

**DECISION OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Application of

**William Partin**

**SVAR14181**

For a Shoreline Variance

**Introduction**

William Partin requests a Shoreline Variance to allow expansion of a nonconforming building footprint within a native vegetation zone at 15737 Point Monroe Drive.

An open record public hearing was held May 9, 2011. Aaron Laing, Schwabe Williamson & Wyatt, represented the applicant. Joshua Machen, Senior Planner, represented the Department of Planning and Community Development.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony and exhibits admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner on this application.

**Findings**

1. KDG Architecture, as agent for William Partin (Applicant), applied for a shoreline variance to allow expansion of a nonconforming building footprint in a native vegetation zone (NVZ) in the shoreline at 15737 Point Monroe Drive. The proposal is to demolish an existing residence and construct a new two-story, two-bedroom residence with a two-car garage and new septic system.
2. The location of the subject site is known as “Sand Spit” or Point Monroe, a sandy, narrow landmass that extends into Puget Sound so it is bounded by water on both sides with an average width of approximately 100 feet. It was platted in 1931. The subject site consists of Lots 71 and 72, on the lagoon side of Point Monroe Drive. A boundary line adjustment has been submitted to aggregate the two lots. Lots 86 and 87, also owned by the applicant, lie on the Puget Sound side of the roadway and are vacant except for remnants of a bulkhead. The existing house with a garage connected by a breezeway straddles the common lot line between Lots 71 and 72, and portions of it are constructed over water on creosote pilings. A pier ramp and float and a partially over-water deck also occupy the site. The four lots have a total upland lot area of about 5,900 square feet.
3. The Point Monroe neighborhood contains 101 platted lots. Fifty-nine of the lots are developed with single family residences, nearly all nonconforming because they were built prior to the Shoreline Master Program (SMP) or built with substantial variances. Exhibit 39. All are

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served by on-site septic systems, many of which are on the remaining undeveloped lots and almost all within the NVZ.

4. The subject site is zoned R-6, Six Units Per Acre. The Bainbridge Island Comprehensive Plan designates it UR, Single-family Residential, 4.3-6 units per acre.

5. The shoreline area where the subject property is located is designated Semi-Rural shoreline environment in the SMP. The Semi-Rural environment is intended, generally, to provide for transition between the urban environment and the rural environment and protect natural resources such as beaches, etc., while still allowing development. Section 16.12.140E.

6. Section 16.12.150 establishes a requirement for a buffer, the NVZ, of a depth of 50 ft. upland from the OHWM in Puget Sound. Section 16.12.260B allows the configuration of the NVZ to be altered by as much as 25 percent to site the residence closer to the water or to site accessory structures. On the open Puget Sound side of the property, Pt. Monroe Drive interrupts the 50 feet but the NVZ still extends onto the site. On the other, lagoon, side, the 25 ft. NVZ extends over a significant amount of the footprint of the existing residence and garage. Therefore, the existing development is nonconforming as to the NVZ and also to the side yard requirements of the SMP. Were the site not developed with a nonconforming structure, there would be an allowable building envelope but it would be very narrow and unusually shaped due to the location of the road, the size and shape of the lots, and the NVZ extending in from both water frontages. The proposed development is dependent upon the existing nonconforming development as the nonconforming structure provisions of the SMP permit reconstruction and expansion of a nonconforming structure that does not increase the nonconformity. Section 16.12.390A.2a. Increased nonconformity requires a variance.

7. Parking is not permitted on the roadway and would not be feasible because of the narrow width of the roadway so must be located on-site.

8. The new construction within the NVZ along the lagoon side is proposed to stay within the existing house footprint, except for a 1.5 by 13 ft. section of the new roof that would extend into the NVZ at the center of the new residence but over an existing deck. A 2.5 by 8.33 ft. area of the current footprint would not be used so would offset the new extension. On the Puget Sound side, portions of the existing and proposed septic system now encroach and would expand slightly into the NVZ south of the road. After averaging, allowed by Section 16.12.260, 435 square feet of the system would encroach into the NVZ. Due to the width of the combined lots, it is impossible to avoid the encroachment by the septic system. Exhibit 48. An 81 square foot encroachment of the house footprint into the NVZ on that side overlaps the septic system encroachment and would be off the ground by several feet. All of the encroachment of the footprint into the NVZ on this side is landward of the road that separates this part of the NVZ from the shoreline.

9. A 400 square foot temporary construction staging area is proposed on the shore side of the roadway and would be located within the NVZ. There is no area available on the site for staging except within the NVZ, and none of that on the landward side of the road. The applicant proposes to revegetate the area when construction is completed.

10. The existing septic system discharges directly into the surrounding soils and there is no reserve drain field. The new system would include aerobic treatment and an intermittent bottomless sand filter drain field so would have less impact on the environment. It would be

placed as far away from the water as possible and is proposed for the least impactful location. Testimony of Machen. The Kitsap County Health District approved the new system and the location of the drain fields. Exhibit 5. Until sewer service is available, there would be no economic use of the subject site without a septic system that encroaches into the NVZ.

11. The entire drain field for the house next door to the east is in the NVZ on the Puget Sound side. Testimony of Laing. There are of number of properties with that configuration on the point. Testimony of Strehlow.

12. With over 4,000 square feet of floor area, Exhibit 50, the proposed house would be larger but not too dissimilar in size to the properties adjacent to the east and west. Testimony of Machen. The upland area of the subject site is larger than its neighbors. House sizes on Point Monroe range from the very small, considerably less than 1,000 square feet, to more than 4,300 square feet. There are very few that do not intrude on the NVZ.

13. The primary views of the water from the homes on each side of the subject property are from the front and back of each one directly toward the water. The applicant was required to provide analysis of potential view blockage from the expanded footprint. The analysis showed that the proposed house in the nonconforming but expanded footprint would not obstruct the existing views of the water from the residences on either side or from the public right-of-way to any greater extent than a fully conforming structure. Exhibit 46.

14. The subject property is in a liquefaction hazard area. The best option for reducing potential structural damage from liquefaction induced movements would be a foundation with piles or shafts, but because of access constraints a mat foundation extended down approximately three feet below current grade would be the most suitable. Exhibit 58. The geotechnical report made recommendations for controlling erosion and for sediment control. The MDNS includes conditions regarding removal of the materials and restoration.

15. A Mitigated Determination of Nonsignificance (MDNS) pursuant to SEPA was issued by the Director on April 14, 2011. The MDNS includes conditions requiring the removal and preservation of the grasses where possible for replanting and that all cleared areas be replanted and generally addressed protection of the water and vegetation resources and restoration. Exhibit 55.

16. A cumulative impact analysis was prepared by Margenex International. Exhibits 32 and 39. The survey for the analysis showed multiple habitats in the area: the sand spit, the estuarine lagoon, estuarine wetlands, mud flats, forage fish beaches, and herring spawning. All habitats have been, or possibly have been, impacted by development, according to the report. The report stated that it is likely that no new single-family residences can be built on Point Monroe because of inadequate area and the Kitsap County Health District's requirement for 100 ft. setbacks from the OHWM for septic systems from which requirement it no longer issues variances. The report also stated that there appears to be little room to expand footprints on most lots and most of those with room can only expand toward the road.

17. Habitat between the road and the existing homes is not properly functioning because it is essentially cut off from the beach. Exhibit 39. Approximately 780 square feet of tall grass would be affected, largely from the septic field, but because the grass has little or no habitat value because of its isolation from the shore, any impact from the installation of the drain field and the

construction staging could be fully mitigated through replanting following construction. Therefore, there will be no effect on the habitat or shoreline processes if the footprint is not expanded on the lagoon side and best management practices are used during construction and on the Puget Sound side there will be no effect, even with expansion of the footprint, because of the road barrier and because any impacts can be mitigated by replanting.

18. The cumulative impact analysis also shows that visual resources will not be impacted because the expanded structure would sit between two houses and those houses create an east-west view shed blockage for all three houses as well as others. The proposed expansion of the footprint would not block any more view from the houses to each side than a house built in a conforming footprint. As both adjacent houses are pretty much in alignment with the proposed new home, no water views would be obstructed. Exhibit 32; Testimony of Machen. Views from the road to the lagoon would be unchanged because the existing home obstructs them. The existing home and the elevation change blocks views to the north from the lagoon. Exhibit 39.

19. The cumulative impact survey report found that 26 percent of the homes exceed 2,500 square feet in building footprint area, 40 percent are between 1,501 and 2,500 square feet, 21 percent between 1,001 and 1,500 square feet, and 5 percent under 1,000 square feet. Two-thirds are multi-story. The record contains conflicting statements regarding the size of the footprint of the existing house but because the Director's staff participated in actual measurement on February 22, 2011, and then required revision to the site plan to reflect those measurements, the hearing examiner accepts as correct the measurements shown on Exhibit 38, the resulting revised site plan. The application for the shoreline substantial development permit, Exhibit 50, shows the square footage of the proposed building area to be 3,042 square feet.

20. The proposed footprint is smaller than the maximum allowed if each of the two lots were developed independently. Testimony of Machen.

21. Because a question was raised about the OHWM used in the application, applicant engaged a fisheries professional to delineate it. The result was that the OHWM was found to be further south, which had the effect of extending the NVZ farther onto the site, increasing the amount of encroachment so the application was amended.

22. The Point Monroe Comprehensive Plan Amendment of November 2008 added new policies to the Land Use Element, Policies W 8.3 and 8.4. Policy W 8.3 provides that the Urban Residential District on the Point Monroe sand spit is intended for small, beach-oriented residences that are compatible with the spit's environment. The policy was adopted in expectation that a new sewer system for the Point Monroe area would be constructed and that there would be an increase in development. Funding for the sewage treatment plan was not provided and plans for its future are uncertain. No regulations limiting the size of residences on the spit have been enacted. Policy W 8.4 requires consideration of the cumulative impacts of proposed development along with additional requests for like actions, which is reflected in the SMP. The total development is not to produce substantial adverse effects on the shoreline environment or neighborhood character. Additionally, the Aquatic Resources section of the Environmental element, Policy AQ 1.3, was amended at the same time to allow reductions in vegetated buffers only in areas where the reductions would not result in significant cumulative impacts to aquatic resources and fish and wildlife habitat. The cumulative impact analysis showed that the proposal is consistent with these policies.

23. The Director recommended approval of the Shoreline Variance subject to imposition of conditions addressing required approvals and restrictions.

24. Section 16.12.350B provides that:

1. The City of Bainbridge Island hearing examiner is vested with authority to:
  - a. Approve, approve with conditions, or deny shoreline variance and shoreline conditional use permit applications after a public hearing and after considering the findings and recommendations of the director, which shall be given substantial weight; provided, that decisions may be appealed in accordance with BIMC 16.12.370.B.

25. The SMP criteria for shoreline variances for development landward of the OHWM are as follows:

- a. The strict requirements of the bulk, dimensional, or performance standards set forth in the master program preclude or significantly interfere with a reasonable economic use of the property not otherwise prohibited by the master program.
- b. The hardship described above is specifically related to the property and is the result of unique conditions, such as irregular lot shape, size, natural features, and the application of the master program, and is not, for example, from deed restrictions or the applicant's own actions.
- c. The design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to adjacent properties or the shoreline environment.
- d. The shoreline variance authorized does not constitute a grant of special privilege not enjoyed by other properties in the area and will be the minimum necessary to grant relief.
- e. The public interest will suffer no substantial detrimental effect.

Section 16.12.380B.2.

26. In addition, the SMP requires consideration of the cumulative impact of additional similar requests. Here the cumulative impact was determined not likely to cause substantial adverse impacts to the shoreline environment and to be consistent with the policies of Ch. 90.58 RCW. Section 16.12.380B.4.

27. The policies of the Shoreline Management Act set out in RCW 90.58.020 include protecting against adverse impacts to the land, to its vegetation, and to wildlife and the waters of the state.

28. Installation of the new septic system cannot occur without a variance because of the constraints caused by the size and shape of the lots and the NVZ. Those conditions would significantly interfere with reasonable economic use of the property if variance were not granted for the septic system. The need for the variance is not the result of the applicant's actions. Variance for the extension of the septic system further into the NVZ would not adversely affect neighbors. There would be no special privilege granted the applicant where the septic systems

serving most houses on Point Monroe are located, at least in part, in the NVZ. The variance requested for the septic system is the minimum necessary for relief. The record shows that the development, if conditions requiring protections during construction and replanting are imposed, would not impact shoreline values or resources and they could be enhanced by a more technologically advanced septic system. Given this, there should be no detriment to the public interest.

29. The same constraints on development outside the NVZ from size and configuration of the lots force the proposed construction staging area into the NVZ. A staging area is essential for redevelopment of the lots so without variance the regulations would interfere with a reasonable economic use. The cumulative impacts analysis shows that if the area were replanted when the temporary use is ended, there would be little if any effect on the shoreline or the public interest, and no adverse affect on other properties was identified.

30. The 81 square foot expansion into the NVZ on the Puget Sound side associated with the actual house footprint would have no material affect on the functioning of the NVZ as it would be over the area disturbed for the reserve drain field, nor would the addition cause adverse affects to other properties in the area since it could not block any view of the water from the other houses, nor would the small encroachment cause detriment to the public interest. The record does not contain facts that show how the regulations as applied to this property “preclude or significantly interfere” with a reasonable economic use of the property, nor could not allowing such a small portion of a sizeable house do so, and the facts do not support a finding that the granting of a variance for this addition would not award a special privilege to the applicant when the proposed footprint and structure is at the upper end of the range of house sizes on the point, or that 81 square feet is the minimum necessary for relief.

31. Notice of the public hearing on the application was published and mailed on April 22, 2011, and posted on April 25, 2011.

### **Conclusions**

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. Notice and public hearing requirements of the Code were met.
3. As the findings show that the applicant demonstrated that all of the criteria for approval of a variance to allow elements of the septic system to intrude further into the NVZ and to allow temporary use of an area of the NVZ for construction were met, it should be approved subject to the SEPA and the other recommended conditions. Were the 81 square foot addition a separate encroachment into the NVZ, though it would have no impact on the shoreline environment nor adversely affect other properties, it has not been shown to satisfy all criteria for variance approval. However, because it is within an area where variance for disturbance for construction of the septic system should be approved, it does not represent a separate encroachment.

### **Decision**

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The Shoreline Variance to allow development within the NVZ for the septic system and the 81 square foot area of the structure in the same area, and a temporary construction staging within the NVZ is granted subject to the following conditions:

**SEPA Conditions:**

1. No fertilizers, pesticides, or herbicides shall be used in the native vegetation zone. The use of these products elsewhere on the site is discouraged, but if necessary they shall be used consistent with Integrated Pest Management (IPM) strategies.
2. Prior to the issuance of a building permit, a planting plan for the property shall be submitted and approved by the City. Upon completion of construction, all cleared areas shall be landscaped with native vegetation, including but not limited to the construction staging area, within the first planting season following construction. Any areas outside of the averaged native vegetation zone may be planted with non-native species. Once planted, removal of any native plants within the native vegetation zone is prohibited. Removal of invasive/non-native species may be permitted with prior City approval of a replanting plan indicating the type of vegetation being removed and the type and quantity of replacement native plants being provided.
3. A temporary sediment and erosion control plan shall be submitted prior to building permit issuance.
4. The existing native vegetation on the Puget Sound side of Point Monroe Drive shall be protected except for the designated construction staging area. Native vegetation within the construction staging area should be removed and preserved where possible for replanting purposes. Silt fencing shall be placed between the native vegetation zone on the Puget Sound side and the proposed construction staging area prior to permit issuance.
5. The replaced over water deck on the lagoon side of the house shall be constructed with functional grating across at least 50 percent of the deck surface to allow light penetration to the tidelands below.
6. In order to protect the migration of the juvenile salmon and the spawning of the sand lance, the project is only allowed to do in water construction activities outside of the accustomed migration and spawning times. Unless otherwise approved by the Washington Department of Fish and Wildlife and the Army Corps of Engineers in water work shall not occur during the following time periods: March 15<sup>th</sup> to July 15<sup>th</sup> or October 15 to March 1<sup>st</sup>.
7. The disturbed tideland beach area is to be restored following the installation of the mate building foundation. The beach restoration material shall be the same material that was excavated from the beach and the beach grade shall match the beach grade of the adjacent tidelands.
8. All machinery used or stored on site shall be kept in good working condition to prevent the release of oil, chemicals or other hazardous materials to the water.

9. Extreme care shall be taken to prevent petroleum products, chemicals, or other toxic or deleterious materials from entering the water and degrading water quality. If a spill does occur, or if oil sheen or any distressed or dying fish are observed in the project vicinity, work shall cease immediately and Washington Department of Ecology shall be notified of such conditions. Contact: Northwest Regional Spill Response Section at (206) 649-7000.
10. Contractor 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:

11. The applicant shall obtain an approved building permit from the Department of Planning and Community Development prior to construction of the proposed residence.
12. The footprint of the residence and garage shall be in substantial conformance with the drawing date-stamped February 25, 2011.
13. A geotechnical report shall be required for the foundation design and shall be submitted with the building permit application. A geotechnical engineer shall fill out the City's standard geotechnical forms during the building permit process.
14. Prior to issuance of a building permit, an indemnification agreement for all activities and structures on the sites shall be duly executed in a form approved by the City Attorney, pursuant to BIMC Section 16.20.150(D)(1)(a).
15. Prior to building permit issuance, a flood elevation certificate is required to be filled out by a licensed surveyor. The site plans submitted for the building permit shall show the top of the lowest floor one (1) foot above base flood level (13'). The design of the residence shall employ measures to minimize flood damage and will be reviewed for such during building permit submittal.
16. An approved BSA from the Health District is required to be submitted prior building permit issuance.
17. To mitigate potential off-site glare, lights shall be hooded and shielded so that the light or glare does not extend beyond the property boundary in accordance with the standards listed in BIMC Chapter 15.34.
18. Washington State Department of Fish & Wildlife Hydraulic Project Approval and Army Corps of Engineers Permit approval is required prior to beginning any work on this project. Copies of approvals must be submitted to the City prior to beginning any work on the site. A copy of all public agency approvals and approved drawings shall be given to all contractors performing work at the site prior to beginning any construction work.
19. All Hydraulic Project Approval conditions and any Army Corp of Engineers Permit conditions shall become conditions of approval for shoreline variance.

20. A copy of these Conditions of Approval shall be attached to the building permit application for the residence and the garage.

Entered this 1st day of June 2011.

/s/ Margaret Klockars

Margaret Klockars  
Hearing Examiner *pro tem*

### **Concerning Further Review**

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. The State Department of Ecology will approve, approve with conditions or deny the variance within 30 days of the date it receives the permit from the City. Appeal of the Department of Ecology's decision is to the Washington State Shorelines Hearings Board as provided by RCW 90.58.180 (or its successor) and Chapter 461-08 WAC (or its successor). To be timely, petition for review must be filed within the 21-day appeal period following the decision by the Department of Ecology. [see BIMC 16.12.380].