

## RESOLUTION NO. 902

### A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR REGARDING A DECISION IN THE APPEAL OF ROBERT G. FRISBIE, APPEAL NUMBER 12-0001.

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NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

**Section 1.** For its decision the City Council adopts the following:

#### PROCEDURAL HISTORY

An appeal was filed in this matter on April 23, 2012 by Robert G. Frisbie. The Gig Harbor City Council appointed W. Scott Snyder as its hearing officer. The hearing officer held a pre-hearing conference with the appellant, City Attorney and staff member Peter Katich on May 24, 2012. This matter came on for hearing before the Gig Harbor City Council on Tuesday, May 29, 2012. The hearing officer chaired the hearing, but did not participate in deliberation or the decision. Councilmembers Ekberg, Guernsey, Kadzik, Payne, Perrow and Young were present. Council member Malich was absent. Mayor Charles Hunter was present but did not participate in the hearing.

At the hearing the parties stipulated that there were no procedural issues. The City stipulated that the appeal was filed on time and the appellant stipulated that his appeal raises no issue regarding notice, publication, timing or other procedural issues relating to the issuance of the determination of non-significance (hereinafter "DNS") for the City's 2012 draft Shoreline Master Program ("SMP draft").

The decision is based upon the record of the proceeding. The record consists of the transcript of the proceeding and the exhibits listed in Section 2 below.

#### POSITION OF PARTIES

##### Appellant

The appellant's appeal dated April 23, 2012 lists seven appeal grounds. The grounds are summarized as follows:

1. The shift in emphasis within the SMP draft from hard armoring to soft armoring is not adequately addressed by the checklist.
2. The SMP draft proposes "additional uses for overwater net shed" whose environmental impact is not adequately assessed by the checklist.

3. The SMP draft provides for enhancement of public access and the impact of enhanced access is not adequately assessed by the checklist.
4. The SMP draft establishes new minimum setbacks from the ordinary high water mark (OHWM) and the impact of this change is not adequately assessed by the checklist.
5. Limits on maximum impervious surface in the SMP draft are not adequately assessed by the checklist.
6. SMP draft provisions for “pump-out, holding and/or waste treatment facilities” are not adequately assessed by the checklist.
7. The regulation of commercial fishing moorage does not appear to include requirements for pump-out stations or public access. The appellant asserts that the checklist fails to “identify the benefit for this exemption.”

Appellant's appeal and his hearing statement received by the City Council on May 29, see Exhibit 2, provides significant additional detail on the basis for his appeal. At hearing, appellant states that his sole request for relief was an expansion of the checklist to include the additional material which is referenced in his presentations.

#### City's Position

The City emphasizes that the determination of the responsible official is required to be given substantial weight under City ordinance and state law. The City asserts that the appellant's contentions are policy matters best addressed through the legislative process preceding adoption of Shoreline Master Program amendments, if any. The City asserts that issues related to economics associated with implementing regulations contained in the Shoreline Master Program are “not within the zone of interest protected by SEPA” citing *Alliance v. Snohomish County*, 76 Wash. App. 44, 52, 882, P.2d 807 (1994), review denied 125 Wn.2d 1025 (1995) and that a request for a cost benefit analysis is beyond the scope of SEPA review. The City asserts that the appellant has failed to sustain his burden of proof which it asserts to be a “clearly erroneous” standard.

#### **FINDINGS OF FACT**

1. The appeal of Robert Frisbie was timely filed in accordance with City ordinance and state law.
2. The State Environmental Policy Act review process was conducted by the City in accordance with City ordinance and state law.
3. The City's environmental checklist is used to review the “proposed activities, alternatives, and impacts... in accordance with SEPA's goals and policies” in

connection with the adoption of the Shoreline Master program amendments. WAC 197-11-060.

4. The checklist is a standard form designed to illicit sufficient information about the proposal and its environmental impacts in order that an intelligent threshold determination can be made.
5. Assessment of the potential impacts of a proposal on elements of the environment are determined on accord with categories established by the Washington Administrative Code. WAC 197-11-315; WAC 197-11-960.
6. The issues raised by appellant's appeal are by and large policy issues best addressed in the continuing legislative process attending adoption of Shoreline Master Program amendments. Expanding the checklist to perform cost benefit analysis, evaluate economic impacts, are specifically prohibited by case law and State regulation. *Alliance v. Snohomish County, ibid*; WAC 197-11-450.
7. The relief sought by the appellant, expansion of the checklist to evaluate the individual provisions of the draft SMP, misstates the purpose of the checklist. The checklist's primary purpose is to enable an intelligent threshold determination regarding the proposal and its environmental impacts, not assess policy considerations, such as public benefits and individual costs.
8. Appellant has failed to identify any potential significant adverse environmental impact associated with the SMP draft. Those environmental impacts which he has identified, such as the impact of a tsunami, are unrelated to the adoption of the SMP draft and concern either, as in the case of the tsunami, the impacts of a natural disaster or differences in degree in alleged benefits to be derived from certain regulatory measures.

## **CONCLUSIONS OF LAW**

The appellant has failed to sustain his burden of proof. Having given the determination of the SEPA official "substantial weight," the City Council is not left with the definite and firm conviction that a mistake has been committed.

## **DECISION**

The appeal is denied. The appellant's position is included in the legislative record created before the City's Planning Commission. The appellant will have a chance to make his policy arguments in the more appropriate legislative context during public hearings regarding the Shoreline Master Program. The SEPA process is designed to assess the potential "probable significant adverse environmental impacts" of a proposal or a project, not to weigh policy considerations such as the cost benefit of regulatory actions versus their economic consequences. State and federal constitutions, state law and City ordinance provide adequate protections to prevent unconstitutional takings or to allow the

appellant to challenge any assessment which he believes to be in violation of his constitutional rights.

**Section 2:** The exhibits entered into the record of this proceeding are:

Exhibit 1     Agenda Council Packet and Attachments:

- A. SEPA checklist dated February 1, 2012
- B. SEPA checklist Supplemental Sheet for non-project actions dated February 29, 2012
- C. Determination of non-significance
- D. Appeal letter from Robert Frisbie dated April 23, 2012
- E. Appellant Frisbie comments and exhibits to Planning Commission
- F. City Memorandum in Support of Denial of Appeal

Exhibit 2     Appeal Presentation of Robert Frisbie May 29 with attachments:

- A. Drawing
- B. RCW 43.21C.030
- C. Email chain regarding soft-armoring dated May 7, 2010 and salmon run chart
- D. Frisbie comments to Planning Commission dated March 31, 2011
- E. RCW 43.21C.010 and 43.21C.020
- F. WAC 173-27-040
- G. Gig Harbor Shoreline Inventory - title page and page 30
- H. Wikipedia article 5th Amendment to the United States Constitution
- I. Photographs (9) of hard-armoring
- J. Internet article regarding Wildlife Water Pollution.
- K. Washington State Recreation and Conservation office- grant information

Exhibit 3     Declaration of Tom Dolan

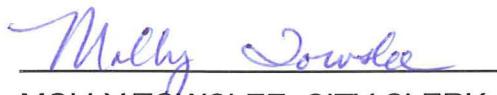
Exhibit 4     Overhead exhibits - staff presentation

RESOLVED this 11th day of June, 2012.

APPROVED:

  
MAYOR CHARLES L. HUNTER

ATTEST/AUTHENTICATED:

  
MOLLY TOWSLEE, CITY CLERK

FILED WITH THE CITY CLERK: 06/04/12  
PASSED BY THE CITY COUNCIL: 06/11/12  
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