



February 25, 2022

TRANSMITTED VIA ELECTRONIC MAIL

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Ms. Nicole Floyd
Principal Planner
City of Olympia
601 4th Avenue E.
Olympia, Washington 98501

**Re: Applicant's Response to Legal Issues Raised in City's 1st Round Substantive Review Comments
West Bay Yards Project No.: 21-2854**

Dear Ms. Floyd:

This letter provides the Applicant's responses to legal issues raised by the City's 1st Round Substantive Review Comments for the West Bay Yards project ("Project") dated September 3, 2021.

A. Scope of Required View Analysis

Item 3, paragraph two, bullet one of the review comments requests that the Applicant provide additional detail regarding how views might be affected by both a 35-foot-tall building and a 65-foot-tall building. The Applicant does not believe view analysis of a 35-foot building is necessary or appropriate for the City's review of the Project. As a preliminary matter, the Applicant has not proposed 35-foot-tall buildings, so analysis of a 35-foot building is not consistent with the Applicant's proposal. In addition, OMC 18.06.100(A)(2)(c) specifically allows development of buildings up to 65-feet tall along West Bay Drive subject to providing specific alternate waterfront view access amenities, which the Applicant has proposed. These code provisions were adopted in 2013 and were not appealed. The City's code is presumed valid upon adoption, RCW 36.70A.320(1), and is conclusively deemed legally compliant if not timely challenged, RCW 36.70A.290; *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 345, 190 P.3d 38 (2008). The only analysis that can and should be required as to the increased height should be to demonstrate the Project's compliance with the requirements of OMC 18.06.100(A)(2)(c), which the Applicant has provided.

B. Overriding Considerations of Public Interest

In Item 3, paragraph two, bullet two, the City requests that the Applicant identify the overriding considerations of public interest served by the project to justify increased height, citing OMC 18.20.504 and RCW 90.58.320. The full text of the City's Code provides,

No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five (35) feet above average grade level that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where Olympia's Shoreline Program does not prohibit the same and then only when overriding considerations of the public interest will be served.

OMC 18.20.504. RCW 90.58.320 is nearly identical.

Under those authorities, the threshold questions are: (1) whether a substantial number of residences are impacted; (2) whether the impacted residences adjoin the project area; (3) whether the building exceeds 35 feet; and (4) whether there is an "obstruction of view." See *Walker v. Point Ruston LLC*, SHB Nos. 09-013, 09-016, 2010 WL 1186284, at *10 (Mar. 25, 2010) (noting considerations). Regarding the fourth criteria, where the existing views are "panoramic," as many views of Budd Inlet are, a limited obstruction that leaves substantial views intact is not considered to be a violation. *Id.* That conclusion is particularly true where landward residences "are at least somewhat higher in elevation than the project sight." *Id.* at *11; see also *Batchelder v. City of Seattle*, 77 Wn. App. 154, 164, 890 P.2d 25 (1995) (rejecting challenge to development based on view reduced by approximately 20 percent).

Here, there are only two buildings directly adjoining the Project area, on the west side of West Bay Drive – both buildings are businesses. There are also seven residences located to the west of West Bay Drive, but not immediately adjoining the Project, all of which are set back from the street and located above street level. To the extent the views from these non-adjoining residences qualify for protection under the Shoreline Management Act, the Applicant's view analysis shows that only three are at an elevation where views will be impacted by the height of the proposed buildings. Further, for these three, the Applicant's Project View Narrative shows that due to open spaces incorporated between the buildings, over half of the existing panoramic views from these parcels are retained with the Project. See Fig. 1, Project View Narrative. The Applicant does not believe that the limited view obstruction of three non-adjoining residences constitutes a "substantial number of residences" requiring analysis of the overriding considerations of public interest reflected in OMC 18.20.504 and RCW 90.58.320.

Even if the City were to disagree and conclude that the proposed Project will obstruct a "substantial number" of residential views, there are multiple overriding considerations of public interest warranting increased height. First, and foremost, increased height allows for additional residential units. There is a well-documented housing shortage in the region, with the Olympia area estimated to need 34,000 new housing units in the next two decades. Olympia has enacted plans and strategies to provide more housing, for example, pledging to "minimiz[e] regulatory review risks, time and costs and removing unnecessary barriers to housing." Olympia Comprehensive Plan, Land Use and Urban Design, PL 16.5. The City has expressed similar goals intended to support the development of new, denser housing as part of its Housing Action Plan (June 2021).

Allowing a 65-foot development is directly in line with the City's stated goals of developing additional housing. Under the current plans, an additional 233 total units will be developed above 35 feet. That is substantially more units than would be gained by reducing the buildings to 35-foot tall and increasing the building's width: under current regulations, only 46 units would be added if the building widths were increased to the maximum 70-percent horizontal view blockage. *See* OMC 18.06.100(A)(2)(c)(iii). In other words, a decrease in height would result in the loss of much-needed 187 market-rate housing units.

Finally, increased height allows for additional public spaces and access, which are in the public interest. OMC 18.06.100(A)(2)(c) uses increased building height as an incentive to create public spaces, describing the allowance for a 65-foot building height limit as being in exchange for "retain[ing] public and private view access to Budd Inlet" from both the hillside and street levels. Public resources like waterfront restoration and trails are a recognized "contribution[]" to the public interest." *Guon v. City of Vancouver*, SHB No. 93-53, 1994 WL 905449, at *6 (Mar. 31, 1994).

C. The Ordinary High Water Mark for Project Review Purposes Should Anticipate Completion of Required Shoreline Restoration

In Item 5, the City comments that under RCW 90.58.030, the ordinary high water mark ("OHWM") should be measured based on its existing location, rather than the location of the OHWM upon completion of the proposed shoreline restoration project. The Applicant respectfully disagrees and believes that the issue can be properly addressed through a condition of approval limiting upland development in the shoreline jurisdiction until such time as the proposed restoration project is completed and the final OHWM location can be mapped and verified.

As a preliminary matter, the City's review comment omitted the relevant portion of RCW 90.58.030(2)(c). Under that provision, OHWM is defined to be based on the relevant considerations "as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department." RCW 90.58.030(2)(c) (emphasis added). This definition expressly anticipates that the OHWM can change as a result of permitted activities, and therefore requires that setback requirements for development be adjusted as a result of that activity.

This requirement was applied by the Shorelines Hearings Board ("Board") in *Stephanus v. City of Seattle*, SHB No. 83-49, 1984 WL 264535 (Apr. 27, 1984) (attached), in which the Board rejected an argument by the City of Seattle nearly identical to the City's comment here. The proposed development at issue, on Lake Washington, involved construction of a residence and shoreline protective structure. The City permitted the protective structure but imposed a condition on the residential construction requiring that the OHWM be determined by the existing shoreline, not the new mark resulting from the structure. Citing the definition noted above, the Board concluded:

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The evidence shows that Seattle has granted a substantial development permit for a protective structure which authorizes a waterward shift of the OHWM. Once appellants build the protective structure, this new OHWM, not the old one, will prevail under the SMA definition quoted. Consequently, the residential setback provision, SSMP Sec. 24.60.395(F), must be measured from the new OHWM on the appellants' lot.

There is no reason to apply a different interpretation to this Project.

In addition, accounting for a waterward shift of the OHWM following completion of a shoreline restoration project is analogous to a similar situation, addressed in RCW 90.58.580 and WAC 173-27-215. Under these provisions, where restoration causes a landward shift in the OHWM that interferes with the use of property, relief can be provided from shoreline standards and regulations are allowed if certain criteria are met.

For all of these reasons, the Applicant believes it is appropriate for the City to review the Project based on the location of the anticipated new OHWM following completion of the proposed shoreline restoration project, which is required by the Development Agreement between the City and the Applicant. To resolve any uncertainty regarding the final location of the OHWM at this point in the review process, the Applicant proposes a condition of approval requiring that the new OHWM be verified prior to issuance of Project construction or development permits for upland development within shoreline jurisdiction. The City code allows for such a condition, under OMC 18.20.210(C): "Conditions may be attached to the approval of permits as necessary to assure consistency of the project with the Act and this Shoreline Program." The Applicant believes that such a condition is *more* consistent with the relevant authority than use of the existing OHWM for Project review where the Applicant has agreed to, and is obligated to complete, a shoreline restoration project that is reasonably expected to result in a waterward shift of the current OHWM.

Please do not hesitate to contact me should you have any questions or would like to discuss the items addressed in this letter.

Yours very truly,



Heather L. Burgess

HLB/cpw

cc: (via email only)

Michael Young, Deputy City Attorney, City of Olympia (myoung@ci.olympia.wa.us)

Attachment:

Stephanus v. City of Seattle

1984 WL 264535 (Wash.Shore.Hrg.Bd.)

Shorelines Hearings Board

State of Washington

IN THE MATTER OF A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT CONDITIONALLY GRANTED
BY THE CITY OF SEATTLE TO PAUL C. STEPHANUS, PAUL C. AND BARBARA H. STEPHANUS,
APPELLANTS

v.

CITY OF SEATTLE, RESPONDENT

SHB No. 83-49

April 27, 1984

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

*1 This matter, a request for review of a shoreline substantial development permit conditionally granted by the City of Seattle to Paul C. Stephanus, came on for hearing before the Shorelines Hearings Board; Gayle Rothrock, Lawrence J. Faulk, Rodney M. Kerslake, Nancy R. Burnett, and A.M. O'Meara, convened at Seattle, Washington, on March 9, 1984. Administrative Appeals Judge William A. Harrison presided.

Appellants appeared by their attorney Richard U. Chapin. Respondent City of Seattle appeared by Gordon S. Crandall of the Seattle Law Department. Reporter Bibi Carter recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

This matter arises on Lake Washington in the Windermere section of Seattle. Appellants, Mr. and Mrs. Stephanus, seek to construct their personal single-family residence on a waterfront lot. On June 2, 1983, appellants applied to the City of Seattle for a shoreline substantial development permit for a shoreline protective structure. The purpose of the structure is to protect the lot from erosion caused by the waters of the lake. The structure consists of sills at sharp angles to the shore on either side of the appellants' lot with stone or gravel spread along the shoreline between the sills.

II

On October 11, 1983, Seattle conditionally granted a substantial development permit for the protective structure. The State Department of Ecology (DOE) requested review from this Board in our No. 83-50, a companion case to this one which has been settled by agreed order changing slightly the design of the protective structure.

III

Appellants also requested review of condition number 1. of the permit granted by Seattle. This provides:

1. The shoreline residential setback on the site shall be determined from the ordinary high water mark of the existing shore (i.e. shoreline immediately prior to the construction of the rockery in May, 1983), not of the new shoreline resulting from the new protective structure.

Appellants' appeal was filed on November 9, 1983, and two settlement conferences were convened prior to the date of hearing. These conferences were instrumental in reaching settlement of DOE's appeal, SHB No. 83-50.

IV

The protective structure would shift the ordinary high water mark a minimum of five feet waterward in front of the proposed homesite (see Exhibit A to the Stipulation and Order of Dismissal in SHB No. 83-50 of which we take official notice).

V

The Seattle Shoreline Master Program (SSMP) designates the shoreline containing the site as "Urban Residential" (UR). The shoreline protective structure is defined as a Special Use within the UR environment. SSMP Sec. 24.60.420, Table 2, p. 211. As such it may be permitted if these conditions, at SSMP Sec. 24.60.525(H.), p. 222, are met:

*2 H. Uses which are identified in Table 2, Section 24.60.420 as special uses in a particular environment may be authorized by the Director when the following additional conditions are satisfied:

1. The use will not have a significant adverse effect upon the environment or other adjacent or nearby uses, or such adverse effects can be mitigated, or the benefits of permitting such use outweigh such adverse effects;
2. The use will not interfere with public use of public shorelines;
3. Design and appearance of the development will be compatible with the design and appearance of surrounding uses; and
4. The use will not be contrary to the general intent of the Shoreline Master Program of the city.

In authorizing a shoreline special use, the director may impose requirements and conditions in addition to those expressly set forth in this chapter with respect to location, installation, construction, maintenance and operation and extent of open spaces as may be deemed necessary for the protection of other properties in the shoreline environment or vicinity and the public's interest in the shoreline.

VI

The SSMP also provides, pertinent to this matter:

Residential structures on waterfront lots shall not be located closer to the shoreline than adjacent structures. If there is no other structure within one hundred feet, residential structures shall be located at least twenty-five feet back from the line of ordinary high water. SSMP Sec. 24.60.395(F.), p. 199.

Seattle interprets the term "shoreline" in the first sentence of the above provision to mean ordinary high water.

VII

In evaluating appellants' application, Seattle also referred to the following SSMP provision:

The UR environment is intended to protect areas which are appropriate primarily for residential uses. The purpose of the UR environment designation is to maintain the existing residential character of the designated area in terms of bulk, scale, and general types of activities and developments. SSMP Sec.

24.60.340, p. 195.

VIII

There is an existing home on the adjacent lot to the north of the site. It is within one hundred feet of the proposed homesite. There are several vacant lots to the south of the site. In response to appellants' application, Seattle endeavored to measure the setback of the adjacent home from the ordinary high water mark. This was complicated by the fact that the adjacent lot to the north had been filled into Lake Washington since the advent of the Shoreline Management Act, but apparently without any shoreline permit. Seattle, therefore, excluded that fill from its determination and "interpolated" the location of the ordinary high water mark previous to that fill (old OHWM). Appellants have not proven that Seattle fixed the location of the old OHWM incorrectly. The adjacent home to the north is set back 36 1/2 feet from the old OHWM.

IX

Applying condition number 1. of the subject permit (see Finding of Fact III, above), Seattle contends that the residential setback on appellants' lot is 36 1/2 feet back from the old OHWM. Appellants contend that the setback should be measured from the new OHWM which would be at least 5 feet further waterward as a result of the protective structure (see Finding of Fact IV, above) authorized by the permit. Notwithstanding this, the relief requested by appellants is that they be allowed a residential setback which is the more landward of either; a) the correct setback distance measured from the new OHWM or b) the landward edge of the Seattle sewer line easement which crosses their lot roughly parallel to the shore. This would align the waterward wall of the appellants' residence with that of the adjacent residence. View from the waterward side of the adjacent residence would not be impaired under these circumstances. The setback imposed by condition number 1. of the permit is at least partially landward of that requested by appellants.

X

*3 Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

We review the proposed development for consistency with the applicable (Seattle) shoreline master program and the provisions of the Shoreline Management Act (SMA). [RCW 90.58.140](#).

II

The SMA provides the following definition of "ordinary high water mark" (**OHWM**), at [RCW 90.58.030\(2\)\(b\)](#):

(b) "Ordinary high water mark" 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 June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: 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; (Emphasis added.)

The evidence shows that Seattle has granted a substantial development permit for a protective structure which authorizes a waterward shift of the **OHWM**. Once appellants build the protective structure, this new **OHWM**, not the old one, will prevail under the SMA definition quoted. Consequently, the residential setback provision, SSMP Sec. 24.60.395(F), must be measured from the new **OHWM** on the appellants' lot. Conversely, Seattle was correct to measure setback from the old **OHWM** on the adjacent lot where fill was added without a **shoreline** permit.

III

Because the protective structure is a Special Use, the additional requirements of SSMP Sec. 24.60.525(H.) apply. That section authorizes conditions with respect to location (setback) in addition to those expressly set forth elsewhere in the SSMP such as the usual residential setback provided in Sec. 24.60.395(F.). Such conditions may only be imposed where:

... necessary for the protection of other properties in the shoreline environment or vicinity and the public's interest in the shoreline. SSMP Sec. 24.60.525(H.).

IV

In this case, permit **condition** number 1. is inconsistent with SSMP Sec. 24.60.525(H.). This comes about not by the mere fact that **condition** number 1. requires setback to be measured from the old **OHWM**. In another case this might be a proper means to effectuate the requirements of Sec. 24.60.525(H.). It is not a proper means in this case because the resulting setback is more than is necessary to protect other properties in the **shoreline** environment or vicinity and the public's interest in the **shoreline**, which is the stated object of Sec. 24.60.525(H.).

V

*4 In this case, the proposed development would be consistent with the SMA and the provisions of the SSMP cited by the parties if the language of condition number 1. were stricken and the following substituted in its place:

The shoreline residential setback of the site shall be the more landward of: a) a line 36 1/2 feet landward of and parallel to the shoreline (ordinary high water mark) resulting from the new protective structure referred to in the Stipulation and Order of Dismissal in SHB No. 83-50 or b) the landward edge of the Seattle sewer line easement which crosses the site.

Such a permit should be granted by Seattle.

VI

Any Finding of Fact which should be deemed a Conclusions of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The shoreline substantial development permit granted by the City of Seattle to Paul C. Stephanus is reversed as to condition number 1. and remanded for reissuance on the same terms as previously granted but with: a) the substitute language of condition number 1. set out in Conclusion of Law IX, above, and b) the stipulated site plan for the shoreline protective

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structure referred to in the Stipulation and Order of Dismissal in SHB No. 83-50.

DONE at Lacey, Washington, this 27th day of April, 1984.

Gayle Rothrock
Chairman
Lawrence J. Faulk
Vice Chairman
Rodney M. Kerslake
Member
Nancy R. Burnett
Member
A.M. O'Meara
Member
William A. Harrison
Administrative Law Judge

1984 WL 264535 (Wash.Shore.Hrg.Bd.)

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