

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

In the Matter of the Appeal of

SARA J. FINLAY, ET AL.

BLD15358MIS

From an Administrative Decision
Of the Director, Dept. of Planning and
Community Development

Introduction

Sara J. Finlay, Judy Finlay Eaton, Marshall Eaton, Gretchen Moores-Hooper, and John Hooper appealed the administrative decision issued by the Director, Department of Planning and Community Development, regarding the application of David Nunes to construct an accessory boathouse on property at 3546 Point White Drive NE.

A public hearing on the appeal was held July 24, 2009. Sara Findlay was the designated representative for the appellants, Rod Kaseguma, Inslee Best Doezie & Ryder, P.S., represented the Director, Department of Planning and Community Development, and David Nunes, applicant, represented himself.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. David Nunes, owner of the subject site, a waterfront property at 3546 Point White Drive NE, applied on June 27, 2008, for a building permit to demolish an existing single family residence and build a new residence with attached garage. BLD15358SFR. Though a boathouse was shown in the first application, the application materials did not include the design. A second permit was applied for to build a 200 sq.ft. boathouse. BLD15358MIS. The Department of Planning and Community Development (hereafter "Department") issued both permits on April 20, 2009, determining that "both permits complied with the applicable requirements of the municipal code, including compliance with the Shoreline Management Act and shoreline master program," an administrative land use decision. Exhibit 6.

2. The applications were determined to be exempt from the requirement of the Shoreline Management Act for a substantial development permit. Exhibit 5.
3. The site of the proposed residence and boathouse is in the Semi Rural shoreline. It is zoned R-2.
4. The residence on the subject property and its neighbors face easterly and have views of and across Rich Passage.
5. The proposed boathouse is to be located at the existing rockery bulkhead in the southeasterly corner of the subject site approximately 17 ft. from the southerly property line. The boathouse would be 17 ft. long and its footprint would be 198 square feet in area. The design has the boathouse recessed into the slope to reduce the height on the westerly side to just less than 6 ft. The roof slopes up toward the waterside and is 11 ½ ft. at its highest.
6. A boathouse in the semi-rural environment is limited to 200 square feet in size and 12 ft. in height above existing grade. Section 16.12.260B(13). A native vegetation zone covering a 50 ft. wide area parallel to the shoreline is required.
7. The Finlay and Eaton family have owned the property at 3588 Point White Drive NE, on the northerly side of the subject site, together with the subject site, for some 50 years before selling the subject site to the present owner in 2007. Moores-Hooper and Hooper have owned the property at 3520 Point White Drive NE on the southerly side of the subject site and have lived there 37 years. Both properties have expansive, treasured views of the water and shorelines. During the pendency of the application, each family communicated their concerns to the Department that the boathouse had the potential to obstruct their views of the water. On May 4, 2009, appellants filed an appeal as to both permits. At the time of hearing, appellants confirmed that they were not pursuing any issues as to the permit for the residence itself.
8. The planner for the Department, Kelly Tayara, conducted extensive review of the application for the residence as to shorelines and zoning compliance including setbacks, heights, etc., and then all elements were reviewed again when the plans for the boathouse were received. Various adjustments to the proposed plans were required for compliance with the Code. She considered the comments by appellants and conducted further review of potential view blockage. Her review of views included visiting the site on several occasions, including the adjacent properties and reviewing photos of a mock-up of the boathouse.
9. The residences on each side of the subject property, including attached covered decks and patios, are adjacent principal buildings.
10. The applicant's architect installed four poles with red tape at the top on the site of the proposed boathouse to demonstrate the effect on views. Photos of that "mock-up" and its effect on views (Exhibits 22a and 22b) taken by the architect showed at least 75 percent of the view of the shoreline and water directly in line with the boathouse location would be obstructed. That portion of the water is the corner of Rich Passage where the ships come through. Testimony of Finlay.
11. The "mock-up" was removed after the photos were taken so appellants asked the Department to require the applicant to re-install it so that they could assess the degree of view obstruction. This was not done. Appellants attempted to fix the location of the proposed structure

by measuring 16 ft. 9.75 in. from where they believed the property line lies and locating holes that may have been made by the poles from the applicant's mock-up. At the location they determined for the northeast corner of the boathouse, they marked the height of the boathouse using measured objects and took photos directly toward it to show its affect on that view. Their mock-up showed that most of the view of the shoreline and water in line with the boathouse between the Finlay/Eaton property and the far shore would be obscured. Exhibits 29-35. Appellants questioned the accuracy of the location of the boathouse in the architect's mock-up, believing it to have been placed farther north than it would be, because of the location of the holes they found in the ground. Both demonstrations show some view obstruction.

12. The only view from the dining area in the Finlay/Eaton residence kitchen is at an angle toward Rich Passage which is the view that would be affected. The boathouse would less affect the view from the window at the kitchen sink. Testimony of Eaton.

13. The Department considers the "view" to be the sky, territory, water, and beach that can be seen from directly in front of the principal building on the property. Testimony of Tayahara.

14. Based on Exhibit 10 D6, it appears that a reasonable estimate of the view of the water that would be lost from the Finlay/Eaton property due to the boathouse would be about 10 degrees.

15. Because the residence on the property on the southerly side is at a higher elevation, and there is considerable vegetation between the house and the location of the proposed boathouse, there appears to be little loss of view from that house. As much of the vegetation is deciduous, there could be loss of the view of the immediate shoreline. Exhibits 10 A3, 10 C1, 5, 6 & 7.

16. Section 16.12.260A(9) provides that no accessory structure may be located within the required native vegetation zone with boathouses listed as an exception.

17. Section 16.12.260B(11) provides:

Design and location of accessory structures shall protect existing views from adjacent principal buildings on adjacent properties and minimize adverse impacts to the environment.

18. Section 18.79.060B provides:

Accessory structures, such as fences, may be situated within the shoreline setback; provided, that they do not substantially obstruct the view of adjacent principal buildings.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Section 2.16.130.

2. The issues that must be addressed to resolve this appeal are:

1) What is the view to be protected;

- 2) From where on a lot is the effect on the view to be assessed;
- 3) Whether the boathouse would “substantially obstruct” the view from the adjacent parcels; and
- 4) Whether the design and location of the structure protects the existing views.

Other issues raised at hearing regarding what constitutes the principal buildings were largely agreed upon and do not need to be further discussed in light of the resolution of this matter.

3. The Department’s working definition of view, which includes the sky, territory, water, shorelines, etc.”, is too broad when applying code provisions addressing views within the shoreline jurisdiction. Though view is not defined in either the Shorelines Management Act (SMA), the Shoreline Master Program (SMP), or the zoning code, it is clear from the context that the protected views are of the water and shoreline.

4. Appellants believe that the intent of the regulations is that all views, including those from inside their homes, are to be protected. The Department’s position that interpreting the SMP and code to protect all views from a lot, including views from inside a house, could lead to absurd consequences is well taken. At the same time, to read the requirement to be met if there remains a point on the lot that retains the view would also be absurd. For the purpose of determining if views would be protected or obstructed in this case, the view from immediately in front of the adjacent houses will be used as the protected view.

5. When words are not defined in the statutes or regulations, their common meaning is assumed to be intended. Neither “substantially”, “obstruct” nor “protect” is defined in the SMA, SMP or applicable codes. “Substantial” is defined as “4. considerable; ample; large”. Webster’s New World Dictionary (1982). “Obstruct” means “3. to cut off from being seen; block (the view).” Id. “Protect” means “1. to shield from injury, danger, or loss; guard; defend.” Id.

6. The Shoreline Hearings Board in *Grill v. Baraka LLC and City of Anacortes*, SHB 02-001, pointed out that giving a liberal construction of a regulation prohibiting obstruction of a view might mean that cutting off from sight a view of a portion of Puget Sound from an adjacent residence would constitute obstruction of view. But in another case, *Jacobs v. San Juan County*, SHB 01-015, the Board noted that a reduction in view is not the equivalent of an obstruction of the view. In *Batchelder v. Seattle*, 77 Wn.App.154, 164, 890 P.2d 25 (1995), the court in deciding whether there would be an obstruction of view concluded that a reduction of 18 degrees of view from a residence did not constitute an obstruction.

7. Here, given that both neighboring properties would still have sweeping views, even with the loss of perhaps 10 degrees of the view from the northerly parcel, it must be concluded that their views are not substantially or largely obstructed so would not be contrary to Section 18.78.060B.

8. Whether the boathouse is located and designed to “protect” existing views, that is to shield them from loss, so as to comply with Section 16.12.260B(11), is more difficult. The issue is whether existing views are protected when, though some attempt has been made by recessing the structure into the slope to reduce the amount of loss, the boathouse would cause a loss of some of the view, though not substantial. Appellants argue that the requirement to protect existing views in Ch. 16.12 is more specific and should control. Because the other section in Ch. 18.78 attempts to establish a standard (“substantially obstruct”), the examiner considers it to be more specific.

9. The only way to reconcile the two provisions that both address existing views though described differently, where one allows view obstruction if it is not substantial and the other requires that existing views be protected, is to consider the view protected if all reasonable adjustments to location and design, including size, height, roof pitch, orientation, have been made. The record does not reflect how the structure's design and location were determined and, other than recessing the structure into the slope, what accommodations were made to assure the minimum intrusion into the existing views. However, the Hearing Examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F2.

10. The "substantial weight" requirement means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Giving substantial weight to the decision of the Department that the design and location does protect existing views, and because there was no proof that there are changes that could reasonably be made to the location or design that would preserve more of the views, the examiner cannot find that the decision was clearly erroneous, so is required to affirm that decision.

Decision

The Director's Administrative Decision as to BLD15358MIS is affirmed and the appeal is denied, and the appeal as to BLD15358SFR is dismissed.

Entered this 5th day of August 2009.

/s/ Margaret Klockars
Margaret Klockars
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 shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.