

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

Dan and Harriet Alexander

SSDP 15335

From the Administrative Decision
to Deny a Shoreline Substantial Development Permit

Introduction

Dan E. and Harriet H. Alexander, appeal the decision by the Director, Department of Planning & Community and Development, denying their application for a substantial development permit for a protective bulkhead for property at 10920 Broomgerrie Road.

A public hearing on the appeal was held on April 8, 2010. Appellants were represented at hearing by their attorney, Dennis Reynolds, Dennis D. Reynolds Law Office, and the Director, Planning and Community Development Department, by Rosemary A. Larson, Inslee Best Doezie & Ryder. The record closed May 10, 2010.

For the purposes of this decision, all section numbers refer to the Bainbridge Island Municipal Code unless otherwise indicated

After due consideration of all the evidence in the record, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner on this appeal.

Findings

1. Dan Alexander applied for a substantial development permit to construct a new rock bulkhead with soft shore protection in front of undeveloped property at 10920 Broomgerrie Road owned by Dan and Harriet Alexander and intended for recreational use and investment.

2. The subject property is a lot of over one half acre that extends on both sides of Broomgerrie Road with a rolling upland in that there is a moderately flat area near the road on the west and then as the topography drops toward the northeast there are two prominent benches midway and then a bank at the shoreline that ranges from about 8 feet up to approximately 20 feet in height. *Testimony of Cousins*. Overall vertical relief from the road to the beach is around 70 feet over the approximate 250 ft. distance. *Exhibit 18*. Vegetation on the site consists of a mix of alder and some cedar trees with ivy and blackberry understory growing on the shoreline bank approximately

30-40 feet deep, down to and overhanging the beach, then the upper slope that has been partially cleared and periodically mowed with low growing vegetation on it now. There is one large cedar tree in the treed slope area along with alders from 3-4 inches to 12 inches or more in diameter plus one or two sumac. The beach is sand with scattered gravel and slopes at approximately 10H:1V down to the water and a flatter lower intertidal area.. At the time of the hearing, there was no beach berm so no backshore.

3. The subject property is on a topographic bench that represents a portion of a prehistoric landslide area and is mapped as an active slide area on the City's GIS maps and classified as geologically hazardous. Exhibit 4. It has slopes of 40 percent Appellants' geotechnical report indicates awareness of landslide activity on the site and an adjacent site. Exhibit 18. The site shows up as unstable in DOE records as having had recent landslides. Otherwise there is little in the public record about the landslide history but anecdotal evidence of periodic activity that would be greater than normal. *Testimony of Cousins.*

4. The site is zoned Residential Two Units Per Acre (R-2) as are lots in the surrounding vicinity. The Shoreline Master Program (SMP) designation is Semi-rural environment with Aquatic water environment.

5. Rock bulkheads protect the lots on both sides of the subject property. Of the 20 lots on Broomgerrie Road, bulkheads protect 19, the subject property being the lone exception.

6. The Alexanders applied for a shoreline substantial development permit on June 17, 2008, for the installation of a bulkhead. Mr. Alexander's reasons for wanting a bulkhead are to protect the front of his property from eroding away, to protect his neighbors' property, to provide structural support to prevent slides, and to create a way to reach the beach to make the property usable for recreation and the enjoyment of his family. Mr. Alexander was advised by letter after a preapplication conference that it was unlikely that approval for a shoreline armoring structure on the property would be granted because the geotechnical report did not indicate there was a risk to an adjacent residence or that the subject property was at risk due to serious wave erosion nor that non-structural solutions would not provide the protection desired. Exhibit 10. Because of his concern for his property and that of his neighbors, he decided to go forward with his application and submitted a revised application on May 13, 2009, showing the rock bulkhead extending to the neighbors rip rap with soft shore protection in front of the proposed rock bulkhead plus a ramp or stairway down to the beach.

7. The proposed bulkhead would be a "hybrid" utilizing both soft and hard components to achieve the goal of mimicking the natural condition of the shoreline while protecting the toe of the slope. The two components would be a stopgap rock component between 6 and 7 feet high and a series of anchored logs, stumps, imported sand, and cobble in front. The bulkhead would be built at or above the ordinary high water mark (OHWM) and considerably landward of the mean high higher water (MHHW). The slightly higher beach profile would allow for energy dissipation and reduction to protect the beach and adjacent bulkheads, and with the soft materials in front of the rock bulkhead would mimic natural conditions. *Testimony of Cousins.*

8. The application includes extending the bulkhead onto the Fink property to the north to connect with the bulkhead on that property. The owner of that property, Lee Fink, did not sign the application, however he testified at hearing that he would be willing to join in the application because waves wash around the end of his bulkhead. He has observed that the vegetation in that

area is moving back from the beach more rapidly on the Alexander side and is threatening the integrity of his property. *Testimony of Fink.*

9. The Deputy Director of the Department of Planning and Community Development, on behalf of the Director (“Director”), denied the substantial development permit because the applicant did not conclusively demonstrate that serious wave erosion threatens existing development or land and because the applicant did not show that nonstructural protection was unworkable. *Testimony of Machen; Exhibit 4.*

10. Section 16.12.310.B.5 provides:

Revetments and bulkheads may be allowed only when evidence is presented which conclusively demonstrates that the following conditions exist:

- a. Serious wave erosion threatens an existing development or land;
- b. Bulkheads or revetments may be approved for the operations and location of water-dependent and water-related activities consistent with the master program; provided, that all alternatives have proven infeasible (i.e., use relocation, use redesign, nonstructural shore stabilization options.) Such bulkheads or revetments must meet other policies and regulations of this chapter; and
- c. That use of natural materials and processes and nonstructural solutions to bank stabilization are unworkable in protecting existing development.

11. The Bainbridge Island Nearshore Assessment, Summary of Best Available Science (October 2003) (“Nearshore Assessment”) (Exhibit 25) describes physical characteristics and dynamics, habitats, biological resources of the shoreline, and the effects of nearshore modifications, among other topics. One of its conclusions is that shoreline modifications can have direct, indirect, and cumulative impacts to estuarine and nearshore marine biological resources and that the best way to protect sensitive shoreline habitat is to maintain it in a natural condition. The Nearshore Assessment was intended to provide best available science to be used in making planning and regulatory decisions.

12. The site is not identified in the Nearshore Assessment as a feeder bluff, that is one that contributes a significant amount of sediment through erosion to the beach providing various benefits to marine organisms. This east facing area is considered “semi-protected” as to wave action. *Exhibit 25.*

13. Five observers with differing areas but similar levels of expertise observed the beach at the subject site: Josh Machen, Senior Planner for the City with extensive shoreline permitting experience; Robert Cousins, a licensed engineering geologist and hydrogeologist with almost 20 years of experience; Mark Pedersen, a Senior Aquatic/Marine Scientist and President of Margenex International with over 25 years of experience in aquatic and marine environmental issues; Chris Waldbillig, also with extensive experience working with municipalities on shoreline issues, who implements the hydraulics code with the Washington State Department of Fish and Wildlife; and Hugh Shipman, licensed geologist, who works in the Shorelands and Environmental Assistance Program, Washington State Department of Ecology, and has thirty years of experience.

14. Machen visited the subject site on several occasions and did not see serious wave erosion. He observed vegetation growing down to the base of the slope and tree root systems right at the beach that hold the bank together. He saw no significant undercutting of the bank. He explained that where erosion has caused over steepening of a bank, one will observe trees falling over and that is not happening at the subject site. He saw some erosion at the base but considered it typical erosion for Puget Sound shoreline. Machen was actually surprised to see how little erosion there has been given several significant storm events in the last five years. At the site, the MHHW is a significant distance from the toe of the slope so water rarely meets the toe. Where he has observed serious erosion, the MHHW is only a couple of feet from the OHWM

15. Cousins observed definite erosion at the toe of the slope on the beach with varying degrees of scouring on both sides of the property creating pocket beaches and, relying on the neighboring property owner's estimate of a 3 foot loss over seven or eight years, regarded it as serious wave erosion because of the instability of the slope and because as the toe erodes, the upper part will slide down to fill it in. He advised that loss at the toe of the slope destabilizes the upland by removing the buttressing so the upper part of the slope will come down to fill in. As the erosion continues it moves up the slope and the risk to adjacent houses increases. He believes that there is no doubt that the continued erosion will cause deep-seated slope failure and though the bulkhead would not provide significant buttressing of the larger landslide mass, that protection of the toe is needed to remove the threat to the upland itself and to the houses on both the north and south sides, which he estimated to be 60 and 100 feet from the shoreline of the subject property. He did not do a risk factor calculation. His opinion is that the erosion should be regarded as serious, recognizing that the judgment about seriousness of erosion is subjective. Cousins prepared a wave analysis (Exhibit 19) for the site to calculate wave height to determine overall energy regime at the site and compared his results with the National Weather Service predictions for a specific day to confirm the analysis' accuracy. He opined that the wave characteristics from windstorms that he projected would cause serious erosion if they strike the shore. He did not have information about the frequency of such wave events. While he inferred from information provided by Alexander that the erosion rate at the site averages 6 inches per year, he pointed out that the average could mean no erosion one year and then a bad year with 5 feet of erosion, for example, and the latter would destabilize the bank.

16. Pedersen saw evidence of wave-caused erosion and bank undercutting of the bank and trees and a pocket beach at the adjacent property.

17. Waldbillig observed wave erosion at the toe of the slope of the subject property and on the property to the north that he classified as minor because the riparian zone is intact with healthy habitat, there are no shear faces on the bluff, and there is minor to no undercutting of the toe.

18. Shipman saw gradual movement that he did not regard as serious and observed no evidence such as fresh wood or soil on the beach indicative of active wave erosion. He observed bare soil under the overhanging ivy, but no undercutting. He could not reconcile what he observed with even six inches of erosion a year and estimated something of the magnitude of a couple of inches, though there could have been periods of greater erosion. He concluded that wave erosion for the last several years on the property was not serious. He acknowledged that the right tides and storm events could cause greater erosion. He explained that pocket beaches often occur between two bulkheads and are very stable because sediment cannot escape. Here, Shipman observed a little

scouring behind the bulkhead to the south, but drainpipes emptying at that location could be the cause.

19. The estimates of annual toe erosion ranged from 2 inches (Shipman) to 6 inches (Cousins), though several acknowledged that with the right tidal and storm events it could be greater in one year.

20. The average wave erosion rate for Puget Sound is 4-6 inches per year. Machen regards this rate as normal and acceptable, especially on an undeveloped site, and a part of the natural process. In his judgment, the site is experiencing much less than 6 inches per year but that even a 6 inch rate of erosion would not “threaten” the land, when there are no structures and its use is only recreational since it would be many years at that rate to impact recreational use. He would regard a loss of several feet per year as serious wave erosion. *Testimony of Machen.*

21. Donald Macleod who owns the property with a single-family residence adjoining the subject site on the south described water coming up around his bulkhead on the Alexander side and his having to backfill his bulkhead with rock and stack rocks every few years. He is fearful that his bank will erode in time and topple his house. *Testimony of Macleod.* The bulkhead on that property is functioning and likely extends below the OHWM. *Testimony of Machen.*

22. The wave analysis results from Cousin’s calculation may have been exaggerated as the analysis assumed a straight line from the northeast where there would be fairly high exposure to the site but the site is somewhat sheltered by Yeomalt Point and the dominant wave action at the site is from the south. *Testimony of Shipman.*

23. High tides are more frequent in winter and that is when storm events occur so the potential for erosion is greater at those times. *Testimony of Pedersen.* There have been several significant storm events in the past five years but little evidence that they caused significant erosion at the site. *Testimony of Machen.*

24. The OHWM is landward on this site of where Pedersen would expect forage fish to spawn and the site is not shown on the Department of Wildlife’s website as a forage fish spawning area. The site is not mapped for sand lance spawning either. *Exhibit 22.* Pedersen opined that the beach could support spawning, but a survey would be necessary to determine if it occurs there. He also observed that though the maps show eelgrass beds in front of the site, they are in the lower intertidal over 150 feet away from the OHWM at the site. The soils eroding are highly organic so would not contribute the quantity of sand that is needed for the health of eelgrass. Therefore he would not expect the proposal to have a significant effect on eelgrass beds, especially with the safeguards that the HPA would impose. The proposal would not have adverse effects on spawning of forage fish or sand lance if there is spawning on the site as the timing of construction would avoid spawning time. *Testimony of Pedersen; Exhibit 22.*

25. Waldbillig believes that forage fish spawning could occur on the beach at the subject site because there is appropriate sand grain and gravel size on the beach. Surf smelt spawning is mapped within the drift cell and there are salmon in the area. It is a “potential spawning beach”. *Testimony of Waldbillig.*

26. The likely actual impacts on the shoreline environment would be the compaction caused by construction equipment on the beach and displacement of woody debris, the alteration and displacement in the intertidal habitat from cobble and logs, and refraction, scouring, turbidity and

loss of beach material on the occasions when waves do reach the face of the bulkhead. The loss of a minimum of a 10 foot swath of riparian vegetation, except for the cedar tree which would remain, from construction of the 7 or 8 foot wide bulkhead, with its canopy extending 20-25 feet over the intertidal area and up the bank has the potential for an adverse impact because the vegetation provides large woody debris to the shoreline to keep sand and gravel in place, leaf litter and insects that benefit fish, and shading for keeping water cool and protection of eggs. Machen estimates that it would take 20-25 years to reestablish the existing level of vegetation at the shore. *Testimony of Machen.*

27. Trees and other vegetation at the water's edge provide shade and insects for feeding fish and organics and leaf litter and woody debris. Terrestrial insects provide between five and 100 percent of juvenile salmon's diet, depending upon the site. *Testimony of Waldbillig.* The removal of invasive species of vegetation and revegetation behind the bulkhead with native vegetation would result in a net gain; however there would be a temporal delay before the pre-project condition is approximated but because part of the riparian vegetation would remain, there would be some of the same contribution to the shoreline function of shade, leaf litter, and insects and no measurable displacement of woody debris. If the bank is not protected, over time the existing vegetation will wash away if the bank is not protected. *Testimony of Pedersen.*

28. Erosion of banks along the shore contributes sedimentary input to the drift cell. Bulkheads eliminate the flow of those natural materials, but the degree of impact would depend upon location and mitigation measures. Where the bulkhead is above the OHWM the impact is more limited. *Testimony of Waldbillig.* If appropriate substrate is placed on the beach, and Pedersen found that the proposed mix of sand and gravel is appropriate, the natural sediment supply would not be reduced by the proposed protection. *Testimony of Pedersen.*

29. Because construction would be at or above the OHWM, the edge of the water would only touch the base of the bulkhead for a few minutes approximately 15-20 days per year, assuming mild weather, so the bulkhead would not have the same detrimental effect on shoreline function as those placed lower on the beach. *Exhibit 22.*

30. As 19 or the 20 properties along this reach already have bulkheads, the addition of one additional bulkhead would not have a measurable cumulative effect on shoreline function. *Testimony of Pedersen.*

31. Though the geotechnical report indicated that the proposed bulkhead would increase the factor of safety of adjacent properties, the degree of increase was not indicated nor the length of time before the support for the homes would fail if protection was not built. And though even six inches per year of erosion of the toe of a bank could be serious depending upon the context, such as very steep bank with no vegetation which is not the pattern here, Shipman does not anticipate any increased factor of safety for the residences on the two adjacent properties from the proposed bulkhead.

32. The City has never before received an application for a bulkhead to protect adjacent property, according to Machen, and there is no provision that allows bulkheads to protect another protective structure on adjacent property. In this case, the property to the north could extend its bulkhead or construct wing walls to prevent erosion behind its bulkhead. *Testimony of Machen.*

33. A low bulkhead was permitted in combination with soft protection at the Mackie property on Yeomalt Point approximately a half mile south of the subject site. That site had no bank and during a significant storm, a beach berm was taken away, woody debris moved out and water reached the edge of the lawn and within 10-15 feet of the drainfield on the adjacent property. *Testimony of Machen.*
34. A bulkhead was permitted for protection of vacant property next to the Pace property, which had a bulkhead, where there was an oversteepened bank. The bank experienced more significant wave action than at the subject property and trees had fallen and large Douglas firs at the top threatened the house on the Pace property. The MHHW was very close to the toe of the bank. *Exhibit 23; Testimony of Machen.*
35. Cousins evaluated the site and concluded that a single-family residence could be sited on the lot while meeting the critical areas ordinance requirements for a geologically hazardous site.
36. Cousins reviewed alternatives to the proposed bulkhead and concluded that supplemental vegetation would only help with surface erosion as the stabilizing effect is no greater than four feet in depth; a rock bulkhead would harden the shoreline and protect the toe in the smallest space; a rock revetment would dissipate wave energy but be susceptible to more toe erosion and scouring; and a soft bank would be adequate for day-to-day protection but would not alone be adequate to protect the toe on this site which is not a low energy, protected environment during storm events. He recommended the hybrid system because it would stop the erosion from wave action while promoting the natural condition and at the proposed location at or above the OHWM, would have no significant impact on beach functions. *Testimony of Cousins.*
37. The City did not complete its environmental analysis and make a threshold determination pursuant to SEPA when it determined that the permit would not be granted.
38. BIMC 16.12.350B(1)(a) vests the Hearing Examiner with the authority to hear and decide appeals of the Director's shoreline substantial development decisions.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. The hearing examiner is required to give substantial weight to the determination of the Director. Section 2.16.130F(2). When a regulation requires that substantial weight is to be given, the clearly erroneous standard is to be applied and the hearing examiner may reverse the Director's decision only if she has a definite and firm conviction that a mistake has been made. See *Hayden v. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980). The parties argue about whether an interpretation by the Director as the official charged with a provision's enforcement of an ambiguous provision is entitled to great weight, *Milestone Homes v. City of Bonney Lake*, 145 Wn.App. 118, 127, 186 P.3d 357 (2008), as indicated by various cases cited by the Department. Appellants urge that no deference is due the Department's interpretation of the code because there is no ambiguity, the Department ignored other code provisions such as the Critical Areas Ordinance, the persuasive factors are not present, and the Department did not show that it had similarly interpreted the provisions in the past.

3. The hearing examiner does consider the provision, “serious wave erosion threatens development or land” to be ambiguous. Where possible, effect is to be given each word in a statute, *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006), and where the terms are not defined in the code provision, the examiner is required to ascertain the plain and ordinary meaning of the term by utilizing a standard dictionary. *Qwest Corp. v. City of Kent*, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006). So the provision requires two showings, as urged by the City: 1) that the erosion caused by waves is serious; and 2) that the erosion causes a threat, if all words are to be given effect. As “serious” means “6. giving cause for apprehension; critical or threatening...”, *Webster’s College Dictionary (1992)*, the provision means that only wave erosion that causes apprehension or a threat is serious. But “threatens” is used separately and that use requires that it be given meaning as well. The parties have not offered a way of reconciling this dilemma and the examiner is unable to do so using the common rules of statutory construction. Therefore, relying on how the Shorelines Hearings Board, the body that is charged by statute with reviewing the shorelines decisions of municipalities on appeal, applied the provision to the circumstances of an application with very similar site characteristics is the appropriate way to resolve this issue.

4. The Findings of Fact, Conclusions of Law, and Order in *Stollar et al. v. City of Bainbridge Island et al.*, SHB No. 06-024 and 06-027, Exhibit 3 Appendix A, show that the applicants sought approval (there a conditional use permit) for a common bulkhead for several properties. The sites were on a feeder bluff, were classified as unstable due to recent landslides and may have had a rotational slide recently nearby, had vertical distances of 70 to 100 feet from the top of the bluff to the beach, and experienced erosion described as 8-10 feet over a ten year period, 2-8 feet of which was a result of a storm in 2006, but at an average rate of between less than 3 inches to six inches per year, characteristics not unlike the Alexander’s property, except that a feeder bluff is not involved on the subject site. There the various homes were located 16, 45, 65, 80 and 85 feet from the top of the bluff, much closer than the adjacent residences to the bank on the Alexander property. The Shorelines Hearings Board (SHB) recognized the continuing risk of landslide because of the eroding shoreline bluff. *Id.* Though decided on other grounds, the SHB indicated how it would rule on the application of Section 16.12.310B.5 requiring evidence that conclusively demonstrates that serious wave erosion threatens an existing development or land to the facts before it. The SHB seems to have conflated the two parts of the required demonstration in that it did not address separately the “serious” wave erosion and looked instead at the consequences of whatever erosion was occurring.. Except for the house within 16 feet of the bluff, it concluded that appellants did not conclusively demonstrate that the ongoing erosion threatens their homes “other than over a period of many decades, or centuries.” *Id.* p. 34. The showing was sufficient as to the closest home in that even the smaller and ongoing slide activity could reach the structure “in a reasonable period of time.” *Id.*

5. The correspondence of the facts between the *Stollar* case and the one at hand, similar geological and erosion characteristics and, even though expert opinion that there is no doubt that continued erosion will cause slope failure, the lack of evidence regarding the time period in which development or land would be threatened, the distance of the adjacent residences from the subject property’s shoreline, the minor wave or scouring effect on those properties, and availability of other means of protection for them, persuades the examiner that here the applicant did not

conclusively demonstrate the necessary “serious” erosion or level of threat, as interpreted by the SHB.

6. It should be noted that the hearing examiner is not required to decide whether to give great weight to the Director’s interpretation of the provision that the erosion must at least be more than normal to constitute a threat and the provision requires a showing of a threat to the land that is quantifiable and can be predicted temporally because the substantial weight required by Section 2.16.130F.2 that the decision is required to be accorded is sufficient here. The record contains experts’ opinions that support the Director’s decision that the erosion is not serious and the SHB precedent supports the determination that some showing is necessary that the harm from the threat would occur within a reasonable time. Since the applicant did not make the conclusive showing required, the Director’s decision was not shown to be clearly erroneous and should be affirmed.

7. Appellants also contend that the Director is required by Section 16.20.360 to read the provisions of the SMP along with other City policies and code provisions that apply to the property, such as the Critical Areas Ordinance (CAO) and Comprehensive Plan, and that the director failed to do so. While the purpose of the CAO is to protect critical areas, which includes geologically hazardous sites, its regulations contemplate providing that protection through regulation of development. Section 16.20.010. As to the Comprehensive Plan, the Director’s decision shows that Comprehensive Plan policies were considered and Appellant has not shown that the decision was contrary to any policy.

8. The Director’s decision was also based upon the failure to show that a non-structural shoreline solution is unworkable. The record does show that it would not be as effective and would require maintenance, but it does not show that it would be unworkable.

9. Though the record does show that the proposed bulkhead is not likely to have the serious effect on the shoreline function and resources that are the consequence of most bulkheads, the Director’s decision must be affirmed for failure to make the conclusive showing of the necessary threat from the erosion.

Decision

The Director’s decision to deny a substantial development permit is affirmed and the appeal is denied.

Entered this 18th day of May 2010.

/s/ Margaret Klockars

Margaret Klockars
City of Bainbridge Island
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. Appeal of this decision is to the Washington State Shorelines Hearings Board as provided by RCW 90.58.180 (or its successor) and Chapter 461-08 WAC (or its successor). To be timely, petition for review must be filed within the 21-day appeal period [see BIMC 16.12.370].