

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BREMERTON

In the Matter of the Appeal of ) NO. BP04-00295  
)  
**Jim Reed** )  
)  
) FINDINGS, CONCLUSIONS  
Of a Denial of an Exemption Request from a ) AND DECISION  
Shoreline Substantial Development Permit )  
\_\_\_\_\_ )

**SUMMARY OF DECISION**

Jim Reed (Appellant) requests approval of an appeal of a decision by the Director of the Department of Community Development for the City of Bremerton in which the Director denied the Appellant's request for an exemption from a Shoreline Substantial Development Permit. The Director's decision was based on substantial evidence and is upheld. The appeal is DENIED.

**SUMMARY OF RECORD**

Request

Jim Reed (Appellant) requested an exemption from the City of Bremerton (City) of a Shoreline Substantial Development Permit (permit). It is the intent of the Appellant to construct a bulkhead at the subject property, 1503 Lower Marine Drive, Bremerton, Washington<sup>1</sup>. According to the City the request did not satisfy the exemption criteria outlined in the Washington Administrative Code Section 173-27-040 and was denied by the Director of the Department of Community Development. The Appellant appeals that denial.

Hearing

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

Testimony

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

1. Adrienne Ralph, Environmental Planner for the City of Bremerton's Department of Community Development
2. Jim Reed, Appellant

Exhibits

The following exhibits were admitted to the record at the open record public hearing:

<sup>1</sup> The subject property's legal description is Section 15, Township 24 North, Range 01 East, W.M. Survey recorded under A.F. 8202250056, Volume 17 page 123.  
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- Exhibit A: Exemption Request received February 20, 2004
- Exhibit B: Survey Map received March 19, 2004
- Exhibit C: Letter from Chris Hugo to Jim Reed dated May 3, 2004
- Exhibit D: Washington Administrative Code 173-27-040
- Exhibit E: Letter from Adrienne Ralph to Jim Driscoll dated July 15, 2004
- Exhibit F: Appeal of Exemption Request Denial received May 17, 2004
- Exhibit G: Aerial Photographs of the Subject Property dated May 19, 1992
- Exhibit H: Photographs of Oyster Bay near Subject Property dated July 19, 2004
- Exhibit I: Photographs of the Subject Property and its Shoreline
- Exhibit J: Department of Ecology Aerial Photograph of Subject Property
- Exhibit K: Letter from Adrienne Ralph to Jim Reed dated May 2, 2003
- Exhibit L: Letter from Chris Hugo to Jim Reed dated October 22, 2003
- Exhibit M: Letter from Paul McConkey dated July 17, 2004
- Exhibit N: Series of photographs submitted by Appellant

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

### **FINDINGS of FACT**

1. On February 20, 2004, the Appellant filed an exemption from a permit request in order to construct a bulkhead on the t property at 1503 Lower Marine View Drive, Bremerton, Washington. In the request the Appellant submitted that he desired to construct a “normal protective bulkhead common to a single family residence” for the purpose of “protecting an existing single family residence from loss or damage from erosion.” Supporting materials submitted with the application estimated that the project would cost \$5,000.00, and affirmed that the stockpile of all materials and all construction would be landward of the Ordinary High Water Mark. The Appellant’s proposed bulkhead would be built of large rock, at a negative angle and would be 4 feet in height or less. It would be placed at the toe of the bank. No more than one cubic yard of back fill would be used per one foot of wall. *Exhibit A, Exemption Request, pages 1, 2, and 4; Testimony of Mr. Reed*
2. On May 3, 2004, the Director of the Department of Community Development for the City of Bremerton denied the Appellant’s request. The Appellant filed a timely appeal of the denial on May 17, 2004. *Exhibit C; Exhibit F*

3. The initial request was filed by the Appellant on February 20, 2004. On March 19, 2004 it was supplemented with a survey map that depicted the Ordinary High Water Mark and its relation to the location of the single family residence on the subject property. According to the Appellant the bank immediately in front of the Appellant's residence is subject to erosion from the high water that hits the bank during heavy storms. *Exhibit B, Survey Map, page 1; Testimony of Mr. Reed...*
4. In the denial letter dated May 3, 2004, the Director, Chris Hugo, denied the Appellant's exemption request. Mr. Hugo concluded that the development proposed by the Appellant did not meet the *precise terms of the listed exemptions*. He set forth that the request did not meet the strict criteria for an exemption as set forth in the Washington Administrative Code (WAC) Section 173-27-040. Apparently Mr. Hugo based this decision on the measurements as listed in the site plan that the closest corner of the single family residence was 42 feet from the Ordinary High Water Mark and the furthest corner was 68 feet away. Moreover, he asserted that the section of Oyster Bay adjacent to the single family residence did not appear to be eroding in a manner that would lead to loss or damage. *Exhibit C, Letter from Chris Hugo, page 1.*
5. The Appellant filed a timely appeal to the Director's denial of the exemption request on May 17, 2004. In that appeal, he stated that the Director's decision was arbitrary and that it was not based on findings of fact or proof that erosion would not cause damage. *Exhibit F, Appeal of Exemption Request Denial, page 1.*
6. In a July 15, 2004 response to the appeal<sup>1</sup>, Adrienne Ralph, Environmental Planner for the City of Bremerton's Department of Community Development, submitted that the appeal should be denied for numerous reasons. She contended that pursuant to WAC 173-27-040(1)(a), exemptions from the Shoreline Substantial Development Permit application process must be construed narrowly. The Appellant did not provide any evidence of loss or damage that would warrant an exemption. *Exhibit E, Letter from Adrienne Ralph, pages 1*
7. The City contended that in the shoreline designated area in which the Appellant the subject property is located (the subject property). The Bremerton Shoreline Master Program would allow a residence to be built without a bulkhead within 25 feet of the Ordinary High Water Mark. Because the Appellant's single family residence is 42 feet at its closest corner from the Ordinary High Water Mark the residence is at low risk of loss or damage. *Exhibit E, Letter from Adrienne Ralph; Testimony of Ms. Ralph*
8. According to the City, WAC 173-27-040(1)(c) places the burden of proving that a development or use is exempt from the permit process on the applicant. The Appellant failed to provide sufficient information that the bulkhead was necessary for

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<sup>1</sup> The City's response was in the form of a letter to the Hearing Examiner and was treated as the staff report for the matter.

the preservation of the single family residence. *Exhibit E, Letter from Adrienne Ralph, pages 1 and 2; Testimony of Ms. Ralph*

9. At the hearing the Appellant offered testimony of extreme tidal action on the site, of heavy boat of Oyster Bay resulting in wake action on the shoreline; and of winter storms. He submitted that all of these activities place the shoreline at risk of erosion and thus contested the City's requirement that he show erosion. He submitted that the bulkhead would be constructed as a preventative measure. Further the Appellant contended that exposed roots a tree on the shoreline demonstrated the erosive nature of the site and the potential harm to the residence. *Testimony of Mr. Reed; Exhibit N*
10. In response to the Appellant's arguments the City representative submitted that the area is a low energy environment with little evidence of wave action. The City submitted photographs depicting the low energy of the area. However the Appellant submitted that the photographs were taken in the summer months when the erosion activity is not as apparent. : *Testimony of Ms. Ralph; .Testimony of Mr. Reed*
11. On behalf of the Appellant, Paul McConkey wrote a letter on July 17, 2004. Mr. McConkey, who has lived on the property adjacent to the Appellant's since 1976, stated that prior to the Appellant living on site the subject property had an old wooden boat ramp on the shoreline. As a former marine construction businessman, he believed that it had been washed away. It was his contention that the bank was being washed away. *Exhibit M, Letter from Paul McConkey, page 1.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner is granted authority to review an appeal of an exemption request denial pursuant to Bremerton Municipal Code (BMC) Sections 2.13.070, 2.13.080, and 21.04.110. 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)*.

### Criteria for Review

In order to grant an exemption from the ordinarily required Shoreline Substantial Development Permit, it must be found that the development in question precisely meets one or more of the exemptions listed in the Washington Administrative Code (WAC) Section 173-27-040. Relevant to the present appeal, WAC 173-27-040(2)(c) reads:

“Construction of the normal protective bulkhead common to single-family residences. A ‘normal protective’ bulkhead includes those structural and nonstructural developments installed at or near, and parallel to, the ordinary high water mark for the sole purpose of protecting an existing single-family residence and appurtenant structures from loss or damage by

erosion. A normal protective bulkhead is not exempt if constructed for the purpose of creating dry land.”

WAC 173-27-040 also requires that exemptions be construed narrowly and that the burden of proof that a development or use is exempt from the permit process be on the applicant. *WAC 173-27-040(1)(a), (b), and (c)*.

An action is held to be arbitrary when it is a “willful and unreasoning action, without consideration and regard for facts and circumstances.” *Teter v. Clark County*, 104 Wash.2d 227, 237 (1985) (quoting *Miller v. Tacoma*, 61 Wash.2d 374, 390 (1963)). However, when there is evidence in the record and “[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Miller v. Tacoma*, 61 Wash.2d 374, 390 (1963) (quoting *Smith v. Hollenbeck*, 48 Wash.2d 461, 464 (1956)).

#### Criteria Based on Findings

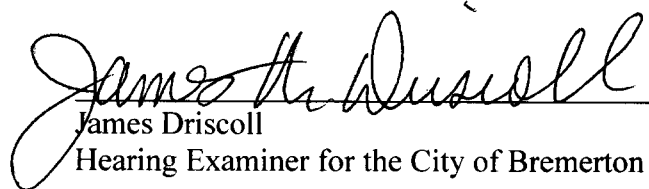
- 1. The Appellant has not met the burden of proof in showing that the proposed development is exempt from the permit process.** Pursuant to WAC 173-27-040(1)(c), the applicant bears the burden of proving that the proposed development meets exemption criteria. The Appellant stated that he proposed construction of a “normal protective bulkhead common to a single family residence” for the purpose of “protecting an existing single family residence from loss or damage from erosion.” At first glance, the request meets the exemption criteria because it aims to protect an existing single family residence by erecting a bulkhead near the Ordinary High Water Mark. However, pursuant to WAC 173-27-040(2)(c) the Appellant must also show that the *sole purpose* of erecting the bulkhead is to protect the single family residence from *loss or damage by erosion*. In other words, he must demonstrate that there is sufficient risk of loss or damage by erosion in order to establish that such protective action is the sole purpose of the construction. If there is no significant risk of loss or damage by erosion, then the project’s sole purpose cannot be to protect from such erosion. The amount of erosion taking place at the Appellant’s property is in dispute and as the exemption criteria are to be construed narrowly, and as the burden of proof is on the applicant, there is insufficient evidence that the proposed project meets the exemption criteria. *Findings of Fact Nos. 2, 4, 6, 7, and 8.*
- 2. The Director’s denial of the exemption request was not arbitrary.** In denying the exemption request, Mr. Hugo, the Director of the Department of Community Development for the City of Bremerton set forth factual reasons for the denial. The Director stated that the request did not meet the strict criteria for an exemption set forth in the Washington Administrative Code (WAC) Section 173-27-040. He stated that the closest corner of the single family residence was 42 feet from the Ordinary High Water Mark and the furthest corner was 68 feet away. Moreover, he asserted that the section of Oyster Bay adjacent to the single family residence did not appear to be eroding in a manner that would lead to loss or damage. It is evident from the

letter written by the Director to the Appellant on May 3, 2004, that the Director considered all of the evidence before him in ruling on the exemption request. He quoted the relevant portions of the exemption statute and listed the reasons for which the Appellant failed to meet its strict criteria. Since the Director's action was a reasoned action made in consideration and regard for the facts and circumstances, his action was not arbitrary. *Findings of Fact No. 4.*

#### **DECISION**

The denial of the Exemption Request to circumvent the Shoreline Substantial Development Permit application process is supported by substantial evidence and must be upheld. The Director's decision was not arbitrary; it was based on factual evidence submitted by the Appellant and the Appellant failed to meet the burden of proof in showing that a bulkhead is proposed for the sole purpose of preserving his existing residence. Therefore, the appeal is **DENIED**. The Appellant may apply for a permit and the application will be reviewed and processed by the City.

Decided this 10 day of August 2004.

  
James Driscoll  
Hearing Examiner for the City of Bremerton