

BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON

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MAY 16 2005

BREMERTON-DEPT. OF
COMMUNITY DEVELOPMENT

In the Matter of the Application of) NO. BP04-00433
)
Port of Bremerton) FINDINGS, CONCLUSIONS
) AND DECISION
For Approval of a Shoreline Conditional)
Use Permit)

SUMMARY OF DECISION

The request for approval of a Shoreline Conditional Use Permit to construct a 1,400 foot-long breakwater is **GRANTED**, with conditions.

SUMMARY OF RECORD

Request

The Port of Bremerton (Applicant) requests approval of a Shoreline Conditional Use Permit to allow for an expansion of an existing marina including to accommodate 216 long-term boat slips; 119 transient boat slips; and 335 boat slips (some covered). A Shoreline Substantial Development Permit has been issued for the expansion project, but a 1,400 foot-long breakwater is also needed for the expansion project, which requires a shoreline conditional use permit. The marina would be accessed by land from the public boardwalk below the Bremerton Conference Center and by sea from Sinclair Inlet.

Hearing Date

The Hearings Examiner for the City of Bremerton held an open record hearing on the matter on April 25, 2005. The City recommended approval at the hearing and the Applicant expressed agreement with the recommended conditions. However, representatives of the Washington State Ferry System expressed safety and security concerns about the proposal as presented. The representatives requested that the United States Coast Guard be given additional time to prepare written comments on the homeland security concerns with the proposal as presented. The Hearing Examiner granted the additional time requested and allowed additional time for the Applicant, the City and other parties to respond. The record was closed on May 6, following receipt of comments and responses.

Testimony

The following individuals presented testimony under oath at the open record hearing:

1. Mr. Robert Grumbach, City of Bremerton Planner
2. Ken Attebery, Chief Executive Officer, Port of Bremerton, Applicant's Representative
3. Robert Henry, Applicant's Project Civil Engineer
4. Wayne Wright, Applicant's Environmental Scientist

5. Steve Slaton, Director of Marine Facilities, Port of Bremerton
6. Richard Hayes, Director of Kitsap Transit
7. Norman McLoughlin, Executive Director, Kitsap County Housing Authority
8. Russ East, Director of Terminal Engineering, Washington State Ferries
9. Helmut Steel, Director of Security, Washington State Ferries
10. Pete Williams, Captain of Ferry Operations, Bremerton

Exhibits

The following exhibits were admitted into the record at the open record hearing:

1. Staff Report, with Appendices A – J:
 - A: Application
 - B: Shoreline Designation Map
 - C: SEPA Analysis
 - D: Mitigation Plan
 - E: Shoreline SD Permit, SCU 96-0001
 - F: Float Wave Attenuator Study
 - G: Report on Bremerton Attenuator Project
 - H: Joint Aquatic Resources Permit Application
 - I: Draft HPA from WDFW
 - J: Biological Assessment of Project
2. Public Comments Received Prior to Hearing
3. Agency Comments Received Prior to Hearing
4. Applicant's Response to Comments
5. Notice of Hearing
6. Shoreline SSDP No. BP04-00432
7. Revised Site Plan, Dated April 19, 2005
8. Copies of Power Point Presentation Slides by City Staff
9. Letter from M. Dix, Commander U.S. Coast Guard to Grumbach dated 4/27/05
10. Response to Coast Guard Comments from Grumbach, dated 5/4/05
11. Response to Coast Guard Comments from Attebery, dated 5/3/05
12. Response to Coast Guard Comments from Hayes, dated 5/4/05

Upon consideration of the testimony and exhibits admitted at the open record hearing, the Hearings Examiner enters the following Findings, Conclusions and Decision:

FINDINGS

1. The Applicant proposes to expand an existing marina to accommodate 216 long-term boat slips, 119 transient boat slips, and to construct a 1,400 foot-long breakwater. A Shoreline Substantial Development Permit has been issued for the boat slip expansion project, but a 1,400 foot-long breakwater is also needed for the expansion project. The breakwater project requires a shoreline conditional use permit. The proposed floating concrete breakwater would be supported by anchors. It would be 24.5 feet

wide and 10 feet deep. The breakwater will cover approximately 35,000 square feet of water area. The 35,000 square feet is in addition to the 50,000 square feet of shaded area created by the expanded marina. Approval of the breakwater would provide protection for the expansion of the existing marina. *Exhibit 6, Shoreline Permit; Exhibit 1, Appendix A.*

2. The site proposed for development is located adjacent to the Bremerton Conference Center and between the Kitsap Transit passenger ferry dock and USS Turner Joy. The parcel number is identified as Assessor Account Number SW ¼ of Section 24, Township 24 N., R. 1 East. *Exhibit 1, Staff Report, page 1; Exhibit 1, Appendix A, Application.*
3. The site is designated as “Downtown Waterfront/ Marine (DW/F)” within the City’s Shoreline Master Plan. The property is entirely over water and does not have a comprehensive plan or zoning designation. *Exhibit 1, Staff Report, Appendix B.* The City’s Comprehensive Plan in effect at the time of complete application, however, does contain the following goals and policies that are relevant to a review of this application:

ELEMENT J: ENVIRONMENTAL MANAGEMENT

- Goal A: Water-Oriented Land Uses: “Reserve appropriate shoreline areas for water-oriented uses and to discourage non-water-oriented uses in the shoreline.”
- Goal D: Public Access: “Protect and enhance the rights of the general public to enjoy the physical and aesthetic qualities of the shoreline, while allowing controlled development consistent with the public interest.”

“Encourage water-oriented shoreline uses and activities that provide an opportunity for substantial numbers of the public to enjoy city shorelines.”

Goal P: Recreational and Open Space Linkages: “Marinas: Encourage marinas in areas which will have the least negative impact on water quality, marine life, visual or physical access to the shoreline, or the residential use of property.

In addition, the updated Comprehensive Plan contains policies for the Downtown Waterfront that encourage expansion of the existing marina to accommodate long and

short stays, with public access to a breakwater structure.¹ *Exhibit 1, Staff Report; City's Comprehensive Plan, as cited, effective December 17, 2004.*

4. The Shoreline Master Program (SMP) contains a number of statements, guidelines and policies that are relevant to the consideration of this application. The breakwater is wholly located within the *Downtown Waterfront/ Marine (Over-Water)* environmental designation. The intent of the *Downtown Waterfront* designation is to encourage development of the downtown waterfront into a vital, attractive water-oriented area that maximizes opportunities for large number of people to interact passively and actively with the shoreline for leisure and enjoyment uses. The Shoreline Use/ Matrix, Table 3-1, allows breakwaters in the *Downtown Waterfront* environmental designation subject to obtaining a Shoreline Conditional Use Permit. SMP breakwater requirements are articulated in Chapter 6 – Breakwaters, Jetties, Rock Weirs and Groins, p. 6-13 – 6-15 and they include Shore Modification, p. 6-2 – 6-8. SMP Chapter 6 – Breakwaters, Jetties, Rock Weirs and Groins policies encourages breakwaters to be open-pile or floating structures anchored in place so as not to impede long shore sand and gravel transport and fish movement. The policies also state that breakwaters should include public access or multiple use opportunities in the design of the breakwaters when this can be done safely. SMP Chapter 6 – Breakwaters, Jetties, Rock Weirs and Groins, p. 6-14 -- contains regulations specifically applicable to breakwaters. The requirements for breakwaters include specifications that it be designed by a civil engineer; that a breakwater be integrated with a marina; that it conform to all requirements of Washington Fish and Wildlife and the U.S. Army Corps of Engineers; that it be visually compatible with its surroundings; that the impact on beach maintenance be considered; and that fish and wildlife and their habitat be protected.

The uncontroverted testimony of the City Planner is that the proposed breakwater is in compliance with all SMP regulations. *Testimony of Mr. Grumbach; Exhibit 1, pages 6-8.*

5. The Port of Bremerton acted as lead agency for review of environmental impacts caused by the proposal. The Port considered an environmental checklist and the requirements of city ordinances prior to issuance of its threshold determination. The Port's Responsible Official determined that the proposal would not have probable significant environmental impacts if conditions were imposed to mitigate anticipated impacts, as detailed in a Mitigation Plan. The Port issued a Mitigated Determination of Nonsignificance (MDNS) on September 18, 2004. It was not appealed. The mitigation plan restores key physical and biological processes that have been

¹ The application was complete when the prior Comprehensive Plan was in effect. Both the old policies and the new policies are relevant to consideration of the application, as the policies are consistent and indicate an intent of the City to expand the existing marina.

degraded by human activities at the site and within the general watershed. Mitigation actions include:

- a. Limit disturbances to the smallest area feasible, minimizing generation of turbid water, disposal of waste materials off site, readiness to respond to spills, limit in-water work to periods that minimize harm to salmonids and wintering bald eagles, move coverage moorage into deeper water (+20 MLLW), and utilization of the existing marina and increase pile sizes in order to reduce the number of required piles.
- b. Remove nine creosote piles near the marina boardwalk.
- c. Remove approximately 64 Port of Bremerton owned piles near the former Rock Quarry Barge Loading Facility in Gorst.
- d. Create 54,000 square feet of estuary at the former Evergreen Auto Wrecking Site in Gorst. This is about a mile from where the Suquamish Tribe operates a rear and release Chinook salmon facility on Gorst Creek.
- e. Offset potential impacts to tribal fishing.
- f. Illuminate walkways and finger slips to 5 foot-candles per IESNA guidelines.
- g. Install moorage covers that are translucent white or neutral colors and that will be distributed over the marina rather than concentrated.
- h. Design the new breakwater to weaken in intensity the wake generated from the boats of the Washington State Ferries.

Exhibit 1, Appendix C, SEPA MDNS; Appendix D, Mitigation Plan.

6. Notice of the open record hearing was published in the Bremerton Sun and posted on the site on January 18, 2005, and was mailed to adjoining property owners within a 300-foot radius of the proposed project on January 18 and 25, 2005. *Exhibit 5, Legal Notice Affidavits.*
7. At the open record hearing, no one spoke in opposition to the proposed breakwater. Several testified in support of the breakwater development, as proposed, including Kitsap Transit and the Kitsap Housing Authority as well as the Applicant's representatives. *Testimony of Mr. McLoughlin & Mr. Hayes; Testimony of Mr. Attebery; Mr. Wright, Mr. Henry & Mr. Slaton.*

At the hearing, representatives of the Washington State Ferry system expressed concerns about the proposal relating to security and navigational safety and requested

additional time to allow for written comments by the U.S. Coast Guard. *Testimony of Mr. East, Mr. Steel and Mr. Williams.* A letter was received from the U.S. Coast Guard that expresses safety and navigation concerns. *Exhibit 9.* The concerns expressed center on the need for a safety and security zone around all large passenger vessels such as ferries. The security requirements are for the purpose of detection and increased reaction time to potential threats. The U.S. Coast Guard requires that all vessels within a 500-yard radius of a ferry operate at the “minimum speed necessary to maintain a safe course” and to take direction from the master of any large passenger vessel that is underway. No vessel may come within a 100-yard radius of a ferry underway without approval from the master; while moored, a 25-yard radius exclusion zone must be maintained. The safety concern focuses on the potential for problematic interactions with marina users and mooring/unmooring ferries. The Coast Guard urged the Port to work with the ferry system to explore alternative. *Exhibit 9; Testimony of Mr. East and Mr. Steel.*

The City, the Port and Kitsap Transit responded in writing to the concerns of the Washington Ferry System and the U.S. Coast Guard. The City pointed out that the concerns expressed by the Ferry System and Coast Guard did not raise any new issues and that the City had already considered safety and security concerns. The City concluded that a “winged” breakwater is not necessary to mitigate potential conflicts but that signage and an education program will suffice.

The Port also stated that the concerns are not new. The Port provided factual information on the likelihood of a security concern involving an invasion of the protected zone. The Port notes that a ferry nearly always uses Slip 1. When Slip 1 is used, the 100-yard security zone never intersects the proposed marina south entrance. Only when using Slip 2 would there be an intersect with the 100-yard zone. The Port estimates that this might occur as much as eight times a day, for a total of eight minutes a day. If Slip 2 were used for all ferry operations, the Port estimates there would be a total of 22 minutes of security zone concern per day. Additionally, the Port notes that it does not own the property over which a breakwater extension would need to be located. Thus, the Port urges approval without further conditions or limitations of operation. The Kitsap Transit statement echoed the Port’s statement and, in addition, noted that the conflicts that may exist are the result of planning that involved the Ferry System and the Coast Guard, and that ample opportunity was provided to address the concerns prior to the hearing on this application.

Exhibits 10, 11 & 12.

CONCLUSIONS

Jurisdiction

Pursuant to Sections 2.13.070 and 21.04.110 of the Bremerton Municipal Code (BMC), the Hearings Examiner of the City of Bremerton has jurisdiction to hold open record pre-decision hearings on Shoreline Conditional Use permit applications and issue decisions on those applications. The Shoreline Management Act, Chapter 90.58 RCW, requires

that the Department of Ecology review all shoreline conditional use decisions by local government. WDOE may accept, reject or modify a shoreline conditional use decision. *BMC 2.13.110, 21.04.110.*

Shoreline Conditional Use Criteria

In order for a development activity in the shoreline area to be authorized under a Conditional Use Permit it must meet the following criteria set forth in Chapter 173-27-160 of the Washington Administrative Code, and referenced by BMC 21.04.110. The Hearing Examiner must conclude:

- a. *That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;*
- b. *That the proposed use will not interfere with the normal public use of public shorelines;*
- c. *That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;*
- d. *That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and*
- e. *Additionally, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.*

Conclusions Based on Findings

1. **The proposed use is consistent with the policies of RCW 90.58.020 and the master program.** The proposed development is specifically authorized under the Shoreline Use/ Activity Matrix, and the Master Program was approved by Ecology as consistent with the Shoreline Management Act. The application, with conditions, will be in compliance with all requirements for location of a breakwater as stated in the Shoreline Master Program. Thus, the proposal with conditions will be consistent with the City of Bremerton Shoreline Master Program and the policies of the Shoreline Management Act. *Findings of Facts Nos. 1, 2,3,4 & 5.*
2. **The proposed use will not interfere with the normal public use of public shorelines.** The proposed development will enhance the public use of the shoreline area by providing a public walkway to the expanded marina, including access to the breakwater. The views from the breakwater toward the City waterfront and out

toward Sinclair Inlet will be enhanced by the proposed project. *Findings of Facts Nos. 1, 2, 3, 4 & 5.*

3. With conditions, the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program. The only concern voiced at the hearing and in letters submitted following the hearing is the potential for security and navigational safety problems between the Washington State Ferry system and marina users. While the concern is a valid one, the potential for conflict is very limited. The methodology proposed by the City and the Port for addressing the concern – including signs and an education program – is sufficient to conclude that the proposed breakwater will be compatible with other uses in the area. There is insufficient evidence upon which to base a denial of the application or upon which to fashion additional conditions. The suggestion that a “wing” might be placed on the proposed breakwater may make sense in the context of future proposals, but there is insufficient justification to impose such a condition on this proposed breakwater for the expanded marina. “A denial of a permit must be based on valid or substantial evidence showing that granting the permit would be detrimental to the health, safety, morals, or the general welfare”. *State Ex Rel. Wen. Etc. V. Wenatchee, 50 W2d 378 (1957) at 382.* The level of potential interference with security and navigational safety is not sufficient to justify a denial of the requested permit, as it does not rise to the level of ‘substantial evidence’. *Findings of Facts Nos. 1 - 7.*

4. With conditions, the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located. The proposed breakwater would be constructed in a manner consistent with the mitigation conditions of the SEPA MDNS as well as additional conditions intended to protect fish and wildlife habitat. These conditions require an anchoring system, HPA approval, limitations on shading, restoration of other shoreline areas that have been disturbed in the past, limitations on illumination, and other measures intended to protect fish habitat. Conditions also require compliance with a wave attenuation plan that will reduce or eliminate shoreline impacts from forceful wave action that might otherwise occur. The biological assessment, environmental review, mitigation plan and wave attenuator report all identify positive attributes of the breakwater to the shoreline environment. The proposed project will have many benefits for the shoreline environment. *Findings of Facts Nos. 1-7.*

5. Consideration has been given to the cumulative impact of additional requests for like actions in the area. The one additional project that may occur in the area is the Kitsap Transit passenger-only ferry, which may occur between the proposed project and the WSF terminal. All other water area along the downtown waterfront is developed. The possibility of the Kitsap Transit program was considered during project planning, and the breakwater designed so as not to interfere with a passenger-only ferry. *Findings of Facts Nos. 2, 3 & 7.*

DECISION

The request for a Shoreline Conditional Use permit, to construct a 1,400 foot-long breakwater is **GRANTED**, subject to the following conditions:

A. All conditions set forth in the shoreline substantial development permit BP04-00432 are included as conditions for this conditional use permit including:

1. *Illumination of walkways and slips shall be pursuant to the Bremerton Building Code (2003 International Building Code). Ingress and egress routes shall be illuminated to at least one (1) foot-candles. Light sources, both directable and non-directable shall be selected and placed so that glare produced by any light source does not extend to adjacent properties or to the right-of-way (except for sidewalks).*
2. *Compliance to BMC Section 18.02.130, International Fire Code, Chapter 46 Marinas, is required prior to occupancy of the marina. Plans for marina fire-protection facilities shall be approved prior to installation. The work shall be subject to final inspection and approval after installation.*
3. *Accessory uses at the marina will be limited to marina operations and access of the shoreline environment.*
4. *The conditions set forth in the Mitigated Determination of Nonsignificance including the Mitigation Plan Bremerton Marina Expansion dated September 15, 2004 shall be included as conditions of approval for the substantial development permit. Where applicable, the Department of Fish & Wildlife may approve modification to the mitigation plan. These conditions include, but are not limited to:*
 - a. *Limiting disturbances to the smallest area feasible, minimizing generation of turbid water, disposal of waste materials off site, readiness to respond to spills, limit in-water work to periods that minimize harm to salmonids and wintering bald eagles,*
 - b. *Limit coverage moorage into deeper water (generally beyond -20 MLLW).*
 - c. *Utilize the existing marina and increase pile sizes in order to reduce the number of required piles.*

- d. *Remove nine creosote piles near the marina boardwalk.*
 - e. *Remove approximately 64 Port of Bremerton owned piles near the former Rock Quarry Barge Loading Facility in Gorst.*
 - f. *Create a 54,000 square feet of estuary at the former Evergreen Auto Wrecking Site in Gorst per Washington Department of Fish & Wildlife requirements.*
 - g. *Take measures to offset potential impacts to the Suquamish Tribe tribal fishing rights including a net-damage fund, boater awareness education programs of treaty fishing rights, and 150 feet of free moorage at the Port Orchard marina.*
6. *Moorage covers shall be limited to not more than the forty-six (46) floating structures (92 slips) as proposed in the site plan received March 17, 2005. Moorage covers shall be distributed in a dispersed pattern similar to the pattern indicated on the site plan. The Director may approve minor modifications to the distribution pattern.*
 7. *Moorage covers shall be of a translucent material that allows at least transmittal of 55 percent light and the covers shall be erected on structures with open ends and sides.*
 8. *Two portable toilet dump station shall be provided prior to occupancy of the marina. The dump stations must be approved by Kitsap County Health District and signage per Health District regulations Section VI.B.8 shall be included.*
 9. *Prior to the issuance of occupancy for the marina, the Port of Bremerton will develop a set of "best management practices" to provide guidance to marina users for the use of and disposal of organic and inorganic materials and waste materials within the marina. The Kitsap Health District and the Public Works Department will review the set of "best management practices".*

10. *Prior to removing creosote pilings from the shoreline at the site, the Port shall locate the existing sanitary force main. This information shall be provided to the Public Works Department whose approval is required before removing the pilings.*
11. *Signage and education programs are required to address navigational, safety, and security requirements that vessel operators are required to follow when operating near vessels carrying passengers including Washington State Ferries. The signage and educational programs should be developed in cooperation with Washington State Ferries, Kitsap Transit and the U.S. Coast Guard.*
12. *Conditions set forth in the Hydraulic Project Approval required by Washington Department of Fish & Wildlife shall be included as conditions of approval of this permit.*
13. *If at any time fish are observed in distress, fish kill occurs or water quality problems develop because of project activities, immediate notification shall be made to the appropriate state agencies and the Department of Community Development.*
14. *No petroleum products or other deleterious materials shall enter surface waters.*
15. *The structures shall not exceed the lengths and widths specified in Port of Bremerton Marina Coverage Matrix dated March 23, 2005. Modifications to structure lengths and widths are permitted provided the modifications meet the criteria for a minor revision set forth in the Bremerton Shoreline Master Program.*
16. *The pilings proposed to be removed either as part of the marina expansion or as compensatory mitigation shall be fully extracted and disposed of upland at an approved site.*
17. *Public access along the central floating breakwater and the 1,400-foot floating breakwater shall be made available at least between the hours of 10:00 a.m. and dusk (one-half hour after sunset) each day. Signage indicating the public's rights to access the floating central breakwater and the 1,400-foot breakwater and the hours it is open shall be provided and posted near the entrance.*

18. *Shading areas shall be limited to not more than the proposed 50,000 square feet of water surface area. The Director in consultation with Washington Department of Fish & Wildlife may approve minor modifications to the shading areas.*

- B. The breakwater shall be limited to the 35,000 square feet of water surface area. The 35,000 square feet is in addition to the 50,000 square feet shading area for the marina.
- C. Floats and associated anchoring systems shall be designed and deployed so that the bed is not damaged. The line and anchoring systems shall comply with Washington Department of Fish & Wildlife requirements.
- D. Conditions set forth in the Hydraulic Project Approval required by Washington Department of Fish & Wildlife, which relate to the breakwater, are included as conditions for approval of this permit.
- E. Construction, or substantial progress toward completion, must begin within two (2) years after the affective date of filing with the Department of Ecology and resolution of any appeals. The Director may extend this deadline up to one (1) year if substantial progress is made. Construction, or substantial progress, shall include construction of the breakwater and other marina structures, which must occur on land before they are moved to over water locations.
- F. Construction of the marina and the placement of the breakwater shall be completed within five (5) years after the affective date of filing with the Department of Ecology and resolution of any appeals. The Director may extend this deadline for one (1) year upon a showing of good cause and after notifying parties of record pursuant to the provisions of the Bremerton Shoreline Master Program. The City shall notify the Department of Ecology in writing of any change to the effective date of a permit with an explanation of the basis for approval of the change
- G. Minor revisions to the site plan is allowed if the Director, after review of revised site plans, determines (1) no additional over-water construction is involved, except floating construction may be increased by 10 percent or 500 square feet, whichever is less; (2) revisions do not allow violations of the Shoreline Master Program development standards; (3) the use authorized pursuant to the original permit is not changed; (4) the revision will not result in the obstruction of the view of a substantial number of residences on areas adjoining the shoreline; (5) no substantial adverse environmental impact will result from the revision; and (6) the revision complies with other criteria set forth in the Bremerton Shoreline Master program for revisions to a permit.

H. No construction shall begin and is not authorized until twenty-one (21) days from the date of filing by the Department of Ecology as defined in RCW 90.58.140(6) and WAC 173-27-130.

Decided this 16th day of May 2005.

A handwritten signature in black ink that reads "Theodore Paul Hunter". The signature is written in a cursive style with a horizontal line underneath the name.

Theodore Paul Hunter
Hearings Examiner for the City of Bremerton