

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

In the Matter of the Application of

CAPSTONE PARTNERS LLC

for a Conditional Use Permit for
“Wing Point Patio Homes”

**CUP 13719
REMAND
DECISION**

BACKGROUND

The Applicant seeks a Conditional Use Permit (CUP) to construct eleven houses on one parcel in the R-2.9 zone. The Director, Department of Planning and Community Development, has reviewed the application and recommends approval with conditions. A public hearing was held beginning September 27, 2007 and continuing on November 1, 2007. The Applicant, Capstone Partners LLC, was represented at the hearing by its attorney Dennis D. Reynolds, and the Director, Department of Planning and Community Development (PCD or Department), City of Bainbridge Island, was represented by Jay Derr, attorney for the City.

In 2006, the Hearing Examiner denied the CUP (that decision is in the record here as Exhibit 129; referred to as the “Wing Point decision”). The applicant appealed that denial to Kitsap Superior Court and, in 2007, the matter was remanded to the jurisdiction of the Hearing Examiner (referred to herein as the “remand”). The record for the subject remand decision contains the evidence admitted into the record for the prior “Wing Point decision” [including Exhibits 1-63], as well as the evidence associated with the remand hearing [including Exhibits 64-129]. The procedural history of this matter is summarized in Findings 1-4.

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. All evidence admitted in to the record was considered in making this decision. References to exhibits and testimony that are shown in brackets denote some of the evidence relied upon; these references are not intended as exclusive or exhaustive. Except where “WP” precedes the citation (which indicates the 2006 Wing Point decision), references to specific “Findings” or “Conclusions” refer to the findings and conclusions as enumerated in this remand decision.

FINDINGS

PROCEDURAL HISTORY

1. The Conditional Use Application (CUP 13719) of Capstone Partners LLC, for its proposed “Wing Point Patio Homes” project, came before the Hearing Examiner in 2006,

and after proper notice and hearing, the Hearing Examiner denied the CUP [see Wing Point Decision, Exhibit 129]:

December 5, 2005 Capstone Partners submits CUP Application for "Wing Point Patio Homes" [Exhibit 12]; PCD deems Application complete December 7, 2005 [Exhibit 13].

March 29, 2006 PCD Director issues SEPA Mitigated Determination of Nonsignificance (MDNS) [Exhibit 36]; the MDNS was not appealed.

May 4, 2006 Hearing Examiner conducts CUP hearing [see WP Findings 32-44].

May 9, 2006 Finding conflicting evidence as to the proper location of the "*top of the ravine bank*", the Hearing Examiner orders that the record be reopened and supplemented [Exhibits 41, 43, 44, and 52].

June 22, 2006 The hearing is reconvened, additional information submitted and testimony given [Exhibits 53-59; see also WP Findings 37-44]; the record is closed.

July 21, 2006 Finding that the record did not establish that all the CUP approval criteria would be met, Hearing Examiner issues the decision denying the requested CUP [Exhibit 129; also see WP Finding 58 and Conclusions 3-5].

2. Pursuant to the Land Use Petition Act, the Applicant (Capstone Partners LLC) and the property owner (Wing Point Golf and Country Club), filed an appeal in Kitsap Superior Court, seeking reversal of the Hearing Examiner's decision denying the CUP.

3. In 2007, the matter was remanded to the Hearing Examiner, additional public hearing was held and additional evidence admitted into the record:

July 17, 2007 Based upon the joint request of Capstone Partners and the City, Judge Costello, Kitsap Superior Court, issues an Order [Exhibit 64] vacating the Hearing Examiner's Wing Point decision and remanding the matter for additional proceedings.

August 16, 2007 The Hearing Examiner receives notification of the issuance of the "Stipulation and Agreed Upon Order".

September 12, 2007 The Office of Hearing Examiner provides public notice for the remand hearing [Exhibit 65]

September 27, 2007 and November 1, 2007 Hearing Examiner conducts remand hearing; the record remained open to allow the Applicant and Director to file additional comments [Exhibits 126 and 127]. Written comments from interested persons [Exhibits 121-123], as well as different size/scale versions of maps already in the record, were also admitted into the record after hearing [Exhibits 124 and 113A].

November 16, 2007 With receipt of Exhibit 113A, the record closes.

4. Several persons who submitted public comment, advocated that the subject application be reviewed using the City's current laws and regulations, rather than those in effect when the application was filed. As a conditional use permit application is properly reviewed under the land use laws and regulations in effect when the application is filed

[see Weyerhaeuser v. Pierce County, 95 Wn. App. 883 (1999)], this is CUP application is properly reviewed using City ordinances in effect on December 5, 2005.

SITE DESCRIPTION

Size and Location

5. 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 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; Exhibit 39, page 6]

6. The general shape of the site is a narrow rectangle. The north/south axis is approximately 1,000 ft. with the east-west dimension is 149 ft. fronting Wing Point Way and 180 ft. at the northern property boundary. [Exhibit 40, Sheet A1 and Sheet 1/1]

Natural Features

7. The site is undeveloped and covered with mature forest (except for the area in the southwest where the age and type of vegetation reflects past clearing and the lawn of the neighboring property encroaches). Vegetation includes mature alder, maple, cedar, and fir trees, with a dense understory of woody shrubs, blackberry, salal, and sword fern. English ivy, classified in Washington a "noxious weed" (due to its destructive, invasive nature) is widespread; dominant in the south part of the site. [Exhibits 6, 27, and 108]

8. A ravine containing a Class 4 stream extends along the east side of the site. This intermittent stream is referred to by some as "Hawley Creek" [Exhibit 26]. Except where it enters a culvert in the southeastern corner of the subject site, the centerline of the stream is within Lots 11-22 of the "Wing Point Greens" plat [see Exhibit 5 and Sheet 4.2, Exhibit 109], not the subject site. From the culvert under Wing Point Way, the stream flows 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]. West of the adjacent property, there is another stream that flows in a southerly direction; it crosses beneath Wing Point Way through a different culvert [see illustrations in Exhibits 7 and 8].

9. Along much of the east side of the subject property, the ravine slopes steeply down to the stream. [Exhibit 6; Exhibit 26; Exhibit 27; Exhibit 113A] See Findings 44-45 for further description of the ravine slopes. The site also slopes moderately from north-to-south (overall elevation change of approximately 50 ft. in 1,000 ft.), with an overall slope on the order of 4-6%, and maximum slope of 12% [Exhibits 6, 8, and 113A].

Vicinity

10. Except for the Wing Point Golf and Country Club to the north, all uses in the immediate vicinity are residential.

11. Azalea Avenue, to the east is developed with two dozen residences. The street extends north from Wing Point Way, terminating at a cul-de-sac approximately 1,000 ft. to the north. Lots 11-22 of the “Wing Point Greens” plat, on the west side of Azalea Avenue, are adjacent to the subject site along the entire length of its eastern boundary. The stream itself and the base of the western slope of the ravine are within Lots 11-22. The residences on these lots are generally located west of the crest of the slope. [Exhibit 40, Sheet 1/1; aerial photo, Exhibit 48; Exhibit 58]

12. 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]

Zoning

13. The zoning of the subject site is R-2.9 (residential, one dwelling per 15,000 sq. ft.) [see BIMC 18.30.040]. At the R-2.9 density, this site would be permitted 11 lots (*i.e.*, 170,775 sq. ft. divided by 15,000 sq. ft./lot = 11.3 lots).

14. The Comprehensive Plan designation is SUR (Semi-Urban Residential). Zoning in all directions is R-2.9 (with corresponding SUR-2 Comprehensive Plan designation). [Exhibit 39, page 6; Testimony of Bonsell]

15. Although they would be single-family structures (*i.e.*, one dwelling unit per structure), the houses are considered “*multifamily dwellings*” under the Code definition [see BIMC 18.06.320] because they would be located on one lot. BIMC 18.30.030 provides that “*Multifamily dwellings*” may be allowed in the R-2.9 zone as a Conditional Use. [See criteria for conditional use approval at BIMC 18.108.040A; Finding 62.]

PROPOSAL: “Wing Point Patio homes”

16. The Applicant proposes to construct 11 two-story detached residences, approximately 10 ft. apart, each with a “footprint” of approximately 2,200 sq. ft. An attached two-car garage of approximately 500-600 sq. ft. and individual driveways, would provide parking area for the individual units. Nine parking spaces for guests would be located adjacent to the access drive (3 spaces near middle of the site and 6 spaces at south end, near Wing Point Way). [Exhibit 5; Exhibit 12; Exhibit 39; Exhibit 78 and 78A; Testimony of Wenzlau]

17. The proposal was revised for the remand hearing [Testimony of Wenzlau]. The houses had formerly been an identical shape and uniformly aligned perpendicular to the access drive (except for units #1 and #2 in the south end of the site which were, and remain, generally parallel to the access drive). The revised site plans show some variation in shape, and the houses are now angled northeast to southwest. This reconfigured layout allows for more space between the houses and the ravine slope, the same number of houses with footprints comparable to the original proposal, better views of the forested open space and, consequently less views of adjacent neighbors (increasing privacy). [Site plans: Exhibit 4 and Exhibit 78A.]

18. “Wing Point Patio Homes” is proposed as a condominium with the houses individually owned and shared rights and responsibilities for everything else ("common elements"). The houses would look like and function like typical single family homes. [Testimony Wenzlua] Ownership rights and responsibilities for the common elements would be documented in a Condominium Declaration for the "Wing Point Patio Homes" prepared pursuant to the Washington Condominium Act (presently codified in RCW Chapter 64.34).

19. A draft Condominium Declaration was submitted without discussion at the remand hearing [Exhibit 116]. An owners' association, as prescribed in the Declaration, would manage on-going usage and maintenance of the common elements (including access drive, parking spaces, storm water system, Open Space, and critical area buffer). The decks, patios, and porches immediately accessible to each unit, and the yards surrounding it, would be reserved for the exclusive use of that unit. Individual home owners would have responsibility for maintenance of those immediately adjacent areas as provided in the Declaration.

20. Vehicular access would be provided to Wing Point Way at a point near the southwest corner of the site. The applicant has agreed to “construct and install street improvements and make dedications” according to City standards as required by the Public Works Director [see Finding 43].

21. An access drive (also referred to as “private lane” or “access road”) would extend the entire length (north/south axis) of the site with a vehicle turn-around in the Open Space area in the north. The road would have a 12-ft. wide paved surface and 3-ft. wide graveled shoulders; the turn-around would accommodate emergency vehicles (as required by the Fire Department). At the approach to Wing Point Way, there would be an 18-20 ft. wide, 40 ft. long “landing”. [Exhibit 124, Sheet 4.7; Testimony Wenzlau]

22. City water and sewer would serve the project [Exhibit 7] and storm water facilities would provide detention on-site and discharge into the existing public system. [See Findings 37-40 regarding storm water system.]

23. Along the east side of the property, a 30-ft. wide stream buffer (measured from the “top of the ravine) is proposed, rather than the minimum 25-ft. buffer required by the Code [see Finding 49]. There would also be a 15-ft. wide "building setback" beyond the 30-ft. wide buffer. No buildings could be constructed in either the buffer or the building setback, but the setback area could be cleared and/or graded as necessary to facilitate construction of the proposed houses.

24. No revised landscape plan was submitted during the remand proceeding and the cross-section at the driveway [Exhibit 80, Sheet A0.3.2] shows the storm water drainage ditch/swale beginning at the property line, leaving no room for the landscaped screen along the western property line as originally proposed [Exhibit 25]. The Director recommends that the final landscape plan include a sight-obscuring fence or vegetative barrier along the west property line [Exhibit 75, page 2].

DIRECTOR'S REVIEW AND RECOMMENDATION

25. 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*”.

26. After Capstone Partners filed its application in December 2006, PCD gave notice of the application and of the SEPA Comment Period [Exhibit 18]. Several concerned neighbors submitted comments to the Director during the SEPA comment period [Exhibit 20, Leatherman/Miller; Exhibit 21, Smith; Exhibit 22, Miller; Exhibit 23, Peters; Exhibit 24, Atkinson]. 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 traffic safety on Wing Point Way).

27. The Director referred the application to various City departments for review and comment [Exhibit 11]. The Public Works Department advised that the location would be served by City water and sewer [Exhibit 7] and that the storm water drainage system must be designed by a civil engineer. The Public Works Department also considered likely traffic impacts and issued a Certificate of Concurrency [see Finding 41]. The Fire Department specified that new hydrant(s) would be required in accordance with City standards and that the access drive must have a minimum width of 12 ft. and an approved turn-around.

28. The Director reviewed the revised site plans for the remand proceedings and characterized the revisions as “minor”. The Director's memo for the remand hearing [Exhibit 75] affirmed previous recommendation [Exhibit 39] that the CUP be approved with conditions. Some modification of the previously recommended conditions was suggested, including: a split-rail fence and signs along the buffer should be required; an Open Space Management Plan should be submitted for the Director's review; a final landscape plan should address parking areas and a vegetative barrier or a 5-6-ft. tall view-obscuring fence along the west property line; pesticide use should not be permitted in the Open Space; and, City enforcement of buffer maintenance should be clarified. [Exhibit 88; Testimony of Machen]

PUBLIC COMMENT

29. In 2006 and on remand in 2007, this CUP application has been the subject of considerable public comment, both in writing and at the public hearings.

30. During the public comment portion of the hearing on May 4, 2006, several members of the public spoke [including testimony of: Williams, Smith, Atkinson, West, Gace, Peters, Miller, Cain, Carmell]. Written comments were also submitted [including: Leatherman, Miller, Smith, Peters, Atkinson, Carmell, Wing Point Way Neighborhood Association, Azalea Avenue Residents; Exhibits 20, 21, 22, 23, 24, 28, 29, 32, 33, 34, 35, 45, 46, 47, 61, 63].

31. Information provided in the 2006 public comments, indicated that some of “flags” used to stake/mark the “top of ravine”, were not at the “top”, but on the bank itself [see WP Finding 35]. The record was reopened and the hearing reconvened in an attempt to reconcile conflicting evidence in the record so that the “top of ravine bank” could be

properly established to satisfy the critical area buffer requirement. [WP Findings 34-43.] At the reconvened hearing in 2006, a number of individuals commented [Testimony of Bispham, Atkinson, Jorgensen, Cartmell, Ostling] and additional comment was submitted in writing [Exhibit 60, Atkinson; Exhibit 62, Perry; Exhibit 61, Wing Point Way Neighborhood Association; Exhibit 63, Azalea Avenue Residents].

32. Concerns expressed at the hearing in 2006 included: public stormwater management facilities already inadequate; Wing Point Way is dangerous; additional right-of-way should be required to accommodate future Wing Point Way redesign; traffic problems would be created by the access drive; development would have adverse environmental impacts; the proposed "density" would be out of character with existing development; there was no assurance as to future maintenance and proper functioning of stormwater facilities; the geotech report was ambiguous; there should be a more definitive stability assessment. [Testimony of: Macchio, Jorgenson, Adams, Smith, Atkinson, Creech, Peters, Balsam, Carmell]

33. During the remand proceedings, numerous comments were submitted at hearing [Atkinson, Strauss, Miller, McAllister, Macchio, Bainbridge Island Keepers, Schouw, Association of Bainbridge Communities, Carey, Temple, Boyce, Warriner, Smith, Rees, Kragerud, Jorgenson, Leatherman, Sheldon, Boynton] and in writing [Exhibits 66, 68, 69, 70, 71, 72, 73, 90, 95, 96, 97, 98, 99, 100, 101, 102, 105, 106, 110, 121, 122]. The concerns were similar to those expressed in 2006 (e.g., potential for adverse impact on slope and/or stream, adverse visual impact, density incompatible with the neighborhood character, storm water and traffic problems).

34. A number of comments regarding this matter, particularly those received during the remand proceedings, offered only expressions of support or opposition for the proposal. Although public comment is expressly allowed during review of a conditional use permit (CUP) application, the relative popularity of a proposal is not a factor considered when making CUP decisions [see specific decision criteria in BIMC 18.108.040A; Finding 62].

STORM WATER

35. The geotechnical consultant's reports on geologic conditions emphasize the importance of the proper handling of storm water. Improperly managed storm water is cited as a potential contributor to surficial slope instability and it is cautioned that: "Under no circumstances should storm water from the developed area be allowed to collect near the top of the slope or to be allowed to flow uncontrolled over the top or any portion of the slope." [Exhibit 6, page 4]

36. The 1999 slope evaluation recommends in addition to "temporary erosion control", that a "no vegetation disturbance zone" (at least 25-ft. wide, delineated by construction fencing), be maintained between construction and the crest of the steep slope. [Exhibit 27, attachment page 4] For control of erosion and sedimentation, "Best Management Practices" (BMPs) would be employed and temporary erosion control measures included in a storm water pollution prevention plan. The site would be inspected regularly during construction. [Testimony of Browne]

37. Stormwater would be collected, conveyed, and detained on-site before discharge into existing stormwater drainage facilities in the Wing Point Way right-of-way. Runoff from the northern ("upper" portion) of the access drive would drain to a biofiltration swale. Drainage from roofs and patios would be collected and tight-lined to a 10 ft. X 40 ft. underground detention vault at the southern end of the site. A filter-treatment unit for runoff from the lower portion of the road (*i.e.*, downslope from the biofiltration swale) would be located adjacent to the vault. [Exhibits 8, 82, 84, 85, 86; Testimony Browne]

38. The on-site facilities would be designed in accordance with DOE's 1992 Washington State Stormwater Management Manual. The applicable standards require detention sufficient so that the peak flows from the site are not increased from pre-developed conditions. Based upon modeling for peak flows, before and after development, the project engineer testified that peak flows would not exceed pre-development levels. An operations and maintenance schedule and manual for the on-site storm water facilities would be required with applications for construction permits. [Testimony of Browne]

39. The current standards for storm water systems (that became effective after the subject application was filed), require lower rates of discharge and regulate duration of flow, as well as volume of flow. The proposed system would meet the applicable standards; the new standards would necessitate a larger detention vault. [Testimony of Browne]

40. Neighbors commented about instances when public storm water facilities did not functioning adequately and questioned the adequacy of downstream and culvert capacity. The project engineer credibly testified that there is sufficient capacity in the culvert under Wing Point Way to receive storm water from the developed site and that his visual inspection downstream revealed no sign of capacity problems. [Testimony of Browne] During the hearing in the 2006, information was received about insufficient capacity in the culvert under Wing Point Way west of the subject property resulting in damage to property on the south side of Wing Point Way [Testimony of Miller]. That culvert would not receive discharge flows from the site's storm water system [Exhibit 8 and Exhibit 86].

TRAFFIC SAFETY

41. The Public Works Department issued 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 residence for a total of 105 ADT. 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].

42. The access drive "landing" [see Finding 21] would accommodate at least two vehicles in queue waiting to turn onto Wing Point Way and have space for simultaneous entry and exit. This resolves questions about whether there would be enough space for vehicles to queue and/or to enter and exit at the same time. [Exhibit 38; Testimony Wenzlau, Hathaway]

43. The City has been planning improvements for Wing Point Way for some time and the tentative schedule has design in 2008 and construction in 2009. The improvements that the applicant would be required to provide would be consistent with the overall plans and are anticipated to include a bicycle lane on both sides of Wing Point Way and a sidewalk on the south side. [Exhibit 119, Testimony Wenzlau, Hathaway, Carmell]

STEEP SLOPES

44. The ravine slopes along the eastern portion of the site have been identified as a geologically hazardous area due to the presence of slopes greater than 40%. BIMC 16.20.080C.2 requires that a "*buffer of 50 feet shall be provided from the edge of all slopes that are geologically hazardous areas.*" The "*edge of a slope*" includes the top, toe, and sides of the slope. The required buffer may be extended to mitigate hazards and may be reduced "*if the applicant provides expert verification...that the proposal will not adversely impact the geologically hazardous area.*" [Testimony of, [Exhibit 6, page 4; Exhibit 41; Testimony of Peterson, Bonsell, Hathaway]

45. A slope evaluation conducted in 1999 [see Exhibit 27, Myers Biodynamics report, pages 1-2] notes the east side of the property is "roughly delineated by a steep ravine slope that descends approximately 30 to 40 feet eastward to a stream channel. This report further notes slope angles that average "approximately 50 degrees from crest to mid-slope". The geologic reconnaissance conducted for the subject proposal [Aspect Consulting; Exhibit 6, page 1], states that slopes "...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)." The mapping of slopes of 40% or greater and 15% or greater [see respectively: shaded area and dashed line, Exhibit 113A] indicates the presence of steep slopes within much of the site along its eastern boundary.

46. The 1999 report concluded that there were no indications for risk of "deep-seated rotational landslides, but "shallow-seated, localized landsliding and soil slumps" could occur. The Applicant's geotechnical engineer, Aspect Consulting, reached similar conclusions in 2005 [Exhibit 6] and cited curvature of tree trunks, toppled trees, loose soil and bare patches as indicative of ongoing shallow soil creep and surficial landsliding (*i.e.*, in top 1 to 3 feet of soil). [Exhibits 6 and 27; Testimony of Peterson]

47. The Aspect report cautions that if "slope and runoff conditions are changed in an adverse manner, the potential for slope damage could increase." The 1999 slope evaluation recommends a minimum 25-ft. wide "no disturbance" zone during construction and similar protection for vegetation post-construction. [Exhibits 6 and 27]

48. It has credibly been established that that a 40-ft wide geologically hazardous area buffer would provide for the requisite factor of safety for the proposed houses and would not adversely impact the steep slope. The site map [Sheet A0.4.9, Exhibit 111] depicting setbacks from the western edge of the areas of 40% slope accurately depicts the location of the top of the steep slopes (*i.e.*, slopes 40% or greater). [Testimony Peterson] The 40-ft. wide buffer for the geologically hazardous area should be measured from the line [labeled "a" on Sheet A0.4.9, Exhibit 111] that marks the western edge of the 40% slopes. (The line labeled "c" on Sheet A0.4.9 is 40 ft. west of the top of the steep slope area and consequently represents the location and western extent of a 40-ft. wide

geologically hazardous area buffer.) As no buildings may be located within the geologically hazardous area buffer, proposed Building #1 would need to be relocated a few feet to the west [see in Exhibit 112].

STREAM BUFFER

49. To protect the functions and values of streams from adverse impacts [see "Definitions" section, BIMC Chapter 16.20], BIMC 16.20.090.H provides that Class 4 streams must have buffers a minimum of 25 ft. wide and building setbacks of 15 ft. beyond those buffers. Where a stream is in a ravine, as is the case here, *"the buffer shall be measured from the top of the ravine bank."* The *"top of ravine of the ravine bank"* was not defined by the applicable Code. The current definition (effective January 2006), at BIMC 16.20.030.A. (emphasis added), provides the clarification and guidance that the applicable Code provisions did not:

The top of the slope is determined where there is a significant change in the slope to generally less than a 15 percent slope.

50. A stream buffer along a ravine is to provide area sufficient for storm water to be slowed down enough to infiltrate, rather than rushing down the steep banks, causing adverse impacts of erosion, sedimentation, pollution, and slope destabilization. The stream buffer is measured from the *"top of the ravine bank"* [see BIMC 16.20.090.H] where there is a "break" in the steep slope (*i.e.*, the slope begins to be "flat" enough to provide the desired water quality protective functions for the stream).

51. Establishing the top of the ravine bank", the point where that buffer measurement begins, is essential. [See WP 42-43 and 58.] During the remand proceedings, evidence came into the record that sheds light on the *"top of the ravine bank"* and the proper location of the stream buffer, including:

(a) Where a steep slope flattens to about 15% is generally considered the "top"; a good place to begin the stream buffer. However, there are environmental factors provide for adequate buffer that begins on slopes greater than 15%. These factors include the character of the vegetation (*e.g.*, denser vegetation more effectively slows runoff); soil type (*e.g.*, some provide better infiltration); and, the size of area upslope draining (*e.g.*, larger area generally need larger buffer). [Exhibit 114; Testimony Demming and Morse]

(b) The "top of ravine" line [see Exhibit 113] is the result of a field assessment that considered a combination of factors. In October 2007, City staff and the habitat consultant reset several stakes [stakes 107A, 108A, and 114A in Exhibit 113] relocated two stakes upslope to the west. Stake 110 was moved about 20 ft. and Stake 104 about 10 ft. [see locations in Exhibits 83 and 113]. The adjusted staking is reflected in the Topographic Information site plan map [Exhibit 113] prepared by the surveyor. (No Stake 105 was found in the field or marked on the site map.) [Exhibits 83 and 113; Testimony of Adam, Morse, and Demming]

(c) The stakes that (labeled "top of ravine") are consistently (11 of 13 stakes) located at, or within a few feet of the western (upslope) edge of the area mapped as

"40% slope or greater". The "breaks" verified in the field are where slopes 40% or greater "flatten", not the "break" at the top of 15% slopes. [See in Exhibit 113.]

(d) Because it is straight and the ravine bank curves, the "top of ravine" line drawn between Stakes 102 and 103 takes in an area of steep slope. The "top of the 15% slope" between Stakes 102 and 103, is outside of that steep slope area. [Exhibit 113]

52. Experienced professionals, considering a combination of environmental factors, identified where a buffer could be located that would meet the applicable Code requirements. Their field assessment results in a buffer that begins at locations where slopes exceed 15%. The "top of the 15% slope" guidance is not part of the applicable Code [see Finding 49] and here it is not unreasonable or inconsistent to have slopes exceeding 15% within the buffer and have the buffer still be effective. [Exhibits 83, 113A, 114, 115, and 124; Testimony of Morse and Hemming]

53. However, to include slopes unquestionably steep (*i.e.*, slopes 40% or greater) within the buffer (which has the indispensable purpose and function of providing terrain that is NOT steeply sloping), is logically inconsistent and unacceptable. No areas mapped as having "40% slopes or greater" should be within the stream buffer. Stakes 104 and 110 have already been relocated out of the area of steep slopes; other staking and the "top of ravine" should be also revised, and maps depicting the buffer and associated limits redrawn, so that none of the mapped steep slope area is within the buffer. [See Conditions 8-10.]

OPEN SPACE

54. In addition to the 30-wide stream buffer , approximately 85 ft. of the north end of the site would be designated Open Space, as would approximately 50 ft. of the south end along the eastern portion of the Wing Point Way frontage [see Open Space Management Plan map, Sheet A0.4.7, Exhibits 109 and 124]. The draft OSMP [Exhibit 108] provides that maintenance of the Open Space would include replacement of significant trees that become diseased, die, or are removed because they are determined to be a hazard. Maintenance would also include removal of English ivy from trees and long-term control of invasive plant species.

55. Three categories of Open Space would be designated: Critical Area and Buffer; Passive Recreation Space; and, Road Access. Activities would be allowed or prohibited as specified in the Open Space Management Plan (OSMP or Plan).

	<u>Allowed</u>	<u>Prohibited</u>
<u>Critical Area & Buffer</u>	Planting of native vegetation Removal of invasive plants Removal of hazard trees	Construction of buildings, etc. Clearing/cutting existing native vegetation Informal/formal recreation Dumping debris, etc.
<u>Passive Recreation Space</u> (Private Trail)	Informal/formal recreation (trail) Planting of native vegetation Fence at critical area boundary Removal of hazard trees Repair of trail	Construction of buildings, etc. Dumping debris, etc. Clearing/cutting native vegetation

Road Access

Road (construction, repair, etc.)	Construction of buildings, etc.
Planting of native vegetation	Clearing/cutting existing native vegetation
Removal of invasive plants	Dumping debris, etc.
Removal of hazard trees	

56. The "Passive Recreation Space" would consist of a 5-ft. wide private trail in the eastern 5 ft. of the 15-ft. wide building setback, adjacent to the buffer. The trail route would need to be cleared, leveled, and surfaced with wood chips or similar pervious material. (As the trail is to be within the building setback, it could be cleared during construction.) The trail is not required by the Code, but the Director recommends its inclusion in the Open Space because trails are considered a desirable amenity for recreation, pedestrian safety, and internal access. [Exhibit 116; Exhibit 109 and 124, Sheet 4.7; Testimony of Machen]

57. A trail is not necessary here for pedestrian travel between houses; the access drive would provide safe internal access. Adjacent to stream buffer and steep slopes, a trail in this location could attract recreational use detrimental to both the stream buffer and the steep slopes. Revegetated with native plants, this 5-ft. wide strip could extend the protective functions and contribute to the effectiveness of the buffer. At hearing, the Applicant indicated a willingness to utilize this area as buffer rather than develop a trail. The former would be a better alternative and the OSMP should be revised to reflect that.

TREE CANOPY

58. At the hearing in 2006, it was estimated that the existing "tree canopy" was approximately 166,000 sq. ft. [Exhibit 12; Exhibit 40, Sheet L1; Testimony of Goss]. With the revision of the site layout, construction of turn-around at the north end of the site [see Finding 21] would necessitate removal of part of the canopy that was previously proposed to be entirely retained.

59. There is no canopy retention requirement for this proposal [Machen]. The retention proposed is important for mitigating environment impacts, but most the existing tree canopy would be removed for construction. Except for the those parts of the designated open space in the north and south ends of the site that would not be affected by access drive construction, the entire site from the western property line, to the west edge of the buffer, could be cleared.

BAINBRIDGE ISLAND MUNICIPAL CODE (BIMC)

60. BIMC 2.16.025.B.1 assigns decisions on regular Conditional Use Permit (CUP) applications to the Hearing Examiner. The Hearing Examiner is authorized to hold a public hearing and make a decision to "approve, approve with modifications, deny or remand an application". The Hearing Examiner is required to "consider the applicable decision criteria of this code, all applicable law, and any necessary documents and approvals" and has the authority condition approval [BIMC 18.108.040.B].

61. 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.

62. BIMC 18.108.040A (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.

63. The proposal for Wing Point Patio Homes, as conditioned, meets the approval criteria of BIMC 18.108.040A as follows:

(1) It would be harmonious and appropriate with the character of the vicinity and the subject property:

The size and design of the proposed residences would similar to and compatible with the single-family development in the vicinity. The “density” – dwellings per acre - would be consistent with the zone’s limit of one dwelling per 15,000 sq. ft.; the distance separating residences does not determine “density”. That the houses would be closer to one another than existing development, does not diminish their "residential" character and is consistent with Code and policy goal of clustering development for the preservation and protection of critical areas.

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. Azalea Avenue residences on the east side of the

ravine may be able to see some parts of the proposed residences, but the tall trees in the buffer and other vegetation in close proximity to the proposed residences would at least partially screen them from view. The property to the west is undeveloped and a fence and/or a vegetative barrier along the western property line (as recommended by the Director) would adequately obscure views from the west.

As conditioned, the Open Space Management Plan and the Condominium Declaration would adequately provide assurance that the site's developed character and appearance would be harmonious with the character of the vicinity.

(2) It would be adequately served by public utilities:

Adequate water and sewer service is available to serve the proposed residences. The storm water drainage system, designed by a licensed engineer and maintained by the home owners' association, would meet applicable City standards.

(3) It would not be materially detrimental to uses or property in the vicinity:

No material detriment to uses or property in the vicinity would result from this proposal. That some the proposed houses might be seen from neighboring properties (or that they would relatively close to one another) would not be materially detrimental. The proper establishment and maintenance of the buffer and Open Space areas would mitigate and/or preclude adverse impacts on the stream and ravine slopes.

(4) It would be in accord with the Comprehensive Plan:

With a pattern of development similar to the existing development in the vicinity (*i.e.*, single family houses along a road extending north from Wing Point Way), the houses would reflect neighborhood character and be in accord with the SUR (Semi-Urban Residential) Comprehensive Plan designation. Construction of street improvements, including bike lanes along Wing Point Way, would be consistent with the Non-Motorized Transportation Plan. Retaining trees along Wing Point Way would be in accord with Comprehensive Plan goals of preserving the forested view from highways.

(5) It would comply with applicable provisions of this Code:

As modified by the conditions of this decision regarding relocation out of areas mapped as 40% slope or greater, the “*top of the ravine bank*” would be credibly established and a satisfactory buffer would be provided.

(6) 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”. [See also (1), (3), and (4) in this Finding.]

(7) All measures have been taken to eliminate impacts.

As conditioned, all measures to eliminate impacts would be taken, including: properly establishing the critical area buffer for ongoing mitigation of

potential adverse water quality impacts; providing open space and buffer areas; setting back development from geologically hazardous slopes; and providing for safe and appropriate access to and within the site.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. This application was previously denied because the record was not adequate for determining if the proposal would meet, or be conditioned to meet, the criteria for approval. There is now credible and sufficient evidence in the record to make that determination.
3. A major sticking point with the prior consideration was anomalous evidence regarding the "*top of the ravine*" location that would be used as a basis for establishing a buffer consistent with the applicable requirements of the Code. The record on remand establishes that the "*top of the ravine*", as determined (somewhat roughly) in the field, while not the topographic "top", can be refined by conditions to be the proper starting point for the stream buffer. With the 30-ft. width proposed by the Applicant, measured from the "*top of the ravine*" relocated so that it is entirely out of steep slope areas, and augmented with an additional 5-ft. wide vegetated area (in lieu of a private trail) [see Findings 23, 49-53, 56-57], the buffer would be provided consistent with the applicable requirements of BIMC 16.20.090. [See Conditions 8-10, 31-34]
4. Conditions to ensure protection of the buffer and its effectiveness are required by CUP criterion BIMC 18.108.040A.7, as are conditions regarding the access drive, storm water system, construction mitigation measures, and geotechnical review. Similarly, conditions regarding the revision of the proposed Open Space Management Plan areas and restrictions, and the clear declaration and notice of responsibility for on-going maintenance, are necessary to satisfy BIMC 18.108.040A.
5. Conditions of approval are necessary to ensure that the Conditional Use decision criteria would be met. With these conditions, the proposal would meet all decision criteria of BIMC 18.108.040A and should be approved.

DECISION

The application of Capstone Partners LLC for a Conditional Use Permit to develop the 11-unit "Wing Point Patio Homes" is **APPROVED WITH CONDITIONS** 1 through 36 in Appendix A which follows on pages 17-22.

Entered this 13th day of December 2007.

Signed in Original

Meredith A. Getches
Hearing Examiner

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 Hearing Examiner's 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.

APPENDIX A
Conditions of Approval
CUP 13719
Wing Point Patio Homes

<p>These Conditions of Approval are generally both SEPA conditions and conditions required to meet the CUP approval criteria of BIMC 18.108.040. Non-SEPA conditions are marked with an asterisk (*). Unless otherwise indicated, "Director" refers to the Director, Planning and Community Development (PCD).</p>

PERMIT REVIEW

1. *All appropriate **City permits** must be obtained prior to construction of dwelling units or infrastructure. Site plans for the building permits must be comparable to the site plans (dated 11/01/07) as revised to conform to these conditions of approval. (Repositioning of units as necessary to comply with the conditions of approval shall be allowed consistent with limits of buffer, setbacks, etc., and fewer units and/or smaller building footprints shall be allowed.)
2. *At the time of building permit submittal, the applicant shall address Public Works requirements and obtain necessary approvals/permits with regard to:
 - a) Required **water and sanitary sewer mains** within the condominium and along Wing Point Way.
 - b) Improvements in the Wing Point Way right-of-way (**bicycle lanes and sidewalk**) consistent with the Wing Point Way Improvement Project.
 - c) **Fire hydrant(s)** in accordance with City Municipal Code requirements as directed and approved by the Fire Department.
3. *Prior to issuance of any clearing, grading or construction permit, the Applicant shall comply with applicable provisions of **BIMC 18.85** to the satisfaction of the Director.
4. *Prior to construction, the applicant shall submit a **final landscape plan** to the Director for review and approval. Landscape plans shall include: the **revegetation of the eastern 5 ft. of the building setback** [see Condition 31] and the 3-5-ft. west of the top of the drainage ditch; a view-obscuring **fence** along the western property line; sod **lawn or other ground cover** to stabilize the area of construction between the houses and the "Buffer Perimeter Space"; landscaping of street frontage and between and around the houses consistent with original landscape plan [see Sheet L1 submitted 12/05/05]; and, appropriate **landscaping of guest parking spaces** adjacent to the access drive. The landscaping shall be installed prior to issuance of any Certificate of Occupancy.
5. *All **lighting** associated with this project shall comply with the City's Lighting Ordinance, BIMC Chapter 15.34.
6. *A copy of these conditions shall be attached to any construction plans throughout construction on the site.
7. Prior to building permit issuance, **school impact fees** in effect shall be paid if and as applicable.

BUFFER LOCATION

8. The "top of ravine" location shall be revised on the Topographic Information map [Exhibit 113A], Open Space Management Plan map [see Sheet A0.4.7, Exhibits 109 and

124], and all site plans displaying "top of ravine" and/or buffer locations, as follows: (a) the position of Stake 111 shall be moved west as necessary to be outside of the steep slope areas (*i.e.*, shaded area indicating "40% slopes or greater") mapped in Exhibit 113A; and, (b) south from Stake 103 to the southern property line, the "top of ravine" shall be redrawn to be coincident with the line depicting "top of 15% slope" (the "top of ravine" line between Stakes 103, 102 and 101 should be eliminate and map labels appropriately revised).

9. The 30-ft. wide stream buffer, measured from the revised "top of the ravine" [see Condition 8] and the resultant locations for the buffer and buffer setback, shall be included on all site plans and permit applications that depict the buffer and setback locations.

10. Based upon the revised mapping of the "top of the ravine" [Conditions 8 and 9], the "top of ravine" shall be restaked. The 30-ft. wide buffer shall be measured from the restaked "top of ravine", and staked at 50 ft. intervals beginning 50 ft. north of the southern property line. The stake locations and the width of the buffer shall be verified by a licensed surveyor.

ACCESS DRIVE

11. Prior to issuance of building permit, the Applicant shall submit final engineering **plans for the access drive** for review and approval by the Department of Public Works. The plans shall include the following [see Composite Site Plan, dated 11/01/07, Sheet A0.4.0, Exhibit 109; and Road Section, dated 09/13/07, Exhibit 82.]:

- a) 12-ft. wide paved surface;
- b) "turn-around" adequate for emergency vehicles;
- c) vehicle "landing" (18-20 ft. wide; 40-ft. long) at Wing Point Way;
- d) vehicle "pull out";
- e) 9 guest parking spaces.

12. *Prior to issuance of any Certificate of Occupancy, "**No Parking**" signs must be posted along the pull-out and turn-a-round to the satisfaction of the Department of Public Works.

13. *Removal of vegetation for construction of the access drive shall be the minimum necessary and, prior to issuance of any Certificate of Occupancy, adjacent areas that are graded or otherwise disrupted by construction of the access drive, shall be **revegetated with native plants**, to the satisfaction of the Director.

STORM WATER SYSTEM

14. Prior to issuance of any clearing, grading or construction permit, **final design for the storm water system** shall be reviewed and approved by the Public Works Department. The stormwater civil plans shall be designed by a registered civil engineer in accordance with the requirements of the City of Bainbridge Island Municipal Code as determined by and to the satisfaction of the Public Works Department.

15. Prior to final approval for storm water system construction, the applicant shall submit a system **Operation and Maintenance Plan** that complies with the applicable requirements of BIMC 15.21 as determined by and to the satisfaction of the Public Works Department.

16. The Condominium Declaration, recorded prior to any sale of units or part of the property, must clearly indicate that owners of the subject property have responsibility for the **on-going operation and maintenance** of the storm water system in accord with the approved Operation and Maintenance Plan.

CONSTRUCTION

17. Prior to issuance of any clearing, grading or construction permit, a temporary **erosion and sedimentation control plan** (TESCP) must be submitted and approved by the City Engineer. The TESCP shall directly address wet weather conditions that may occur during construction. The provisions of the TESCP shall be strictly adhered to by the Applicant and enforced by the City. As determined by the City Engineer necessary to ensure effective control of erosion and sedimentation, additional measures or temporary suspension of construction activities can be required.

18. Prior to issuance of any clearing, grading or construction permit for any portion of the property: **erosion control measures**, including silt fencing, bales, and other measures specified by the TESCP to be located adjacent to the buffer and/or between the buffer and construction activities, must be properly installed as verified by the City. These erosion control measures must be maintained in effective condition throughout all phases of construction.

19. Prior to issuance of any permit for clearing, grading or construction, the location of the **buffer shall be clearly identified** to prevent any damage by construction activities.

- a) Orange construction fencing (or other fencing of like size, durability and visibility) shall be installed to mark a 30-ft. wide buffer west of the "Buffer Perimeter Space" [see Condition 31];
- b) Significant trees (as defined in BIMC 18.85.010) that are partially outside the 30-ft. wide buffer shall be considered within the buffer, and the construction fencing shall be placed around the west side of such trees.
- c) The project planner shall inspect and verify the proper installation of the construction fencing.

20. Throughout all phases of construction, the **construction fencing** marking the western extent of the buffer (see above) **must remain in place and be observed** as a limit to construction activities. The construction fencing must remain in place until the installation of the split rail fence required by Condition 33.

21. **No construction activities**, storage of materials or vehicles, or soil stockpiling shall take place **within the buffer or within designated Open Space** (except that the access drive is to be constructed within areas designated "Road Access" in the Open Space Management Plan [see Sheet A0.4.7, Exhibit 109]).

22. All **graded materials** removed from the project shall be hauled to and deposited at City approved locations. Haul routes must have prior approval by the Department of Public Works.

23. During construction in the dry season, the site (including the access drive) shall be watered or otherwise treated as necessary to keep **dust levels** within the maximum allowed by the Puget Sound Clean Air Agency.

24. **Noise levels** shall comply with BIMC Chapter 16.16. With the exception that work on the inside of an enclosed structure may occur between the hours of 10:00 a.m. and 4:00 p.m., construction activities shall be prohibited (1) on legal holidays and Sundays; (2) on non-holiday weekdays between the hours of 7:00 p.m. and 7:00 a.m.; and, (3) on Saturdays before 9:00 a.m. and after 6:00 p.m.

25. The contractor is required to stop work and immediately notify the Department of Planning and Community Development and the Washington State Office of Archaeology and Historic

Preservation if any **historical or archaeological artifacts** are uncovered during excavation or construction.

26. **Mobile fueling from temporary tanks** is prohibited unless the applicant provides and is granted approval for a Permit and Best Management Plan that addresses proposed location, duration, containment, training, vandalism, and cleanup. (Reference 1, Uniform Fire Code 7904.5.4.2.7 and 2. Department of Ecology, Stormwater Management Manual, August 2001, see Volume IV “Source Control BMPs for Mobile Fueling of Vehicles and Heavy Equipment”) (Chapter 173-304 WAC).

GEOTECHNICAL CONCERNS

27. *During review of the building permit application(s), the Director may request an **independent review** of any geotechnical analysis submitted and the Applicant shall submit **additional geotechnical analysis** if and as directed by the Director. The Applicant shall bear the cost of the geotechnical submittals/analysis and of any third party review it requires.

28. The **recommendations** in the November 2, 2005, **Geologic Slope Reconnaissance Report** [Exhibit 6] prepared by Aspect Consulting and in the Myers Biodynamics **Slope Evaluation** [in Exhibit 27, page 4 of 5] shall be adhered to as conditions of approval. Those recommendations, regardless if stated as “should” or otherwise recommended, shall be closely followed unless and only as specifically modified by the project geotechnical engineer and approved by the City Engineer. The Applicant shall submit Parts 1 and 2 of the City’s standard geotechnical forms and they must be reviewed and approved by City Engineer prior to building permit issuance.

29. *All geotechnical features shall be inspected by the Geotechnical Engineer. Final acceptance of the project shall require **professional engineering stamped certification** by the Geotechnical Engineer that the project has been inspected, and has been constructed and functions as recommended by the Geotechnical Engineer. The final certification shall also include operation and maintenance recommendations for the recommended items including drainage features and vegetation management. All geotechnical information, including indemnification requirements, must be made available to all subsequent purchasers.

30. *The applicant is required to **indemnify and hold the City** of Bainbridge Island, its agents their heirs or assigns forever harmless for any damages directly or indirectly related to the geotechnical stability of this site per the City’s standard form. This includes indemnification for unintended results from maintenance, modification, or aging of drainage facilities; or any other City or private facilities that may or may not have any impact on the site or any buildings or facilities thereon. Prior to any clearing, grading or building activities, an indemnification agreement as required by chapter 16.20.080 BIMC, shall be furnished by the City of Bainbridge Island and shall be signed and notarized by the applicant and submitted to the Department of Planning Community Development.

OPEN SPACE

31. *Prior to building permit issuance, the Applicant shall submit and the Director approve, a **Final Open Space Management Plan** (OSMP), including OSMP map. The Final OSMP shall be consistent with the Draft OSMP [Exhibit 108] and map [Sheet A0.4.7, Exhibits 109 and 124] revised as follows:

Maintenance Plan (page 3 and 4):

- Revise maintenance item #2 to include removal of English ivy from significant trees must be done at least annually.

- Revise maintenance item #2 to prohibit any invasive plant species within a common area (including the yards and other areas reserved for use and maintenance by individual unit owners).
- Revise maintenance item #3 to read "existing vegetation", not "existing vegetation".
- Revise maintenance item #4 to read, "that shall be located in the Buffer Perimeter Space", not "that shall be located along the boundary of the open space area."
- Add a prohibition on the use of pesticides in any Open Space area.

Critical Area and Buffer:

- Eliminate "Low impact fencing" (1a, page 2) from the list of Approved Uses.
- Add "Low impact fencing" to the list of Prohibited Uses.

Passive Recreation Space:

- Add "Low impact fencing" to the list of Approved Uses.
- Eliminate "formal and informal recreation, including pervious trails" and "repair and maintenance of pervious trails" [2a and b, page 2] from list of Approved Uses.
- Add "formal and informal recreation, including pervious trails" and "repair and maintenance of pervious trails" to the list of Prohibited Uses.
- **Redesignate the "Passive Recreation Space" category as "Buffer Perimeter Space"** (replace references to "Passive Recreation Space" with "Buffer Perimeter Space" and eliminate the "trail" in OSMP text and map and other documents as necessary to reflect the change in category name and restrictions on use.

32. Prior to obtaining any Certificate of Occupancy, the "**Buffer Perimeter Space**" (eastern 5 ft. of the building setback; see Sheet A0.4.7, Exhibit 109 and Condition 31), shall be **replanted with native plants** (see *e.g.*, "Native Buffer" plants, Sheet L1 submitted 12/05/05) and significant trees consistent with BIMC Chapter 18.85, as determined necessary by and to the satisfaction of the Director.

33. Prior to issuance of any Certificate of Occupancy, the western boundary of the **buffer shall be identified by a split-rail fence** (or similar fence if and as approved by the Director) installed along the eastern boundary of and within the "Buffer Perimeter Space" adjacent to the buffer **and by signs** posted on the fence at 50-ft. intervals. The fence shall be installed after completion of grading/earth work activities, prior to removal of the orange construction fencing [see Condition 19], and prior to, or as a part of, the revegetation of the "Buffer Perimeter Space" [see Condition 32].

34. **Significant trees in the buffer and designated Open Space** may not be limbed, pruned, or removed to create views off of or onto the site. Removal or other damage to significant trees in the buffer or designated Open Space shall be subject to fines and require replacement to the satisfaction of the Director. Hazard trees may be removed with the approval of the Director based upon an arborist evaluation that removal is necessary.

NOTICE TO SUBSEQUENT PURCHASERS

35. Pursuant to BIMC 16.20.130, prior to building permit issuance, the applicant shall record a notice to title describing the **presence of the stream, stream buffer, and geologically hazardous slope**.

36. The Applicant shall revise the draft Condominium Declaration [Exhibit 116] to be consistent with the CUP Conditions of Approval. Revision to include, but not be limited to: eliminating reference to the private trail (Section 5.50); adding that invasive plants are prohibited (Section 10.3); expressly noting that areas designated as Open Space are Common

Elements. The **Condominium Declaration** must comply with the Washington State Condominium Act and expressly provide for (and give notice of) the obligations of individual unit owners and the owners' association with regard to restrictions, obligations, and responsibilities associated with all common areas, including:

- a. Maintenance of the buffer and Open Space in compliance with the Open Space Management Plan [see Condition 31];
- b. Maintenance of on-site storm water system (collection, conveyance, detention, and other associated facilities); and,
- b) Internal access drive (including pavement, shoulders, turn-outs, turn-around, guest parking spaces).