

June 13, 2014

**OFFICE OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND, WASHINGTON**

**REPORT AND DECISION**

**Project:** Campbell Variance

**File number:** VAR15063B

**Applicants:** Staci & Mark Campbell

**Location of Subject Property:** 10016 Ewing Street

**Zoning and Comprehensive Plan Designations:** R-2; Two Units per Acre Zone; OSR-2; Open Space Residential

**Environmental Review:** A SEPA Mitigated Determination of Non-significance was issued May 19, 2014.

**Request:** A variance to reduce the front yard setback along Ewing Street from 25' to 8' 10".

**Staff Recommendation:** Approval of VAR 10372 at a reduced setback of five feet from Ewing Street instead of the requested 8' 10".

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**FINDINGS OF FACT**

**Site Characteristics**

- I. ASSESSOR'S RECORDS
  - a. Tax Lot Numbers: 352502-2-095-2006
  - b. Owners of record: Staci & Mark Campbell

- c. Lot size: 0.18 Acres or 7,907 square feet
- d. Land use: Single-family residence

2. TERRAIN/SOILS

The site is a mapped landslide hazard area. The southern third of the site features an upper moderately-sloping area where the existing house and deck are located. A steeply inclined waterfront slope comprises the middle and northern thirds of the site, descending north to the shoreline of Eagle Harbor. Slope inclinations for the southern third of the site are on the order of 10 to 25%. The steep slope to the north declines at 50 to 100%, with the lowest 10 to 15 feet of the steep slope being nearly vertical and characterized by isolated areas of overhanging. The total elevation change across the lot is about 40 vertical feet.

The site has been mapped within a potential feeder bluff area (*Bainbridge Island Nearshore Assessment Habitat Characterization and Assessment, Management Strategy Prioritization, and Monitoring Recommendations, November 2004*, and *Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping*). A portion of the site, consisting of approximating 30 linear feet extending from its northwestern corner, currently has a rock bulkhead.

3. SITE DEVELOPMENT

The site is developed with older structures proposed for demolition, including an abandoned single-family residence and wooden deck, an abandoned outbuilding euphemistically termed a "studio", stairs to the beach and an over-water dock. The single-family residence is approximately eight feet south of the top of the slope, and the studio is on the lower portion of the steep slope itself where a 50 to 100% slope inclination exists.

4. ACCESS

Ewing Street

5. NEARSHORE ASSESSMENT

The subject property is located in the Eagle Harbor Management Area within reach 3132 (*Bainbridge Island Nearshore Assessment Habitat Characterization and Assessment, Management Strategy Prioritization, and Monitoring Recommendations, November 2004*). The geomorphic class has been identified as high bluff.

6. PUBLIC UTILITIES

- a. Water: Well.
- b. Sewer: On-site septic.

7. PUBLIC SERVICES

- a. Police: Bainbridge Island Police Department.
- b. Fire: Bainbridge Island Fire District
- c. Schools: Bainbridge Island School District.

8. EXISTING ZONING AND COMPREHENSIVE PLAN DESIGNATIONS

R-2, 20,000 sq. ft. per unit; OSR-2, Open Space Residential

9. SURROUNDING USES

- a. North: Eagle Harbor

- b. South: Ewing Street & Single-family residence
- c. East: Single-family residence
- d. West: Single-family residence

10. SURROUNDING ZONING/COMPREHENSIVE PLAN DESIGNATIONS:

- a. North: None, Eagle Harbor
- b. South: R-2, OSR-2
- c. East: R-2, OSR-2
- d. West: R-2, OSR-2

**Procedural History**

11. City staff held a pre-application conference with the previous owners of the Ewing Street property on September 30, 2008 (exhibit 15), to discuss constructing a new bulkhead along the entire length of the shoreline. Staff told them that in 2004 the property had been identified as a feeder bluff in a nearshore assessment report performed for the City (exhibit 8) and that the City's Shoreline Master Plan prohibits new bulkheads on properties with valuable geohydraulic or biological processes sensitive to interference, such as feeder bluffs. In 2012, the property was sold to the Campbells, who approached the City shortly after their purchase to explore redevelopment options for the property. A second pre-application meeting with the new owners was held on November 20, 2012.

12. The present application for a zoning variance to reduce the front setback for a new residence from 25 feet to 8 feet 10 inches was received on November 13, 2013 (exhibit 16). A shoreline exemption application (SSDE15063B) for a 'hybrid' shoreline modification was filed on December 4, 2013 (exhibit 1), accompanied by a request that the City process the two applications simultaneously. At some point it seems to have been implicitly assumed that the shoreline exemption procedure would also encompass review of a proposed reconstruction of the studio located on the slope face. A Notice of Application was published January 24, 2014, with the SEPA comment period ending on February 7, 2014.

13. A SEPA Mitigated Determination of Non-significance (MDNS) issued May 19, 2014, for the consolidated variance and shoreline exemption applications imposed six conditions. Consistent with the posture initially taken by City staff in 2008 that the site's feeder bluff precluded approving any proposal for shoreline armoring, condition number 1 of the MDNS required a foundation design for the proposed residence that eliminates "the use or need for shoreline modification for the life of the project." In other words, the condition presupposed no protective shoreline armoring being approved or constructed and required a stand-alone residential design. As a compensatory gesture, the MDNS authorized the roadside setback to be reduced to 5 feet. SEPA condition number 2 more explicitly stated that the "250 square foot studio proposed for the 50 to 100% slope...is not permitted for redevelopment in the steep slope." No one appealed the City's SEPA MDNS.

14. The notice and staff report issued for the June 5, 2014, public hearing included and discussed both the variance and shoreline exemption applications. The exemption, however, is not really a permit and procedurally not subject to public hearing review unless the Director's decision is appealed. Since the critical elements of the exemption were either denied or precluded by the SEPA MDNS conditions, effective review of the exemption within the current hearing framework would have required a timely appeal of the SEPA threshold determination. At the hearing the Examiner ruled, and

both City staff and the applicants agreed, that in the absence of a SEPA appeal only the variance application was properly subject to review within this proceeding. The consensus seemed to be that the City's new Shoreline Master Program (if indeed it ever becomes effective) will offer more flexibility regarding shoreline armoring in potential feeder bluff areas than do the current provisions. Thus the Campbells are now committed (however reluctantly) to going forward with a rather costly and complicated proposal to reconstruct the house with a foundation that can withstand a reasonable degree of downslope failure in the absence of protective shoreline armoring, hoping that eventually they can succeed in obtaining City shorelines approval for some sort of bulkhead.

### **Substantive Review**

15. BIMC 2.16.120.E provides the criteria for approval of a major zoning variance:

*A major variance may be approved or approved with conditions if:*

- a. The variance is consistent with all other provisions of this code, except those provisions that are subject to the variance, and is in accord with the comprehensive plan;*
- b. The need for a variance has not arisen from previous actions taken or proposed by the applicant;*
- c. The variance is necessary for the preservation and enjoyment of a substantial property right possessed by other property in the same vicinity and zone, but that is denied to the property in question because of special circumstances on the property in question, and will not constitute a grant of special privilege inconsistent with the limitations upon uses of other properties in the vicinity in which the property is located;*
- d. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the property is located; and*
- e. The variance is requested because of special circumstances related to the size, shape, topography, trees, groundcover, location or surroundings of the subject property, or factors necessary for the successful installation of a solar energy system such as a particular orientation of a building for the purposes of providing solar access.*

16. Even though the zoning variance application is technically focused on reducing the roadside setback along the southern boundary away from the slope and shoreline, the problems that drive the process remain located to the north. The property is located in a mapped landslide hazard area, with slope inclinations on the north side reaching 50 to 100% and resulting in a total elevation change across the lot in the 40 vertical foot range. The present house on the parcel is set back approximately eight feet from the top of the steep slope. The development standards for landslide hazard areas in the City's Critical Areas Ordinance (BIMC Chapter 16.20) require a buffer equal to the height of the slope or 50 feet, whichever is greater, from all edges of a landslide hazard area. Although a process for reducing the buffer is provided in the code, the maximum available relief would reduce the buffer to 10 feet from the geologically hazardous area plus impose a 15 foot building setback. With this quantity of buffer reduction, however, only about 20 feet of buildable area would remain on the site between the setback line and the road right-of-way.

17. Normally this somewhat dire circumstance would force a property owner to turn to the City's

remedy of last resort – the reasonable use exception (RUE). But another temporary regulatory path is also presently open. Section 2(c) of EHB 1653 enacted in 2010 allows local critical areas standards within shorelines jurisdiction to be overridden pending enactment of an updated Shoreline Master Program. The newer GMA critical areas standards often overlap older SMP standards affecting the same amenities, creating conflict and uncertainty. The state Supreme Court, in its wisdom, attempted to fix the problem but only ended up making it worse. So the Legislature stepped in with a band-aid to resolve the crisis: under EHB 1653 the application of critical areas standards in shorelines jurisdiction can be suspended pending a SMP update based on a municipality's determination of project consistency with its current shoreline master program and a finding that “*the proposed redevelopment or modification will result in no net loss of shoreline ecological functions.*” This is the tool being used here to circumvent imposition of the City's critical areas landslide hazard requirements.

18. The staff report contains a detailed exegesis of the “no net loss” analysis focused on the shoreline bulkhead component of the proposal that (mercifully) is not relevant to the present more elementary roadside setback variance review. For our purposes it is sufficient to note that the SEPA condition eliminating the so-called studio from the proposal will reduce both the building footprint and total impervious areas within shorelines jurisdiction, thus not only satisfying the “no net loss” requirement but maybe even generating an element of net gain. In addition, mitigation will be provided in the form of required native vegetation plantings in disturbed areas. The staff discussion of current Master Plan compliance also mostly takes place in the context of vegetation preservation as it relates to the mysteries of the City's native vegetation zone (NVZ) and its murky rituals for authorizing encroachments and penetrations. Except as varied, the residential proposal will comply with relevant zoning dimensional criteria and with the Comprehensive Plan, also as elaborated in the staff report.

19. The previous actions of the applicants have not caused the need for a variance. The steep slope is a naturally existing condition of the property, and the old pre-code house is long overdue for removal and replacement. The slope also constitutes a special circumstance that limits normal residential use in this established residential neighborhood.

20. Most of the existing neighbors appear to be pleased that the dilapidated older structures are going to be removed from the site. Like the applicants, they are mostly unhappy that the shoreline bulkhead element of the proposal is being placed on the back burner. The closest neighbors are concerned that a lack of bulkheading and the ensuing normal slope failure on the Campbell parcel may operate to destabilize the slope offsite and eventually cause harm to their own properties. On the uphill side, the concern is that the need to move the house closer to Ewing street and anchor the foundation into the subsoils beneath the road could create a risk of road failure and closure. Execution of the foundation design will require a right-of-way permit from the City, where structural issues will be addressed. Anchoring into the soils beneath the road is not expected to cause construction-related road closures.

21. The engineering testimony was to the effect that the pre-Vashon glacial soils beneath Ewing Street are suitable for the proposed anchoring use. In terms of overall development effects, the technical consensus was that with a new foundation and house, as proposed, the slope will become more stable than it currently is with the older buildings remaining in place. Installation of facilities to catch stormwater runoff and tightline it downslope to a shore release location will reduce slope saturation and contribute to site and shoreline stability. So even if a new bulkhead is never approved and constructed, the current project proposal should lessen slope failure risks, not increase them.

22. Removal of the existing older structures, including a rather primitive wooden stairway without a railing that at some distant historical point was laid across the steep slope, has been a part of the proposal from its inception. Even if the stairway relocation and replacement component is no longer contained within an early phase component of the development plan, safety considerations suggest that the old stairway should be removed when the studio is demolished. A condition to such effect has been added to the decision.

## **CONCLUSIONS**

1. The Hearing Examiner has jurisdiction over this zoning variance application proceeding. Applicable notice and SEPA requirements have been met.
2. Based on the evidence of record, the applicants have complied with the requirements of BIMC 2.16.120.E for the issuance of a major zoning variance. As conditioned, the granting of the variance will not be materially detrimental to the public welfare nor injurious to property or improvements in the vicinity and zone in which the property is located.

## **DECISION**

The zoning variance application of Staci and Mark Campbell (file no. VAR15063B) to reduce the front yard setback to 5 feet from Ewing Street is APPROVED, subject to the following conditions:

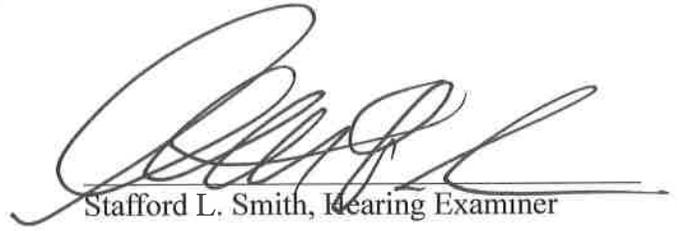
### **SEPA Conditions:**

1. The single family residence shall be constructed with a foundation design (by a qualified geotechnical engineer) to prevent the use or need for shoreline modification for the life of the project.
2. The 250 square foot studio proposed for the 50 to 100% slope, as depicted on the November 13, 2013 site plan, is not permitted for redevelopment in the steep slope.
3. The homesite shall be setback five (5) feet from Ewing rather than the proposed 8'10" in order to maximize the distance the homesite and the top of the steep slope.
4. Any portions of the site not proposed for development shall be replanted with native vegetation. The building permit set shall include a native vegetation plan that provides a multistory effect. Staff shall approve the plan, along with a landscape performance bond, prior to issuance of the building permit.
5. Any replanted areas shall be maintained and assured through an assurance maintenance device.
6. The applicant is required to stop work and immediately notify the Department of Planning and Community Development and the Washington State Office of Archaeology and Historic Preservation if any historical or archaeological artifacts are uncovered during excavation or construction.

**Project Conditions:**

7. Prior to commencing foundation construction, a right-of-way use permit shall be obtained from the City. Any damage to Ewing Street as a result of construction shall be repaired by the applicant prior to final on the residence.
8. To prevent a potential impact to the steep slope, all clearing and grading shall be performed during the dry months from April 1 through October 2.
9. Any proposed vegetation removal requires approval from the Director and shall meet the requirements of BIMC 16.20.150F.5, including but not limited to an ISA certified arborist documenting a hazard, a geotechnical review of the proposed review, and a three to one replacement for any removed trees.
10. The height of the proposed residence shall not exceed 30'.
11. The applicants shall submit a recorded notice to title and indemnification agreement with their building permit.
12. Demolition of the accessory "studio" structure shall include removal of the wooden stairs to the beach.

ORDERED June 13, 2014.

  
Stafford L. Smith, Hearing Examiner  
City of Bainbridge Island

The Hearing Examiner is authorized to make the City of Bainbridge Island's final decision regarding the Campbell zoning variance application. A party with standing may seek judicial review of this decision by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.