

**BEFORE THE HEARINGS EXAMINER  
FOR THE CITY OF LACEY**

In the Matter of the Application of	)	No. 19-309
	)	
<b>Michelle Gusta and Ean Joyner</b>	)	<b>Gusta/Joyner Shoreline Permits</b>
	)	
For a Shoreline Substantial Development	)	
Permit, Shoreline Conditional Use Permit,	)	FINDINGS, CONCLUSIONS,
<u>and Shoreline Variance</u>	)	AND RECOMMENDATION

**SUMMARY OF RECOMMENDATION**

The Hearings Examiner recommends that the Lacey City Council **APPROVE** in part and **DENY** in part the request for shoreline permits, including a shoreline substantial development permit, shoreline conditional use permit, and shoreline variance, to allow for the retention of an installed concrete patio, repaired or replaced bulkhead, and gravel fill, and to allow for the installation of a second dock, on a 3.08-acre property located at 2603 Carpenter Road SE.

Specifically, the Hearings Examiner recommends that the Lacey City Council **APPROVE** the request for a shoreline substantial development permit and shoreline conditional use permit to allow for the retention of a bulkhead—and gravel fill associated with the bulkhead—as well as for ecological restoration activities necessary to address impacts to the vegetation management area within the shoreline environment that occurred previously during unpermitted development. The Hearings Examiner, however, recommends that the Lacey City Council **DENY** the request for shoreline permits that would allow for the retention of a concrete patio built adjacent to the shoreline without benefit of permits, and for installation of a second dock structure on the Hicks Lake shoreline. Conditions are necessary to address specific impacts of the proposal.

**SUMMARY OF RECORD**

Hearing Date:

The Hearings Examiner held an open record hearing on the request on October 18, 2022, utilizing a hybrid approach allowing for participation in person or through remote access technology.

Testimony:

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

Samra Seymour, City Senior Planner  
Michelle Gusta, Applicant  
Alex Callender  
Ean Joyner, Applicant

Attorney Heather Burgess represented the Applicant at the hearing.

*Findings, Conclusions, and Recommendation  
City of Lacey Hearings Examiner  
Gusta/Joyner Shoreline Permits, No. 19-309*

Exhibits:

1. Exhibit List
2. Staff Report
3. Application Materials:
  - a. General Land Use Application, dated December 6, 2019
  - b. Revised Shoreline Permit Application, dated February 16, 2022
  - c. Joint Aquatic Resources Permit Application Form, dated February 15, 2022
  - d. SEPA Environmental Checklist, dated September 19, 2022
  - e. Knotweed Notice from Thurston County Noxious Weed Control, dated August 24, 2018
4. Technical Reports:
  - a. Critical Areas, Shoreland Analysis Report, Land Services Northwest, dated February 23, 2022
  - b. Slope Consultation Report, Quality Geo, PLLC, dated January 19, 2021
  - c. Site Plan, undated
5. Notice Materials:
  - a. Notice of Application
  - b. Notice of Public Hearing
  - c. Certification of Public Notice, dated October 6, 2022
6. Determination of Nonsignificance, dated September 21, 2022
7. Email Comment from Washington State Department of Ecology (DOE) Shoreline Planner Rebecca Rothwell, dated April 1, 2022, with email string
  - a. Site Photograph from Rebecca Rothwell (IMG\_0072.JPG)
  - b. Site Photograph from Rebecca Rothwell (IMG\_0073.JPG)
  - c. Site Photograph from Rebecca Rothwell (IMG\_0074.JPG)
  - d. Site Photograph from Rebecca Rothwell (IMG\_0075.JPG)
  - e. Site Photograph from Rebecca Rothwell (IMG\_0076.JPG)
  - f. Site Photograph from Rebecca Rothwell (IMG\_0077.JPG)
8. Comment from DOE, dated October 5, 2022
9. Aerial Photograph, dated June 23, 2017
10. Additional Exhibits submitted by Applicant on October 17, 2022:
  - a. Alexander Callender Curriculum Vitae
  - b. Luke McCann Biography
  - c. Slope Consultation Report, Quality Geo NW, PLLC, dated October 14, 2022
  - d. Site Photographs
  - e. Comment from Deanna Joyner, dated October 16, 2022
  - f. Additional Site Photographs
  - g. Luke McCann Curriculum Vitae
  - h. Presentation

The Hearings Examiner enters the following findings and conclusions based upon the testimony and admitted exhibits:

*Findings, Conclusions, and Recommendation*  
*City of Lacey Hearings Examiner*  
*Gusta/Joyner Shoreline Permits, No. 19-309*

## **FINDINGS**

### **Background**

1. Ean Joyner and Michelle Gusta (Applicant) previously conducted work on portions of their 3.08-acre property located within 200 feet of the Hicks Lake ordinary high-water mark (OHWM) without first obtaining shoreline permits or exemptions from the City of Lacey (City). Specifically, the Applicant repaired and/or replaced an existing bulkhead, installed a substantial quantity of gravel adjacent to the bulkhead, constructed a 670 square foot cement patio adjacent to the Hicks Lake shoreline, and (potentially) graded and resurfaced areas of an existing pathway providing access to the shoreline area. The City thereafter required the Applicant to prepare a shoreline restoration plan and to apply for various shoreline permits necessary to implement the restoration plan. *Exhibit 2, Staff Report, pages 1, 2, and 4; Exhibit 3; Exhibit 4; Exhibit 9; Exhibit 10.*

### **Application and Notice**

2. The Applicant requests approval of after-the-fact shoreline permits, including a shoreline substantial development permit (SSDP), shoreline conditional use permit (SCUP), and shoreline variance (SVAR), to allow for the retention of the previous development and site work within the shoreline jurisdiction. Specifically, the Applicant requests approval of an SSDP for all elements of the previous development and additionally requests approval of: (1) an SCUP to allow for the previous repairs and/or replacement of the existing bulkhead; (2) an SVAR to allow for the unpermitted placement of gravel fill associated with the bulkhead repairs and/or replacement, in addition to such gravel preventing the spread of invasive knotweed; (3) an SVAR to allow for the retention of the concrete patio structure; and (4) an SCUP for approval of previous grading work to the existing pathway should it be determined that such grading work had actually occurred.<sup>1</sup> In addition to the after-the-fact permit requests described above, the Applicant requests approval of an SSDP, to implement the shoreline restoration plan addressing impacts to the property's shoreline vegetation management area,<sup>2</sup> and requests approval of an SSDP and SVAR, to allow for the construction of a second residential dock providing for access to Hicks Lake from the site. The property is located at 2603 Carpenter Road SE.<sup>3</sup> *Exhibit 2, Staff Report, pages 1, 2, and 4; Exhibit 3; Exhibit 4; Exhibit 9; Exhibit 10.*

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<sup>1</sup> As discussed in further detail later in this recommendation, Applicant Michelle Gusta testified at the hearing that no grading to the existing pathway had occurred and, instead, any alterations to the existing pathway were the result of equipment driving over the pathway to access the shoreline for bulkhead repairs. *Testimony of Ms. Gusta.*

<sup>2</sup> When no designated critical areas are present within the shoreline jurisdiction, a "vegetation management area shall be required to overlay the setback from the OHWM for the primary and most intensive use planned for the site." *City Shoreline Master Program (SMP) 17.40.020.2.* As applicable to the subject property, which is designated as being within the Shoreline Residential environment under the SMP, the shoreline vegetation management area consists of the area between the OHWM and 50 feet landward of the OHWM. *SMP 17.24.015.*

<sup>3</sup> The site is identified by Tax Assessor's Parcel Number 11827124100. *Exhibit 2, Staff Report, page 1.*

3. The City determined that the application was complete on March 13, 2020. On March 26, 2020, the City provided notice of the application by posting notice on-site and publishing notice in *The Olympian*, with a comment deadline of April 7, 2020. The City provided notice of the open record hearing associated with the application by mailing notice to property owners within 300 feet of the site on September 16, 2022; posting notice on-site on September 19, 2022; and publishing notice in *The Olympian* on September 20, 2022. *Exhibit 2, Staff Report, page 4; Exhibit 5.*
4. The City did not receive any comments on the proposal from members of the public in response to its notice materials. The City received comments from the Washington State Department of Ecology (DOE), as quoted below:
  - Application of gravel is not an accepted method for controlling knotweed. Gravel fill in shoreline jurisdiction meets the definition of development. The gravel is within the 50-foot shoreline setback and was not authorized. In order to retain the gravel, the applicants would need a shoreline variance. It is unlikely Ecology could grant a variance for the gravel, as it would not meet the variance criteria in WAC 173-27-170. The gravel needs to be removed from the shoreline setback.
  - The concrete patio is also within the 50-foot shoreline setback and was not authorized. In order to retain the patio, the applicants would need a shoreline variance. It is unlikely Ecology could grant a variance for the patio, as it would not meet the variance criteria in WAC 173-27-170. The patio needs to be removed from the shoreline setback.
  - It appears from looking at the adjacent property to the south that the unauthorized bulkhead may extend waterward of the ordinary high water mark . . . . In order to be eligible for the SDP exemption for maintenance and repair (WAC 173-27-040(2)(b)), the bulkhead would have to meet the precise terms of the exemption, as exemptions are required to be construed narrowly. . . . Because we don't know exactly where the previous bulkhead was or whether it actually needed to be replaced, it is difficult to evaluate this. I recommend that the bulkhead be left in place, as moving it would cause undue disruption to the lake and shoreline that would not offset any potential benefit. However, because the SMP states at 17.45.010.3 that "Additions to or increases in size of existing shoreline stabilization measures shall be considered new structures," the determination of how to address after-the-fact permitting needs to take this into consideration.
  - This parcel already has a dock. It appears that the property has one or more accessory dwelling units in addition to the single-family residence. [City Shoreline Master Program Section] 17.25.010.5 states that "New residential development of two or more dwellings must provide joint use

or community dock facilities, when feasible, rather than allow individual docks for each residence.”

- The 50-foot shoreline setback has been developed with gravel and concrete without permits. Once these developments have been removed, the setback area needs to be restored. The applicants will need to submit a restoration plan that is consistent with Article 4 of the [Shoreline Master Program].

*Exhibit 7.*

#### State Environmental Policy Act

5. The City acted as lead agency and analyzed the environmental impacts of the proposal, as required by the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). The City reviewed the Applicant’s environmental checklist and other information on file and determined that the proposal would not have a probable significant adverse impact on the environment. Accordingly, the City issued a Determination of Nonsignificance (DNS) on September 21, 2022, with a comment and appeal deadline of October 5, 2022. The City received comments on the DNS from DOE, which echoed its earlier comments that the gravel fill placed within the shoreline setback would not meet the criteria for an SVAR and would be required to be removed; the concrete patio would not meet the criteria for an SVAR and would be required to be removed; the proposal does not include water enjoyment structures or uses as defined in WAC 173-26-020(42); the proposed second dock would not be allowed under the City Shoreline Master Program (SMP) 17.25.010.5; and the Applicant would be required to submit a restoration plan consistent with Article 4 of the SMP once all unauthorized development is removed. DOE also provided general comments noting that all grading and filling activity must utilize only clean fill; all removed debris must be disposed of at an approved site; and erosion control measures must be in place prior to any clearing, grading, or construction activity. In addition, DOE provided guidance on construction activities that would require coverage under a Construction Stormwater General Permit. The DNS was not appealed. *Exhibit 2, Staff Report, page 2; Exhibit 3.d; Exhibit 6; Exhibit 8.*

#### Comprehensive Plan and Zoning

6. The City and Thurston County prepared a joint planning document, the “City of Lacey and Lacey Urban Growth Area Comprehensive Plan” (Comprehensive Plan) under the Growth Management Act, to account for long-term growth and planning within the community. The subject property is within the Lakes Planning Area, which includes those neighborhoods significantly influenced by Hicks Lake, Long Lake, Pattison Lake, and Southwick Lake and is characterized as the City’s most environmentally sensitive area. *Comprehensive Plan 7-1.* The primary function of the Lakes Planning Area is residential, with only a very small portion of developed land use allocated to commercial uses. *Comprehensive Plan 7-1.* City staff identified the following Comprehensive Plan goals and policies specific to the Lakes Planning Area as relevant to the proposal:

- Require development to work around environmentally sensitive areas and take advantage of and promote environmental resources as an amenity. [Lakes Planning Area Goal 1, Policy A]
- All development shall be sensitive to protecting environmentally sensitive areas. [Lakes Planning Area Goal 1, Policy B]

*Exhibit 2, Staff Report, page 3.*

7. The portion of the property located within 200 feet of the Hicks Lake OHWM is zoned Shoreline Residential, with the remaining portion of the property zoned Low-Density Residential. Permitted uses, activities, and development within the Shoreline Residential zoning district are governed by the City SMP and “must be compatible with the physical characteristics and identified functions and values of the subject reach in which it is proposed and shall be designed and located accordingly.” *Lacey Municipal Code (LMC) 16.19.020.B*. The proposal’s compliance with applicable provisions of the City SMP is addressed in detail later in this recommendation. *Exhibit 2, Staff Report, page 2.*

#### Existing Site and Critical Areas

8. The subject property is located on a small peninsula extending into Hicks Lake and is currently developed with an approximately 2,400 square foot single-family residence, a detached shop building, two accessory dwelling units, and a mobile home in the upland portion of the property, as well as a 670 square foot concrete patio with retaining wall, rock bulkhead, and dock in the shoreline area of the property.

The property slopes to the north and west, with the lowest point at the shoreline bulkhead, which is located approximately 30 feet below the top of the slope. There is a steep embankment to the water beginning near the single-family residence, which contains a pathway providing access to the shoreline that is partially stabilized from erosion through the earlier installation of an ecology block retaining wall. On-site soils consist of Indianola loamy sand, and vegetation within the nearshore environment consists of western red cedar, Douglas fir, and red alder. On August 24, 2018, Thurston County Noxious Weed Control provided notice to the Applicant that the property contained Japanese knotweed. Since that time, the Applicant has engaged in an invasive removal plan to eradicate the Japanese knotweed, which has required the removal of most of the understory vegetation in the nearshore environment, including other invasive plant species such as English ivy and Himalayan blackberry that previously covered the hillside between the Hicks Lake shoreline and the single-family residence. *Exhibit 2, Staff Report, page 2; Exhibit 3.e; Exhibit 4; Exhibit 9; Exhibit 10.*

9. Land Services Northwest prepared a Critical Areas and Shoreland Analysis Report for the proposal, dated February 23, 2022. The report provided a restoration and enhancement plan to address impacts from the unpermitted work within the 50-foot vegetation management area through the removal of invasive species and planting of native species. The report determined that the restoration and enhancement plan would achieve no net

loss of shoreline functions and would improve the overall landscape by providing increased roughness to slow stormwater and reduce erosion, providing organic input detritus to the nearshore, providing screening for wildlife, screening the built environment for aesthetics, providing shade for water quality and habitat, and providing food for wildlife and structure. *Exhibit 4.a.*

10. Quality Geo NW prepared a slope analysis for the property, dated January 19, 2021, and updated October 14, 2022, which evaluated the existing developed slope face of the property. The report determined that the site is not within an active landslide hazard area and that no excessively prohibitive conditions exist for the current level of slope development. Regarding the unpermitted concrete patio, the report noted that retaining the structure would improve slope conditions by reducing erosion and stabilizing lower soil surfaces and that its removal would necessitate a new form of toe stabilization to prevent erosion. The report also provided recommendations related to the installation of additional retaining wall structures to provide for slope stabilization, vegetation improvements to increase erosional and hydrologic resistance of the slope, and various erosion control measures. *Exhibit 4.b; Exhibit 10.c.*

Shoreline Management Act and City Shoreline Master Program

11. The State Shoreline Management Act (SMA) and the City SMP govern work within 200 feet of the Hick Lakes ordinary high-water line. *SMP 17.15.229; RCW 90.58.030(2)(f).* Any “substantial development” within the shoreline requires approval of an SSDP. Substantial development is any development in which the total cost or fair market value exceeds \$7,047, or any development that materially interferes with the normal public use of the water or shorelines of the state. *RCW 90.58.030(3)(e).* The Applicant’s Joint Aquatic Resources Permit Application (JARPA) form lists the fair market value of the project as above this threshold. The Applicant requests a shoreline exemption for the previous repairs and/or replacement of the existing bulkhead on the property. Although WAC 173-27-040(2)(c) provides an exemption from the requirement for an SSDP for the construction of normal protective bulkheads common to single-family residences, WAC 173-27-040(1)(d) provides, “If any part of a proposed development is not eligible for exemption, then a substantial development permit is required for the entire proposed development project.” Because certain elements of the proposal, including the previously installed concrete patio and the proposed construction of a second dock structure, are not eligible for a shoreline exemption, an SSDP is required for the entire proposal. *Exhibit 2, Staff Report, page 6; Exhibit 3.c; Exhibit 4.a.*
12. 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. *RCW 90.58.020*.

13. Fundamental goals of the City SMP include achieving integration with the state Growth Management Act to provide a long-range community vision for the wise management and use of the City shoreline resources over the long term, providing development standards designed to regulate and protect areas within the shoreline jurisdiction, and ensuring no net loss of ecological functions and restoration of impacts areas to protect and improve the public's long-term interest in shoreline resources. *SMP 17.10.017.4.C*. The SMP designates the project area as within the Shoreline Residential environment. The purpose of the Shoreline Residential environment is to "accommodate residential development and appurtenant structures that are consistent with the SMP, state guidelines and this chapter. An additional purpose is to provide appropriate public access and recreational uses." *SMP 17.20.070. Exhibit 2, Staff Report, page 2; Exhibit 4.a*.

#### *Bulkhead*

14. Because the Applicant is seeking after-the-fact permits for earlier repair work associated with the subject bulkhead, it is difficult to discern the extent of this previous work, and the parties disagree on whether the work included replacement of the existing bulkhead or merely repairs to the existing bulkhead. The City asserts that the work included replacement of portions of the bulkhead based on references to "replacement bulkhead" in the Applicant's shoreline analysis report prepared by Land Services Northwest. In contrast, Applicant Michelle Gusta testified at the hearing that the work to the existing bulkhead included only repairs consisting of adding additional rock to the bulkhead to increase stabilization. Repairs to existing bulkhead structures are exempt from the requirement for a shoreline permit when valued at less than 50 percent of the replacement value whereas the replacement of an existing bulkhead requires an SCUP. *SMP 17.24.020; SMP 17.30.047; SMP 17.51.010. Exhibit 2, Staff Report, pages 6 through 11; Exhibit 4.a; Testimony of Ms. Gusta*.
15. SMP 17.51.010 provides development standards related to bulkheads and, as relevant to the previous bulkhead work, states that bulkheads may not be located waterward of the OHWM. *SMP 17.51.010.6*. As noted above, DOE provided comments stating that the bulkhead appears to extend waterward of the OHWM. Based on this DOE comment and site and aerial photographs showing the previous bulkhead being inundated by water, City staff determined that the "replacement" bulkhead work would not meet development standards under the City's SMP and, therefore, would not meet the criteria for approval of an SSDP and SCUP.

SMP 17.45.010.3.B provides an exception for rebuilding shoreline stabilization structures, such as bulkheads, waterward of an OHWM if a residence was occupied prior to January 1, 1992, and if there are overriding or environmental concerns associated with the site. Under SMP 17.45.010.5, when structural stabilization measures are



demonstrated to be necessary, they must be limited in size to the minimum necessary, must be designed to ensure no net loss of shoreline ecological functions, and shall utilize soft stabilization measures unless demonstrated to be insufficient to protect primary structures. Because the Applicant is seeking after-the-fact permits for the previous bulkhead work, City staff was not provided with the opportunity to analyze the necessary stabilization methods and, therefore, could not determine whether the work meets the standards for rebuilding an existing bulkhead located waterward of the OHWM. As addressed above, DOE has ultimately recommended that the unauthorized bulkhead (whether repaired or replaced) be left as is because moving it would cause an undue disruption to Hicks Lake and its shoreline that would not be offset by any potential benefits. Given these suggestions, City staff recommends that either the existing bulkhead be allowed to remain as-is and that the Applicant be required to provide additional vegetative restoration to offset its impacts or that the Applicant remove the bulkhead and to replace it with soft shoreline stabilization measures. *Exhibit 2, Staff Report, pages 6 through 11; Exhibit 4.a; Exhibit 7; Exhibit 9.*

#### *Gravel Fill*

16. The Applicant previously installed gravel at the top of the bulkhead and within the 50-foot shoreline vegetation management area adjacent to Hicks Lake. City staff determined that this activity required prior authorization because the placement of fill is included in the definition of “development” under SMP 17.15.057 and, further, that an SVAR would be required for this work because the placement of fill is not specifically listed as a permitted use within the Shoreline Residential environment. During further review of the proposal in advance of the open record hearing, staff determined that the previous fill placement would not meet the criteria for an SVAR because it was not necessary for the Applicant to derive a reasonable use of the property. In reaching this determination, City staff relied on information in the Applicant’s submitted materials suggesting that they installed the gravel to prevent ongoing vegetation loss and erosion related to spraying for Japanese knotweed in this area. Such materials failed to explain that the installation of such gravel also served to stabilize the repaired bulkhead. *Exhibit 2, Staff Report, pages 12 and 13; Exhibit 4.a.*

#### *Cement Patio*

17. The Applicant previously installed a 670 square foot cement patio directly adjacent to the bulkhead and within the 50-foot required setback from the shoreline of Hicks Lake for water-related uses. *SMP 17.25.015*. Accordingly, to retain the existing structure, the Applicant must obtain an SVAR.

City staff analyzed the existing unpermitted patio structure and determined that it would not meet the specific criteria for an SVAR, noting:

- Applying the 50-foot shoreline setback would not preclude or significantly interfere with the Applicant’s use of the property. The application materials suggest that the Applicant was merely utilizing extra cement to provide a safe and

comfortable environment for enjoying the shoreline. Although a level cement patio may allow the Applicant to enjoy the shoreline in a particular way, the site's pre-existing topography does not preclude all use of the property or shoreline area, as indicated by the existing dock and path down to the area.

- There are many properties on Hicks Lake with similar steep topographies near the shoreline. Similar properties would not be granted approval for this type of recreational improvement. Allowing this improvement to remain would amount to allowing a non-conforming, after-the-fact structure to justify its own existence.
- The submitted slope analysis indicates that the concrete patio is providing some slope stabilization and erosion control. There are, however, other slope stabilization methods that would result in a substantially smaller footprint with less impervious surface and fewer impacts to the Vegetation Management Area adjacent to the shoreline. The primary use of the patio is as a recreational surface, not as a slope stabilization measure or as a measure designed for the protection and improvement of the ecological functions of the shoreline.
- The application notes that retaining the patio would enhance the owner's use of the property. It does not, however, demonstrate that the lack of such a patio would significantly interfere with the owner's reasonable use of the property. The approval of the variance would be a grant of special privilege not afforded by other property owners on Hicks Lake.

*Exhibit 2, Staff Report, pages 13 and 14.*

18. The shoreline analysis report prepared by Land Services Northwest and submitted with the application evaluated the requirements for an SVAR and determined that the requirements would be met, asserting:<sup>4</sup>
- The Applicant made some mistakes that cannot easily be undone and, in maintaining the public interest, is requesting a variance to retain a shoreline deck that was improperly built in the vegetation management area without required permits. The Applicant did not do this with spite or prejudice but, instead, was merely trying to utilize extra cement that was ordered, and the area was easily prepared for this purpose. The Applicant was trying to provide a safe and comfortable environment for enjoying the shoreline and accessory uses.
  - The Applicant is seeking relief from the 50-foot setback requirement. Site-specific issues including the slope made enjoyment of this area difficult, and the patio does not constitute a significant development because it covers only a small portion of the available nearshore area. The removal of the structure could

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<sup>4</sup> The shoreline analysis report also addressed the criteria for the necessary SCUP that would be required for the retention of work associated with the pedestrian pathway. *Exhibit 4.a.* As addressed in the conclusions, the Hearings Examiner ultimately determines that any impacts from the already completed work would be adequately addressed by a requirement that the Applicant submit and implement a shoreline restoration plan. Accordingly, a discussion of the report's analysis of the SCUP criteria is unnecessary here.

potentially place the Applicant in imminent danger of hazardous erosion, which would effectively interfere with the reasonable use of the property.

- The natural slope of the site is what necessitated the project and maintenance of the structure that was poured in place.
- The design of the project would result in no net loss of shoreline functions consistent with the management policies of the SMA and City SMP. A vegetation management plan has been developed in accordance with the vegetation management guidelines in Chapter 17.41 SMP. As mentioned in the report prepared by Quality Geo dated January 19, 2021, “The patio generally serves to limit storm and wave interactions against the toe of the slope, and additionally offers protection by confining the toe soils, limiting their potential for erosion or destabilization. Overall, the patio is anticipated to improve slope conditions by reducing erosion and stabilizing the lower soil surfaces. As the patio is considered a minor structure with no dwelling unit, and its location being at the toe of a slope, no required slope setback is anticipated.”
- There would not be a grant of special privilege because the Applicant thought it would be allowed, and it is not expected that there are others that have the same lot configuration that required this type of development.
- The Applicant is not requesting anything more than what was inadvertently built for the Applicant’s enjoyment. Now that it is built and determined necessary for slope stability, it is the minimum necessary to maintain the slope.
- The public interest would suffer no substantial detrimental effect because a vegetation enhancement and invasive species plan has been developed and would be implemented upon approval.
- The patio structure would not affect the public rights to navigation.
- The requested variance is not from a use regulation.

*Exhibit 4.a.*

#### *Pathway*

19. Pedestrian paths and trails are generally allowed outright in the Shoreline Residential environment. *SMP 17.15.010; SMP 17.24.010.* City staff determined, however, that the Applicant conducted significant grading on the existing pedestrian pathway to accommodate access for heavy machinery utilized for the unpermitted shoreline work, which caused significant soil disruption and vegetation removal and would have required an SCUP. City staff further determined that the grading activity would not have met the criteria for an SCUP because it was conducted to facilitate prohibited work including the installation of a patio within the 50-foot setback and the placement of gravel fill on the bulkhead. In contrast, Applicant Michelle Gusta testified at the hearing that there was not any significant grading to the existing path and that the soil disruption and compaction was merely the result of machinery traveling over the path to access the shoreline to conduct necessary bulkhead repairs. Although City staff and the Applicant disagree as to whether an SCUP would have been required for the impacts to the existing path from heavy machinery, City staff agrees that the Applicant’s restoration proposal for these

impacts, including replanting the area with native vegetation and use of pervious trail materials, would be consistent with the standards for restoration of the vegetation management area and with SMP goals and policies applicable to the Residential Shoreline environment. City staff also determined that, with conditions, the Applicant's proposed ecological restoration project would meet the criteria for SSDP approval. *Exhibit 2, Staff Report, pages 14 through 18; Testimony of Ms. Gusta.*

#### *Second Dock Structure*

20. As noted above, the subject property is currently developed with a single-family residence, two legally nonconforming accessory dwelling units, a mobile home, and a dock structure. The Applicant seeks to construct a second dock structure for the benefit of the multiple families residing on the property. The development standards for piers and docks under SMP 17.25.010 do not permit multiple dock structures for a single-family property, and multifamily projects are limited to a single joint-use or community dock when feasible. *SMP 17.25.010*. City staff reviewed the proposal for a second dock structure and determined that it would not meet the criteria for a shoreline variance from these standards, noting:
- A second dock would not be required to derive a reasonable use of the property because it already contains an existing dock serving this purpose.
  - There are no unique conditions that would require a second dock to serve the property, and the design would be incompatible with other authorized uses in the area because second docks are not allowed.
  - Allowing a second dock for a single-family residential property would be a significant grant of special privilege because even apartment complexes are allowed only a single dock.

*Exhibit 2, Staff Report, pages 11 and 12; Exhibit 4.a.*

#### Testimony

21. City Senior Planner Samra Seymour testified generally about the work that was previously conducted on the portion of the property within the shoreline jurisdiction, the review process that occurred for the shoreline permit applications, and how certain elements of the proposal would not meet applicable permit criteria. With regard to the work to the existing bulkhead, she noted that City staff determined the work to encompass bulkhead replacement, which would necessitate an SCUP. Ms. Seymour explained that City staff determined that the SCUP criteria could not be met because, due to the after-the-fact nature of the permit request, it could not analyze whether, and to what extent, the replacement bulkhead would be necessary. With regard to the placement of gravel fill, she explained that this activity would have required an SVAR and that City staff determined that the SVAR criteria would not be met. Regarding the pathway, Ms. Seymour stated that, although maintenance to the existing pathway is allowed, the amount of grading performed on the pathway would have required an SCUP and that an SSDP would be required to allow for the restoration of the pathway. She also explained that the construction of a second dock structure would not be allowed under the SMP and

would not meet the criteria for an SVAR. Ms. Seymour stated that the previously installed concrete patio within the 50-foot shoreline setback would not meet the criteria for approval of an SVAR. She noted that the Applicant's proposed restoration plan would need to be updated to address impacts from the removal of any unapproved structures from the vegetation management area, which, for the Shoreline Residential environment, includes the area between the OHWM and 50 feet landward of the OHWM. *Testimony of Ms. Seymour.*

22. Attorney Heather Burgess represented the Applicant at the hearing. She stated that, if the Hearings Examiner determines that the existing patio structure would be required to be removed, the Applicant would submit a revised restoration plan addressing impacts from its removal. *Statements of Attorney Burgess.*
23. Applicant Michelle Gusta testified that the parents of her husband, Applicant Ean Joyner, purchased property adjacent to the subject property in 1982, where Mr. Joyner's mother continues to reside. She noted that she and her husband purchased the subject property in December of 2017, which at the time was inhabitable, and that since that time they have made several improvements including the removal of invasive knotweed as required by Thurston County. Regarding City staff's analysis of the bulkhead work, Ms. Gusta stated that the existing bulkhead was unstable, and that work associated with the existing bulkhead included only adding some additional rocks to restabilize the existing rocks associated with the bulkhead. Regarding the pathway, she stated that no grading had occurred but that there was some soil compaction resulting from heavy machinery traversing the pathway to access the bulkhead for repair work. Ms. Gusta explained that, at the direction of City staff in conjunction with a different development project, the pathway was covered with straw and seeded with grass as a safety measure and to prevent erosion. She presented several recent site photographs showing that the pathway has now been revegetated with grass. The photographs also depict hillside areas, which Ms. Gusta asserted would require additional stabilization measures, but she stressed that such measures are not included as part of the current proposal. She explained that Thurston County notified her about the presence of Japanese knotweed on the property and about the actions taken to remove knotweed as required by the notice. Ms. Gusta stated that she and her husband are prepared to implement the vegetative restoration plan required by the City following a decision on the applications. *Testimony of Ms. Gusta.*
24. Alex Callender, of Land Services Northwest, testified that he prepared the shoreland analysis report submitted with the application materials. He stated that he has visited the site on a number of occasions and explained how the removal of knotweed and other invasive plant species has resulted in the eradication of nearly all understory vegetation on the hillside and has created erosion issues. Mr. Callender also noted that it was apparent to him that no recent grading activity had been performed on the existing pathway as evidenced by the lack of dirt piling at the base of trees along the edge of the pathway. He explained that his initial understanding that the previous work included

replacing the bulkhead was incorrect. Mr. Callender gave a presentation that provided additional details about the existing site conditions and the on-site work, which was admitted into the record as Exhibit 10.h. He explained that the water levels for Hicks Lake is low during the summer months, which can create erosion issues for bulkheads from boat traffic, and is extremely high during winter rainfall conditions, which can cause flooding of some lakeshore structures. Mr. Callender described why it would be appropriate to allow the Applicant to retain the unpermitted patio, consistent with the recommendations provided in his shoreland analysis report, stressing that removing the structure could cause additional erosion issues on the property. He stated that the currently proposed vegetation restoration plan should be sufficient to address impacts from the previous bulkhead work, should it be determined that the bulkhead may be retained as is. *Testimony of Mr. Callender.*

25. Applicant Ean Joyner testified that the gravel fill is a necessary stabilization measure associated with the bulkhead, in addition to addressing knotweed removal. He stressed that requiring removal of the gravel fill would likely result in the spread of knotweed on the property and to any location where the gravel fill would be transported. Mr. Joyner explained that he installed ecology block retaining walls to prevent hillside erosion following approval of emergency shoreline permits and that they are located outside of the 50-foot shoreline setback. *Testimony of Mr. Joyner.*
26. Attorney Burgess provided closing statements, noting the complexity of analyzing permit criteria against work that had already been completed. Regarding the previous bulkhead work, she asserted that the evidence shows that the Applicant conducted only repairs to the existing bulkhead, which would have been an exempt activity and therefore should not require approval of an SCUP or any additional mitigation to be included with the Applicant's shoreline restoration plan. Regarding the placement of gravel fill behind the bulkhead, Attorney Burgess argued that the fill was a stabilization measure associated with the bulkhead repairs and should be considered part of the exempt activity or, in the alternative, should be addressed under the SCUP criteria applicable to bulkhead replacement rather than addressed separately under the SVAR criteria. Regarding the pathway, she asserted that the evidence shows that the Applicant did not grade or add fill to the pathway but, instead, drove heavy machinery on the pathway resulting in soil compaction. Attorney Burgess therefore contended that an SCUP would not have been required for the previous activity and that the Applicant's shoreline restoration plan would address impacts to the pathway from the previous activity. Regarding the previously installed patio, she agreed that an SVAR would be required to allow for it to remain and asserted that its removal would require additional stabilization to the hillside. In light of the current hillside stabilization provided by the unpermitted patio, Attorney Burgess requested that the Applicant be provided sufficient time to develop a plan for its removal should it be determined that it would not meet the SVAR criteria. *Arguments of Attorney Burgess.*

27. In response to Attorney Burgess’s argument, Ms. Seymour acknowledged that disturbance of the shoreline vegetation management area of the property was required by the need to remove invasive plant species and that the hillside area within the shoreline jurisdiction likely requires stabilization measures, but she stated that the City requires proper permitting for this work. She clarified that, should the patio be required to be removed, the City is not requesting that the patio be removed within 30 days but, instead, is requesting that a plan for its removal be submitted within 30 days. Ms. Seymour noted that, even assuming that the Applicant conducted only repairs to the existing bulkhead, there is insufficient information upon which to determine that the repair work was under the cost threshold to qualify for a shoreline exemption and, therefore, would nonetheless require approval of an SCUP. Regarding the placement of gravel fill along the bulkhead, she stated that City staff analyzed the fill primarily as a knotweed control measure based on language in the shoreland analysis report prepared by Land Services Northwest, which would have required approval of an SVAR. Ms. Seymour noted that DOE has final permit authority over the matter. *Testimony of Ms. Seymour.*

#### Staff Recommendation

28. City staff recommends approval of the SSDP request as it pertains to the proposed ecological restoration of the shoreline vegetation management area, with conditions. City staff recommends denial of the SSDP and related shoreline permit requests with respect to the other previous work within the shoreline jurisdiction and the request for a second dock structure, but recommends that either the bulkhead be allowed to remain as-is and that the Applicant be required to provide additional vegetative restoration or that it be required to be removed and replaced with a soft shoreline stabilization method. *Exhibit 2, Staff Report, pages 17 and 18.*

### **CONCLUSIONS**

#### Jurisdiction

The Hearings Examiner has jurisdiction to hear applications for shoreline substantial development permits, shoreline conditional use permits, and shoreline variances and to issue a recommendation to the City Council to grant, grant with conditions, or deny the applications. *LMC 2.30.090.B.3; LMC 2.30.140.*

#### Criteria for Review – Shoreline Substantial Development Permit

##### *Shoreline Management Act*

The Shoreline Management Act is codified at Chapter 90.58 RCW. 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 vegetation and wildlife; and give priority to single-family residences and appurtenant structures in authorizing alternations to the natural condition of the shoreline. Nonetheless, “private property rights are ‘secondary to the SMA’s primary purpose, which is to protect the state shorelines as fully as possible.’” *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (internal quotation marks omitted) (quoting *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998)). 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*. See also *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

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 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 WAC 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 WAC sets forth permitting procedures and permit criteria. The Hearings Examiner reviews the shoreline substantial development permit (SSDP) application under 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 governments 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.*

Thus, the Hearings Examiner must review the SSDP application against the City SMP policies and regulations. Consistent with the requirements under WAC 173-27-150, the City SMP provides that SSDP applications shall be reviewed in accordance with the following criteria:

- A. All regulations of this program appropriate to the shoreline environment designation and the type of use or development proposed shall be met,



except those bulk and dimensional standards that have been modified by approval of a shoreline variance under Section 17.30.020;

- B. All general goals and policies of this program, and goals, policies and standards specific to the appropriate shoreline environment designation and the type of use or development activity proposed shall be considered and substantial compliance demonstrated.

*City SMP, Section 17.30.010.2*

In addition to the above criteria:

Consideration shall be given to the cumulative environmental impact of additional requests for like actions in the shoreline vicinity. For example, if shoreline substantial development permits were granted for other developments in the area where similar circumstances exist, the sum of the permitted actions should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.

*City SMP, Section 17.30.010.3.*

#### Criteria for Review – Shoreline Variance

As noted above, applicable Department of Ecology shoreline regulations are located in Chapter 173-27 WAC. WAC 173-27-170 sets forth permitting procedures and permit criteria for shoreline variances. The Hearings Examiner reviews the application under the following criteria:

- (1) Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.
- (2) Variance permits for development and/or uses that will be located landward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(c), and/or landward of any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following:
  - (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, reasonable use of the property;
  - (b) That the hardship described in (a) of this subsection 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 the master program, and not, for example, from deed restrictions or the applicant's own actions;

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Gusta/Joyner Shoreline Permits, No. 19-309*

- (c) That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;
  - (d) That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
  - (e) That the variance requested is the minimum necessary to afford relief; and
  - (f) That the public interest will suffer no substantial detrimental effect.
- (3) Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM), as defined in RCW 90.58.030 (2)(c), or within any wetland as defined in RCW 90.58.030 (2)(h), may be authorized provided the applicant can demonstrate all of the following:
- (a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property;
  - (b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section; and
  - (c) That the public rights of navigation and use of the shorelines will not be adversely affected.
- (4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment.
- (5) Variances from the use regulations of the master program are prohibited.
- WAC 173-27-170.*

Consistent with the requirements under WAC 173-27-170, the City SMP provides that shoreline variance permit applications shall be reviewed in accordance with the following decision criteria:

1. Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.
2. Variance permits for development and/or uses that will be located landward of the ordinary high water mark (OHWM) and/or landward of any wetland as defined in this Master Program may be authorized provided the applicant can demonstrate all of the following:

- A. That the strict application of the bulk, dimensional or performance standards set forth in Lacey's Master Program precludes or significantly interferes with reasonable use of the property;
  - B. That the hardship described in (A.) of this subsection 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 the master program, and not, for example, from deed restrictions or the applicant's own actions;
  - C. That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the Comprehensive Land Use Plan and Shoreline Master Program and will not cause adverse impacts to the shoreline environment;
  - D. That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area;
  - E. That the variance requested is the minimum necessary to afford relief; and
  - F. That the public interest will suffer no substantial detrimental effect.
3. Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM) or within any wetland as defined in this Master Program may be authorized provided the applicant can demonstrate all of the following:
- A. That the strict application of the bulk, dimensional or performance standards set forth in Lacey's Master Program precludes all reasonable use of the property;
  - B. That the proposal is consistent with the criteria established under Section 17.20.030. 2 A-F; and
  - C. That the public rights of navigation and use of the shorelines will not be adversely affected.
4. In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area, for example, if variances were granted to other developments and/or uses in the area where similar circumstances exist. The total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment.

*SMP 17.30.020.*

#### Criteria for Review – Shoreline Conditional Use Permit

WAC 173-27-160 sets forth permitting procedures and permit criteria for shoreline conditional use permits. The Hearings Examiner reviews the application under the following criteria:

- (1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:

- (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
  - (b) That the proposed use will not interfere with the normal public use of public shorelines;
  - (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
  - (d) That the proposed will cause no significant adverse effects to the shoreline environment in which it is to be located; and
  - (e) That the public interest suffers no substantial detrimental effect.
- (2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not provide substantial adverse effects to the shoreline environment.
- (3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.
- (4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

*WAC 173-27-160.*

Consistent with the requirements under WAC 173-27-160, the City SMP provides that shoreline conditional use permit applications shall be reviewed in accordance with the following decision criteria:

- 1. Uses which are classified or set forth in the City of Lacey's Shoreline Master Program as conditional uses may be authorized provided that the applicant demonstrates all of the following:
  - A. That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
  - B. That the proposed use will not interfere with the normal public use of public shorelines;
  - C. That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the Comprehensive Land Use Plan and Shoreline Master Program;
  - D. That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
  - E. That the public interest suffers no substantial detrimental effect.

2. In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area, for example, if conditional use permits were granted for other developments in the area where similar circumstances exist. The total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

*SMP 17.30.015.*

The criteria for review adopted by the Lacey 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 County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings  
*Bulkhead and Gravel Fill*

1. **With conditions, the previously completed bulkhead work and associated placement of gravel fill along the bulkhead would be consistent with the policies of the Shoreline Management Act (SMA), the SMA shoreline regulations, the City Shoreline Master Program, applicable SMP regulations, and the specific criteria for approval of an SSDP under SMP 17.30.010 and for approval of an SCUP under SMP 17.30.015.** At the outset, the Hearings Examiner notes that the City and Applicant disagree as to whether the previous bulkhead work constituted repairs that would have been exempt from shoreline permitting requirements or, instead, constituted replacement requiring approval of an SCUP. Due to the after-the-fact nature of this permitting process, it is difficult to discern the extent of the previous work that was performed to the existing bulkhead and, ultimately, it is the Applicant's burden to demonstrate that the work qualified for a shoreline exemption. The Applicant cannot meet this burden. Although testimony from Ms. Gusta and site photographs of the bulkhead taken before and after the completed work establishes that the Applicant likely performed repairs to the existing bulkhead consisting of adding additional rock and placing gravel fill behind the bulkhead, as opposed to replacing the bulkhead, the extent of these repair activities cannot be determined on this record. Therefore, even assuming that the bulkhead work included only repairs, the Applicant cannot show that the repairs would be valued at less than 50 percent of the replacement value, as required by the SMP for a shoreline exemption. Accordingly, an SCUP is required.

The City analyzed the environmental impacts of the proposal, determined that it would not have a probable significant adverse impact on the environment, and issued a DNS, which was not appealed. The City provided reasonable notice of the application for after-the-fact permits necessary to allow for the retention of work performed to an existing bulkhead. The City did not receive any comments on the proposal from members of the

public in response to its notice materials. The City received comments from DOE, which, as relevant to these elements of the proposal, stated that the bulkhead appears to extend waterward of the Hicks Lake OHWM but that it should be allowed to remain because moving it would cause an undue disruption without any potential benefit, the placement of gravel fill is not an acceptable method for controlling knotweed and would be required to be removed from the 5-foot shoreline setback because it would not meet the criteria for an SVAR, and the Applicant would be required to submit a restoration plan addressing removal of the gravel fill. Upon review of the testimony provided by Ms. Gusta and Mr. Joyner at the hearing clarifying that placement of the gravel fill was in conjunction with the stabilization measures associated with the bulkhead work, and in consideration of the arguments presented at the hearing by Attorney Burgess, the Hearings Examiner determines that it would be appropriate to review the gravel fill as part of the bulkhead work and therefore would not require review under the criteria for an SVAR. The Hearings Examiner recognizes that DOE will have the final shoreline permit authority over this matter and that it has recommended removal of the gravel fill based on its determination that it would not likely meet the SVAR criteria. The Hearings Examiner notes, however, that DOE made this recommendation without the benefit of this clarifying testimony, as well as testimony concerning how removal of the fill could lead to the spread of knotweed in the nearshore environment. Accordingly, the Hearings Examiner determines that both the bulkhead work and the placement of gravel fill associated with the bulkhead work should be reviewed under the SCUP criteria as part and parcel of the same bulkhead replacement project.

The property is designated as being within the Shoreline Residential environment under the City SMP. Work involving the replacement of bulkhead or repairs to bulkhead valued at 50 percent or more than the replacement value is allowed in the Shoreline Residential environment with an SCUP. The previous bulkhead work and associated placement of gravel fill behind the bulkhead is consistent with the policies of the SMA because these improvements support the continued residential use of the property, which is a reasonable and appropriate use of land within the Shoreline Residential environment, and because requiring removal of the bulkhead would result in undue impacts to the shoreline environment without any offsetting benefits.

The Department of Ecology shoreline regulations are located in Chapters 173-26 and 173-27 of the Washington Administrative Code (WAC). Chapter 173-26 WAC 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 WAC sets forth permitting procedures and permit criteria. The SSDP request is being reviewed under the criteria set forth in WAC 173-27-150 and the request for an SCUP is being reviewed under the criteria set forth in WAC 173-27-160. These criteria are intended to implement the policies of the SMA, which require that all shoreline projects be consistent with an approved local Shoreline Master Program and are reflected by the SSDP criteria under SMP 17.30.010 and SCUP criteria under SMP 17.30.015.

With conditions requiring the Applicant to submit and implement a shoreline restoration plan addressing the project's impacts to the shoreline vegetation management area, the completed bulkhead work and associated fill placement would be consistent with SMP policies and regulations related to shoreline stabilization and restoration. Although the SMP prohibits locating a bulkhead waterward of the OHWM, and evidence presented at the hearing suggests that the bulkhead extends beyond the OHWM, the SMP provides an exception for rebuilding shoreline stabilization structures waterward of an OHWM when there are overriding safety or environmental concerns. Again, although it is difficult to assess the extent of the need for the bulkhead work to protect the property because it has already been performed, the Hearings Examiner determines that the evidence is sufficient to determine that the completed bulkhead work was reasonable and necessary to provide shoreline stabilization and that requiring removal of the bulkhead improvements would cause undue impacts to the shoreline environment. Accordingly, the Hearings Examiner determines that, with conditions, allowing the completed bulkhead work to remain as is would be consistent with the intent of SMP policies and regulations and would be compatible with other authorized uses in the vicinity and in the Shoreline Residential environment. Because the work included only improvements to an existing bulkhead, allowing it to remain in its current state on the residential property would not interfere with the public use of the shoreline. As conditioned to require the submission and implementation of a shoreline restoration plan, the completed bulkhead work and associated placement of gravel fill would not result in any significant adverse effects to the shoreline environment or a substantial detrimental effect to the public interest.

*Findings 1 – 28.*

#### *Pathway*

2. **Even assuming that the Applicant performed grading activity to an existing pathway that would have required SCUP approval and that this activity would not have met the criteria for an SCUP, impacts from the already completed work are adequately addressed by the requirement that the Applicant submit and implement a shoreline restoration plan.** Upon review of the admitted exhibits and testimony provided at the hearing, the Hearings Examiner determines that the disturbance to the existing pedestrian pathway providing access to the shoreline was caused by heavy machinery utilizing the pathway and was not the result of any grading activity. The disturbance to the pathway within the shoreline environment, consisting of soil compaction from the heavy machinery, would be addressed by the Applicant's shoreline restoration plan. Because these impacts would be addressed by the shoreline restoration plan and because the Applicant does not propose any further use of the pathway for this purpose as part of this proposal, review of the already completed activity under the SCUP criteria is essentially an intellectual exercise without any practical implications.

That said, the Hearings Examiner notes that, although pedestrian paths are generally allowed outright in the Residential Shoreline Environment and may be appropriately maintained, the SMP does not appear to contemplate use of *pedestrian* paths as a means for heavy equipment to access the shoreline, and the Hearings Examiner cautions the Applicant to seek guidance from the City prior to utilizing the existing pathway for this purpose in the future. To the extent that an SCUP would have been required for the utilization of the pathway for heavy machinery to access the shoreline to perform the completed developments, it would not have met the SCUP criteria with respect to the installation of the concrete patio because, as discussed below, the installation of the patio was inconsistent with SMP policies and regulations and does not meet the criteria for a SVAR. The use of the pathway by heavy machinery for the bulkhead work would also not meet the SCUP criteria because, based on this record, it cannot be determined that such heavy machinery was necessary and appropriate to complete the bulkhead work consistent with applicable SMP policies and regulations. *Findings 1, 2, 4, 6 – 28.*

#### *Concrete Patio*

3. **The previously installed 670 square foot cement patio within the 50-foot shoreline setback does not meet the criteria for an SVAR.** A variance from the 50-foot shoreline setback requirement is not necessary for the Applicant to derive a reasonable use of the property. Prior to the unpermitted installation of the cement patio, the property already contained a dock structure and pedestrian pathway providing access to the shoreline and dock structure and from the single-family residence. Although the evidence in the record shows that the completed patio structure provides stabilization to the hillside area within the shoreline environment, this benefit is incidental to the primary purpose of the patio to provide an additional amenity for the Applicant's recreational enjoyment of the shoreline and is not the minimum necessary to provide relief from hillside erosion on the site. Accordingly, approving the variance would constitute a grant of special privilege not enjoyed by other properties in the area. Conditions are necessary to ensure that impacts from the removal of the patio are adequately addressed by the Applicant's shoreline restoration plan. *Findings 1, 2, 4, 6 – 28.*

#### *Second Dock*

4. **The proposal to install a second dock structure on the property does not meet the criteria for an SVAR.** Development standards for pier and dock structures under the SMP do not permit multiple dock structures for a single-family property, and multifamily properties are similarly limited to a single dock structure when feasible. A variance from these development standards is not necessary for the Applicant to derive a reasonable use of the property because it already contains a dock structure providing water-dependent recreational opportunities. There are no conditions unique to the property that would justify allowing it to contain a second dock structure, and allowing the Applicant to construct a second dock structure would be inconsistent with other authorized uses in the vicinity and in the Residential Shoreline environment. *Findings 1, 2, 4, 6 – 13, 20 – 28.*



### RECOMMENDATION

The Hearings Examiner recommends that the Lacey City Council **DENY** the request for shoreline permits that would be required to allow for the retention of the concrete patio and for installation of a second dock structure and **APPROVE** the request for a shoreline substantial development permit and shoreline conditional use permit to allow for the retention of the bulkhead and the gravel fill associated with the bulkhead, as well as for ecological restoration activities necessary to address impacts to the vegetation management area in the shoreline environment, subject to the following conditions:

1. The Applicant shall submit a revised Vegetation Management and Shoreline Restoration plan to the City of Lacey within 30 days of the last day of any applicable appeal period, which:
  - Includes provisions for Japanese knotweed management using methods recommended by the Washington State Noxious Weed Control Board.
  - Meets the requirements and standards for shoreline restoration in the Shoreline Master Program and best practices.
  - Includes the removal and restoration of elements within the shoreline jurisdiction not recommended for approval by the Hearings Examiner through the shoreline permit process, including removal of the concrete patio structure.
  - Proposes a reasonable schedule for quickly restoring the property upon plan approval.
  - Establishes a form of financial guarantee ensuring that the restoration will be completed.
2. The Applicant shall cause the restoration plan to be fully implemented in a manner consistent with the plan as approved by the City of Lacey.

**RECOMMENDED** this 8<sup>th</sup> day of December 2022.



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ANDREW M. REEVES  
Hearings Examiner  
Sound Law Center