

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

In the Matter of the Application of)	Case No. BP24 00282
)	
William Jett)	Jett Shoreline Variance
)	
For Approval of a Shoreline Variance)	FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The request for a shoreline variance from the shoreline buffer requirements of the City of Bremerton Shoreline Master Program, to allow for a fence to be installed around the front and side yards, on an approximately 0.53-acre property, which is developed with a single-family residence, located at 4635 Marine Drive Place, is **DENIED**.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 24, 2025.

Testimony:

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

Justin Rowland, City Senior Planner
William Jett, Applicant
Mike Dubos

Attorney Ken Bagwell represented the Applicant at the hearing.
Attorney Brett Jette represented the City at the hearing.

Exhibits:

The following exhibits were admitted into the record:

- A. Shoreline Variance Application, received November 18, 2024
- B. Request for a Variance narrative summary, received November 18, 2024
- C. Variance Site Plan and Site Photos, received November 18, 2024
- D. Environmental Reports, received November 18, 2024
 - D1. Habitat Management Plan, prepared by Ecological Land Services, dated June 17, 2024

*City of Bremerton
Administrative Hearing Examiner
Findings, Conclusions, and Order
Case No. BP 24 00282*

- D2. Email summary of site visit prepared by EnCo Environmental Corporation, dated August 2, 2023
- D3. Summary of site visit prepared by Ecological Land Services, dated November 21, 2023
- E. Noticing Record, received November 18, 2024
 - E1. Notice of Incomplete Application, dated November 4, 2024
 - E2. Determination of Completeness, dated November 25, 2024
 - E3. Notice of Application, dated December 4, 2024
 - E4. Declaration of Mailing, dated November 27, 2024
 - E5. Address labels
 - E6. Declaration of Posting, dated December 4, 2024
 - E7. Affidavit of Publication in the *Kitsap Sun* on December 4, 2024
 - E8. Comments
 - i. Email from Taylor Harriman on behalf of the Suquamish Tribe, dated December 4, 2024
 - ii. Email from Rod Malcom on behalf of the Suquamish Tribe, dated January 2, 2025
 - iii. Email from Matthew Evinger on behalf of the Washington State Department of Ecology, dated January 6, 2025
 - iv. Letter from James Singer, dated December 13, 2024
 - v. Email from Frank Carsey, dated December 13, 2024
 - vi. Emails from Susan Digby, dated December 6, 2024, and January 1, 2025
 - vii. Letter from Mike and Jonee Dubos, dated December 10, 2024
 - viii. Letter from Juliana Hsu and Lein Shaw Hsu, dated December 27, 2024
 - ix. Letter from Matthew and Erin Olson, dated December 9, 2024
 - E9. Applicant response to comments, dated January 21, 2025
 - E10. Notice of Public Hearing
 - i. Posted March 7, 2025
 - ii. Mailed March 6, 2025
 - iii. Published in the *Kitsap Sun* on March 7, 2025
- F. Staff Report, dated March 7, 2025
- G. Applicant Response to Staff Report, submitted March 21, 2025

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. William Jett (Applicant) requests approval of a shoreline variance from certain requirements of the City of Bremerton Shoreline Master Program (City SMP) to allow for the development of a fence, on an approximately 0.53-acre property that abuts Dye's Inlet/Ostrich Bay, which is developed with a single-family residence. Specifically, the

Applicant seeks relief from the City SMP requirement to maintain a 100-foot shoreline vegetation buffer from the Ordinary High-Water Mark (OHWM) of Dye’s Inlet/Ostrich Bay. *City SMP Figure 7.010(a)*. The subject property is located at 4635 Marine Drive Place.¹ *Exhibit A; Exhibit B; Exhibit F, Staff Report, pages 1 and 2.*

2. The City of Bremerton (City) determined that the application was complete on November 25, 2024. The City provided notice of the application in compliance with City ordinances by posting notice at the subject property on December 4, 2024, by publishing notice in the *Kitsap Sun* on December 4, 2024, and by mailing notice to owners of property within 300 feet of the subject property on November 27, 2024, with a comment deadline of January 3, 2025. The City received comments from the Suquamish Tribe and the Washington State Department of Ecology (DOE), and it received several public comments. The comments are discussed in detail later in this decision. *Exhibit F, Staff Report, pages 1, 5, and 6; Exhibits E2 through E9.*
3. The City provided notice of the open public hearing by posting notice at the subject property on March 7, 2025, by publishing notice in the *Kitsap Sun* on March 7, 2025, and by mailing notice to property owners within 300 feet of the subject property. *Exhibit E10.*

Environmental Review

4. The proposal is categorically exempt from environmental review under the State Environmental Policy Act (SEPA), chapter 43.21C Revised Code of Washington (RCW), in accord with Washington administrative Code (WAC) 197-11-800(6)(e). WAC 197-11-800(6)(e) provides in pertinent part that a land use decision related to granting a variance due to special circumstances is categorically exempt from SEPA review. *Exhibit F, Staff Report, page 1.*

Comprehensive Plan and Zoning

5. The subject property, and adjacent properties to the north, east, and south, are designated “Low Density Residential” under the City Comprehensive Plan and are located in the “Low Density Residential” (R-10) zoning district. To the west is Dye’s Inlet/Ostrich Bay. Detached single-unit residential dwelling units are a permitted use in the R-10 zoning district. *Bremerton Municipal Code (BMC) 20.60.020*. The subject property and properties to the north, east, and south are developed with single-family residences. *Exhibit F, Staff Report, pages 1 and 2.*
6. For properties along shorelines, such as the subject property, the yard area abutting the shoreline is considered a “front yard.” *BMC 20.44.010, Figure 20.44(b)*. Within the City’s residential zones, where there are no superseding regulations, fences can have a

¹ The subject property is identified by Tax Assessor Account Number 3761-000-021-0008. *Exhibit E3; Exhibit E6; Exhibit E7; Exhibit F, Staff Report, page 1.*

maximum height of four feet within the front yard setback and can have a maximum height of six feet within the side yard setback. *BMC 20.46.020; Testimony of Justin Rowland.*

Existing Site, Critical Areas, and Proposed Development

7. Ecological Land Service (ELS), prepared a Habitat Management Plan (HMP) on behalf of the Applicant, dated June 17, 2024. The report states that the subject property is developed with a single-family residence and currently includes a mowed lawn in the shoreline-facing front yard area, which extends to a six-foot concrete bulkhead with stairs that provide access to the shoreline. The report notes that the surrounding properties are also developed with single-family residences with maintained lawn areas and that, although there are some trees on the subject property and the adjacent property to the south, there is currently no understory vegetation providing protection or food for wildlife. Additionally, the report notes that there are very few larger mammals in the area due to the human population and domestic dogs in the area. The HMP determined that Ostrich Bay provides habitat for many listed fish and aquatic mammals and is listed as a priority habitat for surf smelt by the Washington State Department of Fish and Wildlife. The HMP discusses a variety of habitat deficiencies in the area, including a lack of habitat features, lack of evidence of use by shore birds, and the presence of boats, humans, and dogs. The HMP notes that “the buffer currently lacks vegetation onsite and therefore has minimal function.” *Exhibit D1.*

8. The required 100-foot vegetative shoreline buffer extends beyond the location of the residential structure on the property and, accordingly, the existing residential structure is legally nonconforming with the buffer requirement. The Applicant proposes utilizing the buffer reduction option provided for in City SMP 7.010(b)(6), which, with mitigation, allows for a reduction of the required buffer to the average of like adjacent structures. In this case, the residential structure to the north is 72 feet from the shoreline, and the residential structure to the south is 56 feet from shoreline, and, therefore, the Applicant is proposing a reduced buffer of 64 feet from the shoreline. For mitigation, the Applicant’s HMP determined that the only feasible option, from the options laid out in the City SMP, would be the option provided under Figure 7.010(b)(vi), which allows for “[a]ny alternative jointly agreed upon by the Director and the Washington Department of Fish & Wildlife.” In reaching this determination, the HMP utilizes mitigation sequencing as required under City SMP 7.030, noting that impacts would be avoided by retaining existing vegetation and minimized by the fence height and material. As compensation for impacts, the HMP proposes mitigation in the form of installing native vegetation on top of the existing bulkhead, to a depth of 10 feet. The HMP includes a planting, maintenance, and monitoring plan for the proposed mitigation area. The HMP determined that, with the proposed mitigation, the project would result in no net loss of habitat function. *Exhibit D1.*

9. The Applicant proposes to erect a fence that would extend to the bulkhead along the

shoreline to provide security from people trespassing on to the property, to act as a safety measure against falls off the bulkhead, and to keep domestic dogs out of the shoreline-facing front yard area. Within the buffer area on the property, the fence would be 42-inches high, with some sections composed of cedar plank and the section on top of the bulkhead composed of chain link, which would allow small mammals to pass through. The HMP notes that the proposal would not have impacts to the shoreline because it is landward of a six-foot tall bulkhead; the conversion of the lawn, which provides little ecological benefit, to native plants within the shoreline buffer area would provide no net loss of habitat function; and the project would not contribute to cumulative impacts because the project does not change the use of the property, and the proposed fence would allow for wildlife passage. *Exhibit D1.*

10. EnCo Environmental Corporation conducted initial testing of the property and sent a letter to the Applicant, dated August 2, 2023, summarizing the findings from two test plots as well as other gathered data. The letter noted the presence of an estuarine wetland and a floodplain, both of which end waterward of the bulkhead, and it noted that there are no watercourses on the subject property or within 315 feet of the subject property. The letter summarized the mapped, indicated, and observed habitats, animals, and plants, specifically stating that there are priority habitats mapped on the upland segment of the parcel. Observation of a stormwater drainage pipe was noted, which the landowner said is from the driveway. Additionally, the letter stated that the landowner observes off-leash pets, houseless persons, and residents on the beach. *Exhibit D2.*
11. An Initial Assessment and Recommendations for the Fence Project, dated November 21, 2023, was prepared by ELS. The initial assessment is similar to the HMP, discussed above, which was also prepared by ELS. *Exhibit D3.*

Shoreline Management Act and City Shoreline Master Program

12. The proposed fence would be located within 200 feet of the OHWM of Ostrich Bay, which is within the shoreline jurisdiction and is therefore governed by the State Shoreline Management Act (SMA) and the City SMP. *RCW 90.58.030; City SMP 4.020.* Although City SMP 7.010(b)(7) provides standards for installing fences within side yards located within the shoreline vegetative buffer, it does not allow for fences within front yard areas and, therefore, the Applicant requests a shoreline variance to be able to construct a fence in the front yard. Review criteria for granting variances are found in City SMP 5.040(c), which provides that variances may be granted if all of the criteria of WAC 173-27-170 are met. *Exhibit A; Exhibit B; Exhibit D1; Exhibit F, Staff Report, pages 1 and 2; Testimony of Justin Rowland.*
13. The Applicant provided information to demonstrate that the proposal would meet the shoreline variance criteria of WAC 173-27-170, noting:
 - Certain policies contained in RCW 90.58.020 would be thwarted if the variance

request is denied because denial of the variance would prevent a reasonable use of the property, would not adequately recognize private property rights, and would prevent enjoyment of the property by the property owner. The existence of the bulkhead and the findings in the HMP show that the proposed fence would not adversely impact the resources and ecology of the shoreline. The natural character of the shoreline in the area already consists of bulkheads and fencing.

- Due to safety concerns in the neighborhood related to domestic dogs and people coming on to the subject property, the Applicant does not have a reasonable use of the property, and the safety concerns represent extraordinary circumstances and have created a hardship.
- The proposed fence is not “unrestricted construction.”
- A reasonable use of the property includes being able to safely use the front yard, and the property is underperforming due to the safety risks. Full enclosure of the yard is the minimum relief that can be afforded.
- Proposed alternatives to fencing, such as hedges or plants, would not provide protection from domestic animals or prevent falls from the bulkhead.
- The HMP determined that there is no wildlife or habitat on the property and that there would be no ecological impact from the proposal.
- The existing conditions in the area, including other fences, hedges, and development, already prevent wildlife from utilizing the subject property.
- There is no shoreline habitat, wildlife, wetlands, or other environmentally sensitive areas on the subject property and, therefore, the shoreline buffer requirements should not apply.
- The proposal requests the elimination of the buffer zone; therefore, the shoreline variance criteria do not apply to the property.
- The examples of unique conditions in the regulations are a non-exclusive list and should not be construed to only apply to physical conditions of the property.
- There is a safety hardship related to the height of the bulkhead.
- Surrounding shoreline properties already have fences and structures within the shoreline buffer area.
- The proposal would not undermine City SMP regulations because there would be no impact on habitat or shoreline.
- Cumulative impacts are unlikely because the public would not know about this proposal; other property owners do not face the same safety risks; many other properties are more accessible to wildlife; and other property owners would not go through this same long, expensive process.

Exhibit B; Exhibit E9; Exhibit G.

14. City staff reviewed the proposal and determined that it would not meet all of the criteria contained in WAC 173-27-170, noting:
 - A denial of the proposal would not thwart relevant policies in RCW 90.58.020

because there is an existing reasonable use of the property; unrestricted construction on shorelines is not in the best interest of the public; there is a preferences for statewide interests over local interests; the natural character of the shoreline should be preserved; long-term benefits should be prioritized; and there is an interest in protecting the resources and ecology of the shoreline.

- The Applicant has not demonstrated extraordinary circumstances or how a denial would frustrate the relevant shoreline policies.
- The subject property is already developed with a single-family residence, which is a reasonable use of the property.
- The City SMP would allow for a fence to be installed between the shoreline and the residential structure without a variance. Safety concerns related to falling from the bulkhead could be addressed by installing a safety rail as provided in the City SMP.
- The Applicant does not demonstrate how the bulk, dimensional, or performance standards preclude or significantly interfere with the reasonable use of the property.
- The Applicant does not show how the hardship is the result of unique conditions of the property's shape, size, or natural features.
- Although fences are generally compatible with single-family residences, they must also conform to buffer requirements.
- Similar applications would not be approved, and granting a variance would be a special privilege.
- City SMP 7.010(b)(7) allows for the construction of a fence within a shoreline buffer if it is in conformance with the code section and, therefore, this request is not the minimum necessary to afford relief.
- The City SMP regulations are intended to protect the public interest by promoting the long-term health, safety, and welfare of the public by protecting the ecological resources and health of the shorelines.
- The Applicant did not provide adequate information relating to the cumulative impact of approval of this request. The Department of Ecology suggested that approval of this variance could lead to similar requests.

Exhibit F, Staff Report, pages 2 through 5.

Written Comments

15. As noted above, the City received multiple comments from the Suquamish Tribe. The comment from Suquamish Tribe Archeologist, Taylor Harriman, requested an inadvertent discovery plan during any ground disturbing activities. Comments from Suquamish Tribe Biologist/Ecologist, Rod Malcom, provided specific concerns related to the HMP, including that there are additional species beyond listed species, that the nearshore area is used for migration, and that grass can provide some buffer function. Additionally, Rod Malcom questioned the HMP's determination that the site provides no shoreline habitat function and questioned whether the proposed fence would adequately protect against

domestic animals.

16. Comments from DOE concluded that, based on available information, DOE would not support the proposal, noting the following:
- The Applicant has not described a hardship related to the unique conditions of the subject property.
 - The Applicant described security concerns as a neighborhood-wide concern.
 - Safety concerns related to the height of the bulkhead would be best described as self-imposed.
 - There would be adverse impacts to habitat connectivity by installing a fence within the shoreline buffer.
 - There are alternatives to a fence that would avoid or minimize adverse impacts.
 - The requested relief is not the minimum necessary, the Applicant could build a fence in accordance with City SMP 7.010(b)(7).
 - Cumulative impacts of the proposal have not been addressed.
17. The City also received numerous comments on the proposed rezone from members of the public. Relevant concerns raised in the comments are summarized below and are generally related to the following topics:

Shoreline habitat impacts – Comments on this topic expressed general concerns about the loss of habitat and impediments to wildlife, and stressed the importance of protecting and restoring the shoreline habitat. The comments mentioned wildlife that had been observed in the area and the impacts that a fence would have on the ability of wildlife to travel and have habitat cover.

View impacts – Comments on this topic expressed concerns about impacts to views of the land from the water and obstruction of the open views of the water from residents.

Cumulative impacts – Comments on this topic expressed concerns that this would set a precedent to allow for more fences or similar structures.

Testimony

18. City Senior Planner Justin Rowland testified generally about the proposal, summarizing the notice procedures and comments, and providing the reasons the City is recommending denial of the variance. Mr. Rowland testified that fences are only permitted within the side yard, and the proposal entirely encloses the buffer, which violates the code by being on the waterward half of the shoreline buffer and not being limited to the side of the property. He stated that the variance may only be granted if all ten of the criteria under WAC 173-27-170 are met, noting that the proposal only meets two of the ten criteria. Mr. Rowland further testified that DOE is required to review and provide final approval of a shoreline variance and that, based on the absence of support

from DOE, the City recommends denial of the permit. He noted that the unique conditions specifically related to the property are typically topography, site shape, and size, which would significantly prohibit the development use of the site. He continued by stating that safety and security are more general concerns. In answer to a Hearing Examiner question, Mr. Rowland testified that he does not have information about the legal status of surrounding properties and that there have not been any shoreline variances granted in the last five years. *Testimony of Justin Rowland.*

19. Attorney Ken Bagwell, on behalf of the Applicant, brought up a number of concerns with the staff report and City staff's analysis of the proposal. He stated that the staff report was devoid of any authority supporting its conclusions, noting that, although it referenced relevant portions of the WAC and Bremerton Municipal Code, its determination that the proposal failed to meet the applicable criteria was conclusory. Mr. Bagwell referenced the most recent *Variance Permit Reviews Guidance* published by DOE in June 2023, noting that, when considering variances, local governments must use deliberate professional judgment. He agreed that the Applicant has the burden to show that the proposal would comply with the criteria but stated that the staff report must include independent findings and conclusions on how a proposal does or does not meet the criteria. Mr. Bagwell asserted that denial of the variance would thwart the policies of RCW 90.58.020, noting that the policies allow for a limited reduction in private rights for the public interest and contemplate against adverse effects to public health, land, environment, waters of the state, aquatic life, while protecting rights of navigation. He continued by noting that these policy objectives have been resolved by the habitat management plan, which determined that the proposal would have no adverse effects. Mr. Bagwell stated that a small fence would allow for reasonable use of the property because fences are appurtenant to a home, and he stressed that denial would impact the Applicant's reasonable use of the property. Mr. Bagwell commented that the requirement that the hardship be specifically related to the property as a result of unique conditions does not use an exclusive list. He further mentioned that property location may be a consideration and that, in this case, property location is the problem, due to more individuals walking the beaches coming on to his property and more stray animals accessing his property. Mr. Bagwell noted that the design would be compatible with other uses in the area because there are many nearby properties with fences and other developments that would not be allowed under current regulations. He explained that the proposal is the minimum necessary to afford relief and noted that the yard includes a drain field. Mr. Bagwell further stated that, because the HMP determined that there would be no ecological impact and because site lines would not be affected, the proposal would not impact the public interest. Finally, Mr. Bagwell discussed the cumulative impact of similar proposals, stating that the *Variance Permit Reviews Guidance* provide that, if there are no ecological impacts of a particular proposal, there would be no cumulative impacts on ecological functions, and the proposal does not have other impacts, such as impacts to public access, recreation, or water dependent uses. Mr. Bagwell noted that, because the neighbors are all opposed to the proposal, there would

not be additional requests for fences in this shoreline area. *Statements of Attorney Ken Bagwell.*

20. Applicant William Jett testified about the problems leading to this request, including a number of dog attacks on his family, friends, and his dogs. He noted that the proposed fence would solve these issues, stating that other solutions proposed such as heavy vegetation would not work because it would take too long to fully mature. Mr. Jett testified that he is trying to get this done before passing the property on to his heirs. He stated that the HMP, and other letters from biologists, determined that there would be no adverse ecological impact, noting that his yard is grassy and does not have natural habitat or vegetation. Mr. Jett continued by noting that he is asking for an elimination of the buffer zone so that he can have full enjoyment of his shoreline-facing front yard area. He reiterated that the hardship criteria for a shoreline variance do not include an exclusive list and that his hardship is that he can't use his yard to his fullest. Regarding the question of whether this would be a special privilege, Mr. Jett responded that other people can also apply for a variance and that he is just asking for the same privilege as others to safely use his property. In response to the Hearing Examiner raising the issue of DOE having final authority to approve the permit, Mr. Jett stated that he thinks DOE has ignored the determinations of the HMP and the letters from the two biologists. Mr. Jett testified that he does not believe there would be cumulative impacts from approval of this proposal, stating that other people would be deterred by the onerous process of requesting a variance and that other nearby properties do not have the same bulkhead height.

Testimony of William Jett.

21. Michel Dubos testified that he is a neighbor to the north. He agreed with Mr. Bagwell and Mr. Jett that there have been dog issues in the past. Mr. Dubos testified that both the dogs and property owners at issue will not be around forever and that his biggest concern is that there would be numerous additional requests for fences if this variance is approved. He further testified that the proposed fence was originally going to be a six-foot fence that he could see from his kitchen, which led him to get together with several neighbors to go through this process. Mr. Dubos testified that he and his neighbors will accept whatever happens but want it to be done in accordance with state law and local regulations. *Testimony of Mike Dubos.*

22. Bremerton City Attorney Brett Jette stated that the main concern regarding cumulative impacts is that there has been nothing submitted from the Applicant regarding cumulative impacts of the proposal apart from speculation. He stated that approving this variance would be a grant of special privilege that has not been provided to anyone else in the area. *Statements of Attorney Brett Jette.*

Staff Recommendation

23. Mr. Rowland testified that City staff recommends denial of the shoreline variance request. *Exhibit F, Staff Report, page 7; Testimony of Justin Rowland.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to approve, approve with conditions, or deny applications for a shoreline variance. *City SMP, Section 5.020(e)*.

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 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. Nonetheless, “private property rights are ‘secondary to the SMA’s primary purpose, which is to protect the state shorelines as fully as possible.’” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (internal quotation marks omitted) (quoting *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)). 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 determined that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” The legislature also found that the SMA was needed to “prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.” *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)*.

Shoreline Management Act 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. WAC 173-27-170 sets forth permitting procedures and permit criteria for shoreline variances. For development landward of the OHWM, the Hearing Examiner reviews the application under the following criteria:

- (1) Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that

extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.

- (2) Variance permits for development and/or uses that would be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(c), and/or landward of any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following:
 - (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;
 - (b) That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;
 - (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and would not cause adverse impacts to the shoreline environment;
 - (d) That the variance would not constitute a grant of special privilege not enjoyed by the other properties in the area;
 - (e) That the variance requested is the minimum necessary to afford relief; and
 - (f) That the public interest would suffer no substantial detrimental effect.

...

- (4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment.

WAC 173-27-170.

Bremerton Shoreline Master Program

Similar to WAC 173-27-170, the City SMP provides the following criteria for approval of a shoreline variance:

Relief from specific bulk, dimensional or performance standards in the Shoreline Master Program can be granted only when there are extraordinary or unique circumstances relating to the property such that strict implementation of the

Shoreline Master Program will impose unnecessary hardships on the applicant or thwart the policies set forth in RCW 90.58.020.

- (1) Development activities considered a Variance may be authorized if all of the criteria in WAC173-27-170 are met. The criteria include:
 - (i) The strict application of the bulk, dimensional, or performance standards would preclude or significantly interfere with the reasonable use of the property not otherwise prohibited by the Shoreline Master Program;
 - (ii) The hardship is specifically related to the property, and is the result of unique conditions such as lot shape, size or natural features, and the application of the Shoreline Master Program;
 - (iii) The project design is compatible with other permitted uses in the area, and will not cause adverse effects to adjacent properties or the shoreline environment;
 - (iv) The Variance will not constitute a grant of special privilege, and is the minimum necessary to afford relief;
 - (v) The public interest will suffer no substantial detrimental effect; and
 - (vi) If the development is waterward of the ordinary high-water mark, the public rights of navigation and use of the shorelines will not be adversely affected.
- (2) After the City makes a final decision on a variance permit, the permit and application must be reviewed and approved by Ecology.

City SMP 5.040(c).

Conclusions Based on Findings

The request for a shoreline variance to allow for the installation of a fence within the shoreline buffer would not meet the specific requirements for a shoreline variance under the SMA and the City SMP.

The City determined that the shoreline variance request is categorically exempt from SEPA environmental review, in accord with WAC 197-11-800(6)(e). The City provided reasonable notice of the application and associated open record hearing. The City received numerous comments on the proposal from members of the public and one member of the public testified at the hearing. The comments and testimony from members of the public expressed opposition to the variance request, raising concerns largely related to the proposal's impact to the shoreline habitat, as well as the cumulative impacts that would result from similar proposals in the area.

As an initial matter, the Hearing Examiner notes that the Hearing Examiner's decision is limited to determining whether the proposal meets all of the criteria for granting a shoreline variance under WAC 173-27-170 and the City SMP 5.040(c). In this matter, the Applicant has argued that many of the criteria do not apply because of the lack of ecological impact and because the request is to eliminate the buffer zone. It is, however, well established that a hearing examiner has only the authority granted to it by statute or ordinance. *HJS Development, Inc. v. Pierce*

*City of Bremerton
Administrative Hearing Examiner
Findings, Conclusions, and Order
Case No. BP 24 00282*

County, 148 Wn. 2d 451, 61 P.3d 1141, 1152 (2003) (citing *Lejeune v. Clallam County*, 64 Wn. App. 257, 270, 823 P.2d 1144 (1992)). Here, City SMP Sections 5.020(e) and 5.040(c) grant the Hearing Examiner authority to hear and approve or deny a variance permit request and provide the criteria for approval of a shoreline variance. The Hearing Examiner is not provided with the authority to invalidate a state or local policy or regulation, including regulations establishing shoreline vegetative buffers, and is authorized to approve a shoreline variance only if all of the criteria in WAC 173-27-170 are met. Because the Hearing Examiner lacks authority to eliminate required shoreline vegetative buffers, and because the Hearing Examiner determines that the Applicant has not met all of the criteria for the reasons addressed further below, the request for a shoreline variance is denied.

WAC 173-27-170(1) provides an overarching statement that variance permits “should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020” and that “[i]n all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.” The City staff determined that the policies of RCW 90.58.020 would not be thwarted by the denial of this request and that the Applicant had not demonstrated that there are extraordinary circumstances. The City highlighted that the fencing restrictions in the City SMP are designed to protect the public interest and that the Applicant retains use of the single-family residence on the property. The Applicant addressed these criteria and noted that a denial of the variance request would prevent the full reasonable use of the property and that there would be no adverse impacts on the ecology of the shoreline. The Hearing Examiner addresses the project’s consistency with the applicable policies in RCW 90.58.020 throughout the analysis below.

WAC 173-27-170(2)(a) provides that the Applicant must show that “the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property.” Here, a reasonable use of the subject property has already been established because the existing residence on the subject property has been in use for many years. The Applicant contends, however, that a fence to the edge of the shoreline is the only way to continue a reasonable use of their property because of safety concerns related to intrusions that have occurred in the shoreline-facing front yard area. Fences are often considered appurtenant to a primary residence and, therefore, integral to the reasonable use and enjoyment of a residential property. For example, WAC 173-27-040(2)(g) provides that “[o]n a statewide basis, normal appurtenances include . . . fences.” The City SMP, however, does not list fences as among the “normal appurtenances” included within the definition of an appurtenance. *City SMP, Chapter 3 – Definitions*. More importantly, the City SMP contemplates that fences are treated differently than other typical appurtenances associated with a residential structure by providing specific regulations for their development within shoreline buffers and setbacks. *City SMP 7.010(a)(7)*. The Hearing Examiner therefore determines that the existing residential structure provides a reasonable use of the property without the need for a fence, consistent with the policies of RCW 90.58.020, and that any proposal to install a fence must comply with applicable City SMP regulations. Although the property owner has asserted that, without the fence, he cannot continue to use the front yard, this

preference for the use of the shoreline-facing front-yard does not eliminate the existing reasonable use of the property. For these same reasons, the Hearing Examiner determines that the Applicant cannot satisfy the criterion under WAC 173-27-170(2)(a) because the fence standards of the City SMP do not preclude a reasonable use of the property.

City staff determined that the proposal does not meet WAC 173-27-170(2)(b), noting that unique conditions that meet this criterion are related to the topography, size, or shape of the property, and that safety and security are not considered unique conditions that qualify for a variance. The Hearing Examiner agrees with City staff's determination. Although the Applicant points out that the examples provided in WAC 173-27-170(2)(b) and City SMP 5.040(c)(ii) are non-exclusive and argues against a narrow interpretation of the unique conditions justifying a variance, the Hearing Examiner notes that each of the examples provided relate to the physical features of a property. Consistent with principles of statutory construction, the Hearing Examiner declines to expand the type of unique conditions justifying a variance to include situations unrelated to a property's physical features, such as safety and security from trespassing pets or individuals. In addition, the Hearing Examiner agrees with DOE that a neighborhood concern, such as stray animals or trespassing, is not unique to this particular property.

Regarding WAC 173-27-170(2)(c), the subject property and surrounding properties are located within R-10 zoning district and are developed with single-family residential structures. Yard fencing is generally compatible with low-density residential development allowed in the R-10 zone and existing single-family homes in the area, and the Applicant has provided evidence that the proposed project would not cause adverse impacts to the shoreline environment. The existing bulkhead and mowed lawn result in current conditions that have limited wildlife activity, habitat, and ecological benefit. Although, as noted in the Suquamish Tribe comments, there may be some additional animals and habitat that were not considered in the Applicant's HMP, given the proposed mitigation, the HMP shows that the project would likely result in no net loss to the shoreline environment. Because it is ultimately not at issue with a denial of the variance, the Hearing Examiner declines to comment on the specifics of the mitigation plan, but notes that, if the proposal were approved, it would likely have been with conditions, possibly including requiring final approval of the plan by the City, restrictions on the type and height of fencing, and the long-term preservation of the land for native habitat through signage and fencing to keep domestic animals and people out of the restored area.

Regarding WAC 173-27-170(2)(d), City staff determined that approving this variance would grant a special privilege to the property owner. The Hearing Examiner agrees. City staff noted that the property owner can already build a fence on the property in accordance with City SMP 7.010(b)(7) and that another, similar application would not be approved. There have been no shoreline variances for any proposals granted in at least the last five years. The Applicant stated that other properties in the area already have fences or other development within the shoreline buffer. Although the existence of

nonconforming uses may be considered when determining whether a special privilege would be granted, there is insufficient evidence that other properties in this area are benefiting from fenced-in, shoreline-facing front yards and, therefore, the granting of this variance would be a special privilege not provided to other owners of similarly constrained properties.

Regarding WAC 173-27-170(2)(e), City staff determined that the relief sought is not the minimum necessary because the property owner could build a fence on the property in accordance with City SMP 7.010(b)(7). Although the Hearing Examiner is not entirely persuaded by the City's argument that building a fence at the edge of residential structure would be the minimum necessary to provide relief, the Applicant has not demonstrated attempts to reduce encroachment into the buffer area, stating only that the minimum relief necessary is to fence around the entire shoreline-facing front yard area and noting the existence of a septic drain field in the yard. As discussed above, the property owner continues to have a reasonable use of the property without the requested shoreline-facing front yard fenced enclosure.

Regarding WAC 173-27-170(2)(f), City staff determined that approval of the variance would adversely impact the public interest, noting that the City SMP regulations are intended to protect the public interest and that undermining those regulations would "constitute a detrimental effect on the public interest." The Applicant noted that the HMP shows that there would be no impact to habitat or shoreline ecology and that the proposal would not have an impact on the public interest. The Hearing Examiner agrees with the Applicant's additional argument that, by providing a process for shoreline variances, the SMA and the City SMP envision circumstances where a variance from strict application of the regulations is warranted. The Hearing Examiner determines that, given the existing, degraded conditions of the buffer on the property and the Applicant's proposed buffer enhancement, the public interest would not suffer substantial harm from the proposal.

Finally, regarding WAC 173-27-170(4), City staff determined that the Applicant did not demonstrate that there would not be cumulative impacts as a result of the granting of the variance request. City staff highlighted feedback provided by DOE, which noted that neighborhood-wide concerns about safety could lead to cumulative impacts from additional requests to install fences within shoreline vegetative setbacks on other nearby properties. The Applicant disagreed that such cumulative impacts would be likely and suggested that the City should bear the responsibility of demonstrating that there would be cumulative impacts. Unlike WAC 173-27-170(2), which requires the Applicant to demonstrate that each criterion is met, WAC 173-27-170(4) requires only that cumulative impacts are considered and does not specify who bears the responsibility for that consideration. Because the Hearing Examiner has denied the request on other grounds, it is not necessary for the Hearing Examiner to consider the potential cumulative impact of granting the variance. *Findings 1 – 23.*

DECISION

Based upon the preceding findings and conclusions, the request for a shoreline variance from the shoreline vegetative buffer requirements of the City of Bremerton Shoreline Master Program to allow for the development of a fence enclosing the front yard within the shoreline buffer area, on property located at 4635 Marine Drive Place, is **DENIED**.

Decided this 7th day of April 2025.

A handwritten signature in black ink, appearing to read 'Yoshi Kumara', is written over a horizontal line.

Yoshi Kumara
Administrative Hearing Examiner
City of Bremerton