

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

In the Matter of the Appeal of

**Bainbridge Island Boatyard, Inc. d/b/a Bainbridge Island Marina
DARRELL McNABB**

COD-312

From a Code Enforcement Decision of
the Director, Planning and Community
Development Department, Regarding Alleged
Violations of the Shoreline Master Program
[BIMC 16.20]

BACKGROUND

This matter having come on for hearing before the undersigned pro tem Hearings Examiner, Terrence F. McCarthy, on September 28, 2006, having been continued to March 13, 2007 and further continued to August 30, 2007. The appellants being represented by Dennis Reynolds and Steven James and the City being represented by Rod Kaseguma. The parties having signed a Stipulation and Agreement to Resolve Certain Issues on Appeal and Set Hearing, and having submitted an Order on Stipulation of Parties to the Examiner for signature on October 22, 2007. The Hearing Examiner having reviewed the files and being duly advised in the premises does now enter findings, conclusions and decision of the hearing examiner on this appeal.

Kitsap County Code 2.16.130 et seq contains the provisions governing appeals from the Director's Decision.

Kitsap County Code 2.16.130(F) provides that in considering appeals, the Hearing Examiner shall do one of the following:

- a. Affirm the decision;
- b. Reverse the decision;
- c. Affirm the decision with modifications; or
- d. Remand the decision to the department.

The appellant and the City have asked me to ignore these provisions and just render a Findings and Decision with reference issues surrounding the pontoon lifts.

FINDINGS

I.

1X

On January 23, 2006, Meghan McKnight forwarded a letter of violation to Darrell McNabb. On March 10, 2006, Darrell McNabb, through his attorney of record, Dennis Reynolds, requested a director's review of the decision of Meghan McKnight. In the request is a statement that the January letter was not served on their firm until March 6, 2006.

On July 27, 2006, Larry Frazier, Director of Planning and Community Development, responded to the request for review as follows:

In accordance with BIMC, Section 1.26.070(B), I am sustaining the notice of violation dated January 23, 2006, with a modification of the deadline for removal of the portable boat lifts and relocation of the items located outside of the approved dry storage and repair area to 4:00 p.m., Friday, August 25, 2006.

Pursuant to BIMC, Section 2.16.130, the appellants timely appealed the director's decision.

II.

Initially, this matter came before this Hearing Examiner on September 28, 2006 for hearing, and was continued from time to time and on the 22nd day of October 2007, this Hearing Examiner signed an Order on Stipulation of Parties. The parties also signed a Stipulation and Agreement to Resolve Certain Issues on Appeal, leaving one issue to be determined by the Hearing Examiner, as set out on page six of the Stipulation, which states:

Bainbridge Marina and the City have not reached agreement as to whether a shoreline permit approval is required for the floating boat lifts used by tenants within the marina, including those floating boat lifts that have a top canopy with open sides and ends. The parties will set a time for the hearing on this issue, and submit the issue to the Hearing Examiner for resolution and decision.

The entire Stipulation and Agreement to Resolve Certain Issues on Appeal and Set Hearing is hereby incorporated by reference, as is the order.

III.

The sole issue before the Hearing Examiner is whether or not the pontoon boatlifts used on the premises of the marina require a separate substantial development permit or request for exemption. The pontoon boatlifts are currently being used inside seven or eight different slips within the marina. The testimony seemingly indicates that these pontoon style boatlifts are used to store the boats above water. The pontoons are filled with water,

so that they are water level. The boat is driven up on to the lift, then the water is let out of the pontoon and the boat is lifted out of the water and remains out of the water until the owner wishes to use the boat again.

IV .

Testimony indicates that removing the boat from the water has substantial environmental benefits such as eliminating the need to paint the bottoms of boats to prevent corrosion and fouling of the bottom of the boat.

V .

The appellant does not own these boatlifts. The individual boat owners own the lifts. When they rent the marina slip, they bring the lifts in with their boat and when they cancel their lease, they remove the boatlifts. The lifts are not used as a separate structure. They are used as part of the slip, which is rented. They are attached to the slip and surrounded on three sides by the slip. The rear section opens for the boat to pull up on to the lift.

VI .

When the boats leave the mooring slips, the lifts remain. The boat lifts never leave the mooring slips except for repair or for permanent removal at the end of the lease. Therefore, they do not interfere with normal public use and enjoyment of the water's overlaying lands subject to this SMA. The marina and the individual slips have a tendency to interfere with normal public use of the waters on the shoreline. The lifts themselves do not, as they are totally contained within the marina and within the original slips.

VII .

The City contends that the use of these lifts constitutes development, as set out in RCW 90.58.030(3)(D) and (E). This examiner disagrees. Lifts in many different uses could be considered an obstruction. However, as used here at the marina, they are an accessory to the individual boat slip. The lifts themselves are not an obstruction, nor do they interfere with the normal public use of surface waters overlying lands, subject to the Shoreline Management Act. In this particular case, the boatlifts are not development. It is the slip which constitutes the obstruction. The lifts fit inside of the slip, which have been previously permitted. In many different uses and different situations, the lifts would constitute development, but under the particular facts of this case, as used inside of a mooring slip, they actually become part of the slip.

VIII .

The City contends that even if the use of the slips is not a substantial development, the appellant is still required to request an exemption. The appellant contends that the use of

the pontoon lifts, in this particular case, constitutes an accessory use found in BIMC 16.12.180(B)(4), which provides in pertinent part, that accessory uses at a marina or public launch will be limited to those which are water dependent, related to boating, necessary for marina operations or which provide physical or visual access to substantial numbers of the public. The lifts are definitely water dependent. They are definitely related to boating, and they have become necessary for marina operations as a method of protecting the environment. While the lifts are a fairly recent addition to boating on the West Coast, their use is expanding rapidly because of the protection they furnish for the boat and water.

IX.

Paragraph BIMC 16.12.180(A) provides as follows:

Accessory uses found in marinas may include fuel docks and storage, boating equipment sales and rental, repair services, boat launches, bait and tackle shops, potable water, waste disposal, administration, parking, and grocery and dry goods.

The above list is not exhaustive and does not contain a total list of all accessory uses. Lifts could be considered part of storage. They could be considered part of boating equipment sales and rental. They could be considered part of repair services. They do fall within the general ambit of accessory uses found in marinas.

The marina's original application has previously undergone a significant regulatory review and approval process for the commercial marina and within the approval was the use of "boat lifts." The specific type of boat lifts, which are currently being used, were not contemplated at the time of the original approval process, but boat lifts as a category of the above items were seemingly approved. These boatlifts have, as the City has stated, become part of and are indistinguishable from the docks to which they are tied. They are merged within the slips. The appellant argues that docks and boatlifts are a common part of a marina operation. Generically, they are.

CONCLUSIONS:

From the foregoing findings, the Examiner makes the following conclusions:

1. Pontoon boatlifts, as used in this particular marina, i.e. inserted into individual slips, (which have previously received a permit) are an accessory use, which has become customarily incidental and related to the primary use. The boatlifts, as used in this particular case, have become a part of and are basically indistinguishable from the slips to which they are tied and which have been previously approved.
2. The appellant has no control over the individual slips once he rents them. Individual boat owners are free to use a lift or not use a lift.

3. To require that each owner of a boat lift who moors a boat in the marina to apply for an exemption or a substantial development permit and to reapply, if necessary, every five years would appear to be little benefit to the system. The equipment is definitely the type of equipment that is an accessory to a marina and should be considered at the time of the original permits. There would seem to be little to no benefit generated by requiring all of these people to apply for this type of permit each and every time they move a boat or moor a boat in a new area. This use should be reviewed and considered at the time of the original application for the marina.

The above decision is limited to the use of boatlifts in marinas where the boatlifts are contained within slips, which have been previously permitted. This decision should not be taken out of context of the particular factual situation presented to this Hearing Examiner. There are other situations where the use of lifts should be reviewed with the Shoreline Substantial Development permit process. In other cases, boat lifts standing by themselves could be considered to be an obstruction to navigation.

DECISION

The boatlifts as used in this particular case are an accessory use incidental and related to the primary use, and would not require a separate permit or request for an exemption.

ORDERED this 3rd day of January, 2008.

TERRENCE F. McCARTHY
Hearing Examiner