

No. 36201-5-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent,

v.

RAINIER YACHT HARBOR, LLC, et al

Appellant,

OPENING BRIEF OF APPELLANT RAINIER YACHT HARBOR, LLC

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I. INTRODUCTION

This appeal involves Appellant Rainer Yacht Harbor, LLC's ("Rainer Yacht") applications to construct two large single-family homes on adjoining lots along the Gig Harbor shoreline. The proposed homes are very large (8,022 and 9,642 square feet), and the square footage for each home includes a large basement (3,650 and 5,150 square feet, respectively). Each basement will be used both as a garage to house several vehicles and boats owned by the families that will live there and will also be used for storage and other purposes. Both homes will be served by a single, 20-foot wide driveway.

Though the Shoreline Management Act ("SMA") requires property owners to obtain a shoreline substantial development permit for most substantial development along shorelines, the Legislature has expressly exempted certain development from this permitting requirement. One such express exemption is for single family homes that do not exceed 35 feet in height and are being constructed for use by the property owners or the property owner's family. RCW 90.58.030(3)(e)(vi). The Washington State Department of Ecology ("DOE"), acting in its rule-making capacity, has defined "single-family residence," to include not just the home itself, but also separate structures that are "normal appurtenances" to the home, such as a garage and a driveway. WAC 173-27-040(2)(g). Significant to this appeal, the DOE has pronounced in its rules that "[o]n a statewide

basis, normal appurtenances include a garage ... [and] driveway.” (*Id.*) Other than the 35-foot height limitation, there are no physical constraints as to size or shape of a single-family residence for the residence to qualify for an exemption from the shoreline substantial development permit requirement. Likewise, the rule regarding exemptions for normal appurtenances imposes no size restrictions upon garages and driveways.

Based upon the clear language in the SMA and the corresponding regulation, the City of Gig Harbor Hearing Examiner concluded that, because they are for single-family residences, the applications are “exempt” under the SMA. Thus, the Hearing Examiner concluded that Rainier Yacht was not required to obtain a shoreline substantial development permit for either home or, correspondingly, for the appurtenances for each home. Following a Land Use Petition Act appeal by the City of Gig Harbor, the Pierce County Superior Court reversed the Hearing Examiner’s decision and Rainier Yacht filed this appeal.

The City’s appeal of its own Hearing Examiner’s decision is essentially on two grounds. First, despite that there are no size restrictions imposed by either the SMA or the associated regulations, the City argues that the basement/garages and driveway are not “normal” appurtenances. The City focuses on the size of the structures and will invite the Court to engage in a subjective assessment as to what should be considered “normal.” Second, based upon prior develop plans abandoned by Rainier

Yacht, the City speculates that Rainier Yacht does not intend to use the proposed structures for single-family homes, but intends to later convert the structures to commercial uses. Thus, the City will invite the Court to ignore the actual applications and speculate as to Rainier Yacht's motivations and future plans.

The speculation advocated by the City is contrary to the substantial evidence in the record and contrary to the applicable law. The proposed basement/garages will be part of the single-family residences and the single driveway will provide access for both residences. As such, both appurtenances fit squarely into the DOE regulations that deem them to automatically qualify as normal appurtenances to the proposed single-family homes. This Court should reverse the Superior Court and reinstate the well-reasoned decision of the Hearing Examiner.

II. ASSIGNMENTS OF ERROR AND ISSUES

Appellant Rainer Yacht Harbor, LLC assign error to the trial court's March 12, 2007 Order on Land Use Petition Act Appeal Reversing Decision of Hearing Examiner (CP 1310 – 1317) in its entirety, including the following:

1. The trial court erroneously concluded that the Hearing Examiner failed to decide whether the basement garages and 20-foot driveway were normal appurtenances to the use and enjoyment of the

single-family residences as required by WAC 173-27-040(2)(g). (CP 1316.)

2. The trial court erroneously concluded that the only finding that the Hearing Examiner made in regard to the issue of “normal appurtenances is that “nothing in the applicable city code would prohibit the proposed driveway or size of the basement garage structures proposed for the residences.” (CP 1316-17.)

3. The trial court erroneously concluded that, in the absence of an express finding that the driveway and garage are normal appurtenances, the Hearing Examiner’s findings are inadequate and precludes the trial court from finding that the decision was supported by the substantial evidence and a correct interpretation of the law. (CP 1317.)

4. The trial court erroneously concluded that, given the Hearing Examiner’s finding number 37, the Hearing Examiner should have denied the exemption instead of placing a condition on the exemption. Moreover, the trial erred in making its own finding, rather than remanding the matter to the Hearing Examiner to make its own finding in light of the substantial evidence in the record.

In light of the above assignments of error, the following issues are presented in this appeal.

A. Is a Hearing Examiner required under WAC 173-27-040(2)(g) to make a separate finding that the proposed basement/garages

and driveway are normal appurtenances to the use and enjoyment of a proposed single-family residences, when the WAC provides that all garages and driveways appurtenant to a single-family home are such normal appurtenances?

B. Is the Hearing Examiner free to apply a subjective standard to determine if proposed appurtenances to a single-family home are “normal”?

C. Are the Hearing Examiner’s findings adequate to support his conclusion that the proposed single-family residences are exempt under the SMA?

D. If a Hearing Examiner’s findings are deemed inadequate to support his conclusion, may the trial court evaluate the evidence and make its own finding, or should the trial court remand to the original trier of fact, the Hearing Examiner, to make any omitted findings based upon the substantial record?

E. May a Hearing Examiner engage in speculation as to possible future uses of a proposed development that is contrary to the intended use stated on the applications?

III. STATEMENT OF CASE

A. Rainer Yacht’s Original Development Plans

Rainier Yacht owns two separate parcels of property located at 3525 and 3555 Harborview Drive in Gig Harbor, Washington. The

property is in the Waterfront Millville (WM) zoning classification, which district allows a variety of commercial and residential uses. The property is also within the jurisdiction of the City Shoreline Master Program. (CP 170.) The property is currently improved with an existing 10-foot wide driveway that crosses near the eastern boundary of the property to access an existing pier and float that have long been used for commercial purposes. (CP 82-83, 86-87.)

Rainier Yacht formed to purchase and develop the property, and hired Architect Steven Bull to begin developing plans for a mixed-use project. The project, as originally contemplated, would consist of two buildings constructed over a single underground parking garage and was to include offices, condominiums, and a marina. (CP 409-35.) Consistent with the original plan, Rainier Yacht took steps to advance its proposal through the various agencies that would have to approve it, including the Corps of Engineers, the Department of Natural Resources, and the City of Gig Harbor. (CP 186, 359, 361-63, 409-35.) Toward this end, Rainier Yacht's architect developed plans to a conceptual stage, sufficient to allow the jurisdictions, including Gig Harbor, to undertake a preliminary review. (CP 72-74.)

Rainier Yacht thereafter had a pre-application conference with Gig Harbor's staff on May 12, 2005 and presented its original mixed-use project plans to the City for review as to the applicable codes. (CP 72-76.)

Rainier Yacht's plans were generally well-received by the City's staff at the pre-application meeting. However, the staff advised Rainier Yacht that the City Council would, at the end of the month, be considering revised code language for development in the WM zone. (CP 72-74.) The City staff thus recommended that Rainier Yacht obtain and consider the proposed revised code language with regard to its planned commercial application. (*Id.*) Included in the code revisions under consideration were provisions that would significantly limit the amount of commercial building space allowed in the WM zone, including the size of building areas located underground. (*Id.*)

As represented by the staff, the Council did consider proposed code revisions at the May 31, 2005 Council Meeting. The Council was not prepared at that time, however, to adopt the proposed legislation. Thus, the Council deferred that decision. Aware that property owners such as Rainier Yacht were prepared to file applications for commercial development that would vest under the existing code, the Council elected to adopt a moratorium on all commercial development in the WM zone to allow the Council additional time to revise its code on commercial development in this zone. (CP 72-76.) Specifically, on May 31, 2005, the City Council passed Ordinance 1003. (CP 287-93.) The Ordinance placed a moratorium on the acceptance of applications for new

development and redevelopment of non-residential structures in the WM district. *Id.*

B. As A Result Of The City's Moratorium, Rainier Yacht Changed Its Development Plans

The moratorium effectively stopped Rainier Yacht from submitting permit applications for its mixed-use development. (CP 72-76; 287-93, 170 at Finding 20.) It was also clear at that time that the revised City code, once adopted, would preclude a later commercial application even after the moratorium was lifted. Accordingly, Rainier Yacht took the logical next step. Rainier Yacht changed its plans so that it could proceed with development of its property. Rainier Yacht instructed its architect to convert the existing plans to allow two single-family homes on the property, one for Bruce Steel and one for Mike Burton, each an owning member of Rainier Yacht.¹ (CP 75-78, 441.)

Rainier Yacht instructed its architect to commence work immediately on the residential development application and to use the existing plans to the greatest extent possible. The architect was so instructed for two reasons. First, Rainier Yacht was understandably concerned that the Council would pursue additional legislative changes to

¹ The owners opted to temporarily take title to the property under the LLC because they had not completed all necessary environmental evaluations prior to closing and they were concerned about personal liability for unknown hazardous waste issues. It is the owners' intent to dissolve the LLC at a future date and transfer title to the LLC members who will reside there. (CP 441.)

further limit development on this valuable piece of property for which Rainier Yacht's members paid \$1,700,000. Additional legislative changes were anticipated as early as July 11, 2005, and Rainier Yacht wanted an application submitted before additional code revisions were adopted. Use of the existing plans would better allow Rainier Yacht to promptly submit the residential applications. (CP 75-76, 361-63.)

Second, Rainier Yacht wished to recoup, to the extent possible, their already substantial application costs. By the time Rainier Yacht was faced with the unexpected moratorium and ever-changing City land development policies and codes, its members had, in addition to investing \$1,700,000 in the property itself, already invested approximately \$30,000 in the permitting process for such actions as engineering, surveying and land use planning.² (*Id.*)

On July 11, 2005, Rainier Yacht's architect submitted for each home a building permit application, a design review application, a boundary line adjustment application and a request for Shoreline Substantial Development Permit Exemption.³ (CP 76, 39, 114-15, 4-404,

² Because the original plans included residential uses, they were suitable for conversion to single-family home plans. The modification did, however, necessitate a modification to the plans so that there would be two separate basement/garages rather than the single garage structure proposed earlier. (CP 75-78.)

³ The applications were considered vested by the City on July 25, 2005. Effective August 8, 2005, the City adopted Ordinance 1008, limiting the maximum gross floor area, including attached and detached garages to 3,500 sq. feet per lot for all commercial and residential structures in the WM district. (AR, Ex. 17.) Because Rainier Yacht's applications vested their projects under the prior Gig Harbor code, the size limitation could not be imposed upon Rainier Yacht's residential development plans.

441, 484-89, 490-506.) All of the documents submitted in connection with the single-family permit applications are consistent with the characterization of the proposed buildings as single-family homes. No applications were submitted to the City for any commercial use. (*Id.*)

The homes are large (the Burton residence is 8,022 total square feet – 4,372 square feet for the two-story home and 3,650 square feet for the basement; the Steel residence is 9,642 square feet – 4,500 sq. feet for the two-story home and 5,150 sq. feet for the basement). The homes' designs are not, however, atypical of residential development on expensive waterfront lots. (CP 76-77, 549-602.)

C. The Proposed Basement/Garage Concept

The basement in each single-family house is an integral part of the house, and is not a separate appurtenance. (CP76-79, 548.) Rainier Yacht recognizes that, typically, basements are not larger than the ground floor of a home. Larger underground basement and/or garage areas are more common, however, where property values are high, the land area is small, topography is steep, and where open space is valued. Those characteristics apply to this site. (CP 76-77.) A large garage of some description should certainly be expected in connection with the large, expensive homes that are proposed by Burton and Steel. As acknowledged by Gig Harbor staff planner Jennifer Sitts, underground

parking is the only practical alternative on this site given applicable regulations and site conditions. (CP 102-03.)

These same constraints also increase the size of any constructed underground garage. The lot size and topography of the subject property dictate that there may only be a single entrance to the garage. Thus, a portion of the underground garage area is taken up by an underground driveway area to facilitate entry into the available parking spots for cars and boats. (CP 77-79.)

The garage/basement areas on the Burton and Steel homes are not extraordinarily large for the site and the proposed large homes. There are other larger homes in the area, including homes across Gig Harbor Bay and elsewhere on the Gig Harbor Peninsula. These larger homes generally have large multi-car detached garages in addition to the large home area. Credible evidence was provided to the Hearing Examiner that in other waterfront areas outside the immediate Gig Harbor area, some homes have 10 to 15-car covered garages.⁴ (CP 549-602.)

⁴ The City and the appellants in the underlying proceeding repeatedly claimed that the basement/garages “could” accommodate 36 parking stalls. Rainier Yacht was not required by the City code to show, nor did it show, on the submitted plans detailed information as to how the full extent of the basement garages would be used. (CP 136, 172, Finding 28.) Rainier Yacht did, however, present testimony that the basements would not be exclusively used as a garage, but would be used for other purposes (e.g., a workshop) and would also incorporate the driveway. (CP 76-79, 548). Moreover, Rainier Yacht presented evidence that the basement areas would be just large enough to accommodate the vehicles, boats and equipment that are already in the Mr. Burton and Mr. Steel’s possession. (Id.) There is nothing in the record, other than pure speculation, to support the City’s claims that the basement/garages will be used for 36 parking stalls.

D. The Existing Access To The Existing Pier And Float

Both the Burton and Steel homes would be served by a single joint driveway. The proposed joint residential driveway terminates at a point between the Burton house (past the basement/garage entrance) and the existing pier. This portion of the driveway is designed to serve the Burton house. The driveway design is based exclusively upon the planned residential use and it has not been designed for any other purpose. (CP 82-87.)

As noted earlier, there already exists on the site 10-foot driveway on the east side of the Burton lot. That driveway serves an existing pier and a float that has had commercial use for many years. The pier is now owned by Rainier Yacht and the float continues to be owned by the former owner of the Rainier Yacht property.⁵ Since the Burton house is proposed to be located 5 feet from the east property line, construction of the home will eliminate the existing driveway. Rainier Yacht's architect determined that, without any physical change to the proposed joint-use residential driveway, and without any additional expense, the driveway could also serve as access to the pier. (CP 82-87.) Accordingly, Rainier Yacht simply proposed to allow access to the float on their planned joint

⁵ The float owner currently has an easement over the existing 10-foot driveway, and that easement permits the relocation of the driveway so long as access to the float is maintained. The easement document does not permit parking on the Rainier Yacht property. (CP 82-87, 314-21.)

residential driveway in light of their plan to eliminate the existing driveway. (*Id.*)

The proposal for Burton-Steel driveway to also serve the existing float will not change the use of the float in any way. Providing access over the residential driveway that will already exist would also provide benefits in eliminating an impervious surface (the old driveway) and in creating an expanded view corridor between the Burton and Steel homes. (*Id.*; *see also* CP 103-04.)

E. Gig Harbor's Changing Position On The Shoreline Exemption

Just as the development rules for Rainier Yacht's property kept changing, the City position as it processed Rainier Yacht's applications also changed.

At the time the plans were submitted, the City's Community Development staff advised Mr. Bull orally that the single-family homes would be exempt from the requirement for a Shoreline Substantial Development Permit. (CP 76.) This was not a formal determination by the City, but was taken by Rainier Yacht as the position of the City. It is worth noting that, had the City advised at that time that a Shoreline Substantial Development Permit was required, the permit could have been processed by the time of the proceeding before the Hearing Examiner. (*Id.*)

In any event, after a visit by Robert Frisbie and Richard Allen, neighbors who oppose development of the Rainier Yacht property, the Washington Department of Ecology (DOE) issued a letter dated November 2, 2005 stating that the Burton and Steel proposals included too much grading to be considered exempt under the Shoreline Management Act and related regulations. (CP184-185) Based upon this letter the City issued a Notice of Decision on November 2, 2005 stating that the Burton and Steel homes were not exempt because the proposals exceeded the application grading limitation. (*Id.*, Ex. 141.)⁶ Significantly, DOE also stated in its letter that it was skeptical that the basement/garages were normal appurtenances in light of their size. (CP 184-85.) The City did not, however, adopt that rationale as justification for its decision to deny the requested exemption. (CP 905-06, 273-74.)

On November 7, 2005, Mr. Steel and Mr. Burton timely appealed the City's denial of the shoreline exemptions. (CP 275-28.) On November 28, 2005 the City issued a Notice of Administrative Decision advising that Rainier Yacht's designs for the Steel and Burton homes comply with the Design Review Manual's standards for residential development (CP 482-83.) Frisbie and Allen appealed these approvals on December 4, 2004 (CP 444-49) and their appeals were consolidated with Rainier Yacht's appeal.

⁶ This Notice was revised and reissued because of a clerical error on November 11, 2005. (CP 273-74.)

Included in the Frisbie and Allen's appeals was the allegation that Rainier Yacht did not intend to use the homes for residential purposes, but that the applications were, according to Frisbie and Allen, for commercial development. (*Id.*) Frisbie and Allen based this allegation their own research with other governmental agencies that revealed that Rainier Yacht had submitted applications for commercial development of the property with other government agencies. (*Id.*) Notably, with only one exception (CP 516-539), each of these applications were made prior to the date that Rainier Yacht revised its development plans to single-family homes. (CP 173, Finding 37.). The one commercial application that was made after the project was changed to residential was subsequently formally withdrawn. (CP 517.)

After DOE issued its November 2, 2005 letter, Rainier Yacht's counsel contacted DOE to advise that its position on the grading limitation, as applied to Rainier Yacht's proposed development, was inconsistent with its prior interpretations on the regulation. (CP 507-09.) As a result, on January 5, 2006, DOE sent an email stating that its earlier correspondence regarding excessive grading was inaccurate and contrary to the Department's published guidance. (*Id.*) With respect to the size of the basement/garages, DOE advised:

I disagree with your conclusion that the garages, as presently proposed, could be considered normal appurtenances to a single

family residence. As I stated below in earlier e-mails, and as various elements of the file seem to indicate, the garages are proposed to be constructed in a manner that will accommodate large numbers of vehicles or as you stated at one point, "likely to be used by the owner for a variety of purposes." **If the property owners are now limiting their development to two single-family residential structures for residential uses only, and limiting site impacts to those necessary for constructing the homes, then a shoreline exemption may be appropriate.**

Absent assurances that this development is limited to residential uses, I can not [sic] agree that the proposals meet the criteria for an exemption. Per WAC 173-27-040 exemptions are to be construed narrowly and the burden of proof that a development or use is exempt from the permit process is on the applicant. (Emphasis added.)

(CP 507.) Though DOE continued to oppose the exemption in this case, it also necessarily recognized that, under the plain language of the WAC, if the proposed development was indeed to be limited to residential purposes, the exemption is appropriate.

After DOE acknowledged that the exemptions could not be denied on the grounds that the projects will exceed the grading limitations, the City recognized that the Notice of Decision it had previously issued could not survive the appeal. Rather than issue an exemption, however, on January 11, 2006, the City simply issued a 2nd Revised Notice of Decision

changing the rationale for its denial. (CP 962-65.) In this 2nd Revised Notice the City instead asserted that the garages were too large to be considered “normal appurtenances” and also cited the fact that the driveway would be used for “commercial purposes” as a new basis for its. (*Id.*)

F. Though Aware Of Rainier Yacht’s Prior Mixed-Use Development Plans, The City Staff Accepted That Rainier Yacht Was Proposing A Residential Development

Though the City questions Rainier Yacht’s intentions in the context of this litigation, this was not the City’s position when it was processing Rainier Yacht’s applications. The applications were always processed as residential applications. (*See e.g.* CP 482-83, 612-19.) In fact, the City staff expressly rejected Frisbie and Allen’s contention that the applications were commercial applications in disguise.

Contrary to the City’s position in this litigation, the City staff had the full benefit of Frisbie and Allen’s “research” regarding applications to other government agencies, and suppositions there from, before the City issued its Second Revised Decision (changing the rationale for denying the exemption) and before the City issued its staff report and recommendation to the Hearing Examiner. Even with this information, the City staff did not challenge that Rainier Yacht’s applications were residential applications.

Frisbie and Allen submitted their brief and exhibits (including the applications submitted to other jurisdictions) to the City on January 8, 2006. (CP 1137-1152, 1172-1187.) On January 11, the City simultaneously issued its Second Revised Notice of Decision on the exemption request (CP 962-65) and its staff report on the consolidated appeals (CP 612-19.) The City's staff directly addressed Frisbie and Allen's accusations with regard to Rainier Yacht's intended use of the property in the staff report:

... I think it would be helpful to provide some additional background information on the property, project and City ordinances that have affected the projects form. It may help in understanding this complex project and the appellants brief and exhibits.

The appellant [Frisbie] has stated that the proposed homes are commercial structures. Nothing in the building permits, design review applications or requests for shoreline substantial development permit exemptions provided by Rainier Yacht Harbor LLC indicate that the buildings are nothing but single-family residences. While [the] single-family homes are large and the garage[s] can accommodate a variety of vehicles, they are still being proposed as single-family homes (see application materials and the letter dated July 22, 2005 from Bruce Steel). Rainier Yacht Harbor, LLC at one time proposed a mixed-use development for the subject properties. On May 12, 2005, a pre-application conference was held with Community Development

staff to review a potential mixed-use and marina development on the subject properties. Staff provided written comments and a voice recording of the event. No zoning or building applications were filed with the city for this development at that time. On May 31, 2005, the City Council passed Ordinance 1003 placing a moratorium on the acceptance of applications for new development and redevelopment of nonresidential structures in the Waterfront Millville district. This moratorium effectively stopped Rainier Yacht Harbor, LLC from submitting permits for the mixed-use development.

However, during the moratorium, Rainier Yacht Harbor, LLC instead submitted permits for the subject single-family residences....

(CP 617-18.) The City's position in the staff report was consistent with its usual practice – the City staff appropriately accepted the representations on Rainier Yacht's application, without engaging in speculation as to possible future uses of any structure, and processed the applications accordingly. (CP 110-11.)

G. The Hearing Examiner Conditionally Approved The Shoreline Exemptions

The Hearing Examiner concluded that Rainier Yacht's applications were applications for single-family residences and were therefore exempt under the SMA from the requirement to obtain a shoreline substantial development permit. (CP 178.)

With regard to the claim that the basement/garages and driveway were not “normal” appurtenances because of their size, the Hearing Examiner applied the plain language of the applicable statutory and regulatory provisions that exempted garages and driveways that are appurtenant to single-family residences. The Hearing Examiner found:

Nothing in applicable city code would prohibit the proposed driveway or the size of the basement/garage structures proposed for the two residences.

(CP 177, Finding 59.) This was not the only finding that the Hearing Examiner made regarding the “normal appurtenances” issues.

With respect to the proposed driveway, the Hearing Examiner found that the driveway presented in Rainier Yacht’s plans was being constructed to serve the two residences. (CP 172-73, Findings 33, 35.) The Hearing Examiner also found that the driveway was designed to serve the single family residences, but “without any physical change to the proposed driveway, it can also serve as access the pier. (CP 172-23, Finding 35.) Significantly, the Hearing Examiner found that proposed driveway would not result in a new or increased commercial use of the property.

The proposal for the Burton-Steel driveway to also serve the float will not change the use of the float. Since the proposed joint use drive-way is approval for single-family homes and does not alter the use of the float, it does not change the proposal from single-

family residential to commercial. These applications do not involve any construction or exterior alteration to the float or its-pre-existing use.

(CP 173, Finding 36.) Finally, the Hearing Examiner found:

While the terms of the purchase of the property by Rainier Yacht from its seller included the reservation of an easement allowing the seller to continued access to a float for, among other things, continued commercial purposes,” Rainier Yacht’s proposed development of two single-family residences does not impact or affect that pre-existing use commercial use.

(CP 177, Finding 60.) Thus, the Hearing Examiner concluded that the proposed driveway, which driveway was designed for residential use, did not lose the benefit of the single-family residence exemption simply because an existing commercial use would also be permitted to use the driveway serving the proposed homes.

The Hearing Examiner also accepted Rainier Yacht’s representations that the proposed projects will be used for single-family residences. The Hearing Examiner acknowledged that the applications submitted by Rainier Yacht were applications for single-family homes. (CP 168 at Findings 1-2.) Addressing Rainier Yacht’s historical development plans, the Hearing Examiner found that Rainier Yacht changed “the plans from a proposed mixed-use development to two single-family homes, one for Mr. Steel and one for Mr. Burton, both members of

Rainier Yacht.” (CP 170 at Finding 21.). The Hearing Examiner further found:

The submitted and processed application materials characterize the proposed buildings as single-family homes. While the proposed homes are large (the Burton residence is 8,022 total sq. feet, including 3,650 sq. feet for the basement, and the Steel residence is 9,642 sq. feet, including 5,150 for the basement), applications were neither filed nor processed by the City for any commercial use.

(CP 171, Finding 24.)

The Hearing Examiner also addressed Frisbie and Allen’s accusations that Rainier Yacht’s applications were commercial application in disguise head on:

Messrs. Frisbie and Allen presented a significant amount of evidence regarding Rainier Yacht’s undisputed plans to obtain approval for a marina, and paints a convincing picture that Rainier Yacht may try in the future to convert these homes to a marina or other permissible commercial uses. Most of the evidence cited by Mr. Frisbie and Mr. Allen, however, relates to actions taken by Rainier Yacht prior to the adoption of Ordinance 1003, and Rainier Yacht’s subsequent change of its development proposal from mixed-use commercial to single-family residential. There is evidence that Rainier Yacht’s application for a Corps of Engineers permit (necessary for the marina proposed as part of Rainier Yacht’s earlier mixed-use

proposal) has been withdrawn and may be resubmitted later this year. There is also evidence that Rainier Yacht's application for a DNR tidelands lease has not been withdrawn. A tidelands lease, without more, is consistent with a single-family residential use of the property since such a lease would be required for pleasure craft or other single-family moorage that extends over tidelands. In any event, and despite what Rainier Yacht may, or may not, intend for the future, Rainier Yacht's single-family residential proposals have been submitted and processed consistent with the city code applicable at the time of submittal.

(CP 173, Finding 37.)

Rainier Yacht's applications, by their terms and according to the testimony of its architect, Mr. Bull, are designed for single-family residences. As it must, the City processed those applications under the codes applicable to single-family residences....

(CP 177, Finding 59.)

Likewise, at least since the adoption of Ordinance 1003 on May 31, 2005, applications and other written material submitted by Rainier Yacht and processed by the City have been limited exclusively to single-family residential uses.

(CP 177, Finding 61.)

Ultimately, the Hearing Examiner concluded that Rainier Yacht's applications were exempt under the SMA. (CP 178.) Notably, the Hearing Examiner conditioned approval to require that, if the property owners sought to change the use, they would first be required the

appropriate permits and approvals, including the shoreline substantial development permit from which they were exempted. (*Id.*) Thus, the Hearing Examiner's decision was wholly consistent with the guidance from DOE. He made a factual determination that the structures are for residential purposes and, further, he provided adequate assurance that the structures would be used as represented and not avoid applicable permitting processes if the uses were later altered.

H. Superior Court

The City of Gig Harbor timely appealed the Hearing Examiner's decision under the Land Use Petition Act, chapter 36.70C RCW.⁷ (CP 1-51.) The Honorable Rosanne Buckner reversed the Hearing Examiner. (CP 1310-17.)

Ignoring the plain language of, WAC 173-27-040(2)(g), which deems all garages and driveways for single-family residences as "normal appurtenances", regardless of size, the trial court held that the Hearing Examiner "did not decide whether the basement garages and 20-foot driveway were normal appurtenances necessarily connected to the use and enjoyment of the single-family residences as required by the Washington

⁷ Neither Mr. Frisbie, nor Mr. Allen appealed the Hearing Examiner's decision. Because they participated in the Hearing Examiner proceeding, both were named as respondents in this appeal. Mr. Allen elected not to participate in the LUPA proceeding. Mr. Frisbie participated by submitting briefing consistent in support of the City's position. (*See* CP 1256-63.)

Administrative Code 173-27-040-(2)(g).” (CP 1316.) The trial court further stated:

The only finding that the hearing examiner made in this regard is, I believe, number 59 on page 23, and I just want to quote, “Nothing in the applicable city code would prohibit the proposed driveway or size of the basement garage structures proposed for the residences.” And that is not adequate and therefore precludes a finding by this court that his decision was based on the substantial evidence and a correct interpretation of the law.

Given the hearing examiner’s finding number 37 with respect to the significant amount of evidence regarding Rainier’s plans to obtain approval for a marina and convert the single-family residence into a marina or other commercial use, the hearing examiner should have denied the exemption instead of placing a condition on the exemption. For these reasons, I will grant the city its requested relief and I will reverse the hearing examiner’s decision...

(CP 1316-17.) Rainier Yacht timely appealed the trial court’s decision.⁸

IV. ARGUMENT

A. Standard Of Review Under Land Use Petition Act.

Under Washington’s Land Use Petition Act (LUPA), the party seeking relief from an administrative decision, in this case respondent City

⁸ The Clerk’s Papers do not include the Notice of Appeal. Rainier Yacht will file a Supplemental Designation of Clerks Papers designating the Notice of Appeal so that it will be part of the record before this Court.

of Gig Harbor, bears the burden of proving error. *North Pacific Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003); RCW36.70C.130(1). When considering administrative decisions on appeal from the trial court, this Court reviews the Hearing Examiner's findings of fact and conclusions of law, not the trial court's findings and decision. Thus this Court stands in the same shoes as the superior court. *Id.*; *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47, 52 P.3d 522, (2002); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 688, 87 P.3d 1176 (2004).

The standards relevant to this appeal are set forth in RCW 36.703.130, which provides in relevant part:

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

* * *

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]

(d) The land use decision is a clearly erroneous application of the law to the facts;... (Emphasis added).

On appeal, the court reviews the Hearing Examiner's factual findings under the substantial evidence standard⁹ and conclusions of law de novo. *North Pacific Union Conference Ass'n of Seventh Day Adventists*, 118 Wn. App. at 28.

The Court should be mindful that the factual review under the substantial evidence test is deferential. It requires the Court "to view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217, review denied, 120 Wn.2d 1008 (1992). See also, *Department of Corrections v. City of Kennewick*, 86 Wn. App. 521, 529, 937 P.2d 1119 (1997). Here, the Examiner was the highest forum to exercise fact-finding

⁹ The Court of Appeals' review is deferential, and the Court views the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Isla Verde International Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 134, 990 P.2d 429 (1990), *aff'd on other grounds*, 146 Wash.2d 740, 49 P.3d 867.

authority. GHMC § 17.10.080; §19.01.003. Thus this court's review is based on the record before the Examiner, and it views the evidence and draws inferences in light of the Examiner's conclusion. *See, Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-372, 859 P.2d 610 (1993)

To the extent that Gig Harbor is challenging the Hearing Examiner's interpretation of the law, this Court should also give deference to the Examiner's legal interpretations, since he is the appointed local expert on issues involving land use regulations. The Hearing Examiner is the decision-maker that the City has charged to "interpret, review and implement land use regulations as provided by ordinance." GHMC § 17.10.010. Consistent with that charge, the City has given the Examiner "the exclusive authority to hold public hearings and make recommendations and decision on all application, permits or approvals described in Chapter 19.01," which chapter addresses all project and development permit applications, including shoreline permit applications.¹⁰ (GHMC § 17.10.080.) Relevant to this case, the Hearing Examiner is the highest City decision-maker authorized to resolve issues related to shoreline permits. (*See* GHMC § 19.01.003.)

¹⁰ To preserve the integrity of the Hearing Examiner's decision-making, Gig Harbor has prudently taken steps to shield the Examiner from the influence of local politics. The Hearing Examiner is prohibited from holding any other "elective or appointive office or position with city government;" and the City has further prohibited any person, "including city officials, elected or appointed," from attempting to influence the Examiner in any matter pending, except as duly appropriate in the public hearing process. (GHMC §§ 17.10.030; .040.)

B. The Hearing Examiner Correctly Determined That Rainier Yacht’s Applications Are Exempt Under The SMA And The Trial Court Incorrectly Reversed The Decision.

Following an open hearing, the Gig Harbor Hearing Examiner – the City’s highest fact-finding decision-maker on shoreline permitting issues – determined that the two single-family residences proposed by Rainier Yacht, including their combined basement/garages and the driveway providing access, are exempt from any SMA requirement to obtain a shoreline substantial development permit. The Examiner stood on solid statutory ground when he rendered this decision.

Though the Shoreline Management Act requires property owners to obtain a shoreline substantial development permit prior to performing “substantial development” along the shoreline,¹¹ the SMA also expressly exempts the construction of single-family homes from this requirement.

The Act provides:

The following **shall not be considered substantial development** for the purpose of this chapter: . . . (vi) **Construction on shorelines by an owner, lessee, or contract purchaser of a single-family residence for his own use or for the use of his or her family**, which residence does not exceed a height of 35 feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements

¹¹ RCW 90.58.140.

imposed pursuant to this chapter; ...
(Emphasis added.)

RCW 90.58.030(3)(e)(vi). The Washington DOE, acting in its rule-making capacity, has defined “single-family residence,” to include not just the home itself, but also separate structures that are “normal appurtenances” to the home, such as a garage and a driveway:

“Single-family residence” means a detached dwelling designed for and occupied by one family **including those structures and developments within a contiguous ownership which are a normal appurtenance.** An “appurtenance” is necessarily connected to the use and enjoyment of a single-family residence and is located landward of the ordinary high water mark and the perimeter of a wetland. **On a statewide basis, normal appurtenances include a garage; deck; driveway; utility; fences; installation of a septic tank and drainfield and grading which does not exceed 250 cubic yards and which does not involve placement of fill in any wetland or water ward of the ordinary high water mark.** Local circumstances may dictate additional interpretations of normal appurtenances which shall be set forth and regulated within the applicable master program. Construction authorized under this exemption shall be located landward of the ordinary high water mark. (Emphasis added.)

WAC 173-27-040(2)(g). The City has not adopted any ordinances to provide additional interpretations of this DOE regulation. (CP 174,

Finding 41.) Thus, the DOE regulation provides the exclusive guidance on the issue of normal appurtenances in this case.

Other than the 35-foot height limitation, there are no physical constraints as to size or shape of a single-family residence for the residence to qualify for an exemption from the shoreline substantial development permit requirement.¹² Likewise, all garages and driveways that are appurtenant to single-family homes, **regardless of size**, have been deemed by the State to be “normal appurtenances.” Application of the plain language of the SMA and related regulations to the substantial evidence support the proposed single-family residences (including the basement/garages) therefore led the Hearing Examiner to the inescapable conclusion that the homes are exempt.

1. The Hearing Examiner presented sufficient findings of fact and conclusions of law.

The City of Gig Harbor asserted and the trial court concluded that the Hearing Examiner’s Findings are deficient on their face under *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994). This argument is without merit.

¹² The single-family homes will be used by two of the families that are members of Rainier Harbor Yacht LLC. One home will be occupied by the Steel family and the other home will be occupied by the Burton family. (CP 441.) Thus, the SMA requirement that the single-family residence will be used by the property owner or a member of the property owner’s family is satisfied. The City did not make appear to challenge the family use of the proposed residences.

Initially, Rainier Yacht notes that “findings of fact” by an administrative agency or officer are subject to the same requirement as are findings of fact drawn by a trial court. *Weyerhaeuser, supra*, 124 Wn.2d at 35. The findings must resolve ultimate facts and the findings of fact and conclusions of law should reveal the process used by the decision-maker. *Id.* Even if the decision-making process is not explicit in the decision-maker’s findings, courts will deem the findings adequate if they “clearly imply its conclusion on the major issues involved.” *Tugwell v. City of Ellensburg*, 90 Wn. App. 1, 19, 951 P.2d 272 (1997). Thus, the lynchpin for determining sufficiency of the Examiner’s findings is whether the findings allow the reviewing court to determine the basis of the Examiner’s decisions. *Citizens Alliance to Protect our Wetlands v. City of Auburn*, 126 Wn.2d 356, 369, 894 P.2d 1300 (1995). The Examiner’s findings in this action readily satisfy this standard.

The City challenged the Examiner’s findings by asserting that the Examiner failed to decide whether garages and driveway are “normal” appurtenances “necessarily connected to the use and enjoyment of a single-family residence.” The argument ignores the applicable SMA regulatory provision directing that any garage or any driveway appurtenant to a single-family home (that is for personal use by the property owner and does not exceed 35 feet), regardless of size, must be deemed a “normal appurtenance.” WAC 173-27-040(2). Thus, the key

factual determinations that the Examiner must make are whether the proposed structures are single-family residences that do not exceed 35 feet and are for personal use by the property owners. The Examiner made these findings and, accordingly, his conclusion that the appurtenant basement/garages are exempt is adequately supported by his findings.

In that regard, the Examiner made findings that the applications submitted were for single-family residences; that the applications did not include any applications for commercial uses; that the applications were processed by the City as residential applications; that the residences do not exceed 35 feet in height; and that the homes would be used for personal use by the property owners. (*See* CP 168-78, Findings 1, 2, 21, 24, 37, 59, 61.) Under WAC 173-27-040(2), there was no requirement for the Examiner to make any further finding as to whether the subject basement/garages are “normal.” Since he found that the structures are single-family residences that are less than 35 feet in height and are for personal use, the basement/garages (as well as the driveway) are automatically deemed normal appurtenances under the regulation.

Though not required to do so, the Examiner did make additional findings to support the conclusion that the planned basement/garages and driveway, as appurtenant to the specific single-family homes at issue here, are normal appurtenances necessarily connected to the use and enjoyment of a single-family residence. The Examiner found that the sizes of the

basement/garages are appropriate in light of the topography and driveway requirements, the planned uses, and the size and locations of these particular single-family homes. (See Findings 28-32) The Hearing Examiner also found that the driveway, though it will be jointly used for the existing commercial float, was designed for the residential uses and would not result in any new, changed or additional commercial uses. (See Findings 33-36, 60).

The findings are more than adequate for this Court to determine the manner in which the Examiner applied the facts to the applicable law to reach the ultimate conclusion that the proposed single-family homes are exempt. Gig Harbor may disagree with the Examiner's analysis, but the analysis is sufficiently set forth in the findings.

Finally, to the extent that the Hearing Examiner omitted requisite findings, the trial court should not have made the omitted findings. RCW 36.70C.140 authorizes the trial court to "affirm or reverse the land use decision under review or remand it for modification or further proceedings." If additional findings were required, the trial court should have remanded the matter back to the Hearing Examiner so that he, as the trier of fact, could make the requisite findings in light of the substantial evidence in the record.

2. The substantial evidence in the record supports the examiner's finding that the project is residential rather than commercial.

The signed and certified applications clearly state that each of the proposals consist of a single-family home. (CP 394-04, 484-506.) None of the applications make any request for commercial use. (*Id.*; *see also* CP 76, 115-16.) Subsequent to the application submittals, Bruce Steel an owner and the managing member of Rainier Yacht explained the sound reason for the temporary LLC ownership and assured the City that the homes would be used as personal residences for two of the owning members of Rainier Yacht. (CP 441.) The building permit and design review applications were processed and approved as residential uses. (CP 115-16, 482-83, 612-19.)

It is true that Rainier Yacht Harbor originally planned mixed-use buildings and a marina on the subject property. (*See e.g.* CP 186, 73-76.) A pre-application conference was held and a significant amount of work done to advance that proposal. (CP 73-76.) However, after this work was done, on May 31, 2005, the City Council adopted a moratorium ordinance barring the submission of development applications for non-residential structures in the waterfront Millville District. (*Id.*; *See also* CP 287-93.) It was clear to all concerned that the development restrictions in the area were being significantly tightened. The moratorium was for the purpose

of reviewing greater restrictions, including restrictions on the size of allowed buildings. (*Id.*)

As a result of the City's action, Rainier Yacht Harbor changed its plans to propose the only kind of structures not affected by the moratorium, residential homes for two of its members. (CP 73-76.) Mr. Steel and Mr. Burton were obviously concerned about the increasing regulations and particularly concerned that the size of allowed structures might be limited by future Council action.¹³ As a result, they elected to file residential applications as quickly as possible, before additional regulations were imposed. Because of the value of the property, and because of their own family needs, they elected to submit applications for large homes. Because of their own needs, because of the design work that had already been done for the earlier-planned structures, and because of the need to get the applications in quickly, they submitted plans that included the large basement and garage areas proposed. Those structures have the benefit of allowing covered parking and other basement uses without the necessity for additional above-ground garages that would block views and otherwise not serve the owners or the community. (CP 73-78, 548.)

¹³ In fact, the allowed size of all structures was subsequently limited. (CP 300-307.)

Rainier Yacht was not, as the City will argue, attempting to advance a fraud on the City. To the contrary, its members were simply trying to put an end to the substantial financial hardships they were sustaining from the City's constant changing of the development rules. Rainier Yacht wanted to complete the necessary work to acquire the benefit of vested development applications that would fix and make certain the development rules for this property.¹⁴

The Hearing Examiner was presented with a variety of documents in support of their contention that the Rainier Yacht is actually proposing a marina. These documents only prove, however, that Rainier Yacht **earlier** proposed that use. Rainer Yacht has never denied that its current proposal is different from its original proposal. The documents that represent efforts by Rainier Yacht Harbor to obtain approval for a marina generally pre-date the moratorium and the applications for single-family homes.

Based upon the proceedings below, it is expected that the City will make much ado about the JARPA application, which was the single

¹⁴ Under Washington's vested rights doctrine, a developer who files a timely and complete land use application obtains a vested right to develop land in accordance with the land use laws and regulations in effect at the time of the application. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). Vesting fixes the rules that will govern land development regardless of later changes in zoning or other land use regulations. The purpose of the vesting doctrine is to provide a reasonable measure of certainty to developers and protect their expectations against fluctuating land use policy. *Id.* The doctrine is based upon constitutional principles of fairness and due process, acknowledging that development rights are valuable and protected property rights. *Vashon Island Comm. For Self-Government v. Boundary Review Board*, 127 Wn.2d 759, 903 P.2d 953 (1995); *Erickson & Assoc. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987).

application that was submitted after the residential applications were submitted. (CP 516-39.) Notably, the JARPA application specifically identified the upland development permits as building permits for residential structures. (CP 521.) The application did not identify any permit applications for commercial structures. In any event, Rainier Yacht Harbor later terminated its application with the Corps of Engineers, thus making clear that its present plans are for single-family homes. (CP 517.)¹⁵ The Hearing Examiner was within his discretion as a fact-finder, given the substantial evidence in the record, to conclude that Rainier Yacht's applications are for residential uses. The existence of this withdrawn application is certainly not sufficient to disturb his finding on this appeal.¹⁶

Finally, the City's claim that Rainier Yacht's intent to allow use of its residential driveway for access to a pre-existing commercial use (that

¹⁵ Rainier Yacht Harbor LLC has maintained its application with the Department of Natural Resources for a harbor lease and has submitted documentation needed by the DNR to process that application. Such a lease would be needed for **any use** of the associated tidelands. The owners of these homes will have a clear interest in leasing the land for moorage and for view preservation purposes. This interest is totally independent of any marina. In any event, in this climate when even its single-family home proposals are being challenged, the Applicant can certainly not be faulted, for preserving as many of its options as possible. The City cannot challenge every single land use action associated with the property and somehow fault the owners for trying to do what they can to preserve the value of their investment.

¹⁶ There is also no law that would support a conclusion that Rainier Yacht was without the right to keep its options open. The permit review process in this case has demonstrated that the project exists in an extremely uncertain environment. If this project is ultimately denied, or even if approved, Rainier yacht could, consistent with the code, explore a marina without the upland structures or with different upland structures. There is no legitimate basis, however, for this Court to simply choose to reject Rainier Yacht's application based upon the City's speculation.

already has access and will not gain additional access) converts the project to a commercial project is without merit. Rainier Yacht has never denied that there is an existing pier and float on the property which has been in place for a number of years. In fact, its existence and use dates back long before the time the SMA was adopted. The use of the pier and float will not be changed in any way by the proposal. In fact, some existing net sheds on the property are being demolished as part of the proposal. The pier is owned by Rainier Yacht and the float by the former owner of the property. (CP 78-79, 82-83, 86-87, 103-04.)

There is a driveway that presently serves the pier and float. That driveway will be eliminated by the proposal. This allows the Burton house to be moved to the side, allowing a wider view corridor between the homes. The proposed residential driveways, without any modification from their design as residential driveways, can be used for access to the float. Parking for the pre-existing commercial uses on the pier or float will not occur on the Steel and Burton property. The easement allowing continued access to the float allows only that access; it establishes no parking rights. (*Id.*; *see also* CP 314-21.) The proposal is not a commercial one. The access only maintains that which currently exists and does not alter the residential design in any way.

There is ample evidence in the record to support the Hearing Examiner's finding that the proposal is for a residential, rather than

commercial use. To reject the evidence in the record, the Hearing Examiner would be required to simply not believe the multiple representations of Rainier Yacht and speculate that the property will be used differently at some unknown time in the future. Of course such speculation of possible future plans is not mandated in review of land use application. *See San Juan County v. Dept. of Natural Resources*, 28 Wn. App. 796, 802, 626 P.2d 995 (1981). To the contrary, according to Gig Harbor's own senior planner, speculation of possible changed future uses is not typically a basis for the City's land use decisions. (CP 112.)

As noted earlier, this Court views the evidence in the record and the reasonable inferences therefrom in the light most favorable to Rainier Yacht, the party who prevailed before the Hearing Examiner. As such, this Court must necessarily accept the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex rel. Lige & Wm. B. Dickson Co., supra*, 65 Wn. App. at 618. In light of this standard, the City cannot prevail on this LUPA appeal.

3. The City's rationale is and the trial court's ruling is contrary to the express words of the SMA and associated regulations.

The City will also assert that the basement/garages of the homes are too big to constitute a normal appurtenance to a single-family residence. The City's argument is not correct for a number of reasons.

a. **The SMA exempts single-family homes, not just homes of a certain size decided arbitrarily by the staff.**

The statute expressly exempts single-family homes from the requirement for a substantial development permit. This is not limited to homes of a certain size or shape. The statute does not exempt “modest homes” or “averaged-sized homes” or anything to that effect; it exempts all homes under 35 feet in height. The regulations clarifying the statute make clear that the exempt house includes normal appurtenants such as garages and decks. Again, these are not limited to some arbitrary size.

In fact, there are two limitations on the exemption under the statute. The home must not exceed a height of 35 feet and the home must meet all other non-SMA regulations of the local government. The express mention of these limits implies the exclusions of others. *Washington State Republican Party v. Public Disclosure Commission*, 141 Wn.2d 245; 4 P.3d 808 (2000). Where a statute specifically lists the things upon which it operates, there is a presumption that the legislative body intended all omissions, i.e., the rule of expression unius est exclusion applies.” *Id.* at 280.

To the extent that there is any room to limit the size of an appurtenance, it would have to be done by code, and not on an ad hoc basis. The regulation states:

Local circumstances may dictate additional interpretations of normal appurtenances

which **shall be set forth and regulated**
within the applicable master program.
WAC 173-27-040(2)(g). (Emphasis added.)

Gig Harbor has not adopted any such provision in its Shoreline Master Program. (CP 174, Finding 41.)

In any event, the City simply does not have the authority to limit the exception created by the Legislature. When the Legislature creates an exception, the local government may not create some process or standards to limit that exemption. See *Seattle v. Crispin*, 149 Wn.2d 896, 71 P.3d 208 (2003). (Property owner not required to go through city process for boundary line adjustments when such adjustments are categorically exempt under RCW 58.17.)

b. Allowing the City to restrict the exemption on an ad hoc basis without any standards would violate Constitutional principles.

In *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993), the Court of Appeals made clear that zoning regulations must contain standards or else violate the Constitution as unacceptably vague. In that case, the City had design standards, but they were so generalized that applicants could not predict how they would be applied. Here there are no standards at all other than, in the City's view, an analysis of what is "normal". While we do not agree that such a standard can even be read into the exemption, it would be unconstitutionally vague if it was.

If the City's interpretation is correct, then it is now in a position of deciding what constitutes an excessively large (abnormal) garage, deck, and even driveway. Presumably the same analysis would apply to any other out buildings, sheds, stables, and the like. The City might even decide that a garage or driveway was abnormally small. All of these determinations would be based upon no standards whatsoever except the particular staff member's own notion or experience as to what is "normal". The standard would apparently presumably evolve over time. For example, a three-car garage was once a rarity but is now a common sight. (CP 76-77.) It might have been abnormal in 1980 but normal now. Each jurisdiction would likely have a different standards because what is "normal" for waterfront in the South Sound might be very different for what is "normal" on Lake Washington or Lake Sammamish. Obviously this is no standard at all and makes clear that the City's interpretation would violate the Constitution.

- c. **A garage is a normal appurtenance under the regulations; nothing in the code says is must meet some "normal size" standard.**

The regulations state that a home, including normal appurtenances is exempt. It goes on to state that garages and decks **are** (by definition) normal appurtenances. It does not state that only garages, decks or driveways of a certain "normal size" are exempt. The term "normal"

modifies the term “appurtenances”. The regulation then lists those things (not sizes of things) that are normally appurtenant to a house, including decks and garages. No invitation or allowance is made for local staff to measure what size is normal.

Had the regulators intended to limit the size of appurtenances, they could have said “average sized decks and garages” or “normal sized decks and garages.” As written, the regulations do not grant discretion for regulators to decide how normal a garage or deck is.

d. The basement/garages are not exceptionally big for large expensive waterfront homes.

First, it must be noted that the portion of the homes in question are not simply garages; they are both basement and garages. (CP 76-78, 548.) It is inaccurate to characterize this space as all garage with a capacity of a particular number of cars.¹⁷ This ignores the term “basement” that also appears on the plans as descriptive of these areas. (*Id.*)

In fact, these underground areas serve both purposes. The underground garage portion simply replaces what could be separate garage structures. The basement portion of the home could include storage, work shops, hobby rooms, game rooms, wine cellars, living areas or other play areas or other uses at the owner’s discretion. (*Id.*) There is nothing

¹⁷ Note that there is nothing in the City code that requires an applicant to specify in its application the number of cars that may be parked in a garage. (CP 136.)

unusual about that at all, nor would it be unusual in any way for a basement to be the same size as the house.

The City will assert that the underground area could hold too many cars, but does not distinguish between a basement (which clearly is allowed as part of the house) and the garage area (which is specifically allowed as an appurtenance). On the proposed homes, not all of the underground areas are for car parking. If the basement that corresponds to the size of the other floors of the house is excluded, the remaining area is much smaller and much more “normal” in the City’s analysis.

It is also very common, in fact the norm, to have a separate garage structure in addition to the basement. The underground garage spaces here are actually preferable from an aesthetic (and neighborhood) perspective because such parking shields cars without adding additional building footage to obscure views of neighbors, etc. (CP 76-78, 102-03.)

Even if the basement/garages were entirely devoted to vehicle and boat storage, they would not be of exceptional size. These are active families with multiple cars and boats. The evidence demonstrated that, even leaving very limited room for **some** of the other basement uses described above, boats and cars owned by the family will fully occupy the space provided. (CP 77-78, 548.)

Finally, the evidence presented demonstrated that large homes with large covered parking areas are not unusual, particularly in expensive

areas including the waterfront. Homes in the Gig Harbor area, including one just across the Bay are 10,000 square feet in size, larger than either the Burton or Steel homes. Homes in the same area have comparable-sized basements and garages with one on 50th Avenue NW having such areas totaling 6618 feet. Other evidence showed even larger homes in other areas. Even limiting the search to homes presently for sale revealed a number of homes with from 10-15 covered parking spaces. (CP 549-602; CP 76-77.)

The point is that there are a number of larger homes, and homes seem to becoming larger, including the covered parking areas. These may not be average homes but by no generally accepted standard are they “abnormal”.

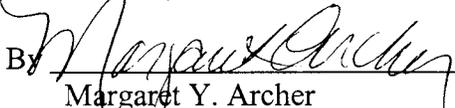
V. CONCLUSION

The Hearing Examiner made a well-reasoned decision that was supported by the evidence in the record and consistent with the applicable law. This Court should reverse the trial court and reinstate and uphold the decision of the Hearing Examiner.

Dated this 24 day of July, 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By 
Margaret Y. Archer
Attorneys for Appellant Rainier Yacht
Harbor, LLC
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 24th day of July, 2007, I did
serve by the method indicated below, true and correct copies of the
foregoing by addressing and directing for delivery to the following:

Counsel for Respondent The City of Gig Harbor:

Carol A. Morris
LAW OFFICE OF CAROL A. MORRIS, PC
7223 Seawitch Lane NW
P O Box 948
Seabeck, WA 98380

VIA U.S. MAIL

Robert G. Frisbie
9720 Woodsworth Avenue
Gig Harbor, WA 98332-1049

VIA U.S. MAIL


Margaret Archer

07 JUL 25 PM 2:10
STATE OF WASHINGTON
BY _____ DEPUTY

MAILED
JUL 25 2007
GIG HARBOR, WA