

NOTICE OF DECISION

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

- Applicants:** Douglas and Linda MacGregor
4132 Point Williams Place
Bow, WA 98332
- Agent:** Waterfront Construction, Inc. (Attn: Peter Zuvela)
205 NE Northlake Way, Suite 230
Seattle, WA 98105
- Request/File No:** Shoreline Substantial Development Permit and Shoreline Variance,
PL 08-0144
- Location:** 4132 Point Williams Place, west side of Samish Island, on the
shore of Samish and Padilla Bay, located within NE1/4 Sec. 28,
T36N, R2E, W.M.
- Shoreline Designation:** Conservancy, landward of Ordinary High Water Mark (OHWM);
Aquatic, waterward of OHWM. The area seaward of extreme low
tide is within Shorelines of Statewide Significance.
- Summary of Proposal:** To build a dock for private boat moorage, associated with a
residence. The structure would be 155 feet long and six feet wide,
consisting of a 95-foot fixed pier, a 52-foot grated ramp, and a 40'
x 8' float. The float will be perpendicular to the fixed portion.
- SEPA Compliance:** Mitigated Determination of Non-Significance (MDNS) issued
November 24, 2011. No appeals.
- Public Hearing:** May 30, 2012. Public testimony pro and con. Planning and
Development Services (PDS) recommended approval.
- Decision/Date:** The Shoreline Substantial Development Permit and Shoreline
Variance are approved. June 22, 2012.
- Reconsideration/Appeal:** A Request for Reconsideration may be filed with PDS within 5
days of this decision. The decision may be appealed to the Board
of County Commissioners by filing an appeal with PDS within 5
days of the date of decision or decision on reconsideration , if
applicable.
- Online Text:** The entire decision can be viewed at:
[www.skagitcounty.net/hearing examiner](http://www.skagitcounty.net/hearing_examiner)

FINDINGS OF FACT

1. Douglas and Linda MacGregor seek to build a dock on the northwest shore of Samish Island.
2. The property is at 4132 Point Williams Place within the NE1/4 Sec.28, T36N, R2E, W.M. The parcel numbers are P47294 and P104066. The applicants own both the uplands and the tidelands at the site. The Examiner conducted a site visit.
3. Under the Skagit County Shoreline Master Program (SMP), the subject property is designated Conservancy landward of the Ordinary High Water Mark (OHWM). Waterward of the OHWM, the environment designation is Aquatic.
4. Below extreme low tide, the shoreline at the site is a Shoreline of Statewide Significance. This is a designation created by the Shoreline Management Act itself. In the management of such shorelines the statute declares that "the interest of all the people shall be paramount." See RCW 90.58.020.
5. The proposal is to build a boat dock to serve a single family residence. The dock would be approximately 155 feet long and six feet wide. It would consist of a fixed portion extending 95 feet from a rock bluff on the shore to a grated ramp. The ramp would then extend another 52 feet from the fixed portion to a float. The float would be 40' x 8' with the long portion parallel to the bank. The float would lie over publicly-owned bedlands.
6. The fixed pier portion of the dock would be located at the top of a near-vertical rock bank. At the structure's landward end, the top of the bank is 15 feet above the OHWM. This would place the pier portion 24 to 25 feet above Mean Lower Low Water (MLLW). The elevated pier would be supported by six 8-inch steel piles.
7. The ramp portion of the structure would extend over a bed of bull kelp which exists waterward of the MLLW line. The ramp would be fully grated. The float would be placed seaward of the kelp bed and would be partially grated. Overall the structure would contain 1,127.3 square feet of surface, of which 364.6 square feet would be grated. The dock was designed and engineered by a firm with a high reputation for this kind of work.
9. The proposed dock would be shared by two parcels, but both are owned by the applicants. The proposal is not for true joint use. The dock would be private, associated with the applicants' residence on the adjacent uplands. Except perhaps during emergencies, public use of the dock is not contemplated.
10. At present pleasure boats are moored in the bay and accessed by small-craft from the shore. The 155 foot distance from the bank selected for the proposed dock is needed to obtain enough water depth for boat moorage at extreme low tide. The length would also allow placement of the float at the outer edge of the kelp bed.

11. The shores of Samish Island are predominantly developed with single family residences and recreational cabins. At present there are no existing docks on the west shore of the island. The proposed dock would be the first.

12. The applicants' home is sensitively sited within an old quarry where it is largely obscured from view from the water by topography and retained mature conifers. Looking out from the property, the view is an extraordinarily beautiful vista of the San Juan Islands and the sea around them. There are no over-the-water structures in the viewscape.

13. The subject property and other waterfront lots in the area are served by road. The dock is not needed for access. Its purpose is purely recreational.

14. Adjacent property owners to the south share the small bay where the dock would be located. These owners have placed their property in a conservation easement which would prevent future shoreline development there.

15. The salt waters at and around the project site are within an area of active recreational and commercial fishing. The area is also actively used for recreational boating and near-shore kayaking.

16. A Preliminary Eelgrass Macro Algae Habitat Survey was conducted by Jan-Jay Diving, Inc., dated August 23, 2007. The survey mapped the extent of the bull kelp in the vicinity of the dock. No eelgrass was encountered.

17. Because of the shoreline location, the applicants submitted a Fish and Wildlife Habitat Site Assessment Addendum for the dock to comply with the County's Critical Areas Ordinance. The report was prepared by Edison Engineering and dated March 24, 2008. The report concluded that the proposed dock would not degrade the environment and that its use would have fewer adverse impacts than the small-boat dragging associated with accessing a mooring buoy. The report did not contain a thorough analysis of the possible impacts of shading, leaving protection of the area waterward of the OHWM to conditions imposed by state and federal agencies, in particular the State Department of Fish and Wildlife.

18. The State Department of Fish and Wildlife issued a Hydraulic Project Approval (HPA) for the project on July 22, 2011, subject to standard conditions. The HPA represents a professional judgment that the project, as conditioned by the permit, will adequately protect aquatic resources. The HPA was not appealed.

19. The County noted that a private, non-commercial recreation dock is an allowed use within a critical area and associated buffers, provided that it have a minimum adverse impact on fish and wildlife and does not significantly degrade water quality. The Staff concluded that the professional assessments performed were sufficient to conclude that the proposed dock will meet the minimum impact standard.

20. The application was reviewed under the State Environmental Policy Act (SEPA). A Mitigated Declaration of Non-Significance (MDNS) was issued by PDS on

November 24, 2011. This action means that no environmental impact statement need be written. The MDNS was not appealed. The conditions of the MDNS are as follows:

- a. Temporary erosion/sedimentation control measures shall be in place prior to the start of work. The applicant shall maintain all temporary erosion/sedimentation control measures in place until completion of the project.
- b. The applicant shall comply with all relevant provision of 14.24 (Skagit County Critical Areas Ordinance).
- c. The subject proposal shall comply with the Skagit County Shoreline Management Master Program (SCC 14.26) and the Shoreline Management Act RCW 90.58.
- d. The applicant shall perform all general construction measures as recommended in the Fish and Wildlife report prepared by Edison Engineering and dated March 24, 2008.
- e. The applicant shall strictly adhere to the project information (site diagram) submitted for this proposal. If the applicant proposes any modification of the subject proposal, he/she shall request at a minimum a permit revision from this office prior to the start of construction.

21. The moorage provided by the new structure is beyond extreme low tide, located over state-owned aquatic lands. The State Department of Natural Resources, which manages public lands, has advised that it does not require a lease for the proposed structure.

22. Appropriate approval has been sought from the U. S. Army Corps of Engineers. Their decision awaits the completion of the local process and issuance of a Coastal Zone Management Act consistency determination. The latter is dependent on compliance with State's shoreline management program.

23. The application was routed to various County Departments. No concerns about the proposal were expressed.

24. The principal local regulatory mechanisms for developments of this kind are the State Shoreline Management Act (SMA) and the local Shoreline Master Program (SMP). The County Staff reviewed the proposal under these authorities.

25. The Staff concluded that the proposal meets some of the policies of the SMP and fails to meet others. See SMP 7.10(1). It does not comply with policies favoring public access and joint-use docks or with the policy preference for mooring buoys in areas without docks. However, on the basis of the professional reviews conducted, the Staff concluded that the project will comply with policies protecting against adverse impacts on water quality, fish, shellfish or wildlife, and against interference with geohydraulic processes.

26. The Staff analysis determined that the proposal does meet the specific SMP regulations for docks. See SMP 7.10(2). Docks are a permitted use within the Conservancy and Aquatic designations, if consistent with the regulations. The Staff determined that the proposal will comply with the specific regulations for the number and setback of docks on private property, that reasonable justification was given for the length of the dock to exceed 50 feet, and that the physical setting provides sufficient reason for a height variance to allow the pier portion at 15 feet above OHWM. The Staff concluded that the dock will not be a hazard to navigation.

27. Shorelines of Statewide Significance are subject to special statutory policies. These were adopted essentially without embellishment in the SMP. Under RCW 90.58.020, master programs for such shorelines

shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline.

28. As to these special policies, the Staff concluded that the dock proposal will not adversely impact the natural systems of Shorelines of Statewide Significance, although some impact on marine resources, fishing opportunities and boating opportunities might occur. The Staff noted that the natural character of the shoreline will be changed by addition of a structure of significant size and that it is unlikely that the dock will result in long term benefit to the people of the state. However, Staff appeared to agree with the applicants that recreational opportunities for the public will not be negatively affected.

29. A variance was sought in order to avoid the SMP requirement that docks shall not exceed three feet in height above the OHWM. See SMP 7.10(2)(B)(5)(b). The Staff concluded that placing the access to the dock at the top of the rock bluff is both practical and convenient. They determined that locating the dock on a nearby beach would require even greater length for the structure, that the physical conditions dictating use of the bluff are not of the applicants' making, and that there is no suitable lower elevation bluff location.

30. The Staff agreed that the raised dock would have a lesser environmental impact than one located at water level. They stated that the chosen site is the lowest bluff-top location in the area, and agreed with applicant that the dock at 15 feet above OHWM will not be a substantial detriment to the public interest.

31. The Staff ultimately concluded that, on balance, the issuance of both a Substantial Development Permit and a Shoreline Variance would not violate the SMP and recommended that the permits be approved, subject to standard conditions.

32. Proper notice was given of both the application and the hearing. The application elicited a significant amount of written public comment. Forty five (45) letters from the public were received in advance of the hearing and an additional 23 were taken into the record at the hearing. Some of these letters were additional or repeated comments from the same people, but nonetheless there was a substantial amount of public input. Sixteen (16) members of the public testified at the hearing. The correspondence and testimony contained strong sentiment both for and against the proposal.

33. The primary arguments favoring the dock were that people ought to be able to use their property as they wish, consistent with the regulations; that the regulations have all been met here; that public access is not required; that the experts consulted have basically answered environmental objections; and that, in a crisis, the dock might be used as an emergency evacuation point from the island for residents.

34. The arguments against the dock focused on its partial placement on Shorelines of Statewide Significance in an area where there has been no shoreline development. It was asserted that the dock will interfere with established fishing and recreational uses; that it will compromise the aesthetics of the site; that the environmental work done was not based on best science; that the dock might not survive severe storms; and that the allowance of a dock could set a precedent which would lead to adverse cumulative effects.

35. The application materials do not propose using the dock for emergency egress from the island, though it is hard to imagine that such a use would be refused in a crisis.

36. Of particular note were communications from commercial fishermen which stated that the dock site is within an area traditionally used by purse seiners and gill netters. They opposed the dock claiming that it would interfere with their fishing operations. There is nothing in the record which explains why these fishermen would be bothered by the dock when they are apparently content to live with a boat at a buoy in a comparable location. Tribal fishing interests did not oppose the dock.

37. Any conclusion herein which may be deemed a finding is hereby adopted as such.

DISCUSSION

Proponents of projects of this sort tend to argue that a person should be allowed to do what he wants to do with his own property. However, the waters of the state are public. They are not private property. Ownership of the underlying beds, whether private or public is irrelevant. The waters are held in trust for all the people. The Shoreline Management Act is an effort to define how development that impinges on public waters can be allowed consistent with the public trust. Thus, the private property rights argument does not apply in this context.

In considering a "shorelines" case, it is important to remember that the term "shorelines" does not refer only to the interface between land and water. Under RCW 90.58.030(2)(d) "shorelines" include "all water areas of the state." The act reaches over the water out to the three-mile limit.

This shorelines case is a close and difficult one. On the one hand, the proposed dock appears to meet all the specific regulations applicable to it. On the other, there are a number of policies, such as those favoring buoys and public access which the project does not meet.

In particular, the policies for Shorelines of Statewide Significance are troublesome. Those policies favor preservation of natural conditions and greater availability of the shorelines for members of the public at large. Clearly, this project does not serve those policies.

However, the encroachment on Shorelines of Statewide Significance here is not large. It includes only that area which is seaward of the line of extreme low tide. See RCW 90.58.030(2)(e)(iii). The reason the dock is so long is to reach all-tides moorage depth -- the usual objective for a salt water dock. Under the circumstances the encroachment of the structure on Shorelines of Statewide Significance could be viewed as incidental.

There are a number of statutorily designated Shoreline of Statewide Significance which include tidelands -- the area between the OHWM and the line of extreme low tide. The location involved in this case is just outside such a statutorily designated tideland area -- Padilla Bay. If both the tidelands and the subtidal area were Shorelines of Statewide Significance here, this would be a different case.

The location of the dock in a Conservancy shoreline environment means that it is in an area where there is little development and the objective of management is sustained resource utilization and the ensuring of recreational benefits to the public. The record does not sustain a finding that the presence of the dock will significantly interfere with existing uses of the water including commercial and recreational fishing and boating. Were the dock located in a Natural environment, it would be expressly prohibited. But, as noted, the Conservancy environment specifically allows docks.

The Aquatic environment also specifically allows docks if the Aquatic area is next to a Conservancy designation. SMP 7.10(2)(A)(6)(a). A reasonable interpretation of the master program is that the allowance of docks below the OHWM adjacent to Conservancy environments can extend throughout the Aquatic designation -- that is beyond extreme low tide into Shorelines of Statewide Significance in appropriate cases.

The policies for Shorelines of Statewide Significance do not prohibit private docks. They set up a hierarchy of preferences. The proposal at hand does not fit within any of these preferences. The one most clearly violated is the preference for preserving "the natural character of the shoreline," However, because a use is not "preferred" does not mean that it is prohibited.

The exercise here is ultimately one of balancing. The core question is whether this incidental intrusion into Shorelines of Statewide Significance, on balance, is likely to do

significant harm to the shoreline values the policies seek to protect. The Examiner after much soul searching is of the view that the answer to this question is no.

The balancing must include a consideration of the central premise of the Shoreline Management Act which is that limited development can go forward consistent with public rights of navigation. The main thing about a dock is that it is inherently a construct in aid of navigation. Further, residential docks are given special recognition in the Act. They do not even require a permit if they are small enough.

There is some opinion in the record which argues that the environmental review for this project could and should have been more rigorous. This is doubtless true. However, the Examiner is not persuaded that more analysis of the possible effects of the dock on aquatic organisms, fish, wildlife, water quality, or littoral drift would have produced a substantially different final result.

It is unarguable that the dock will occupy a viewscape that is now free of man-made intrusions. But, the aesthetic concern is not one that the master program really deals with in any clear and explicit way.

A number of persons suggested that the dock would provide a needed means of escape from the island in cases of emergency. Others testified that placing the dock at the proposed location would be dangerous because it will stand in the path of storms which could destroy it. Overall, this discussion seems a wash to the Examiner. It is unclear whether the dock would practically be available for emergency use during a major storm event.

The final area of concern is the possible precedential effect of this development. There are currently no docks in the area. Some of the adjacent property is locked up by a conservation easement. Other nearby owners expressed no interest in building a dock. The private dock proposed here is a considerable undertaking. The likelihood of a proliferation of private docks on the west shore of Samish Island is, in the Examiner's view, remote.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding. SMP 9.06.
2. Under SMP 9.02, a Shoreline Substantial Development Permit shall be granted only when the proposed development is consistent with:
 - a. Policies and regulations of the Skagit County Shoreline Master Program; and
 - b. Applicable policies enumerated in RCW 90.58.020 in regard to shorelines of the state and shorelines of statewide significance; and
 - c. Regulations adopted by the Department of Ecology pursuant to the Act.

3. The Examiner concludes that the regulations under the SMP, if met, entitle a person to a Shoreline Substantial Development Permit, notwithstanding that the policy statements which precede the regulations may not in every case be carried out. The Examiner holds that the subject proposal, as conditioned, is consistent with the SMP 9.02(a), as so interpreted.

4. The Examiner concludes that the subject proposal is a "reasonable and appropriate" use of the shorelines of the state, consistent with the general policies of RCW 90.58.020.

5. The Examiner determines that the statutory "preferences" set forth in RCW 90.58.020 for Shorelines of Statewide Significance do not preclude the approval of a private dock development which only incidentally occupies such shorelines and which neither displaces traditional uses nor results in significant environmental harm.

6. No regulations of the Department of Ecology have been identified as potentially violated by this proposal.

7. Accordingly, the Examiner rules that the criteria for approval of a Shoreline Substantial Development Permit have been met in this case, subject to the conditions set forth below.

8. The subject development involves elements both landward and waterward of the OHWM. Under these circumstances, the Examiner concludes that the more restrictive Variance standards for "waterward" development apply. These are set forth at SMP 10.03(2) as follows:

- a. That the strict application of the bulk, dimensional or performance standards set forth in the Master Program preclude a reasonable use of the property not otherwise prohibited by this Master Program.
- b. That the hardship described above is specifically related to the property and is the result of unique conditions such as irregular lot shape, size or natural features and the application of this Master Program and not, for example, from deed restrictions or the applicant's own actions.
- c. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment designation.
- d. That the requested variance will not constitute a grant of special privilege not enjoyed by other properties in the area and will be the minimum necessary to afford relief.
- e. That the public rights of navigation and use of the shorelines will not be adversely affected by the granting of the variance.
- f. That the public interest will suffer no substantial detrimental effect.

In the granting of variances, consideration is to be given to the cumulative impact of additional requests for like actions in the area.

9. The Examiner underscores that the variance sought is not for the dock structure per se, but is limited to the height of the structure. The elevation sought for the dock is a reasonable use of the property which would be precluded if the three-foot height limit were applied. The need (hardship) is related to the physical conditions of the property. The high dock as designed will not cause adverse affects on adjacent property or the Conservancy environment. It will not be incompatible with other activities in the area. The height is the minimum necessary for relief based on the physical setting and not a grant of special privilege. Public rights of navigation and other shoreline uses will not be adversely affected. The public interest will not be violated by increasing the elevation of the dock.

10. The Examiner is not persuaded that approval of this elevation variance will establish a precedent for other similar requests in the area. If such a request were made under similar vertical bank conditions, the granting of a height variance would not violate the policies of the Act, or the SMP or produce substantial adverse environmental effects.

11. Accordingly the Examiner concludes that the criteria for a Shoreline Variance have been met in this case, subject to the conditions set forth below.

12. Any finding herein which may be deemed a conclusion is hereby adopted as such.

CONDITIONS

1. The project shall be carried out as described in the application materials, except as the same may be modified by these conditions.

2. The applicants shall obtain all other required permits and approvals, whether local, State or Federal, and shall abide by the conditions of same.

3. The applicant shall comply with all conditions of the Mitigated Determination of Non-Significance (MDNS). See Finding 20 above.

4. The applicants shall comply with all relevant local, State and Federal regulations.

5. The applicants shall submit a copy of this Order in connection with the building permit application for the subject dock

6. The applicants shall perform all general construction measures as recommended in the Fish and Wildlife report prepared by Edison Engineering, dated March 24, 2008.

7. The project shall be commenced within two (2) years from the date of Shoreline Variance approval. The project shall be completed within five (5) years from the date of Shoreline Variance approval.

8. Approval of this application permits use of the dock for moorage of private non-commercial boats only. No approval of float plane use is intended.

9. If the applicants propose any modification of the proposal as approved, they shall contact Planning and Development Services and obtain permission through appropriate processes.

10. No utilities shall be located on the dock.

11. Failure to comply with any permit condition may be grounds for permit revocation.

DECISION

The requested Shoreline Substantial Development Permit and Shoreline Variance are approved, subject to the conditions set forth above.

DONE, this 22nd day of June, 2012.



Wick Dufford, Hearing Examiner

Transmitted applicants and interested parties on June 22, 2012

See Notice of Decision, Page 1, for Reconsideration and Appeal information.

Note: After final County approval of the variance, approval from the Department of Ecology shall be required.