



Snohomish County

Planning & Development Services

M/S #604

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TO: Hearing Examiner
FROM: Ed Caine, Planning and Development Services
SUBJECT: Summation for 06-134741-SM

Complete application for a shoreline variance to site a residence within the required 25-foot setback from the Ordinary High Water Mark (OHWM) of Port Susan was made on November 13, 2006, and the project is vested to the codes that were in effect on that date. Chapter 30.44.260(2) SCC requires a public hearing when PDS is recommending denial of a shoreline variance application. The public hearing for the Shoreline Variance recommendation of denial by PDS was held on June 23, 2010, and continued on July 13, 2010. The position of PDS was to forward a recommendation of denial to Washington Department of Ecology (DOE) for the shoreline variance. The decision of PDS to recommend denial was based upon the PDS practice to defer the determination of the OHWM to DOE whenever DOE had made an OHWM determination for a site.

PDS suggests that there are two alternative determinations that are appropriate outcomes of the public hearing:

OPTION 1: Uphold the recommendation of PDS, and forward a recommendation of denial to DOE for a final determination.

If the Examiner makes this determination, then Snohomish County will forward a recommendation of denial of the shoreline variance application to DOE. DOE then will evaluate the recommendation from Snohomish County and render a final decision to approve or to disapprove the application. PDS believes that, given the opportunity that would be afforded by a formal recommendation from Snohomish County on the shoreline variance application, DOE will negotiate with the applicant for mitigation measures to compensate for the encroachment into the setback. The result from these negotiations will be that DOE will approve the shoreline variance permit with conditions to implement the mitigation measures.

OPTION 2: Reject the recommendation of PDS, finding that PDS was mistaken in giving deference to DOE's determination of the OHWM location, finding that the substantial evidence indicates an absence of marks on the soil that are distinct from abutting upland, finding that overwhelming evidence supports a determination that the OHWM for the subject property is found at an elevation of 11.1 feet, finding that the building is located in excess of 25 feet from that OHWM, finding that a shoreline variance is not needed for the proposed development, and remanding the recommendation to PDS with instructions to issue a Shoreline Substantial Development Permit.

If the Examiner makes this determination, then PDS will issue a Shoreline Substantial Development Permit (SSDP) for the residence. Issuance of the SSDP is an actual permit issuance and a final

determination by Snohomish County. DOE has the option of appealing the decision to the Shorelines Hearings Board, but DOE does not have the ability to approve or disapprove the decision.

DISCUSSION:

The criteria for determination of OHWM is found in RCW 90.58.030(2)(b), WAC 173-22-030(11)(a)(i), and Chapter 30.44.640 SCC (the criteria are nearly identical in the cited codes, differing only in that Snohomish County code identifies "... on the effective date of the Shoreline Management Act ...", and both the RCW and the WAC have a specific date "... on June 1, 1971, ..."). OHWM, as found in Chapter 30.44.640 SCC, is:

"Ordinary high-water mark, shoreline" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation, as that condition exists on the effective date of the Shoreline Management Act or as it may naturally change thereafter; provided that in any area where the ordinary high-water mark cannot be found, the ordinary high-water mark adjoining salt water shall be the line of mean higher high tide, and the ordinary high-water mark adjoining fresh water shall be the line of mean high water. (Added Ord. 02-064, § 19 (part), Dec. 9, 2002, Eff date Feb. 1, 2003).

It is undisputed that the site is considered to be high energy tidal location. Exhibits B.4, B.5, G.4, H.1C, H.1D, and I.3 are photographs of the site that provide visual evidence that there is little, if any, permanent vegetation on the site. DOE provided testimony that a site visit was made on December 6, 2006. At that site visit, DOE observed wrack materials that were considered to be marks on the soil which identified the location of the OHWM. The applicant provided testimony that opined that the wrack material was the result of storm events and extraordinary high tides, which are not appropriate for determination of the OHWM.

PDS, as an historical practice, defers the OHWM determination to a DOE determination whenever DOE has made an OHWM determination for a site. Exhibit D.2 is the written determination of OHWM that was made by DOE. The historical deference to DOE is not specified by Snohomish County code, rule, or policy, and is merely a practice.

At the public hearing, DOE testified that the authority to make the OHWM determination was established by RCW 90.58.030(2)(f). That code citation is repeated in Exhibit I.2 on page 1, as the code that provides DOE with the authority to make determinative OHWM decisions. PDS notes that that code citation is in a section entitled "Shorelands" or "shoreland areas" which establishes the landward boundary of shoreline jurisdiction. The code section may be interpreted as directing DOE to designate features such as wetlands, river deltas, and tidal waters that are adjacent to the OHWM as being within the area that is subject to shoreline jurisdiction. It is important that RCW 90.58.030(2)(b), the section that defines OHWM, has no reference to DOE. No section of either the RCW or the WAC contain a statement that establishes DOE's authority to establish the OHWM for regulatory purposes. It is also significant that DOE provided reference to a single decision by the Shoreline Hearings Board decision that accepted the methods used by DOE to determine OHWM (Exhibit I.2). Neither decisions by the Shoreline Hearings Board nor by the courts were provided to establish DOE's authority to determine the OHWM for a specific project.

PDS also is troubled by DOE's testimony that DOE uses the 6-10 highest tides of a year to determine the elevation of OHWM. DOE provided Exhibit I.2, which, on the second page, contains a chart of the highest monthly tidal heights between December, 2004, and December 2006. The exhibit and testimony

was a part of the explanation of the methods used by DOE in making a determination of OHWM. The methods of DOE do not meet the statistical definition of the explicit term, “the line of mean higher high tide” contained in the RCW, WAC, and Snohomish County code. Typically there are two high tides and two low tides a day, with one high tide being higher than the other. Statistically, the mean higher high tide would be the mean of all higher high tides over the course of a prolonged period of time, such as a 10-year mean higher high tide. At a minimum, the mean higher high tide determination would be made over the course of a year. The values obtained from averaging the 6-10 highest tidal elevations for a year, or the table in Exhibit I.2 with the highest monthly tidal elevations, are not equivalent to the mean higher high tide that is specified in the codes. DOE testified that, should a OHWM require use of tidal height, that they would use an elevation of 13.0 feet. However, the mean of the tidal height values provided in Exhibit I.2 is 12.69 feet, and that figure is derived by only evaluating the highest high tide value for the 25 months between December, 2004, and December, 2006.

PDS notes that a mean higher high tide level of either 12.69 or 13.0 feet is above the intersection of the beach sand and the concrete bulkhead on the subject property. Testimony of the applicant and of DOE agreed that there was no water mark on the bulkhead at the Jukanovich site, and testimony was provided that the bulkhead has been in existence for over 40 years. A water mark on the bulkhead would be expected if the OHWM rose to the bulkhead on a regular basis.

If PDS were to make an OHWM call on a high energy tidal site that had neither vegetation on or near the subject property and that did not have distinctive marks on the land to identify the OHWM, then PDS would use an elevation of 11.1 feet to establish the OHWM of the site. An OHWM of 11.1 feet would be a minimum of 25 feet 4 inches from the nearest portion of the residence. The required 25 foot setback that is required by the Snohomish County Shoreline Master Program for the suburban shoreline designation would be met. A shoreline variance would not be required because no infringement was being proposed. If the OHWM is determined to be at 11.1 feet at the subject property, PDS would issue a shoreline substantial development permit in response to the application.