

**SHORELINE MANAGEMENT PERMIT
ACTION SHEET**

Application #: SP-15-05
Administering Agency Douglas County Transportation and Land Services
Type of Permit: ■ Shoreline Substantial Development
Action: ■ Denied
Date of Action: January 9, 2017

Date Mailed to DOE/AG

Pursuant to Chapter 90.58 RCW and the Shoreline Master Program of Douglas County, a permit has been applied for by:

**James & Kim Dir
71 N. Shore Dr.,
Orondo, WA 98843**

To undertake the following development: An application for a shoreline substantial development permit for a disability accessible residential shoreline access trail and mooring buoy.

Upon the following property: 71 N. Shore Drive, Orondo, WA 98843.

Within 200 feet of the **Columbia River** and/or its associated wetlands.

The project will be within a shoreline of state-wide significance (RCW 90.58.030). The project will be located within a **Rural Conservancy** Shoreline designation. The Douglas County Shoreline Master Program is applicable to this development.

FINDINGS OF FACT

1. The applicants are James & Kim Dir, 71 N. Shore Dr., Orondo, WA 98943.
2. Shoreline Substantial Development Permit application 15-05 is for a disability accessible shoreline access trail and mooring buoy. This application was submitted on October 7, 2015.
3. The project is proposed to serve 71 N. Shore Dr., Orondo, WA. The property is described as being Lot 38, Block 2 of the Beebe Orchard Tracts plat. The property is further described as being located in the Northwest Quarter of Section 16, Township 27N, Range 23 EWM, Douglas County, Washington.
4. Site Characteristics:

The existing vegetation and habitat conditions on the properties are divided into three distinct areas, which are providing very distinct levels of habitat functions and values. The areas are separated

based on slope, existing vegetation, and development. The first section is located immediately landward of the OHWM and consists of a narrow vegetated strip. The second area consists of the steeply sloped portion of the shoreline. The third area is located above the top of the bank and has been developed as part of the construction of the single family residence. The subject property includes a retaining wall, swimming pool and single family residence. The existing developments are located above the top of the bank and approximately 100 -110 ft. landward of the OHWM. The area where the trail is proposed begins at an elevation of 730 ft. on the upper bench dropping down to an elevation of 710 ft. along the shoreline. The grade between the two benches is relatively consistent although the slope in the center of the area does steepen slightly. The existing slope in this area is approximately 25%.

5. The Douglas County Assessor's number is 45700203800.
6. The Comprehensive Plan Designation is Rural Resource 5 Acres.
7. The subject property is located in the RR-5 zoning district.
8. The Columbia River Shoreline section of the subject property is designated as "Rural Conservancy" by the Douglas County Shoreline Master Program. The purpose of the rural conservancy environment is to protect ecological functions, conserve existing natural resources and valuable historic and cultural areas in order to provide for sustained resource use, achieve natural flood plain processes, and provide recreational opportunities.
9. Douglas County issued a Determination of Non-significance on August 4, 2016 in accordance with WAC 197-11-355 (Optional DNS).
10. The following agencies were notified of this project. Their response, if any, is listed below.
 - 10.1 WA Department of Ecology: response received November 5, 2015;
 - 10.2 WA Department of Ecology-Shorelines: response received December 9, 2015;
 - 10.3 Chelan County PUD: response received November 6, 2015;
 - 10.4 WA Department of Fish & Wildlife: response received November 24, 2015;
 - 10.5 Army Corps of Engineering: no response;
 - 10.6 Yakama Nation: no response.
11. No public comments were received.
12. The applicants have requested a shoreline substantial development permit for a shoreline access trail with the intent for it to be utilized for wheelchair access. The applicants have a need for wheelchair accessibility on site. There is off site shoreline disability access available in the applicant's subdivision.
 - 12.1 The State of Washington has adopted barrier-free accessibility standards in WAC 51-50-005 and ANSI ICC A117.1-2009. This prescribes safe, equitable and defensible standards for access by disabled persons. The standards are internationally recognized for uniform, universal application. The purpose of the criteria in ANSI ICC A117.1-2009 is to allow all persons, regardless of physical ability, to independently get to, enter, and use a site, facility, building, or element. The standards, as a part of the State Building Code, are applicable in all counties and cities in the State of Washington, including Douglas County.

- 12.2 The Douglas County Plans Examiner reviewed the proposed access trail and concluded that the project as designed does not meet the minimum standards required in this regulatory manual.
13. Douglas County has adopted by reference the American National Standard Institute (ANSI) ICC A117.1-2009 Accessibility and Usable Building and Facilities Code.
14. The project Joint Aquatic Resource Permit Application (JARPA) in Sections 6a and 8a discloses that originally the project was designed to meet all of the current standards for disability access. The JARPA indicates that the compliant design was abandoned in favor of the current proposal to minimize disturbance to the shoreline.
 - 14.1 Douglas County staff requested an ANSI compliant design in correspondence dated January 14, 2016. The applicant responded March 29, 2016, again, that full compliance with the disability access standard would result in additional shoreline disturbance. The applicant's representative in an email dated July 6, 2016 decided to proceed with application review to a public hearing with the non-compliant ANSI design.
 - 14.2 The applicant can design and construct on the project site an ANSI compliant shoreline access trail for use by persons with disability.
 - 14.2 The County is bound by the Americans with Disabilities Act and the barrier-free accessibility standards of the Washington State Building Code. These principles and standards are precedent to the Shoreline Master Program.
 - 14.3 The County agrees that full compliance with the required accessibility standards will most likely result in additional shoreline disturbance. The Shoreline Master Program provides flexible mitigation options for projects that disturb the shoreline environment. However, the County cannot review the project for compliance and consistency with the Douglas County Shoreline Master Program until an ANSI compliant trail design is provided.
 - 14.4 Mooring buoys are a permitted use in the Rural Conservancy shoreline designation, although an access trail meeting ANSI and DC SMP standards is required for approval of a buoy.
15. The project design is not consistent with ANSI ICC A117.1-2009.
16. The project cannot be evaluated for compliance and consistency with the Douglas County Shoreline Master Program as the project design does not meet ANSI standards for accessibility.
17. Comments from reviewing agencies have been considered and addressed where appropriate.
18. Douglas County issued a Determination of Non-significance on August 4, 2016 in accordance with WAC 197-11-355 (Optional DNS).
19. Surrounding property owners were given the opportunity to comment on the proposals, can request a copy of the decision, and can appeal the decision subject to the requirements outlined in DCC Title 14.
20. Proper legal requirements were met and surrounding property owners were given the opportunity to comment on the proposal at a public hearing.
21. An open record public hearing after legal notice was held on December 15, 2016.
22. It should be noted that the applicant requested continuance of the December 15, 2016 hearing. This request was denied by written Order dated December 5, 2016. The reasons stated for the

continuance are set forth in that written Order. However, to briefly summarize, this hearing had been continued from its original setting on August 25, 2016, and from a reset hearing date of November 17, 2016. The County opposed any further continuance.

23. Appearing and testifying on behalf of the applicant was Michelle Green. Ms. Green indicated that she was the attorney for the applicants. The applicant's position was that the May 12, 2016 document issued by Douglas County was an amendment of the Shoreline Master Program, was legislative, and therefore was illegal and invalid as legislative decisions may not be made administratively. The applicant's position was that the standards relied upon by Douglas County were not applicable to private residential trails. The applicant's position is that the applicant is being treated differently than others who had received permits in the past. Her position was that the applicants were being discriminated against due to Mrs. Dir's disability.
24. Also testifying on behalf of the applicant was Larry Lehman. Mr. Lehman testified that he was an agent of the Dirs. Mr. Lehman discussed prior shoreline permits issued by Douglas County, consistent with Mr. Lehman's memorandum dated December 14, 2016 that was attached to Ms. Green's letter dated December 14, 2016 addressed to the Douglas County Hearing Examiner and Douglas County Transportation and Land Services staff.
25. Also testifying on behalf of the applicant Eric Smith. Mr. Smith testified consistent with his December 14, 2016 memorandum. Mr. Smith testified that the walkway from the applicant's pool to the shoreline varied in slope from 10 percent to 4 percent. Mr. Smith indicated that the walkway could be built to comply with ANSI standards but that this was not what they applied for because of other ANSI requirements
26. No member of the public appeared at the hearing.
27. At the open record public hearing, the entire planning staff file was admitted into the record.
28. At the conclusion of the hearing, the Hearing Examiner kept the record open for the specific purpose of allowing the applicant and the County to provide additional legal research regarding the question of the vesting doctrine and how it may or may not relate to a May 12, 2016 document authored by Douglas County.
29. Admitted in to the record were the following additional documents:
 - 29.1 December 21, 2016 letter from Devon Gray, attorney for the applicant to the Douglas County Hearing Examiner.
 - 29.2 December 22, 2016 memorandum from Douglas County Transportation and Land Services staff to the Douglas County Hearing Examiner;
30. Public agencies with potential jurisdiction over this project were given an opportunity to review the proposal. Agencies that responded with comments were admitted into the record and considered by the Hearing Examiner in rendering this Decision.
31. For the Hearing Examiner approve this shoreline access trail for wheelchair access, the trail must be designed to the most recent addition of the ICC Public Assessable Usable Buildings and Facilities (ICC A117.1-2009).
32. In order to meet the required grade and landings of the Americans with Disabilities Act standards and those set forth by the Internal Code Council, the trail would need to include an additional switchback. Such an additional switchback would result in the disturbance of the riparian buffer below the top of the slope. But this additional switchback can be constructed on the site.
33. An existing access trail to the community dock, which the applicant's property is a member and allowed to use, does provide ADA access to the Columbia River and the community dock.

34. In 2004, becoming effective in 2005, the State Building Code Council adopted the 2003 International Building Code, including ICC A117.1-2003. The State Building Code Council then adopted ICC A117.1-2009 in 2012. This is the current code on accessibility that has been effective since July 1, 2013.
35. In 1975 the Washington State Legislature granted the State Building Code Council the authority to adopt barrier-free regulations based upon American National Standards Institute Standard A117.1.
36. When a person proposes to create an accessible feature such as a ramp for accessing a private residence, it is the standards set forth in ICC A117.1-2009 that are used to evaluate the permits necessary for the accommodation even though the private residence is not "open" to the general public.
37. The May 12, 2016 document issued by Douglas County Department of Transportation was an administrative interpretation issued to assist those persons wishing to take advantage of the shoreline exemption created by RCW 90.58.030 (3)(e)(xii).
38. The purpose of this May 12, 2016 document was to provide guidance to assist designers and property owners in developing an exempt project through the use of clear and accepted international standards. However, the May 12, 2016 document also reminds designers and property owners of the required design standards for accessibility are set forth in ICC A117.1-2009, regardless whether the project qualifies for a substantial development permit exemption.
39. The May 12, 2016 document is authorized by Section 6.1 of the Douglas County Shoreline Master Program.
40. The subject application is allowed to be processed according to the rules and regulations that existed on October 7, 2015.
41. The May 12, 2016 document is not a code, regulation or other law.
42. The May 12, 2016 document is not a land use control ordinance.
43. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

CONCLUSIONS

1. The Hearing Examiner has been granted authority to render this Decision.
2. Vested rights originated in common law but is now statutory.
3. Shoreline permits are not, in and of themselves, subject to vested rights pursuant to Potala Village Kirkland, LLC v. City of Kirkland 183, Wn.App 191 (2014) rev.den. 182 Wn.2d 1004 (2015).
4. RCW 90.58.030(3)(e)(xii), which is the codified 2016 law referenced by Douglas County, provides that a substantial development permit is not required if "external or internal retrofitting of an existing structure with the exclusive purpose of compliance with the Americans with Disability Act or to otherwise provide physical access to the structure by individuals with disabilities."
5. ICC A117.1-2009, Section 106, defines a walk as an exterior pathway with a prepared surface for pedestrian use.

6. ICC A117-1-2009, Section 103 provides for alternative compliance with these standards “so long as equivalent or greater accessibility and such equivalency is approved by the administrative authority adopting this standard.”
7. Douglas County has not adopted an alternative standard to ICC A117.1-2009.
8. If state or federal law directs permittees to implement the regulations at issue, those regulations are not the sort of municipal land use zoning ordinances that the legislature was concerned with when codifying the vested rights doctrine.
9. The State of Washington has mandated compliance with the American with Disabilities Act by all Municipalities and Counties.
10. The Shoreline Application is not consistent with the Douglas County Shoreline Master Program.
11. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

DENIED this 9th day of January, 2017.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp

Anyone aggrieved by this decision has twenty-one (21) days from the “date of receipt” as defined in RCW 43.21B.001 to file a petition for review with the Shorelines Hearings Board as provided for in Washington law.

**THIS SECTION FOR DEPARTMENT OF ECOLOGY USE ONLY IN REGARD TO A
CONDITIONAL USE OR VARIANCE PERMIT**

Date received by the Department _____

Approved _____

Denied _____

This conditional use/variance permit is approved/denied by the Department pursuant to Chapter 90.58 RCW.

Development shall be undertaken pursuant to the following additional terms and conditions:

Date

Signature of Authorized Department Official