

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

In the Matter of the Appeal of

**Kenneth S. Hammer**

**SSDP 13664**

From the decision to issue a Shoreline  
Substantial Development Permit and MDNS

**Introduction**

Kenneth S. Hammer appeals the decision by the Director, Department of Planning & Community and Development, to issue a shoreline substantial development permit and a Mitigated Determination of Non-significance for a dock to be located at 15090 Sievertson Road, on Port Madison Bay. A public hearing on the appeal was held on March 22, April 3, 6 and 19, 2007. Parties represented at hearing were the Appellant by his attorneys, K. P. Kellogg, and R. Bruce Johnston, the Director, Planning and Community Development Department, by its attorney, Rosemary Larson, and the property owners, William and Barbara Knapp, by their attorney, Brian Lawler.

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**

1. Marine Floats Corp. applied for a substantial development permit on behalf of William Knapp “to construct a 4’x165’ pier, 3’x44’ ramp, an 8’x10’ float at an “ell” with 50% functional grating and (19) steel piling. (sic) The overall length is 220’.” The site is at 15090 Sievertson Road on Port Madison Bay. [Exhibit 7, p. 4]
2. Joshua Machen, AICP, Senior Planner with the Department of Planning and Community Development (hereafter “Department”) was assigned to review the application. The application with environmental checklist was submitted to the Department on October 24, 2005. After reviewing it, Mr. Machen determined that it was incomplete and required additional information. Revised drawings and a survey were submitted and, on May 16, 2006, the application was determined to be complete. During the comment period, Kenneth Hammer provided extensive comments, which Mr. Machen reviewed and considered, including questioning the survey provided by the applicant. On November 16, 2006, the staff report recommending approval of the permit subject to

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conditions, the administrative decision conditionally approving the application, and a SEPA mitigated determination of nonsignificance (MDNS) were issued. [Exhibits 30, 31; Testimony of Machen]

3. Project conditions imposed included those that required modification of the structure. The “L” shaped float was to be no greater than 8 by 10 feet supporting the ramp and 35 feet exterior dimension providing the moorage slip. The pier is to be reduced in length to 197 feet “or the length necessary to obtain four feet of water at the landward limit of the moorage slip at extreme low water and is a minimum of 60 feet from the neighbor’s existing mooring buoy to the west.” [Exhibit 31, p.3] This reduction in length was based on the location of the existing docks and buoy and the depth at the moorage slip. [Exhibit 30; Testimony of Machen] The conditions also required that a building permit from the Department, hydraulic project approval from the Washington State Department of Fish & Wildlife, and Army Corps of Engineers permit be obtained prior to beginning work on the project and that any conditions of those permits become conditions of the approval.

4. At hearing the Department agreed that Condition No. 14 regarding the length of the dock and depth of water should be modified to add the phrase “whichever is less.”

5. The plans available to the planner showed the location, dimensions and other details of the proposed pier, ramp and float. They showed that the pilings would be steel and 10” in diameter and the float would have 50 percent grating. [Exhibit 30, Att. C; Testimony of Machen]

6. Kenneth Hammer filed an appeal of the administrative decision and MDNS on December 7, 2006, alleging that the Department failed to consider the issues identified in his, his attorney’s, and his engineer’s comment letters, that the City has a conflict of interest because of the Mayor’s interest in the outcome, that the information submitted was incomplete, that the easterly littoral boundary is not clear and the Cove Rule was not properly applied, that the proposal will have significant adverse impacts, that the permit would violate Shorelines policies, among other allegations. [Exhibit 32]

7. The subject site, owned by Knapps, is a 2.4-acre lot zoned Residential Two Units Per Acre (R-2) and developed with a single family residence. The owners own the 2<sup>nd</sup> class tidelands that extend waterward approximately 175 feet in the location of the proposed dock, which is approximately 80 ft. east of the section line. The upland part of the site is designated Semi-rural by the City’s Shoreline Master Program and the water environment is designated Aquatic. The Comprehensive Plan designates the site as Open Space Residential Two Units Per Acre (OSR-2). [Exhibit 30]

8. The Knapp’s property lies between property owned by the Hammers on the westerly side and property owned by James Abbott and Darlene Kordonowy (hereafter, the “Abbott” property) on the easterly side. Both adjoining properties have docks. Darlene Kordonowy is mayor of the City of Bainbridge.

9. A biological evaluation (BE) prepared for the Army Corps of Engineers and Washington State Department of Fish and Wildlife was submitted in connection with the

application for the shoreline permit as requested by the Department. A BE is not a requirement of the City. A dive survey was done using nine parallel transects, ten feet apart except for the sides which were 20 feet, to identify flora and fauna and get other information. Water visibility was reported to be poor, about one foot. Port Madison Bay is shallow with a muddy substrate so low visibility is typical. Fish and Wildlife requirements dictate the timing of the dive survey. Sea hair was observed between 80 and 90 feet out, primarily west of the proposed pier. Red algae were found at approximately 200 ft. but no other macroalgae or eelgrass was found. These results are consistent with other information the planner had available about marine habitat in the area. The survey allowed the planner to conclude that the proposed dock would be located outside the herring spawning and macroalgae habitat so, with the conditions on size and design, any impact would be minimized. [Testimony of Daley; Testimony of Machen; Exhibits 1, pp. 8 and 30, pp. 7, 8]

10. Wayne Daley, a fisheries biologist testifying for appellant, faulted the BE for not addressing cumulative effects of the proposal, as required by federal regulations. He testified that it was also deficient for not including photographs taken along and between the transects. He also explained that reasonable visibility is required and one foot would violate standards of care in the field. [Testimony of Daley; Exhibit 84]

11. Mr. Machen relies on the state Department of Fish and Wildlife to determine if the BE is adequate and if any problem is identified in the BE that needs to be addressed. He always attempts to communicate with the fisheries biologist before the Department makes its decision and did in this case. She did not indicate any concern. Reliance on that expertise is reasonable. [Testimony of Machen]

12. As the result of a state and federally funded project, the City has information, which Mr. Machen utilized, about the shorelines nearshore habitat including location of eelgrass and kelp and forage fish spawning areas. The mapping shows herring spawning habitat in front of the Knapp property but no known eelgrass beds, either continuous or patchy. [Exhibit 88; Testimony of Machen]

13. Shading from overwater structures can have a negative effect on the growth of eelgrass and macroalgae. The macroalgae that is present is in the pier area. [Exhibit 1]

14. There is extensive dense vegetation overhanging the shore on the Knapp property except for one area in the center where there is less. The foot of the pier is to be located just east of center. Some vegetation would be removed for access to the pier. The pier is proposed to be four feet wide so Mr. Machen, who had identified the approximate location on his site visit, estimated that approximately six feet of brush would be cut back but because of the proposed location, no significant trees would be removed. Mr. Daley testified that he believes the amount would be greater than eight feet, but that in any event, loss of any magnitude would impact the resource. Because of Mr. Machen's greater opportunity to assess the condition of the vegetation and location of the foot of the pier, his estimate will be given greater weight. The amount of disturbance would be typical for residential access to the shore, with or without a dock, and would not be significant in Mr. Machen's opinion. Overhanging vegetation is important for shading and the rearing of some fish species. [Testimony of Daley; Testimony of Machen]

15. The Hydraulic Project Approval (HPA) includes a condition, incorporated into the shoreline decision, limiting the amount of vegetation removal to that necessary for construction of the project. [Exhibit 87 p. 3]
16. The BE reported an active bald eagle nest approximately 3,600 feet north of the site, separated by a hill and trees. That is consistent with information the City has and would be outside the typical management zone for eagles.
17. In 1983, the Hammers applied for a shoreline substantial development permit to construct a dock on their property. Mr. Knapp objected to the placement of the dock, believing that it encroached on his property. The Court of Appeals in an unpublished opinion eventually affirmed the Kitsap Superior Court's application of the Massachusetts Rule or "Cove Rule" determining that the lateral boundary between the tideland of the Knapps' and Hammers' property was a line "extending from the meander line at its intersection with the section line between Sections 33 and 34 at a bearing of South 27° East measured as a deflection from the extension of the section line...." [Exhibits 67, p.3 & 39]
18. Prior owners of the Abbott property, the Strongs, applied for and received a shoreline permit to construct a dock on that property in 1984. The permit was conditioned on the dock being oriented consistent with the Cove Rule. Appellant contends that this condition was violated when the dock was built. [Testimony of DeGroot; Exhibits 78, 89]
19. Mr. Knapp applied for a shoreline permit in 1985 to construct a dock on his property, the subject site. That application was approved subject to certain conditions. The dock was never constructed. [Exhibits 104, 109; Testimony Hammer; Testimony of Knapp]
20. Mr. Knapp moors his boat at a buoy located between the Hammer and Abbott docks. The Abbott/Kordonowys, as did their predecessor the Strongs, allow Mr. Knapp to store a dinghy on their dock for use in accessing his boat and, on occasion, allow him to moor his boat at their dock for provisioning or cleaning. This use has continued for some 10-14 years. Both Ms. Kordonowy and Mr. Knapp regard this as a neighborly accommodation or permissive use only. No joint use covenant has been filed with the City and no written agreement exists between the two parties regarding use of the dock. [Testimony of Knapp; Testimony of Kordonowy] James Abbott and Darlene Kordonowy submitted a comment letter to the City indicating that they are not interested in joint ownership of their dock. [Exhibit 30, Att. K]
21. At the preapplication meeting and in a follow-up letter, Mr. Machen explained the policy of the SMP to encourage joint use of docks and asked the applicant's agent to discuss with the Knapps the possibility of sharing a dock. [Testimony of Machen; Exhibit 76]
22. The boundary line in the tidelands between the Abbott property and the Knapp property has not been fixed by recorded survey. Mr. Knapp has assumed that it is a line extending the upland lateral boundary between the lots. [Testimony of Knapp]

23. The City required a survey of the tidelands to identify tidal elevations a minimum of 20 feet waterward from the proposed dock and to show the location of docks on adjoining properties. The applicant provided a site plan based on a survey by Bruce MacLearnsberry, PLS. The City had Mr. Hammer's comments where he contended that the boundaries shown were incorrect (Exhibit 30, Att. I), comments from his surveyor, Mr. DeGroot (Exhibit 26), the survey done by ADA Engineering for Mr. Hammer (Exhibit 28), and a response with survey from Mr. MacLearnsberry (Exhibit 30, Att. J). The City's surveyor reviewed the information and advised Mr. Machen that he saw no problem with the MacLearnsberry methodology. More than one possible boundary was shown but Mr. Machen understood, based on the letter from Abbott and Kordonowy, that there was no disagreement between the two owners about where the location of the boundary. Considering the information from both the applicant's surveyor and that supplied by Mr. Hammer, Mr. Machen concluded that no further boundary work was needed in that whichever line was used, the proposed dock would meet required setbacks. [Exhibit 75; Testimony of Machen]

24. Appellant's surveyor witness, Peter DeGroot, testified that applying the Cove Rule would place the easterly lateral littoral boundary of the Knapp's property such that the line would bisect the Abbott dock. Knapp's surveyor testified that application of the Cove Rule has subjective elements and could result in various lines depending upon what one judges the limits of the cove to be, for example.

25. Even if the property's easterly boundary actually bisected the Abbott dock, Mr. Machen testified that the City would treat the encroachment as it normally does when an encroachment is called to its attention, which is to call it to the attention of the properties' owners. The City treats such encroachments as private matters to be resolved between the parties. [Testimony of Machen]

26. The Abbott/Kordonowys and the Knapps have recently entered into an agreement, Exhibit 97, fixing the littoral boundary between them as shown in the "Trimble Lot 6, Hidden Cove Littoral/Aquatic Survey" dated March 24, 2006. They intend to record the document. [Testimony of Knapp] The effect of the agreed-to boundary is to avoid any encroachment of the Abbott dock into Knapp property.

27. The revised location of the slip is shown at approximately -8.5 NAVD88. [Exhibit 93] According to un rebutted testimony by DeGroot, there would be approximately 1.5 feet of water, not four feet, in the moorage slip at extreme low tide (ELT). Four feet would occur only some 30-40 feet further waterward at -10.9 NAVD88 (-8.5 MLLW). With a depth of approximately 1.5 feet at the revised location, part of the float would be on the beach at ELT, according to Mr. DeGroot. He testified that the frequency of this occurrence would be "quite seldom." Buoys could be used for moorage at ELT.

28. The proposed float stops would prevent the float itself from grounding. [Exhibit 1]

29. Mr. Machen considered whether the proposed dock would present any navigation or safety issues. He looked at other marinas for comparison of distances and found that they ranged in aisle width from 45-55 feet. Since, as proposed, the float would be at least

50 feet from the Abbott dock and at least 48 feet from the Hammer dock, the original proposed location would have allowed a reasonable distance between the structures for navigation. That separation would be increased by the condition requiring the dock to be shortened. (Exhibit 25; Testimony of DeGroot; Testimony of Machen.) Because BIMC 16.12.340H(5) requires that new buoys be at least 20 yards from preexisting structures, Mr. Machen decided that the proposed dock should be no closer than 60 feet from the buoy leased by Mr. Hammer that is waterward of the Hammer dock and imposed a condition to that effect. [Exhibit 31; Testimony of Machen]

30. The City's policy regarding size of single-family dock slips is based on the average size of slips within 15 nautical miles. A condition requiring reduction of the slip to 35 feet was imposed to make it consistent with the City's policy for single-family docks. [Testimony of Machen]

31. Because the structure will be primarily over and in the water, piles will be driven, and the excavation for the footing for the head of the dock is similar to a stairway to the beach, Mr. Machen determined that the possibility of impacts on archeological artifacts is close to nil. [Testimony of Machen]

32. Hydraulic Project Approval was issued for the proposed dock on December 6, 2006. The approval was subject to numerous conditions including incorporation of the SEPA mitigating conditions. Condition No. 21 limits the removal or destruction of overhanging bankline vegetation to that necessary for construction of the project. Design and location to avoid shading of eelgrass is required. No portion of the dock or float system may ground and at least 12 inches is to be maintained at all times between the bottom of the dock or float and the beach grade. [Exhibit 87]

33. The Director concluded that, as conditioned, the proposal would be consistent with the applicable provisions of the Shoreline Master Program (BIMC 16.12.050, 16.12.060, 16.12.090). [Exhibit 32]

34. The Shoreline Master Program (SMP), BIMC Chap. 16.12, regulates development in the shoreline. The SMP contains policies relating to docks including two cited by Appellant:

1. Multiple use and expansion of existing conforming piers, docks, and floats should be encouraged over the addition and/or proliferation of new facilities. Joint use facilities are preferred over new, single use piers, docks, and floats.

...

4. Piers, floats, and docks should be sited and designed to minimize possible adverse environmental impacts, including potential impacts on littoral drift, sand movement, water circulation and quality, and fish and wildlife habitat.

BIMP 16.12.340 B. Policies.

35. The SMP regulation, BIMC 16.12.340C(2), sets out the information required for proposals that includes a description of the proposed structure, ownerships within 300 feet, proposed location, location and size of piers or docks on adjacent properties, and

any agreements for cooperative use. This information was provided. The regulations also establish various development standards such as minimum vertical clearance for pilings of one foot above extreme high water, inclusion of stops to keep floats off the bottom of tidelands, the allowable length of piers which is either the average length of the piers on the two adjoining properties or the distance necessary to obtain a depth of four feet of water as measured at extreme low tide at the landward limit of the moorage slip, the size, and side yard setbacks of at least 10 feet from side property lines. BIMC 16.12.340D & G.

36. The Director has the authority to approve, approve with conditions, or deny shoreline substantial development permits. BIMC 16.12. 350 A. The SMP provides that

b. In making the decision, the director shall consider the applicable provisions of the Shoreline Management Act of 1971, as amended, Chapter 173-14 WAC or its successor, the master program, all other applicable law, and any related documents and approvals. The director shall also consider whether the cumulative impact of additional past and future requests that reasonably may be made in accordance with the comprehensive plan, or similar planning document, for like actions in the area will result in substantial adverse effects on the shoreline environment and shoreline resources.

BIMC 16.12.360E(4).

37. BIMC 16.12.350B(1)(a) vests the Hearing Examiner with the authority to hear and decide appeals of the Director's shoreline substantial development decisions.

38. Authority for the Hearing Examiner to hear and decide SEPA appeals is granted in BIMC 16.04.170.

### **Conclusions**

1. The Hearing Examiner has jurisdiction to hear and decide this matter.
2. In an appeal of a SEPA determination, the Hearing Examiner is required to give substantial weight to the decision of the responsible official. BIMC 16.04.170E. The threshold determination is reviewed under the clearly erroneous standard. *Norway Hill v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). The decision to issue an MDNS is not clearly erroneous if the record shows that the Department considered environmental factors "in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA," and the decision is based on information sufficient to evaluate the proposal's environmental impact. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718 (2002), citing *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 814, 576 P.2d 54 (1978).
3. Issuance of an MDNS as the threshold determination is permitted when the responsible official determines that with the imposition of conditions, the proposal will not have significant adverse impacts on the environment. WAC 197-11-350. The

Appellant contends that the City had incomplete information and faults the Director's consideration of impacts of the proposed dock on fish and marine habitat. The Appellant must either show that the planner failed to consider impacts on those elements of the environment or that it was clearly erroneous not to determine that the impacts in these areas would be more than moderate. The record shows that the planner gathered sufficient information from various sources to evaluate the potential impact of the proposal, that potential impact on fish and marine habitat was considered, mitigating conditions imposed, and with those conditions he determined there would be no significant adverse environmental impact. While some impact is possible even with the conditions imposed, Appellant's evidence did not show that the impact is likely to cause a probable significant adverse impact. The MDNS should be affirmed.

4. In an appeal of a decision to approve a substantial development permit, the Code requires the hearing examiner also to give substantial weight to the decision of the Department director. BIMC 2.16.230F. When substantial weight is to be given, the clearly erroneous standard is to be applied and the hearing examiner may reverse the Director's decision only if she has a definite and firm conviction that a mistake has been made. See *Hayden v. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980)

5. Appellant argued that applying the Cove Rule to determine the easterly boundary of Knapp's property would result in the encroachment of part of the Abbott dock onto the subject property thus permitting the proposed dock would allow more than one dock on a lot, contrary to SMP regulations. The lot boundary agreement entered into between the two owners removes the encroachment and avoids this issue.

6. Appellant also contends that the Abbott dock is in joint use which use must be continued because of the shoreline policy encouraging joint use of docks based on both the location of the Abbott dock vis-à-vis the property line and the history of use by the Knapps. The facts show that the Knapps' use of the dock was by permission so, even if it were crossing a lot boundary line, it would not have been treated as a joint dock by the City. Moreover, the City did observe the policy of "encouraging" joint use when it asked that joint use be considered by the applicant. No City regulation or state statute requires joint use.

7. Appellant's contention that the Abbott dock was constructed contrary to the conditions of approval, even if accurate, has no bearing on the correctness of the shoreline decision on this proposal.

8. The concern that the proposed dock would place an unreasonable navigational burden because of proximity to other docks and buoys was addressed by conditions imposed to assure adequate separation between the adjacent slips and the new structure and the buoy and the new structure.

9. Appellant questioned whether the cumulative effects on the environment of the proposed dock, along with existing docks, had properly been taken into account. SEPA requires consideration of cumulative effects if an EIS is prepared. WAC 197-11-060. The cumulative impacts to be considered are those from additional actions that may be induced by the proposed action or if the proposal is dependent upon future proposed development, not factors here. *Boehm v. Vancouver*, 111 Wn.App. 711, (2002).

However, the SMP does require that the decisionmaker consider whether the proposal will result in substantial adverse effects on the shoreline environment and shoreline resources in conjunction with other likely applications. It is clear from the planner's analysis and Director's decision that they concluded that because of the conditions imposed, and that also would be imposed on future applications, this dock and docks that can be anticipated will not result in substantial effects on the environment and resources. Appellant adduced no evidence of substantial cumulative adverse effects. The Director's decision as to cumulative effects was not clearly erroneous.

10. Appellant's argument that the res judicata effect of the Court's determination as to the littoral boundary between the Hammer and Knapp property prevents the Knapps and Abbott/Kordonowys from determining the boundary between their properties through a boundary line agreement is unavailing. If there were a dispute between the property owners so that court action were necessary instead of utilizing the process provided by RCW 58.04.007, there is no concurrence of identity in all respects necessary for res judicata effect.

11. Conclusion No. 14, as modified at hearing, will result in overall length no greater than 197 ft. but will not assure 4 ft. of water at ELT, because of the unreconciled difference in datums used. Because of the possible grounding of the float stops at ELT there is the potential for some environmental degradation, however slight and infrequent. Avoidance of that consequence, however, would likely necessitate an additional 30-40 ft., or 120 to 160 square feet of overwater structure and coverage and, even if fully grated, some shading of the habitat. Because of the infrequency of ELT and the limited contact assured by the float stops, the lesser water level does not require that the condition be revised.

12. The Director's shoreline substantial development permit decision, not being shown to be clearly erroneous, should be affirmed.

### **Decision**

The Director's decision to issue a MDNS is affirmed. The Director's approval of the Shoreline Substantial Development Permit with conditions, as amended at hearing, is affirmed.

Entered this 16<sup>th</sup> day of May 2007.

/s/ Margaret Klockars

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Margaret Klockars  
City of Bainbridge Island  
Hearing Examiner *pro tem*

### **Concerning Further Review**

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the Hearing Examiner is the final decision of the City in this matter. Appeal of this decision is to the Washington State Shorelines Hearings Board as provided by RCW 90.58.180 (or its successor) and Chapter 461-08 WAC (or its successor). To be timely, petition for review must be filed within the 21-day appeal period [see BIMC 16.12.370].