

ISLAND COUNTY HEARING EXAMINER

RE: Appeal) File No. APP 238/09
Appellant: Mutiny Bay Shores, Inc.) FINDINGS OF FACT CONCLUSIONS
OF LAW AND DECISION

SUMMARY OF APPEAL AND DECISION

APPEAL: The appellant, the Mutiny Bay Shores Subdivision, Inc. Homeowners Association has appealed a decision by Island County Planning & Community Development approving a Shoreline Exemption, subject to conditions, and the issuance of a SEPA Threshold Determination of Non-Significance on a proposal by the applicants to install 190 feet of new soft-shore protection above the ordinary high water mark, at the toe of Double Bluff, a waterfront feeder bluff located on the west side of Whidbey Island, Island County Washington. The purpose of the new soft-shore bank protection system is to provide protection to an existing single family residence located on the top of the bluff.

DECISION: The appeal of the Approval of the Shoreline Exemption is dismissed on the grounds that the Hearing Examiner does not have jurisdiction to hear an appeal of a Shoreline Exemption Decision by Island County Planning & Community Development.

The appeal of the Threshold Determination of Environmental Non-Significance is upheld based on the conditions of approval attached to the Shoreline Exemption and the requirement that the applicants obtain Hydraulic Project Approval from the Washington State Department of Fish & Wildlife.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on December 17, 2009.

I.

PRELIMINARY INFORMATION

Appellant: Mutiny Bay Shores Inc.

Property Location: 6675 Wahl Rd. on South Whidbey Island.

Publication: December 2, 2009

Mailing of Notice to Appellant: October 21, 2009

Mailing of Staff Response: December 7, 2009

Date of Appeal: September 2, 2009

Date of Comprehensive Statement: October 16, 2009

Hearing Date: December 17, 2009

Exhibit Log:

1. Staff Appeal Response
2. Staff Report
3. Land Development Permit Application, received 10/16/07
4. Application for Shoreline Exemption, no date
5. Septic System Asbuilt, no date
6. Report from Coastal Geologic Services, Inc to Pamela Hill-Keeva, dated 8/29/07
7. Biological Assessment, dated 10/12/07
8. Environmental checklist, no date
9. Site Data, dated 10/16/07
10. Notice of complete application from Cindy White to Jim Johannessen, dated 10/26/07
11. Review letter from Matt Kukuk to Jim Johannessen, dated 1/30/08
12. Letter from Gloria K. Koll to Matt Kukuk, dated 7/20/07
13. Letter from Deb Asplund to Matt Kukuk, dated 7/21/07
14. Letter from Law Office Skinner & Saar, P.S , Christon C. Skinner to Matt Kukuk with attachments, received 7/21/07
15. Email from Joe Burcar to Matt Kukuk, dated 1/8/08
16. Letter from Katie Slayton to Bobak Talebi, received 9/11/09
17. Email from Matt Kukuk to Katie Slayton, dated 9/17/09
18. Notice of Application with SEPA, dated 11/7/07
19. Notice of Appeal letter to applicant from Paula Bradshaw to Joseph Keeva, dated 9/2/09
20. Acknowledgement letter from Paula Bradshaw to Christon Skinner, dated 9/3/09
21. Notification to applicant for extension request letter from Andreana Richardson to Joseph Keeva, dated 9/14/09
22. Acknowledgement of extension request letter from Andreana Richardson to Christon Skinner, dated 9/14/09
23. Letter granting extension of comprehensive statement from Andreana Richardson to Christon Skinner, dated 9/17/09
24. Notice of hearing letter from Paula Bradshaw to Christon Skinner, dated 10/21/09
25. Affidavit of mailing, dated 10/21/09
26. Letter of notice of appeal from Christon Skinner to the Hearing Examiner, received 9/2/09

27. Letter to request extension for filing the comprehensive statement from Christon Skinner to the Paula Bradshaw, received 9/10/09
28. Comprehensive Statement, received 10/16/09
 - a. Declaration of Katie A. Slayton with attached exhibits A through H
 - b. Declaration of Jeffrey D. Parsons with attached exhibit A
 - c. Declaration of Donald A. Mallett
 - d. Declaration of Ed Merlino
 - e. Declaration of Thomas R. Collins
 - f. Declaration of Sue Todd Yates
 - g. Declaration of Joseph Herrin
29. Addendum to Comprehensive Statement of Factual Objections, received 11/03/09
 - a. Letter of explanation regarding Exhibit # 29, received 11/03/09
30. Email from Larry Kwarsick to Paula Bradshaw, Bobak Talebi, Bob Pederson, Matt Kukuk, dated 11/11/09
 - a. Attached Request for Dismissal of Appeal
31. Hard copy of Request for Dismissal of Appeal, from Larry Kwarsick, Applicant's Agent, received 11/12/09
32. Email from Paula Bradshaw to Katie Slayton, Chris Skinner forwarding Request for Dismissal of Appeal, dated 11/12/09
33. Email from Chris Skinner to Paula Bradshaw, dated 11/12/09
34. Email from Paula Bradshaw to Chris Skinner and Bobak Talebi, dated 11/12/09
35. Letter from Paula Bradshaw to Christon Skinner and Katie Slayton, resetting hearing date, dated 11/13/09.
36. Affidavit of mailing exhibit 35, dated 11/13/09
37. 238-09 APP – Keeva-Response to Request for Dismissal 11-17, from Bobak Talebi to the Island County Hearing Examiner, dated 11/17/09
 - a. Email from Bobak Talebi to Michael Bobbink with attached exhibit 37
38. Reply to Applicant's Request for Dismissal of Appeal of Approval of SHE 426/07 and SEPA Determination of Non-Significance, dated 11/18/09
 - a. Email from Chris Skinner to Michael Bobbink, dated 11/18/09 with attached exhibit 38
39. Hard copy of Reply to Applicant's Request for Dismissal of Appeal of Approval of SHE 426/07 and SEPA Determination of Non-Significance, dated 11/18/09
40. Memorandum from Larry Kwarsick to Island County Hearing Examiner, dated 11/20/09
 - a. Email from Larry Kwarsick to Paula Bradshaw, dated 11/20/09 with attached exhibit 40
41. Email from Andreana Richardson to Michael Bobbink, dated 11/20/09 forwarding exhibit 40 for review
42. Email from Paula Bradshaw to Katie Slayton and Chris Skinner, dated 11/23/09 forwarding exhibit 40
43. Memorandum from Larry Kwarsick to Island County Hearing Examiner, dated 11/23/09
44. Email from Paula Bradshaw to Larry Kwarsick, Bobak Talebi, Chris Skinner, dated 11/30/09 with memo from the Island County Hearing Examiner, Michael Bobbink in the body.
45. Letter from Paula Bradshaw to Christon Skinner and Katie Slayton with attached Appeal Response (exhibit 1) from Bobak Talebi, dated 12/7/09
46. Affidavit of Mailing exhibit 45, dated 12/7/09
47. Administrative Approval With Conditions Shoreline Exemption, dated 8/17/09
48. SEPA Determination of Non-Significance for file No. SHE 426/07, dated 8/17/09
49. Approved Plot Plan showing proposed location of soft shore protection, dated 8/17/09
50. Approved Plot Plan of horizontal distance from house, dated 8/17/09
51. Photo illustrating activity of the bluff face

- 52. Résumé of Jim Johannessen
- 53. Photo of slide near the Keeva property
- 54. Photo of slide near the Keeva property, different angle
- 55. 1995 Impact Assessment for Double Bluff Seawall Proposal

HEARING TESTIMONY

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II.

The applicants, Joseph Keeva and Pamela Hill-Keeva, submitted a land development permit application for a Shoreline Exemption to Island County Planning & Community Development on

October 16, 2007. The Keeva's are owners of a multi-acre waterfront property located on Double Bluff, Admiralty Inlet, on the west side of Whidbey Island, Island County, Washington. The application sought approval for the proposed construction of a soft-shore bulkhead system for protection of an existing single family residence from coastal erosion along Double Bluff.

Double Bluff is designated as a "feeder" bluff and contributes significant material into the littoral drift cell which feeds accreting beaches to the north. These accreting beaches front the Mutiny Bay Shores Subdivision. The Mutiny Bay Shores, Incorporated Homeowners Association is the Appellant herein.

On August 17, 2009 Island County Planning & Community Development granted the requested Shoreline Exemption and issued a SEPA Threshold Determination of Non-Significance on a project, which was described as follows:

"Proposal:

To install 190 feet of new soft-shore bank system that protects an existing single family residence. The project involves importing two inch plus cobbles keyed landward of MHHW. Buried ecology blocks using galvanized chains to anchor drift logs and root masses. According to Island County Critical Areas Map the shoreline designation parcel is Rural and is subject to the requirements of Chapter 17.05 Island County Shoreline Management Code."

The Administrative Approval of the soft-shore bank system was subject to sixteen conditions. Based on Planning's review of the proposal and consultations with the Washington State Department of Ecology and the Department of Fish & Wildlife, the SEPA Responsible Official for Island County concluded that the proposed development would not have a significant adverse impact and issued a Threshold Determination of Non-Significance.

III.

Both the Shoreline Exemption approval and the Threshold Determination of Non-Significance were appealed by Mutiny Bays Shores, Inc. HOA, consisting of property owners within the Mutiny Bay Shores Subdivision. The appeal was filed in a timely manner. A request for additional time to submit a Comprehensive Statement of Appeal outlining the grounds for the appeal was

granted by the Hearing Examiner and a timely Comprehensive Statement of Appeal was submitted.

IV.

On November 11, 2009 the applicant's agent, Larry Kwarsick, filed a request for dismissal of both the Appeal of the Shoreline Exemption Approval and the SEPA Threshold Determination. Planning and the appellants were given an opportunity to respond to this motion and on November 30, 2009 the Hearing Examiner notified the parties through a short memorandum that the Hearing Examiner was dismissing the Appeal related to the approval of the Shoreline Exemption but was not dismissing the SEPA Appeal. A public hearing on the SEPA Appeal was held on December 17, 2009.

V.

The applicants own an existing house with a detached garage located on the top of Double Bluff. The purpose of the proposed 190 feet of soft-shore protection is to reduce the erosion of the bluff in order to protect the existing residential development at the top of the bluff.

Double Bluff is approximately eighty feet in height and the applicant's home is approximately forty feet from the edge of the bluff. The bluff face is nearly vertical. The toe of the bluff has an open, over water reach of somewhere around fifteen miles. The toe of the bluff is subjected to significant erosion caused by wave action during storm events. Materials which erode from the face and toe of the bluff are then carried northward by littoral drift and a significant amount of this material feeds the accretion shore form in front of the Mutiny Bay community. A significant reduction in the materials contributed to the littoral drift cell by the erosion of Double Bluff could result in long term adverse impacts to both the Mutiny Bay community, which is protected by the accretion beach in front of the community, and to biological organisms within the littoral drift cell.

If no action is taken the existing home could be undermined by erosion in approximately forty-five years. Due to the dynamic nature of the bluff, as evidenced by large recent slide events the home could become uninhabitable within a significantly shorter time.

VI.

During the approximately two years during which this application was pending, concerns about the impacts of construction of a erosion protection system at the toe of Double Bluff, in front of the applicants home, were raised and discussed by staff members Island County Planning & Community Development and State Department of Ecology. The site was visited both by staff from the Department of Ecology and from the State Department of Fish & Wildlife before Island County Planning & Community Development ultimately determined that a soft-shore protection system with added beach nourishment materials, and subject to numerous conditions which call for ongoing monitoring and adaptive management, including a condition which would allow Island County staff to require additional analysis and any action necessary to ensure that any unanticipated significant impacts which may occur are appropriately mitigated (see condition number 7). The Hearing Examiner reads the conditions placed on the project as allowing the Island County Planning Department to require in the future any necessary modifications, including complete removal of the soft-shore protection system approved under SHE 426/07, in order to insure there are no significant adverse environmental impacts resulting from the project.

The monitoring plan required by Planning includes an evaluation of the project after one year, again after five years, and every five years thereafter. The adaptive management allowed by the conditions of approval would allow staff to require more frequent monitoring should it appear appropriate or necessary.

VII.

In addition to consultation between Island County Planning staff, staff at the Department of Ecology and Department of Fish & Wildlife staff, Planning reviewed professional reports submitted by an experienced and licensed engineering geologist, Jim Johannessen, who has an extensive history in dealing with issues of coastal erosion. The report prepared by Jim Johannessen dated August 29, 2007 is exhibit number six in the Hearing Examiner file. Mr. Johannessen had also studied the site at the request of the Mutiny Bay Incorporated Homeowners

Association in 1995, when a prior owner of this property proposed a hardened bulkhead along the same stretch of the bluff face.

Mr. Johannessen concluded, based on his visits to the site over a twelve year period as well as his review of the geological literature regarding this site, that the primary cause of bluff erosion on the Keeva property was wave attack at the toe of the bluff. Mr. Johannessen has recommended approval of a soft-shore protection system with a specific design and subject to a number of recommendations. Conditions of approval attached to the approval of the Shoreline Exemption by Planning Staff require compliance with Mr. Johannessen's recommendations.

It was noted by the appellants that Mr. Johannessen had previously, in 1995, recommended denial of a hardened bulkhead along this stretch of feeder bluff. Staff concluded that the additional information regarding the rate of retreat along the shoreline and the change in the protection proposal to a soft-shore system including beach nourishment reasonably explained any differences in Mr. Johannessen's recommendations from 1995 to the report done in 2007.

VIII.

The applicants provided written materials and testimony from Jeff Parsons, a qualified Coastal Geomorphologist. Mr. Parsons also concluded that Double Bluff was an important feeder bluff which supplied materials to the accretion shore form in front of the appellants' properties. Mr. Parsons raised a number of concerns with Mr. Johannessen's recommendations. The main concerns were inadequate monitoring; an inadequate supply of beach nourishment materials; and the possible instability of the proposed protection system which consists of ecology blocks as anchors for large woody materials. The ecology blocks will be buried in two inch plus cobble, which will be topped by nourishment materials intended to supply material to the littoral drift cell, and then planted with dune grass.

Mr. Parsons pointed out that Mr. Johannessen was not a licensed engineer and that there was no evidence that adequate calculations were performed to establish that the system will be stable and work as proposed. He admitted that he had done no engineering calculations himself but that he

had had his doubts about the long term stability of the proposed system. He indicated he believed significantly more nourishment materials than proposed were required to maintain the current level of material feeding the littoral drift cell and that additional materials may be necessary virtually every year. He also raised the possibility of biological impacts including possible impacts on forage fish and/or sand lance. However Mr. Parsons is not a qualified biological expert and indicated he had not read the biological study submitted by the applicants (exhibit number 7). Island County Planning Staff has evidenced a clear awareness that the proposed soft-shore protection system may not work as designed and/or may result over time in adverse impacts. This is apparently also the conclusion of the Department of Ecology. In some ways this proposal could be described as an experiment. The approval granted by Island County is subject to active adaptive management including long term monitoring and the potential modification of the requirements for, or even future removal of the system, should it fail to function as designed, without significant adverse environmental impacts.

IX.

Issues regarding potential adverse impacts on endangered species and species and habitats of local significance were addressed by EarthWorks Environmental Inc. in a report submitted to Island County in October of 2007. The appellants have submitted no expert testimony which would contradict the conclusions of the biological assessment prepared by EarthWorks. Island County Planning has required implementation of the conservation measures recommended by EarthWorks. The conditions of approval also require Hydraulic Project Approval by the State Department of Fish & Wildlife. The Department of Fish & Wildlife has responsibility and the expertise to identify and address potential impacts to fish or wildlife habitat resulting from this proposal.

X.

If the proposed soft-shore protection is installed and then ignored there is a potential for significant adverse impacts both on the biological communities along the shore and the downstream accretion shore forms fed by this feeder bluff.

However, subject to the Conditions of Approval placed on this project, including ongoing monitoring and adaptive management, the Hearing Examiner finds, as a fact that it is unlikely that this proposal will result in significant adverse environmental impacts.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

A request for a Shoreline Exemption is a Type I administrative decision pursuant to ICC 16.19.04A(b). There is no appeal to the Hearing Examiner provided for Type I decisions. ICC 16.19.190(1)(2).

A Type I decision may be appealed by the applicant to the Board of Island County Commissioners. Island County Ordinances do not set forth a right for aggrieved parties to an administrative appeal of a Type I decision. It would appear that the only appeal afforded to aggrieved parties, other than the applicant, of a Type I Administrative Decision would be pursuant to the Land Use Petition Act and would have to be filed in Superior Court. In any case the Hearing Examiner has only the jurisdiction granted specifically by the legislative body pursuant to Island County Ordinances. A Type I decision is not appealable to the Hearing Examiner. The appeal of the Shoreline Exemption approved by Planning should be dismissed.

II.

The Island County Hearing Examiner is given the specific jurisdiction and authority to hear appeals of SEPA Threshold Determinations, ICC 16.13.100(A). The Board of Island County Commissioners has determined that the Hearing Examiner hear any appeal of a SEPA Threshold Determination and has, at the same time, decided not to give the Hearing Examiner jurisdiction to hear appeals of a Type I Administrative Determination, including Shoreline Exemptions. The

intent of the Board of Island County Commissioners is clear. If there are issues of the legality of the bifurcation of SEPA appeals and appeals of approval of Type I decisions, based on State law the Hearing Examiner lacks the jurisdiction to resolve or rule on such issues. The Hearing Examiner does not have the jurisdiction determine that an ordinance passed by the County legislative body violates either State law or constitutional restrictions on government power. For this reason the Hearing Examiner must hear the appeal of the SEPA Threshold Determination filed by the appellants, but cannot hear the appeal of the Planning Department Approval of the Shoreline Exemption.

III.

A Threshold Determination made pursuant the State Environmental Protection Act is entitled to substantial weight. RCW 42.21C.075(3)(b). The Hearing Examiner equates the requirement to give the SEPA Determination substantial weight as putting a burden of proof on the appellants to show with clear, cogent, and convincing evidence was that the Threshold Determination was issued in error.

IV.

In order for the Responsible Official to require an Environmental Impact Statement and to issue a Determination of Environmental Significance the Official must determine that there is a likelihood of a significant adverse environmental impact from the proposal. In this case the appellants would need to establish that the proposed project will result in adverse impacts that have a “reasonable likelihood of more than a moderate adverse impact on environmental quality” to prevail. WAC 197-11-794.

The appellants in this case have established a possibility that the installation of the proposed soft-shore protection system could result in significant adverse environmental impacts.

However, in determining whether or not to issue a Determination of Environmental Significance or a DNS the responsible Official is to take into account mitigation of potential adverse impacts through the exercise of existing regulatory authority at the local, state, and/or federal level.

In this case Island County Planning & Community Development has conditioned the Shoreline Exemption Approval with conditions adequate to make it unlikely the proposal will have more than a moderate adverse impact on environmental quality. The use of adaptive management and the requirement for Hydraulic Project Approval from the State Department of Fish & Wildlife makes it likely that potential adverse impacts will be dealt with prior to resulting in a significant adverse environmental impact.

Since, subject to the conditions of approval of the Shoreline Exemption, the proposed project is unlikely to have more than a moderate impact on environmental quality the Responsible Official under SEPA appropriately issued a Threshold Determination of Non-Significance.

V.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

The appeal of the Mutiny Bay Shores, Inc. Homeowners Association is denied. The Threshold Determination of Non-Significance issued by the Responsible Official under SEPA is upheld.

Entered this 11th day of January, 2010, pursuant to authority granted under the laws of the State of Washington and Island County.

MICHAEL BOBBINK
Island County Hearing Examiner

APPEAL PROCESS:

APP (SEPA)

Appeal Process for SEPA Related Appeal Issues:

This decision of the Hearing Examiner is a final decision at the County level. Any further appeals must be taken in conformity with RCW 43.21C.075 and WAC 197-11-680.