

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

In the Matter of the Application of

The City of Bainbridge Island

For a Shoreline Substantial Development/
Conditional Use Permit

and

SCUP11335

The Appeal of

Friends of Cannery Cove Park

From a Determination of Nonsignificance

Introduction

The City of Bainbridge Island proposes a new park at the Strawberry Plant site at 240 Weaver Road with habitat improvements that would require a shoreline substantial development permit and shoreline conditional use permit. Friends of Cannery Cove Park, a group of individuals, appeal the issuance pursuant to SEPA of a Determination of Nonsignificance for the project.

An open record public hearing was held June 12 and 25th and July 10, 2009, on the application and the appeal. Dawn Reitan, Inslee Best Doezie and Ryder, P.S., represented the Department of Planning and Community Development. Appellants' designated representative was Gerald Elfendahl.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony and exhibits admitted at the hearing, the following shall constitute the findings, conclusions, and decisions of the Hearing Examiner in these matters.

Findings

1. The application by the City of Bainbridge Island (COBI) filed April 13, 2009, requests approval of a Shoreline Conditional Use Permit and Shoreline Substantial Development Permit for a project to "(r)estore intertidal, marsh, and riparian shoreline

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habitat at the Strawberry Plant site, establish the site as a public park use, and provide compatible recreational improvements, including a small, non-motorized, hand-powered boat launch, non-motorized bridge, elevated overwater viewing structure, and non-motorized trail connections” at 240 Weaver Avenue. Exhibit 13. The shoreline restoration and the boat launch would be constructed immediately following approval but the viewing structure, pedestrian bridge, and trail connections with the Winslow Waterfront Trail would be built by the Bainbridge Island Park and Recreation District (“Park District”) in the future following completion of the restoration project.

2. The National Oceanic and Atmospheric Administration (NOAA), the Natural Resource Trustee Council for the Wyckoff/Eagle Harbor settlement, and the COBI jointly propose the project.

3. A shoreline conditional use permit is required because of the proposed beach enhancement waterward of the OHWM. Section 16.12.150.

4. The subject site is in the back reaches of Eagle Harbor and is described as being a combined 3.91 acres and .64 acres in area. Shepard Way NW bounds the northern side of the property and the northern part of the site is wooded. The west side is bordered by residential property, and Weaver Creek (also known as Cannery Creek), a fish-bearing stream that flows into the harbor, forms the eastern boundary. Leslie Landing, a residential development, lies beyond the creek. A large, hard-surfaced area lies to the south of the forested area. The shoreline, with two earthen “piers” jutting into the harbor has areas lined by armoring. A small number of pilings remain in the water, the bulk of them having been recently removed. Concrete slabs and other debris appear in various places on the site.

5. A second parcel, owned by PNEC Corporation referred to as the “Conoco” property, is included in the application because a small, 120-200 square foot piece is to be part of the salt marsh. Testimony of Machen.

6. The COBI has owned the site for several years. Though not officially a park, informal use has been made by the public for recreation including dog walking, bird watching, swimming, picnicking, and viewing marine activity, among others. Some activity has been troublesome, such as firing potato guns toward the adjacent houses and noisy activities with vehicles on the paved areas. The site now provides views of the harbor and access to the water along most of the shoreline. Volunteers have maintained the “park” to the extent that it has been maintained.

7. The Bainbridge Island Comprehensive Plan designates the subject property as Semi-Urban Residential (2.9-3.5 units per acre) and it is zoned Residential 3.5 units per acre. The City’s Shoreline Master Program (“SMP”) designates the site’s uplands as Semi-Rural and the shoreline as Aquatic shoreline environment. The Semi-Rural environment of the shorelines is intended to serve as a transitional area between the urban and rural environments and to protect natural resources such as vegetation on steep banks, indigenous trees, beaches, banks and bluffs while allowing development. It accommodates low to medium density residential development and parks are a permitted use in the environment. Comprehensive Plan (“CP”) Section IV C. The Aquatic

environment designation is intended to protect the marine water area seaward of the ordinary high water mark by managing uses and activities and assuring compatibility between upland and aquatic uses. Section 16.12.140.I.

8. The restoration elements of the proposal include removal of concrete and other debris in the intertidal zone working largely from upland areas; removal of approximately 250 lineal feet of shoreline armoring consisting of concrete bulkhead, riprap, piling and asphalt paving along the shoreline; removal of approximately 3,000 cubic yards of fill at the shoreline and reusing some of it on-site; removal of approximately 38,000 square feet of concrete and asphalt pavement from the upland; restoring the estuarine, riparian and salt marsh habitat by placing sand, gravel, topsoil, and wood debris and then planting according to the planting plan; clearing non-native invasive vegetation and replacing with native species establishing salt marsh that would expand the existing marsh from 7,000 square feet to some 14,000 square feet, dune grass backshore, and riparian habitat areas and an upland meadow area that is currently paved. Constructing a footbridge over Weaver Creek for eventual connection of a path on the subject site to the existing Winslow Waterfront Trail, constructing an overwater viewing structure supported by up to 60 piles over what is currently upland, and constructing a non-motorized boat launch with a gravel surface and logs on both sides to contain the materials comprise the recreation element of the proposal. The effect on habitat would be to increase the uppertidal area which increases the amount of habitat in that zone of higher productivity. Testimony of Small.

9. The boat ramp is for non-motorized vessels such as kayaks and canoes and plans show it extending some 45 to 50 ft. from the OHWM to below the MHHW. Testimony of Machen. A bench is included in the design. A ramp with float design was not considered because to get to navigable depth it would have to be extended to the point where it would have significant impacts. Testimony of Best.

10. The proposed viewing structure is intended to maintain the view that people now enjoy from the earthen peninsulas. It would extend no further waterward than the current OHWM of the existing land fill, would be limited to a height of no more than three feet above EHW and have no more than 24 piles. A condition of approval is recommended that would require that the guardrail be constructed of materials that will minimize view obstruction such as cable. The viewing structure would have a picnic table on the platform.

11. The bridge over Weaver Creek is intended for an eventual connection with the Winslow Waterfront Trail that runs from the ferry terminal in sporadic segments along Eagle Harbor. At present, property rights to connect the trail with the proposed pedestrian bridge on the site have not been obtained. Neighboring owners are concerned about trespassing on their property by people crossing the bridge intending to connect with the trail. Testimony of Shirk.

12. The proposal is intended to enhance the ecological function within Puget Sound. Salt-water marsh is a wetland occurring in the upper tidal zone between MHW and EHW line and serves as a nursery habitat. The marsh expansion at the site is not an attempt to recreate an historical marsh at this site but to enhance the habitat in the upper

tidal zone. Testimony of Best and Small. The enhancement at the site is one element of an overall portfolio of restoration of the habitat projects for the Puget Sound. Testimony of Best.

13. Shallow water habitat needed for small species is lacking at the site because of the bulkheads and other armoring along the shoreline. Removal of the armoring is expected to improve a number of functions that affect food supply and biodiversity. Testimony of Small.

14. Several fisheries scientists testified. All see that that the site has a very low habitat value. Two felt that the proposed work would improve the function of the habitat. Testimony of Daley, Peters. One had many questions about whether the work at this site has scientific merit. Testimony of Mahnken. The potential is good for the proposal to enhance the ecological function of the shoreline.

15. The subject property contains two environmentally sensitive areas, the stream on the east side of the property and the estuarine shoreline wetlands along the shoreline, according to the critical areas report for the property. The stream was determined to meet the criteria for a Type F stream. The wetlands, likely two systems, are Category II wetlands. Exhibit 7. The wetlands are to be removed and a larger salt marsh area to be established.

16. A native vegetation zone providing a vegetation buffer is required for the area 50 feet upland from the OHWM for recreational development. The native vegetation zone on the site has been altered by past development and few native trees and shrubs remain in the zone. A new native vegetation zone would be established after removal of fill and planted according to the planting plan. Some of the zone will be planted with low shrubs to leave a view corridor that appears to be approximately 55 ft. in width. Exhibit 5.

17. A water quality buffer of 100 ft. and a habitat buffer of 50 ft. from the stream would be required normally but because of the existing road, would end at the edge of the road. The existing vegetation would be maintained within the buffer and new riparian vegetation would be planted where the stream meets the saltwater. No new development may occur within the buffer except for certain passive recreation structures.

18. A full screen perimeter landscape area 25 ft. wide is required between the park and residential development. Section 18.85.070. The vegetation on the west perimeter will require augmentation but the east exceeds the requirement.

19. The regrading of the site would recontour the area in the western and eastern portions of the site to create what was described as “berms” higher than existing elevations along the west and east sides of the proposed meadow area. The berms appear to be about 4 ft. and 3 ft. in height, respectively.

20. A temporary fence, to be in place from a few months up to three years, would be installed at the location of the 50 ft. native vegetation zone parallel to the shoreline, along both sides of the boat ramp, along the proposed ordinary high water mark along the creek, and along both sides of the meadow area. Exhibit 82; Testimony of Best.

21. The removal of the piers would reduce the length of the site's shoreline, estimated at about 700 ft., to approximately 350 lineal feet. Existing physical access to the water would be reduced from most of the existing shoreline to the 5 ft. wide entrance to the boat ramp. The overwater viewing platform, if constructed, would provide views of the vista and tideland below. The new vegetation in the native vegetation zone would likely reduce views of the water from the meadow area and houses to the west to some extent. Testimony of Rovelstad.

22. Though the ability to see and touch the water that users of the unofficial park now enjoy may be reduced, it is the position of the Department that because the site is not now a public park, public access to the shoreline would not be reduced and that establishing it as a public park with the overwater viewing structure and launching facility will increase public access. Testimony of Best.

23. The "beach" is silty, rather than sandy, and the City's witnesses suggested that physical access is used less than where a sandy beach is available.

HISTORY/CULTURE

24. A summary of the cultural history connected with the site follows:

The territory of the Suquamish Indians included Bainbridge Island. There are reports of camps for fishing, hunting and gathering in the vicinity of the Strawberry Plant site.

In 1869 Captain William Renton bought the site along with other lands to supply timber to the sawmill he established at Port Blakely. The land, including the subject site, was sold to Captain Alvin Oliver in 1891 and by the end of the 1800's the land was logged and he had a small farm with farm buildings and house and boat landing on or near the property. In the early 1900s, Japanese began growing strawberries in the area. Sakakichi Sumiyoshi, a former employee of the Port Blakely Mill Company, lived on the land owned by Oliver, later sold to Tilton who was a retired Arctic whaler, and started growing strawberries soon after 1909 and eventually bought his own land just northwest of the site. He helped establish the Winslow Berry Growers Association and allowed the association to run a canning operation in his barn. Tilton leased some of his land to George Masukawa who lived on it and had an association cannery in his barn which eventually burned down. Because laws had been passed that no alien could own land, Tilton's actions made it possible for the growers' association to function. Sumiyoshi sold his land to another berry farmer, Jitsuzo Nakata.

By 1923, a small cannery structure had been constructed to provide easier access to ships but had outgrown the space by the 1930s so a new larger structure was constructed in the same location. The new cannery was completed in 1932 with a double-gable roof building partially on pilings over water. Hundreds of people, including indigenous peoples, came from British Columbia and other places and camped beside the fields to help with the berry harvest. In 1940, the plant was shipping 500 55-gallon barrels of berries per day. When Japanese-Americans on Bainbridge Island were sent to internment camps during World War II, Filipino families cared for the farms and, after the war, many Japanese-American returned and resumed farming.

After the cannery was abandoned for a new processing plant elsewhere, the property was obtained by Charles Marshall who used it for sand and gravel sales. Then Ed and Angela Weaver operated Weaver Concrete Supplies on the site for 14 years. During that period there was grading and filling and installation of the existing concrete pad. The building was modified and sidewalks and curbing installed. The property was then sold to and operated by Island Concrete until 1970. Following that use, various uses were contained within the building such as contractors' offices and storage, artists' studios, and housing. In January 1997 the building was destroyed by fire.

The site also has maritime history. The site of the eventual cannery was used to build and maintain boats and sailing vessels. Commercial and recreational boats continued to be built, maintained and stored. In the 1950's, Bristol Bay fishing vessels were stored for the winter in one of the warehouse bays. Herring fishing boats were kept there in the 1960's and after the cannery burned, it was again used for boat maintenance. Exhibit 100.

25. Northwest Archaeological Associates, Inc., undertook an archaeological survey and provided a report, Cultural Resources Assessment, Exhibit 117, addressing the effects on historic properties because the NOAA funding requires compliance with Section 106 of the National Historic Preservation Act. The report assessed geology and geomorphology, vegetation history, fauna, and cultural history. The assessment utilized the work of Gerald Elfendahl, an historian, for the latter. The work also utilized the two geotechnical studies done on the property.

26. The site was evaluated in the report for eligibility for the National Register of Historic Places and found to meet the test of significance in that the property is associated with "events that have made a significant contribution to the broad patterns of our history", i.e., early settlement by Captain Oliver and development by Japanese farmers as a successful strawberry cannery, but not the requirement that it convey its significance because there is no clear indication on the site of the property's previous use. Though there are likely pre-contact and historic archaeological materials beneath the fill, the project's design limits excavation to the fill and those historic materials are not likely to be disturbed.

27. Christian Miss, project manager for the cultural resources assessment who directed the work of Northwest Archeological Associates hired by NOAA as subcontractor to comply with the requirements of the National Historic Preservation Act, concluded that the historic remains of the plant do not retain enough of the historic fabric to clearly convey the period. What remains is the outline of half the foundation and a modified work area. She believes that though it is possible that prehistoric or early historic remains are on the site, those remains would be at the interface between the fill and native sediments. The design of the project limits excavation to the fill so would avoid damage to those remains. The effect of the project is to cap the archeological deposits, not destroy them. She testified that the intent of inclusion on the National Register is to preserve, not to commemorate, a historic property.

28. NOAA concurred with the assessment that no historic property would be affected by the project. Exhibit 120. The Suquamish Tribe concurred. Exhibit 88. The state's

historic preservation officer did not concur, needing information addressing the concerns raised by appellant.

29. The site is nominated for listing on Bainbridge Island's Historic Register but not yet listed. Exhibit 116.

30. Borings on the site were done in 2004 in connection with a Phase II Environment Site Assessment, to investigate for contamination. A total of twelve borings were drilled to the point that groundwater was encountered or materials were so hard the boring could not go further. Each was completed to a depth of eight feet except for one that went to 12 feet. One boring was drilled in each of the earthen piers. Disturbed fill was encountered in the south and southwest portion of the site to five to six feet below the surface and in the more easterly fill was one to three feet below the surface. Eight additional borings were made in 2008 in the area of and between the peninsulas to a depth of eight and 15 feet. These showed native soils from three to eight feet below the fill. The NWAA staff monitored the boreholes in the second excavation and examined the material from each core. Examination of the cores showed several feet of fill overlying native sediments with potential for buried archaeological material. Exhibits 117 and 127.

31. The record is not sufficient to show a definitive determination of the shape of the "natural" or "native" shoreline at the site. A photo from 1945 suggests a more linear shore under the cannery building than now exists that could be close to that now proposed. Exhibit 125. A photo from 1900 is said to suggest that there were two projections at that time. Exhibit 101. There seems to be no question that materials have been added that has expanded the piers beyond any natural projection. Staff believes that the soil profiles from the borings and their chemical constituencies establish generally the earlier shoreline. Testimony of Best. While not definitive as to the exact shoreline, the borings done in the peninsulas do show fairly deep fill and fill is also shown over much of the rest of the site, suggesting that the native shoreline was north of the existing shoreline.

32. The analysis of soil and ground water samples from the site showed that any contamination from metals or volatile organic compounds falls well below the MTCA clean up levels. Exhibits 123 and 124; Testimony of Small.

33. Section 18.81.030 requires sufficient parking to meet the peak demand of the park. Six parking spaces on existing pavement are proposed for the park. The proposed parking was deemed adequate. Exhibit 68. Overflow parking would use Shepard Way. Testimony of Best. Ferry commuters now use the street for parking to avoid the cost of parking closer. The street is one lane with parking on one side. If vehicles parked on both sides, the street would be impassable. Testimony of Palmer. The plans in the record do not show whether any control of runoff from the parking area is proposed.

34. Public Works found the average daily trips on the adjacent street to be very low and even with additional traffic from an improved park, capacity would still not be exceeded at the intersection. Testimony of Machen. A certificate of concurrency showing the determination that the proposal will not create impacts that require transportation improvements was issued. Exhibit 107.

35. The restoration project is subject to the NEPA, not typical for most local restoration projects. Testimony of Small. Following an environmental assessment for the overall restoration program in Eagle Harbor (Exhibit 126), NOAA issued a Finding of No Significant Impact (FONSI). Exhibit 128. A supplemental environmental assessment (Exhibit 127) to address the more detailed aspects of the Strawberry Plant Park project element of the program was prepared and a finding of no significant impact has been made. A final FONSI has not been issued following the public comment period. Testimony of Small.

36. The City acted as lead agency for SEPA compliance and issued a Determination of Nonsignificance (DNS) on April 17, 2009. Exhibit 15.

37. A Notice of Application for the shoreline conditional use and substantial development permits and site plan and design review was mailed and posted on April 23, 2009, and published on April 24, 2009. Exhibit 17. The Notice of Public Hearing beginning June 12, 2009, was published on May 22, 2009, and posted on May 26, 2009.

38. The environmental checklist on which the SEPA threshold determination was based was shown to contain errors and inconsistencies and information was omitted. Among others, the amount of fill to be removed varied; swimming that now occurs at high tide will be eliminated; trees to be planted on the west side and the overwater structure may obstruct views from surrounding properties; some historical artifacts are visible on the site and the historical use of the site was not mentioned; the proposal includes six parking spaces rather than the four stated.

39. An appeal of the DNS was filed on May 8, 2009, signed by nineteen persons on their own behalf and on behalf of Friends of Cannery Cove Park. The appeal challenges the DNS on the grounds that its history was misstated, not properly considered, and will be lost; the proposal will remove significant amounts of shoreline and will reduce public access to the water and its quality; the proposal will have the effect of downsizing an urban park. Exhibit 43.

40. On May 27, 2009, the Site Plan and Design Review application to make the site a park was conditionally approved subject to fourteen conditions including those to require a 50 ft. native vegetation zone from the shoreline and 150 ft. buffer from the stream, submission of landscaping and lighting plans, installation of signage indicating the west and east property boundaries, and retention of significant trees. Exhibit 65. That approval was not appealed.

41. The Director of Planning and Community Development recommended that the hearing examiner approve the Shoreline Substantial Development/Conditional Use Permit subject to nine conditions including design criteria for the overwater structure. The suggested condition would limit the number of piles for the structure to 24, require that the decking be grated and provide up to 50% light penetration, and require that the guard rail be constructed of materials that will minimize view obstruction. Exhibit 70.

42. Hydraulic project approval (HPA) was issued for the project on June 24, 2009. The approval contained 23 provisions. Exhibit 106.

43. Two fir trees on the west side are at risk because of potential salt water intrusion. The project will try to avoid this but the Department maintains that their loss would be offset by the planting of new trees along the shoreline. While a willow tree, a non-native tree, on the west side is scheduled for removal to accommodate some of the grading, it will be retained if possible. If it dies from either the excavation or salt water exposure, it could be left as a snag for use by perching birds. Testimony of Small.

44. The listing of vegetation in the area description summary for the critical areas assessment, Exhibit 7, omitted three species, red alder, Pacific madrone and black cottonwood. The purpose of the assessment was to survey stream and wetland resources so the omission was not material. Testimony of Small.

45. It is likely that there are one or more wells on the site of which the reviewers were unaware.

46. No biological survey was performed for Endangered Species Act compliance but existing data from the extensive studies focusing on Eagle Harbor were relied upon. Utilizing existing data is standard practice for ESA compliance. Exhibit 2; Testimony of Small.

47. Appellants and others complained that the planning and permitting process did not allow for full and informed public participation. Examples offered were what was perceived as limiting participation to the immediate neighbors at the charette held on the proposal, holding the public comment period of the joint City Council and Park District commission meeting on February 24 prior to the plan being presented, adding the overwater viewing structure and bridge after the preferred design was announced, moving the location of the viewing structure from the west side of the site to the east, not making the public aware of the restrictions on use of the park in the proposed memorandum of agreement with the funder.

48. The covenant required by the funding agency would restrict the use of the property to “a fish and wildlife habitat and for limited passive recreational use”. Exhibit 10.

49. Much testimony was addressed to the wisdom of the selection of the Strawberry Plant site for expenditure of the restoration funds, i.e.: it may not be as contaminated as others; it may not be large enough; it may not be connected to other valuable habitats or fit into the entire Eagle Harbor ecosystem; whether the project is actually “restoration” as labeled or not; whether the earthen piers are native or natural or not; whether the uses are or should be passive versus active uses for the park; whether there are other better uses and designs for the project; and the whether the altering of the shoreline and establishing saltwater marsh would actually be beneficial.

50. Other visions for the site were described including retaining the earthen piers, boat building, restoration and training, ghost structures, moving structures to the west side.

PERMIT APPROVAL CRITERIA

51. Section 16.12.380C(1) provides:

1. Uses classified as conditional uses may be authorized; provided, that the applicant can demonstrate all of the following:

- a. The proposed use will be consistent with the policies of RCW 90.58.020 or its successor and the policies of the master program.
- b. The proposed use will not interfere with the normal public use of the public shorelines.
- c. The proposed use of the site and design of the project will be compatible with other permitted uses within the area.
- d. The proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is located.
- e. The public interest suffers no substantial detrimental effect. (WAC 173-14-140(1) or its successor.)
- f. The proposed use is consistent with the provisions of the zoning ordinance (BIMC Title 18) and the comprehensive plan (Ordinance No. 94-21).

* * *

52. Section 16.12.350B provides that:

- 1. The City of Bainbridge Island hearing examiner is vested with authority to:
 - a. Approve, approve with conditions, or deny shoreline variance and shoreline conditional use permit applications after a public hearing and after considering the findings and recommendations of the director, which shall be given substantial weight; provided, that decisions may be appealed in accordance with BIMC 16.12.370.B.

* * *

53. To receive a shoreline substantial development permit, a proposal must be consistent with the applicable provisions of the Shoreline Management Act, Chapter 173-14 WAC, the COBI SMP and all other applicable law and approvals. The proposal's impact along with past and future requests that may be made for like actions in the area must not be found to result in substantial adverse effects on the shoreline environment and shoreline resources. Section 16.12.360E(4)(b).

54. The policies of the Shoreline Management Act set out in RCW 90.58.020 include fostering all appropriate uses and protecting against adverse impacts to the land, to its vegetation, and to wildlife and the waters of the state. The list of priority uses includes shoreline recreational uses.

COMPREHENSIVE PLAN POLICIES

55. The Cultural Element of the Comprehensive Plan includes Goal 6, to develop greater understanding of heritage and relationship to the past by providing places and facilities in which the history would be preserved, interpreted and shared. The one policy

under this goal that is somewhat applicable to the proposal is to provide places to collect, preserve and interpret history.

56. The Environmental Element of the Comprehensive Plan includes the broad goal, Environment Goal 1, to preserve and enhance the natural systems and environmental quality of Bainbridge Island. Policy EN 1.6 is to use the SMP to address and protect marine fish and marine shoreline habitat. Policy FW 1.6 supports the Fish and Wildlife goal of protecting and enhancing wildlife, fish resources and the natural ecosystem by requiring that the COBI take appropriate action to protect and recover state priority species and habitat to contribute to the protection and recovery of such species throughout the greater region in cooperation with federal, state and other local agencies. Policies AQ 1.8 and AQ 1.12 and AQ 1.14 of the Aquatic Resources goal to preserve and protect remaining aquatic resources' functions and values, address buffers, restricting herbicides and pesticides and restoration of degraded wetlands and streams.

57. The goals and policies of the Shoreline Master Program (SMP) are considered an element of the Comprehensive Plan. Applicable goals in the SMP are: B. Shoreline Use Element, E. Conservation Element, to the greatest extent feasible reclaim and restore areas which are degraded; F. Public Access Element, 1. provide, protect and enhance a public access system with both physical and visual elements increasing the amount and diversity of public access, and 2. integrating public access into the public trail system; G. Historic/Cultural/Education Element, that 1. identifies, protects and preserves important historic and cultural sites, 2. acquires sites, and 3. encourages educational projects that foster greater appreciation of the importance of shoreline management, marine activities, environmental conservation and marine history; and H. Recreation Element, that ensures optimal recreation opportunities without destroying the integrity and character of the shoreline, optimizes opportunities for both passive and active water-oriented recreation, and integrates shoreline recreational elements into public access and conservation planning.

58. The policies of Section III A, Archaeological and Historic Resources, apply where the resources are either recorded at the State Historic preservation Office and/or with the City of Bainbridge Island, or where they have been uncovered and requires that work be stopped and permission be obtained to proceed if resources are discovered.

59. The policies in Section III B, Clearing and Grading, and Section 16.12.060, address minimizing impacts to water quality and habitat including retention or replacement of vegetation.

60. The policy of Section III C, Environmental Impacts, is that the adverse environmental impacts should be minimized during all phases of development.

61. Section III D, Environmentally Sensitive Areas, establishes the policies that unique, rare and fragile shoreline resources should be preserved, that those natural features be protected, plus several that do not apply to this site.

62. Policies of Section III E, Native Vegetation Zone, which is the required vegetation buffer landward from the OHWM, are to preserve native plant species, protect, maintain and enhance native plant communities, restore degraded shorelines to

provide native habitats and enhance water quality, preserve existing environmental features to minimize disturbance of natural systems, and to implement a public education program about the importance of maintaining native vegetation in the shoreline.

63. Section III F., Parking, contains policies that parking be sensitive to the shorelines, be located, designed and constructed to minimize adverse impacts, and should be planned to achieve optimum use.

64. Section III G, Public Access – Visual and Physical, contains fifteen policies to promote and increase the public’s visual and physical access to the shoreline. With respect to public property it emphasizes improvement of existing public property and future acquisition of additional public property. Other policies that may be applicable include 7, that public access must be considered and , if diminished, be required, 8, that shoreline development, uses, and activities not unreasonably impair or detract from the public’s physical and visual access to the water, 9, public access should not adversely affect the shoreline environment, 10, City-owned shorelines be reserved for water-dependent or public recreational uses or maintained as open space, 12, public access be designed to minimize potential impacts to private property and individual privacy, 13, public and private spaces be clearly marked and/or separated to avoid user conflicts; 14, shoreline and water views from public upland areas should be preserved and enhanced where it would not risk environmental damage but this does not apply to native vegetation zones, and 15, that development should minimize visual impacts to natural shoreline landscape.

65. Section IV C, Semi-rural Environment, indicates that the purpose of the environment is to serve as a transitional area between urban and lower-intensity uses and to protect natural resources including beaches and marshes while still allowing for development. Management policies prefer recreational uses, along with low to medium intensity residential development that are compatible with uses and activities in adjacent environments.

66. The purpose of the Aquatic Environment, Section IV G, is to protect it and promote the wise uses of the natural features and resources. Management policies encourage diverse public access opportunities that are compatible with the existing shoreline and aquatic uses, minimizing interference with surface navigation and allowing for passage of fish and animals, discouraging motorized vehicle travel except for boat launching, and removal of abandoned or neglected structures which cause adverse visual impacts or are a hazard.

67. As the boat ramp is considered a boating facility, some of the policies in Section V D, Boating Facilities, apply. The design and location of boating facilities are to provide the maximum feasible protection and enhancement of all form of aquatic and other life, minimize effects upon beneficial shoreline features and processes and be aesthetically compatible with the area visually affected and not unreasonably impair shoreline views from adjacent shoreline properties.

68. The policies regarding recreational development, V J., that may be applicable to the proposal encourage: 1. coordination of planning; 4. variety of compatible recreational experiences; 5. linking of shoreline parks and recreational areas and public

access into linear systems; 6. location and design to minimize impacts on environmental quality and adjacent uses; 7. location and design to preserve, enhance or create scenic views and vistas; and 12. that all recreation development is to make adequate provision for the prevention of overflow and trespass onto adjacent properties.

69. Section VI B, Beach enhancement, addresses aquatic habitat restoration or enhancement and applies because the proposal includes removal of fill dirt and debris. The Department has determined that it is not prohibited at this location.

70. Section VI F. Piers, Docks, Recreational Floats, and Mooring Buoys, includes applicable policies: No. 3 is that piers be designed to cause minimum interference with navigable waters, the public's use of the shoreline and views from adjoining properties, and No. 8 provides that the size and intensity of use be compatible with surrounding environment and land and water uses

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide the SEPA appeal and the application for shoreline permits.
2. The required public notice was given.
3. Despite the considerable public sentiment that the planning process did not provide sufficient public information and opportunities for meaningful comment, the process met the legal requirements for public notice of the application, SEPA determination, and required public hearing. The hearing examiner has no authority to require more than that legally required.
4. The hearing examiner's role is to assess whether Appellants have shown that the specific proposal that is the subject of the SEPA threshold determination and the application for shoreline permits would cause a probable significant adverse impact, in the first instance, and meets the criteria for approval as to the permits. Whether utilizing the available funds at another site could provide more benefit to the marine ecosystem or whether a different array of features and uses at the park or redesign to move features from one side to the other would better serve the public interest are policy judgments that are not within the province of the hearing examiner. The information and opinions in the record can be considered by those policy makers should they decide to revisit determinations about use and design.

SEPA APPEAL

5. If the responsible official determines that a proposal is not likely to have a probable significant adverse environmental impact, a determination of nonsignificance shall be issued. WAC 197-11-340. "Significant" means a reasonable likelihood of more than a moderate adverse impact on environmental quality and involves context and intensity. WAC 197-11-794.
6. Substantial weight is to be accorded the determination of the responsible official on review. Section 16.04.170D. The standard of review then is "clearly erroneous".

Norway Hill Pres. And Prot. Assn v. King County Council, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). The hearing examiner may reverse only if, after reviewing the entire record, the hearing examiner is left with a definite and firm conviction that a mistake has been committed. Id.

7. Appellant and others questioned the accuracy of the title of the project and its description arguing that the proposal is not a “restoration” project because there has not been enough study to determine the actual shape of the original shoreline and there has been no showing that there was a salt marsh where one is to be established. Even if the title were inaccurate, which if the broader restoration of the Puget Sound ecosystem was intended, it is not, there was no showing that anyone was misled given that the description of the proposal stated what was encompassed by the title.

8. The environmental checklist was shown to contain several contradictions and minor omissions, however there was no showing that the SEPA responsible official or any commenter was misled or that the omitted facts, if included, would show that the proposal would have a probable significant adverse impact and should have led to a determination of significance. The errors do not require reversal of the determination.

9. Appellant did show that there is likely to be a well or wells on the site that were unknown to the person making the threshold determination. Again, why the presence of additional wells would result in a significant adverse impact on the environment from the proposal was not shown.

10. It is not clear if Appellant contends that the proposed project would have a significant adverse impact on the recreation element of the environment. As the findings show, some access to the water that is enjoyed now will be lost and the new gradient will eliminate swimming activity as well as the loss of some kinds of activity on the pavement, however, none of those losses rises to the level of significance needed for reversal of the determination.

11. The findings show the possible interference with views of the harbor from several residences on each side from the regrading of the site, the planting of additional trees, and the overwater viewing structure. Conditions proposed on the design of the viewing structure should reduce the amount of interference with views. The evidence did not demonstrate the actual degree of interference so, although some is likely to result, the lack of sufficient quantification of the magnitude of the loss, given the small number of views involved, means that the effect cannot be considered to be more than a moderate adverse impact.

12. Appellant’s witness alluded to traffic impacts but did not demonstrate that the conclusion that resulted in the certificate of concurrency, i.e., the street and intersections can accommodate the expected traffic, was wrong or that the park would draw sufficient traffic to cause more than a moderate adverse impact on the environment.

13. The central contention of Appellant’s SEPA appeal is that the proposal would have a significant adverse impact on the historic element of the environment. As the findings show, the site was likely utilized by native peoples prior to European settlement, was the location of early Bainbridge Island European residents, it has a role in maritime

history, and it played a central role in both the strawberry industry and the Japanese community. The findings also show that little on the surface remains to identify the site with that history. The proposed project will alter the physical shape of the site but not diminish that history in any other material way and nothing precludes the addition of a commemorative or interpretive display on the site. And, as the findings show, the proposal is designed not to disturb any historic artifacts below the fill. Certainly nothing proposed will diminish the “soul” or the deep sense of the spirit of the site described by Appellant’s witnesses. The record does not convince the hearing examiner that the responsible official was wrong in determining that that the proposed project would not cause more than a moderate adverse effect on the historical and cultural preservation element of the environment.

14. As Appellant has not carried its burden of proving that the determination was clearly erroneous in that there is a reasonable likelihood that one or more of the adverse impacts on the environment caused by the project would be more than moderate, the appeal of the DNS must be denied.

SHORELINE CONDITIONAL USE

15. For approval of the shoreline conditional use permit the proposal must satisfy the criteria set out in Section 16.12.380C, the first of which is consistency with the policies of the Shoreline Management Act and the policies of the SMP. The proposal meets the broad policy of the Act in that it fosters a priority use that would promote and enhance the public interest by allowing substantial numbers of people to enjoy the shoreline while minimizing any damage to the ecology and environment of the shoreline and interference with the public’s use of the water. The policies of the SMP must be addressed in more detail.

16. As to the Archaeological and Historic Resources policies in Section III A of the SMP, the archeological report found that the site no longer retains the integrity of location, design, setting, materials, workmanship, feeling and association to be eligible for listing in the National Register and the site, at this point, is nominated but apparently not yet listed on the Island’s Historic Register and, therefore, is not directly subject to this policy. Though prevention from alteration of a site having been identified by “appropriate” authorities as having historic values is a policy, Policy 2, and “appropriate” authorities is not defined, the overall statement that this section applies to sites on the state or COBI list shows the authorities referred to are the state historic preservation office or COBI, neither of which has at this time identified the site by listing as having that value. The historic resource, due in part to the work of Appellant, has been considered, however, as required by Policy 1. The proposal has been designed to avoid destruction of any buried cultural materials by limiting excavation to the fill and the improvements proposed would not preclude the inclusion of interpretive or commemorative features. The proposal is consistent with these policies.

17. The proposal would be consistent with the clearing and grading policies of Section III B, if applicable.

18. The plans and studies show that adverse impacts will be minimized during construction and use so the proposal would be consistent with the policy of III C, Environmental Impacts.

19. Regarding the policies of Section III D, Environmentally Sensitive Areas, the stream and its buffer area will be protected. The proposal to remove some habitat and to expand and enhance the salt-water marsh and other habitat is not inconsistent with the policy to preserve fish habitat.

20. As to the policies of Section III E, Native Vegetation Zone, the proposal is consistent with applicable policies because it would reestablish a native vegetation zone in an area where most of the native vegetation is gone.

21. The proposed parking would be largely consistent with the policies in Section III F., Parking, in that it will utilize existing pavement and be the minimum that appears to the City experts to be necessary. Whether it will have features to control runoff could not be ascertained from the record but the proposal will greatly reduce the amount of existing pavement, from which runoff apparently simply infiltrated the ground or flow off in sheets, and that should improve water quality. Approval could be conditioned to comply with the regulations requiring use of BMPs to control the quality and quantity of runoff.

22. Determination of the consistency with policies in Section III G Public Access—Visual and Physical, is made difficult by the nature of the proposal because the focus of the policy is on the typical residential, commercial or industrial development. The purpose statement is helpful, however, in that it refers to the public's ability to see the shoreline and the public's ability to reach and touch the water's edge. It recognizes ways to provide for such access, such as trails, docks, viewing towers, boat launches, etc. It states that the policies and regulations are intended to promote an increase in the public's access to the shoreline in a balanced manner.

However, considering Policies 7, 8, 9, and 14 together, 7, that public access should be considered in review of a proposal and if diminished by the proposal require public access unless health, safety or environmental protection needs cannot be met; 8, that the development, uses, and action should not unreasonably impair or detract from public access; 9, that public access should be provided without adversely affecting the shoreline environment; and 14, that views from public upland areas should be preserved unless it would risk environmental damage allowing vegetation removal but not applicable to native vegetation zones, the hearing examiner concludes that though shoreline access would not be increased by the proposal and views from the upland area could be diminished, public access is being proposed consistent with Policy 7, that the reduction is not unreasonable, satisfying Policy 8, that the public access provided by the viewing structure and boat ramp is designed to avoid adverse effect on the shoreline enhancements consistent with Policy 9, and that views from the upland are preserved by the wide view corridor through the native vegetation zone consistent with Policy 14. The proposal is also consistent, or with a condition to further clarify the separation between public and private properties would be consistent, with the other applicable policies, as well.

23. The proposed use is consistent with the purpose described in Section IV C., Semi-rural Environment, and with the management policies that prefer low to medium intensity recreation uses, designed to protect and enhance the shoreline environment, that are compatible with the uses and activities in the adjacent environments.

24. As to the policies of Section IVG. Aquatic Environment, the proposal is consistent with applicable Policy 2 in that the boat ramp and viewing structure would add to the diversity of public access opportunities without interfering with navigation or fish passage and with Policy 11 in that the proposal includes removing concrete and other debris from the shoreline.

25. The proposal would be consistent with Section VD, Boating Facilities, in that the boat ramp is designed to have low impact on marine life and habitat, and on shoreline features and systems, would have little effect on aesthetics, and would not impair the use or enjoyment of the water or beach at adjoining properties or views from those properties.

26. The proposed development would be consistent with the recreational development policies in Section VJ, Policy 1 in that it is being coordinated with the Park District and with adopted park plans; Policy 3 in that it was acquired and is proposed to be incorporated into the public park system; Policy 4 providing a variety of recreational experiences and activities; Policy 5 as it is proposed to be linked with the Winslow Waterfront Trail; and Policy 6 in that it has been designed to minimize adverse impacts on the environment and natural features. Policy 12 includes making adequate provision for prevention of overflow and trespass onto adjacent properties. A condition would be necessary to assure consistency with this policy until rights of entry have been acquired because of the proposed bridge over the creek that could encourage users of the park to cross onto private property to reach the existing trail. Though the findings show that the regrading, overwater viewing structure and new vegetation may in fact reduce the existing views from both surrounding properties and from the site itself which would be inconsistent with Policy 7, it is largely the required vegetation that would have that effect, and that the actual development, e.g., the viewing pier and boat ramp, would increase public views, the proposal is deemed not to be inconsistent with this policy.

27. The proposal is consistent with the applicable policy of Section VI B, Beach Enhancement, that requires that enhancement projects ensure that aquatic habitats, existing water quality levels and flood-holding capacities be maintained.

28. Because the viewing pier will be located within the footprint of the existing earthen pier, it will result in an improvement in navigability, habitat and ecological function consistent with Policy 3 of Section VI F, Piers, Docks, Recreational Floats, and Mooring Buoys. The condition imposed on other approvals for the proposal restricts the height of the structure and directs that railings that minimize view obstruction be used, so the proposed structure should be reasonably compatible with surrounding development.

29. As to the criterion that the proposed use not interfere with the normal public use of the shorelines, the public's ability now enjoyed to reach the water in all locations will be diminished, but would be by any development of the site because of native vegetation zone requirements. Normal public use, meaning to touch and see the water, is retained

and provided in the proposal by the viewing structure, the boat ramp, and the view corridor so the proposal satisfies this criterion.

30. The proposed park and its activities will be reasonably compatible with the residential uses in the area. Though used by residents of the area now, the design should be an aesthetic improvement, except for some view loss that the immediate neighbors would experience, and official status as a park will bring with it maintenance that the record shows is done only by volunteers. A condition is necessary to minimize trespass onto nearby properties.

31. With the conditions proposed, the proposed park will cause no unreasonably adverse effects to the shoreline environment and has the potential to improve habitat and systems in the aquatic environment.

32. The larger public interest would not suffer any substantial detrimental effect but should actually benefit from the improved fish habitat, new park and future trail connection, boat launch, and viewing pier.

33. The proposal is consistent with the applicable provisions of the Comprehensive Plan, the Land Use, Environmental and SMP elements, and with the possibility of including an interpretative feature to explain the historical use of the site, the Cultural element, and with Title 18, the zoning ordinance, as evidenced by the issuance of the site plan review approval.

34. As the findings show that all of the criteria for approval of conditional use are met or can be met with appropriate conditions, the application should be approved.

35. The application is also consistent with the requirements for substantial development permit approval. As discussed above, it is consistent with the applicable provisions of the Shoreline Management Act, 173-14 WAC, and the SMP policies and should be conditioned to assure compliance with all SMP regulations. It has the necessary HPA and should be conditioned to obtain all other required approvals. Because the proposal would have the effect of improving the shoreline environment and resources, it, along with past and future requests for similar actions, would not adversely affect the shoreline environment and resources.

Decision

The appeal of the DNS is denied and the Shoreline Conditional Use and Substantial Development Permits are granted subject to the following conditions:

1. The use, development and activities shall conform to all applicable regulations of Chapter 16.12.
2. The applicant shall obtain an approved building permit from the Department of Planning and Community Development prior to any clearing, grading or construction activities that require a permit under the International Building Code and shall obtain all other required state and federal approvals.

3. The proposed parking area and any future picnic shelters or accessory structures shall be outside of the floodways and behind the native vegetation areas. Specifically, parking shall be at least 100 feet from the OHWM, any new restrooms or accessory structures shall be 75 feet from the OHWM, and picnic areas and related improvements shall be at least 50 feet from the OHWM.
4. Appropriate BMPs shall be used to control the quantity and quality of runoff from the parking area.
5. The overwater structure shall conform to the following design criteria:
 - a. Concrete or steel pile shall be used.
 - b. No creosote-treated material shall be used. Any other treated wood used shall be approved for use in the maritime environment.
 - c. The minimum number of piles shall be used, preferably in a single row, and shall not number more than 24. The span between piles should be at least 20 feet except as necessary on the landward and waterward ends of the structure.
 - d. Decking shall be grated and provide at least 50 percent light penetration to the substrate below.
 - e. The orientation shall be north-south to the greatest extent reasonable.
 - f. The length shall not extend beyond the OHWM of the existing landfill prior to removal during restoration as shown in Exhibit #5.
 - g. The height of the bottom of the structural decking beams shall be at least 1 foot above extreme high water (EHW) and no more than 3 feet above EHW.
 - h. The guardrail on the pier shall be constructed of materials that will minimize view obstruction, such as stainless steel cables.
6. The conditions of the Site Plan and Design Review Decision shall be conditions of approval for this shoreline conditional use permit. (Exhibits 65 and 68).
7. The contractor is required to stop work and immediately notify the Department of Planning and Community Development, the Suquamish Tribe, and the Washington State Office of Archaeology and Historic Preservation if any historical or archaeological artifacts are uncovered during excavation or construction.
8. Work shall be completed in substantial compliance with the site plans and cross section drawings date stamped April 13, 2009 (Exhibit #5), except as modified by the conditions of approval.
9. Washington State Department of Fish & Wildlife Hydraulic Project Approval and Army Corps of Engineers Permit will be required prior to beginning any over water work on this project. Copies of approvals must also be submitted to

the City prior to beginning any work on the site. A copy of all public agency approvals and approved drawings shall be given to all contractors performing work at the site prior to beginning any excavation or construction work.

10. All Hydraulic Project Approval conditions and any Army Corps of Engineers Permit conditions shall become conditions of approval for this conditional use permit.
11. A fence or other means to discourage users of the pedestrian bridge from trespassing on private property shall be installed between the easterly end of the pedestrian bridge over the creek and the property line until the Park District or City obtains right of access over the private property. This is in addition to the signage required by a condition of site plan approval.
12. Construction pursuant to this permit shall not begin and is not authorized until approval of the conditional use permit by the Department of Ecology or 30 days since filing with the Department of Ecology, whichever is first, or until all review proceedings initiated pursuant to RCW 90.58.180 and Chapter 461-08 are terminated, except as provided in RCW 90.58.140(5) (b).

Entered this 29th day of July 2009.

/s/ Margaret Klockars
Margaret Klockars
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. The State Department of Ecology will approve, approve with conditions or deny the conditional use within the 30 days of the date it receives the permit from the City. Appeal of the Department of Ecology's 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 following the decision by the Department of Ecology. [see BIMC 16.12.380].