

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of	)	No. HEA-2012-01*
	)	No. PLN52110 SSDE
<b>Paul D. Jones and Becky Ann</b>	)	
<b>Burke-Jones</b>	)	
	)	
Of a Shoreline Exemption	)	FINDINGS, CONCLUSIONS, AND
<u>Amendment Denial</u>	)	DECISION

**SUMMARY OF DECISION**

This appeal addresses whether the Planning Director of the City of Bainbridge Island (City) erred in denying a request for an amendment to a previously approved emergency shoreline exemption that would allow for the construction of a rock bulkhead with accompanying wingwalls, concrete steps, and a stormwater diffuser as “emergency” protection measures to address the failure of an existing concrete bulkhead on the subject property. Because substantial evidence in the record supports the determination that the proposed emergency construction would not be consistent with the policies of the Shoreline Management Act or the City Shoreline Master Program, the City did not clearly err in denying the emergency shoreline exemption amendment request. Accordingly, the Director’s decision is **AFFIRMED**, and the appeal is **DENIED**.

**SUMMARY OF PROCEEDINGS**

Hearing Date:

The City of Bainbridge Island Hearing Examiner held an open record appeal hearing on June 7, 14, and 24, 2022, using remote access technology. The record was held open until July 8, 2022, to allow the parties to submit closing briefs.

Testimony:

The following individuals presented testimony under oath in this matter:

*Appellant Witnesses:*

Erik Andersen, P.E., Principal Geotechnical Engineer, Aspect Consulting, LLC  
Paul Jones, Appellant  
Ryan Lewis, Project Manager, Sealevel Bulkhead Builders, Inc.  
Jennifer Rotsten, Officer, Sealevel Bulkhead Builders, Inc.  
Alison Dennison, LEG, Senior Engineering Geologist, Aspect Consulting, LLC

---

\* The Hearing Examiner notes that this matter was inadvertently labeled as “HEA-2012-01” in the initial pre-hearing order sent to the parties but should have been identified as “HEA-2022-01.” All submissions by the parties since that time have (understandably) referred to this matter as “No. HEA-2012-01.” To avoid confusion, the Hearing Examiner has determined it would be best to leave his own error uncorrected. That said, the record clearly reflects this matter involves an appeal from 2022 (not from 2012).

*Findings, Conclusions, and Decision*

*City of Bainbridge Island Hearing Examiner  
Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial  
No. HEA-2012-01; No. PLN52110 SSDE*

*City Witnesses:*

Jim Johannessen, MS & LEG, Principal Coastal Geologist, Coastal Geologic Services, Inc.

Wei Chen, PhD, P.E., Senior Coastal Engineer, Coastal Geologic Services, Inc.

Peter Best, MMA, City Senior Planner

Paul Nylund, P.E., City Engineering Manager

Attorneys Piper Thornburgh and Stephanie E. Marshall represented the Appellant at the appeal hearing.

Attorney James E. Haney represented the City of Bainbridge Island at the appeal hearing.

Exhibits:

The following documents were submitted to the Hearing Examiner for review and admitted as exhibits:

*Appellant Exhibits:*

- A-1. Emergency Shoreline Exemption Amendment Decision, dated March 14, 2022
- A-2. Emergency Shoreline Exemption Decision, dated December 1, 2021
- A-3. Hydraulic Project Approval, issued March 14, 2022
- A-4. Geotechnical Assessment of Bulkhead Repair Project, Aspect Consulting, LLC, dated January 6, 2022
- A-5. PLN52110 SSDEA (Jones Emergency Bulkhead) Code Analysis, sent February 11, 2022
- A-6. Site Plan, revised December 13, 2021
- A-7. Hydraulic Project Approval, issued December 1, 2021
- A-8. Hydraulic Project Approval, issued January 14, 2022
- A-9. Email from Peter Best to Jenny Rotsten, dated January 20, 2022, with email string
- A-10. Email from Jenny Rotsten to Peter Best, dated February 3, 2022, with email string
- A-11. Email from Peter Best to Jenny Rotsten, dated February 11, 2022, with email string
- A-12. Email from Alison Dennison to Peter Best, dated February 11, 2022, with email string
- A-13. Email from Alison Dennison to Peter Best, dated February 14, 2022
- A-14. Email from Jenny Rotsten to David Greetham, dated February 15, 2022
- A-15. Jones Bulkhead Timeline, dated March 25, 2022
- A-16. Agreement for Professional Services between City of Bainbridge Island and Wood Environment and Infrastructure Solutions, Inc., dated February 22, 2022
- A-17. Agreement for Professional Services between City of Bainbridge Island and Associated Earth Sciences, Inc., dated February 22, 2022
- A-18. Agreement for Professional Services between City of Bainbridge Island and Aspect Consulting, LLC, dated February 22, 2022
- A-19. Site Photograph (Low Tide 1)
- A-20. Site Photograph (Low Tide 2)
- A-21. Site Photograph (Low Tide 3)
- A-22. Site Photograph (Looking South from North)
- A-23. Site Photograph (Looking South from North)

*Findings, Conclusions, and Decision*

*City of Bainbridge Island Hearing Examiner*

*Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial*

*No. HEA-2012-01; No. PLN52110 SSDE*

- A-24. Site Photograph (North)
- A-25. Jones Short Plat, dated November 19, 2013
- A-26. Erik Andersen Resume
- A-27. Alison Dennison Resume

*City Exhibits:*

- C-1. Emergency Shoreline Exemption Amendment Decision, dated March 14, 2022, with the following attachments:
  - a. Review Timeline, undated
  - b. Eight (8) Site Photographs, various dates
  - c. Emergency Shoreline Exemption Decision, dated December 1, 2021
  - d. Email from Peter Best to Jenny Rotsten and Alison Denison, dated December 2, 2021, with email string
  - e. Site Plan, revised February 3, 2022
  - f. Geotechnical Assessment of Bulkhead Repair Project, Aspect Consulting, LLC, dated January 6, 2022
  - g. Email from Peter Best to Jenny Rotsten, dated February 11, 2022, with email string
  - h. Email from Alison Dennison to Peter Best, dated February 23, 2022, with email string
  - i. Appendix H: Expedient Coastal Protection
  - j. PLN52110 SSDEA (Jones Emergency Bulkhead) Code Analysis, undated
- C-2. Master Land Use Application, dated February 3, 2022
- C-3. Jones Project Narrative, undated
- C-4. Hydraulic Project Approval, issued January 14, 2022
- C-5. Peter Best Curriculum Vitae
- C-6. Jones Emergency Shoreline Exemption Amendment (PLN52110 SSDEA) Photo Comparison, prepared May 24, 2022
- C-7. Paul Nylund Resume
- C-8. Coastal Geologic Evaluation of Proposed Jones Temporary Shore/Slope Protection, Coastal Geologic Services, Inc., dated May 31, 2022
- C-9. Jim Johannessen Resume
- C-10. Wei Chen Resume

Orders, Motions, & Briefs

- Appeal, dated March 25, 2022
- Letter from Attorney Piper Thornburgh, dated March 25, 2022
- Email from Attorney Piper Thornburgh, dated April 18, 2022
- Pre-Hearing Order, dated May 6, 2022
- Appellant's Dispositive Motion, dated May 17, 2022
- City's Response to Appellant's Dispositive Motion, dated May 24, 2022

*Findings, Conclusions, and Decision*

*City of Bainbridge Island Hearing Examiner*

*Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial*

*No. HEA-2012-01; No. PLN52110 SSDE*

- Declaration of James Haney in Response to Appellant’s Dispositive Motion, dated May 24, 2022
- Notice of Association of Counsel, dated May 25, 2022
- Appellant’s Witness and Exhibit List, dated May 30, 2022
- City’s Witness and Exhibit List, dated May 31, 2022
- City’s Prehearing Brief, dated May 31, 2022
- Appellant’s Motions in Limine and Request for Site Visit, dated June 3, 2022
- City’s Response to Appellant’s Motion in Limine and Request for Site Visit, dated June 6, 2022
- Decision on Appellant’s Pre-Hearing Motions, dated June 6, 2022
- Appellant’s Closing Argument, dated July 8, 2022
- City’s Post-Hearing Brief and Closing Argument, dated July 8, 2022

## **FINDINGS**

### Background

1. Paul D. Jones and Becky Ann Jones (Appellant) own waterfront property at 11376 Arrow Point Drive. The property is located along the Puget Sound shoreline (Manzanita Bay) and is developed with a 2,395 square foot, two-story single-family residence, 812 square foot detached garage, 560 square foot cabin, and 195 square foot boathouse. The property slopes slightly down from the east property line to the top of a steep slope along the Manzanita Bay shoreline to the west, with approximately 44 feet of elevation loss. An approximately 31-foot-wide, level bench ran from the toe of the slope to the top of a concrete bulkhead that extended along the property’s 140 feet of shoreline, which was constructed sometime prior to 1969. The boathouse structure was constructed within this level bench area in 2013, pursuant to a permit granted by the City of Bainbridge Island (City) in 2012. The foundation system for the boathouse consists of a concrete slab-on-grade with thickened edges, with the base of the concrete footing located approximately two feet below the existing ground surface. The single-family residence, detached garage, and cabin are located to the west of the boathouse, on relatively level ground above the bluff. *Exhibit A-4; Exhibits A-19 through A-25; Exhibit C-1; Appeal, dated March 25, 2022.*
2. Given concerns over the age and long-term stability of the existing concrete bulkhead on-site, the Appellant contracted with Aspect Consulting, LLC, (Aspect) in 2021 to evaluate the conditions of the existing concrete bulkhead. On September 9, 2021, Aspect determined that the 8.5-foot-tall concrete bulkhead was beginning to fail, observing evidence of large cracks, shallow embedment of the footing, corrosion of the tieback anchors, and a slight lean toward the water. On October 19, 2021, Appellant Paul Jones, Jenny Rotsten of Sealevel Bulkhead Builders (Sealevel), and Alison Dennison of Aspect, attended a remote pre-application conference with City Senior Planner Peter Best and City Public Works Engineering Manager Paul Nylund to discuss permitting requirements for the repair of the failing concrete bulkhead. At the preapplication conference, the

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial  
No. HEA-2012-01; No. PLN52110 SSDE*

Appellant discussed a bulkhead repair/replacement proposal that would consist of removing the existing concrete bulkhead, installing 50 feet of new rock bulkhead just landward of the existing concrete bulkhead to the west of the boathouse, installing an additional 20-foot rock wing wall extending to the northeast to provide additional protection to the boathouse, and installing a second (new) rock wing wall at the northern property line to provide protection to the existing bulkhead on the adjacent property to the north. The proposal also included soft bulkhead protection measures for the remaining shoreline areas. The Appellant contends that City staff viewed the proposal favorably at that time, but the City disagrees with this characterization. *Exhibit A-4; Exhibit A-6; Exhibit A-15; Exhibit A-19 through A-25; Exhibit C-1; Appeal, dated March 25, 2022; Appellant's Dispositive Motion, dated May 17, 2022; City's Response to Appellant's Dispositive Motion, dated May 24, 2022.*

3. On November 29, 2021, following heavy rainfalls in September through November of 2021, the Appellant saw that the entire 140-foot length of the existing concrete bulkhead had collapsed onto the beach. The next day, a site meeting was held at the subject property to discuss emergency measures to protect the boathouse in light of the collapsed concrete bulkhead, with Appellant Paul Jones, Alison Dennison, Ryan Lewis of Sealevel, Peter Best, and Paul Nylund in attendance. The same day, the Appellant applied for an emergency shoreline exemption to allow for emergency measures consisting of placing filter fabric and sandbags along up to 70 feet of exposed slope behind the failed concrete bulkhead, which was approved, with conditions, by City Interim Planning Director Mark Hofman on December 1, 2021. The same day, the Appellant also obtained expedited Hydraulic Project Approval (HPA) from the Washington State Department of Fish and Wildlife (WDFW) to allow for the temporary emergency erosion control measures. The Appellant thereafter installed the approved filter fabric and sandbags, consistent with the approved emergency shoreline exemption and the expedited HPA. *Exhibits A-2 through A-4; Exhibit A-15; Exhibits A-19 through A-24; Exhibit C-1; Appeal, dated March 25, 2022.*
4. On December 2, 2021, City Senior Planner Peter Best emailed Jenny Rotsten and Alison Dennison to provide guidance on the requirements for obtaining a shoreline substantial development permit (SSDP) to allow for permanent shoreline stabilization measures. Mr. Best noted that provisions of the City Shoreline Master Program (SMP) allowing for the repair of up to 50 percent of existing damaged structural stabilization would not apply to the current situation on the subject property given the complete (100 percent) failure of the concrete bulkhead and that SMP policies do not allow for structural stabilization modifications or for the replacement of existing hard shoreline stabilization structures unless necessary to protect a primary structure, which would not include the accessory boathouse structure. He further noted that replacement shoreline stabilization measures would not likely meet the criteria for a shoreline variance. Mr. Best suggested addressing the issue by modifying and/or moving the boathouse onto a pile foundation, moving it to

an allowed location not requiring shoreline stabilization with a rock bulkhead, or removing it from the property. *Exhibit C-1.d.*

5. On December 8, 2021, Paul Jones, Alison Dennison, and Ryan Lewis attended a site meeting with WDFW Habitat Biologist Nam Siu to discuss an expedited bulkhead replacement proposal. No members of City staff were in attendance at this site meeting. Following the site meeting, the Appellant applied for an expedited HPA to allow for the bulkhead replacement proposal described above in Finding 2. The Appellant withdrew the expedited HPA application on December 27, 2021, after Mr. Siu advised that the proposal would require an alternatives analysis. On January 7, 2022, the Appellant resubmitted the application for an expedited HPA with a geotechnical assessment and alternatives analysis provided by Aspect, dated January 6, 2022, which WDFW approved on January 14, 2022. *Exhibit A-3; Exhibit A-8; Exhibit A-15; Exhibit C-4; Appeal, dated March 25, 2022.*
6. The January 6, 2022, geotechnical assessment determined that the proposed rock bulkhead would “provide adequate long-term protection of the existing boathouse, the shared stormwater infrastructure along the southern property line, and the existing rockery along the northern property line.” The assessment also included an alternatives analysis as required by Revised Code of Washington (RCW) 77.55.231(1)(b), which asserts in pertinent part:
  - The existing concrete bulkhead is no longer functioning as intended, and if nothing is done to repair the portion of bulkhead directly in front of the boathouse, the shoreline will continue to erode, and the boathouse will fall into Manzanita Bay imminently, in a matter of weeks.
  - There is no other suitable place within the level bench area on the property in which to move the boathouse, and moving the boathouse with large slab-on-grade with thickened footings would be cost prohibitive.
  - Replacing the concrete bulkhead with soft armoring would be cost prohibitive and would not provide adequate protection for the boathouse structure.
  - There is insufficient space in which to construct an upland retaining wall that would protect the boathouse structure.
  - The existing bulkhead could be partially replaced with hard bulkhead landward of the existing bulkhead to protect the boathouse structure.*Exhibit A-4; Exhibit C-1.f.*
7. On January 19, 2022, the Appellant provided the City with the expedited HPA approved by WDFW, and requested that the City provide written approval of an emergency exemption to commence the emergency work. The next day, Mr. Best responded that the City could not approve the proposed emergency bulkhead proposal because it would not be consistent with the SMA and the City SMP, as was explained in his earlier December 2, 2021, preapplication guidance letter/email. The Appellant later requested guidance

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial*  
*No. HEA-2012-01; No. PLN52110 SSDE*

from the City on the submittal requirements for an application to amend the previously approved emergency shoreline exemption, which the City provided on February 2, 2022. *Exhibit A-9; Exhibit A-10.*

Emergency Shoreline Exemption Amendment Request

8. On February 3, 2022, the Appellant applied for an amendment to the emergency shoreline exemption to allow for the construction of a repair/replacement rock bulkhead, wing walls, concrete steps, and a stormwater diffuser as emergency protection measures to address the failure of the existing concrete bulkhead. The Appellant provided a project narrative, which specifically described the proposal as follows:

The proposal includes the removal of the fallen approximately 140-foot concrete bulkhead. Approximately 70 feet of the bulkhead will be replaced with rock, around 50 feet in front of the boathouse and a 20-foot wing wall to the north. The base rocks will be keyed in about 3 feet with the remaining stacked on top to a total above grade of approximately 7 feet. Quarry spalls will be installed behind the armor rock and filter fabric placed between the spalls and the bank. Precast concrete steps will be built into the bulkhead for beach access. The remaining approximate 70 feet will be smoothed out to restore to nature. All access will be by barge. The old concrete bulkhead material will be removed from the beach. A wing wall will be built along the north property line to protect the neighboring bulkhead, as recommended by the geotechnical engineer. Additionally, the existing drainage will be extended to outlet within this wing wall and above the ordinary high-water mark. The area being restored will have temporary erosion control placed until the native plantings are installed, which may include jute mat, straw, and/or seed. Planting will be done during the next suitable season.

*Exhibit C-3.*

9. On February 11, 2022, while the emergency shoreline exemption amendment application was being processed, Mr. Best provided the Appellant with a code analysis indicating that the proposed bulkhead replacement project would not meet criteria for approval of an emergency shoreline exemption. Mr. Best explained that a permanent solution would undergo full due process review through the regular permitting process and that, in the meantime, the City would support temporary protection measures that could include: the placement of sandbags covering filter fabric or coconut matt on the face of the slope in front of the boathouse and along the north flank of the boathouse in any location where erosion reaches within 10 feet of the boathouse; the shoring/bracing of the north concrete wing wall and temporary sandbagging if erosion continues landward of the wingwall.

The same day, Ms. Dennison and Professional Engineer Erik Anderson, of Aspect, provided a response stating that, in their professional opinion:

- There is an imminent risk to the environment from the collapse of the boathouse into the waterway.
- The collapsed concrete bulkhead is currently providing protection of toe erosion.
- Removing the concrete bulkhead and replacing it with sandbags, jute/coir matting, fabric, or otherwise would not provide adequate protection to the boathouse for any amount of time, and it would continue to be an imminent risk to the environment.

Ms. Dennison provided an additional response on February 14, 2022, which stated that an engineered sandbag revetment would not be feasible due to existing slopes on the property. *Exhibit A-5; Exhibits A-11 through A-13.*

#### Decision Denying Emergency Shoreline Exemption Amendment

10. On March 14, 2022, City Interim Planning Director Mark Hofman issued a decision denying the request for an emergency shoreline exemption amendment, which included the following findings:

- 1) On October 19, 2021, the applicant attended a staff consultation meeting with their contractor and engineering geologist to discuss replacement of their concrete bulkhead which was at risk of failure. During that meeting, the applicant was informed of applicable requirements and procedures, including:
  - The SMP's non-conforming rules do not apply to shoreline stabilization. [SMP 4.2.1.1].
  - Replacement shoreline stabilization would only be allowed if determined to be necessary to protect the house or primary appurtenances [SMP 6.1.3(1) and 6.1.5(2)] and the least impacting alternative was selected based on the required alternatives analysis [SMP 6.2.8(1)] and no net loss analysis [SMP 4.1.2.4].
  - The SMP does not authorize shoreline stabilization to protect a boathouse because it is not a "primary appurtenance." [SMP 6.1.3(1), 6.1.5(2), & 8.0].
  - The SMP prohibits shoreline stabilization for the protection of landfill. [SMP 6.2.4(3)].
- 2) The concrete bulkhead on the subject property was approximately 8-feet tall and 140 linear feet long. The face of the bulkhead was the ordinary high water mark. The bulkhead was retaining landfill approximately 8-feet deep at the bulkhead which likely reduced in depth over a horizontal distance of approximately 28-feet landward to the existing toe of slope. A

boathouse was built on the landfill located approximately 13-feet landward of the bulkhead.

- 3) The concrete bulkhead is presumed to have been legally established prior to the establishment of the Shoreline Management Act. The boathouse was legally established in 2012 under City permit (BLD17525MIS) for water-dependent use common to a boathouse but was observed on November 30, 2021, being used instead as an illegal living space with bunkbeds and other furnishings. The boathouse has power but does not have plumbing or cooking facilities.
- 4) On November 28, 2021, the entire concrete bulkhead fronting the subject property failed and fell face forward onto the beach, which is a documented forage fish spawning beach.<sup>11</sup> The landfill immediately began to erode placing the boathouse at risk, as well as potentially placing at risk the end of the bulkhead that is located on the adjacent property to the north.
- 5) On November 30, 2021, the City conducted a site visit and pre-application meeting attended by the applicant with their contractor and engineering geologist. During the site visit, all parties acknowledged the house and primary appurtenances were not at risk. Subsequently, the geotechnical report does not state that the house or primary appurtenances are at risk, and the currently proposed design does not propose shoreline stabilization to protect the house or primary appurtenances.
- 6) On December 1, 2021, an emergency shoreline substantial development exemption (SSDE) was issued by the City, which authorized emergency construction to temporarily stabilize the eroding soil in front of the boathouse while a long-term solution could be developed and permitted. The City acknowledged that future emergency SSDE amendments could be considered if additional temporary stabilization was necessary.
- 7) On December 2, 2021, a pre-application letter was issued by the City, which:
  - Provided SMP requirements and guidance applicable to shoreline stabilization.
  - Clarified that replacing only 50 percent of the linear length of the failed bulkhead does not qualify as “repair” per SMP 6.2.7(2).

---

<sup>1</sup> Senior Planner Peter Best testified that characterization of the beach as a documented forage fish spawning beach was inaccurate. *Testimony of Mr. Best*. This fact is immaterial to the outcome of the current decision.

- Provided guidance on potential long-term options for the boathouse, which included:
    - Relocating the boathouse elsewhere on the property where it would no longer be at risk.
    - Modifying the boathouse by putting it on piles so that erosion could occur underneath it without putting it at risk.
    - Removing the boathouse from the property.
  - Stated that additional temporary protection measures could be considered if necessary to buy time for the design and permitting of a long-term solution for the boathouse.
- 8) On February 4, 2022, the applicant submitted an application for an amendment to the emergency SSDE proposing to install rock rip-rap bulkheads, concrete steps, and stormwater diffuser.
- The proposed amendment was requested:
    - 14 weeks after the initial staff consultation; and
    - 8 weeks after the emergency SSDE was issued, the pre-application meeting was held, and the pre-application letter was issued.
  - During the 8-week period the applicant:
    - Completed project design for a rock rip-rap bulkhead;
    - Completed a geotechnical report with an alternatives analysis based on Washington State Department of Fish and Wildlife (WDFW) requirements; and
    - Coordinated closely with WDFW on a Hydraulic Project Approval (HPA) for permanent rock rip-rap bulkheads, which was issued on January 14, 2022.
  - During the 8-week period the applicant could have, but did not, simultaneously:
    - Coordinate with the City regarding the proposed design and applicable SMP requirements.
    - Complete an alternatives analysis as required by the SMP which is slightly different from WDFW alternatives analysis requirements.
    - Submit an application for the proposed project.
  - The concrete steps and stormwater diffuser are not necessary to abate the emergency.
- 9) On February 11, 2022, City staff:
- Provided applicable code analysis demonstrating the proposed design was not consistent with the requirements for an emergency

- exemption and clarifying why the proposed design would not qualify as "repair" under SMP 6.2.7(2).
  - Requested revisions to the amendment for a more temporary solution.
- 10) Between February 11, 2022, and February 23, 2022, City staff and the applicant corresponded by email and phone regarding the revision request.
- The City provided the applicant with US Army Corps of Engineers guidance for "expedient coastal protection" in Alaska that included engineering guidance for the use of temporary engineered sandbag revetments which the City believes is applicable and scalable to the subject property.
  - Temporary engineered sandbag revetments were not considered in the geotechnical report prepared for the HPA. Since the City's revision request, WDFW has confirmed they would permit a temporary engineered sandbag revetment at the subject property.
  - The applicant's responses were not adequate to clearly rule out the use of a temporary engineered sandbag revetment and did not provide enough analysis to support third-party review.
  - The applicant did not suggest or evaluate other temporary approaches that would abate the emergency while final permitting on a long-term solution was completed.
- 11) On March 7, 2022, City staff met with the applicant hoping to discuss revisions to the emergency SSDE amendment and the process for permitting a long-term solution.
- Attending the meeting were:
    - City: Planning Director, Planning Manager, Public Works Engineering Manager, Senior Planner, City Attorney
    - Applicant: Owner, contractor, engineering geologist, attorney
    - WDFW Area Habitat Biologist
  - The applicant requested a decision as soon as possible on the emergency SSDE amendment application as submitted.
- 12) Per WAC 173-27-040(1)(a):
- Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of the listed exemptions may be granted exemption from the substantial development permit process.
  - The burden of proof that a development or use is exempt from the permit process is on the applicant.

- 13) Staff analysis demonstrates that the current proposal does not meet the requirements of WAC 173-27-040(2)(d).

The decision denying the request for an emergency shoreline exemption amendment noted that the City would be willing to consider:

- New emergency SSDE amendment applications for temporary protection measures that would be consistent with applicable requirements while a long-term solution is permitted; and
- An expedited review of an application proposing a long-term solution.

*Exhibit A-1; Exhibit C-1.*

#### Appeal, Subsequent Materials, and Motions

11. On March 25, 2022, Attorney Piper Thornburgh, on behalf of the Appellant, filed an appeal of the City's decision denying the emergency shoreline exemption amendment. The appeal asserts that substantial evidence does not support the Director's findings 1, 3 through 10, and 13 and contends:

- The parties do not dispute that there is an emergency as a matter of fact and law within the meaning of the City SMP, and the Appellant's proposed emergency construction is consistent with policies of the SMA and the City SMP.
- The issue of whether the proposed emergency construction would constitute a repair under the City SMP is not pertinent to the determination of whether the construction should be authorized under an emergency shoreline exemption. Rather, this is an issue to be addressed by the City during its review of the after-the-fact permit that the Appellant would apply for after the emergency is abated. Denying the emergency shoreline exemption amendment on this basis constitutes a denial of due process.
- When it is determined that an emergency exists, the City's authority in considering an emergency shoreline exemption to allow measures to abate the emergency is ministerial, rather than discretionary.
- The City circumvented the abbreviated, ministerial emergency exception process and predetermined a future permit for which no application has been submitted. This is clearly outside the City's authority and defeats the entire purpose and intent of the allowance of exemptions to SSDP permit requirements to provide an immediate course for protecting property, health, and safety in the event of an emergency.
- A permit for the rock bulkhead, recommended by Aspect, would be sought after the emergency has been abated. The objections that the City raises in its code analysis can be fully examined at a future hearing. To deny the emergency permit on the basis of other standards besides the emergency process puts the Appellant in jeopardy given the danger of the boathouse collapsing into Manzanita Bay.

- The City has withheld its approval despite determinations by the Appellant’s geologist and engineer that an untested idea of a sandbag revetment, which has not been considered by the State, is not workable and that hard stabilization is necessary. The City merely disagrees with this expert opinion but offers no expert or licensed professional opinion of its own. Although the City has proposed to contract for third-party review, it has not followed through on that proposal and, instead, rejected the Appellant’s engineer’s analysis based on the City Planner’s belief and based on the application of City SMP standards that do not apply until the emergency is abated and an after-the-fact permit is sought.
- The Appellant would bear the risk of having to remove the proposed shoreline stabilization measures after the emergency is abated if an after-the-fact permit is not approved.
- The decision denying the emergency shoreline exemption should be reversed because it is not supported by substantial evidence, is based on error of law, is an erroneous application of the facts to the law, is arbitrary and capricious, is outside the authority of the City, and constitutes a denial of the Appellant’s constitutional rights.

*Appeal, dated March 25, 2022.*

12. On May 6, 2022, the Hearing Examiner issued a pre-hearing order that set an open record appeal hearing date for June 7, 2022, and that provided instructions and deadlines for the filing of dispositive motions and the submission of witness lists and documentary evidence. *Pre-Hearing Order, dated May 6, 2022.*
13. Consistent with the pre-hearing order, the Appellant filed a dispositive motion requesting that the Hearing Examiner summarily grant the appeal as a matter of law, asserting:
  - If an applicant establishes that there is an emergency, the City’s authority in considering an application for an emergency shoreline exemption under WAC 173-27-040(2)(d) is merely ministerial and not discretionary. Because it is undisputed that an emergency exists, the City lacked discretion to deny the Appellant’s request for an emergency shoreline exemption amendment.
  - The City does not have authority to deny an emergency shoreline exemption based on the belief that a project would not meet after-the-fact permit standards. Under WAC 173-27-040(2)(d), these after-the-fact permitting standards cannot constitute a legal basis for the denial of temporary protective measures necessary to abate an emergency. The City bears no risk associated with approving a structure that cannot meet the more rigorous review associated with an SSDP. The Appellant, however, could be required to remove the structure if an SSDP application is denied.
  - The City arbitrarily rejected the only expert-recommended shoreline stabilization solution. The City’s denial of the emergency shoreline exemption amendment

*Findings, Conclusions, and Decision  
 City of Bainbridge Island Hearing Examiner  
 Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial  
 No. HEA-2012-01; No. PLN52110 SSDE*

was therefore arbitrary and capricious and consisted a violation of procedural and substantive due process.

- Because an emergency shoreline stabilization project is considered and approved on an immediate, urgent basis, there is not time for a municipality to contract for or seek out third-party review. The City’s only questions to be answered at this time are whether there is an emergency and, if so, whether the proposed fix would address the immediate situation. This is a ministerial review process, without required notice or opportunity to comment or a hearing. Any third-party review could occur at the later after-the-fact permitting stage.

*Appellant’s Dispositive Motion, dated May 17, 2022.*

14. The City submitted a response to the Appellant’s dispositive motion, asserting:
- The rules governing the open record appeal hearing do not contemplate a summary determination on the merits by motion, and the City has the right to present evidence and testimony at the hearing, which would become part of the record for deciding the appeal.
  - The dispute over whether the proposed emergency shoreline stabilization measures would be “appropriate” under WAC 173-27-040(2)(d) forms a central question in this appeal. The City is currently working with a third-party consultant to provide an opinion and testimony at the hearing concerning, among other things, the appropriateness of the proposed bulkhead. Therefore, the City has not finalized the evidence it will present at the hearing and cannot respond to the Appellant’s dispositive motion with that evidence.
  - The Appellant asserts that several “undisputed facts” support its dispositive motion, but the City disagrees with many of these assertions.
  - Contrary to the assertions in the Appellant’s dispositive motion, the City’s review process for emergency shoreline exemption requests is not purely ministerial, and WAC 173-27-040(2)(d) provides the City with discretion to determine whether proposed protective structure would be “the appropriate means to address the emergency situation.”
  - Under 173-27-040(1)(b), the City must consider policies and provisions of the SMA and the City SMP when deciding a request for an emergency shoreline exemption. Although the emergency process allows an applicant to construct a protective structure without going through the ordinary permitting process, it does not allow an applicant to construct a structure that would otherwise fail to meet applicable standards.
  - The City did not arbitrarily reject the proposal. The proposal includes new construction where none previously existed, disqualifying it from emergency shoreline exemption, and also fails under applicable SMA and City SMP policies, guidelines, and regulations. The City asked the Appellant to consider alternative emergency measures, but the Appellant chose to not rule out other possible alternatives and, instead, requested a decision on their submitted emergency

application. Although the Appellant characterizes the City's denial of the application as being based on a personal agenda, the City based its decision on the submitted application, as requested by Appellant. The Appellant had the burden of proof, and they failed to rule out other alternatives sufficient to demonstrate their proposal was the appropriate means for addressing the emergency.

*City's Response to Appellant's Dispositive Motion, dated May 24, 2022.*

15. On May 31, 2022, Engineering Geologist Jim Johannessen of Costal Geologic Services, Inc., completed his third-party review of the proposal at the City's request. The third-party review report determined that additional bank erosion had been minimal since the geotextile fabric was installed in accordance with the previously approved emergency shoreline exemption and that the proposed rockery wall appears to involve significantly more structure and footprint than would be required for temporary protection of the boathouse structure. The report recommended emergency protective measures that would include placing a larger cross-share width of geotextile that would be covered with a temporary geo-bag revetment and leaving the toppled concrete wall in place during this temporary emergency measure to protect the toe of the slope during the pendency of shoreline permit review. *Exhibit C-8.*
16. On June 3, 2022, the Appellant filed motions in limine and a request that the Hearing Examiner conduct a site visit prior to or shortly after the scheduled open record appeal hearing. The motions in limine requested that the Hearing Examiner exclude the City's third-party review report, discussed above, and any testimony related to the report, as well as any testimony or argument concerning bulkhead repair versus bulkhead replacement. On June 6, 2022, the City filed a response opposing the Appellant's motions in limine, which asserted that the motions are inconsistent with the open record appeal hearing process, that evidence concerning the third-party review of the proposal is highly relevant to whether the proposed rock bulkhead would be an appropriate emergency measure, and that testimony regarding repair versus replacement is relevant to the issue of whether the proposed rock bulkhead would be consistent with City SMP policies. *Appellant's Motion in Limine and Request for a Site Visit, dated June 3, 2022; City's Response to Appellant's Motion in Limine and Request for a Site Visit, dated June 6, 2022.*
17. On June 6, 2022, the Hearing Examiner issued a decision on the Appellant's pre-hearing motions, which determined:

Given the limited timeframe in which to consider the Appellants' motions and the City's responses, the Hearing Examiner has determined that it would be appropriate to hear oral argument on the motions at the outset of the appeal hearing on June 7, 2022. The Hearing Examiner will then make any applicable oral rulings on the various motions prior to commencement of the Appellants' case-in-chief related to the appeal.

*Findings, Conclusions, and Decision*  
*City of Bainbridge Island Hearing Examiner*  
*Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial*  
*No. HEA-2012-01; No. PLN52110 SSDE*

...

[T]he Hearing Examiner notes that he is currently under quarantine, having tested positive for COVID-19 recently. Accordingly, a site visit would not be safe at this time. At the conclusion of the hearing, however, the Appellants may renew the request for a site visit and the parties can discuss whether such visit is necessary or appropriate for the Hearing Examiner's ultimate determination of the motions and/or appeal.

*Decision on Appellant's Pre-Hearing Motions, dated June 6, 2022.*

#### Pre-Hearing Brief

18. The City submitted a pre-hearing brief, dated May 31, 2022, arguing:
- The Appellant bears the burden of proving that the proposed amendment qualifies for an emergency shoreline exemption and that the Director's decision denying the amendment was clearly erroneous. As will be addressed in the hearing testimony presented by the City, the Appellant cannot meet this standard, and the appeal must be denied.
  - The Director's denial of the requested amendment was correct because the proposed rock bulkhead does not qualify for an emergency shoreline exemption under WAC 173-27-040(2)(b). Specifically, the proposal does not meet the requirements of WAC 173-27-040(2)(b) because it includes new protective structures where none currently exist, it would not be the appropriate means to address the emergency situation, and it would not be consistent with the policies of the SMA and City SMP.

*City's Prehearing Brief, dated May 31, 2022.*

#### Testimony<sup>2</sup>

19. At the outset of the hearing, the Hearing Examiner addressed the Appellant's unresolved pre-hearing motions. Following argument by the parties, and as detailed further in the conclusions below, the Hearing Examiner ultimately denied the Appellant's motion to summarily grant the appeal, reasoning that the City's decision to grant or deny a request for a shoreline exemption is not ministerial in nature and, contrary to the Appellant's arguments, requires discretionary review of the proposal by the City. The Hearing Examiner also denied the Appellant's motions in limine, reasoning that an appeal of this type involves an open record hearing and, accordingly, it would be inappropriate to preclude submitted evidence (by either party) that may have probative value in

---

<sup>2</sup> As noted above, the hearing on this matter occurred over the course of three days. For scheduling reasons, the testimony of some witnesses was taken out-of-order. As these details do not impact the result, they are not fleshed out in the current decision. Moreover, the Hearing Examiner has only briefly summarized the testimony and, further, focused the testimony findings on those matters impacting the outcome of the appeal. The Hearing Examiner acknowledges, however, that such summary does not reflect all the information conveyed by the parties' witnesses and should not be considered a verbatim transcript of the testimony.

determining whether the City erred in denying the emergency exemption request. The Hearing Examiner acknowledged that the City's third-party review report, in particular, was not available and/or relied on by the Director when he issued his denial but determined that review and analysis of such a report (and testimony from the applicable witnesses) would assist the Examiner in determining whether the City erred in issuing its denial. In addition, the Hearing Examiner ruled that it would be inappropriate to exclude all testimony related to "repair" versus "replacement" in the context of the Appellant's proposal because analysis of this issue is contemplated by the controlling regulation, WAC 173-27-040, and may be highly fact specific. *Oral Rulings of the Hearing Examiner.*

#### *Appellant Witness*

20. Principal Geotechnical Engineer Erik Andersen, of Aspect Consulting, LLC, testified on behalf of the Appellant and explained that he worked in concert with others (including staff from Sealevel Bulkhead Builders, Inc.) on the design and configuration of the proposal. Mr. Andersen stressed that, in his professional opinion, the proposal would appropriately address the emergency situation present on the property. He noted that, in his experience, third party review is not uncommon when reviewing a bulkhead proposal like this one, but such review would normally occur during the regular permitting process (as opposed to during review of an emergency exemption). Mr. Andersen also explained that, typically, third party review addresses whether code criteria and regulatory requirements have been satisfied and that he has not previously seen third party review where a detailed alternative solution/proposal is provided. That said, Mr. Andersen reviewed the City's third-party review evaluation from Coastal Geologic Services, Inc. (Exhibit C-8) and determined that, while the suggested alternative of using soft bank stabilization measures would provide temporary relief from the current emergency, a permanent solution would still be necessary within a year or so. On cross-examination, Mr. Andersen further acknowledged that the alternative suggestion proposed by Coastal Geologic Services would be reasonable as a temporary measure. On re-direct, however, Mr. Andersen stressed that installation of a permanent solution is preferred in such circumstances to minimize construction impacts. *Testimony of Mr. Andersen.*
21. Property owner and Appellant Paul Jones testified about the history of the property and his experiences with the failing bulkhead. He noted that he was left with a positive impression of the proposal following the preapplication meeting with City staff, prior to the complete failure of the bulkhead. After the failure, he believed that temporary protection measures would be approved on a very short-term basis until final approval of the suggested proposal occurred. Mr. Jones testified about his interactions with Nam Sui, from WDFW, and his understanding that WDFW did not want the existing, failed bulkhead to remain in place as part of any emergency measures. Mr. Jones noted that he offered to pay for third-party review of the Appellant's proposal to expedite the process but that the City did not accept that offer. Finally, Mr. Jones emphasized that this has

been a stressful ordeal, particularly because he has felt that the City's position about the bulkhead proposal has changed over time. *Testimony of Mr. Jones.*

22. Project Manager Ryan Lewis, of Sealevel Bulkhead Builders, Inc. (Sealevel), testified about his involvement with the proposal and efforts to obtain approval for the repair/replacement bulkhead. He noted that, in the past, the City approved several similar bulkhead repair/replacement projects to the one the Appellant has proposed, so long as the bulkhead "replacement" did not involve significant alterations to more than 50 percent of the linear footage of the original bulkhead structure. Mr. Lewis stated that, in discussing the project initially with City staff—prior to the complete failure of the bulkhead—he was left with the impression that the proposal would receive permit approval. He noted that, after this, the City's position appeared to change. Mr. Lewis also discussed working with WDFW to obtain approval for temporary/emergency measures and that WDFW stressed the importance of avoiding detrimental impacts to area fish, in particular. Mr. Lewis also testified about the logistics of installing/constructing a project like this and explained that it requires significant coordination because of limited allowable work windows and the need to use very heavy equipment and a barge. Because of this, he had begun the process of scheduling work on the proposal in advance of obtaining a decision on the emergency exemption request from the City. On cross-examination, Mr. Lewis acknowledged that he did not receive verbal approval from City staff at any point during the process. *Testimony of Mr. Lewis.*
  
23. Jennifer Rotsten, of Sealevel, testified about her experience with bulkhead construction projects, including experience with similar proposals on Bainbridge Island in the recent past, and her involvement with the current proposal. Ms. Rotsten testified that, similar to the impressions of Paul Jones and Ryan Lewis, she left the preapplication meeting with the firm belief that the City would approve the bulkhead repair/replacement proposal and that additional communications thereafter did not raise any "red flags" in her mind. She stated that, in reviewing the City's denial decision from March 14, 2022, it appeared that many of the issues of concern were not earlier addressed or conveyed to the Appellant during the project review process because, otherwise, additional redesign or project assessment would likely have occurred. Ms. Rotsten discussed steps that Sealevel took to obtain an emergency Hydraulic Project Approval (HPA) from WDFW after failure of the existing bulkhead in November 2021, and explained that the initial emergency exemption measures the Appellant sought approval of from the City were meant to be temporary (i.e., only as a short-term fix for a few weeks) to abate the emergency. She also explained that the Appellant did not seek approval of an additional emergency exemption from the City concurrently with seeking approval from WDFW for an emergency HPA because this is not a regulatory requirement, and that the Appellant was later surprised by the City's position. In terms of addressing emergency situations under WAC 173-27-040, Ms. Rotsten conveyed her belief that, once an emergency is acknowledged and an applicant's engineer proposes a solution that would abate such emergency, approval

should be granted. She also noted that, based on her experience, it seems unlikely that WDFW would approve the use of non-biodegradable sandbags as an emergency solution to the situation or in conjunction with an emergency HPA. Ms. Rotsten also testified about her past experiences with third-party review and that the nature of such review in these circumstances was unusual. She also stressed that a single solution is preferable from a construction standpoint. On cross-examination, Ms. Rotsten acknowledged that the only basis to deny an emergency HPA is because a project would have detrimental impacts on aquatic wildlife and that WDFW does not review compliance with a jurisdiction's Shoreline Master Program (SMP) when assessing an emergency HPA. She also noted that she did not recall the details of Mr. Best's December 2021 email and the concerns therein about the rock bulkhead proposal. On re-direct, Mr. Rotsten stressed her belief that the City's view of the proposal changed after the existing bulkhead failed but, despite this, the Appellant's team believed approval of the proposal would still be possible. *Testimony of Ms. Rotsten.*

24. Senior Engineering Geologist Alison Dennison, of Aspect Consulting, testified on behalf of the Appellant and explained her involvement with the current proposal. She reiterated the view expressed by the other Appellant witnesses that the City seemed amenable to the proposal prior to the existing bulkhead collapsing and that the City's position seemed to later change. Ms. Dennison testified that, in her view, the existing bulkhead has not entirely (or 100 percent) failed such that any requirements related to repair versus replacement could still be satisfied. On cross-examination, Ms. Dennison acknowledged that the emergency situation has not put the Jones' residence in danger but stated that she still believes the Appellant's solution is allowable and appropriate as a repair of the existing bulkhead. *Testimony of Ms. Dennison.*

#### *City Witnesses*

25. Coastal Geologist Jim Johannessen, of Coastal Geologic Services, Inc., testified on behalf of the City and explained the analysis he performed in producing the third-party evaluation of the Appellant's project (Exhibit C-8). He noted that he limited his evaluation to the scope suggested by the City, which included assessing the need for installation of a rock retaining wall to address the emergency situation (as proposed by the Appellant) and the potential for alternative, temporary measures to address the emergency during the pendency of permit review for a long-term and permanent solution. Mr. Johannessen discussed scientific aspects of coastal processes and wave energy and his determination that, given the current situation, feasible emergency measures falling short of installation of a new rock bulkhead would be possible. He then discussed the suggested emergency solution proposed by his colleague at Coastal Geologic Services, Dr. Wei Chen, and his belief that such solution—involving the installation of additional geotextile fabric and use of non-biodegradable sandbags—would serve to abate any emergency during the pendency of permit review for a permanent solution. Mr. Johannessen also emphasized that, in his experience, “temporary” protection measures

often become permanent solutions so it is important to limit emergency measures, where possible, if the proposed measures would not satisfy regulatory requirements. On cross-examination, Mr. Johannessen elaborated further on the limited scope of his analysis based on information provided by the City (i.e., he did not address potential impacts to neighboring properties) and acknowledged that the alternative emergency solution proposed by Coastal Geologic Services requires keeping the toppled/failed bulkhead in place. He also noted that, in his view, the temporary solution proposed would likely only abate the emergency conditions for a year or two. In response to additional questioning, Mr. Johannessen stated that he concurs with the proposition that the Appellant's proposal would abate the emergency situation and, also, that a single construction/installation project may have fewer ecological impacts than could occur with installation of further temporary measures then, later, construction/installation of a final project. He stressed, however, that it is important to consider the long-term impacts of any "final" project proposed. Finally, on re-direct, Mr. Johannessen stated that he believed two years would be a sufficient amount of time, in his experience, for an applicant to obtain necessary shoreline permits for a permanent solution to a situation like this one. *Testimony of Mr. Johannessen.*

26. Senior Coastal Engineer Wei Chen, of Coastal Geologic Services, Inc., testified about the alternative, temporary solution to the emergency situation on the Jones' property that he suggested as part of third-party review. Dr. Chen noted that the use of sandbags is a common solution in emergency situations and that this is often the approach the U.S. Army Corps of Engineers (USACE) employs. Dr. Chen noted that, from an engineering perspective, long-term solutions are preferable, but each situation is circumstance specific and that, here, the Appellant is requesting approval for an emergency exemption from normal shoreline permit processes. Accordingly, in his view, a temporary solution—defined in his experience, including his understanding of professional norms, as one that would adequately address an emergency situation for at least a year—is appropriate if a solution is not readily available that would satisfy both short-term and long-term needs. Dr. Chen stressed that, here, the Appellant's solution of installing a replacement rock bulkhead would not satisfy regulatory requirements when reviewed in the long-term and, accordingly, it would be inappropriate as a short-term emergency fix. On cross-examination, Dr. Chen explained that his proposed temporary solution is conceptual at this point and that, because of this, he did not "stamp" Mr. Johannessen's report. Finally, on re-direct, Dr. Chen again noted that it is important to consider additional permitting and other regulatory requirements, along with environmental impacts, when proposing engineering solutions in situations like the one that currently exists on the Jones' property. *Testimony of Dr. Chen.*
27. City Senior Planner Peter Best testified about his involvement with the project, including his preparation of the "code analysis" that served as the foundation for the Director's later decision denying the emergency exemption. Mr. Best stressed that, in the early stages of

the review—including with the preapplication meeting—the City did not suggest or intend to suggest that approval of a repair or replacement rock bulkhead would be approved. He also explained that, whether the Appellant’s proposal would have been possible as a “repair” under the City’s SMP and other regulatory requirements prior to the complete failure of the existing bulkhead is immaterial but, regardless, a boathouse is not the type of primary appurtenance that warrants the types of repair/replacement the Appellant has suggested. Mr. Best explained that, in the code interpretation, he sought to provide guidance to the Appellant and was not dictating or requiring any particular solution to the emergency situation. The point, instead, was to stress that any emergency measures would still need to comply with the City’s SMP and that the Appellant’s proposed solution would not. Mr. Best noted that, in his view, he never conveyed to the Appellant and their consultants that any particular proposal or solution would be approved in advance of further City review—either before or after the existing bulkhead failed. Mr. Best also explained that the “alternatives analysis” required by WDFW for approval of an emergency HPA is different than what the City determined would be required for approval of an emergency shoreline exemption under WAC 173-27-040.

Mr. Best stressed that the emergency exemption process does not exempt an applicant from the need to comply with substantive regulations of the Shoreline Management Act or a jurisdiction’s SMP but, instead, exempts someone from the need to comply with the procedural requirements necessary to obtain a Shoreline Substantial Development Permit (SSDP), in advance of construction/installation, in an emergency situation. To that end, Mr. Best reiterated his belief that installation of a new/replacement rock bulkhead would not be necessary to abate the emergency on the property and that the Appellant’s proposal to that effect would not be consistent with requirements of the City’s SMP. Mr. Best also discussed third-party review and explained that the City did not have such a review performed in advance of the denial because it was waiting on additional information from the Appellant, including the requested alternatives analysis. Mr. Best stressed that he is confident that the SSDP process for a permanent solution to the issues on the property could be accomplished within a year.

On cross-examination, Mr. Best acknowledged that the City’s SMP can be a challenging document to work with but, despite this, stressed his belief that WAC 173-27-040 is clear in terms of when an emergency exemption is appropriate. Mr. Best testified that, recently, the Jones proposal for an emergency exemption is the only matter that was denied. He also acknowledged that he is aware that WDFW would, contrary to the emergency solution proposed by Coastal Geologic Services, like to have the failed concrete bulkhead removed even during the pendency of the emergency situation. On redirect, Mr. Best stressed that the SMP does not distinguish between temporary and permanent situations and that, in his view, WAC 173-27-040 clearly envisions that emergency measures must still comply with SMP requirements. *Testimony of Mr. Best.*

28. City Engineering Manager Paul Nylund testified about his involvement with the proposal and review of the Appellant’s various submittals. He stressed that he did not leave the preapplication meeting with any particular impression—either positive or negative—about the initial proposal prior to the failure of the existing bulkhead. He noted that, in his experience, third-party review of emergency proposals is not common and, here, he did not determine that third-party review of the Appellant’s proposal was necessary from an engineering standpoint. On cross-examination, Mr. Nylund stated that he believes the City’s position about this proposal (and other bulkhead proposals) has remained fairly consistent and stressed that, for emergency situations, there is no requirement that a proposal involve a temporary solution, but concurred with the position of other city staff that any proposal must still adhere to regulatory requirements of the City SMP.

*Testimony of Mr. Nylund.*

#### Closing Briefs

29. The Hearing Examiner left the record open until July 8, 2022, to allow the parties to submit closing briefs. *Oral Ruling of the Hearing Examiner.*

30. The Appellant submitted a closing brief, which asserts:

- The City has argued that WAC 173-27-040(2)(d) contemplates emergency construction to be “temporary” and limited to “the minimum necessary” to abate the emergency. The City, however, is not entitled to read in new terms that do not appear in the plain language of the WAC. The City’s interpretation of the WAC to include these requirements is an error of law that led to an unfair outcome and denial of due process for the Appellant.
- There is nothing in WAC 173-27-040(2)(d) that provides the City with discretion to deny an emergency application when the provisions of the process are met and when the application is supported by a stamped engineering report. The City has held the Appellant’s application for approval of an emergency fix to the wrong standards, which is clearly erroneous. The reference in WAC 173-27-040(2)(b) to consistency with policies of the SMA and SMP does not provide a green light to the City to bootstrap in all standards that are reserved for full review after the emergency is abated.
- The project meets all requirements for emergency shoreline exemption approval under WAC 173-27-040(2)(d). The Appellant does not propose a new permanent structure where none previously existed. The City’s interpretation of DOE’s regulation to require that a repair needs to be in the precise location of the former bulkhead in order to comply with the SMP leads to absurd results because it would mandate denial of any new structure placed further landward from the location of the original protective structure.
- The City improperly subjected the project to full SSDP review. A full review of the proposed structure in an after-the-fact permitting review is not ripe. To the extent that the Hearing Examiner determines that any future standards for an

*Findings, Conclusions, and Decision*

*City of Bainbridge Island Hearing Examiner*

*Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial*

*No. HEA-2012-01; No. PLN52110 SSDE*

after-the-fact permit may be considered, the Appellant should only have to establish potential application approval, which would be analogous to a prima facie showing. The Appellant has made a prima facie showing that the project would fall under the definition of repair.

*Appellant's Closing Brief, dated July 8, 2022.*

31. The City submitted a closing brief in which it argues:
- The Director's decision denying the application is entitled to substantial weight, and the Appellant has not met the burden of proving that the decision was clearly erroneous.
  - The evidence demonstrates that the proposed rock bulkhead is not consistent with the policies of the City SMP. The City SMP allows for structural stabilization modifications and for the replacement of hard shoreline stabilization structures only when necessary to protect primary structures and primary appurtenances. Boathouses and yards are not primary structures or primary appurtenances as those terms are used in SMP Sections 6.1.3(1) and 6.2.3(5).
  - The Appellant's witnesses admitted that the proposed rock bulkhead was intended to be permanent and that new protective structures were proposed where none previously existed.
  - The Appellant failed to prove that the proposed rock bulkhead was the appropriate means of addressing the emergency.
  - The substantial evidence test is not applicable in this appeal but is nevertheless met by the evidence presented at the hearing.
  - The arbitrary and capricious standard of review does not apply in this appeal. Nevertheless, the Director's decision denying the emergency shoreline exemption amendment was not arbitrary and capricious.
  - The Hearing Examiner lacks jurisdiction to address the Appellant's constitutional claims.

*City's Post-Hearing Brief and Closing Argument, dated July 8, 2022.*

## **CONCLUSIONS**

### Jurisdiction and Criteria

The Hearing Examiner has jurisdiction to hear and decide appeals from an administrative decision by the City Director of Planning and Community Development, or his or her designee, to grant, deny, or conditionally approve a shoreline substantial development exemption. *BIMC Table 2.16.010-1; BIMC 2.16.165.E.*

WAC 173-27-040 addresses exemptions from the requirement for a shoreline substantial development permit and provides in relevant part:

- (1) Application and interpretation of exemptions.
  - (a) Exemptions shall be construed narrowly. Only those developments that meet the precise terms of one or more of the

*Findings, Conclusions, and Decision  
City of Bainbridge Island Hearing Examiner  
Jones/Burke-Jones, Appeal of a Shoreline Exemption Amendment Denial  
No. HEA-2012-01; No. PLN52110 SSDE*

listed exemptions may be granted exemption from the substantial development permit process.

- (b) An exemption from the substantial development permit process is not an exemption from compliance with the [Shoreline Management Act] or the local master program, nor from any other regulatory requirements. To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act. A development or use that is listed as a conditional use pursuant to the local master program or is an unlisted use, must obtain a conditional use permit even though the development or use does not require a substantial development permit. When a development or use is proposed that does not comply with the bulk, dimensional and performance standards of the master program, such development or use can only be authorized by approval of a variance.
- (c) The burden of proof that a development or use is exempt from the permit process is on the applicant.
- (d) 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.

...

- (2) The following developments shall not require substantial development permits:

...

- (d) Emergency construction necessary to protect property from damage by the elements. An “emergency” is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter. Emergency construction does not include development of new permanent protective structures where none previously existed. Where new protective structures are deemed by the administrator to be the appropriate means to address the emergency situation, upon abatement of the emergency situation the new structure shall be removed or any permit which would have been required, absent an emergency, pursuant to chapter 90.58 RCW, these regulations, or the local master program, obtained. All emergency construction shall be consistent with the policies of chapter 90.58 RCW and the local master program. As a general matter, flooding or other seasonal events that can be anticipated and may occur but that are not imminent are not an emergency. . . .

Consistent with these requirements, BIMC 2.16.165.E.3.a provides the following criteria for a director’s decision on a request for an emergency shoreline exemption:

Exemptions shall be narrowly construed. When making the determination, the administrator<sup>3</sup> shall grant a statement of exemption only when the development proposed is consistent with the following:

- i. The applicable policies, guidelines, and regulations of the Shoreline Management Act of 1971; Chapter 90.58 RCW, as amended; and Chapters 173-26 and 173-27 WAC or their successors;
- ii. The goals, policies, objectives and regulations of the city of Bainbridge island shoreline master program;
- iii. The city of Bainbridge Island comprehensive plan and municipal code; all other applicable law; and any related documents and approvals.

BIMC 2.16.020.R.1 provides the procedure for appealing an administrative review decision, stating in relevant part:

a. Applicability. All administrative decisions, departmental rulings and interpretations made in accordance with administrative review procedures of BIMC 2.16.030 . . . may be appealed to a hearing examiner.

. . .  
i. Appeal Hearing. . . . The appeal shall be held at an open record public hearing. Participation in an appeal hearing is limited to the applicant, the applicant’s representative, the appellant, the appellant’s representative, appropriate city staff and consultants, any witnesses called by each and any nonparty who submitted written comments during the public comment period if the hearing examiner determines that the testimony will be relevant to the issue on appeal and nonrepetitive of the testimony of other witnesses.

. . .  
ii. In an appeal of a substantive decision made by the city, the criteria shall be whether (A) the proceedings were materially affected by failure to comply with adopted procedures, or (B) the decision is inconsistent with the BIMC criteria for that type of approval, or (C) the evidence in the record was not adequate to support the decision.

. . .  
k. Decision. Upon completion of the appeal hearing, the hearing examiner shall (i) affirm the decision, (ii) reverse the decision, (iii) affirm the decision with conditions, or (iv) remand the decision to the department director for further consideration of identified issues. The decision of the

---

<sup>3</sup> BIMC 2.16.165.B.1 provides that the “administrator” is “[t]he city of Bainbridge Island director of planning and community development or his/her designee.”

director shall be accorded substantial weight by the hearing examiner. The hearing examiner may include conditions as part of a decision granting or granting with conditions an appeal to ensure conformance with BIMC, the city's comprehensive plan and other applicable laws or regulations.

Finally, the Hearing Examiner's decision shall be final unless, within 21 days after issuance of the decision, a person with standing appeals it in accordance with Chapter 36.70C RCW or its successor. *BIMC 2.16.020.R.2.*

### Conclusions Based on Findings

**The Appellant has not met its burden of showing that the City erred in denying the request for an emergency shoreline exemption.** The Appellant's principal argument in this appeal is that the City failed to adhere to the specific process for emergency shoreline exemption review under WAC 173-27-040(2)(d) by analyzing, and ultimately denying, the Appellant's requested emergency shoreline exemption based on City SMP standards and policies that are contemplated to be reviewed only as part of a later request for a shoreline substantial development permit (SSDP) upon abatement of the emergency. In this regard, the Appellant contends that, once an emergency requiring immediate action has been established (i.e., acknowledged by both parties), the City lacks discretion to deny proposed measures designed to address the emergency that are proposed by a qualified engineering professional even if those measures would fail to meet the regulatory requirements for SSDP approval under the City SMP. The Hearing Examiner disagrees with this contention—as he did when addressing the Appellant's motion to summarily grant the appeal on this basis at the open record appeal hearing—because the Appellant's argument does not comport with the plain language of WAC 173-27-040(2)(d).

The rules of statutory interpretation apply to the interpretation of regulations under the Washington Administrative Code. *Silverstreak v. State Dep't of Labor*, 159 Wn.2d 868, 154 P.3d 891, 898 (2007); *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002).

When interpreting a statute, the court's fundamental objective is to ascertain and give effect to the legislature's intent. We begin with the plain meaning of the statute. In doing so, we consider the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. If the meaning of the statute is plain on its face, then we must give effect to that meaning as an expression of legislative intent. If, after this inquiry, the statute remains ambiguous or unclear, it is appropriate to resort to aids of construction and legislative history.

*Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 405, 377 P.3d 199 (2016).

WAC 173-27-040(1) contains provisions related to the interpretation and application of all shoreline exemptions listed under WAC 173-27-040(2). These provisions clearly and

unambiguously establish the following: (1) the burden is on the applicant to prove that a proposed development is exempt from the shoreline substantial development permit process; (2) shoreline exemptions are to be construed narrowly, such that “[o]nly those developments that meet the *precise* terms of one or more of the listed exemptions may be granted exemption” from the SSDP process; (3) to be authorized for a shoreline exemption, a proposed development must be consistent with the policies and provisions of the applicable SMP and the SMA; and (4) 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.” *WAC 173-27-040(1)(a)-(d) (emphasis added)*. Accordingly, to obtain the requested shoreline exemption, the Appellant was required to prove that the *entirety* of the proposed emergency proposal and its component measures would meet the *precise* terms for emergency construction under WAC 173-27-040(2)(d) and that the proposed emergency measures would be consistent with the policies and provisions of the SMA and the City SMP.

WAC 173-27-040(2)(d) provides in relevant part:

An “emergency” is an unanticipated and imminent threat to public health, safety, or the environment which requires immediate action within a time too short to allow full compliance with this chapter. Emergency construction does not include development of new permanent protective structures where none previously existed. Where new protective structures are deemed by the administrator to be the appropriate means to address the emergency situation, upon abatement of the emergency situation the new structure shall be removed or any permit which would have been required, absent an emergency, pursuant to chapter 90.58 RCW, these regulations, or the local master program, obtained. All emergency construction shall be consistent with the policies of chapter 90.58 RCW and the local master program.

Although the Hearing Examiner agrees with the Appellant’s contention that the emergency construction provisions of WAC 173-27-040(2)(d) are designed to bypass the typical permit requirements for an SSDP in order to address an “unanticipated and imminent threat to public health, safety, or the environment which requires immediate action,” the Hearing Examiner disagrees that these emergency provisions thereby divest the City of any regulatory authority to deny emergency construction proposals on the basis that such proposals would be contrary to regulatory requirements and substantive provisions of the City SMP. The City’s retention of such authority is made clear *both* under the general provisions of WAC 173-27-040(1) requiring that all proposed developments comply with local shoreline master programs *and* under specific language in WAC 173-27-040(2)(d) requiring that “[a]ll emergency construction shall be consistent with the policies of . . . the local master program.”

Moreover, WAC 173-27-040(2)(d) contains additional language that, contrary to the Appellant’s claims on appeal, clearly and unambiguously limit the range of emergency construction measures available to an applicant. For example, WAC 173-27-040(2)(d) states that

“[e]mergency construction does not include development of new permanent protective structures where none previously existed” and that proposed “new protective structures” must be “the appropriate means to address the emergency situation.” WAC 173-27-040(2)(d)’s use of the term “appropriate” clearly indicates that the emergency shoreline exemption does not allow for any and all protective measures so long as they would abate an emergency and have been proposed by someone with appropriate engineering expertise. Rather, the provision clearly provides “the administrator” with discretionary authority to “deem” certain new protective structures as “appropriate” to address the emergency and, conversely, to deem other protective measures as inappropriate. While the administrator’s discretionary authority is not boundless, it must be upheld absent a clear showing of an abuse of such discretion. *See e.g., Wash. Dep’t of Labor and Indus. V. Higgings*, 21 Wn. App. 268, 273, 505 P.3d 579 (2022) (“Appellate bodies review discretionary administrative decisions for an abuse of discretion.”).

Having established that, contrary to the Appellant’s contention, the emergency shoreline exemption review process is not merely ministerial in nature and that the Director retained discretionary authority to approve or deny the Appellant’s proposed emergency construction measures, this decision turns to whether the Director abused his discretion here. “A clear abuse of discretion may be shown by demonstrating the discretion was exercised in a manner which was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Schuh v. State Dep’t of Ecology*, 100 Wn.2d 180, 186, 667 P.2d 64 (1983) (quoting *Wilson v. Board of Governors*, 90 Wn.2d 649, 656, 585 P.2d 136 (1978)). Decisions that are “manifestly unreasonable or based on untenable grounds include those that are unsupported by the record or result from applying the wrong legal standard.” *Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018). The Hearing Examiner determines that the Director properly exercised his discretion to deny the emergency shoreline exemption.

First, the record establishes that the Director correctly determined the Appellant’s proposal to address the emergency situation through the installation of a replacement rock bulkhead with associated wing walls and other features as contrary to City SMP policies that do not allow for structural stabilization modifications or for the replacement of existing hard shoreline stabilization structures unless necessary to protect a primary structure. Specifically, SMP Section 6.1.3(1) provides:

Allow structural shoreline modifications *only* where it is demonstrated to be necessary to support or protect an allowed *primary structure and primary appurtenances*, or a legally existing principal use that is in danger of loss or substantial damage or are necessary for reconfiguration of the shoreline for mitigation or enhancement purposes.

(Emphasis added).

Additionally, SMP Section 6.2.3(5) provides:

Allow existing “hard” shoreline stabilization structures to be replaced *if* there is a demonstrated need to protect *the principal use or primary structure* from erosion

and the replacement structure is designed, located, sized and constructed to assure no net loss of ecological functions and ecosystem-wide processes.

Here, the evidence clearly demonstrates that the proposed protective measures were required only for the protection of the boathouse structure and not the primary residence and associated primary appurtenances located above the bluff. Accordingly, the proposed measures would not comply with these applicable City SMP policies and, therefore, would not comply with the requirement under WAC 173-27-040(2)(d) that the proposed emergency construction be consistent with the City's local shoreline master program. For this reason alone, the Hearing Examiner must uphold the Director's decision denying the emergency shoreline exemption request. The Appellant does not address these applicable SMP policies but, instead, relies on its argument that the Director erred by analyzing the proposal against these policies and thereby thwarted the expedited review process for emergency shoreline exemptions. The Hearing Examiner has rejected this argument but notes in this regard that the City had notified the Appellant of these deficiencies as early as December 2, 2021, before the Appellant sought the City's approval of the proposed emergency measures on January 19, 2022, and well before the Appellant formally applied for the emergency shoreline exemption on February 3, 2022. Therefore, any claim that the Director's analysis of these SMP policies to deny the application actually thwarted the expedited emergency shoreline exemption review process is belied by the record in this matter.

The record also establishes that the Director correctly determined the Appellant's proposal included the development of new permanent protective structures where none previously existed, contrary to the prohibition under WAC 173-27-040(2)(d). It is uncontested that the proposed new rock bulkhead would be located landward of the location of the existing concrete bulkhead and, further, would include additional features such as the wing walls, stairs, and stormwater features. Although the Appellant argues that the Director's interpretation of this prohibition would lead to absurd results because it would mandate the denial of any new structure placed further landward from the location of the original protective structure, that is what is required under the language of the provision, and WAC 173-27-040(1)(a) explicitly requires proposals to meet the "precise terms" of listed exemptions. In addition, the inclusion of concrete steps providing beach access is clearly not a protective structure necessary to address the emergency situation and WAC 173-27-040(1)(d) explicitly provides that if any component of a proposed development is ineligible for a shoreline exemption, then the entire proposal is subject to the requirement for an SSDP. Accordingly, the Hearing Examiner affirms the Director's decision for this reason as well.

While the Hearing Examiner acknowledges that testimony provided at the open record hearing, as well as evidence in the record, supports a conclusion that the Appellant's proposal would abate the emergency situation on the property and, further, that WDFW has expressed its support for said proposal, this does not undermine City staff's determination that the proposal for a permanent, rock bulkhead with wing walls and other features, would not be consistent with regulatory requirements of the City's SMP. Further, while City staff (particularly, Senior

Planner Peter Best) suggested alternative measures that would meet the requirements for an emergency shoreline exemption prior to denial of the request, and (later) its third-party consultant suggested a similar solution involving use of a sandbag revetement, the Hearing Examiner does not wish to suggest that an Appellant in these circumstances must adopt the City's suggested solution, only that *any* solution presented by the Appellant when requesting an emergency shoreline exemption must satisfy the regulatory requirements of the City SMP. Because the Appellant did not do so here, denial of the requested exemption was appropriate. *Findings 1 – 31.*

### DECISION

Because substantial evidence in the record supports the City's determination that the proposed emergency construction would not be consistent with the regulatory policies of the Shoreline Management Act or the City Shoreline Master Program, the City did not clearly err in denying the Appellant's emergency shoreline exemption amendment request. Accordingly, the City's decision is **AFFIRMED**, and the appeal is **DENIED**.

**DECIDED** this 3<sup>rd</sup> day of October 2022.



---

ANDREW M. REEVES  
Hearing Examiner  
Sound Law Center