

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON**

In the Matter of the Appeal of)	NO. BP04-00231
)	
Phil Olwell)	
)	FINDINGS, CONCLUSIONS
of a Shoreline Substantial Development)	AND DECISION
Permit Approval for a Planned Unit)	
Development for Tiferet, LLC)	
_____)	

SUMMARY OF DECISION

The decision of the Director of the City of Bremerton’s Department of Community Development to approve the Shoreline Substantial Development Permit application is supported by substantial evidence and is upheld. The appeal is **DENIED**.

SUMMARY OF RECORD

Background:

The City of Bremerton Department of Community Development’s Director published approval of Tiferet’s (Applicant) application for a Shoreline Substantial Development Permit on June 22, 2004. Finding that the development would not interfere with the normal public use of public shorelines; that the development would not cause significant adverse impacts on the shoreline environment; and that the public health, safety and general welfare had been served, the Director approved the application, subject to eight conditions. Setting forth six allegations, Phil Olwell (Appellant) filed a timely appeal to the approval of the Shoreline Substantial Development Permit. The Director’s decision was supported by substantial evidence and is upheld. The appeal is denied.

Hearing Date:

An open record appeal hearing was held before the Hearing Examiner for the City of Bremerton on July 20, 2004.

Testimony:

The following persons presented testimony under oath during the open record appeal hearing:

1. Keith Machlum, for the Applicant
2. Phil Olwell, Appellant
3. Larry Taylor, Neighbor
4. Chris Thatcher, Neighbor

Exhibits:

The following exhibits were admitted as part of the official record at the open record hearing:

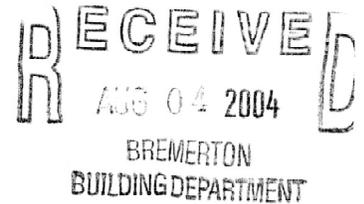
*In the Matter of the Appeal of Phil Olwell, BP04—00231
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1. Exhibit A: City of Bremerton Department of Community Development Decision published June 22, 2004
2. Exhibit B: Administrative Appeal submitted by Phil Olwell on July 6, 2004
3. Exhibit C: City's Response to Appeal dated July 13, 2004
4. Exhibit D: Email from Larry Taylor dated June 22, 2004
5. Exhibit E: Phil Olwell's Response to the City dated July 20, 2004
6. Exhibit F: Letter from Phil Olwell dated July 20, 2004
7. Exhibit G: Shoreline Permit Submittal Checklist dated January 8, 2004
8. Exhibit H: Proposed Site Plan
9. Exhibit I: Vicinity Map

The Hearing Examiner enters the following Findings, Conclusions and Decision based upon the evidence admitted at the open record appeal hearing:

FINDINGS

1. The City of Bremerton Department of Community Development's Director published approval of Tiferet's (Applicant) application for a Shoreline Substantial Development Permit on June 22, 2004. Finding that the development would not interfere with the normal public use of public shorelines; that the development would not cause significant adverse impacts on the shoreline environment; and that the public health, safety and general welfare had been served, the Director approved the application, subject to eight conditions. *Exhibit A, Staff Report, pages 1, 14-16.*
 - a. All construction practices shall follow best management practices pertaining to erosion control to prevent any material from entering waters of the state. No fill or construction debris shall enter the adjacent Port Washington Narrows.
 - b. All storm water shall be handled using best management practices.
 - c. At no point should any of the proposed structures be built waterward of the 38.4-foot shoreline setback.
 - d. Removal of riparian vegetation within the low marine bluff is prohibited in order to protect the near shore habitat.
 - e. The clearing limits indicated on the TESC Plan received by the Department of Community Development May 7, 2004, shall constitute the limits of vegetation removal. Any cleared vegetation within the shoreline area 200 feet from the Ordinary High Water Mark shall be replaced according to the conditions set forth in the Mitigated Determination of Nonsignificance.



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FINDINGS

1. The City of Bremerton Department of Community Development's Director published approval of Tiferet's (Applicant) application for a Shoreline Substantial Development Permit on June 22, 2004. Finding that the development would not interfere with the normal public use of public shorelines; that the development would not cause significant adverse impacts on the shoreline environment; and that the public health, safety and general welfare had been served, the Director approved the application, subject to eight conditions. *Exhibit A, Staff Report, pages 1, 14-16.*
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 - b. All storm water shall be handled using best management practices.
 - c. At no point should any of the proposed structures be built waterward of the 38.4-foot shoreline setback.
 - d. Removal of riparian vegetation within the low marine bluff is prohibited in order to protect the near shore habitat.
 - e. The clearing limits indicated on the TESC Plan received by the Department of Community Development May 7, 2004, shall constitute the limits of vegetation removal. Any cleared vegetation within the shoreline area 200 feet from the Ordinary High Water Mark shall be replaced according to the conditions set forth in the Mitigated Determination of Nonsignificance.

- f. All construction shall be located such that the long-term stability of near shore habitat is protected and that a bulkhead or other shoreline protection is not necessary. The installation of a bulkhead or other shoreline protection shall be prohibited.
 - g. All conditions set forth in the preliminary approval of the Planned Unit Development shall be included as conditions of this 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.
2. The Applicant proposes to develop a 2.486-acre lot at the northeast corner of North Wycoff Avenue and 25th Street in Bremerton, Washington. The subject property is within the "Residential Low-Density" (SF-3) zone and is bordered to the west by the Port Washington Narrows. The Applicant proposes to build 22 attached single-family dwelling units on a lot that borders the shoreline, and a Shoreline Substantial Development Permit is required. *Exhibit A, Staff Report, page 1; Exhibit G, Shoreline Permit Submittal Checklist; Exhibit H, Proposed Site Plan; Exhibit I, Vicinity Map.*
3. Phil Olwell (Appellant) filed a timely appeal to the approval of the Shoreline Substantial Development Permit. The appeal was filed on July 6, 2004, and sets forth six allegations. *Exhibit B, Administrative Appeal, pages 1-4.*
- a. The subject property's zoning designation, SF-3, is incorrect.
 - b. A Mitigated Determination of Nonsignificance was improperly issued.
 - c. The subject property is improperly treated as two parcels.
 - d. The approved view corridor does not comply with RCW 90.58.020.
 - e. Public access to the beach is required.
 - f. The proposed driveways and parking spaces in the development must be dedicated.
4. The City of Bremerton Department of Community Development responded to the Appellant's appeal. *Exhibit C, City's Response to Appeal, pages 1-4.*
- a. Shoreline permit decisions are based on consistency with the policies, procedures and regulations set forth in the Shoreline Management Act and the Bremerton Shoreline Master Program. A property's zoning designation is inapplicable to a shoreline permit.

- b. The Appellant previously appealed the Mitigated Determination of Nonsignificance. The appeal was denied and cannot be appealed a second time to the Hearing Examiner pursuant to the Revised Code of Washington (RCW) Section 36.70B.060.
- c. The subject property is treated as one lot. The reference to “as if two parcels existed instead of one” was used to demonstrate that the shoreline master program site development regulations only apply to the portion of the property within the 200-foot shoreline jurisdiction.
- d. The City determined the proper view corridor after evaluating lands adjacent to the shoreline, reviewing court and Shoreline Hearing Board decisions, and after consulting with the City’s legal department. The Appellant alleges a general statement of violation of the view corridor without specifying facts illustrating how the view corridor fails to comply with the Shoreline Master Program. The issue of open space is not relevant to this appeal as it is determined by zoning code, and not Shoreline Master Program, regulations.
- e. The subject property’s unique configuration, the concern for the impacts that shore modification would have on the low marine bluffs, and neighborhood concerns for irresponsible activity along the beach resulted in the Director’s determination that public visual access from sidewalks located adjacent to 25th Street were acceptable in meeting the improved public access requirement. Further, the Bremerton Shoreline Master Program does not require that improved public access be provided on private property. Rather it requires that improved public access be designed and operated to avoid blocking, reducing, or adversely interfering with the public’s visual or physical access to the water and shorelines where feasible. A public easement is not required because the sidewalk improvements are located within a public right-of-way and a public easement would therefore be redundant.
- f. Street dedication is not relevant to this appeal as street development standards are set forth in the zoning code. If street dedication is construed as to be relevant to this appeal, Bremerton Municipal Code (BMC) Section 21.02.480(e) does not require dedication to be to the City. Since street dedications are a matter of responsibility for the maintenance of the street, the City construes this to mean that the dedication can be to the common ownership of the property owners who comprise the Planned Unit Development. Further, BMC 11.12.130(e) allows for private streets.

5. Notice of the Application was published in The Sun newspaper on May 7 and 14, 2004, and posted on the property on May 14, 2004. Notices were mailed to property owners within 300 feet of the site, parties of record, and state and local agencies. *Exhibit A, Staff Report, page 15.*

CONCLUSIONS

Jurisdiction

The Bremerton Municipal Code (BMC), grants the Hearing Examiner of the City of Bremerton jurisdiction to hold open record appeal hearings and decide appeals. *BMC 2.13.070*. Specifically the Bremerton Municipal Code grants the Hearing Examiner authority to hear appeals of Shoreline Substantial Development permit applications. *BMC 2.13.080(e)*. When reviewing an appeal of an administrative decision, the Bremerton City Council restricts the authority of the Hearing Examiner to determining whether the administrative decision was supported by substantial evidence. *BMC 21.02.935(j)*.

Conclusions Based on Findings

1. **The subject property's zoning designation is not relevant to this appeal.** The particular zoning designation does not affect the outcome of a Shoreline Substantial Development Permit application. Moreover, as this issue was resolved in the Hearing Examiner's decision of June 28, 2004, in approving the Planned Unit Development, it is a *res judicata*.¹ The issue of zoning was previously adjudicated and since it has not changed substantially since that adjudication, it cannot be appealed again. *Findings of Fact No. 4.*
2. **The Mitigated Determination of Nonsignificance cannot be appealed.** While RCW 36.70B.060 allows an individual to appeal an environmental determination under the State Environmental Policy Act, RCW 36.70B.060(3) limits the appeal of such a determination to one time. The MDNS was appealed during the preliminary plat application process for the Planned Unit Development and was denied in the Hearing Examiner's decision of June 28, 2004. It cannot be appealed again. *Findings of Fact No. 4.*
3. **The subject property is treated as one parcel.** In order to calculate the view corridor pursuant to the Bremerton Shoreline Master Program Chapter 3-27 (Table 3-2), the City used only that portion of the property subject to shoreline jurisdiction. If

¹"The doctrine of *res judicata* bars the resurrection of the same claim in a subsequent action. The doctrine applies in a quasi-judicial administrative context and stands for the general proposition that 'a controversy should be resolved once, not more than once.' *Res judicata* will bar a claim when a prior final resolution has a concurrence of identity in four respects with a subsequent proceeding: 'There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.'" *Davidson v. Kitsap County*, 86 Wn.App. 673, 680 (1997) (citing *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 30-32 (1995)).

the entire parcel had been used in calculating the view corridor, a view corridor of 151 feet would have been required. Such a requirement would have disallowed development in 75.8% of the property in the shoreline jurisdiction, a restriction that is inconsistent with the intent of an urban residential environmental designation. As calculated from 25th Street, the nearest public street, using only that portion of the parcel subject to shoreline jurisdiction, a minimum view corridor of 70 feet is required. The Applicant's proposed view corridor is 89 feet 6 inches. The proposed development does not impair views of the water from upland residential properties, given that the proposed height of the dwelling units would be elevated approximately 8 feet above the existing street grade. The subject property is considered one parcel of land. *Findings of Fact No. 4.*

4. **The approved view corridor does comply with RCW 90.58.020.** In relevant part, RCW 90.58.020 provides,

“In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the *greatest extent feasible* consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline.” (emphasis added)

The requirements of this provision are met, as the public and private interests are balanced through the establishment of a view corridor. *Findings of Fact No. 4.*

5. **Physical public access to the beach is not required.** Given the probable impacts that shore modification would have on the low marine bluffs and neighborhood concerns for probable irresponsible activity along the beach, the Director's determination that public visual access from sidewalks located adjacent to 25th Street was acceptable in meeting the improved public access requirement is consistent with the requirements and the intent of the Bremerton Shoreline Master Program Chapters 4-10 and 5-21. Allowing public visual access while restricting physical access to the beach is necessary for the health of the shoreline environment and is consistent with the intent of the Bremerton Shoreline Master Program (BSMP). Furthermore, the BSMP does not require that improved public access be provided on private property. Rather it requires that improved public access be designed and operated to avoid blocking, reducing, or adversely interfering with the public's visual or physical access to the water and shorelines where feasible. It would not be feasible to allow public physical access to a beach that would require traversing private property and jeopardizing the health of the shoreline environment. *Findings of Fact No. 4.*
6. **Dedication is not required for the development's driveways and street.** The dedication of roadways is not within the scope of a Shoreline Substantial

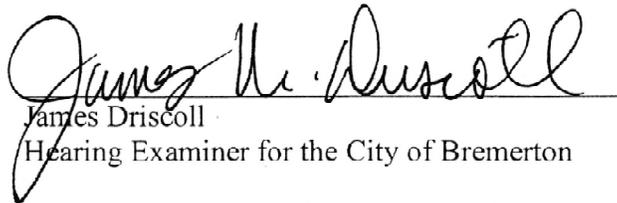
Development Permit application. Notwithstanding the fact of a wrongly appealed issue, dedication is often preferred in order to ensure the maintenance of streets, Bremerton Municipal Code (BMC) Section 11.12.090 states that the City "may require dedication" of a right-of-way to mitigate traffic impacts. As the development's driveways and street will primarily be used by homeowners and guests of homeowners within the development, allowing dedication to the homeowners is acceptable. *Findings of Fact No. 4.*

7. **The Director's decision to approve the Shoreline Substantial Development Permit application is supported by substantial evidence and must be upheld.** In reviewing an administrative decision, substantial weight is given to an agency's legal interpretation, especially in areas involving the agency's special knowledge and expertise.² Pursuant to the criteria listed in the Revised Code of Washington Section 36.70c.130, an agency's decision will not be overturned unless the agency has "engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;...[or] [t]he agency has erroneously interpreted or applied the law."³ The Director's decision was based on evidence submitted by the Applicant, the Appellant, and several local and state agencies. His decision is consistent with the Bremerton Shoreline Master Program and the Shoreline Management Act, as required by BMC 21.04.010. The decision is supported by substantial evidence.

DECISION

The Director's decision to approve the Shoreline Substantial Development Permit application is supported by substantial evidence and must be upheld. Therefore, the appeal must be **DENIED**.

Decided this ^{27th} day of August 2004.


James Driscoll
Hearing Examiner for the City of Bremerton

² *Puget Sound Water Quality Defense Fund v. Municipality of Metropolitan Seattle*, 59 Wash.App. 613, 617 (1990) (citing *Providence Hosp. Of Everett v. Dept. of Social & Health Services*, 112 Wash.2d 353, 360 (1989)).

³ *Bellevue Farm Owners Ass'n v. State of Washington Shorelines Hearings Board*, 100 Wash.App. 341, 363 (2000) (citing *Batchelder v. City of Seattle*, 77 Wash.App. 154, 158 (1995)).