. 25 ft. from property line.
“Top of ravine” at northwest corner of “Lot 16” is approx. 37 ft. from property line.

35. Photographs included in Exhibit 41, public testimony [Aktinson], and written comment [Exhibit 62] are persuasive to the finding that some “flags” used to mark the “top of ravine” for the maps submitted by the applicant, were not at the “top of the ravine bank”, but on the bank itself. One photograph, near the corner of Lot 17, shows the flag approximately 6 ft. down the slope of the ravine and another photo indicates a similar incongruity near the boundary adjacent to Lot 16.

36. On May 9, 2006, the Hearing Examiner reopened the record and ordered it to be supplemented so that the location of the “*top of the ravine bank*” could be determined as necessary for the approval and/or conditioning of the CUP application. [Exhibit 52]

37. The hearing was reconvened for consideration of the response to the Hearing Examiner’s order to supplement the record. At the reconvened hearing held on June 22,

2006, the Applicant discussed its response [Exhibits 51, 53-59; Testimony of Wenzlau]. Exhibit 54, Site Plan A, was presented to provide the supplemental information. The map shows the requested supplemental information, except that instead of indicating the location of “slopes 15% or greater” as directed in the Order, the “top of 15% slope” is marked.

38. The applicant noted [Exhibit 53; Testimony of Wenzlau] that in the 1999 CUP decision denying the driving range proposal for this site, the Hearing Examiner found that the “top of slope” [Exhibit 58] had been marked “in accord with the provisions of BIMC 16.20”. It is presumed that this meant it had been marked so as to be consistent with the “*measured from the top of the ravine bank*” language of BIMC 16.20.090.H (the only reference in BIMC 16.20 to the phrase “*top of the ravine bank*”). There was no definition given for “*top*”, nor were the “provisions” of BIMC 16.20 identified. The 1999 decision was made based on a different record and is not binding here.

39. The Director provided information regarding where staff had assisted with the staking of the “top” in 1999 and reviewing stake locations for consistency with their experience in the field. The ‘I know it when I see it’ approach was used to stake the location of the “top”. [Testimony of Katai and Morse] Variations of slope observable in the field could cause the location the “top” to be at staked at points inconsistent with the topography suggested by contour lines [see *e.g.*, Exhibit 59]. However, photographs and other evidence in this record persuasively challenge the accuracy of some of the staking.

40. The applicant [Exhibit 53 and Testimony of Wenzlau] described the evolution and refining of the mapped information. Exhibit 43, produced by Browne Engineering in 1999, shows an “estimate” of the location of the top of the ravine “based upon rough observations”. Later in 1999, the Golf Course Superintendent [Exhibit 57, page 1] “revised” the “site plan” to indicate the “top of the ravine” and Tanner Consulting Group used it to show the “trajectory analysis” for the driving range proposal [Exhibit 58]. What was considered the “top of the ravine” shown in Exhibit 44 was staked in the field by PCD staff. In 2005, the surveyor re-staked and surveyed the “top” based upon the line shown in Exhibit 58. PCD staff visited the site again in 2005 and found the staking consistent with what was done in 1999. Moving two of the flags to the west, was the only adjustment deemed necessary. [Testimony of Morse]

41. The applicant notes that the topographic information employed for the maps produced in 1999 and 2005 was based on aerial photographs and produced less than accurate results [Exhibit 6, page 1; Exhibit 52; Testimony of Wenzlau]. At the reconvened hearing, the applicant submitted “Site Map B” [Exhibit 55]. This map indicating “top of slope”, buffer and building setback, and “Top of 15% slope”, was prepared by surveyors Adam and Goldworthy, is dated 5/15/06, and has contours “based on a field survey performed between 12/19/05 and 1/25/06”. Apparently this field-verified topographic information was available for months prior to the May 4th hearing.

42. Unfortunate for resolution of questions regarding the proper location of the “*top of the ravine bank*” (including how the mapped location relates to slopes 15% or greater), the contour lines on the “field verified” map stop at the anticipated limits of work rather than extending to the base of the ravine (or even to the site’s eastern property line). The nature and extent of the “field verification” was not described and the decision to not survey all the property and/or not to reveal the surveyed topographic conditions on the ravine slope, deprives the record of valuable information with regard to compliance with the stream buffer requirement.

43. In the five year “evolution” of the mapped location for the “top of slope”, there have been a number of opportunities for mistakes: some of stakes may have been improperly (“I know when I see it”) placed, or they got moved, or improperly re-staked or re-verified, or mapped inaccurately when revised [Exhibit 58], and so on. There is not a credible and satisfactorily precise mapping in the record that could reasonably be relied upon to ensure the critical area protection envisioned by the Code.

44. At the June 22nd reconvened hearing, several members of the public also gave testimony [Testimony of Bispham, Atkinson, Jorgensen, Cartmell, Ostling] and submitted written comment [Exhibit 60, Atkinson; Exhibit 62, Perry; Exhibit 61, Wing Point Way Neighborhood Association; Exhibit 63, Azalea Avenue Residents]. Comments were to be focused on the new information regarding location of the “*top of the ravine bank*”. Some of those providing comment urged that the line indicating where 15% slope ends should be used to mark the “*top of the ravine bank*”.

Bainbridge Island Municipal Code

45. BIMC 18.06.320 defines “*Dwelling, multifamily*” (emphasis added) to mean “*a building or portion of a building containing two or more dwelling units or more than one dwelling unit on one lot, not including accessory dwelling units*”. The proposed residences are considered “*multifamily*” because they would be on one lot. Each structure would, however, be a separate dwelling unit and would look like and function like, single family homes (*i.e.*, a detached structure with a permanent foundation; see BIMC 18.06.330).

46. Pursuant to BIMC 18.30.030.J, “*multifamily dwellings*” may be permitted as a conditional use in the R-2.9 zone.

47. BIMC 16.20.010 establishes that “*streams and their protective buffer lands*” are included among the “*critical areas*” that are “*of special concern to the city*”. BIMC 16.20.090.H provides that Class 4 streams must have 25 ft. wide buffers and building setbacks of 15 ft. wide beyond the buffers.

48. The Critical Areas Ordinance, at BIMC 16.20.010, requires that critical areas “*be protected by establishing minimum standards for the impact of development of properties which contain or adjoin critical areas.*” The following are included in the list of ways to protect the public interest regarding critical areas:

A. Avoiding the impact;

B. Minimizing or limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;

* * *

D. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;

* * *

F. Reducing the potential for personal injury, loss of life or property damage due to flooding, erosion, landslides, seismic events, or soil subsidence;

* * *

I. Protecting unique, fragile, and valuable elements of the environment, including wildlife and its habitat;

* * *

K. Providing city officials with sufficient information to adequately protect critical areas when approving, conditioning, or denying public or private development proposals

49. The Critical Areas Ordinance, at BIMC 16.20.030 (emphasis added), further provides that:

B. Interpretation. The provisions of this chapter shall be held to be minimum requirements in their interpretation and application and shall be liberally construed to serve the purposes of this chapter.

C. Applicability. This chapter establishes regulations for the protection of sites which contain critical areas or are adjacent to sites which contain critical areas. Development and land use activities proposed on critical area sites shall comply with the provisions of this chapter. No action shall be taken by any person, company, agency, or applicant, which results in any alteration of a critical area except as consistent with the purposes, requirements, objectives, and goals of this chapter. An area is a critical area if it is an aquifer recharge area, fish and wildlife habitat, frequently flooded area, geologically hazardous area or regulated wetlands and/or stream.

50. A stream “*Buffer*”, as defined in BIMC 16.20.020(5), includes:

...an area adjacent to a stream...that surrounds and protects the functions and values of the stream...from adverse impacts and is an integral part of a...ecosystem and which provides shading, input of organic debris and coarse sediments, room for variation in stream...edge, habitat for wildlife and protection from harmful intrusion necessary to protect the public from losses suffered when the functions and values of the...stream are degraded.

51. BIMC 16.20.090.H directs that in “*case(s) of a stream in a ravine, the buffer shall be measured from the top of the ravine bank.*”

52. The terms “Ravine” and “Top of ravine” are not defined in the Code. A common (online) dictionary definition for “ravine” is: a deep narrow steep-side valley, especially one formed by running water [e.g., see online: Merriam-Webster; encarta.msn; ardictionary; and elook]. With regard to locating the “*top of the ravine bank*”, the Critical Areas Ordinance Update (adopted December 2005, effective January 2006), at BIMC 16.20.030.A (emphasis added), provides some helpful guidance in its definition of “ravine”:

40. “Ravine” means a V-shaped landform generally having little to no floodplain and normally containing steep slopes, which is deeper than 10 vertical feet as measured from the centerline of the ravine to the top of the slope. Ravines are typically created by the wearing action of streams. The top of the slope is determined where there is a significant change in the slope to generally less than a 15 percent slope.

53. BIMC 18.108.040.A (emphasis added) provides that a conditional use “*may be approved or approved with modification*” if:

1. The conditional use is harmonious and appropriate in design, character and appearance with the existing or intended character and quality of development in the immediate vicinity of the subject property and with the physical characteristics of the subject property;

2. The conditional use will be served by adequate public facilities including roads, water, fire protection, sewage disposal facilities and storm drainage facilities;

3. The conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property;

4. The conditional use is in accord with the comprehensive plan;

5. The conditional use complies with all other provisions of this code;

6. The conditional use will not adversely affect the area or alter the area’s predominantly residential nature; and

7. All necessary measures have been taken to eliminate the impacts that the proposed use may have on the surrounding area.

54. Under the authority of BIMC 18.108.040.B, a conditional use may be approved with conditions. It is further provided that if “*no reasonable conditions can be imposed that ensure the application meets the decision criteria*” of Chapter 18.108, “*the application shall be denied.*”

55. BIMC 2.16.025.B.1 assigns decisions on regular Conditional Use Permit (CUP) applications to the Hearing Examiner. Following the decision procedures of BIMC 2.16.100, the Hearing Examiner holds a public hearing and then makes a decision to

“approve, approve with modifications, deny or remand an application”. In making a CUP decision the Hearing Examiner is required to *“consider the applicable decision criteria of this code, all applicable law, and any necessary documents and approvals.”*

56. *“Landslide hazard areas”* include *“any area with a slope of 40 percent or greater and with a vertical relief of 10 or more feet except areas composed of consolidated rock”* [see definition at BIMC 16.20.020].

57. BIMC Chapter 17.04 regulates subdivision of property into more than four lots and such subdivisions are subject to review and decision by the City Council after public hearing held by the Hearing Examiner. All residential subdivisions must be designed consistent with the flexible lot subdivision provisions. Those provisions include requirements for 50-ft. wide roadside buffers and 25-ft wide landscaped perimeter buffers [BIMC 17.04.080]. Where open space is designated as part of a subdivision, an Open Space Management Plan is required to guide and regulate permanent maintenance of open space. [BIMC 17.04.082].

58. The following findings are made regarding the Conditional Use approval criteria of BIMC 18.108.040.A [see Finding 52]:

(1) The project would not be entirely harmonious and appropriate in design, character and appearance with the character of the vicinity and with the physical characteristics of the subject property. The size and design of the proposed residences would similar to and compatible with the single-family development in the vicinity. (“Density” – dwellings per acre - would be consistent with the zone’s limit of one dwelling per 15,000 sq. ft.; the distance between or around residences does not determine “density”.) The proposed residences would be screened from view along Wing Point Way by the 50-ft.-wide open space and from the golf course by the open space at the northern end of the site. Some of the proposed residences could be seen from the Azalea Avenue residences on the east side of the ravine (just as some of those residences could be visible from the subject property). However, the proposed two story residences (located approximately 40 ft. from the western property line), would not be effectively screened by the narrow (5-9 ft. wide) landscaping strip proposed along the west side of the “private lane”. If the property to the west were to be subdivided, it would have to provide a 25-ft. wide perimeter buffer along the shared property line. The project would not be “harmonious” in that it would not provide a comparable perimeter buffer (and would produce a combined buffer 34-ft. wide, rather than 50-ft. wide as anticipated by the subdivision requirements).

The ravine is a major *“physical characteristic”* of the site and it has not been established that the *“top of the ravine bank”* has been located appropriately for the protection of the critical area. Also, in the absence of

plans and provisions to protect and maintain the open space and buffer areas, there is no assurance that the developed character and appearance would be appropriate for the site and/or harmonious with the vicinity.

(2) The project would be adequately served by public utilities, but capacity of stormwater facilities **needs review**. Adequate water and sewer service is available to serve the proposed residences. Because it must be designed by a licensed engineer and be approved by the Public Works Department as meeting City standards, the storm water drainage system should be satisfactory. However, the remaining capacity of the public stormwater drainage facilities has not been reviewed and mitigation required if and as necessary.

(3) The project would not be materially detrimental to uses and property in the vicinity except and to the extent noted in the other criteria.

(4) The project would be **in** accord with the Comprehensive Plan. Retaining trees along Wing Point Way would be in accord with Comprehensive Plan goals of preserving the forested view from highways. The proposal, with pattern of development (*i.e.*, single family houses along a road extending north from Wing Point Way) would similar to the existing pattern of development [see platting “pattern” shown in vicinity maps, Exhibit 48], so as to be consistent with Goal 4, Land Use Element, would be consistent.

(5) The project **does not comply with all other provisions of this Code.** The Critical Areas ordinance requires that there be a 25-ft. wide stream buffer, as measured from the “*top of the ravine bank*” BIMC 16.20.090.H]. The location of the “*top of the ravine bank*” has not been credibly established in this record. As a consequence, it cannot be found that the proposal, even as modified or with conditions, complies with this provision of the Critical Areas ordinance.

(6) The project would not adversely affect the area's residential nature. The project would, in appearance and function, be similar to “single-family” development; consistent with the area’s “residential nature”.

(7) **All measures have not been taken to eliminate impacts.** Measures that have not been taken to eliminate impacts include: properly locating critical area buffer, ensuring ongoing protection and maintenance of open space and buffer areas, meeting design standards for access roadway, ensuring safe entering and exiting, and providing inadequate perimeter buffer. Also, there are slopes in the ravine in excess of 40%, but it has not been determined what areas, if any, should be treated as geologically hazardous.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. Appropriate notices of the application and of the public hearing were given and the hearing was properly convened and all comments, testimony, and other evidence offered and admitted to the record have been considered.
3. The applicant's assertion that the project would be "identical" to single family development is not accurate. The project would not provide a perimeter landscape buffer on the west side of the site and plans and the commitment for ongoing open space protection that would be typical of a single family subdivision development of this size. Indeed, in order to fit eleven residences on this narrow site, many features are proposed to be "narrower" than would be typical: the access road with 1-ft. wide, rather than 3-ft. wide shoulders; the western landscape "perimeter" would be 5-9-ft. wide rather than 25-ft. wide; and, most of the residences would have their "long" side oriented east-west (facing adjacent residences), rather than north-south (toward views of forest east and west). If all the requirements for "typical" single family subdivision were met, it appears that the number of dwelling units possible would be less than the eleven proposed here.
4. The applicant has known that the accurate mapping of the location of the "*top of the ravine bank*" is essential for a decision here [Exhibit 52; Exhibit 53; Testimony of Wenzlau]. The applicant also knew that there were inaccuracies in and conflicts between the maps presented. The comments from neighbors given at the meeting held in November 2005 should have made it clear that the accuracy and objectivity of the mapping would be an issue [Exhibit 25]. The reopening of the record was an opportunity for the applicant to provide updated, credible and accurate information. Instead, the most accurate and refined topographic information available did not extend to include the ravine - - where more credible and accurate information was most needed.
5. Not all the Conditional Use Permit approval criteria of BIMC 18.108.040.A are met [see Finding 58] and it is not possible on this record to impose reasonable conditions to ensure all the criteria would be met. The application should be denied.

Decision

The application of Capstone Partners LLC for a Conditional Use Permit to develop the 11-unit "Wing Point Patio Homes" is **DENIED**.

Entered this 21st day of July 2006.

Signed in Original
Meredith A. Getches
Hearing Examiner
City of Bainbridge Island

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

A decision on a regular conditional use is the city's final decision unless it is appealed. Request for judicial review of this decision by a person with standing can be made by filing a land use petition in superior court within 21 days in accordance with the Land Use Petition Act, Revised Code of Washington, Chapter 36.70C.