

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

In the Matter of the Appeal of

GEORGE AND NANCY LOBISSER

Nos. ADM 12337 & SSDP 12337

From an Interpretation of the Code and
A Shoreline Substantial Development Permit

Introduction

George and Nancy Lobisser appealed the administrative decision issued by the Director, Department of Planning and Community Development, regarding the interpretation of the code regarding a cover on a boat lift and a condition of the shoreline substantial development permit for the boat lift at 16304 Euclid Avenue NE.

A public hearing on the appeal was held September 25, 2009. Mr. Lobisser represented appellants and Rosemary Larson, Inslee Best Doezie & Ryder, P.S., represented the Director, Department of Planning and Community Development.

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. George and Nancy Lobisser (hereafter “Appellants”) purchased a boat lift in 2005 to add to their residential dock at 16304 Euclid Avenue NE. Appellants paid the dealer to obtain all necessary permits. An Army Corps of Engineers Regional General Permit 1 was obtained and the lift installed. In 2006, Appellants put a canvas cover over the lift. In 2007, Appellants received a letter from the City of Bainbridge Island (“City”) requiring Appellants to remove the lift or obtain a City required permit. Appellants applied for the needed shoreline substantial development permit for the boat lift in November 2008 (Exhibit 4 Attachment D) with a translucent and temporary cover, instead of the canvas cover. Upon being advised by the staff that a covered lift was prohibited, Appellants requested an administrative interpretation of the relevant Code provisions.

2. On May 29, 2009, Katharine Cook, Director, Department of Planning and Community Development (“Department”), issued a written code interpretation regarding whether a temporary,

translucent cover is allowed over a boat lift. The Director interpreted Section 16.12.340(D)(9) to prohibit new covered moorage on piers or docks. Exhibit 4, Attachment N. The Director relied, in part, on The Memorandum of Opinion in *Bainbridge Island Boatyard v. City of Bainbridge Island* (“McNabb decision”), Kitsap County Superior Court, No. 08-2-00515-3.

3. Notice of Administrative Decision and Determination of Nonsignificance (DNS) (Exhibit 4 Attachment L) was issued June 4, 2009. The decision approved the shoreline substantial development permit for the floating boat lift subject to conditions including Condition 3: “Work shall be completed in accordance with the site plan and dock detail dated March 26, 2008, except that the float shall not be covered.”

4. Appellants filed an appeal of both the code interpretation and the shoreline substantial development permit, as to Condition 3 only.

5. Section 16.12.340D.9 provides:

New boat houses and new covered moorage shall not be permitted on piers or docks. Other structures on piers and docks shall be strictly limited in size and height to avoid impacting shoreline views.

6. “Covered moorage” is defined as “boat moorage, with or without walls, that has a roof to protect a vessel or vessels.” Section 16.12.030A(48).

7. To “moor” is “to secure in place with or as if with lines, cables, or anchors.” The American Heritage Dictionary, 3d Ed. (1994).

8. “Roof” is:

1. The exterior top surface of a building and its supporting structures. 2. The top covering of something. 3. The upper surface of the mouth. 4. The highest point or limit.

The American Heritage Dictionary, 3d Ed. (1994).

9. Bainbridge Island Nearshore Assessment (Exhibit 4, Attachment O) showed the subject property in a herring spawning area. Appellants submitted to the Department a Preliminary Survey of Eelgrass/Macroalgae Habitat in Port Madison Bay, Bainbridge Island, Washington, prepared by WSP Environment & Energy. The survey showed no eelgrass and less than or equal to 10% coverage by macroalgae within the survey area. It did not address herring spawning, however there was testimony that the immediate area was the site of the Port Madison Mill and is basically dead. Testimony of Lobisser.

10. The Department determined that the aesthetic impacts of a covered boat lift are greater than those of a boat lift with no cover. Exhibit 4.

11. Appellants’ proposed cover would be flat and approximately 4 inches above the boat in the lift. It would have little aesthetic impact in terms of interference with views, and less than sailboat covers shown in Exhibit 5, Attachments 5-9.

12. Boat lifts are beneficial in that more light can enter the water with the boat out of the water and the boat’s painted bottom is not continually in the water. The cover would be beneficial because the boat is protected from bird droppings that require frequent washing of the boat that can

introduce chemicals into the water. The cover is simply washed by the rain. The translucent cover does not prevent bleaching of the boat as an opaque canvas cover would, however.

13. The Department has had three applications for boat lifts with covers, though none with translucent covers. It previously interpreted the code provision at issue to prohibit covered boat lifts in a marina. Exhibit 4. That interpretation was upheld in superior court and an appeal of that decision is pending in the Court of Appeals, Division II. McNabb decision.

14. Appellants' request for the proposed covered boat lift is different from the situation in the McNabb decision in that the boat lifts have covers made with two sides coming to a peak, they are permanent, they are opaque, and they are in a commercial marina.

15. Appellants' boat lift is made up of floating pontoons attached to the dock by four mooring lines. Appellants' practice is to move the lift to a different spot on the dock when their boat is moved to dry storage for the winter. The cover would be in place from May until October.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Sections 2.16.095, 2.16.130, and 16.12.370.

2. The Hearing Examiner is to give substantial weight to the decision of the Department director. Section 2.16.130F.2. 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).

3. Here, Appellants ask the hearing examiner to interpret the words "covered moorage" to exclude the covering of a boat lift. Where terms are not defined in the regulations, their common meaning is assumed to be intended so the Hearing Examiner is required to give words in a provision their plain and ordinary meaning unless a contrary intent is evidenced in the statute.' " *Marriage of Caven*, 136 Wn.2d 800, 806 (1998) (quoting *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)). The common meaning of covered moorage is to be obtained from a standard dictionary.

4. The dictionary definitions of "moorage" and "roof" show that the proposed boat lift is moorage and the proposed covering is a roof. Therefore, the application seeks a new covered moorage that Section 16.12.340(9) does not permit. The Hearing Examiner's role is not to judge the wisdom of unambiguous provisions. Though the examiner may believe that prohibition of the covering proposed in this case may not necessary to carry out the Council's intent, it does not appear to be actually contrary to the Council's intent, so the provision must be applied as written.

5. Applying the common meanings of the undefined terms and giving substantial weight to the decision of the Department that the covering on the boat lift is prohibited, the examiner cannot find that the decision was clearly erroneous, so is required to affirm the decisions.

Decision

The appeals of the Director's administrative code interpretation and the shoreline substantial development permit, ADM12337 and SSDP12337 are denied and those determinations are affirmed.

Entered this 8th day of October 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.