

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

In the Matter of the Application of)	No. BP16-00070
)	
Mark Goldberg, on behalf of)	
Water Wind & Sky, LLC)	
)	
For a Shoreline Substantial Development)	
Permit and a Shoreline Conditional)	FINDINGS, CONCLUSIONS,
<u>Use Permit</u>)	AND DECISION

SUMMARY OF DECISION

The request for approval of a shoreline substantial development permit to construct a 111-unit multifamily structure with two levels of parking on 1.39 acres, and a shoreline conditional use permit to allow a building height of 70 feet, is **APPROVED**. Conditions are necessary to mitigate specific project impacts.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on January 23, 2017.

Testimony:

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

Kelli Lambert, City Planner
Kent Smutny, Architect, for Applicant
Mark Goldberg, Applicant Representative

Assistant City Attorney Kylee Purvis represented the City at the hearing

Exhibits:

The following exhibits were admitted into the record:

1. Shoreline Permit Submittal Checklist, received October 5, 2016
2. Topography Survey Drawing (Sheet 1 of 1), dated September 28, 2016
3. Site Plan, dated September 27, 2016
4. Vicinity Map, undated
5. SEPA Environmental Checklist, submitted September 30, 2016
6. Geotechnical Engineering Report, EnviroSound Consulting, Inc., dated September 28, 2016
7. Vegetation Management Plan, BGE Environmental, LLC, dated September 22, 2016
8. Statutory Warranty Deed, recorded August 26, 2016

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9. Conditional Use Permit Application, received October 5, 2016
10. Trip Generation, Distribution and Access Review Traffic Letter, Jake Traffic Engineering, Inc., dated November 10, 2016
11. Determination of Completeness, dated October 3, 2016
12. Notice of Shoreline Application and SEPA Determination, dated October 18, 2016
13. Declaration of Posting on October 18, 2016
14. Declaration of Mailing, on October 18, 2016
15. Public Access Development, dated October 21, 2016, and December 6, 2016
16. Memorandum from Chal Martin, Public Works Director, to Bremerton Department of Community Development, dated December 13, 2016
17. Plans
 - a. Cover (Sheet A1), dated November 15, 2016
 - b. Perspective (Sheet A2), dated November 7, 2016
 - c. East and North Elevations (Sheet A3), dated November 7, 2016
 - d. West and South Elevations (Sheet A4), dated November 7, 2016
 - e. Level P2 (Sheet A5), dated November 7, 2016
 - f. Level P1 (Sheet A6), dated November 7, 2016
 - g. Level R1 (Sheet A7), dated November 7, 2016
 - h. Level R2 (Sheet A8), dated November 7, 2016
 - i. Level R5 (Sheet A9), dated November 7, 2016
 - j. Club Room (Sheet A10), dated November 7, 2016
18. Determination of Nonsignificance, dated December 19, 2016
19. Comment letter from WDFW, dated December 27, 2016
20. Conditional Water and Sewer Availability Letter, dated January 9, 2017
21. Example: Notice to Title/Hold Harmless, undated
22. Notice of Public Hearing, undated; Declaration of Posting on January 5, 2017; and Declaration of Mailing on January 5, 2017
23. *Kitsap Sun* Ad Proofs - NOA/SEPA, dated October 18, 2016; and Notice of Hearing, dated January 5, 2017
24. Staff Report
25. Revised Staff Report, dated January 23, 2017
26. Memorandum from Kelli Lambert, dated January 20, 2017

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

1. Mark Goldberg, on behalf of Water Wind & Sky, LLC (Applicant), requests a shoreline substantial development permit (SSDP) to construct a 111-unit multifamily structure with two levels of parking on 1.39 acres, and a shoreline conditional use permit (SCUP) to

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allow a building height of 70 feet.¹ The property is located at 1943 Wheaton Way.² *Exhibit 1; Exhibit 9; Exhibit 17; Exhibit 25, Revised Staff Report, pages 1 and 4.*

2. The City of Bremerton Department of Community Development (City) determined the application was complete on October 7, 2016. On October 18, 2016, the City provided notice of the application and expected issuance of a State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) by mailing the notice to the Applicant, local, state, and federal agencies, the Suquamish Tribe, and property owners within 300 feet; posting notice on the property; and publishing in the *Kitsap Sun*, with a comment deadline of November 18, 2016. The City received city department comments from the Building Department requiring a current geotechnical report; from the Engineering Department regarding minimum fire flow requirements, frontage improvements and driveways, storm water drainage mitigation under Chapter 15.04 BMC and the most current edition of the Department of Ecology Stormwater Management Manual for Western Washington, street lighting design, and no need for traffic mitigation; from the Fire Department requiring compliance with the International Fire Code, International Building Code, National Fire Protection Association, and BMC. The City did not receive any public comments. On January 5, 2017, the City provided notice of the open record hearing by mailing notice to property owners within 300 feet, posting, and publication in the *Kitsap Sun*. *Exhibits 11 through Exhibit 14; Exhibit 23; Exhibit 25, Revised Staff Report, pages 13 and 14.*

SEPA Determination of Nonsignificance

3. The City Department of Community Development acted as the lead agency and reviewed the proposal for environmental impacts under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. The City consolidated the DNS and application comment periods under the optional DNS process provided by WAC 197-11-355. The City reviewed the completed environmental checklist and other available information, and determined that the proposal would not have a probable significant adverse

¹ The project is described in a variety of ways in public documents related to the application, including in the Notice of Public Hearing. The Notice of Shoreline Application and SEPA Determination described the structure as a “4-story, 111 unit multifamily structure. . . with two levels of parking.” *Exhibit 12*. The Applicant’s Environmental Checklist listed the height of the proposed structure as “approx. 65 feet from median grade.” *Exhibit 5*. The Notice of Public hearing described the structure as a “four-story multifamily development,” but did not list the type of permit(s) required under BMC 20.02.100(c)(4)(iii). Ms. Lambert testified that City considered the notice of application and notice of public hearing description of the structure as adequate to inform the public of the proposal. *Testimony of Ms. Lambert*. The City and the Applicant agreed that the City would provide a copy of the decision to property owners within 300 feet of the site to remove any doubt about what is proposed.

² The property is identified by tax parcel number 3976-030-012-0007. The legal description of the property is provided in the Applicant’s Environmental Checklist. *Exhibit 5*.

environmental impact. The City issued a DNS on December 19, 2016. The DNS was not appealed. *Exhibit 10; Exhibit 25, Revised Staff Report, page 13.*

Comprehensive Plan and Zoning

4. The City Comprehensive Plan designates the property as Eastside Employment Center. City staff identified the following Comprehensive Plan goals and policies as relevant to the proposal:

Goal LU 1: Plan for Bremerton’s population and employment growth.

LU1(E): Preserve regional historic, visual and cultural resources *including public views.*

Goal H2. Encourage the development of a variety of new housing options and densities to meet the changing needs of Bremerton residents.

H2(A): Support the private sector’s efforts to provide a full range of housing options to meet the needs of all ages and *demographics.*

H2(B): Encourage new development to blend with positive characteristics of surrounding neighborhoods.

Goal H3. Support access to quality and affordable housing for all Bremerton residents.

H3(A): Provide opportunities for the production of new housing for all incomes, ages, and family types through infill by stimulating growth of non-traditional housing types such as townhomes, carriage units, accessory dwelling units, and duplexes in locations where they will seamlessly infill into the fabric of the existing neighborhoods.

Goal E3: Water: Protect water resources for present and future generations.

E3(H): Apply Bremerton’s Shoreline Master Program goals and policies to development and redevelopment within the shoreline jurisdiction.

Exhibit 25, Revised Staff Report, page 5.

5. The property is zoned Employment Center (EC). The intent of the EC zone is to offer a planned and designed environment where a potentially large employee population is offered the option to live near places of employment. The EC zone provides for integration of employment activities with housing and commercial activities scaled to serve the employee population at the center, thereby reducing home-to-workplace commute trips. Employment centers create large numbers of jobs in uses to include office and services. *BMC 20.92.010.* Residential uses of all types except group residential facility - Class II are outright permitted uses in the EC zone. *BMC 20.92.010(o).* Development within the EC zone has a minimum density of 15 dwelling units per acre with no maximum, zero front, rear, and side setbacks, maximum height of 80 feet, and maximum building coverage of 85 percent. *BMC 20.92.060.* The proposed development would have 111 dwelling units on 1.39 acres or 79 dwelling units per acre, a maximum

building height of 70 feet, and a building coverage of 37 percent. The City's land use code sets out landscaping performance standards, including street trees, vegetation preservation, planting materials, outdoor storage screening, landscaping plan, irrigation, and maintenance. *BMC 20.50.040, .050, and .060*. Light sources may not produce glare extending beyond property lines, except onto adjacent sidewalks. *BMC 20.44.110*. One parking space per dwelling unit is required. *BMC 20.48.060(i)*. Property to the north is undeveloped and zoned East Park Subarea- Mixed Use. Property to the east, a mix of commercial and residential uses, and property to the west, with single-family residential uses, are both zoned EC. Port Washington Narrows is located to the south. *Exhibit 25, Revised Staff Report, pages 1, 4, and 11*.

Existing Site and Proposed Project

6. The site is approximately 1.39 acres and runs northeast/southwest with a generally flat upland portion approximately 85-foot wide and 300-foot long to the east, which slopes southwest down to the Port Washington Narrows shoreline. The eastern upland portion is vacant with remnants of a former asphalt surface, weeds, and bare ground as well as access to Wheaton Way. Mature Douglas firs are located along the northern property boundary. The western steep slope is heavily vegetated with mature trees and secondary brush down to the ordinary high water mark (OHWM). The Applicant's Environmental Checklist lists hawks, herons, eagles, songbirds, and deer, as well as salmon and shellfish as having been observed or known to be on or near the site. While no threatened or endangered species are listed in the checklist, the Applicant's Vegetation Management Plan, prepared by BGE Environmental, LLC, lists the following threatened species in or near the project area: marbled murrelet, streaked horned lark, yellow-billed cuckoo, and bull trout. *Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 25, Revised Staff Report, page 4*.
7. The proposed multifamily building would be constructed along Wheaton Way. The City would provide water and wastewater service to the site. A 24-inch CPEP main is located in the Wheaton Way right-of-way for stormwater service. *Exhibit 17.a; Exhibit 20; Testimony of Ms. Lambert*.
8. Jake Traffic Engineering, Inc., prepared a Trip Generation, Distribution and Site Access Review Traffic Letter (Traffic Letter) for the Applicant, dated November 10, 2016. The proposed project would provide two accesses to the site off of Wheaton Way, a Major arterial. The proposed 111-unit apartment project would generate 472 daily and 33 AM and 43 PM peak hour trips. The Traffic Letter recommends construction and site accesses in accordance with applicable City requirements and on-site bike parking per City requirements. *Exhibit 10; Exhibit 25, Revised Staff Report, page 8*.

Shoreline Management Act

9. The City recognizes the intent of the legislature of the State of Washington in adopting the Shoreline Management Act (SMA) of 1971, and adopts by reference the findings

therein including the intent to protect shorelines of statewide significance, their associated natural resources, and providing opportunities for the general public to have access to generally enjoy shorelines. *Bremerton Shoreline Master Program (BSMP), Chapter 1, page 5*. The overall focus of the BSMP is plan is to protect and restore shoreline resources and ecological functions, increase public access to the shoreline, promote economic development, and accommodate water dependent uses. The BSMP recognizes that – in order to achieve rational, balanced, and responsible use of our irreplaceable shorelines -- uses need to be coordinated to ensure that long term over short term benefits result. *BSMP, Section 2.020, page 7*.

10. Under the SMA, a substantial development may not be undertaken in shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction. *Revised Code of Washington (RCW) 90.58.140(2)*. *Substantial development* shall mean “any development of which the total cost or fair market value exceeds \$6,416.00, or any development which materially interferes with the normal public use of the water or shorelines of the state.” *RCW 90.58.030(3)(e)*. The SMA and the Bremerton Shoreline Master Program (BSMP)³ regulate activity within 200 feet of the ordinary high water mark (OHWM). *RCW 90.58.030(2)(e) and (f); BSMP, Chapter 3, page 19*. The fair market value of the proposed project is given as \$3,000,000. *Exhibit 1*.

Bremerton Shoreline Master Program

11. The BSMP designates two shoreline environmental designations for the property. Upward of the top of the slope, the property is designated Commercial. The Commercial environment designation is intended to accommodate high intensity business districts, light industry, and various commercial operations located in the shoreline jurisdiction. The designation is suitable for existing and future high intensity water oriented uses and water oriented commercial uses. The designation encourages commercial development that could enhance visual and physical public access to the shoreline. A primary goal is to provide a setting for commercial operations that will be of economic benefit while protecting and/or restoring ecological functions in areas that have been previously degraded. *BSMP, Sec. 4.030(c), page 38*. While Multifamily Residential is a permitted use in the Commercial shoreline environment (*BSMP, Sec. 7.090(a), page 81*) it is not a priority for location on the shoreline under the SMA. *BSMP Sec. 8.080(b), page 97*.

Waterward of the top of the slope, the property is designated Urban Conservancy. The Urban Conservancy environment designation is intended to protect and restore ecological functions of lands within the shoreline jurisdiction. These areas are identified as having biological or physical limitations or other unique or hazardous characteristics that are

³ The Bremerton SMP was revised and approved on Dec. 4, 2013 by Ordinance Number 5229. *BSMP, Chapter 1, page 1*.

incompatible with intense development. Activities permitted in these areas are intended to have minimal adverse impacts upon the shoreline. These areas are not generally suitable for intensive water dependent uses. *BSMP, Sec. 4.030(j), page 41. Exhibit 25, Revised Staff Report, page 5.*

12. BSMP shoreline buffer regulations establish a buffer width of 175 feet, with a 15-foot building setback in the Urban Conservancy designation. *BSMP, Sec. 7.010, Regulation (d)(1), page 69.* The 175 foot shoreline buffer is not applicable to the upland Commercial designation. *Exhibit 7.*
13. Development within critical areas of the shoreline jurisdiction is governed by the City's Critical Areas ordinance, except where BSMP policies and regulations supersede those. *BSMP Sec. 7.010, page 67.* The property contains a high geologic hazard area. Structures or impervious surfaces are not allowed within a 50-foot buffer of the top of the slope, unless reductions are supported by a geotechnical report. EnviroSound Consulting, Inc. prepared a Geotechnical Engineering Report (GER) for the Applicant, dated September 28, 2016. The GER identifies the area as between Vashon Till and Vashon recessional outwash deposits. Petroleum stained soils were identified on site. The western slope is an Area of High Geologic Hazard (BMC 20.14.620) and requires a 50-foot buffer between structures or on impervious surfaces from the top or toe of slope areas. The GER determined that the buffer could be reduced to 12 feet if the buildings were supported on auger cast piles and if GER recommendations regarding deep pile foundations, erosion control, drainage, floor slabs, earthwork considerations, site preparation, groundwater concerns, excavations & constructed slopes, structural fill, and utility trench fill are followed. The Applicant would record a "Notice to Title and Hold Harmless" document (BMC 20.14.130(g)), prior to the issuance of a building permit. BSMP policies include protecting critical areas so there is no net loss of shoreline ecological functions, continuing contribution to existing ecosystem wide processes, and promotion of public access and native vegetation management. *BSMP Sec. 7.010, Policies (a) –(c), page 67. Exhibit 6; Exhibit 21; Exhibit 25, Revised Staff Report, page 2.*
14. The City's Critical Areas Ordinance establishes development standards for designated fish and wildlife habitat conservation areas. *BMC 20.14.730.* The Washington Department of Fish and Wildlife (WDFW), in a December 27, 2016, comment letter, identified the beach located at the bottom of the bluff as critically important habitat for juvenile salmonids migrating through Port Washington Narrows and the upland area as valuable riparian zone for the beach below. WDFW's Priority Habitat Species mapping also identifies the beach below the proposed development as habitat for hard shell clams. WDFW expressed concerns about reducing the 50-foot geological hazard zone buffer to 12 feet and whether this would create a need for additional new hard armoring on the beach below. Per a condition recommended by the City, the Applicant's "Notice to Title

and Hold Harmless” document would include a restriction from any future hard armoring at the toe of the bluff. *Exhibit 19; Exhibit 25, Revised Staff Report, page 2.*

15. BSMP regulations require a Vegetation Management Plan (VMP). *BSMP, Sec. 7.020, Regulations (a), page 71.* BGE Environmental, LLC, prepared a VMP for the Applicant, dated September 21, 2016. The top-of-slope 50-foot buffer would be reduced to 12 feet within which Himalayan blackberries would be removed and the area planted with 284 native shrubs. The VMP provides a planting plan, including planting details, maintenance, and monitoring. The monitoring plan would consist of mid-summer evaluation of the health, vigor, and coverage of all planted materials. Review and evaluation would consider presence and coverage of blackberry and success of seeding. Maintenance recommendations and/or contingencies would be provided as necessary to ensure success of the VMP after five years. The VMP proposes to clear Himalayan blackberries by hand and pull vines down from tree canopies from the face of the slope 20-feet downgradient. Himalayan blackberries would be handcut and spotted treated with an herbicide. The slope face would be seeded with an individual native woody vegetation mix. Existing trees would be trimmed but not removed. The VMP would be revised to reflect a limit of not more than 25 percent of a tree’s leaf-bearing crown be removed. *BMC 20.14.630(f)(1).* Conditions of approval recommended by the City would require the Applicant to record a Notice to Title with the Site Development Permit, designating a conservation easement of the buffer area and the required plantings in perpetuity. Prior to occupancy, the Applicant would provide a financial surety accounting for 150 percent of the cost of the removal of invasive species and replanting of native species. *Exhibit 7; Exhibit 19; Exhibit 25, Revised Staff Report, pages 2, 7, and 11.*
16. BSMP policies require applicants to demonstrate that all alternatives have been examined with the intent to avoid and minimize impacts to shoreline ecological functions. *BSMP Sec. 7.030, page 73.* The proposed project would be located outside a 12-foot buffer from the top of the bluff. The Applicant submitted a VMP describing the mitigation sequencing including avoidance, minimization, rectification of impacts, reduction of impacts, compensation, and monitoring. The VMP provides a no net loss analysis including enhancement of ecological functions of the slope. *Exhibit 7; Exhibit 25, Revised Staff Report, page 8.*
17. BSMP regulations include designing public access to provide the general public with opportunity to reach, touch, view, and enjoy the water’s edge and shall be as close to the shoreline’s edge as feasible; comply with mitigation sequencing within a buffer; and dedicate 10 percent or 3,000 square feet, whichever is greater, to public access. *BSMP Sec. 7.040, Regulations (b)(1), page 74.* The Applicant proposes to provide 3,000 square feet of public access by constructing a 15-foot by 20-foot public viewing deck on a portion of the bluff where the upper portion of the bluff is less steep. A 30-foot wide

public access path transitioning to an elevated boardwalk would be located along the north property line from Wheaton Way southwest to a handicapped accessible view deck. The boardwalk would avoid mature trees. Signage would be placed at the intersection of the public access path and the sidewalk parallel to Wheaton Way. The viewing deck would be available from 9:00 AM to dusk. The Applicant would also record this public access easement, as well as a minimum thirty foot wide lateral beach easement waterward of the OHWM to allow for lateral beach access. *Exhibit 7; Exhibit 17.g; Exhibit 25, Revised Staff Report, page 7.*

18. BSMP policies include preventing impacts to water quality and stormwater quantity that would result in a net loss of shoreline ecological function, or a significant impact to aesthetic qualities, or recreational opportunities. *BSMP Sec. 7.050, Policy (a), page 77.* The GER report recommends that building and impervious surface runoff be directed into appropriately designed stormwater disposal system. The Applicant proposes to collect all stormwater on site to be discharged into the stormwater system along Wheaton Way and thereby comply with the storm drainage mitigation specified in Chapter 15.04 BMC, as well as the most current edition of the Department of Ecology Stormwater Management Manual for Western Washington. *Exhibit 5; Exhibit 6; Exhibit 25, Revised Staff Report, page 2.*
19. BSMP policies include minimizing lighting within shorelines, especially where there is proximity to the water. *BSMP Sec. 7.070, Policy (b) and Regulation (a), pages 78 and 79.* The City would review a lighting plan at the time of Site Development Permit, as required by BMC 20.44.110. *Exhibit 25, Revised Staff Report, pages 8 and 12.*
20. BSMP policies and regulations include discouraging parking areas between a development and adjacent body of water. *BSMP Sec. 7.080, Policy (c) and Regulation (b), pages 79 and 80.* The Applicant proposes to locate 115 parking spaces within the proposed structure, with 109 standard stalls, five accessible stalls, one van accessible stall, seven motorcycle stalls, and seventeen bicycle stalls. *Exhibit 7; Exhibit 17.a. and .e; Exhibit 25, Revised Staff Report, page 8.*
21. Multifamily Residential is a permitted use in the Commercial shoreline environment, with a maximum height⁴ of 35 feet. *BSMP, Table 7.090(b), page 82.* Heights in the Commercial shoreline environment may be increased up to the zoning district height limit with a conditional use permit. The Employment Center zone allows a maximum building height of 80 feet for residential uses. *BMC 20.92.060 (g).* The Applicant requests a SCUP to allow a building height of 70 feet within the Commercial shoreline

⁴ The BSMP defines "Height" as: "The distance measured from the average grade level to the highest point of a structure: Television antennas, chimneys, and similar appurtenances shall not be used in calculating height." *BSMP Chapter 3, page 16.*

environment. *BSMP, Figure 7.090(b), pages 82 and 83. Exhibit 17.c; Exhibit 25, Revised Staff Report, page 10.*

22. BSMP policies include a requirement that development of residential units must result in no net loss of ecological function; that any residential development along the shoreline be set back from steep slopes and eroding shoreline areas so that the shoreline is not further eroded nor structural improvements required to protect property; that existing native vegetation be preserved to the greatest extent possible; that impervious area be minimized and Low Impact Development techniques utilized to the greatest extent possible; and that new multi-unit residential development include public access. The proposed project would not require shoreline stabilization, would provide public access for shoreline viewing, and would use Low Impact Development wherever feasible. *BSMP Sec. 8.080, Policies (a), (b), and (d) through (f); Regulation (b), pages 96 through 98. Exhibit 25, Revised Staff Report, pages 2 and 6.*
23. BSMP policies include those requiring that disturbance to and removal of native soils be minimized within shorelines. BSMP regulations include allowing land clearance, filling, and grading activities only between May 1 and October 1, unless the City extends or shortens the time window on a case-by-case basis. Site development would include approximately 18,000 square feet of grading, with approximately 3,400 cubic yards exported and approximately 350 cubic yards of structural fill. The Applicant proposes that land clearing, filling, and grading would be carried out between May 1 and October 1, to avoid wet season work, unless additional information is provided and agreed to by the City. *BSMP Sec. 9.020, Policy (a); Regulation (b)(1), page 103; Exhibit 25, Revised Staff Report, pages 1 and 8.*
24. Veer Architecture, PLLC, prepared plan drawings for the Applicant depicting a proposed structure height of 70 feet (top of highest roof except star & elevator penthouse). *Exhibit 17.a. and c.* A structure may exceed the Commercial shoreline designated height limit of 35 feet up to the Employment Center zoning district height limit of 80 feet if a Shoreline Conditional Use Permit is approved. There are four requirements that must be met before a SCUP can be approved. There must be no substantial view blockage, a finding that greater height is an essential element of an allowed use, a provision for compensating elements if required, and No Net Loss of habitat function. *BSMP Sec. 7.090(b), Height Restrictions (a), pages 82 and 83.*

The City identified two parcels on the north side of Wheaton Way where views could be impacted. The first is a 15-acre wooded parcel owned by the City. It would remain undeveloped as a city park. The second is a future phase of a 30-acre property that may contain residential and mixed uses with a 60-foot maximum height, located at a higher topography than the proposed development. Mark Goldberg, Applicant Representative, testified that there are four houses to the north, and no neighbors to the east, a small

warehouse to the south, and an engineering firm to the west. The City determined that the proposed height increase on the subject property may inhibit some future views, but not substantially block any upland residential properties. A buffer from the top of slope is required and a portion of the site would be dedicated to enhance public access, which limits the building area. The Applicant provided a Vegetation Management Plan containing a no net loss analysis that includes enhancement of ecological functions of the slope. City staff did not identify any additional requests for similar actions in the project area. *Exhibit 25, Revised Staff Report, page 10; Exhibit 26; Testimony of Mr. Goldberg.*

Staff Recommendations

25. The City reviewed the SSDP and SCUP applications and determined that, with conditions, the applications would comply with the Comprehensive Plan, BSMP, Critical Areas Ordinance, and applicable BMC development regulations. Mr. Smutny testified that he agrees with the City's revised staff report. *Exhibit 25, Revised Staff Report, page 1; Testimony of Mr. Smutny.*

CONCLUSIONS

Jurisdiction

Jurisdiction of the Hearing Examiner is granted by the City Council in the Bremerton Shoreline Master Program (BSMP) and Bremerton Municipal Code (BMC). The BSMP provides that: "A Shoreline Substantial Development Permit application shall be processed as a Type II permit pursuant BMC 20.02 and as otherwise required by Chapter 90.58 RCW and Chapter 173-27" and that "permits may be approved, approved with conditions or denied by the Director". The BSMP also allows for increased review, when deemed appropriate by the City. The BSMP provides that a "Shoreline Conditional Use Permit shall be processed as either a Type II or Type III permit depending on project scope" and that "permits may be approved, approved with conditions, or denied by the Director or Administrative Hearing Examiner respectively."⁵ *BSMP, Section 5.020, page 53; BMC 2.02.040(b) and (c).*

Here, the City elevated the permit applications to a Type III permit Hearing Examiner decision to allow the maximum opportunity for public input. *Exhibit 26. BMC 2.13.070, .100, .110; BMC 20.02.040; BMC 20.16.110.* The Shoreline Management Act also requires that the Washington Department of Ecology (WDOE) review all shoreline conditional use decisions by local government. WDOE may approve or disapprove the SCUP. *RCW 90.58.140(10).*

Criteria for Review

Shoreline Management Act

The Shoreline Management Act is codified at RCW 90.58.020. Applicable policies of RCW 90.58.020 include those to foster "all reasonable and appropriate uses"; protect against adverse

⁵ BMC 20.02.080 also provides for an optional consolidated permit process that involves two or more permit applications.

effects to the public health, the land, and vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alternations to the natural condition of the shoreline. Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” *RCW 90.58.020*. See also *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

In promulgating the Shoreline Management Act of 1971, the legislature recognized that “ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development” of the state’s shorelines. *RCW 90.58.020*. The legislature also determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” *RCW 90.58.020*. Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. *RCW 90.58.080(1)*.

Department of Ecology Regulations

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 WAC sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the application under the following criteria:

- (1) A substantial development permit shall be granted only when the development proposed is consistent with:
 - (a) The policies and procedures of the act;
 - (b) The provisions of this regulation; and
 - (c) The applicable master program adopted or approved for the area.
Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.
- (2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-150.

The Bremerton Shoreline Master Program

The BSMP provides that a SSDP shall be granted only when the development proposed is consistent with:

- (i) The policies and procedures of the Shoreline Management Act *RCW 90.58*;

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and the provisions of the Shoreline Guidelines WAC 173-26 and WAC 173-27, and

- (ii) This Shoreline Master Program, as well as the Comprehensive Plan and Zoning Regulations, to the extent that they are consistent with the Shoreline

BSMP, Sec. 5.040(a)(1), page 54 and 55.

In addition:

...

(2) The City may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and this Shoreline Master Program.

(3) Any ruling on an application for a Shoreline Substantial Development Permit under authority of this Master Program, whether it is an approval or denial, shall, with the transmittal of the ruling to the applicant, be filed concurrently with Ecology and the Attorney General by the Director. Filing shall occur in accordance with RCW 90.58.140(6) and WAC 173-27-130.

BSMP, Sec. 5.040(a), page 55.

Development activity considered a Conditional Use may be authorized if all of the criteria in WAC 173-27-160 are met. The criteria include:

- (i) The proposed use is consistent with RCW 90.58.020 and the policies of Bremerton's Shoreline Master Program;
- (ii) The proposed use will not interfere with the normal public use of public shorelines;
- (iii) The proposed use of the site and design are compatible with other permitted uses in the area;
- (iv) The proposed use will cause no net loss of ecological function to the shoreline environment; and
- (v) The public interest will not suffer a detrimental effect.
- (vi) When considering the application, consideration must be given to the cumulative impact of additional requests for similar actions in the area. After the City makes a final decision on a Conditional Use Permit, the permit and application must be reviewed and approved by Ecology and the Attorney General.

BSMP Sec. 5.040(b)(2), page 55, referenced by BMC 20.16.010.

In addition, heights in the commercial and industrial districts may be increased to the zoning district height limit through a Conditional Use Permit provided:

- (1) The increase does not substantially block views from upland residential properties.
- (2) Greater height is demonstrated to be needed for an essential element of an allowed use.

- (3) The project may be required to include compensating elements that substantially enhance the visual and physical public access to the shoreline.
- (4) It is demonstrated that No Net Loss of habitat function will be achieved.

BSMP, Figure 7.090(b), pages 82 and 83.

Thus, the Hearing Examiner must review relevant BSMP goals, policies, and regulations as described in the above findings. The criteria for review adopted by the City of Bremerton City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with Town development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

Shoreline Substantial Development Permit

1. **With conditions, the proposal is consistent with the policies of the State Shoreline Management Act and the State Department of Ecology Shoreline Regulations.** Applicable policies of the Shoreline Management Act (SMA) include those that foster “all reasonable and appropriate uses”; protect against adverse effects to the public health, the land, and vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alterations to the natural condition of the shoreline. Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” *RCW 90.58.020.* While multi-family residential is not a priority use within the shoreline jurisdiction, the BSMP allows those uses to be approved if certain requirements are met.

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 WAC sets forth permitting procedures and permit criteria. This proposal is reviewed under the criteria set forth in WAC 173-27-150. These criteria are intended to implement the policies of the SMA, which requires that all shoreline projects be consistent with an approved local Shoreline Master Program.

Conditions of approval are necessary for compliance with applicable criteria including those to ensure the Applicant retain a 12-foot undisturbed buffer from top of the slope; include Low Impact Development techniques at the time of Site Development Permit submittal; provide public access prior to occupancy; record a 30-foot wide lateral beach access, restriction from any future hard armoring at the toe of the bluff, and conservation easement for the buffer; revise the Vegetation Management Plan to limit no more than 25

percent removal of a tree's leaf-bearing crown; provide a financial surety for 150 per cent of replacement costs of plantings; prepare a final landscaping plan; follow all recommendations and best management practices of the Geotechnical Engineering Report; comply with the City's storm drainage mitigation and the most current edition of the Department of Ecology Stormwater Management Manual for Western Washington; limit clearing, grading, or filling to between May 1 and October 1; and not begin construction until 21 days have passed from the date of filing of the permit decision with the Department of Ecology and until appropriate construction permits are issued by the City. *Findings 1-23, 25.*

2. **With conditions, the proposal is consistent with the City of Bremerton Shoreline Master Program, as well as the Comprehensive Plan and Zoning Regulations, to the extent that they are consistent with the Shoreline Master Program.** The proposal would be consistent with the Comprehensive Plan goals and policies and designation of the site as Eastside Employment Center and the zoning code classification of Employment Center. The Comprehensive Plan encourages the type of use proposed. The EC zone provides for integration of employment activities with housing and commercial activities scaled to serve the employee population at the center, thereby reducing home-to-workplace commute trips. The proposed development would meet City code requirements for density, setbacks, and building coverage. The City analyzed the potential environmental impact of the proposal and determined that the current proposal would not have a probable significant adverse impact on the environment. The City's determination was not appealed.

While multi-family residential is not a priority use within the shoreline jurisdiction, it may be approved if ecological productivity and public access requirements are met. The proposed multi-family housing project would take place within the Commercial shoreline designation. The Applicant's proposal would not require shoreline stabilization, would provide public access to the shoreline, and Low Impact Development techniques would be identified during the Site Development Permit process. The Applicant submitted a Vegetation Management Plan, and would submit a final landscape plan at the time of Building Permit application, which must be approved by the City. The Applicant would also submit a photometric lighting plan at the time of Site Development Permit, to be approved by the City. The proposed project is located on private property and would not affect public shoreline access or recreational opportunities. Parking would be located within the proposed building, complying with the BSMP requirement that parking not be located between a development and adjacent water bodies. *Findings 1-23, 25.*

Shoreline Conditional Use Permit

3. **With conditions, the proposed use would be consistent with the policies of the State Shoreline Management Act, the State Department of Ecology Shoreline Regulations and the City of Bremerton Master Program.** The proposed development is

specifically authorized as a permitted use in the Commercial shoreline environment, but is not considered a priority use unless ecological productivity and public access requirements are met (see Conclusion 2, above). The Applicant requests a SCUP to increase the building height from 35 feet to 70 feet. The SMA prohibits issuance of permits for structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served. *RCW 90.58.320*. Here, the BSMP allows an increase in building height in commercial districts to the zoning height limit of 80 feet where the increase does not substantially block views from upland residential properties, greater height is needed, compensating elements that enhance public access to the shoreline may be required, and No Net Loss of habitat functions would be achieved. The City identified two parcels north of Wheaton Way with views of Port Washington Narrows that could be impacted. One parcel is in City ownership and is proposed to remain a public park. The second is a future phase of a 30-acre property that may contain residential and mixed uses with a 60-foot maximum height, located at a higher topography than the proposed development. The City determined that the proposed height increase on the subject property may inhibit some future views, but not substantially block any upland residential properties. The City did not receive any comments from upland residential property owners. The site would require a 12-foot top-of-slope buffer and a 30-foot wide public access easement, which reduces the allowable building footprint. Therefore, the additional height, which is within the underlying zone limit, is justified. *Findings 1 – 25*.

With a condition, the proposed use would not interfere with the normal public use of public shorelines. The proposed project is located on an upland portion of private shoreline property. The requested SCUP relates to the height of the proposed structure, not its location. The proposed development would provide an upland platform for the public to view the shoreline, as well as a minimum 30-foot wide lateral beach easement for the public to legally access the beach on foot. A condition is necessary to ensure that the public access is fully developed and available prior to occupancy. *Findings 1 and 24*.

With conditions, the proposed use of the site and design of the project would be compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program. The proposal would be consistent with the Comprehensive Plan goals and policies and designation of the site as Eastside Employment Center and the zoning code classification of Employment Center. The Comprehensive Plan encourages the type of use proposed. The EC zone provides for integration of employment activities with housing and commercial activities scaled to serve the employee population at the center, thereby reducing home-to-workplace commute trips. *Findings 4 and 5*.

The property is designated with split parallel shoreline designations. The proposed project would be located on uplands with a Commercial shoreline designation. No activity, other than a shoreline viewing platform would be located in the Urban Conservancy shoreline designation. The SMA provides that no permit be issued for any new building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served. *RCW 90.58.320*. Here, the BSMP allows an increase in building height in commercial districts to the zoning height limit of 80 feet where the increase: does not substantially block views from upland residential properties, greater height is needed, compensating elements that enhance public access to the shoreline may be required, and No Net Loss of habitat functions would be achieved. The City determined that the proposed height increase on the subject property may inhibit some future views, but not substantially block any upland residential properties. The City did not receive any comments from upland residential property owners. The site would require a 12-foot top-of-slope buffer and a required 30-foot wide public access easement, which reduces the allowable building footprint. Therefore, the additional height, which is within the underlying zone limit, is justified. *Findings 1, 3 – 25*.

With conditions, the proposed use would cause no significant adverse effects to the shoreline environment in which it is to be located. The City determined that the proposal would not have a probable significant adverse environmental impact and issued a Determination of Nonsignificance (DNS). The DNS was not appealed. City staff reviewed the proposal for compliance with the critical areas ordinance. The Applicant submitted a Geotechnical Engineering Report that determined that, by following the GER's recommendations, a structure of the proposed height could be constructed on the upland portion of the property with a – buffer from the top of the slope. The Applicant submitted a Vegetation Management Plan and Geotechnical Engineering Report. *Findings 3, 13, and 15*.

With conditions, the public interest would suffer no substantial detrimental effect. The City gave reasonable notice and opportunity to comment on the proposal. The City determined that the proposal would not have a probable significant adverse environmental impact and issued a DNS. The DNS was not appealed. Conditions are necessary, including those to ensure that the project complies with the Vegetation Management Plan so there is No Net Loss of habitat functions and to ensure that public access is provided. *Findings 1-3, 6-25*.

Consideration has been given to the cumulative impact of additional requests for like actions in the area. No additional requests for similar action in the project area are

known at this time. However, given that the City has chosen to use a split shoreline designation allowing commercial development on the uplands above a bluff, it can anticipate that future development in this area will include additional review of both views and slope stability. *Findings 1 and 24.*

Conditions are necessary including those to ensure the Applicant retain a 12-foot undisturbed buffer (except for native plantings) from top of the slope; include Low Impact Development techniques at the time of Site Development Permit submittal; provide public access prior to occupancy; record a 30-foot wide lateral beach access, restriction from any future hard armoring at the toe of the bluff, and conservation easement for the buffer; revise the Vegetation Management Plan to limit no more than 25 percent removal of a tree's leaf-bearing crown; provide a financial surety for 150 per cent of replacement costs of plantings; prepare a final landscaping plan; follow all recommendations and best management practices of the Geotechnical Engineering Report; comply with the City's storm drainage mitigation and the most current edition of the Department of Ecology Stormwater Management Manual for Western Washington; limit clearing, grading, or filling to between May 1 and October 1; and does not begin construction until 21 days have passed from the date of filing of the permit decision with the Department of Ecology and until appropriate construction permits are issued by the City. *Findings 1, 3, 6-25.*

DECISION

Based on the preceding findings and conclusions, the request for a shoreline substantial development permit to construct a 111-unit multifamily structure with two levels of parking on 1.39 acres, and a shoreline conditional use permit to allow a building height of 70 feet at 1943 Wheaton Way, is APPROVED, subject to the following conditions:⁶

1. Consistent with the geotechnical report prepared by EnviroSound Consulting on September 28, 2016, the 12-foot buffer from top of the slope shall remain undisturbed, except for the native plantings proposed in the Vegetation Management Plan, for the life of the project.
2. Wherever feasible, appropriate Low Impact Development (LID) techniques shall be used. This shall be shown at the time of Site Development Permit submittal.
3. Public access shall be fully developed and available for public use prior to occupancy. Public access areas shall be maintained for the life of the project.

⁶ Conditions include legal requirements applicable to all developments and provisions to mitigate the specific impacts of this development.

4. Notice to Title shall be recorded on the property for the following items: Public Access easements (30-foot wide lateral beach access, duration for the life of the project); critical areas buffer Hold Harmless agreement; a restriction from any future hard armoring at the toe of the bluff; and conservation easement for the buffer including plantings, per the Vegetation Management Plan. Notices must be recorded with the Kitsap County Assessor's office prior to Site Development Permit approval.
5. A revised Vegetation Management Plan must be submitted with the Site Development Permit, with a correction to the "Anticipated Impacts" section. This section states that conifers will be limbed to no less than 30 percent crown retention. Per BMC 20.14.630(f)(1), no more than 25 percent of a tree's leaf-bearing crown may be removed.
6. A financial surety is required, which accounts for 150% of the cost of replacement of the plantings proposed in the Vegetation Management Plan. The vegetation shall be monitored for a minimum of five (5) years, and a monitoring program must be submitted, to ensure the performance standards of the geotechnical report are met. The monitoring reports must be submitted on August 1st of each year during the monitoring period. Upon the completion of the five year program, evidence shall be presented to the Department of Community Development which indicates: a survival rate of 100% of trees, 85% of all other required plantings, and maintenance of invasive species removal, before the surety shall be released.
7. A final landscaping plan meeting the requirements in BMC 20.50.060 shall be required at the time of Site Development Permit submittal. Applicant shall coordinate with Waste Management for approval of the proposed dumpster location, before approval of the Site Development Permit.
8. Development shall comply with the recommendations set forth in the Vegetation Management Plan by BGE Environmental (Exhibit 7). All landscaping must be maintained in a healthy growing condition for the life of the development, with any dead or diseased plantings replaced per the landscaping plan.
9. Development shall be consistent with the geotechnical report prepared by EnviroSound Consulting, Inc. (Exhibit 6). All recommendations and best management practices articulated in the submitted reports shall be followed exactly.
10. Storm Drainage mitigation is required pursuant to BMC 15.04 and the most current edition of the Department of Ecology Stormwater Management Manual for Western Washington.
11. Frontage improvements, including driveway approaches and street lighting, shall be required.

12. Minimum fire flow per the Bremerton Municipal Code shall be required.
13. All authorized clearing shall be limited to the minimum necessary to accomplish construction. Clearing, grading, or filling of this site shall be limited to the period between May 1 and October 1, unless additional documentation is provided to allow wet season work.
14. A photometric plan is required, which complies with the regulations in BMC 20.44.110(b).
15. The building shall be limited to the 70 feet maximum height requested in the Shoreline Conditional Use Permit application, and shall comply with the design standards in BMC 20.92.070 for the Employment Center.
16. No construction shall begin and is not authorized until twenty-one (21) days from the date of filing of the decision with the Department of Ecology as defined in RCW 90.58.140(6) and WAC 173-27-130 and until appropriate construction permits are issued by the City.

Decided this 31st day of January 2017.



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

NOTE: The City agreed to provide notice of this decision to all property owners within a 300 foot radius of the proposal and all others that were provided notice of the public hearing on these applications. Should anyone who receives notice of the decision object to inadequate notice of the public hearing, a request for reconsideration may be filed if there are facts that should be considered that were not considered during the public hearing. This step is taken to help make certain any defect in notice of the hearing does not adversely affect the rights of any citizen impacted by the proposal to participate in the decision making process.