Variance Permit Reviews

Guidance for local governments

Shorelands and Environmental Assistance Program

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Introduction

Every Shoreline Master Program (SMP) includes provisions for authorizing shoreline variance permits (variance). The purpose of a variance is strictly limited to granting relief from specific bulk, dimensional, or performance standards in your SMP "where there are **extraordinary circumstances** relating to the **physical character or configuration** of property such that the strict implementation of master program regulations will impose unnecessary hardships on the applicant or thwart the SMA policy enumerated in RCW 90.58.020" (WAC 173-27-170, emphasis added).

Think of a variance as a relief valve, one that you will rarely open but that is critical to a well-functioning shoreline management program. This chapter provides implementation guidance for reviewing variance applications. You will find:

- Resources for local government staff,
- Guidance on the key factors you should consider when reviewing variance requests for consistency with the approval criteria, and
- Information about Shorelines Hearings Board (SHB) and court decisions.

In addition to this guidance, your Ecology shoreline permit specialist[2] can help by attending pre-application conferences, attending a site visit, conducting an OHWM determination, reviewing preliminary site plans, and etc. **Because Ecology has final approval on variance permits, we strongly recommend early coordination.**

The **Shorelines Hearings Board** hears and decides appeals of shoreline permit decisions as well as penalty orders issued by local and state governmental agencies. The SHB is a quasi-judicial board created by the Washington State Legislature and housed under the Environmental and Land Use Hearings Office. The SHB decisions referenced throughout this document are available www.eluho.wa.gov.

[2] https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Contacts

Resources for Local Governments

This section includes three tools local governments can use during the permitting process. While designed for use by local government staff, they may be useful as handouts to help applicants understand the variance process and approval criteria. These resources include:

A tip sheet for variance permits. This four-page resource synthesizes the key concepts and most noteworthy Ecology recommendations from this chapter. The tip sheet references page numbers so that you can dig into ideas and concepts as needed without reading the entire document. We encourage you to use the tip sheet as an annotated reference guide to this chapter.

A diagram of the **variance permit process**. This diagram is a helpful resource for staff and applicants that communicates the stepwise process, timelines, and important milestones from pre-application conference to construction.

A variance permit submittal checklist that includes all requirements established by WAC 173-27-180. This checklist can be to ensure that minimum submittal requirements are met.

Variance permit tip sheet

This tip sheet synthesizes the key concepts and most noteworthy Ecology guidance and recommendations from this chapter. Ecology's guidance is informed by SHB and Washington State courts appeal decisions, the policy of the SMA, and our experience reviewing variance permits. After finding a relevant tip, turn to the pages referenced to review the topic more fully.

Pre-application recommendations

1. Before directing an applicant down the variance permit pathway, carefully review provisions of your code that may allow the activity. Check non-conforming provisions, uses allowed within the buffer/setback, and administrative options for buffer/setback reduction. (See page 15)
2. Ecology rules allow applicants to seek relief through the variance permit process for all SMP regulations except those that prohibit a use at a shoreline location. (See page 15)

Application review pointers

1. Local governments render *decisions*, not *recommendations* on variance permits. Ecology then makes a final decision to approve, approve with conditions, or deny. (See page 17)
2. Your staff report should provide a clear, defensible analysis of how a proposal meets, can meet (i.e., with conditions of approval), or does not meet each review criterion. (See page 17)
3. Determinations about a proposal's consistency with the variance approval criteria will always be a fact-specific inquiry. (See page 17)
4. Past errors in permit decisions should not preclude the correct application of the variance approval criteria for new permit decisions. (See page 18)
5. When approval criteria differ between WAC 173-27-170 and the local master program, the local government and Ecology must apply the more-restrictive criteria. (See page 22)
6. A proposal that cannot meet *all* approval criteria of WAC 173-27-170(2) and (3) is properly denied. (See page 22)

Reasonable use criterion 101

1. The size, location, and physical attributes of a property are relevant when deciding reasonable use. (See page 23)
2. When residential use is not reasonable due to a site's size, location, and/or physical attributes, recreation use may be the reasonable use available to the owner. (See page 23)
3. While the uses and developments on nearby lots should be considered, they should not be the sole deciding factor of reasonable use. (See page 24)
4. Personal desires of the applicant are irrelevant in considerations of reasonable use. (See page 26)

5. A use is not reasonable if there is a realistic likelihood that it will pose a risk to human life or safety, harm neighboring properties, or harm the environment. (See page 25)
6. When an applicant proposes to expand a nonconforming residential structure in a manner inconsistent with the SMP, they should present evidence to demonstrate that relief is necessary to address a condition that either precludes or significantly interferes with continued residential use without the proposed expansion. (See page 27)

Hardship criterion 101

1. The hardship being claimed must be related to the land. (See page 32)
2. Applicants must submit a site plan showing where development is possible without the benefit of a variance. (See page 33)
3. When an applicant has taken an action that reduces the buildable land available on a lot, they will typically have created their own hardship. (See page 35)
4. Homeowners' association CC&Rs are a form of deed restriction and cannot be the hardship claimed by a variance applicant. (See page 36)
5. When an applicant develops the shoreline without proper local and state approvals under the SMP, that illegal or otherwise non-compliant development cannot then become the hardship that necessitates the variance. (See page 36)
6. When an applicant purchases a property with the knowledge that a variance will be necessary to develop, they *may* be creating their own hardship. (See page 38)

Compatibility and adverse impacts criterion 101

1. Consider a proposal's compatibility 1) with immediately adjacent uses, and 2) within a wider geographic area. (See page 39)
2. Compatibility with "uses planned for the area" under the SMP and comprehensive plan means that the resultant variance would exist in harmony with likely future shoreline uses. (See page 40)
3. A demonstration of compatibility should not be substantially based on existing nonconforming uses. (See page 41)
4. The bulk and site design of surrounding development and uses is relevant when considering a proposal's visual compatibility. (See page 41)

Special privilege criterion 101

1. Variance permit applications will often benefit from a comparison table with information on nearby surrounding properties and an associated map. (See page 42)
2. If a project will be a first of its kind in the area, approval *may* be a grant of special privilege. (See page 43)

3. If approval will result in a development that is larger, closer to the water, or otherwise out of scale with surrounding authorized uses and developments in the area, then approval may be a grant of special privilege. (See page 43)

Minimum necessary criterion 101

1. "Minimum necessary to afford relief" means that *no more* than what is necessary to accommodate the objective reasonable use of a property can be authorized. (See page 45)
2. If possible, compare what is proposed to an established, objective minimum standard or threshold associated with the use. (See page 45)
3. An applicant's site plan should clearly show that all attempts have been made to minimize the degree of encroachment or relief being sought. (See page 45)

Public interest criterion 101

1. An applicant's response to the public interest criterion should consider the public interest in the regulation to be varied. (See page 47)
2. Conclusions about whether a proposal will have substantial detrimental effects to the public interest cannot rest on the absence or abundance of public comment/interest alone. (See page 48)
3. There is a public interest in protecting natural shorelines from unnecessary human structures. (See page 48)
4. A proposal might have a "substantial" detrimental effect if it will obstruct, reduce, render unsafe, or eliminate existing public use of the shoreline without replacing or otherwise mitigating for the impact or loss. (See page 49)

Rights of navigation and shoreline use criterion

1. It is possible to authorize a project when it will have some degree of impact to public navigation and shoreline use, when the project promotes or enhances the public interest. (See page 50)
2. When adverse impacts to public navigation and shoreline use will result from a proposal with limited public interest, that proposal will be inconsistent with the criterion. (See page 51)

Cumulative impacts criterion 101

1. The requirement to consider cumulative impacts is placed on the local government and Ecology. (See page 2119)
2. If a project avoids impacts to shoreline ecological functions, it will not contribute to a cumulative impact on ecological functions. (See page 52)
3. Authorizing a variance that achieves NNL through extensive compensatory mitigation can result in cumulative impacts concerns. (See page 52)

4. An analysis of cumulative impacts will often need to look beyond undeveloped lots to consider the likelihood of similar proposals coming from developed lots. (See page 52)
5. An assessment of cumulative impacts must be based on a study area that is appropriate for the project. (See page 53)
6. An evaluation of cumulative impacts must identify specific sites within the study area where similar circumstances exist and where additional requests for like actions may be generated. (See page 53)
7. Knowledge of past development in the area should influence our understanding of how authorizing a particular variance might result in similar, future requests. (See page 54)
8. See Ecology’s suggests approach to assessing cumulative impacts. (See page 54)

Shoreline variance and conditional use permit process

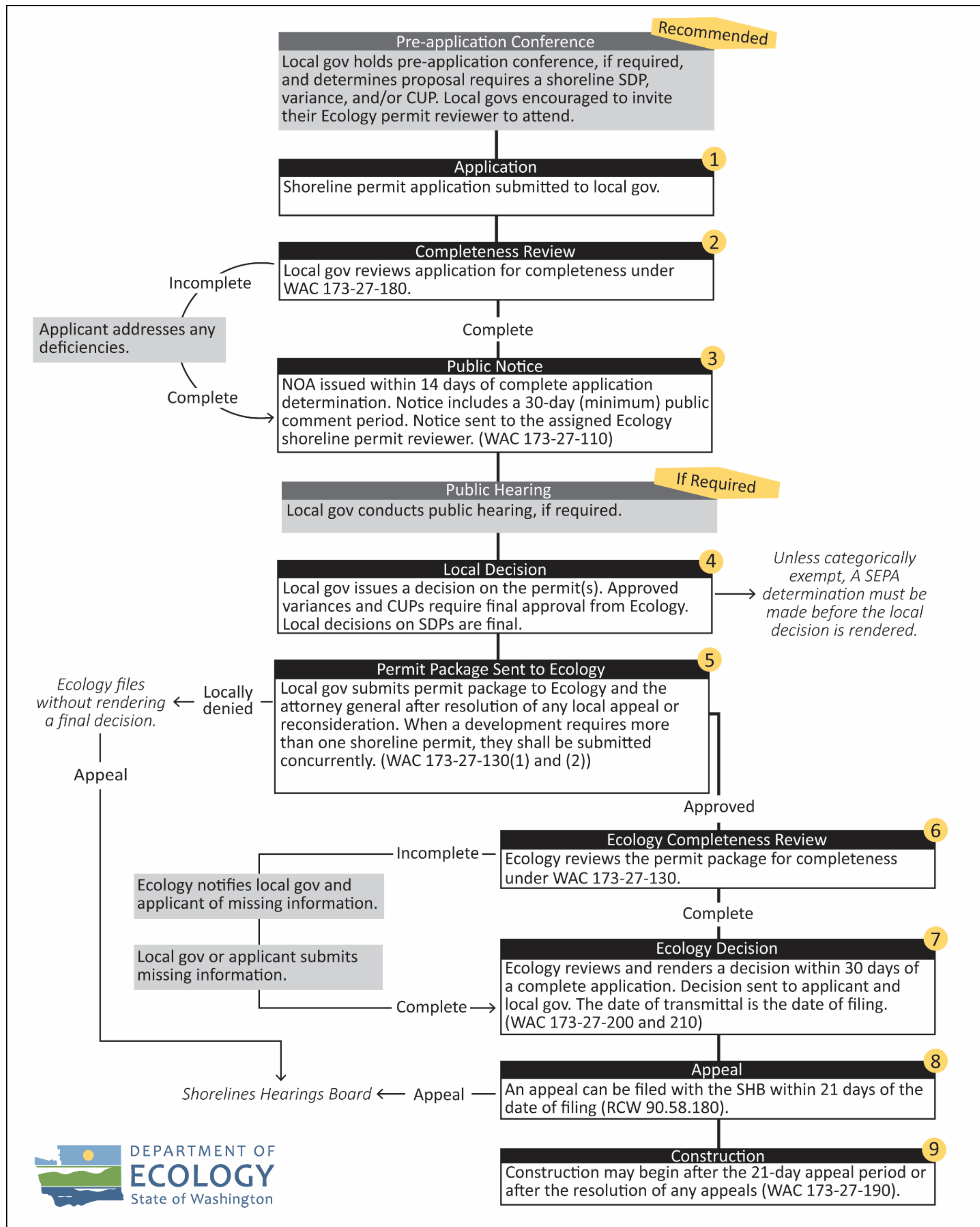

Figure 1. Shoreline variance and CUP permit process.

Variance permit application requirements - checklist

Minimum permit application requirements are established by WAC 173-27-180 and are listed below. In addition to the standard elements listed below, additional submittal materials may be required by the SMP. This checklist can be used to ensure that minimum application requirements are met.

- ☐ **1. The name, address, and phone number of the applicant.** The applicant should be the owner of the property or the primary proponent of the project and not the representative of the owner or primary proponent.

- ☐ **2. The name, address, and phone number of the applicant's representative if other than the applicant.**

- ☐ **3. The name, address, and phone number of the property owner**, if other than the applicant.

- ☐ **4. Location of the property.** This shall, at a minimum, include the property address and identification of the section, township and range to the nearest quarter, quarter section or latitude and longitude to the nearest minute. All applications for projects located in open water areas away from land shall provide a longitude and latitude location.

- ☐ **5. Identification of the name of the shoreline (water body)** that the site of the proposal is associated with. This should be the water body from which jurisdiction of the act over the project is derived.

- ☐ **6. A general description of the proposed project that includes the proposed use or uses and the activities necessary to accomplish the project.**

- ☐ **7. A general description of the property as it now exists** including its physical characteristics and improvements and structures.

- ☐ **8. A general description of the vicinity** of the proposed project including identification of the adjacent uses, structures and improvements, intensity of development, and physical characteristics.

- ☐ **9. A site development plan** consisting of maps and elevation drawings, drawn to an appropriate scale to depict clearly all required information, photographs, and text which shall include:

  - ☐ (a) The **boundary of the parcel(s)** of land upon which the development is proposed.
  - ☐ (b) **The OHWM** of all water bodies located adjacent to or within the boundary of the project. This may be an approximate location provided, that for any development where a determination of consistency with the applicable regulations requires a precise location of the ordinary high water mark the mark shall be located precisely

and the biological and hydrological basis for the location as indicated on the plans shall be included in the development plan. Where the ordinary high water mark is neither adjacent to or within the boundary of the project, the plan shall indicate the distance and direction to the nearest ordinary high water mark of a shoreline.

- (c) Existing and proposed **land contours**. The contours shall be at intervals sufficient to accurately determine the existing character of the property and the extent of proposed change to the land that is necessary for the development. Areas within the boundary that will not be altered by the development may be indicated as such and contours approximated for that area.
- (d) A **delineation of all wetland areas** that will be altered or used as a part of the development.
- (e) A general indication of the **character of vegetation** found on the site.
- (f) The **dimensions and locations of all existing and proposed structures and improvements** including but not limited to; buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.
- (g) Where applicable, **a landscaping plan** for the project.
- (h) Where applicable, plans for **development of areas on or off the site as mitigation** for impacts associated with the proposed project shall be included and contain information consistent with the requirements of this section.
- (i) **Quantity, source, and composition of any fill material** that is placed on the site whether temporary or permanent.
- (j) **Quantity, composition, and destination of any excavated or dredged material.**
- (k) A **vicinity map** showing the relationship of the property and proposed development or use to roads, utilities, existing developments and uses on adjacent properties.
- (l) Where applicable, a **depiction of the impacts to views** from existing residential uses and public areas.
- (m) **On all variance applications the plans shall clearly indicate where development could occur without approval of a variance,** the physical features and circumstances on the property that provide a basis for the request, and the location of adjacent structures and uses.

Pre-application Considerations

Ideally, a local government will be aware of a shoreline variance proposal before an application is submitted. Sometimes this will be through preliminary conversations with the property owner, but it may also be through a formal pre-application conference. This section recommends several steps that you can take prior to an application being submitted that can result in a smoother application process.

Pre-application conference

Many local governments have a process for convening pre-application conferences. It is a best practice for local governments to require a pre-application conference for projects that will occur within the shoreline. The importance of convening a pre-application conference is greater for shoreline variances. This is because variances are discretionary permits where approval is strictly limited to situations where there are extraordinary circumstances relating to the physical character or configuration of property such that the strict implementation of your SMP will impose unnecessary hardships on the applicant or thwart the policy of the SMA.

We encourage you to notify your Ecology shoreline permit reviewer about forthcoming pre-application conferences.[3] Depending on the project, we may participate in the conference, consult with you beforehand, or send preliminary comments.

The pre-application conference is the best opportunity for you to raise concerns about project design, share information about the variance process and approval criteria, and to get early feedback from Ecology and other state and federal agencies.

Determine whether a variance is necessary

Before directing an applicant down the path of a variance, carefully review portions of your SMP that might provide the relief being requested without a variance. When a proposal is to expand a nonconforming structure, review the nonconforming provisions of your SMP for what relief is possible outside of a variance. When a development must encroach on a shoreline or wetland buffer, determine whether your SMP allows for administrative buffer reduction or averaging and whether the proposal qualifies for either option. Another good place to look is that portion of your SMP that lists what development is allowed within the shoreline buffer and setback.

Determine whether a variance is applicable

RCW 90.58.100(5) requires that each SMP contain provisions to allow "for the varying of the application of use regulations." **Ecology rules allow applicants to seek relief through the variance permit process for all SMP regulations except those that prohibit a use at a shoreline**

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[3] Find the permit reviewer assigned to your jurisdiction on Ecology's Shoreline Management Contacts webpage, https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Contacts.

location. This is explicit in the definition of variance, "to grant relief from the specific bulk, dimensional or performance standards set forth in the applicable master program **and not a means to vary a use of a shoreline**" (WAC 173-27-030, emphasis added). A *use* is the underlying function for which a property will be used (e.g., commercial, residential, recreational, industrial, institutional, transportation, agricultural, utility, aquaculture, etc.). Regulations prohibiting uses can be found in your SMP's use table as well as within the portion of your SMP that lists use regulations.

SMP bulk, dimensional, and performance standards for which variances are commonly sought include, but are not limited to:

- Limits on development within shoreline buffers and setbacks.
- Limits on development within critical areas and critical area buffers.
- Dock, pier, ramp, boat lift, and swim float dimensional and design standards (length, width, height, area, configuration, material).
- Structure height limits.
- Use-specific design and performance standards (e.g., public accesses design requirements).
- Impervious surface limits.
- Trail width and material standards.
- Prescriptive mitigation ratios.
- Standards limiting the expansion of existing, non-conforming residential structures (e.g., 25% footprint expansion).

A variance from the SMP and SMA requirement that authorized developments achieve no net loss (NNL) of shoreline ecological functions is not approvable. NNL is the regulatory principle from which many SMP standards are derived and is not a performance standard that can be varied.[4] So, while applicants can seek relief from an SMP requirement that helps achieve NNL, they cannot avoid the requirement to correctly apply the mitigation sequence to achieve NNL. For example, an applicant may seek a variance to build within a shoreline buffer, but the proposal should not be approved unless all impacts to shoreline functions can be rectified or compensated for through a mitigation plan (this permit would also need to be consistent with the variance approval criteria).

Please contact your Ecology shoreline permit reviewer[5] if you need assistance determining whether an SMP regulation is a bulk, dimensional, or performance standard.

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[4] WAC 173-26-186(8)(b) and 173-26-201(2)(c)

[5] https://ecology.wa.gov/Water-Shorelines/Shoreline-coastal-management/Shoreline-coastal-planning/Contacts.

Application Review Considerations

The purpose of this section is to highlight your role in variance permit review and to provide information on local government concerns that often accompany requests for regulatory relief.

Local decision, *not* recommendation

Variance permits require a two-step approval process to be authorized**. Local governments are required to make a decision to approve, approve with conditions, or deny a variance (**[WAC 173-27-130](https://apps.leg.wa.gov/WAC/default.aspx?cite=173-27-130)**)**[6] **before Ecology renders a final decision.** Because the final decision rests with Ecology, some local governments mistakenly consider the local action on variances to be a *recommendation* to Ecology.

Importantly, Ecology will render a final decision only on variance permits that have been approved by a local government and will make no final decision on variances that are denied by the local government.[7]

Professional deliberation and judgment

Variances are discretionary permits that require decision-makers to deliberate and exercise professional judgment. While the onus is on the applicant to demonstrate consistency with most of the criteria, Ecology would like to see staff reports that include independent findings and conclusions. **A staff report should provide a clear, defensible analysis of how a proposal meets, can meet (i.e., with conditions of approval), or does not meet review criteria.** Relying on an applicant's arguments without scrutiny can leave a decision vulnerable on appeal. A well written staff report makes conclusions based on a fact-specific inquiry. Anyone reading your staff report should be clear about your department's position on a proposal.

Fact-specific inquiry

Determinations about a proposal's consistency with the variance approval criteria will always be a fact-specific inquiry and will require you to consider the site-specific conditions and circumstances before you. As you read this chapter, you'll see discussions of SHB and court decisions on shoreline permits. While the facts of the cases shared in this chapter are unlikely to match the exact situations of the proposals you'll review, we cite them here as examples to inform your decisions. However, the citations in this document are from cases that illustrate common themes that emerge from review of many Board decisions and may provide useful context for your review of projects.

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[6] https://apps.leg.wa.gov/WAC/default.aspx?cite=173-27-130

[7] WAC 173-27-200(1) "After local government approval of a conditional use or variance permit, local government shall submit the permit to the department for the department's approval, approval with conditions, or denial."

Past errors in permit decisions

Past errors in permit decisions may have resulted in projects being approved that are inconsistent with your SMP. **These past errors should not preclude the correct application of the variance approval criteria for new permit decisions.** The Washington Supreme Court has ruled that "proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property" (*Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 211 P.2d 910 (1994)). With this said, it is important to be aware that the reasonable use expectations of a property owner can be influenced by their knowledge of variances having been granted on properties with similar attributes.

Regulatory takings

Processing a shoreline variance might raise questions about regulatory takings. Both the U.S. and the Washington State constitutions provide that the government may not take private property unless just compensation is paid. The Fifth Amendment of the U.S. Constitution provides "[N]or shall private property be taken for public use, without just compensation." Article 1, Section 16 of the Washington State Constitution holds "No private property shall be taken or damaged for public or private use without just compensation having been first made."

A "taking" can be through the physical appropriation of property without compensation, but it can also be the result of a regulation. In 2019, years of confusion over how state and federal regulatory takings and substantive due process law differed were made clear by the case *Yim v. City of Seattle* (Yim I), 451 P.3d 675 (Wash. 2019). In *Yim I,* the Washington Supreme Court embraced the federal three-part analysis as the proper test to be used. Under the federal three-part analysis, a regulatory taking occurs only if the challenged regulation:

1. Forces the property owner to suffer a permanent physical invasion;
2. Deprives the property owner of **all** economically beneficial use; or
3. Fails application of the case-specific factors from *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The factors from *Penn Central* probe the character of the regulation, the economic impact on the landowner, and the extent of interference with investment-backed expectations.

Your City or County attorney is your best resource for guidance on whether a permit action amounts to a regulatory taking. However, it is important to understand that a property owner has no constitutional right to develop a property for its most profitable use.

> In a takings challenge to a regulation, courts generally do not require compensation when the regulation merely decreases property value or prevents property owners from doing exactly what they want with their property. If a regulation allows property to be put to productive economic use, the property has value, and the regulation will not be deemed to deny all reasonable economic use of the property; there is no regulatory taking in that situation. (MRSC 2021)

Review Criteria for Variance Permits

WAC 173-27-170 establishes minimum approval criteria for shoreline variance permits and among these criteria there is a great deal of overlap and interplay.

This section introduces how the rule is structured before providing guidance on each individual approval criterion. Ecology's guidance is informed by SHB and Washington State courts appeal decisions, the policy of the SMA, and our experience reviewing variance permits.

Structure of the approval criteria in rule

The variance review criteria rule has five parts, WAC 173-27-170(1) through (5). It is the responsibility of the applicant to demonstrate that their proposal meets all criteria. To do so, an applicant will provide an analysis of all relevant factors related to each criterion.

The local government staff report will assess the applicant's arguments and make independent findings and conclusions about whether a proposal meets all CUP approval criteria. If you agree with the arguments presented by an applicant, explain why. If you find that an applicant has not met the burden of demonstrating consistency with all criteria, explain why. Provide a clear, defensible analysis for your conclusion.

WAC 173-27-170(1)

WAC 173-27-170(1) is analyzed as one of the five criteria. It is an overarching statement of the purpose and intent of shoreline variances and when they are appropriately granted and language of the provision is useful for communicating the high threshold for granting a variance.

> Variance permits should be granted in circumstances where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances the applicant must demonstrate that extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.
> WAC 173-27-170(1)

Applicants should directly address consistency with WAC 173-27-170(1). The local government will evaluate the arguments presented and come to an independent conclusion about whether the proposal meets, can meet (with conditions of approval), or cannot meet the criterion.

WAC 173-27-170(2) – Landward approval criteria

For development and/or uses **landward of the OHWM and/or landward of any wetland**, the request may be authorized provided the **applicant can demonstrate** *all* of the following (WAC 173-27-170(2), emphasis added):

a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, or significantly interferes with, **reasonable use** of the property;

b) That the **hardship** described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions;

c) That the design of the project is **compatible** with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment;

d) That the variance will not constitute a grant of **special privilege** not enjoyed by the other properties in the area;

e) That the variance requested is the **minimum necessary** to afford relief; and

f) That the **public interest** will suffer no substantial detrimental effect.

For a through f above, the local government will evaluate the arguments presented by the applicant and come to independent conclusions about whether the proposal meets, can meet (with conditions of approval), or cannot meet the criteria.

WAC 173-27-170(2) – Waterward approval criteria

The approval criteria differ in a small but significant way when a project will occur **waterward of the OHWM or within a wetland.** Waterward variances include a narrower reasonable use criterion and special consideration for navigation and public use of the shoreline. Variance permits for development and/or uses that will be located waterward of the OHWM or within any wetland may be authorized provided the **applicant can demonstrate** *all* of the following (WAC 173-27-170(3), emphasis added):

a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes **all reasonable use** of the property;

b) That the proposal is consistent with the criteria established under subsection (2)(b) through (f) of this section [the landward development criteria]; and

c) That the public **rights of navigation** and use of the shorelines will not be adversely affected.

WAC 173-27-170(4) – Cumulative impacts

Regardless of a project's location landward or waterward of the OHWM, all variance requests must meet a final approval criterion related to the cumulative impacts of similar requests:

> In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment. (WAC 173-27-170(4))

Applicants should respond to the criterion to the best of their ability. This is an opportunity for applicants to inform your review but does not replace the local government's assessment. **Regardless of information provided by the applicant, local government must independently consider cumulative impacts.** In many cases, applicants will not have access to the information necessary to fully consider cumulative impacts. Local governments will typically have unique access to information about past, current, and potential future requests for like actions in the area and are best positioned to develop findings and conclusions about a proposal's cumulative impacts. The cumulative impacts criterion is great place in your review to bring in new information and analyses that haven't been presented by the applicant.

A variance proposal that will result in cumulative impacts that will conflict with the policy of the SMA or cause substantial adverse effects to the shoreline environment is properly denied.

WAC 173-27-170(5) – No "use" variances

The last part of the rule states, "Variances from the use regulations of the master program are prohibited" (WAC 173-27-170(5)). Ecology interprets WAC 173-27-170(5) to mean that a variance cannot be a means to authorize a prohibited use. This interpretation is consistent with the definition of variance, "a means to grant relief from the specific bulk, dimensional or performance stands set forth in the applicable master program **and not a means to vary a use of a shoreline**" (WAC 173-27-030, emphasis added). This interpretation is also consistent with RCW 90.58.100(5):

> Each master program shall contain **provisions to allow for the varying of the application of use regulations of the program**, including provisions for permits for conditional uses and variances, to ensure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3). (RCW 90.58.100(5))

Your staff report should include a statement affirming that the variance granted is for a use allowed by the SMP at the specific shoreline location.

Minimum approval criteria

The approval criteria of WAC 173-27-170 are **minimum approval criteria**, and some SMPs establish more-restrictive requirements (WAC 173-27-210). When approval criteria differ, the local government and Ecology must apply the more-restrictive criteria (*Buechel,* 125 Wn. 2d 196 at 206-07; reaffirmed in *Jain v. Ecology*, SHB No. 03-022 (March 18, 2004) and *Davidson v. Ecology*, SHB No. 19-006 (Nov. 13, 2019)).

For example, some local governments have adopted reasonable use language that is more restrictive than what exists in the WAC because it eliminates the phrase “or significantly interferes with” from the criterion (see below).

a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes, **or significantly interferes with**, reasonable use of the property (WAC 173-27-170(2)(a), emphasis added).

While consulting this chapter, it will be useful for you to understand whether your SMP adopts WAC 173-27-170 approval criteria without change, includes additional approval criteria, or has modified the WAC 173-27-170 criteria to be more restrictive.

Inconsistency with any *one* criterion

A proposal that cannot meet all approval criteria of WAC 173-27-170 is properly denied. This literal interpretation was upheld in *Gambriell v. Mason Co.,* SHB No. 91-26 (March 2, 1992) where the SHB found failure to meet any one of the required criteria for variance is fatal to granting approval.

Reasonable use criterion

Every SMP includes a variance approval criterion that addresses reasonable use. Reasonable use is a legal concept that has been articulated by federal and state courts in regulatory takings cases. The SMA does not define reasonable use, and it is infrequently defined within SMPs. Yet the concept is fundamental to every shoreline variance request.

For development and uses located **landward of the OHWM and landward of any wetland,** the approval criterion is: "That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program **precludes, or significantly interferes with**, reasonable use of the property" (WAC 173-27-170(2)(a), emphasis added).

An SMP requirement "precludes" reasonable use of the property when 1) the establishment of a reasonable use is completely prevented by an SMP bulk, dimensional, or performance standard of the SMP; **or** 2) when the continued reasonable use of a site will be effectively stopped by an SMP standard.

An SMP requirement "significantly interferes" with reasonable use when 1) the reasonable use can be or has been established, **but** 2) when developed in conformance with SMP requirements would be rendered impracticable or insufficient from the standpoint of a hypothetical user of the shoreline.

A more-restrictive criterion is used for development and uses located **waterward of the OHWM or within a wetland:** "That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program **precludes all** reasonable use of the property" (WAC 173-27-170(3)(a), emphasis added).

Is a use reasonable because it's "allowed?"

It is commonly argued that a use is reasonable when that use is allowed by the SMP and/or the local zoning code. It is true that variances may be granted only for uses allowed by the SMP, because a variance cannot be granted for a prohibited use. But a use may not be reasonable at a specific location because the site's physical character or configuration render it unsuitable for the use.

Size, location, and physical attributes of a property

The size, location, and physical attributes of a property are relevant when deciding reasonable use.[8] There must be a connection between a site's size, location, and/or physical attributes and the preclusion of, or significant interference with, reasonable use. This is because the purpose of a variance is strictly limited to granting relief from specific bulk, dimensional, or performance standards in your SMP "where there are **extraordinary circumstances** relating to the **physical character or configuration** of property such that the strict implementation of

[8] *Buechel v. Ecology* 125 Wn.2d 196 (1994)

master program regulations will impose unnecessary hardships on the applicant or thwart the SMA policy enumerated in RCW 90.58.020" (WAC 173-27-170, emphasis added). Variances have been proposed on sites where reasonable use is not limited by a property's size and physical attributes but where relief from a standard would nonetheless benefit the applicant. This was the case in *Toskey v. City of Sammamish*, SHB No. 07-008 (Oct. 15, 2007) where a variance from the shoreline setback was proposed so that a home could be built closer to the water where expansive views would be possible. The SHB upheld the denial of the permit because the Toskeys had sufficient room on their property to build a reasonably sized house without a variance.

In some cases, the physical characteristics of a site may render an applicant's preferred use unreasonable even when that use is allowed by the SMP and established on neighboring properties. **When residential use of property is not reasonable due to a site's size, location, and physical attributes, recreation use may be the reasonable use available to the property owner.** Recreational use of residentially zoned property has been found to be reasonable when features of the site make residential development unreasonable. In *Buechel v. Ecology* (1994) the Washington Supreme Court established that for the purpose of determining whether land use regulations have left a landowner with no reasonable use of the property, land may have some economic value when the uses allowed are recreational. This was the case in *Caldwell v. Ecology,* SHB No. 11-012 (March 29, 2012), where the applicant proposed to construct a new residence on a steep and unstable slope. In this case, the SHB found that the continued recreational use of the property was the reasonable and legally available use.

Surrounding uses and developments

While the uses and developments on nearby lots should be considered, they should not be the sole deciding factor of reasonable use. The land use context of a site matters and should be considered when determining reasonable use.[9] This is supported by SHB decisions like:

- *Garlick v. Whatcom County*, SHB No. 95-6 (Sept. 8, 1995) where the SHB considered the fact that surrounding neighbors had garages. The SHB found that the hypothetical user would qualify for a garage, consistent with the circumstances of the properties adjoining that of the applicants.
- *Garrett v. Department of Ecology,* SHB Nos.03-031 and 03-032 (May 5, 2005) where the SHB looked at the buildable area and residential footprint of surrounding properties to establish reasonable use and compatibility.

However, demonstrations of reasonable use will often consider surrounding uses but ignore other relevant reasonable-use factors. **Because surrounding uses are not determinative, an applicant's demonstration of consistency with the reasonable use criteria needs to consider all relevant reasonable use factors.**

[9] Land use context is similarly important to decision around compatibility and special privilege.

When considering context, make sure you are comparing apples to apples. Nearby lots may not be equivalent with respect to configuration, size, and physical features. Additionally, nearby uses may have been established prior to the SMA or prior to new SMP regulations (comprehensively updated SMPs) or may be the result of past permitting errors. The SHB has considered these factors in *Weinberg v. Whatcom County,* SHB No. 93-2 (Dec. 15,1993), *Butler v. Ferry County,* SHB No. 07-029 (March 21, 2008), and *Toskey v. City of Sammamish*.

Consider the likelihood of harm

A proposed use would not meet the reasonable use criterion when there is a realistic likelihood that its development will pose a risk to human life or safety, harm neighboring properties, or harm the environment. This makes the size, location, and physical attributes of a property highly relevant to deciding reasonable use.

Variance appeal decisions have addressed a range of aspects of harm to either safety, neighbors, or the environment:

- In *Caldwell v. Ecology* (2012), an applicant's proposal to construct a new residence on a steep, unstable slope serving important shoreline functions was found to be unreasonable. Allowing development on the bluff would have created a hazard and would have interfered with the bluff's biological functions. In *Caldwell*, the SHB found that the site lacked suitable land for building and that the continued recreational use of the property was the reasonable and legally available use.
- In *Buechel v. Ecology* (1994), a variance was denied that would have resulted in a new residence on a lot that was significantly undersized (less than 10 percent of the required minimum lot size) and where the structure would have zero setback from an existing, deteriorated bulkhead insufficient for protecting the proposed home from high tides. In *Buechel*, high tides frequently overtopped the bulkhead, eroding the fill upon which the home was to be built.
- In *Bell v. Spokane County,* SHB No. 87-38 (Aug. 2, 1988), the SHB found a manufactured home set back less than 50 feet from the ordinary high water mark of the Little Spokane River was not entitled to a variance where its sanitary disposal system would adversely affect water quality.

Personal circumstances of an applicant

Reasonable use is based on an objective standard and not the desires of a particular applicant. To consider the unique circumstances of the applicant would make reasonableness completely subjective and dependent upon the desires of each property owner. In evaluating reasonable use, you are considering whether a proposal is necessary to allow reasonable use for the hypothetical reasonable user of the shoreline. **Considerations related to the age, family size, hobbies, design preferences, boat size, and other personal circumstances are irrelevant in considerations of reasonable use.**

The SHB has issued numerous decisions touching on personal circumstance, such as:

- In *Garlick v. Whatcom County* (1995), the SHB found a proposal to construct a garage associated with a single-family residence to be reasonable while also finding aspects of the proposal that would have added living space to be unreasonable. Here the SHB found that a hypothetical shoreline user would qualify for a garage, like the garages on nearby properties, but that a hypothetical user would not qualify for an expansion of the house because some families may be larger than others, "We conclude that the size of the family applying for a variance, under these facts, is irrelevant in establishing extraordinary circumstances or reasonable use" (*Garlick v. Whatcom County*, SHB No. 95-6 (Sept. 8, 1995))
- In *Weinberg v. Whatcom County* (1993), the SHB upheld the County's decision to deny Weinberg's proposal to build a three-story residence for himself and his elderly parents. The proposed residence totaled about 3,400 square feet, included an elevator to accommodate the wheelchair used by Weinberg's elderly father, and required a variance to both the height limit and the shoreline setback requirement. In their decision, the SHB ruled that these personal circumstances did not provide a basis for intensifying the development of the rural shoreline environment.
- In *Northrup v. Klickitat County,* SHB No. 92-40 (July 15, 1993), the SHB held that Northrup failed to provide evidence to show that a 600 square foot cabin did not constitute reasonable use based on the objective, hypothetical-reasonable-user-of-the-shoreline standard.
- In *Crane v. King County and Ecology,* SHB No. 86-38 (March 24, 1987), the SHB held that Crane's reasonable use of a shoreline property for recreation had not been precluded or significantly interfered with by the denial of a variance request to construct a 1,078 building that would store recreational equipment. The property had been used continuously by the Cranes for recreation since it was purchased in 1974. In this case, the SHB held that while hauling several boats, lawn furniture, and equipment back and forth from the site was inconvenient, it did not significantly interfere with the reasonable use of the property for recreation. And that the inconvenience felt by the appellant was "in significant measure, to appellant's chosen style of recreation."
- In *Nelson v. Ecology,* SHB No. 06-014 (Sept. 14, 2006), the SHB upheld Ecology's denial of a variance that would have allowed the Nelsons to add a second story to their

existing four-car garage located completely within the shoreline setback. The Nelsons argued that a larger garage was necessary to store their large collection of car memorabilia. The SHB concluded that the Nelsons' existing structures (single-family residence and garage) provided reasonable residential use and cited previous SHB decisions that concluded that reasonable use is based on an objective standard, not the desires of a particular applicant.

Figure 2. Subject site in *Nelson v. Ecology*, SHB No. 06-014 (2006)

Expansion of non-conforming residences

It can be argued that if residential use has already been established that an owner has reasonable use and therefore cannot demonstrate consistency with the reasonable use criterion. If taken too literally, such an interpretation would preclude authorizing a variance for any expansion of an existing non-conforming residential structure.

When an applicant proposes to expand a nonconforming residential structure in a manner inconsistent with the SMP, they should present evidence to demonstrate that relief is necessary to address a condition that either precludes or significantly interferes with continued residential use. The strongest case is one that shows the proposed expansion is necessary to address objective shortcomings of the existing structure, for example, that a property needs a new drainfield. While the living area of surrounding homes might be one consideration, it should not be determinative.

The desire to create additional living space without other supporting information has typically been rejected by the SHB as insufficient justification for a shoreline variance when a property already has an established residential use. In *Jukanovich v. Ecology,* SHB No. 06-013 (Oct. 3, 2006) the SHB found that where a legally existing non-conforming structure exists, the applicant must put forth facts to support why the structure cannot continue to be reasonably used without the requested variance. In *Northrup v. Klickitat County,* SHB No. 92-40 (July 15,

1993), the SHB held that Northrup failed to provide evidence to show that a 600 square foot cabin did not constitute reasonable use based on the objective, hypothetical-reasonable-user-of-the-shoreline standard. Other similar cases include (see *Wolverton v. Ecology*, SHB No. 02-008 (Jan. 8, 2003); *Garlick v. Whatcom County*; *The Tulalip Tribes v. Snohomish County*, SHB No. 14-007 (September 29, 2014)).

Below are some important considerations when reviewing a proposal to expand an existing residential use:

- When an SMP allows non-conforming residential structures to expand within certain limits, those limits set the standard for reasonable use. An applicant seeking a variance to develop beyond these limits must demonstrate why the expansion allowances of the SMP are insufficient in allowing reasonable residential use. This may be because physical features of the site or lot shape or size prevent an applicant from expanding in the prescriptive ways allowed by the SMP.
- Depending on your fact-specific inquiry, a variance to develop a **normal appurtenance** may be capable of meeting the reasonable use approval criterion. [10] (See the following discussion on the distinction between appurtenant and accessory structures.)
- A variance request to develop a residential **accessory structure that is not a normal appurtenance** is unlikely to be consistent with the reasonable use criteria. Such developments are unlikely to be essential for reasonable residential use to continue.

Appurtenant vs. accessory residential structures

SMPs differentiate between residential appurtenant structures and accessory structures. Appurtenant structures are those considered necessarily connected to the use and enjoyment of a single-family residence and are located landward of the OHWM and outside of wetlands (WAC 173-27-040(2)(g)). On a statewide basis, normal appurtenances include "a garage, deck, driveway, utilities, fences, installation of a septic tank and drainfield, and grading which does not exceed 250 cubic yards and which does not involve placement of fill in any wetland or waterward of the ordinary high water mark" (WAC 173-27-040(2)(g)). Your SMP may include an expanded list of appurtenant structures.

Accessory structures are not necessary for the use and enjoyment of a single-family residence. A list of accessory structures would include things like docks or other in-water structures, bulkheads, gazebos, boathouses, guesthouses, sports courts, pools, and hot tubs.

[10] This guidance is supported by the *Garlick v Whatcom County* (1995). The SHB found that a proposal to construct a garage associated with a single-family residence to be reasonable while finding aspects of the proposal that would have added living space to be unreasonable.

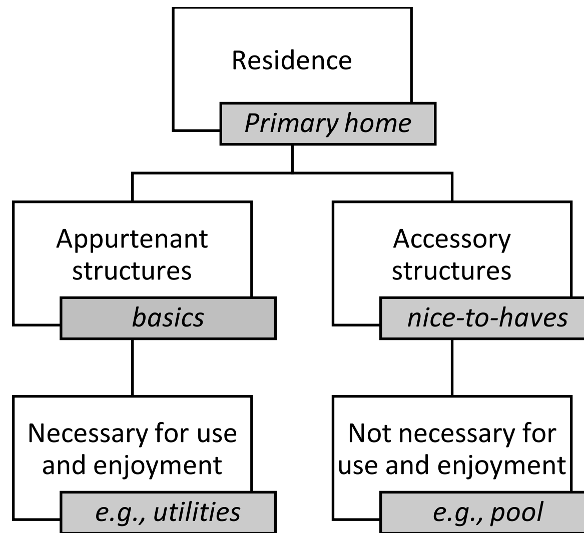

Figure 3. Distinction between appurtenant and accessory residential structures.

Waterward variances

Applicants seeking a variance waterward of the OHWM or within a wetland have a higher threshold: "That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property" (WAC 173-27-170(3)(a), emphasis added).

If taken too literally, any site with an established use would be prevented from achieving a variance on the basis that a use already exists.[11] Such literal readings conflict with the policy of the SMA and would create untenable situations. Consider a necessary bridge widening project that must partially fill a wetland within shoreline jurisdiction. Using a strict interpretation, such a variance could never be approved because a transportation use has already been established. However, the current bridge may be unreasonable because it can't meet current traffic demand, lacks pedestrian and bicycle facilities, and doesn't meet road design standards. The SHB decision in *Boat Yard v. City of Seattle and Ecology*, SHB No. 86-10 (Dec. 31, 1986) is a real-life example of a situation where the outcome of a variance request had implications for whether a water-dependent business would be able to continue. In this case, The Boat Yard appealed the denial of a variance request that would have allowed them to place an on-water repair structure (repair shed) on their property. The variance request was to exceed the SMP's 50% lot coverage limit and 25-foot height limit. Placement of the repair shed would result in 58% lot coverage and have a maximum height of 32 feet. The Boat Yard demonstrated that the structure was a business need and a one-of-a-kind facility that would allow the business to modernize to accommodate larger watercraft and to use state-of-the-art paints and finishes that require a controlled, indoor environment. In their decision, the SHB found:

> We are convinced that the placement of the repair shed on appellant's property is essential to the continuance of its business. If the shed must be removed, we find, more likely than not, the Boat Yard will close its doors and its owner will convert the property to office or moorage or some other use which is not an aspect of the 'working lake' environment. *Boat Yard v. City of Seattle and Ecology*, SHB No. 86-10, 7-8 (Dec. 31, 1986)

Importantly, if the proposal is for a water-dependent use associated with an upland use (such as a proposed dock associated with a single-family residence), then the appropriate questions are:

1. What is the reasonable water-dependent use of the property?
2. Is the proposal necessary to address a condition that precludes the property owner from accessing the reasonable, water-dependent use?

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[11] In *Wriston v. Ecology* (2005), the SHB reversed Ecology's denial of a variance for a single-use recreational dock in Wahkiakum County. The SHB held that Ecology used flawed logic in arguing that the Wristons were not precluded from all reasonable use of their property because they had a residence and access to the water.

You will consider these questions through the lens of the reasonable user of the shoreline.

Consider the applicant who owns a residential property with an existing home, where the bathymetry of the shoreline at 100 feet waterward of the OHWM has insufficient depth for moorage. This applicant is seeking a variance from your SMP’s 100-foot maximum dock length standard to build a 120-foot dock to achieve sufficient water depth for moorage, which the applicant will use for their private moorage. To meet the reasonable use criterion for a waterward variances, they would need to show why alternatives to the proposal were unreasonable. This analysis would consider the potential to use public moorage, the feasibility of using a mooring buoy, and the potential for using a public boat launch. The fact the applicant has a reasonable upland use (a single-family residence) doesn’t preclude them from being able to get a variance to construct a dock.

Hardship criterion

Variance applicants must demonstrate:

> That the hardship described in (a) of this subsection is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant's own actions (WAC 173-27-170(2)(b)).

Here "(a)" refers to the reasonable use approval criterion (i.e., WAC 173-27-170(2)(a)). The hardship criterion and reasonable use criterion are interconnected. There can be no hardship if an applicant fails to demonstrate that reasonable use has been precluded or significantly interfered with.

The criterion includes a list of possible hardships that are related to property (i.e., irregular lot shape, size, or natural features). This is a non-inclusive list, and other types of hardships are possible. For example, the location of a cultural resource of a site when identified by a Tribe or the Washington State Department of Archaeology and Historic Preservation can further limit the developable area of a shoreline property.

SHB decisions illustrate that consideration of unique conditions of the parcel must be considered in context of reasonable use and other related criteria:

- In *Jordan v. Skagit County and Ecology,* SHB No. 88-18 (1988) the SHB upheld the approval of a shoreline variance to the Worleys that authorized them to move their existing house closer to the OHWM and within the shoreline setback. The variance allowed the home to be placed 36 feet from the OHWM, a distance that was generally consistent with the average setback in the area. The Worley lot was severely impacted by flood waters, and the request was made to lessen the impact of flooding because the proposed location on the site was at a higher elevation. In this case, the SHB found the hardship was "specifically related to the … natural features of topography of the lot, flow of excess water, and pre-existing development in the neighborhood" (*id. at p. 11*)."
- In *Castle v. Knutzen et al.,* SHB No. 80-24 (Jan. 29, 1981) the SHB upheld approval of a variance that would allow a new home to be built partially within the shoreline setback. In Castle, the proposal was to replace an existing home built directly behind a bulkhead with a larger home built farther landward. The decision to approve the permit was appealed by a neighbor primarily because of view impact concerns. The SHB held that the variance could be granted for a replacement residence when topographic conditions cause strict application of the setback requirement to substantially interfere with a reasonable use of the land, little view impairment would occur, and the residence would still be set back farther than the existing residence and several neighboring residences.

Comparison site plans

Applicants must submit a site plan showing where development is possible without the benefit of a variance as required by WAC 173-27-180(9)(m) (See Figure 4).[12] By presenting this information on a site plan, an applicant is able to communicate how the physical features and circumstances of the property provide the basis for the variance request. This information is critical to establishing compliance with multiple approval criteria, most notably the hardship, the minimum necessary, and the reasonable use criteria.

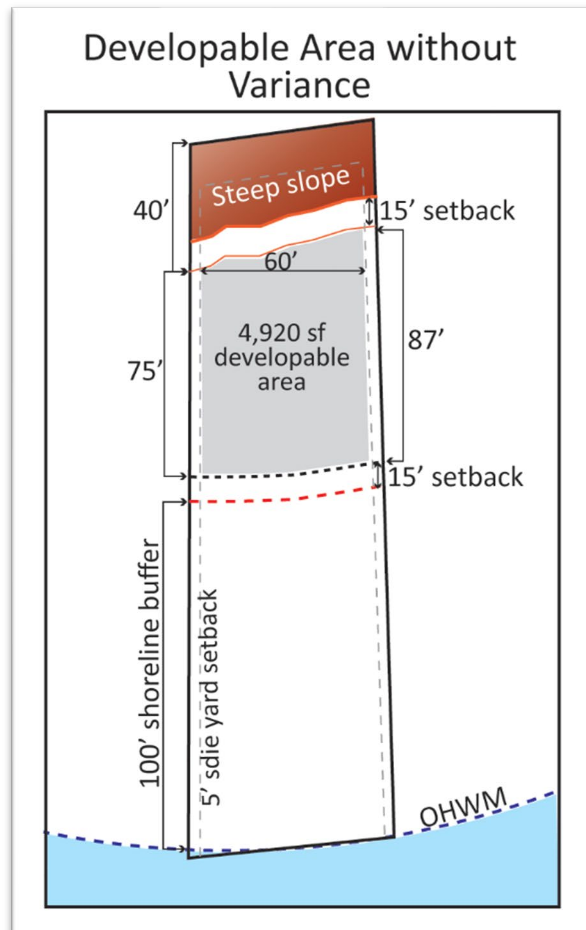

Figure 4. Area where development can occur without a variance.

[12] Application requirements for shoreline permits are listed in WAC 173-27-180. Subsection 9 requires a site development that includes specific information. For variance permits, "… plans shall clearly indicate where development could occur without approval of a variance, the physical features and circumstances on the property that provide a basis for the request, and the location of adjacent structures and uses" (WAC 173-27-180(9)(m)).

Showing what part of the site can be developed without a variance will almost always require an applicant to identify information on a site plan that is **not specifically listed under** WAC 173-27-180(9) such as:

- Shoreline buffers and setbacks (or similar),
- Wetland buffers,
- Geologically hazardous areas and associated setbacks,
- Fish and wildlife habitat conservation area buffers or setbacks, and
- Yard and road setbacks.

While not required, an effective way for an applicant to comply with this submittal requirement is to include a plan sheet that not only shows where development is possible but **what development is possible** without a variance (See Figure 4).

Easements are a form of deed restriction and cannot be the hardship claimed by an applicant. An easement is an acquired interest in land owned by another party. It is a right, separate from property ownership, to use land in a specific way. While an easement cannot be the hardship claimed under (WAC 173-27-170(2)(b)), applicants should identify easements on their site plan and provide information on the type and nature of the easement (e.g., utility, drainage, egress and ingress, view, conservation, etc.), if the easement was secured by a government entity or benefits private individuals, and if the applicant was financially compensated for the easement. This is consistent with WAC 173-27-180(9) which requires an applicant's plans to clearly indicate "…the location of adjacent structures and uses." This information *may* be relevant when considering whether the encroachment requested is the minimum necessary to accommodate the objective reasonable use of a property under WAC 173-27-170(2)(e).

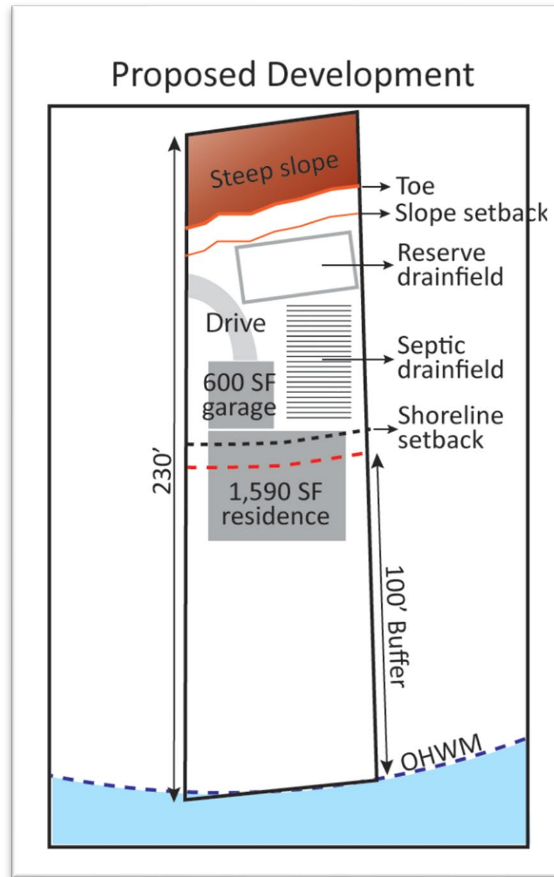

Figure 5. Proposed development.

Owner actions that have reduced a lot’s buildable area

When an applicant has taken an action that reduces the buildable land available on a lot through land segregation, a boundary line adjustment, or the establishment of an easement, they will typically have created their own hardship. Almost always, an applicant who has reduced the buildable land of a property through one of these actions will be unable to meet the hardship criterion. For example, in *Wiswall v. Clark County and Ecology*, SHB No. 90-37 (1991), the SHB upheld the denial of a variance to Wiswall that would have allowed the construction of a single-family residence within a 100-foot shoreline buffer. Here the SHB held that the Wiswalls created the circumstance that triggered the variance request by separating the subject property from a larger, contiguous property and failing to include sufficient land so that development could occur outside of the buffer.

However, in some cases, an applicant may be able to show that a prior action should not be considered a self-imposed hardship because of changing circumstances. For example, in *Save Lake Sammamish v. Ecology and Garrett*, SHB Nos. 03-031 and 03-032 (May 5, 2005), the SHB rejected the argument that the Garretts created their own hardship. In this case, the Garretts owned a lot that was divided by both a railroad line and a road, creating an upland portion of the lot and a very small waterfront portion of the lot. A deed restriction prohibited construction

on the waterfront portion. Nevertheless, the Garretts subdivided and sold off the upland portion of the lot, retaining a property that consisted only of the small waterfront site. The Garretts then applied for a shoreline variance permit to build a single-family residence. Facts specific to this case were that surrounding lots that were subject to the same deed restrictions as the Garretts had been allowed to develop the waterfront portions of their lots. In this case, the SHB concluded that the deed restriction that precluded the development of residential structures on the waterfront portions of the lot to be abandoned and/or subject to the changed circumstances doctrine.[13]

Homeowners' association CC&Rs

Homeowners' association covenants, conditions, and restrictions (CC&Rs) are a form of deed restriction and cannot be the hardship claimed by a variance applicant. CC&Rs are private contracts that are not imposed or enforced by government. Among other restrictions, CC&Rs can establish minimum square footage requirements for homes, establish height limitations, or require greater yard setbacks than what's required by the local zoning code or SMP. These development restrictions can limit a property owner's ability to develop a site in a way that avoids shoreline and critical areas buffers and setbacks. CC&Rs rules or other deed restrictions like this do not supersede state law, local SMP policies and regulations, or the shoreline variance criteria found in WAC 173-27-170.

Homeowners' associations commonly have a variance process whereby a property owner can request permission to depart from a CC&R requirement. This private process, and not the shoreline variance permit process, is appropriate when a CC&R requirement conflicts with state law or SMP compliance. Per WAC 173-27-170(2)(b) deed restrictions are not specifically related to the unique conditions of the property in concert with the application of the SMP provision, so CC&R are not appropriate grounds for approval of a variance from the SMP bulk, dimensional, or performance standards.

The challenge of after-the-fact variance permits

On occasion a local government will require that an SMP violation be addressed through an after-the-fact permitting process. It is important that you understand a challenge particular to after-the-fact applicants meeting the hardship criterion. **When an applicant develops the shoreline without proper local and state approvals under the SMP, that illegal or otherwise non-compliant development cannot then become the hardship that necessitates the variance.** An applicant creates their own hardship when they fail to get proper authorizations before developing the shoreline.

[13]The changed circumstances doctrine establishes several equitable defenses to preclude enforcement of a covenant.

The SHB has addressed this in numerous decisions, such as:

- *Schumsky v. Mason County and Ecology,* SHB No. 83-11(1983): The Schumskys constructed a deck waterward of the OHWM without securing shoreline permits. SHB upheld the denial of their after-the-fact permits, finding "hardships which result from appellant's own doing are not reasons for a variance" (id. at 6-7).
- *Salant v. City of Normandy Park,* SHB No. 79-22 (Sept. 17, 1979): Salant constructed a pool within the shoreline setback without shoreline permits. The SHB upheld denial of the permit, finding that the "hardship falling upon appellant as a result of the denial of a variance for the pool enclosure was the result of his own actions in constructing his pool within the 25 foot [sic] setback" (id. at 8).
- *Darby v. Ecology*, SHB No. 92-39 (April 6, 1994): Darby constructed a non-water-dependent residential structure waterward of the OHWM without securing shoreline permits. When Ecology later denied the variance for the structure, Darby appealed. The SHB upheld the denial, finding: "The only present hardship that Darby suffers is self-induced; namely, he built the octagonal structure prior to obtaining the proper shoreline permits" (id. at 12).
- *Johnson and Mason County v. Ecology,* SHB No. 79-52 (Sept. 24, 1980): The SHB upheld the denial of a variance for an unauthorized deck built beyond the common line setback and partially over water. The SHB held that the applicants had reasonable use of their property without the deck, and any hardship was the result of their own actions.
- *Terek and Skagit County v. Ecology,* SHB No. 05-015 (Dec. 8, 2005). The SHB upheld Ecology's denial of a variance to a sideyard setback for a sauna. The property owner claimed the hardship was due to the fact the sauna had already been constructed on the edge of the property. The SHB held that the homeowner's own actions caused the hardship.
- *Labusohr v. King County and Ecology,* SHB No. 84-62 (Nov. 12, 1985): The SHB upheld the denial of a variance requested for a dock constructed without permits. They found that no special equities arise merely because a development was built in ignorance of permit requirements:

  > Now after the fact, appellant's ignorance of permit requirements cannot serve to authorize construction in violation of applicable land use restrictions. Otherwise, the SMA would effectively be repealed as to any citizen who was unaware of its requirements. (id. at 10)

Voluntary removal of existing structures

Similar to the challenges of after-the-fact variance permits are the challenges that can arise when an applicant voluntarily removes a structure that is providing reasonable use. The nonconforming provisions in many SMPs will prohibit a nonconforming structure to be rebuilt after being voluntarily removed. This situation will often push applicants to go through the variance process when proposing a new structure. However, in many cases, an applicant will

have created their own hardship when they voluntarily removed a structure that was providing reasonable use.

Prior knowledge that a variance will be necessary

When an applicant purchases a property with the knowledge that a variance will be necessary to develop, they may be creating their own hardship.

This guidance is supported by SHB decisions. In *Weinberg v. Whatcom County*, the SHB found that a person who purchases property with notice of a Shoreline Master Program restriction is not qualified to receive a variance to relieve them of that restriction.

In *Rech v. San Juan County,* SHB No. 07-035 (June 12, 2008), the SHB found that the hardship claimed by the applicants was entirely avoidable because the owners knew or should have known when they purchased their narrow and irregularly shaped lot that it would not accommodate even a moderately sized single-family home. In this case there was overwhelming evidence that the owners purchased the lot knowing a variance would be needed. Development limitations were noted on real estate listings for the property and were reflected in the purchase price.

In *Garlick v. Whatcom County*, the SHB held that the applicants (the Eifords) created their own hardship when they purchased a residence that, while fair sized (2,050 square feet), was too small for their family.

> The Eifords can hardly be heard to complain that they have suffered a hardship that merits expansion of the residential space of the home, at the expense of the shoreline setback requirements. Any hardship related to the size of the living quarters, is based on the applicant's own desires and is therefore self-induced. *Garlick v. Whatcom County*, SHB No. 95-6, 13 (Sept. 8, 1995)

However, having knowledge of development limitations at the time of purchase is not a bright-line test. An applicant may be able to argue that their understanding of a property's development limitations have changed over time (see discussion on pages 35-36 related to the decision in *Save Lake Sammamish v. Ecology and Garrett*).

Compatibility and adverse impacts criterion

To approve a shoreline variance, an applicant must demonstrate:

> That the design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment (WAC 173-27-170(2)(c)).

Here compatibility is both about both the use and site design. The phrase “will not cause adverse impacts” means that the proposal can achieve NNL of shoreline ecological functions. Importantly, a variance is properly denied when it cannot achieve NNL.

Compatibility at different scales

An assessment of a proposal’s compatibility must be considered at two geographic scales.

First, consider a proposal’s compatibility with immediately adjacent uses. This decision is supported by Court and SHB decisions such as:

- In *Jefferson County v. Seattle Yacht Club*, 73 Wash. App. 576 (1994), the Court of Appeals found that the SHB considered too broad a geographical area when considering compatibility because they looked at the entire bay as opposed to the impacts the proposed multi-fingered dock would have on the area immediately adjacent to the proposed site. Significantly, they found that if too broad a view is taken when evaluating for compatibility that almost any project can be justified, writing:

  > . . . [C]onsideration of a proposed project’s compatibility with the area immediately adjacent to the project site should be paramount. While consideration of a project’s compatibility with more distant uses might be useful in certain instances, consideration of such information must be in addition to, not in lieu of, an evaluation of a project’s compatibility with permitted land and water uses in the area immediately adjacent to the project site. This is essential because if too broad a view is taken when a permit application is evaluated for compatibility with the SMA and the applicable shoreline master program, almost any project can be justified. Such an approach would undermine the protections the aforementioned enactments are intended to provide to individual local shoreline environments. (id. at 594)

- In *Farber v. Steffen, et al.*, SHB No. 99-005 (Sept. 9, 1999), the SHB remanded approval of Steffen’s variance for a residential proposal to the county and Ecology largely on the basis that the project was incompatible with a neighboring use. In this case, Steffen proposed to replace a small cabin with a three-story, 2,600-sf permanent home within the 50-foot shoreline setback. The proposal would have obstructed his neighbor’s (Farber’s) views. The SHB held the project was incompatible with Farber’s use of his

property because of the degree of view impairment that would result from the three-story home. The Board stated that "Views are a recognized part of the shoreline environment that are properly considered and protected under this criteria" (id. at 8). Interestingly, in *Steffen*, the immediately adjacent properties included a three-story, 2,905-sf home and a 2,200-sf home owned by Farber, meaning that the size and scale of the proposal was compatible with immediately adjacent uses in terms of size.

Second, consider a proposal's compatibility with a wider geographic area. For each proposal, the extent of the broader geographic area will be a fact-specific inquiry. It might be a stretch of walkable beach, the viewshed from an important vantage point, a contiguous stretch of forested shoreline, a segment of shoreline that shares land use development patterns, the shoreline environment designation, etc. For example, in *Rech v. San Juan County* (2008), the SHB's decision to affirm the county's denial of a variance to construct a single-family residence included a finding on the project's compatibility. The SHB found that the development would break up a 1.2-mile-long stretch of shoreline that was otherwise undeveloped with residential structures and that placement of a home would conspicuously interrupt the existing expansive views of a natural shoreline setting. The preservation of natural shoreline views is part of the policy of the SMA and is a public interest articulated in RCW 90.58.020.

Compatibility with uses planned for the area

An approvable variance must be compatible with uses planned for the area under the comprehensive plan and the SMP. This part of the criterion is about how the variance will interact with future uses and requires the applicant to consider how the area might develop over time. Here, a demonstration of compatibility is **not** established simply because the use is allowed or conditionally allowed by the SMP, because all variances are for allowed or conditionally allowed uses or modifications.[14]

Compatibility with "uses planned for the area" under the SMP means that the resultant variance would exist in harmony with likely future shoreline uses. An applicant should consider how undeveloped or underdeveloped lots are likely to be developed or redeveloped in the future with uses listed as "permitted" under the SMP. Applicants should also look for points of consistency or conflict between the purpose and policies of the SED and the proposal. These parts of the SMP establish a vision for the area. Your staff report should address whether a proposal will be in harmony with this vision.

Applicants must also show that the proposal is compatible with the preferred land use designation given to the site under the local comprehensive plan's land use element. The comprehensive SMP update process will typically have ensured that the SMP designations themselves are compatible with the comprehensive plan.

[14] A prohibited use cannot be authorized through a variance.

Avoid comparisons to nonconforming uses

A demonstration of compatibility should not substantially be based on an existing nonconforming use. In *Jefferson County v. Seattle Yacht Club* (1994) the Washington State Court of Appeals found that the SHB erred when it considered a nonconforming use when determining the compatibility of a proposed 20-boat private dock and clubhouse. The Court found that compatibility cannot be substantially based on the existence of a nonconforming use that is used as justification for a further aesthetic degradation, in this case an existing multi-boat dock.

Bulk and site design

The bulk and site design of surrounding development and uses is relevant when considering a proposal's visual compatibility. To some degree, compatibility is related to how a proposed development compares to existing uses with respect to setback, lot coverage, height, size, and density. An applicant's analysis of compatibility should consider differences in lot shape, size, and character that may influence a proposal's compatibility with respect to the bulk and site design of surrounding uses.

SHB decisions that have informed this guidance include:

- In *Caldwell v. Ecology* the SHB found that a proposal to construct a house on pilings such that it would protrude from the side of a bluff would be unlike any other house in the area and that it would be visually conspicuous from the beach and water. The Board concluded that when analyzing compatibility, it is relevant to look at the "extent to which a structure constitutes a visual presence on the environment and the significance of the man-made alteration" (*Caldwell v. Ecology,* SHB No. 11-012, 19 (March 29, 2012)).
- In *Sato Corporation v. Olympia,* SHB No. 81-41 (June 17, 1982) the SHB found that a six-story glazed office building proposed on the narrow isthmus between downtown and West Olympia was visually incompatible with surrounding structures. Here the SHB found "Most striking is the generous use of glazing. The effect of using the material would be to introduce a notable incongruity among the existing structures along the isthmus. Also striking . . . is the relative scale of the proposed building. It would tower above the surrounding structures in height and in bulk . . ." (id. at 8).
- In *Garrett v. Ecology* (2005) the SHB found a 532-sf building footprint to be compatible with other nearby residential properties but that a proposal for a 1,715-sf building was out of character with respect to size. The SHB considered differences in buildable area on surrounding lots to arrive at what building footprint was possible on the Garrett property.

Special privilege criterion

To approve a shoreline variance an applicant must demonstrate "That the variance will not constitute a grant of special privilege not enjoyed by the other properties in the area" (WAC 173-27-170(2)(d)). This criterion seeks to prevent a situation where permit approval results in a benefit held exclusively by the applicant and not generally shared with or available to other shoreline property owners in the area.

Comparison tables

There is significant overlap between the compatibility criterion and the special privilege criterion. Whether a proposal is compatible with other authorized uses in an area is a consideration when determining whether approval would constitute a grant of special privilege. **For this reason, variance permit applications will often benefit from a comparison table with information on nearby surrounding properties and an associated map** (See Table 1 and Figure 6). Looking at Table 1 we can see that the proposal is on the high end of developments in the area with respect to percent lot coverage, total living area, and development footprint.

Table 1. Example comparison table.

Site	Lot size (SF)	Year built	Total living area (SF)	Development footprint (SF)	% lot (footprint/lot)	Average lot depth (feet)
6W	9,148	2004	1,103	1,103	12%	114
5W	13,068	1941	826	826	6.3%	145
4W	20,909	NA	-	-	-	160
3W	27,443	1995	4,746	2,373	8.6%	186
2W	20,908	1979	1,872	936	4.5%	194
1W	30,056	1925	746	756	2.5%	217
Proposal	**18,731**	**NA**	**2,225***	**1,590***	**8.5%***	**230**
1E	27,007	1945	1,568	1,148	4.3%	233
2E	24,829	1998	1,934	1320	5.3%	228
3E	26,136	1956	480	480	1.8%	184
4E	20,038	2005	2,105	1,550	7.7%	156
5E	14,375	NA	-	-	-	111

Figure 6. Map associated with a comparison table.

First of its kind

If a project will be a first of its kind in the area, approval may be a grant of special privilege. In *Weinberg v. Whatcom County and Ecology* (1993), the SHB affirmed the County's denial of a shoreline variance permit to construct a single-family residence that required both a variance from the maximum height requirement and a variance to the 45-foot shoreline setback. The SHB found that if approved, Weinberg's proposal would be the first of its kind on Emerald Lake under the SMP and that as such it would constitute the granting of a special privilege not enjoyed by other properties in the area. However, just because a development will be a first of its kind does not necessarily make its authorization a grant of special privilege. Under this reasoning, the first variance granted in any area would be a special privilege because no one else has one. A property could be uniquely situated, have particular natural features, or have a distinctive history of development that make it dissimilar from other properties in the area. The SHB held that this was the case in *Wriston v. Ecology* (2005), where evidence of past use and bathymetry of the site made it difficult to argue that other property owners in the area were similarly situated.

Size and scale

If approval will result in a development that is larger than other authorized uses in the area, closer to the water, or otherwise out of scale with surrounding authorized uses and developments, then approval may be a grant of special privilege. Consider whether the applicant will receive a special privilege from the larger-scale use. This will not always be the case. For example, a longer dock may result in moorage capability equal to that of other docks because based on the site's benthic topography. The SHB has addressed this in decisions, such as:

- In *Garrett v. Ecology* (2005), the SHB found that approving a proposed single-family residence with a 1,716-square-foot footprint would constitute a grant of special privilege, given the scale of development on adjacent properties relative to the

buildable areas of these neighboring lots. The property adjacent to the north side of the Garretts' lot was vacant. The property to the north contained a modest 484-square-foot structure with a similar setback to that approved for the Garretts. The lot to the south contained a small (660-square-foot) house. In this case, the SHB agreed that a variance could be granted for a house with a building footprint of 532 square feet, a size consistent with other authorized uses in the area.

- In *Jordan v. Skagit County and Ecology* (1988), the SHB held that the Worley residence could be relocated closer to the OHWM and within the shoreline setback to reduce impacts of flooding. In this case, the SHB held that the Worleys were in an unusual situation. They were the only property with a residence located outside of the required 50-foot setback, and the requested variance would result in a similar setback to that of surrounding neighbors. Here the SHB held that there could be no special privilege because the granting of the variance would merely result in the Worleys being afforded the same rights as all other neighbors.

Minimum necessary criterion

For a shoreline variance to be approvable, an applicant must demonstrate "That the variance requested is the minimum necessary to afford relief (WAC 173-27-170(2)(e))." **Here the phrase "minimum necessary to afford relief" means that an applicant can be authorized no more than what is necessary to accommodate the objective reasonable use of a property** (*Garlick v. Whatcom County*, 1995).

If possible, find an objective standard

If possible, compare what is proposed to an established, objective minimum standard or threshold associated with the use so that you can generally gauge whether a proposal is the minimum necessary to afford relief. This could be a dock length standard tied to water depth, minimum off-street parking requirements within your municipal code, a minimum standard from the International Residential Code, etc.

For example, in *Wriston v. Ecology* (2005), the SHB held that the requested variance to the dock length standard was the minimum necessary to fulfill the purpose of the dock in a tidally influenced area of the Columbia River. In this case the proposed length was the minimum necessary to meet the SMP standard that the floating portion of a dock be at least one foot above the bed bottom at all times.

Site design that minimizes the degree of encroachment

An applicant's site plan should clearly show that all attempts have been made to minimize the degree of encroachment or relief being sought. Evidence could include minimized building footprints, minimum width driveways, variances being requested to common property line setbacks, etc. If you can't see that the degree of encroachment has been minimized through site design, then it is unlikely the variance requested is the minimum necessary to afford relief.

Your review should not consider the personal circumstances of the applicant such as family size, hobbies, boat length, disability status, view preferences, and/or age. Remember that the minimum necessary to provide relief is no more than what is necessary to accommodate the objective reasonable use of a property.

SHB decisions that support this guidance include:

- In *Toskey v. City of Sammamish* (2007) the SHB affirmed Ecology's denial of a variance to build a single-family residence that would have varied the 50-foot shoreline setback to 20 feet. In *Toskey*, the SHB found that the property owners did not make an effort to minimize buffer encroachment by exploring avenues for making a smaller variance request and that the proposal was not the minimum necessary to allow them to build a house on their lot.
- In *Garlick v. Whatcom County* (1995), the SHB denied the applicants' proposal to create additional living space in their fair-sized residence, while it approved the construction of a modest garage that encroached on the shoreline setback.

- In *Farber v. Steffen* (1999) the SHB disagreed with Pierce County's approval of a variance for a three-story, 2,600-sf residence that would replace a small cabin within the shoreline setback. In *Farber*, the SHB found that while some type of expansion of this structure could be accomplished in a manner consistent with the variance criteria, a 2,600-sf home on three levels, with wall and roof lines that would significantly block a neighbor's view, was not the minimum necessary to accommodate a normal residential use.

Public interest criterion

For a variance to be approved, applicants must demonstrate "That the public interest will suffer no substantial detrimental effect." The public interest in shorelines of the state is articulated in the SMA policy goals (see RCW 90.58.020 and WAC 173-26-176 and -181).

Ecology's Shoreline Master Program Guidelines summarize the policy goals of the SMA in WAC 173-26-176. The SMA's policy of protecting ecological functions, fostering reasonable utilization, and maintaining the public right of navigation and corollary uses encompasses the following general policy goals for shorelines of the state.

a) The utilization of shorelines for economically productive uses that are particularly dependent on shoreline location or use.

b) The utilization of shorelines and the waters they encompass for public access and recreation.

c) Protection and restoration of the ecological functions of shoreline natural resources.

d) Protection of the public right of navigation and corollary uses of waters of the state.

e) Protection and restoration of buildings and sites having historic, cultural, and educational value.

f) Planning for public facilities and utilities correlated with other shorelines uses.

g) Prevention and minimization of flood damages.

h) Recognizing and protecting private property rights.

i) Preferential accommodation of single-family uses.

As described in WAC 173-26-181, the SMA also identifies special policy goals for "shorelines of statewide significance" that provide direction to Ecology and local governments in preparing SMPs to give preference to uses in the following order of preference which:

(1) Recognize and protect the statewide interest over local interest;

(2) Preserve the natural character of the shoreline;

(3) Result in long term over short term benefit;

(4) Protect the resources and ecology of the shoreline;

(5) Increase public access to publicly owned areas of the shorelines;

(6) Increase recreational opportunities for the public in the shoreline.

The public interest in the regulation to be varied

Every SMP regulation is related to a public interest. **An applicant's response to the public interest criterion should consider the specific public interest in the regulation to be varied.** For example, is it a variance to a height restriction set to protect shoreline views, a dock length standard set to protect navigation, or a shoreline buffer established to protect shoreline

ecological functions? Location and site-specific conditions will then determine to what degree a variance will have a detrimental effect on the public interest in the regulation to be varied. Consider that the public interest in a steep slope setback regulation will be greater if that slope is a feeder bluff or a stream bank than it would be if the slope were within shoreline jurisdiction but functionally disconnected from the shoreline.

Public opposition or support

A conclusion that a project will have no substantial detrimental effects to the public interest cannot be based on the absence of public interest or comments on a project alone. Conversely, a conclusion that a project will have substantial detrimental effects on the public interest cannot be made simply because a proposal is unpopular and has resulted in many public comments in opposition. Public opposition does not necessarily mean a project is against the public interest. In making a determination that the public interest will suffer no substantial detrimental effect, "the public interest must be considered regardless of the number, nature, or extent of public comments for or against a proposal" (*Wriston v. Ecology*, SHB No. 05-005, 29-30 (Sept. 28, 2005).

Visual intrusions on natural shorelines

There is a public interest in protecting natural shorelines from unnecessary human structures. This is consistent with the SMA's policy direction to preserve the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state to the greatest extent possible (RCW 90.58.020). In this guidance, you can see the high degree of interconnectedness between a project's visual compatibility and the public interest in preserving the aesthetic qualities of natural shorelines of the state. This guidance is consistent with SHB decisions such as:

- In *Citizens to Preserve the Upper Snohomish River Valley v. S-R Broadcasting,* SHB No. 06-022 (2006) the SHB has recognized the public interest in avoiding undue visual intrusions of human-made structures into an otherwise natural setting.
- In *Rech v. San Juan County and Ecology* (2007) the SHB found that a proposal would result in substantial detrimental effects by visually breaking up a 1.2-mile-long stretch of shoreline that was otherwise undeveloped with residential structures. They found that the proposal would conspicuously interrupt the expansive natural shoreline views available to the general public from waterside vantage points.

Impacts to public access

For every variance proposal, understand whether there is a likelihood of the use having a substantial detrimental effect on existing public access. **A proposal might have a "substantial" detrimental effect if it will obstruct, reduce, render unsafe, or eliminate existing public use of the shoreline without replacing or otherwise mitigating for the impact or loss.** Where this is the case, a proposal is unlikely to be able to meet the public use criterion.

This guidance is consistent with past SHB decisions such as:

- In *Turner v. Baldwin* No. 52470-8-II (Wash. Ct. App. Oct. 13, 2020)[15] the Washington State Court of Appeals affirmed the decision to deny permits for a dock to the Turners on the grounds that the structure would obstruct and impair recreation, that reasonable moorage alternatives exist, and that the use was not compatible with surrounding environment. This upheld decisions by the Superior Court and SHB that found that the proposed pier/dock would present an impediment to public uses including walking, view enjoyment, and recreational boating.
- In *de Tienne v. Shorelines Hearings Board*, 197 Wash. App. 248 (2016), the Washington Court of Appeals upheld the SHB's decision to deny a permit that would authorize a five-acre commercial geoduck farm in waters of the Puget Sound in Pierce County where there were potential ecological and recreation impacts. While the case involves a shoreline substantial development permit and not a variance, it sheds light on impacts to the public use of shorelines. The case involved a site near a park and boat launch that was popular for windsurfing and other water recreation. The SHB held that any future application at the site should contain a condition that addresses impacts to recreational uses in the area and that would mitigate against aquaculture activities and gear that could pose a safety risk to windsurfers or others.

[15] *Turner v. Baldwin* (2020) was an appeal of an SDP and conditional use permit (CUP). However, it is relevant here because both CUPs and variances have the same public interest approval criterion: "That the public interest suffers no substantial detrimental effect" (WAC 173-27-160(1)(e)).

Rights of navigation and shoreline use criterion

When authorizing variance permits for development and/or uses that will be located waterward of the OHWM or within any wetland, an applicant must demonstrate "That the public rights of navigation and use of the shorelines will not be adversely affected" (WAC 173-27-170(3)(c)).

The SMA policy speaks directly to the importance of public navigation and when impacts to navigation are appropriate:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. **This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest.** This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto. (RCW 90.58.020, emphasis added)

It's likely that an applicant's response to this criterion will overlap with their response to the compatibility and public interest criteria.

Proposals that serve a public interest

Some water-dependent and water-related uses will necessarily result in impacts to navigation and shoreline use, and it is important not to interpret the criterion too narrowly, especially when considering uses that will promote and enhance the public interest (see page 47). The public interest in shorelines of the state is articulated in the SMA policy goals (see RCW 90.58.020 and WAC 173-26-176 and -181). **It is possible to authorize a project when it will have some degree of impact to public navigation and shoreline use, when the project promotes or enhances the public interest.** Consider that a new or expanded marina would almost certainly result in impacts to existing navigation but that the establishment of the use would facilitate public access to shorelines of the state and create opportunities for substantial numbers of people to enjoy the water. This guidance is consistent with the policy of the SMA.

This guidance is supported by two shoreline conditional use permit appeal decisions for economically productive, water-dependent uses:[16]

- In *Nisqually Delta Association et al. v. City of DuPont et al.* SHB Nos. 81-08 and 81-36 Consolidated (Dec. 11, 1981), the SHB upheld approval of a wood products export

[16] The CUP approval criteria include a criterion very similar to WAC 173-27-170(3)(c). For a CUP to be approved, an applicant must demonstrate, "That the proposed use will not interfere with the normal public use of public shorelines" (WAC 173-27-160(1)(b)).

terminal even though the evidence showed some interference with the public use of the shorelines would occur. While appellants claimed that this violated the approval criterion, the SHB held that "when the SMP is read as a whole, including the goals, policies, and use regulations, such language should not be construed to, in effect, prohibit or make illusory the proposed use." Importantly, the SHB remanded the permit back to the local government to add additional permit conditions related to public access.

- In *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wash. App. 503 (2006), the Washington Court of Appeals upheld the approval of a CUP for a barge terminal associated with a gravel mine. The proposal was conditioned to mitigate impacts to shoreline recreation, chiefly by restricting hours of operation to 7:00 am to 7:00 pm, Monday through Friday. Since most shoreline recreation was occurring on weekends, the operating restriction was deemed by the SHB to protect the recreational and aesthetic values that depend on public use of surface waters. The Court agreed.

Proposals that serve *limited* public interest

When adverse impacts to public navigation and shoreline use will result from a proposal with limited public interest, such as a private dock, that proposal will be inconsistent with the criterion. However, the standard of the criterion is *not* "no impact." The standard is that public navigation and use of the shoreline "will not be adversely affected." **The critical question is whether the degree of impact will result in an adverse impact on public navigation and shoreline use.** This could be because the project will result in unsafe boating conditions, unduly interrupt navigation to and from an existing boating facility or preclude safe beach walking. For example, consider a variance request to construct a dock that surpasses the SMP's dimensional limit on dock length. A good number of neighboring properties have docks that are the same length or longer than what is being proposed. In this example, while there might be some degree of impact to navigation, it will not result in unsafe boating conditions or unduly interrupt navigation. On the other hand, consider a proposed variance that would reduce an SMP standard established to ensure adequate distance between docks. If the proposal would result in unsafe passage for vessels, the criterion cannot be met.

Cumulative impacts criterion

In addition to the approval criteria examined in the previous section, all variance requests must be examined for potential cumulative impacts:

> In the granting of all variance permits, consideration shall be given to the cumulative impact of **additional requests** for **like actions in the area**. For example if variances were granted to other developments and/or uses in the area where similar circumstances exist the total of the variances shall also remain consistent with the policies of RCW 90.58.020 and shall not cause substantial adverse effects to the shoreline environment. (WAC 173-27-170(4), emphasis added)

The criterion asks us to consider "additional requests" for like actions in the area. This means that the focus should be on pending and possible future actions. "Like actions" means proposals for the same use or modification that will also require similar relief from an SMP standard (e.g., single-family residential within a buffer, dock length variance, etc.).

The consideration of cumulative impacts is critical because while the impacts of one activity may be insignificant, the accumulation of impacts from similar actions can degrade shoreline ecological functions and values or thwart other policy objectives of the SMA such as public access and recreation, navigation, and fostering water-dependent uses.

Projects that avoid ecological impacts

If a project avoids impacts to shoreline ecological functions, it will not contribute to a cumulative impact on ecological functions. However, cumulative impacts are not limited to ecological impacts, and your consideration should extend to whether a proposal will have cumulative impacts on other policy objectives of the SMA, including impacts to public access (physical and visual) and recreation, public navigation, and water-dependent uses.

Projects requiring compensatory mitigation

Ecology recommends that you review proposals that require extensive amounts of compensatory mitigation carefully, especially if mitigation techniques are novel and untested. **Authorizing a variance that achieves NNL through extensive compensatory mitigation can result in cumulative impacts concerns because the mitigation may not be successful.** Pay close attention to compensatory mitigation that is associated with significant temporal loss in shoreline ecological functions.

Consider both developed and undeveloped lots

An analysis of cumulative impacts will often need to look beyond undeveloped lots to consider the likelihood of similar proposals coming from developed lots. This guidance is supported by past SHB cases. For example, in *Caldwell v. Ecology* (2012), the SHB reversed a Whatcom County approval of a variance requested from a 45-foot bluff setback to accommodate a single-family residence. The Caldwell site included a steep and unstable feeder

bluff subject to ongoing erosion. Among other findings, the SHB held that the County erred by only considering other undeveloped lots along a particular portion of bluff when assessing cumulative impacts. They found that the consideration of cumulative impacts should have been broader because there were many similar bluff areas in the vicinity and because approval of Caldwell's variance could lead to similar requests on both undeveloped and developed lots.

Geographic extent / study area

An assessment of cumulative impacts must be based on a study area that is appropriate for the project. Depending on the project and the shoreline, the geographic extent might be based on natural ecological boundaries, an area that shares a natural feature, an area with a similar land use and development pattern, or it could be the entire shoreline of a lake. In some cases, the shoreline environment designation boundaries will be the appropriate boundary. Identifying the study area will be a project-specific task.

Identify sites

An evaluation of cumulative impacts must identify specific sites within the study area where similar circumstances exist and where additional requests for like actions may be generated. This will often be associated with a map that identifies these sites (Figure 7).

There can be no cumulative impacts concerns where land use patterns in the areas will not result in similar request for variances or where there is a lack of evidence of similarly situated potential applicants. This guidance is supported by SHB decisions such as:

- In *Wriston v. Ecology* (2005), the SHB found that there must be a factual basis for supporting an assertion that similar activities are likely and that a variance should be denied because of cumulative impacts. The Board held that Ecology lacked a factual basis for denying the permit based on cumulative impacts. Ultimately the SHB found that the land use pattern and bathymetry in the area would not likely result in additional requests for similar variances.
- In *Lee's Mooring Houseboat Residents v. City of Seattle and Ecology*, SHB No. 05-019 (Nov. 15, 2005), cumulative impacts concerns were one part of the City of Seattle's decision to deny the permit. However, the SHB found no evidence that there were other properties where similar circumstances existed (i.e., other water-dependent uses without adequate parking reasonably available that could seek to add parking to an existing overwater parking structure).

Figure 7. Example map showing the extent of a cumulative impacts analysis and properties where similar circumstances exist.

Knowledge of past development

Knowledge of past development in the area should influence our understanding of how authorizing a particular variance might result in similar, future requests. For example, in *Butler v. Ferry County* (2008) the SHB affirmed the County's denial of a variance request to a setback requirement for the construction of a single-family residence principally because Mr. Butler could build a residential structure of different design and dimensions without the need for a variance. However, the SHB was also mindful that other properties had undergone boundary line adjustments to meet setback requirements and that allowing Mr. Butler's variance request could trigger similar requests leading to cumulative impacts on the Lake Curlew shoreline.

Suggested approach to assessing cumulative impacts

Many variance applications would benefit from a systematic assessment of cumulative impacts. For this reason, Ecology has developed an approach to conducting a cumulative impacts evaluation consistent with the cumulative impacts criterion of WAC 173-27-170(4). This approach can be used by local government practitioners responsible for permit review.

The steps listed below are intended to be scalable depending on the potential effects of an action, the type and condition of resources at risk of cumulative impacts, and the professional judgment of the practitioner performing the analysis. **As the degree of potential impacts increases, so should the level of detail of the cumulative impacts evaluation.** In this way, the evaluation should be commensurate with the potential impacts, resources affected, project scale, and other factors.

Findings and conclusions associated with each of the steps listed below are the basis for a demonstration of consistency with the cumulative impacts approval criterion. Responses should be a combination of qualitative and quantitative information.

Step 1 – Define a study area. Identify a study area that will be used to evaluate cumulative impacts and explain why that geographic extent is appropriate. To do so, consider what area will have resources potentially impacted by the proposed project. Whenever possible, the study area should be based on natural ecological boundaries. Depending on the project, the shoreline

environment designation boundary may be the appropriate study area. (See conversation on geographic extent on page 53)

Step 2 – Identify sites. Identify sites within the study area where similar circumstances exist and where additional requests for like actions may be generated. To do so, consider whether there are other properties in the study area with the same physical constraints that were part of the basis for the variance being reviewed. You will also want to consider factors like whether lots are vacant or developed and how that might influence the likelihood of additional requests. **If you conclude that similar requests are unlikely, no further analysis is necessary.**

Because cumulative impacts will often depend on the proximity of sites to each other, Step 2 will often be associated with a map.

Step 3 – Determine the impacts of concern. Identify any shoreline ecological functions, shoreline uses (e.g., public access and recreation, public navigation, and water-dependent uses), and archeological and cultural resources in the area that are particularly sensitive to the cumulative impacts of the proposed use. These are the shoreline ecological functions and shoreline uses that should be addressed as part of the cumulative impacts evaluation. If the project will have no impact to shoreline ecological functions, water-oriented uses, navigation, shoreline public access, and archeological and cultural resources, cumulative impacts will not occur and no further analysis is necessary.

Step 4 – Establish a time period. Identify over what time period cumulative impacts will be assessed and why that period is appropriate. This should be directly linked to the period of time where the proposal may result in impacts. For example, the period of time could be the useful life of a structure.

Step 5 – Assess impacts. Assess the cumulative impacts that can be attributed to similar actions that are pending or reasonably foreseeable. Ensure that the full range of potential impacts has been considered (e.g., impacts to water quality, habitat features, species, water storage, sediment transport, shoreline views, public recreation, etc.). Cumulative impacts can result in a beneficial or adverse effect. The analysis must explain assumptions and limitations so that the reviewer can understand how conclusions were reached.

Table 2 shows one way to present your assessment of cumulative impacts. Importantly, the types of effects assessed will be those identified in Step 3 and will vary based on the project.

Table 2. Summary of likely cumulative impacts.

Type of effect	Likely cumulative impacts
Water quality	Slight adverse contribution due to new impervious surfaces within the buffer and loss of mature trees.
Aquatic habitat	Slight beneficial contribution due to LWD placement.
Riparian vegetation	Slight adverse contribution due to the loss of mature trees and the temporal lag before mitigation plantings mature.
Wildlife	Moderate adverse contribution due to increased habitat fragmentation, noise, and light.
Erosion	Does not contribute to cumulative impacts.
Recreational impacts	Does not contribute to cumulative impacts.
Aesthetic/visual impacts	Does not contribute to cumulative impacts.
Water-dependent use impacts	Does not contribute to cumulative impacts.

Step 6 – Draw conclusions. Draw conclusions based on the assessment of cumulative impacts. You will conclude that the cumulative impacts criterion *cannot be met* if the impacts of the proposed project, when considered together with the impacts of similar pending and reasonably foreseeable actions in the study area, will contribute to a cumulative adverse effect. Your conclusions should explain the assumptions and limitations so that reviewers (e.g., hearings examiner, planning manager, Ecology, etc.) can understand how conclusions were reached.

Monitoring Variance Permits

Authorized variances should be rare. If this is not the case in your jurisdiction, the situation should be examined for a planning-level solution.

We recommend that you track information on shoreline variance requests, including their location, the use or modification proposed, and the SMP standard to be varied. Take note of situations where your SMP has required reasonable or environmentally desirable development to obtain a variance. Also track situations where denial of a variance request would "result in a thwarting of the policy enumerated in RCW 90.58.020 [the SMA]" but where the proposal had difficulty in meeting the variance approval criteria. For example, you might track an instance where your SMP required a variance permit for the replacement of a failed septic system on a nonconforming residential lot.

Your SMP periodic review is the best time to consider whether an SMP amendment is needed to address challenges with the number and types of variance requests you are receiving. Talk to your Ecology shoreline planner early in the SMP periodic review process about any concerning trends in variance requests.

SMPs across the state have adopted provisions that help limit the number of variance requests received. Examples include:

- SMP provisions that establish a maximum development footprint for residential development on nonconforming lots. Properties can be developed up to this maximum footprint area without a variance.
- SPM provisions that allow a one-time lateral or landward expansion of a nonconforming residential structure up to a certain percentage of the existing home's footprint (e.g., by up to 25%).
- SMPs provision for nonconforming structures (but conforming use) that allow for landward, lateral, and/or vertical expansion (provided it doesn't exceed the height limitation) within the shoreline buffer or setback without triggering the need for a variance permit.
- SMP provisions that allow nonconforming single-family residential structures to be expanded with an approved CUP.
- SMP provisions that allow nonconforming residential structures to expand by a maximum square footage over the lifetime of the structure (e.g., by no more than 500 feet).

Importantly, these provisions require mitigation sequencing to achieve NNL.

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