

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

In the Matter of the Appeal of

West, McGarvie & Moser

SSDP 14999 (revised)

From the Administrative Decision
Granting a Revised Shoreline Substantial Development Permit

Introduction

Ross West, Carla McGarvie and Judith Moser appeal the administrative decision by the Director, Department of Planning & Community and Development, granting the application by Michael and Neal McMahan and Andrew Mueller for a revised shoreline substantial development permit for a recreational dock at 15135 Anna Vera Lane.

A public hearing on the appeal was held on September 10, 2010. Appellants were represented at hearing by Ryan Vancil, Vancil Law Offices, PLLC. The Director, Planning and Community Development Department, was represented by Dawn Findlay Reitan, Inslee Best Doezie & Ryder. Brian E. Lawler, Socius Law Group PLLC, represented the applicants. The record closed September 24, 2010.

For the purposes of this decision, all section numbers refer to the Bainbridge Island Municipal Code unless otherwise indicated

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. In 2008, Andrew Mueller and Michael and Neal McMahan, hereafter “Applicants”, applied for a Shoreline Substantial Development Permit to construct a recreational dock for joint use in Port Madison Bay at 15135 Anna Vera Lane. The site plan submitted with the application showed a distance of 65 feet between the proposed dock and the existing dock for the property to the east. That application was approved in December 2008 subject to conditions, including one limiting the length of the dock, Hydraulic Project Approval was given by the Washington State Department of Fish and Wildlife, U.S. Army Corps of Engineers approval was given, a building permit issued, and the dock was constructed.

2. In September 2009, the City received letters from the owners of property to the east and west of the Applicants' dock regarding the location of the new dock relative to adjacent docks. It was subsequently determined that the original site plan was incorrect in that it portrayed the next dock to be to the east 65 feet when it actually was between 35 and 37 feet away. After meetings and negotiations, Applicants' agent, Marine Floats Corporation, submitted a request for an amendment to the dock permit to correct the site plan. The Director, Department of Planning and Community Development ("Director"), approved a permit revision on June 21, 2010, subject to a condition prohibiting moorage of boats on the eastern portion of the moorage float and prohibiting any vessel moored to the south side of the float to overhang the east edge of the float. This appeal followed.
3. The Applicants' dock ("new dock") extends over tidelands owned by the McMahans and across Mueller tidelands and is for their joint use. The new dock consists of a pier, ramp, and connector float perpendicular to the shoreline and then a 60 ft. long floating moorage float parallel to the shoreline held in place by pilings. The intended use is for two boats. The uplands of the two properties are developed with single-family houses. Exhibit 4.
4. The L-shaped design of the new dock requires a boat to pull in and turn 90 degrees to moor, so that configuration requires more room to navigate a large boat between the L-shaped dock and the next dock to the west, than a straight dock. Exhibit 4.
5. To the east of the new dock is a floating dock ("Appellants' dock") on properties owned by MollyCo LLC, of which Ross West and Carla McGarvie are owners, and by Einar Thor and Judy Moser that extends into an easement area over those properties and the McMahan tidelands. That dock is subject to a shared moorage agreement defining the rights of the two property owners to the use of the dock. Exhibit 30. A vacation rental house is located on the MollyCo-owned property and an owner-occupied single-family house on the Thor property. Ross West and Carla McGarvie ("West") own and live in the residence on the lot to the east of these properties. West has verbal permission from MollyCo to use the dock and also uses the dock as a guest. Testimony of West.
6. Appellants' dock is a straight dock, perpendicular to the shoreline. It is held in place by two sets of chains and has a range of motion, which is why there is an easement that includes the McMahan property. The easement was designed to accommodate 30 ft. of movement. Testimony of West. During flood tides Appellants' dock is pushed to the west and during ebb tides it is pushed to the east. Wind may also cause it to move but has more affect on large boats. Because Appellants' dock moves, it may be as far as 40 feet away from the new dock. The new dock is 22 feet from the edge of the easement, as scaled by Mr. West who has a civil engineering degree.
7. All of the properties described above are in a single-family zone.
8. Tide currents run about one knot in Port Madison Bay perpendicular to the docks. Prevailing winds are from the south and can be as high as 35 knots in the bay. Testimony of West.
9. West owns several boats, the largest of which is a 42 ft. sailboat with a 12.5 ft. beam. He also has a 30 ft. Santana, 21 ft. Striper fishing boat and numerous small boats. The 200 ft. long dock allows him to moor several boats at a time and he intends to use the dock as part of his business, e.g., moorage for renters of the residence on the MollyCo property and perhaps as a charter boat stop. He moors the largest boat at the dock unless it is in use or there is a minus tide

when he has to take it off the dock. He is an experienced sailor and reports that he can bring his largest boat in even when the separation is the least if it is calm and there is no wind. He is concerned that inexperienced sailors would not be able to maneuver between the docks to moor their boats. He demonstrated that he was not able to maneuver his fishing boat around a boat with a 15 ft. beam moored at the south end of Appellants' dock even when the dock was not at its westernmost reach. When the wind blows harder, or the current is stronger, a boat is pushed sideways and harder to navigate into the waterway between the docks.

10. West has shortened the anchor chain to pull the dock further from the new dock. He now docks his largest boat on the east side away from the new dock. The depth is shallower on the east side of Appellants' dock so putting the boat on that side means that the boat has to be taken off more often. Mr. West does not want to pull the dock further to the east because of the seabed contour.

11. Mr. West contends that the location of the new dock impacts navigation in that it creates an unduly restricted "fairway", boats are unable to navigate around a boat moored at the south portion of the west side of Appellants' dock, which is long enough to accommodate many boats, and Appellants' ability to navigate is much more restricted than the Applicants' ability, due to the location of the Applicants' dock.

12. Appellants' expert witness, Captain Alan Hugenot, has a BS degree in mechanical engineering, is a licensed U.S. Merchant Marine Master, and is a naval architect and has extensive experience with design, operation, construction and repair, and extensive experience skippering of all kinds of marine vessels, among other areas of marine-related expertise. Exhibit 24. He is familiar with Puget Sound and Port Madison Bay. His experience in design or permitting of marinas or docks is limited. At West's request, Capt. Hugenot brought a boat into the berthing area on Appellants' dock and observed that where before the new dock was constructed it would have been easy to approach the dock, now it is difficult to put a boat in under calm conditions and with cross winds and currents it would be difficult to make the "S" curve to get in. He opined that even in this area where gusts happen often, especially in the winter, the new dock would not be a problem for navigation if the new dock were 40-50 ft. away from Appellants' dock but that it is now difficult. In his opinion, the new dock interferes with use of navigable waters and the use previously enjoyed by the users of Appellants' dock. Testimony of Hugenot.

13. Capt. Hugenot suggested that the dock could have been designed to be located 12-15 feet to the west, but did not consider factors such as littoral boundaries, seabed contours, easements or how the dock functions.

14. Capt. Hugenot cited a NOAA document, "Management of Small Docks and Piers, Impacts to Navigation and Public Access" (Exhibit 28), in support of distance between docks at least one and one-half times the length of the boat, here 63 feet for West's boat or 40 feet for Thor's, that describes examples of standards that might be used at the federal, state or local level to manage impacts to navigation. One of the examples given is from the New England District of the U.S. Corps of Engineers and is a mandated setback of 25 feet from riparian lines so that adjacent docks could not be closer together than 50 feet, based on a median-sized vessel of 32 ft. and on the turning radius of 1.5 times its length.

15. Rick Greenbow, general manager of Marine Floats, Inc., a firm specializing in designing and permitting for marine docks, explained that the distance between the docks here provides more

than adequate clearance and exceeds the minimum guidelines, relying on his experience with more than 75 docks in the Puget Sound and a publication the firm uses, "Marinas and Small Craft Harbors, 2nd Edition." Exhibit 27. That publication recommends clear width between finger docks or piers of 19 feet for 45 ft. boats for a single loaded slip. *Id.*, p. 252. Angela Butts, also with that firm, has had experience with the permitting of docks with less separation than that involved here, and offered an example in Pierce County where the approved dock was 25 feet from the adjacent dock on one side and 35 feet from the dock on the other side. Exhibit 47.

16. Josh Machen, the City planner, sought and relied on advice from Jeffrey Layton, P.E., whom he had worked with before, upon being referred by an attorney in another case, and regarded as an expert in dock design. Mr. Layton has BS and MS degrees in civil engineering, and specializes in coastal engineering, which he has practiced for over 30 years, the majority in the Puget Sound area. He has been involved in numerous shoreline facilities projects as the project manager, project engineer, or coastal engineering consultant. Exhibit 29. Mr. Layton advised Mr. Machen that it would be appropriate to treat the configuration of the docks as creating a single slip and that the waterway or the distance between the two docks was adequate. The minimum clearance distance between the docks for a 50 ft. boat is 20 ft., according to planning design guidelines in the American Society of Civil Engineers Manual No. 50 "Planning and Design Guidelines for Small Craft Harbors," the technical manual customarily relied upon by coastal engineers, and a minimum of 18 to 20 ft. in the pre-publication draft of the 2010 version of Manual 50. Exhibit 53. Given that the space between the new dock and Appellants' dock is never as small as 18 ft., Mr. Layton found adequate room for maneuvering. Mr. Layton testified that 35 or 36 feet between the two docks is sufficient room to bring a 45 to 50 foot boat along the west side of Appellants' pier where the docks are perpendicular to shore so a straight shot along its edge with no real turning required except for that required for wind and tide currents, and that smaller boats would be able to pass the 42 ft. boat berthed near the open end to reach the more shoreward portion of the dock.

17. In addition to the condition prohibiting any overhang beyond the east end of the float, Mr. Layton suggested that a condition be added to the revised permit requiring installation of a robust fendering system on the short leg of the new pier to provide a "forgiving" surface should a boater have a problem maneuvering.

18. A "fairway" or aisle is described as the unobstructed waterway between berthing areas, which is defined as the water between the ends of docked boats or the ends of finger piers. Exhibit 53. The distance between the two docks where there is a single slip is not a fairway. Here the fairway is Port Madison Bay itself.

19. The expert witnesses each described rules of thumb used for slip, dock and pier design, but differed to some extent as to their application here, such as: 1) Separation, presumably between slips, should be the same as the length of the boat, or it should be as wide as the beam plus three to seven feet for clearance; 2) Separation between docks needed for turning should be at least one and one-half times the length of the boat, but that applies only when there are opposing slips, meaning slips on both sides of a fairway, not for distance between two parallel docks, etc. The rules of thumb discussed by the experts are not helpful as guidance here for the necessary distance between the two docks with a single "slip".

20. Mr. Layton has greater experience than Capt. Hugenot with standards for the design and construction of docks.

21. All parties agree that the waters of Port Madison Bay are “navigable waters.” Navigable waters extend to the Mean Higher High Water (MHHW) mark so the area between the two docks is navigable water.

22. No regulation in the SMA or SMP provides specific minimum distances between docks.

23. The SMA lists single-family residences and their appurtenant structures as priority uses for use of the state’s shoreline, along with a number of other uses. RCW 90.58.020.

24. Residential recreational docks are limited to moorage of no more than four pleasure craft and may not be put to commercial use, according to state regulations. Testimony of Machen.

25. There are many marinas and recreational docks in Port Madison Bay. The record does not show anything unusual about the size, shape, or use of the new dock compared with others in the bay. There are multiple examples of docks across Bainbridge Island located 40 feet or less from other docks. Exhibit 4.

26. There are code limitations on the length of docks. The length of the new dock could not exceed the limits in Section 16.12.340D(10). The original permit was conditioned to restrict the length, and the new dock conforms. Testimony of Machen. While docks perpendicular to the shoreline are preferred, a float parallel to the shore may be needed to get greater depth on the waterward side, depending upon the seabed contours. Littoral boundaries also limit where a dock may be placed. Testimony of Layton.

27. A permit revision is required when there is a change to the design or conditions of a project from those approved in the permit. The revision may be approved if the changes are within the scope and intent of the original permit and consistent with the SMA and SMP. WAC 173-27-100; Section 16.12.370C.

28. In making a decision on a substantial development permit application, the Director is to consider the provisions of the Shoreline Management Act (SMA), the Washington Administrative Code, the City’s Shoreline Master Program (SMP), other applicable law and any related documents or approvals, and whether the cumulative effect of other similar requests would result in substantial adverse effects on the shoreline environment. Section 16.12.370E(4)(b). Section 16.12.340A provides that the City is to determine whether the proposed dock is suitably located and designed and that all potential impacts have been recognized and mitigated, and whether it is consistent with the intent, policies and regulations of the SMA and the City’s SMP. The two SMP policies relevant to the issues raised in the appeal are the following:

* * *

(3) Piers, docks, and floats should be designed to cause minimum interference with navigable waters, the public’s use of the shoreline, and views from adjoining properties.

* * *

(8) The proposed size of the structure and intensity of use or uses of any dock, pier, and/or float should be compatible with the surrounding environment and land and water uses.

* * *

Section 16.12.340B.

29. The applicable regulations are:

* * *

(4) Piers, floats, buoys, and docks shall not interfere with use of navigable waters.

* * *

(5) Piers and docks may be limited in length or prohibited, where necessary, to protect navigation, public use, or habitat values.

Section 16.12.340C.

30. Mr. Machen recommended to the Director approving the revision application. He found that the proposed revision would not change the size, length and configuration of the dock originally approved. He also found that the revised dock application meets the spirit and intent of the SMP and other applicable regulations, is consistent with the SMA, and the relationship of the proposed dock to other docks is consistent with the custom and standards in the industry and with other private residential docks in similar settings on Bainbridge Island. He concluded that allowing construction of the new dock is unlikely to result in a substantial adverse cumulative impact because there are so few properties left in the area that do not already have docks. Exhibit 4; Testimony of Machen.

31. The Applicants have recorded a Notice of Dock Use Restriction to memorialize the condition of the permit prohibiting moorage on the eastern portion of the moorage float and any overhang to the east beyond the end of the dock. Exhibit 51.

32. Views of docks and boats from upland lots are normal in Port Madison Bay.

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

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this matter.

2. The criterion for revision approval that the revision be within the scope and intent of the original permit is met here as there was no showing that the corrected distance between docks conflicts with any of the restrictions in Section 16.12.370C(2), i.e., amounts to any additional over-water coverage, increases ground area or height, exceeds an additional 250 square feet, adds any landscaping, changes the authorized use, or causes any new environmental impact.

3. As for the requirement that a revision be consistent with the SMP and the SMA, the decision on this appeal turns on whether the new dock is consistent with the SMP policies that the dock be designed so as to cause minimum interference with navigable waters, and be compatible with its surroundings, and the regulation prohibiting interference with the use of navigable waters. Appellants urge that the dock was not designed to minimize interference with navigation, is not compatible with its surroundings, and that the regulation is an unconditioned prohibition on any interference with navigable waters.

4. Appellants have not adduced evidence that the dock which, as a dock appurtenant to a single family residence, qualifies under the SMA as a priority allowed use, was not designed to the minimum length and size necessary to be functional nor that it could have been located elsewhere so Appellants have failed to show that it conflicts with the SMP policy regarding design.

5. The findings also do not show that the revised permit would allow a dock that would conflict with the policy that the size of the dock and the intensity of use should be compatible with surrounding environment and uses as the dock meets length limitations and is intended to be used by two boats and limited to use by no more than four.

6. Appellants urge that Section 16.12.340B(4), the regulation implementing that policy, is absolute--an unconditional prohibition on any interference with the use of navigable waters. And, on its face, this regulation does appear to be. However, the record shows that navigable waters extend to the MHHW mark, yet Port Madison Bay contains many marinas and docks. A court would not rely on a literal reading where to do so would produce a result that would be nonsensical and would not have been intended by the City Council, as shown by the policy that the regulation is to implement. See *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Reading it to prohibit interference of any kind or degree with navigable waters would preclude the building of any dock or other structure in Port Madison Bay where navigable waters extend to the MHHW mark. Given that docks appurtenant to residential uses are permitted, the regulation must be read to prohibit only any substantial or unreasonable interference, as the City has interpreted it in this case. This would be consistent with the policy that the regulation is intended to implement, which is to design for "minimum" interference, recognizing that any dock would cause interference. The determinative issue then is whether the new dock would cause substantial or unreasonable interference

7. While the findings show that accessing Appellants' dock for moorage was easier prior to construction of the new dock, and the experts disagree as to the degree of interference or even whether there is any interference at all, the findings do show that, with care, normal use of the waters can continue. Though West and his expert witness both expressed concern that inexperienced boaters could or would have trouble navigating into the slip, both were able to access the berthing area. It was shown that when a large boat is docked at the southernmost part of the dock, only the smaller boats may be able to pass to berth closer in so it may be necessary to pull out the large boat to allow others in or to berth them on the other side of the dock when conditions force the floating dock to its closest point to the new dock. It also may be that legal limits on the number of boats or the prohibition on commercial use of the dock would interfere with some of the desired use of the dock, making other accommodations unnecessary.

8. Because the Director is charged with administering the SMP, the Director's interpretation as to what constitutes interference with navigation should be given deference. The Director relied

on the expertise of Mr. Layton to understand the degree of inconvenience that the industry regards as reasonable without substantial interference with navigation, and this reliance was not erroneous when that expert has greater expertise in what is considered acceptable in designing docks than Appellants' witness. Mr. Machen's testimony showed that the Director determined that the level of inconvenience is not a substantial or an unnecessary interference. The hearing examiner is required to give substantial weight to that determination of the Director. Section 2.16.130F(2). Without a definite and firm conviction that a mistake has been made, the hearing examiner must affirm the decision made. See *Hayden v. Port Townsend*, 93 Wn.2d 870, 613 P.2d 1164 (1980). As the dock is still accessible, though not as easily, the new dock does not interfere with the use of the navigable waters.

9. Appellants ask that the additional condition suggested by Mr. Layton be imposed for an added measure of safety. Section 16.12.350B(1)(b) does authorize the hearing examiner to affirm the Director's determination with modifications. It appears that a condition requiring installation of a cushioning system on the east side, or short leg, of the new dock could help avoid damage if inexperienced boaters do actually use the dock when the space between the docks is more restricted but that this suggestion was not made prior to the Director's decision. So, while the Director's decision was not clearly erroneous, a modification to increase safety is appropriate and the condition should be added to the existing conditions.

10. Applicants point out that it appears that the joint moorage agreement does not allow some of the use that Appellant West would make of the dock, and that he contends the new dock interferes or would interfere with, but because the hearing examiner assumes that only the parties to that agreement may enforce it, the terms of that agreement have not been considered.

11. Though the issue of impact on views was raised in the appeal notice, that impact was not addressed at hearing or in closing argument so should be deemed abandoned.

12. The decision to approve the revised application should be affirmed, subject to the additional requirement for a fender or buffer on the east side of the floating dock.

Decision

The Director's decision to conditionally grant the revised substantial development permit is affirmed with the addition of the following condition:

The Applicants shall install a dock bumper or fender system, as approved by the Director, along the east side of the floating portion of the new dock.

Entered this 13 th day of October 2010.

/s/ Margaret Klockars

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].