

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

**In the Matter of the Appeal of**

**AMES/SUTHERLAND APPEAL**

**ADM14164**

Appeal of an Administrative Determination  
Gary and Barbara Ames/John and Carol Sutherland

**PARTIES PRESENT:**

Dennis Reynolds, attorney for appellants  
John L. Sutherland  
Carol Sutherland  
Gary and Barbara Ames  
Samuel Plauche, City of Bainbridge Island  
Megan Nelson, attorney for City  
Bob Katai, Current Planning Manager

**SUMMARY OF REQUEST:**

The appellants (Sutherland and Ames) are appealing a determination of Larry Frazier, AICP Director, dated August 31, 2006, finding that floating docks are a subset of fixed docks.

**SUMMARY OF DECISION:**

Appeal dismissed for lack of a justiciable issue.

**PUBLIC HEARING:**

The public hearing was reopened on March 8, 2007. Parties wishing to testify were sworn in by the Examiner.

**MINUTES:**

Appearing was SAMUEL L. PLAUCHE with the assistance of M. Nelson, on behalf of the City of Bainbridge Island (herein "City").

Appearing on behalf of the appellants was DENNIS REYNOLDS of Davis Wright Tremaine.

Both the appellants and City jointly requested that Exhibits 38 and 39 be stricken and Exhibits 54 and 55 were admitted into evidence. Exhibits 1-52 were also admitted into

evidence.

Appearing was JOHN L. SUTHERLAND ("Jack"), appellant. He lives on Northeast Country Club Road and is one of the appellants. The purpose of his testimony was to articulate the issues. He works in the cargo container industry and has lots of experience in working in and around harbors. He has been a lifelong pleasure boater. He has reviewed all the exhibits and briefs, memos and materials submitted herein. He demonstrated with two exhibits, numbers 36 and 37 where his site is located. In his opinion, the issue revolves around the language contained on the short plat, which provides "no fixed docks or similar structures can be built on or appurtenant to the lots contained within this short plat." Apparently this condition is shown on the final plat Mylar and is listed in the CCRs. He and his wife along with Mr. and Mrs. Ames did request an interpretation. It is their intent to share a common use floating dock "if and when" the City amends the Shoreline Master Program (SMP) applicable to Port Blakely, such as to allow construction of new, private docks. He is not seeking an amendment to the present Code. The language as adopted arose out of community concern about the docks on the harbor. Jack went through photographs he took, which are contained in Exhibit 47, and which are examples of various types of docks throughout the area. "Fixed" means permanent. He then submitted Exhibits 41, 54, as example of various floating docks, which are fixed to or held in place by long helical screws. He then went through the language which is contained in Exhibits 42, 44, and the ads for docks, which indicate that the proposed dock would be secured to helical screws by means of floating lines. Docks or jet float units are made with high-density food grade plastic. The applicant indicated that this was a temporary dock, although from his testimony, the Examiner garnered that Mr. Ames and Mr. Sutherland intend to use it as a permanent dock. They believe the word "fixed" as used in this sentence means permanent. The concept of fixed docks and similar structures is limited to situation where a dock is attached to pilings as opposed to being attached by screws. This is a modular project, which is easily assembled. It floats and does not need to be held in place by pilings.

Appearing was RAY STEVENSON. He is a developer in this area and short platted three, non-contiguous plats in the area. At the time of the short plat, this language was adopted, because South Bainbridge Community Association wanted no docks in the area. He indicated that docks were not a city issue but a South Bainbridge Community issue. The language for a community dock was included on the short plat. It was not included in the other short plats, which he developed. He developed certain parcels by using boundary line adjustments. He purchased 850 feet of waterfront and developed three short, noncontiguous short plats and used boundary line adjustments to provide for 16 lots.

Appearing was MICHAEL BOTTLES. He lives on North Shore and is the owner of a floating dock. He was applicant for a shoreline development permit and other permits necessary to construct this dock, which he constructed himself. The cubes weigh about 14 pounds. There is no leaching or loss of Styrofoam. Environmentally, they are extremely safe. It is a portable dock. Each of the cubes is 20 by 20 by 14. Coincidentally, the building department did not require building permits because they indicated there was no building. It was merely putting together a structure. Upon cross-examination, he indicated

that the dock was affixed to the floor of the Sound by two helical screws which are six foot long and two which are 12 foot long to secure the dock in place.

Appearing was GARY AMES. He lives at 10326 Country Club Road. He has four pieces of property adjacent to the Puget Sound. One of his parcels has no plat restrictions. The parcel to the east allows a community dock. He agrees with Mr. Sutherland and believes that for a dock to be fixed, it must be a permanent structure. He is proposing a floating dock, not fixed because it does not use pilings and the helicals, which are six and 12 feet long, can more easily be removed.

Appearing was CAROL SUTHERLAND who indicated that she would like to have a floating dock so that they can hopefully moor their 43-foot boat adjacent to the dock. When they hit high tide, they do not have a beach. She is always concerned for the safety of her grandchildren and others because of the absence of a dock.

The attorney for the appellants rested and the City called Mr. Bob H. Katai.

BOB KATAI drafted the response to the Request for Administrative Interpretation. He believes the proposed modular structures fall within the prohibition of fixed docks or similar structures. Because these floating docks are secured by helical screws and according to the American College Dictionary definition, the word "fixed" means to place securely to make stable or secure for another, to attach. He felt that since the dock which is buoyant it must be secured to the shoreline. It is the secure method that makes a floating dock a fixed dock. It is fixed in place. Being buoyant does not mean that the dock is not firmly attached to the shoreline. He believes that floating docks are a subset of fixed docks.

The City and the applicants requested that the Hearing Examiner not consider any of the CCRs. The City also indicated that the prohibition of this boathouse and boat storage dock in the native vegetation zone was inconsistent with the provisions of the SMP in that they are allowed in a normal situation.

The Examiner took this matter under advisement to allow each of the applicants and the City to get together and remove any further exhibits having to do with the CCRs.

No one spoke further and the hearing was closed at 1:00 p.m.

After due consideration of all the evidence in the record, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner on this appeal.

### **FINDINGS, CONCLUSIONS AND DECISION:**

#### **FINDINGS:**

1. The Hearing Examiner has admitted Exhibits 1-55 into evidence into the record,

reviewed the same, heard testimony, judged credibility of witnesses, viewed the site, researched the issues, and taken this matter under advisement.

2. Notice of this appeal was filed in accordance with the provisions of Bainbridge Island Municipal Code.
3. Gary and Barbara Ames own waterfront property located on Blakely Harbor at 10326 NE Country Club Road and at 10566 NE Country Club Road, Bainbridge Island, Washington 98110.
4. John and Cara Sutherland also own waterfront property located on Blakely Harbor. Their address is 10488 NE Country Club Road, Bainbridge Island, Washington 98110. Their parcels abut each other. Throughout this decision I will refer to the Sutherlands and the Ames as the "parties".
5. On June 20, 2006, the parties requested an administrative interpretation involving their property from Larry Frazier (See Exhibit "4"). Basically they indicated that they propose to share the common use of a "floating dock" structure "if, and when," the City of Bainbridge Island amends their Shoreline Master Program applicable to the Blakely area to allow construction of new private docks. Currently according to testimony and correspondence from their attorney Bainbridge Island Municipal Code prohibits the construction of docks in the Port Blakely area.
6. The short plat of the parties property contains the following condition:
  - 1q. In accordance with a private agreement between the South Bainbridge Island Association and South Harbor LLC and Jefferson Properties, Inc., no fixed docks or similar structures can be built on or appurtenant to the lot contained within this short plat.

This condition is properly shown on the final plat mylar and is listed on CCRs.

7. The parties requested an administrative interpretation stating that the parties "respectfully request a determination whether a floating dock would be considered either a 'fixed dock of similar structure' within the meaning of SEPA Condition 1q of the plat condition of approval." The question is specific to Blakely Harbor. Based upon analysis which follows the parties contend that a floating dock does not fall within the plat restriction of fixed docks of similar structures. No request is made for interpretation of any private agreements or real estates documents. That request is followed by a very lengthy legal analysis performed by Dennis Reynolds wherein he supported the contention that floating docks would not be prohibited in this area after the restriction on docks was lifted from the Port Blakely area. (See Exhibit "4")
8. On August 30, 2006, Bob H. Katai, Division Manager for Current Planning, issued a

memorandum to Larry Frazier, AICP Director, indicating that this decision was exempt from review under State Environmental Policy Act WAC 197-11-800. His conclusion was that "floating docks are a subset of fixed docks. Therefore, installation of the floating dock would be conflict with Condition 1Q of South Harbor Tract F Short Plat." (See Exhibit "12").

9. On August 31, 2006, Larry Frazier, AICP Director, issued a decision based on Mr. Katai's report finding that "floating docks are a subset of fixed docks and therefore installation of the desired floating dock would be in conflict with 1Q of the South Harbor Tract F Short Plat." (See Exhibit "12")
10. On September 13, 2006, the parties appealed the decision of Larry K. Frazier (See Exhibit "15").
11. The appeal involves the issue of whether or not floating docks will be prohibited in Blakely Harbor "when and if" the prohibition against docks is lifted. This appeal is based upon the premise that in lifting the ban on docks the City Council will not make other changes which will provide their definition of fixed docks or further clarify the issues herein. In short, this request is an invitation for the Hearing Examiner to legislate. The Examiner questions what an appeal of this decision would involve and what weight this decision would carry with the Superior Court. More likely than not the case would be reversed with a finding that the matter should have been dismissed because there is no justiciable issue. In fact the appeals are asking for an advisory opinion. A decision on this issue will not result in the final and conclusive determination of anything. The issues before the Examiner have not matured into an actual present existing dispute. It is a request for an opinion as to a possible hypothetical, speculative situation. For the Examiner to hear a case and render a decision there must be a direct and substantial issue rather than a potential, theoretical, abstract or academic issue. See *To-Ro Trade Shows v. Collins*, 144 Wn. 2d 403 (2001). The appellants at this time are not injured. They do not have a justiciable issue. They are prohibited from having a dock regardless of its nature. Whether or not it is fixed and/or floating as defined by the appellants makes little or no difference; both are prohibited and therefore the issues before the Examiner are not ready for final determination and this appeal should be dismissed.

## **CONCLUSIONS:**

From the foregoing findings the Examiner makes the following Conclusions:

1. The Hearing Examiner has jurisdiction to hear and decide appeals of the Director's administrative decisions regarding alleged violations and, pursuant to the mandate of BIMC 2.16.130 [see Finding 43], in making that decision, must give substantial weight to the decision of the department director. To overcome the substantial

weight accorded the Director, an appellant has to show that the Director's decision is clearly erroneous. Under this standard of review, the Director can be reversed if the Hearing Examiner is left with the definite and firm conviction that a mistake has been made.

2. The parties have not presented an existing justiciable issue to the Examiner for resolution.<sup>1</sup> They are premature. They are presenting a hypothetical or speculative issue which should be raised when and if it comes into existence. The request involves a hypothetical of what would the interpretation be when and if the prohibition against docks is lifted assuming that when and if the prohibition is lifted that no other provisions are enacted by the City Council to clarify the issues herein and therefore there is no justiciable issue before the Examiner to determine.<sup>2</sup>
3. The Examiner can find no provision of the City Code which authorizes the Examiner to issue advisory opinions. The Examiner's decision would be purely hypothetical based on of a set of hypotheticals submitted to the Examiner. It would have basically little to not weight in the future and therefore should be dismissed.

### **DECISION:**

The request for an interpretation filed by the parties herein with reference to short plat conditions is hereby dismissed for a lack of justiciable issues.

**ORDERED** this 20th day of April, 2007.

Signed in Original

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<sup>1</sup> Prior to the hearing the applicant referred to CCRs in his brief and other materials as did the City. It has been this Examiner's routine practice for the past 20 plus years to read all materials in advance of the hearing so that the Examiner can identify the issues presented, be familiar with them, and be able to work with the parties in reaching a decision. In consulting with other examiners I have never heard of any other approach by any other examiner. If, in the future, you are appearing in front of me do not submit any material you do not want me to read before the hearing. I feel it is my duty as a hearing examiner to be prepared, to read all materials and to be familiar with the issues presented. There are such a broad range of issues and each piece of property being unique requires a hearing process that demands that the examiner be familiar with the issues when he walks into a hearing.

<sup>2</sup> If in fact the prohibition against docks in Blakely Harbor was lifted and if in fact the City Council took no other action with reference to this area then the Examiner would more probably than not rule in favor of the City's reasoning and logic.

TERRENCE F. McCARTHY  
Deputy Hearing Examiner