

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

In the Matter of the Appeal of

**Paul and Linda Heys**

**CVAR14139**

From a Critical Areas Variance Condition

**Introduction**

Paul Heys applied for a Critical Areas Variance to allow construction of a single-family residence in the 7700 block of Yeomalt Point Drive NE within the required 50 foot setback from a geologically hazardous area.

A public hearing was held July 17, 2008. Mr. Heys represented appellants and Rosemary Larson, Inslee, Best, Dozie & Ryder, P.S., represented the Department of Planning and Community Development.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

**Findings**

1. Paul Heys, applicant, filed a critical areas variance application July 28, 2006 and a revised application September 7, 2007. The requested variance would allow construction of a single family residence in the 7700 block of Yeomalt Point Drive NE within 50 feet of a geologically hazardous area. On May 28, 2008, the Department of Planning and Community Development (hereafter "Department") approved the variance subject to extensive conditions of approval. Paul and Linda Heys (hereafter "Appellants") filed an appeal challenging two of those conditions.

2. The subject property is a .49-acre site located on a steep coastal slope. The western two thirds of the site, the upper slope, averages 100 percent dropping about 55 feet across 55 ft. to a bench. The lower slope drops from the bench to Yeomalt Point Drive from which access is proposed. Angles on the lower slope range from near horizontal to near vertical.

3. A preliminary geotechnical report by Jane Myers was provided. The geotechnical engineer observed the near-vertical bluff, soil cracks, near-vertical scarps, periodic bulging of the slope face and landslide debris, including some 15 ft. that extends below the ground surface of the mid-slope bench. These are all indicators of historic and recent slope instability.

4. The entire property is classified as a geologically hazardous area pursuant to Section 16.20.150. No clearing, grading, or new construction is permitted within 50 feet of the edge of all slopes that are classified as geologically hazardous, according to Section 16.20.150E2a.

5. Where compliance with the geologically hazardous areas development standards would be an unnecessary hardship, an applicant may seek a variance pursuant to Section 16.20.070. The director of the Department may grant a variance if the application meets the following criteria:

1. Special circumstances applicable to the subject property, including size, shape, or topography, and the strict application of this chapter is found to deprive the subject property of rights and privileges enjoyed by other properties in the vicinity; provided, however, the fact that those surrounding properties have been developed under regulations in force prior to the adoption of this chapter shall not be the sole basis for the granting of a variance; and

2. The special circumstances referred to in subsection A of this section are not the result of the actions of the current or previous owner; and

3. The granting of the variance will not result in substantial detrimental impact to the critical area, public welfare or injurious to the property or improvements in the vicinity and area in which the property is situated; and

4. The granting of the variance is the minimum necessary to accommodate the permitted use; and

5. No other practicable or reasonable alternative exists; and

6. A mitigation plan has been submitted and is approved for the proposed use of the critical area; and

7. If structures are the approved use for which the variance is applied, the structures shall be no greater than the minimum size necessary to accommodate the permitted use; and

8. Retention of existing native or equivalent vegetation in other portions of the site is provided in order to offset habitat loss from buffer reduction; and

9. 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.

Section 16.20.070B.

6. The Director concluded that there are special circumstances present that are not the result of any owner's actions and that if the setback requirement were strictly applied would deprive the property of rights and privileges enjoyed by other properties in the vicinity. To determine what rights and privileges are enjoyed by other properties and what the minimum size necessary to accommodate the permitted use would be, the Department obtained Kitsap County Assessor building records for the five properties immediately adjacent to the subject site and determined that the average total living area of the residential development on those properties is approximately 2,050 square feet and the average area dedicated to carports and garages is about 535 square feet. In addition, porches and decks on some of the properties average 570 square feet. Therefore, the Department concluded that a residence of 2,585 square feet, including garage or carport, would afford development comparable to the adjacent properties with similar topography and imposed a condition of approval of the variance, No. 6, limiting floor area to that amount.

7. At the hearing, the Department conceded that a basement for one of the properties was not included in the calculation. The Department calculated that including that area in the total for averaging purposes, less 600 ft. already included as garage, resulted in an average of 2,836 square feet and agreed that the restriction on floor area should be amended accordingly.

8. The Department also imposed a condition, No. 2, that the variance expires and is void if the applicant does not file a complete building permit application and any other necessary development permit within three years. Appellants initially appealed this condition but determined that it is reasonable that it can be accomplished within the three years so withdrew that component of their appeal.

9. Section 16.20.070E2 addresses development design. Development is to be designed to avoid impacts to the geologically hazardous area and "shall be designed to minimize the footprint of buildings in other disturbed areas, minimize removal of vegetation...and retain open space to the maximum extent practicable." The section says that the design shall utilize under-structure parking, multi-level construction and tiered foundations.

10. Section 16.20.150B sets out the intent of the regulations for geologically hazardous areas:

The intent of this section is to prevent the potential for personal injury or loss of life or property due to flooding, erosion, landslides, seismic events, or soil subsidence. Development must not increase slope instability, and must avoid on-site and off-site impacts, as well as potential risk to structures. Preserving the existing vegetation may be an important part of minimizing those risks.

11. Among the goals and policies in the Comprehensive Plan that the Department found applicable to this application are the following:

OS 1.1 Provide protection for critical areas through public and private initiatives, including limiting the amount of lot coverage and other techniques.

OS 1:5 New development should strive to be responsive to the natural landscape and should be sited so as to have the least visual and environmental impact on the island landscape.

GH 1.1 Land uses on landslide hazard areas and erosion hazard areas should be avoided. If the hazard caused by development can be mitigated, then land use should be designed to prevent damage to persons or property and environmental degradation, and to preserve and enhance existing vegetation to the maximum extent possible.

12. While Appellants accept that the City has the authority to restrict the size to protect the stability of the slope and the environment, they contend that restricting the total floor area bears no relationship to this purpose. They refer to various provisions in the Critical Areas chapter of the Code to support their argument that the regulations indicate that the danger from building on steep slopes is best minimized by reducing the amount of disturbance, hence the size of the footprint is the critical factor. Even the size of the structure to be allowed with a reasonable-use exception is measured by lot coverage, not total size. Section 16.20.080 G.5. Appellants pointed out that with the current condition, they could build a single story home covering over 2,500 sq.ft. of lot area. A condition requiring a smaller footprint would limit site coverage while allowing the owners to achieve more floor area by building up or under.

13. Ms. Tayara, the planner who reviewed the application, offered several reasons for restricting floor area instead of restricting footprint. First, the Comprehensive Plan indicates that land uses on landslide hazard areas should be avoided and, in this case, no development of the property would be possible without variance if the setback regulation were strictly enforced because the entire site is within a hazardous area or buffer from the edge of a slope. Further, the Code states that development to be allowed by variance must be the minimum necessary to accommodate the permitted use, if it can be done without substantial detriment to the critical area and will not injure any other property in the area. In determining what that minimum size necessary for a residential use is, she also looked at the criterion that directs consideration of rights and privileges enjoyed by other properties in the vicinity. She concluded that the minimum necessary is the average size of the structures on the other lots surrounding the subject site, even though the subject property is almost twice the size of most of the others. She also concluded that the maximum flexibility for designing a residence needed to be maintained since no design had yet undergone review. A footprint limitation could cause a problem for the applicant if a tiered design to fit the slope, suggested by the code, were the best design, or if extensive retaining walls were needed for the structure there could be very little footprint left for living area.

14. Considerable comment on the application was received by the Department prior to making its decision on the application. Most of the comment addressed concern about potential harm from developing the geologically hazardous site.

### Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Sections 2.16.095 and 2.16.130.

2. The Hearing Examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F2. The "substantial weight" requirement means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

3. Here, the planner explained her reasons for relying on floor area rather than footprint. Though the Hearing Examiner might have chosen differently, there is a sound basis for each of the reasons, i.e., the property is entitled to only the minimum necessary to allow somewhat comparable development to others in the vicinity, using the footprint limitation suggested could result in a good deal more "house" than others, and a limit on total area provides greater flexibility for design on this difficult site than limiting the footprint would, directly relating to designing development to protect the slope and other properties and being responsive to the natural landscape to lessen visual impact. While there are more Code references to footprint and the Comprehensive Plan goals and policies would support either view, the Hearing Examiner is not left with a definite and firm conviction that the choice made by the planner was a mistake. Therefore, the variance condition should be affirmed, as modified to reflect the corrected average of the surrounding properties.

### Decision

The appeal is denied and the determination affirmed, except that Condition No. 6 is modified to read:

The proposed residence is limited to a total of 2,836 square feet, including any area dedicated as a garage/carport, a size that is comparable to surrounding residences.

Entered this 31st day of July 2008.

/s/ Margaret Klockars

Margaret Klockars

Hearing Examiner *pro tem*

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### **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.*

The decision of the hearing examiner shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.