BEFORE THE HEARING EXAMINER
FOR THE CITY OF PORT ORCHARD

In the Matter of the Application of )
) No. SDP 107-11/SDP 108-11/
) SDP 109-11
) 
) City of Port Orchard
) Bay Street Pedestrian Path
) Public Works Department
) 
) For a Shoreline Substantial Development Permit;
) FINDINGS, CONCLUSIONS
) Shoreline Conditional Use Permit; and AND DECISIONS
) Shoreline Variance

SUMMARY OF DECISIONS

The requests for a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, and a Shoreline Variance to construct a multi-use waterfront trail from the Port Orchard Ferry Terminal to Annapolis Ferry Dock, on existing right-of-way and property located at 933/937/1001/1121/1209/1215/1305/1777/1961/2065 Bay Street, in Port Orchard, Washington, are GRANTED. Conditions of approval are necessary to mitigate specific project impacts.

SUMMARY OF RECORD

Request:
Mark Dorsey, on behalf of the City of Port Orchard Public Works Department, requests a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, and a Shoreline Variance to construct a multi-use waterfront trail from the Port Orchard Ferry Terminal to Annapolis Ferry Dock. The subject property is located on existing City right-of-way and property located at 933/937/1001/1121/1209/1215/1305/1777/1961/2065 Bay Street, in Port Orchard, Washington.

Hearing Date:
The Hearing Examiner held an open record hearing on the request on February 1, 2012.

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

Stephanie Andrews, City Planner
Paul Stemen, Stemen Environmental
Bruce Stirling, Applicant Representative

Exhibits:
The following exhibits were admitted into the record:

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1. Application submittal, including the following documents:
   A. Application for Shoreline Substantial Development Permit (SDP 107-11),
      Conditional Use Permit, Shorelines (SDP 108-11), and Variance Shoreline (SDP
      109-11), dated September 23, 2011
   B. Contact Information sheet, dated September 23, 2011
   C. Surrounding Property Owners List and Maps with signed verification statement,
      dated September 8, 2011
   D. List of Parcel Numbers and Legal Descriptions, dated September 23, 2011
   E. Preliminary Storm Drainage Analysis, dated September 23, 2011
   F. Project Narrative, dated September 23, 2011
   G. Statement Addressing Shoreline Master Plan Decision Criteria, dated September
      23, 2011
   H. Environmental (SEPA) Checklist, dated May 25, 2011
   I. Biological Assessment, dated August 26, 2011
   J. Bay Street Pedestrian Path Enhancement Project Drawings, 70% submittal (58
      sheets), dated October 6, 2010, January 7, 2011, January 14, 2011, & January 28,
      2011
   K. Detail Drawings (26 sheets), dated December 27, 2010
   L. Project Completion Report; Bay Street Pedestrian Path Debris Removal, dated
      November 1, 2006
   M. Corridor-Level Environmental Site Assessment, dated May 23, 2011
   N. Cultural Resource Survey, dated May 2011
   O. Letter from the Washington State Department of Archaeology & Historic
      Preservation, dated August 11, 2011
   P. JARPA form with Attachments A & C, dated January 5, 2012

3. Notice of Complete Application, dated October 14, 2011
4. Comment Memo from Greg Rogers, SKFR, Fire Prevention Manager, dated September
   27, 2011
6. Affidavit of Posting: Notice of Application/SEPA Threshold Determination, by Katherine
   Woodside, Code Enforcement Officer, dated October 26, 2011
7. Affidavit of Mailing: Notice of Application/SEPA Threshold Determination to
   surrounding property owners, by Ellen Ferguson, Administrative Assistant/Planning,
   dated October 28, 2011
8. Affidavit of Publication: Notice of Application/SEPA Threshold Determination to Port
   Orchard Independent for Publication 10/28/11, by Ellen Ferguson, Administrative
   Assistant/Planning, dated October 28, 2011
9. Distribution list for SEPA Environmental Review, with distributed documents:
   NOA/SEPA Threshold Determination, Environmental (SEPA) Checklist, and Site Map,
   dated October 28, 2011

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The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

**FINDINGS**

*Application and Notice*

1. Mark Dorsey, on behalf of the City of Port Orchard Public Works Department, requests a Shoreline Substantial Development Permit (SSDP), a Shoreline Conditional Use Permit (SCUP), and a Shoreline Variance to construct a multi-use waterfront trail from the Port
Orchard Ferry Terminal to Annapolis Ferry Dock. The proposed trail would be constructed within City right-of-way (ROW) and property located at 933/037/1001/1121/1209/1215/1305/1777/1961/2065 Bay Street, in Port Orchard, Washington.¹ The proposed trail will generally be located along Bay Street and the developed waterfront within the City. Exhibit 1.A; Exhibit 33, Staff Report, page 1.

2. The City of Port Orchard (City) determined the application was complete on October 14, 2011. Exhibit 3. On October 26, 2011, the City posted notice of the application on the subject property. On October 28, 2011, the City published notice in the Port Orchard Independent and mailed notice to owners of surrounding property in accord with City ordinances. Exhibit 6; Exhibit 7; Exhibit 8. The City extended the comment period on the notice of application and associated SEPA threshold determination until November 21, 2011. Exhibit 15. On January 6, 2012, the City published notice of the open record hearing associated with the application in the Port Orchard Independent, posted notice on the subject property, and mailed notice to surrounding property owners in accord with City ordinances. The City rescheduled the open record hearing from January 19, 2012 to February 1, 2012 due to snow. Stephanie Andrews, City Planner, testified the City contacted parties of record by email and phone to notify them of the postponed hearing date, and posted the postponed hearing date on the City Hall doors. Exhibit 24; Exhibit 25; Exhibit 26; Testimony of Ms. Andrews.

Environmental Review

3. The City acted as lead agency and analyzed the environmental impact of the proposal under the State Environmental Policy Act (SEPA), Ch. 43.21C RCW. The City determined that with 15 conditions, the proposal would not have a probable significant adverse impact on the environment. The City issued a Mitigated Determination of Nonsignificance (MDNS) with 15 conditions on December 19, 2011. The conditions concern work hour restrictions; noise restrictions; ADA ramp installation; structure integrity; measures to avoid and minimize impacts; light penetration; work and staging area delineation; armored shoreline remediation; clean fill; pile replacement best management practices; Washington Department of Fish and Wildlife approval; Hydraulic Permit Approval work timing restrictions; City building permit; and state and federal permit approval. Stephanie Andrews, City Planner, testified that the MDNS was not appealed. Exhibit 22; Testimony of Ms. Andrews.

¹ Parcels affected by the proposed trail alignment are identified by Tax Assessor Parcel Nos. R251509060300; R252232544300; R261509389300; R251746254300; R251503580300; R261503663300; R261509371300; R261509116300; R251161447300; R261509280300; R261509298300; R251161454400; R261503739300; R261503739300; R251746247300; R251967330300; R251967330400; and R252311884300. A legal description is included within the application. Exhibit 1.D.

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Comprehensive Plan, Regional Plans, and Zoning

4. The City Comprehensive Plan (Comprehensive Plan) (December 2008, and as amended 2009, 2010, and 2011) states goals for the City within the 20-year planning horizon include provision of trails, walking/bicycle recreation paths along major residential streets, and a safe waterfront walking area along Sinclair Inlet as part of the Mosquito Fleet Trail. City Comprehensive Plan, Chapter 4: Parks, page 4-8. Comprehensive Plan Transportation Policy T-40 promotes completion of the Mosquito Fleet Trail and pedestrian path components along Beach Drive. City Comprehensive Plan, Chapter 8: Transportation, page 8-15. In addition, Comprehensive Plan objectives, goals and policies relevant to the proposal call for increased public access to the marine shoreline; a coordinated and connected open space system; development and maintenance of recreational facilities in established areas of the City; athletic endeavors and organized sports throughout the City; waterfront preservation and protection to enhance public use; maximized marine shoreline access; a mixture of active and passive open space with residential and commercial developments; open space acquisition and maintenance; existing park facility enhancement and expansion; environmentally sensitive open space preservation and enhancement; diverse shoreline uses; varied water and shoreline related public recreational opportunities; and increased public awareness of historical, cultural, and environmental influences of City shorelines.\(^2\) City Comprehensive Plan, Chapter 4: Parks, pages 4-8 – 4-13; Chapter 9: Shorelines, pages 9-2 – 9-3.

5. The portion of the multi-use trail within the City would a part of the Mosquito Fleet Trail (MFT). The MFT is a part of multiple regional trail planning efforts, including the Port Orchard Urban Waterfront Walkway Plan (1985), the Kitsap County Greenways Plan (1996), Mosquito Fleet Trail Master Plan (2001), Mosquito Fleet Trail Map (2004), Kitsap County Bicycle Facilities Plan (2001), City Comprehensive Plan, and Comprehensive Parks Plan (2008, as amended). The City staff report states the idea for the MFT came from the Kitsap County Greenways Plan, which identifies and links transportation, recreation, natural and scenic resources. The MFT Master Plan further defines the MFT project, identifies the MFT as part of the Kitsap County Bicycle Facilities Plan and the Kitsap County Open Space Plan, and identifies ten project areas between Kingston and Southworth for development of a multi-use trail skirting the eastern County shoreline and Bainbridge Island between historic Mosquito Fleet\(^3\) docks.

\(^2\) City staff identified the following Comprehensive Plan goals and policies as relevant to the proposal: Chapter 4: Land Use, Section 4.8, Objectives 1-3, Goals 1, 2, 5, 7 – 11, and Policies POP-1 – POP-12 and POP22-POP-43; and Chapter 9: Shorelines, Section 9.3, Goals 1, 3, and 4, and Policies SH-1 and SH-5 – SH-9. Exhibit 33, Staff Report, pages 4 – 8.

\(^3\) The “Mosquito Fleet” was a system of individually owned and operated vessels of varied size, including small steamers that provided a somewhat regular means of transport between County waterfront communities until the mid-1900s when roads and bridges were built to link communities. According to the City staff report, the most efficient and effective means of travel when settlement began in the Puget Sound region was by boat. The staff

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6. The proposed project would be constructed within City ROW and property located within the City’s Residential (R8), Commercial Retail and Office, and Mixed Use zoning districts. Exhibit 1.H. The R8 zoning district provides for a mix of single-family detached and attached housing. *Port Orchard Municipal Code (POMC) 16.13.130(2)(a)*. The purpose of the commercial retail and office (Co) zone is to provide for the broadest mix of retail, service, office, and commercial recreation/cultural uses serving the Port Orchard and surrounding market areas and offering significant employment opportunities. *POMC 16.13.150(1)*. The Mixed Use zoning district is intended to provide for innovative, pedestrian oriented mixed use site and building developments or physical design proposals that are capable of providing substantial value to the community over conventional zone districting. *POMC 16.13.170(1)(a)*.

Existing Site Conditions

7. The portion of Bay Street along which the proposed trail would be constructed runs roughly parallel to the Sinclair Inlet shoreline, from a point east of the Sidney Avenue/Bay Street intersection to a point east of the Retisol Road/Bay Street intersection. Preliminary site plans divide the proposed trail into the following sections for ease of illustration: Marina Boardwalk; Waterfront Park; Rockwell; Bay Ford; Blackjack/Westbay; Westbay/Beach; Bay St. South; Bay St. North; Bay St. Corner; Bay St/Tracy; and Bay St/Retsil. Exhibit 1.J; Exhibit 1.K.

8. A boardwalk is currently located in the proposed Marina Boardwalk trail section. The trail would continue east from the boardwalk, traverse Waterfront Park, continue up a slope to join the Bay Street right-of-way (ROW), then descend north toward the shoreline within newly-acquired ROW associated with the Comfort Inn or existing ROW associated with Rockwell Avenue. The trail would follow the shoreline around the Comfort Inn, Coyle Business Center, and Bay Ford properties. The trail would cross a bridge approximately 125 feet in length over the mouth of Blackjack Creek to Etta Turner Park. A 100-foot long portion of the bridge would be placed overwater. From the Park, the proposed trail would continue along the shoreline at Westbay Shopping Center, through the Bay Street ROW adjacent to the shoreline, terminating with the east end of the trail at Annapolis Ferry Dock. Exhibit 1.J; Exhibit 1.K; Exhibit 33, Staff Report, page 2.

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The report states the small foot ferries operating between the Puget Sound Naval Shipyards, Port Orchard, and Annapolis are the last remaining remnants of the Mosquito Fleet. *Exhibit 33, Staff Report, page 3.*

*Trail in Waterfront Park is authorized by an agreement with the Port of Bremerton. Exhibit 33, Staff Report, page 2.*

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9. Paul Stemen, Stemen Environmental, testified that the Bay Ford property and other property along the Maple Street right-of-way contain a degree of environmental contamination that is currently being cleaned up under the terms of the state Department of Ecology (DOE) Voluntary Cleanup Program. Mr. Stemen testified that a proposed condition of approval would provide for coordination between the clean up and placement of bridge pilings associated with the proposed trail. He urged inclusion of that condition to ensure coordination. *Testimony of Mr. Stemen.*

10. Bruce Stirling, Geo Engineers, testified for the Applicant that he prepared a Biological Assessment (BA) to evaluate impacts on species protected under the federal Endangered Species Act (ESA), and that the National Marine Fisheries Service (NMFS) and U.S. Fish & Wildlife Service (USFWS) concurred with the BA’s assessment that the proposed project would not likely adversely affect endangered species. Mr. Stirling testified that the BA focused on impacts to bull trout and Chinook salmon, and noise impacts on orcas. *Testimony of Mr. Stirling.*

11. Ms. Andrews testified as a professional planner that, as proposed, the trail project would be “self-mitigating”. The proposal includes a reduced number of piles over existing piles and would result in removal and remediation of some existing piles. *Exhibit 33, Staff Report, page 11; Testimony of Ms. Andrews.*

12. A December 27, 2011 letter from the NMFS summarizing ESA consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) consultation for the proposed project concurred that overwater shading impacts of the proposal on the Sinclair Inlet nearshore area “may affect, but are not likely to adversely affect” Chinook salmon and steelhead, and Chinook salmon critical habitat. The letter also states the proposal would have no adverse effect on EFH. *Exhibit 34.*

13. Detailed drawings of the proposed trail depict an area of wooden deck replacement extending between the Marina Boardwalk and Waterfront Park sections of trail. In the Bay Ford section, a section of trail would extend to the vicinity of the ordinary high water line (OHWL). The trail would travel over the Blackjack Creek Bridge in the Blackjack/Westbay section, and would be cantilevered over the OHWL in an area extending between the Westbay/Beach, Bay St. South, and Bay St. North sections. The cantilevered section would provide for access near tidal areas without placing pilings in the water. Three proposed pilings would be installed in the Bay St. Corner section. The trail would be attached to an existing beam and deadend in the Bay St./Tracy section and would also be supported by eight pilings and a deck. Project work would include deck repair, including placement of new pilings. Ms. Andrews testified that there has been no groundbreaking yet for the proposed project, but grant applications are underway.

According to the Applicant’s project narrative, the proposal would require approximately...
7,650 square feet of new overwater structures, including the bridge over Blackjack Creek, and cantilevered and pile-supported trail areas. Approximately 4,200 square feet of existing deck and boardwalk surface would be repaired or replaced. Exhibit 1.F; Exhibit 1.K; Testimony of Ms. Andrews.

14. New piles would be installed below the Ordinary High Water Mark (OHWM)/Mean Higher High Water (MHHW)\(^5\) level to accommodate necessary trail support; to improve and replace support for existing overwater structures; and to relocate an existing deck. According to the project narrative, piling removal and installation of new piling is necessary to renovate an existing deck that would support the trail in one area, and to provide additional trail support in two other areas. The area of proposed deck to be renovated includes approximately 21 existing wood and concrete piles ranging from 8 to 15 inches in diameter that would be removed. The project narrative describes the deck renovation area as located at trail station 62+40 to 63+00. The piles would be replaced with 10-inch diameter steel piles and a more efficient support structure, resulting in fewer piles compared to existing conditions. The Applicant anticipates that up to five replacement piles would be needed. Approximately eight new piles would be placed below the OHWM/MHHW for trail support. The work below the OHWM/MHHW would occur at trail station 63+10 to 64+70. Three piles would be added for trail support between two residences at trail station 54+70 to 55+10. An existing deck could also be relocated, and three timber piles removed and replaced by two steel piles. Overall, the proposal would require placement of approximately 16 – 18 new 10-inch diameter steel piles, with an anticipated footprint of 8.8 square feet, and removal of approximately 21 - 24 existing wood and concrete piles, with a current footprint of 13.8 square feet, below the OHWM/MHHW. Exhibit 1.F; Exhibit 1.K; Exhibit 33, Staff Report, page 14.

15. According to detailed plans, the proposed Blackjack Creek pedestrian bridge would be a single-span structure with footings in upland locations. Bridge construction would not place any footings or other structures below OHWM/MHHW. The bridge deck would use

\(^5\) According to the City staff report, the City's shoreline jurisdiction is delineated by the OHWM term and federal jurisdiction is delineated by the MHHW term, so both terms are referenced according to necessity and applicability. Exhibit 33, Staff Report, page 19. POMC 18.02.176 provides:

"Ordinary high water mark" means that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department; provided, that in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water.

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open grating to minimize shading. The Applicant’s project narrative states the bridge foundation would likely consist of four 16-inch diameter steel piles placed in upland locations, with concrete foundations. The foundations would be prepared and the bridge structure first assembled on shore and then placed on completed abutments using a crane. A utility pole and two guy anchors would be relocated and replaced in kind. Bridge deck center grating and side grating would be installed after the bridge structure is secure. *Exhibit 1.F; Exhibit 1.K; Exhibit 33, Staff Report, page 11.*

16. Construction of the proposal would result in replacement of the solid boardwalk over the MHHW/OHWM adjacent to the existing marina with grated deck material for light penetration. *Exhibit 1.K; Exhibit 33, Staff Report, page 11.*

17. The proposed project is a City public works project intended to benefit the public as a whole. The proposed project would result in improved access to the beach area near Westbay Shopping Center. The trail would be used for fish, bird, and wildlife viewing; nature appreciation; walking; bicycling; and jogging. According to the Applicant’s project narrative, the proposed project would also enhance beach access at Rockwell Avenue with an additional four parking stalls and a path connecting the parking area to the beach. The trail would also provide a connection between the two Kitsap Transit Foot Ferry terminals in the City, both of which connect to downtown Bremerton. *Exhibit 1.G; Exhibit 33, Staff Report, pages 10 and 15.*

*Shoreline Management Act and Regulations*

18. The primary goal of the SMA is to protect the public interest in the State’s shorelines through a coordinated development process. The SMA contemplates protecting against adverse effects to the public health, the land, the vegetation, the wildlife, and the waters, and preserving the public’s opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Permitted uses in the shorelines must be designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water. *Revised Code of Washington (RCW) 90.58.020.*

19. The Port Orchard Shoreline Master Program (revised April 1994) (POSMP) includes master program element goals for shoreline uses as well as conservation; recreation; public access, circulation; economic development; and historical/cultural goals. *POSMP, pages 5 and 6.* Ms. Andrews testified the proposed trail would be located on property designated a part of the POSMP Aquatic shoreline environment and part of the upland Urban and Downtown Marine shoreline environments. *Testimony of Ms. Andrews.*

20. The purpose of the Aquatic environment is to protect the unique characteristics of this environment by managing use activities to ensure compatibility between upland and aquatic uses. The environment may allow either multiple water-dependent uses or
specific single dominant water-dependent uses in areas of unique conditions. The environment is designed to promote conservation of natural features and resources of the aquatic area that are substantially different in character from those of adjoining uplands and backshores. The Aquatic environment is located waterward of the ordinary high water mark (OHWM). POSMP, Part VI.6, page 31.

21. The Urban shoreline environment is an area of high intensity land use including residential, commercial and industrial development. The purpose of the environment is to ensure optimum use of shorelines that are presently urbanized or planned for urbanization. According to the POSMP, development in Urban areas should be managed so it enhances and maintains the shorelines for a variety of shoreline uses, with priority to water-dependent, water-related, and water-enjoyment uses. POSMP, Part VI.6, page 30.

22. The Downtown Marine environment allows for some over-water development as a conditional use in an effort to revitalize the central business district. This older business district is located on a small section of Sinclair Inlet characterized by steep bluffs to the south and views of the Bremerton Naval Shipyard to the north. Only water-dependent and mixed use developments comprised of predominantly water-oriented uses are permitted in the environment, which is located waterward of the OHWM adjacent to the downtown upland environment. POSMP, Part VI.6, page 31.

23. Sinclair Inlet is designated a shoreline of statewide significance. All development within shorelines of statewide significance must adhere to the following policies:

1. Recognize and protect the statewide 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.

RCW 90.58.020; POSMP, Part VII.7, page 32.

24. The POSMP provides that no substantial development shall be undertaken on the shorelines of the city except those consistent with the policies of the State Shoreline Management Act of 1971 and the POSMP goals, policies and regulations. POSMP, Sec. I.6, page 3. Substantial development permits are issued for activities classified as permitted uses by the POSMP. POSMP, Sec. 4.1, page 18. State law defines “substantial development” as any development of which the total cost or fair market value exceeds $5,718, adjusted for inflation every five years, or any development that

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6 Backshore means the accretion or erosion zone, located landward of the line of ordinary high tide, which is normally wetted only by storm tides. POSMP, Part III.3, page 8.

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materially interferes with the normal public use of the water or shorelines of the state. RCW 90.58.030(3)(e). Water-dependent\(^7\) and water-enjoyment recreation uses are allowed within the Urban shoreline environment, and allowed within the Aquatic and Downtown Marine environments with a SCUP. \textit{POSMP, Sec. 8.1, page 34}. Ms. Andrews testified that a SCUP is required for the portions of the proposed trail that would be located within the Aquatic and Downtown Marine shoreline environments. \textit{Testimony of Ms. Andrews}. Development within the Urban shoreline environment must adhere to a minimum 30-foot wide building setback from the OHWM. \textit{POSMP, Sec. 8.1, page 40}. Ms. Andrews also testified that a shoreline variance is required for the portions of the trail that would extend overwater, past the OHWM. \textit{Testimony of Ms. Andrews}.

25. POSMP use policies and regulations are relevant to the proposal. POSMP Parks and Recreation policies encourage development of public lands for maximum recreational opportunities; incorporation of unique and sensitive areas with good recreation or access potential into the public open space system; development of trails to link shoreline recreational areas; coordination of development projects to satisfy recreational needs; and use of shoreline street ends for access and recreation. Parks and Recreation policies also encourage minimizing adverse impacts on the environment and giving priority developments providing recreational uses and facilitating public access to the shoreline. Subsection 8.12.1 shoreline regulations require adequate provision for water supply, sewage disposal, and garbage collection; adequate provision for screening, buffer strips, fences, signs to prevent park overflow, and other measures necessary to protect value and enjoyment of adjacent property; prohibition on tree cutting; limits on taking of marine life; minimization of signs associated with recreational facilities; prohibit use of all-terrain vehicles; and make adequate provision for vehicle parking. \textit{POSMP, Sec. 8.12, pages 68 – 69}.

\textit{Public, Tribe, and Agency Comment}

26. The City received eight comment letters on the proposed project during the SEPA comment period. \textit{Exhibit 33, Staff Report, page 17}. An email from Linda Fulkerson expressed concern over the cost of the project, traffic impacts, duration of construction, noise impacts, and whether the City had made a final decision to implement the trail. \textit{Exhibit 10}. An email from Stephen Sweeney requested a number of three foot wide openings in proposed Jersey barriers along the road side of the path and openings in proposed railing on the water side of the path to allow access to the beach for property owners. The email proposed a donation of tidelands owned by Mr. Sweeney to the City if the City would construct an ADA accessible beach access ramp on those tidelands.

\(^7\) A “water dependent use” means a use that cannot exist in any other location and is dependent on the water by reason of the intrinsic nature of its operations. A “water enjoyment use” means a use providing passive and active recreation for large numbers of people along shorelines, and ensures the ability to interact with the shoreline. The use must be open to the public with most, if not all, of the shoreline devoted to fostering shoreline/people interaction. Water enjoyment uses include public waterfront parks. \textit{POSMP, Part III.3, pages 15 - 16}.

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Exhibit 11. An email from Marg and Gerry Schiele also expressed concern that proposed Jersey barriers would prevent access to the beach; would reflect sound from vehicle traffic upland into residential areas; and would create negative visual impacts. Exhibit 12. A letter from Richard A. Gross, Attorney for William Quisenberry, co-owner of the Bay Ford property – now used to operate the Bruce Titus Ford dealership - suggested that the portion of the proposed trail crossing the property be built over rip-rap separating land from the beach rather than on land utilized by the dealership for vehicle inventory. Exhibit 16. A letter from Jean Opsfrey and Renee Lou Curtoni expressed concern that proposed pile driving would undermine foundation, bulkhead, and water main integrity serving residences, and that parking and access to buildings on Bay Street would be limited during and after construction. Exhibit 18. An email from Paul Stemen, whose company is cleaning up contamination at the Bay Ford site, expressed concern that the proposed location of footings for the pedestrian bridge extend into an area of high contamination and a treatment well location. Exhibit 19.

27. A letter from Chris Waldbillig, WDFW, expressed concern that mitigation proposed for the project in 2006 may not be appropriate for the project, citing impacts of overwater structure and shading. The letter also expressed concern that federal funding for beach restoration and clean-up not be used to pay for mitigation; that mitigation opportunities at Annapolis Creek identified in preliminary discussions between the City and WDFW be incorporated into project design; and that the City use the existing bridge over Blackjack Creek for the project rather than build a new bridge. Exhibit 20.

28. A letter from Alison O’Sullivan, Suquamish Tribe Biologist, in response to the notice of application and SEPA comment period, requested that the City: delay project start until City Shoreline Master Program updates are adopted; clarify references between the OHWM and MHHW in documents associated with the proposal; clarify whether proposed mitigation is for fill proposed as part of a 2006 project for roadway stabilization and public access; not use federal grant funding specifically targeted for beach restoration and clean up to pay for mitigation to offset proposed project impacts; include a discussion of additional fill areas, vegetation removal, shading impacts, stream crossings, areas with potential and documented forage fish spawning, and any associated proposed mitigation in project materials; use the existing Blackjack Creek pedestrian crossing rather than build a new bridge; and coordinate a Cultural Resource Inadvertent Discovery document and agreement with the Suquamish Tribe. The letter also stated that the proposed project would be within the Pacific Flyway and used by migrating waterfowl. Exhibit 21.

29. A letter from the South Kitsap Fire & Rescue Prevention Office expressed no immediate concerns with the proposal. Exhibit 17.

30. City staff responded in the City staff report that property or easements needed for construction and construction funding for the proposed project have not been secured at
this point, but the City would determine the construction timeline for the project when funding is secured. Traffic would be re-routed through local streets for temporary detours in construction areas. Construction noise would be limited in accord with Ch. 9.24 Port Orchard Municipal Code (POMC). Public ADA access would be provided to the beach near the Westbay Shopping Center, and Jersey barriers would be used at locations where the proposed trail would be near the road to protect pedestrian safety. According to city staff, property owners can participate in and comment during the Right-of-Way Permit application process for consideration of private construction activities within public ROW. The City staff report states access to sub-tidal beach areas is unavailable to many upland property owners because owners need to cross the public ROW and traverse a vertical rip-rap barrier before accessing the sub-tidal areas. The staff report also states no documentation was provided or identified that Jersey barriers increase noise from typical daily traffic. Exhibit 33, Staff Report, page 18.

31. City staff also responded that the design of the proposed project would account for ongoing cleanup efforts, and a proposed condition of project approval would coordinate the exact location of footings with contamination cleanup efforts. If tests conducted on test piles before construction show vibration would be problematic for integrity of adjacent structures, additional mitigation measures such as pre-boring the pile position, reducing the hammer drops, reducing the pile load and increasing the number of piles may be required. The access and location of business entrances and parking areas would not be changed by the location of the proposed path. Exhibit 33, Staff Report, pages 18 – 19.

32. According to City staff, the proposed project is vested to the City’s SMP in effect on the date of complete project submittal, with a notice of complete application issued by the City on October 14, 2011. The City’s shoreline jurisdiction is delineated by the OHWM term and federal jurisdiction is delineated by the MHHW term, so both terms are referenced according to necessity and applicability. No fill is proposed waterward of the OHWM. The Applicant would use fill only in upland areas where necessary. No native vegetation removal is proposed. Vegetation along the trail corridor is dominated by ornamental plantings and turf grasses. As noted in the City staff report, proposed conditions of approval include provisions to preserve or replace native vegetation if any native vegetation is encountered during the project. The report states that no impacts to migrating waterfowl were identified. The pedestrian bridge is the sole area where shading impacts of new construction were identified, and impacts would be mitigated through use of bridge grating. According to City staff, the Biological Assessment prepared for the project and proposed conditions of project approval address proposed project impacts and mitigation. There would be no off-site or supplemental mitigation as the project would be self-mitigating. The 2006 mitigation measures applied to earlier planning for the trail system and are not specifically applicable to the proposed project. Exhibit 33, Staff Report, pages 19 – 21.
33. The City staff report states that use of the existing bridge was considered but not identified by the Applicant as its preferred alternative during the trail design process. According to City staff, Blackjack Creek estuary restoration and a change in use and improvements on either side of the Creek is not part of the project proposal. The proposed pedestrian bridge site currently contains historic fill material and riprap- armored shoreline, with a thin buffer of vegetation above the rip rap. The vegetative buffer separates the proposed bridge site from adjacent shopping center development and landscaping within Etta Turner Park. Bay Street crosses Blackjack Creek through a three-lane vehicle bridge south of the proposed pedestrian bridge site. Exhibit 1.1; Exhibit 33, Staff Report, page 22.

34. The Biological Assessment (BA) prepared for the Applicant, dated August 26, 2011, states no groundfish or coastal pelagic species occur in the proposed project action area, and groundfish are not expected to occur in intertidal areas that could be affected or in the estuarine area at the mouth of Blackjack Creek. The BA adds that Chinook and Coho salmon are known to use habitats near the project site, but pink salmon are not present. The BA determined that overall the proposed action would not adversely affect groundfish, coastal pelagic or Pacific salmon EFH, as there would be a net reduction in the number and volume of piles below the MHHW as a result of the proposed project. The BA determined that bridge construction over the mouth of Blackjack Creek would be insignificant due to the size and type of bridge and use of grating on the bridge deck surface that would allow light penetration and reduce the effects of shading. Exhibit 1.1.

Stormwater Management

35. Watercourses extending south from the Sinclair Inlet shoreline are depicted on an environmental map submitted by the City. According to the City staff report, the map has been adopted as part of the City’s Comprehensive Plan. The Applicant’s SEPA Checklist notes that Blackjack Creek flows into Sinclair Inlet near the Bay Street/Bethel Avenue intersection. The proposed project would utilize existing culverts and crossings except for the proposed new Blackjack Creek crossing. The City Public Works Department documents and maintains culverts within the City. Exhibit 1.H; Exhibit 32.

36. The Applicant’s Preliminary Storm Drainage Analysis states the proposed project includes the following improvements: approximately 4,200 square feet of grating to replace the existing solid boardwalk and for bridge decking; approximately 8,500 square feet of pervious asphalt; and approximately 83,500 square feet of impervious surface consisting of concrete or asphalt for the pedestrian/bicycle trail. According to the Analysis, the impervious surface is considered non-Pollution Generating Impervious Surface due to proposed use as a trail. The Applicant’s SEPA checklist states runoff from the trail would sheet flow into Sinclair Inlet or adjacent vegetated areas for infiltration and passive treatment before entering the Inlet. A proposed four-stall parking
area within the Rockwell Avenue ROW would include pervious pavement and would infiltrate all stormwater runoff. *Exhibit 1.E, Exhibit 1.H.*

**Staff Recommendation**

37. Ms. Andrews testified that City staff reviewed the application and determined that the proposal is consistent with the City’s Comprehensive Plan, City Codes, and the POSMP. Ms. Andrews testified that with conditions proposed by City staff, it is her professional opinion that the proposal meets all SSDP, SCUP and shoreline variance criteria. Ms. Andrews testified that City staff recommends approval of the requests with MDNS conditions and seven additional conditions of approval. The seven additional conditions concern the location of the footings for the pedestrian bridge over Blackjack Creek, coordinated with property cleanup efforts; compliance with all City and agency conditions prior to final inspection; WDFW approval before commencing construction activities; obtaining a City building permit for construction; obtaining required state and federal permits; prohibition on use of pentachlorophenol during construction; and preparation of a Cultural Resources Inadvertent Discovery plan before City building permit issue. *Exhibit 33, Staff Report, pages 22 – 24; Testimony of Ms. Andrews.*

**CONCLUSIONS**

**Jurisdiction**

The City of Port Orchard Hearing Examiner is authorized to hold a hearing on the shoreline substantial development permit, shoreline conditional use permit, and shoreline variance applications. Based on the evidence in the record, the Hearing Examiner may grant, modify and grant, or deny the applications. *Port Orchard Municipal Code (POMC) 2.76.080; POMC 2.76.100; POMC 2.76.110; POMC 16.01.021(3).*

**Criteria for Shoreline Substantial Development Permit Review**

**Shoreline Management Act**

The Shoreline Management Act is codified at RCW 90.58.020. Applicable policies of RCW 90.58.020 include those to foster “all reasonable and appropriate uses;” protect against adverse effects to the public health, the land and its vegetation and wildlife; and give priority to single family residences and appurtenant structures in authorizing alternations to the natural condition of the shoreline. Permitted shoreline uses must be designed to “minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public’s use of the water.” *RCW 90.58.020.*

In promulgating the Shoreline Management Act of 1971, the legislature recognized that “ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the state’s shorelines.” *RCW 90.58.020.* The legislature also determined that “unrestricted construction on the privately

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owned or publicly owned shorelines of the state is not in the best public interest.” RCW 90.58.020. Accordingly, the Shoreline Management Act requires local governments to develop a master program to regulate shoreline uses consistent with its guidelines. RCW 90.58.080(1).

**Shoreline Management Act Regulations**

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 sets forth permitting procedures and permit criteria. The Hearing Examiner reviews the application using the following criteria:

1. A substantial development permit shall be granted only when the development proposed is consistent with:
   - a. The policies and procedures of the act;
   - b. The provisions of this regulation; and
   - c. The applicable master program adopted or approved for the area. Provided, that where no master program has been approved for an area, the development shall be reviewed for consistency with the provisions of chapter 173-26 WAC, and to the extent feasible, any draft or approved master program which can be reasonably ascertained as representing the policy of the local government.

2. Local government may attach conditions to the approval of permits as necessary to assure consistency of the project with the act and the local master program.

WAC 173-27-150.

The Hearing Examiner must review the relevant Port Orchard shoreline master program goals and policies to determine whether the proposal complies with the Shoreline Management Act regulations. All development activity in identified shoreline areas must be consistent with the policies of the Shoreline Management Act (RCW 90.58) and the Port Orchard Shoreline Master Program. POSMP, Sec. 5.3, page 25.

**Criteria for Shoreline Conditional Use Permit Review**

Uses which are classified or set forth in the City of Port Orchard Shoreline Master Program (POSMP) as conditional uses may be authorized by the Hearing Examiner provided the applicant can demonstrate all of the following:

- a. The proposed use will not interfere with the normal public use of public shorelines;
- b. The proposed use of the site and the design is compatible with other permitted uses in the area;
- c. The proposed use will cause no significant adverse effects to the shoreline environment; and
- d. The public interest will suffer no substantial detrimental effect.

POSMP, Sec. 4.2, page 19.

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The total or cumulative impacts of the conditional use should also remain consistent with RCW 90.58.020 policies and should not produce significant adverse effects on the shoreline environment. In authorizing a conditional use, special conditions may be attached to the permit to prevent undesirable effects of the proposed use. *POSMP, Sec. 4.2, pages 4 – 5.*

**Criteria for Shoreline Variance Permit Review**

Variance permits for development that will be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.59.030 (2)(b), except those areas designated by the Washington Department of Ecology as marshes, bogs, or swamps under Ch. 173-22 WAC, may be authorized by the Hearing Examiner provided the applicant can demonstrate the following:

a. The strict application of the bulk, dimensional or performance standards would substantially preclude and interfere with the reasonable use of the property not otherwise prohibited by the Shoreline Master Program;

b. That the hardship is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size or other natural features and the application of the Shoreline Master Program, and not, for example, from deed restrictions or the applicant’s own action;

c. That the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment;

d. The variance will not constitute a special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief; and

e. The public interest will suffer no substantial detrimental effect.

Variance permits for development that will be located waterward of the ordinary high water mark (OHWM), as defined in RCW 90.59.030 (2)(b), or within those areas designated by the Washington Department of Ecology as marshes, bogs, or swamps under Ch. 173-22 WAC, may be authorized by the Hearing Examiner provided the applicant can demonstrate all of the following:

a. The strict application of the bulk, dimensional or performance standards would substantially preclude and interfere with the reasonable use of the property not otherwise prohibited by the Shoreline Master Program;

b. That the proposal is consistent with (b) – (e) of the previous subsection for development landward of the OHWM; and

c. That the public rights of navigation and use of the shorelines will not be adversely affected.

Consideration is given to the cumulative impact of additional similar requests within an area. *POSMP, Sec. 4.2, pages 19 – 20.*

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The criteria for review adopted by the Port Orchard City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations considering the type of land use, the level of development, infrastructure, and the characteristics of development. RCW 36.70B.040.

Conclusions

1. **The proposed trail meets the criteria to obtain a Shoreline Substantial Development Permit.**
   a. **With conditions, the proposed project is consistent with state Shoreline Management Act policies and procedures.** A pedestrian/bicycle trail to provide public access to and views of the shoreline and wildlife is a reasonable and appropriate use of the shoreline. Ongoing cleanup of contamination at the Bay Ford property under the supervision of the state Department of Ecology would protect against adverse public health effects. A proposed ADA accessible ramp to the beach would be installed in the vicinity of the Westbay Shopping Center. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The federal National Marine Fisheries Service (NMFS) concurs with the Applicant’s assessment that the proposal may affect, but would not likely adversely affect species listed under the Endangered Species Act (ESA) or adversely affect Essential Fish Habitat (EFH). There is very limited native vegetation present in proposed trail areas. MDNS conditions require consideration of additional mitigation measures if test pile vibration magnitudes would threaten existing structures and minimized impacts through use of BMPs and deck grating. Overall, old wood and concrete pilings would be replaced with fewer steel pilings and solid decking would be replaced with grated decking, reducing environmental impacts from current conditions. New Blackjack Creek Bridge pilings would be located above the OHWM/MHHW. The proposed project would utilize existing culverts and crossings except for the proposed new Blackjack Creek crossing. Conditions of approval are necessary to ensure that the Applicant receives WDFW Hydraulic Project Approval prior to the start of construction and addresses preservation and replacement of any native vegetation encountered during construction. *Findings 1, 7 – 18, 26, 28, 30 – 35, 37.*

   b. **With conditions, the proposed project is consistent with Chapter 173-27, Washington Administrative Code regulations.** The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 sets forth procedures and guidelines for local adoption of shoreline master programs that are not applicable to the Applicant’s permit request. Chapter 173-27 sets forth permitting procedures and permit criteria. This proposal is being reviewed under the criteria set forth in WAC.
173-27-150. These criteria are intended to implement the policies of the SMA, which requires that all shoreline projects be consistent with the SMA and an approved local Shoreline Master Program. The proposal would be constructed primarily within City ROW. According to City staff, additional property or easements needed for construction and construction funding for the proposed project have not yet been secured. The proposal is consistent with the City SMP, as described in more detail below. Conditions are necessary to ensure that the Applicant obtains all required local, state, and federal permits associated with the proposed development; complies with BMPs listed within the Biological Assessment; remediates any impact to armored shoreline; and delays construction until receipt of WDFW Hydraulic Project Approval. Findings 1, 3, 7 – 10, 13 – 25, 30, 32, 34, 37.

c. With conditions, the proposed project is consistent with the Port Orchard Shoreline Master Program and Port Orchard Shoreline Management Regulations. The proposed trail would provide public recreation access to the Sinclair Inlet shoreline, consistent with POSMP Parks and Recreation policies. A proposed vehicle parking lot would be constructed within City ROW of pervious pavement, consistent with POSMP regulations. Proposed project work would occur within the City’s shoreline jurisdiction, with the majority of work occurring in City ROW. Water-dependent and water-enjoyment uses are allowed within the Urban shoreline environment and within the Aquatic and Downtown Marine environments with a Shoreline Conditional Use Permit (SCUP). The Applicant has filed a related request for a SCUP to authorize the project. Conditions of approval are necessary to ensure the Applicant does not pentachlorophenol during construction; obtains all required local, state, and federal permits associated with the proposed development; complies with BMPs listed within the Biological Assessment; remediates any impact to armored shoreline; and delays construction until receipt of WDFW Hydraulic Project Approval. Findings 1, 18 – 25, 36, 37.

2. The portions of the proposed trail within the Aquatic and Downtown Marine shoreline designations meet the criteria for granting a Shoreline Conditional Use Permit (SCUP).

a. The proposed use would not interfere with the normal public use of public shorelines. The proposed use would occur primarily within City ROW. A pedestrian bridge would be constructed over Blackjack Creek. ADA accessible access to the beach would be provided near the Westbay Shopping Center. Jersey barriers would be constructed in City ROW to protect pedestrians and bicyclists from vehicle traffic on adjacent roads. Some private property owners must currently cross City ROW and vertical rip-rap to access the beach. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The access and location of business entrances and parking areas would not be changed by the

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location of the proposed path. According to City staff, additional property or easements needed for construction and construction funding for the proposed project have not yet been secured. *Findings 1, 7, 8, 13 – 17, 26 – 31, 37.*

b. **With conditions, the proposed use of the site and the design is compatible with other permitted uses in the area.** The proposed use would be constructed within City ROW. The proposed project would utilize existing culverts and crossings except for the proposed new Blackjack Creek crossing. Use of the existing Blackjack Creek bridge was considered but not identified as the Applicant’s preferred alternative during the trail design process. The cantilevered section would provide for access near tidal areas without placing pilings in the water, reducing project impact. New steel piles would be installed below the OHWM/MHHW level to accommodate necessary trail support, and to improve and replace support for existing overwater structures and relocation of an existing deck. The solid boardwalk over the MHHW/OHWM adjacent to the existing marina would be replaced with grated deck material for light penetration. Jersey barriers would be constructed in City ROW to protect pedestrians and bicyclists from vehicle traffic on adjacent roads. Some private property owners must currently cross City ROW and vertical rip-rap to access the beach. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The access and location of business entrances and parking areas would not be changed by the location of the proposed path. According to City staff, additional property or easements needed for construction and construction funding for the proposed project have not yet been secured. Conditions of approval are necessary to ensure coordination of ongoing environmental cleanup with proposed project design and construction. *Findings 1, 3, 7 – 10, 13 – 17, 26 – 31, 35, 37.*

c. **With conditions, the proposed use would cause no significant adverse effects to the shoreline environment.** The City acted as lead agency and determined that with 15 conditions, the proposal would not have a probable significant adverse impact on the environment. The conditions concern limits on work hours; noise restrictions; installation of ADA ramps; integrity of adjacent structures; measures to avoid and minimize impacts; light penetration; clear delineation of work and staging areas; remediation of disturbances to armored shoreline; provision of clean fill consistent with parent materials; best management practices for pile replacement; Washington Department of Fish and Wildlife approval; Hydraulic Permit Approval work timing restrictions; City building permit; and state and federal permit approval. The City issued an MDNS; the MDNS was not appealed. Construction of the proposed project result in reduced environmental impacts as compared to current conditions, through replacement of wood pilings with steel pilings, reduction in the number of pilings in the shoreline area, and replacement of solid deck with grated deck for light
penetration. The federal NMFS determined the proposal may affect but would not likely adversely affect federally-listed species or EFH. Stormwater impacts of a proposed parking lot would be minimized through use of pervious pavement. Conditions of approval are necessary to ensure that the Applicant coordinates pedestrian bridge footings with property cleanup efforts; complies with all City and agency conditions prior to final inspection; obtains WDFW approval before commencing construction activities; obtains a City building permit for construction; obtains required state and federal permits; complies with a prohibition on use of pentachlorophenol during construction; and prepares a Cultural Resources Inadvertent Discovery plan before City building permit issue. Findings 1, 3, 7, 8, 10 – 16, 27, 28, 32, 34, 36, 37.

d. The public interest will suffer no substantial detrimental effect. The City provided adequate notice and opportunity to comment on the proposal. The proposal is consistent with the City Comprehensive Plan and other planning efforts for the Mosquito Fleet Trail. The City acted as lead agency and determined that with 15 conditions, the proposal would not have a probable significant adverse impact on the environment. The MDNS was not appealed. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The proposed project would provide public benefit, with improved access to the beach area near Westbay Shopping Center. The trail would be used for fish, bird, and wildlife viewing; nature appreciation; walking; bicycling; and jogging. The trail would also provide a connection between the two Kitsap Transit Foot Ferry terminals in the City, both of which connect to downtown Bremerton. Findings 1, 2, 4, 5, 13 – 17, 26 – 32, 37.

3. The portions of the proposed trail that would be constructed within 30 feet of the OHWM, including portions of the trail that would extend overwater, meet the criteria for granting a Shoreline Variance Permit.

a. The strict application of the bulk, dimensional or performance standards would substantially preclude and interfere with the reasonable use of the property not otherwise prohibited by the Shoreline Master Program. Strict application of the 30-foot wide building setback from the OHWM would prohibit construction of portions of the proposed trail. Cantilevered sections of trail would provide for public access near tidal areas without placing pilings in the water. As a result, proposed trail construction would incorporate fewer pilings than currently exist in the shoreline area. Proposed trail construction would replace existing solid deck with grated deck, also lessening impacts. Another section of trail would provide ADA access to the beach. Water-dependent and water-enjoyment uses are allowed within the Urban shoreline environment, and are allowed within the Downtown Marine and Aquatic

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environment with an SCUP. A pedestrian/bicycle trail to provide public access to and views of the shoreline and wildlife is a reasonable and appropriate use of the shoreline. The proposed trail would be a City Public Works Department project and would occur within City ROW. *Findings 1, 7, 8, 11, 13 – 18, 20 – 22, 24.*

b. **The hardship is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size or other natural features and the application of the Shoreline Master Program.** The proposed trail is designed to provide public waterfront access, and thus must be located on the waterfront. The property subject to the variance application is located on the waterfront, adjacent to the Sinclair Inlet shoreline. Application of the 30-foot wide building setback otherwise required within the Urban shoreline environment would prohibit construction of portions of the proposed trail. *Findings 1, 7, 8, 13 – 17, 24.*

c. **With conditions, the design of the project is compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment.** The proposed use would be constructed within City ROW. The proposed project would utilize existing culverts and crossings except for the proposed new Blackjack Creek crossing. Use of the existing Blackjack Creek bridge was considered but not identified as the Applicant’s preferred alternative during the trail design process. The cantilevered section would provide for access near tidal areas without placing pilings in the water, reducing project impact. New piles would be installed below the OHWM/MHHW level to accommodate necessary trail support; improve and replace support for existing overwater structures; and relocate an existing deck. The solid boardwalk over the MHHW/OHWM adjacent to the existing marina would be replaced with grated deck material for light penetration. Jersey barriers would be constructed in City ROW to protect pedestrians and bicyclists from vehicle traffic on adjacent roads. Some private property owners must currently cross City ROW and vertical rip-rap to access the beach. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The access and location of business entrances and parking areas would not be changed by the location of the proposed path. The City analyzed the proposal and determined that with 15 conditions, the proposal would not have a probable significant adverse impact on the environment. The City issued an MDNS, and it was not appealed. According to City staff, additional property or easements needed for construction and construction funding for the proposed project have not yet been secured. Conditions of approval are necessary to ensure coordination of ongoing environmental cleanup with proposed project design and construction. *Findings 1, 3, 7 – 10, 13 – 17, 26 – 31, 35, 37.*
d. The variance will not constitute a special privilege not enjoyed by the other properties in the area, and is the minimum necessary to afford relief. The proposed project would be constructed within City ROW, with additional property or easements acquired as necessary. The project would be a City Public Works Department project intended for public benefit. Findings 1, 7, 8, 17, 30.

e. With conditions, the public interest will suffer no substantial detrimental effect. The City provided adequate notice and opportunity to comment on the proposal. The proposal is consistent with the City Comprehensive Plan and other planning efforts for the Mosquito Fleet Trail. The City acted as lead agency and determined that with 15 conditions, the proposal would not have a probable significant adverse impact on the environment. The MDNS was not appealed. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. The proposed project would provide public benefit, with improved access to the beach area near Westbay Shopping Center. The trail would be used for fish, bird, and wildlife viewing; nature appreciation; walking; bicycling; and jogging. The trail would also provide a connection between the two Kitsap Transit Foot Ferry terminals in the City, both of which connect to downtown Bremerton. Conditions of approval are also necessary to ensure that the Applicant coordinates placement of pedestrian bridge footings with property cleanup efforts; complies with all City and agency conditions prior to final inspection; obtains WDFW approval before commencing construction activities; obtains a City building permit for construction; obtains required state and federal permits; does not use pentachlorophenol during construction; and prepares a Cultural Resources Inadvertent Discovery plan before City building permit issuance. Findings 1, 2, 4, 5, 13 – 17, 26 – 32, 37.

f. The public rights of navigation and use of the shorelines will not be adversely affected. The proposed project would primarily be built within City ROW and would not impact navigation. As proposed, the project would provide public beach access near Westbay Shopping Center and Rockwell Avenue. The trail would be used for fish, bird, and wildlife viewing; nature appreciation; and recreational exercise through walking, bicycling, and jogging. The trail would also provide a connection between the two Kitsap Transit Foot Ferry terminals in the City, both of which connect to downtown Bremerton. Some private property owners must currently cross City ROW and vertical rip-rap to access the beach. Further public input on accessibility of beach areas from private property may be available during City Right-of-Way (ROW) permit review processes for construction of the proposed project. Findings 1, 7, 8, 13 – 17, 26, 30.
DECISIONS

Based on the above findings and conclusions, the requests for a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, and a Shoreline Variance to construct a multi-use waterfront trail from the Port Orchard Ferry Terminal to Annapolis Ferry Dock, on City right-of-way and property at 933/937/1001/1121/1209/1215/1305/1777/1961/2065 Bay Street, in Port Orchard, Washington, are GRANTED, subject to the following conditions.¹

1. Construction activities shall be limited to the work hours of 7am to 9pm Mon-Fri and 8am to 9pm Sat-Sun as provided for in the Port Orchard Municipal Code. Additionally, noise provisions as outlined in the Biological Assessment for the project will be met at all times.

2. An ADA ramp shall be installed at the Westbay Center Beach area.

3. Prior to production pile placement in areas close to potentially vulnerable existing residential and/or commercial structures, the engineer may require a pilot pile installation program to be performed to verify ground vibration associated with pile placement given site specific conditions. If test pile vibration magnitudes are found to be likely problematic for existing structural integrity of such adjacent structures, additional mitigation measures may be required to be instituted to reduce the vibration by; pre-boring the pile position, reducing the hammer drop, or reducing the pile load and increasing the number of piles.

4. All BMPs for impact avoidance and minimization measures referenced in the Biological Assessment will be followed at all times (BA pgs 6-7).

5. The bridge deck surface over Blackjack Creek will allow light penetration and will reduce the effects of shading.

6. Prior to implementing work, the “Project Area” must be completely delineated with the appropriate sediment and erosion control measures. In addition, an “Upland Staging Area” for each Phase of the project must also be clearly delineated on-site and appropriate containment measures shall be in place.

7. Where new piles are proposed, all reasonable measures shall be taken to minimize impacts to surrounding substrate.

8. As disturbance to the armored shoreline is anticipated the following actions shall be taken to remediate the shoreline:

   a. Angular rock removed from the action area shall be assessed for size and integrity for reuse in remediation of the shoreline frontage.

¹ This decision includes conditions required to reduce project impacts as well as conditions required to meet City Code standards.

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b. Rogue, or disturbed angular, which has been washed away from the armoring or disturbed by the construction activities shall either be removed from the site completely or reinserted into the armored shore.

c. In the event that solid-waste or foreign material is encountered within the project area, this material shall be removed in its entirety from the site. Corrective actions for the removal must be approved by the City and appropriate agencies prior to the removal process. Disposal of the material shall be within an approved upland site, specific to the nature of the waste.

9. Any new material such as gravels, sand or large angular rock must be clean and received from a respectable source and appropriate for the use within shoreline interfaces. Sands and fines shall be consistent in nature with the surrounding parent materials of the shoreline and intertidal zone.

10. An improvement to the net impacts on the shoreline due to the presence of old pilings is expected with the removal of pilings and replacement with fewer pilings that are less hazardous and more structurally sound. In all, 21 derelict wooden and concrete piles will be replaced with 16-18 steel piles using Best Management Practices as described in the Biological Assessment.

11. Prior to commencing construction activities the applicant shall receive approval from the Department of Fish and Wildlife.

12. All conditions of the Hydraulic Project Approval (HPA), to be issued by the Department of Fish & Wildlife, shall be followed, including, but not limited to; timing restrictions, installation provisions, habitat features, and water quality.

13. Work shall conform to timing restrictions as identified by Fish & Wildlife in the HPA, for the protection of fish and salmonid species.

14. A City of Port Orchard building permit will be required for portions of the construction.

15. If required State or Federal permits are not approved, a City building permit will not be issued for construction.

16. The exact location of the footings for the pedestrian bridge over Blackjack Creek will be coordinated with the cleanup efforts so as not to disturb ongoing treatment efforts.

17. All conditions identified by City Departments and other agencies must be met prior to final inspection.

18. Prior to commencing construction activities the applicant shall receive approval from the Washington State Department of Fish and Wildlife.

19. A City of Port Orchard building permit will be required for the construction.

20. If required State or Federal permits are not approved, a City building permit will not be issued for

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21. The use of pentachlorophenol during construction is generally prohibited.

22. The Cultural Resources Report shall include a Cultural Resources Inadvertent Discovery agreement prior to issuance of any building permit.

23. Any native vegetation encountered during construction shall be preserved or replaced as necessary.

Decided this 14th day of February 2012.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center