

August 8, 2011

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**
King County Courthouse, Room 1200
516 3rd Avenue
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-0198
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File Nos. **L05SAX02,**
L05AE004 and **L05SH003**

ROGER W. SPRINKLE

Appeal of Combined Reasonable Use Exception, Critical Areas Alteration Exception and
Shoreline Management Substantial Development Permit Approval

Location: 28380 Point Piner Road SW, Maury Island

Appellant: Roger W. Sprinkle
represented by **Robert Johns, Attorney**
Johns Monroe Mitsunaga Kolouskova, LLC
1601 – 114th SE, Suite 110
Bellevue, WA 98004
Telephone: (425) 467-9960
Facsimile: (425) 451-2818
Email: johns@jmmlaw.com

King County: Department of Development and Environmental Services (DDES)
represented by **Mark Mitchell**
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-7119
Facsimile: (206) 296-6613
Email: mark.mitchell@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Grant appeal of Condition 5 of the CAAE Permit Approval, striking it as void, and, given the proposed alternative site design, dismissing without prejudice the appeal of Condition 14

EXAMINER PROCEEDINGS:

Hearing opened: February 17, 2011
Hearing closed: February 17, 2011

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:¹

1. Roger Sprinkle appeals Conditions 5 and 14 placed on a Critical Area Alteration Exception (CAAE) approval issued under file L05AE004.²
2. The subject property is a high-bluff waterfront parcel at 28380 Point Piner Road Southwest on Maury Island, which lies in Puget Sound. Mr. Sprinkle's family has owned the property since the 1940s. In the early 1980s a small cabin was constructed on the site along with a deck and a stairway from the cabin to a bulkhead rising from the shore edge below (the toe of the bluff). There has been dispute between DDES and Mr. Sprinkle as to when the bulkhead was constructed, with Mr. Sprinkle contending that the entire bulkhead was constructed before the enactment of the County Shoreline Management Program and its associated requirements governing bulkheads through a permit process. DDES concedes that at least part of the bulkhead was constructed prior to bulkhead regulation, but claims that an 85-foot length of the bulkhead was constructed in the early 1980s, *after* the adoption of the Shoreline Management Program and therefore subject to its regulations. Mr. Sprinkle has stipulated to the inclusion of "legalization" of the disputed 85 feet of bulkhead in the subject permit processing rather than continue to dispute it.
3. In the late 1980s or early 1990s, DDES engaged in code enforcement action regarding the property for the construction of its structural improvements and reached a voluntary compliance agreement with Mr. Sprinkle in or around 2001 calling for the obtainment of permits. The agreement contained the above-noted stipulation that the bulkhead was partly without necessary permits and a stipulation to the need to obtain a shoreline substantial development permit.
4. The permit process had a lengthy delay because of the difficulty of obtaining approval from Public Health with respect to a potable water source, which has now finally been satisfied by connection to public water service provided by the Dockton Water Company. Onsite sanitation is subject to Public Health review as well; the site presents serious constraints to placement of a Public Health-approvable sanitation system on the property.

¹ Note: The Examiner acknowledges that to provide a narrative flow in this report, certain findings herein contain conclusions of law in addition to those set forth specifically in the Conclusions section. Whatever findings or portions thereof may be substantively conclusions of law are deemed as such, and vice versa.

² A combined report and decision was issued by DDES for the subject CAAE as well as a Reasonable Use Exception under file L05SAX02 and a Shoreline Substantial Development Permit under file L05SH003. The subject conditions were only placed on the CAAE and the Examiner would not have appellate jurisdiction over the shoreline permit matter in any case. [KCC 20.20.020.E]

5. Given the property's steepness of grade above the bluff, development access and improvement are presented serious if not prohibitive impediments in the normal regulatory posture. Accordingly, Mr. Sprinkle applied for and received from DDES a critical area alteration exception (CAAE) and a reasonable use exception (RUE), both permits associated with the limited allowance, on a justified exception basis, of development in critical areas and/or properties that are severely constrained by critical areas, and a shoreline substantial development permit (SSDP) for the cabin, stairway, deck and bulkhead.
6. DDES's report and decision (decision) granting such approvals imposed two conditions on the CAAE which Mr. Sprinkle disputes and appeals in this proceeding. He stipulates to the acceptability of all other conditions imposed in the decision granting the permit approvals.

Beach Nourishment Facility Condition No. 5

7. The first permit condition appealed is CAAE Condition 5, which requires the construction of a structural facility which provides "beach nourishment" to the beach below the bulkhead on the Sprinkle property, essentially replacement of the sand no longer produced by erosion of the "feeder" (sediment source) bluff due to the bulkhead protection. DDES roughly calculates the previous annual contribution of sediment from the now-protected bluff, if it had been left unprotected as it was prior to bulkhead construction, at 190 cubic yards.
8. A natural resources evaluation report prepared by AMEC Earth & Environmental, Inc. concludes that with the constructed bulkhead in place, the beach directly below the Sprinkle property possesses adequate beach nourishment, including sand, and the beach and nearshore provide adequately viable marine habitat, in particular for forage fish such as Pacific Sand Lance which spawn in the adjacent nearshore. The AMEC report does not find that the bulkhead causes an adverse impact on the beach and nearshore environment below the property, nor to the marine habitat it provides, nor to any area in the proximity of the property.
9. The Appellant argued that DDES's requirement of a beach nourishment system is not founded on any persuasive showing of an adverse impact of the bulkhead on the beach sand nourishment system along the subject stretch of the Maury Island shoreline; that DDES has not refuted the AMEC study's conclusions that with the bulkhead in place the beach nourishment on the Sprinkle property frontage is adequate and the beach and nearshore provide adequately viable marine habitat; and that DDES thus has not identified a direct impact, nor its adverse nature, on which to base by any *rational nexus* the imposition of the subject condition.
10. In its decision, DDES noted that the AMEC report "describes the fish and other species that use this area, and the direct and indirect effects on fish and wildlife from the house, stairs and bulkhead. *No direct effects are identified.* This report (the AMEC report) identifies the *indirect* effect of the project as a *possible* decrease in beach nourishment from construction of the bulkhead. Based on their analysis, AMEC concludes that the bulkhead, house, stairs down the slope and platform at the base have had 'negligible effects on marine shoreline habitats and the species they support'; essentially no adverse effect on the biological or physical processes on the shoreline in the nearshore environment." (sic) (Emphases added)
11. Nothing in the record refutes the AMEC report's conclusion of a lack of direct effect from the house, stairs and bulkhead on fish and wildlife, and that the beach directly below the Sprinkle property possesses adequate beach nourishment, including sand, and the beach and nearshore provide adequately viable marine habitat.

12. After reviewing and discussing conformity of the development with the CAAE approval criteria, DDES's decision concluded that the application met all of the criteria. After that summary conclusion, the decision simply stated that "DDES has concluded that the alteration exception could (sic) be approved, as long as the applicant complies with the conditions outlined under the action section of this report." But the decision did not make its previous conclusion of approval criteria conformity dependent on compliance with condition 5, nor did it render any other finding or conclusion that formed any factual or legal basis for the condition's imposition. There was no recitation in the DDES decision of any reasoning to support the imposition of condition 5; specifically, there was no *nexus* (connection or linkage) cited that would illuminate the reader as to any relationship of the condition to any particular aspect of the development and/or its impacts that warranted imposition of the condition. Nevertheless, DDES's decision imposed the beach nourishment condition on the CAAE permit approval.
13. In its departmental report in response to the appeal, DDES cited as authority for imposition of the contested conditions KCC 21A.24.070.D and KCC 21A.24.130. KCC 21A.24.070.D states, "Alteration exceptions granted under this section shall meet the mitigation requirements of this chapter." KCC 21A.24.130 leads with, "If mitigation is required under this chapter to compensate for *adverse* impacts..." (Emphasis added)
14. In its appeal report, DDES stated, "Because this site is a feeder bluff that supplies sediment to the intertidal zone naturally through weathering and shoreline erosion, we include under "development impacts" not only impacts to the aquatic area buffer, but also the loss of supplied sediment due to shoreline armoring and slope stabilization. Thus mitigation must include the replacement of that function in order to prevent damage to intertidal and subtidal resources." The appeal report contains the first DDES mention of intertidal and subtidal resources in its reports; nowhere in the record are such "resources" in the proximal area described by DDES. Also nowhere in the record is there any specific identification of any adverse nature of the "loss of supplied sediment" and of the asserted "damage to intertidal and subtidal resources" that must be "prevented" by the imposed mitigation condition.
15. In its appeal report, DDES also cited certain "reports from Geospectrum Consultants, Inc."³ as demonstrating that "the placement of the bulkhead is the nexus that did indeed result in a loss of sediment being supplied to the beach, and *that impact* requires mitigation." (Emphasis added) However, again, nowhere in its appeal report or elsewhere in the record, including DDES's testimony, is there any persuasive showing that "that impact" is an *adverse* impact. "Loss" is not necessarily adverse. The adverse nature of a "loss" must be substantively demonstrated for a *finding* of adverse impact arising from a circumstance of loss.
16. In its testimony at hearing, DDES stated that it imposed condition 5 because of its concern that the greater stretch of beach and nearshore environment along this portion of Maury Island (i.e., extending north and south of the Sprinkle property) will not have sufficient beach nourishment without the condition. But on examination, DDES could not identify any beach sand deficit occurring on the beach or nearshore below the subject property, nor any to the north or south.
17. DDES acknowledged in testimony that feeder bluffs are not the sole source of beach sand, which can be also produced by other sources including upland areas from which sediments are transported downstream to the Sound via streams and rivers.

³ The "Geospectrum reports" DDES cited were not offered as evidence for the hearing record.

18. In testimony, DDES again acknowledged that the AMEC study identified no direct impact on the Sprinkle property, couched its (DDES's) assessment of the nature of the development's impact on the beach and nearshore environment as being a "potential" impact, and characterized the impact as "indirect." "Potential" and "possible" impacts, even accepting as given an implication that they are "potentially" or "possibly" adverse, do not constitute adverse impacts of sufficient probability that a reasonable person would conclude they are likely to occur. Without such likelihood, an unfounded fear of such impacts essentially amounts to speculation and supposition and lacks sufficient demonstration to constitute a *fact* of adverse impact.
19. DDES argued that the AMEC study, and the sum total of the Appellant's presented evidence, do not show that there would *not* be an adverse impact. DDES stated in its appeal report that the AMEC study established no base of conditions prior to placement of the bulkhead "to compare against post-construction observations and cannot conclude *that there has been no change.*" (Emphasis added) First, "change" does not by any means equate automatically to adverse impact. Primarily, though, DDES's assertion is a reversal of the test of adverse impact assessment, and an impermissible attempt to shift the burden of proof of the supportive basis of the conditions at issue to the Appellant. In the imposition of mitigation conditions, the burden is on the regulatory agency is first to demonstrate sufficient identification of adverse impact and a substantial rational *nexus* of the condition requirements to an identified adverse impact.
20. DDES also stated that it is the purpose of the zoning code critical area regulations to prevent adverse impact. That is all well and good in and of itself as a general assertion, but absent a persuasive *showing* of adverse impact there is simply nothing to prevent.
21. At several junctures in the instant proceeding, DDES cited the adjacent Jewson property's bulkhead and its structural beach nourishment components as a directly relevant example of proper compensating beach nourishment and stated that a similar provision is required in the instant case on the Sprinkle property development to provide a similar "mitigation" of the feared "potential" impacts. But the mere presence of the Jewson beach nourishment facility does not provide to any substantially persuasive degree the "same - same" justification DDES implies by its citation; the comparison still suffers from the failure to identify any specific adverse impact caused by the Sprinkle development.
22. Only at one sole juncture in DDES's testimony was the loss of bluff erosion and resultant lack of sediment nourishment asserted as an "adverse impact." Even then it was stated only generally as being visited on "the aquatic environment," and prefaced with the peremptory declaration "King County has determined," with no elaboration and no offering of or pointing to supporting evidence which would persuade of the asserted adverse nature.
23. A well founded finding of the specific adverse nature of an impact is necessary for the discretionary imposition of mitigation requirements. Only *adverse* impacts are required by the critical areas regulations to be mitigated. Impacts which are not adverse are not required to be mitigated (which is only logical, since if an impact is not adverse there is nothing to mitigate). (See the definition of "mitigation"; KCC 21A.06.750: "an action taken to compensate for *adverse* impacts to the environment resulting from a development action or alteration," and KCC 21A.24.130 (cited above along with KCC 21A.24.070.D as DDES's authority to impose the subject conditions), which as noted previously leads with, "*If* mitigation is required under this chapter to compensate for *adverse* impacts..." (Emphases added)
24. From the record presented, DDES's stated concern of greater area impact is merely an abstract and speculative one, a supposition, of a "possible" or "potential" cumulative impact by the loss of sediment being fed into the Sound by bluff erosion which would normally occur without the

bulkhead protection. DDES has not identified with any persuasive specificity any adverse nature of a direct impact of the bulkhead on the subject beach and nearshore environment. Nor has it identified with any persuasive specificity any direct contribution of the development to an adverse cumulative impact on the greater area's beach and nearshore environment.

25. In the final analysis, DDES has not made a persuasive showing of any adverse nature of an impact of the bulkhead on beach sand nourishment, maintenance of the quality of nearshore habitat, and intertidal and subtidal resources. It thus fails to make the basic factual foundation of identifying an adverse impact necessary for imposition of mitigation requirements, and thus fails the rational nexus test for imposition of mitigating conditions.

Upslope Bulkhead and Debris Catchment Wall Condition No. 14

26. DDES has also imposed Condition 14 on the CAEE, in order to protect the cabin and driveway onsite from vegetation debris flows descending the steep slopes above the cabin. The Appellant has countered the imposition of such condition with a revised engineering design which depicts relocation of the driveway to locations which preclude the need for a catchment wall. The driveway would be relocated landward further back from the top of bank of the bluff (with it asserted that there is sufficient room to do so with a long lifespan for the driveway), and supported by a shorter driveway bulkhead rather than a retaining wall. DDES concurred tentatively that the proposal was a better site plan meriting further administrative review for approval. DDES noted that it would be subject to a right-of-way use permit and a combined building permit which included grading components (rather than a separate grading permit).

CONCLUSIONS:

Beach Nourishment Facility Condition No. 5

1. A mitigation condition placed on development must be reasonably based. The burden of proving such reasonable basis rests on the regulatory agency imposing the condition. A two-pronged test applies, with its first component requiring the presence of a specifically identified adverse impact reasonably attributable (related) to the development action. This is the rational *nexus* test. Second, the corrective measures imposed by the condition must have a direct, remedial and proportional effect of mitigating the identified specific adverse impact. This is the rough proportionality test.
2. Here, as found above DDES has not made a sufficient showing of a directly attributable specific adverse impact by the Sprinkle development on beach nourishment.
3. DDES has made no persuasive showing of the adversity of any impact caused by the Sprinkle bulkhead and has made no persuasive showing that it will contribute to any adversity of speculated cumulative impacts by the loss of beach nourishment. The only impact that has been asserted specifically is acknowledged variously to be "potential," "possible" and "indirect." Absent a persuasive showing of cumulative impact to which the subject development has a direct causal relationship of contribution, the identification by DDES of only a potential, possible, indirect, essentially cumulative impact fails the fundamental test of showing that an actual adverse impact caused by the specific development at hand is addressed by the condition. It thus fails the first test of the two-pronged test for imposition of a development mitigation condition, the rational *nexus* test. Under the law governing exactions and regulatory takings, the County thus cannot impose such a condition without compensating the property owner, which is not proposed in the instant case.

4. In summary, absent a substantial showing of a direct adverse impact tied directly to the proposed action, there can be no showing of a rational *nexus* of the beach nourishment condition imposed on the CAAE. Condition 5 thus fails to pass the test of permissibility under the rational *nexus* test and shall be reversed.

Upslope Retaining Wall and Debris Catchment Wall Condition No. 14


5. As the parties have reached tentative agreement that the redesign of the development with relocation of the access driveway landward further away from the top of bank would reduce or eliminate the impact of the development which prompted the imposition of Condition 14, the Examiner shall dismiss the appeal as moot with respect to Condition 14. However, the dismissal shall be without prejudice; that approach will allow the appeal to be revived with respect to Condition 14 if the parties reach an unforeseen obstacle or impasse on the design feasibility of the alternative proposal. In that eventuality, the matter could then be returned to hearing for adjudication.

DECISION:

Condition 5 imposed by DDES on its November 8, 2010 approval of the subject Critical Areas Alteration Exception (CAAE) is REVERSED as constituting an impermissible condition and STRICKEN as VOID from the CAAE permit approval.

The appeal is DISMISSED WITHOUT PREJUDICE with respect to Condition 14.

ORDERED August 8, 2011.



Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE FEBRUARY 17, 2011, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NOS. L05AE004, L05SAX02, L05SH003

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell, Greg Wessel and Laura Casey representing the Department; Robert D. Johns representing the Appellant; Appellant Roger Sprinkle; and Jim Doolittle.

The following Exhibits were offered and entered into the record:

- Exhibit No. 1 Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for L05AE004, L05SAX02 and L05SH003 dated November 8, 2010
- Exhibit No. 2 Copy of the Notice of Appeal received December 2, 2010
- Exhibit No. 3 Copy of the Statement of Appeal received December 2, 2010
- Exhibit No. 4 Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for L05AE004, L05SAX02 and L05SH003 dated February 10, 2011
- Exhibit No. 5 Applicant's Pre-Hearing Brief
- Exhibit No. 6 Site plan sketch
- Exhibit No. 7 Jewson/Sprinkle bulkhead extension
- Exhibit No. 8 Natural Resources Evaluation Critical Areas Alteration Exception report prepared by AMEC Earth & Environmental, Inc. dated July 14, 2008

PTD:mls

L05AE004 & L05SH003 RPT