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DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BAINBRIDGE ISLAND BOATYARD, INC. d/b/a BAINBRIDGE
ISLAND MARINA, DARRELL MCNABB, its President; and DARRELL
MCNABB and VANNEE R. MCNABB, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND,

Respondent.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This appeal presents a straightforward question of statutory interpretation, measured by a dollop of common sense. Appellants (collectively “Bainbridge Marina”) have operated a commercial marina on Bainbridge Island, Washington since 1990. Part of the marina consists of boat moorage, including mooring fingers and boat slips that boat owners may rent. Some boat owners have tied to the dock pontoon-style boat lifts that fit entirely within their slip. These boat lifts are not actually on the mooring fingers or “dock;” rather they float in the water and are tied to the dock. Both parties agree that these boat lifts provide significant environmental benefits because, by lifting the boat out of the water when it is not in use, they reduce the frequency of required boat maintenance – including the use of toxic paint on the bottom of the boats.

About three of the boat lifts’ owners have attached aluminum poles to their lifts, from which they have hung peaked fabric canopies that rise approximately 11 to 12 feet off the water’s surface. After a challenge by the City of Bainbridge Island, a Hearing Examiner ruled that the boat lifts were an “accessory use” to the marina and could stay without the owners needing to obtain a permit. However, on reconsideration, the Hearing Examiner limited his ruling to the un-canopied boat lifts. As for the boat lifts with canopies, he ruled that the Bainbridge Island Municipal Code

precluded such marina accessories because the canopied boat lifts were “covered moorage,” and the Code prohibits “covered moorage” (a) in new marinas or expansion areas of existing marinas, and (b) on docks or piers.

As Bainbridge Marina explains below, the Examiner’s ruling is wrong in four separate respects. *First*, because the Examiner ruled that a floating boat lift is a permitted accessory use, so also is the use of a removable tarp or fabric canopy on these devices. *Second*, the Code’s definition of “covered moorage” does not include the canopied pontoon-style boat lifts. *Third*, even if the canopied lifts are “covered moorage,” they have not been installed in a new marina or in an expansion area of an existing marina. *Fourth*, the canopied lifts, even if “covered moorage,” are not actually on a dock or a pier – rather they are floating on the water within an approved slip and simply tied to the dock.

II. ASSIGNMENT OF ERROR

The Hearing Examiner and Superior Court erred in interpreting the Bainbridge Island Municipal Code to prohibit the canopied floating boat lifts in Appellants’ commercial marina.

III. ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Is use of a removable fabric canopy on a floating boat lift within an existing marina slip a permitted accessory use, when it has already been determined that the lift itself is a permitted accessory use?

2. Did the Hearing Examiner and the Superior Court erroneously interpret the Code's definition of "covered moorage" to include the canopies attached to the floating boat lifts?

3. Did the Hearing Examiner and the Superior Court erroneously apply the Code's prohibition of "covered moorage" for "[n]ew marinas and expansion areas in existing marinas" to Bainbridge Marina, which was approved pursuant to the relevant permits in 1982 and constructed in 1990, before the adoption of the relevant Code provision?

4. Did the Hearing Examiner and the Superior Court erroneously apply the Code's prohibition of "[n]ew boat houses and new covered moorage . . . on piers or docks" to the canopies that are attached to the floating boat lifts, neither of which is constructed "on" a pier or a dock?

5. Did the Hearing Examiner and the Superior Court erroneously defer to the City's interpretation of its Code provisions regarding "covered moorage" when the City had not adopted and applied such an interpretation as a matter of City policy?

IV. STATEMENT OF THE CASE

Appellant Bainbridge Island Marina owns and operates a commercial marina and boatyard located in Bainbridge Island, Washington. CP 4. The Marina was approved in 1982 pursuant to a

Shoreline Substantial Development Permit (SSDP), Unclassified Public Use Permit, Conditional Use Permit, building permits issued by Kitsap County, and permits issued by the United States Army Corps of Engineers and Washington Department of Fish and Wildlife. CP 4. Those permits authorized the construction and operation of a full service marina and boat yard, including boat moorage, storage facilities, outdoor storage, and marine repair operations. CP 4-5.

At the time of approval, Kitsap County regulators determined that marina operations were in full compliance with the Bainbridge Island Subarea Plan, which designated the property for Light Manufacturing uses, and the Kitsap County Zoning Code, which zoned the property “Light Manufacturing” on the waterfront area and “Residential RS-20,000” in the rear portion. CP 5. Further, the County found that marina operations were consistent with the Kitsap County Shoreline Master Program and its Use Activities, which included Boating Facilities, Marinas, Shoreline Works, and Dredging. CP 5. The last fingers for the Marina’s boat slips were completed in early 1992, but the facility was opened for business in 1990. *See* CP 5.

In 1992, the property was annexed by the City of Bainbridge Island. CP 5. After annexation of the entire island, representatives from

the City inspected the Marina facility and found that its permits were in order and that marina operations complied with all code provisions. CP 5.

In 2004, the Marina commenced a process to amend the Bainbridge Island Comprehensive Plan and zoning district designations on the property to facilitate certain improvements, some of which were contemplated in the original Kitsap County approval but had yet to be completed. CP 5. During the required pre-application conference, City staff expressed “concerns” about the Marina’s current operations. CP 5-6. On January 23, 2006, after considerable delay and without consideration of the proposed amendments, the City issued a Letter of Violation to the Marina and its President, Darrell McNabb, served on March 6, 2006, alleging several violations of the Bainbridge Island Municipal Code (BIMC), including: (1) use of recreational vehicles as residences on the property; (2) expansion of outdoor storage areas without proper review and shoreline substantial development permit; and (3) a covered boathouse, three covered boat lifts, and multiple pontoon-style boat lifts not legally established. CP 6. The City imposed enforcement fees with additional enforcement activity imposed at \$180 per hour, and the threat of civil penalties, permit revocation, criminal proceedings and an injunction. CP 6.

The Marina filed a timely request for a Director's Review upon service of the notice of violation, seeking confirmation that the Marina and its accessory uses were legally established and, if prohibited by subsequent code provisions, constituted legal nonconforming uses. CP 6. The Marina sought a determination of full compliance, advising that there were no recreational vehicles on the property, that outdoor storage was approved pursuant to the SSDP, that the boathouse was specifically authorized, and that boat lifts were common accessory uses in marinas. CP 6.

The Director concurred that there was no compliance issue with the recreational vehicle or the boathouse, but determined that the approval of outdoor storage did not extend to the residential zoning district on the property. CP 6. The Director also determined that the portable boat lifts were "structures" and thus regulated "development" under the Bainbridge Island Shoreline Master Program that must be removed. CP 6. The Marina filed a timely appeal of this decision to the Hearing Examiner. CP 15.

The City and the Marina eventually resolved each of these alleged violations prior to the hearing through a settlement agreement, with the exception of the City's continued insistence that the pontoon-style boat lifts required a permit. CP 15. The only remaining issue before the

Examiner, therefore, was the legal status of these boat lifts – and a determination of whether such boat lifts used within an approved marina constituted new development subject to an additional shoreline review and permitting process, or whether they were legally permissible accessory uses exempt from such processes. CP 15.

The boat lifts in question – of which there are seven or eight in the Marina – are used in conjunction with and as part of a rented boat slip; the lifts belong to the boat owners who rent a boat slip in the Marina.¹ CP 15, 16; Hearing Examiner Transcript (“Tr.”) at 9, Tape 2 (8/30/07). The boat lifts are installed simply by tying them to the mooring fingers that comprise the marina facility. CP 16; Tr. 2, Tape 2 (8/30/07); *see generally* Ex. 2F (photograph of pontoon boat lifts). Accordingly, the boat lifts can be removed or inserted into a slip with ease. *See* Tr. 12, Tape 2 (8/30/07).

¹ While Bainbridge Marina provides boat moorage, the boat lifts are actually owned by the Marina’s customers. Therefore, the condition the City alleges is unlawful, i.e., use of a boat lift with a canopy, is not caused by Bainbridge Marina. The Marina was thus in the odd position of defending the practice of third parties before the Examiner, when the City Code provides that it can be enforced against tenants who create the condition considered in violation of the law. BIMC § 1.26.065. However, the City declined to issue notices to the tenants. To resolve the matter, Bainbridge Marina entered into a stipulation with the City prior to the hearing before the Examiner that provided that Marina customers will seek inclusion under Regional General Permit Number One (“RGP1”) for use of the boat lifts. Ex. 59 (Stipulation, ¶ 2.10, p. 6); Ex. 17 (RGP1). RGP1 allows the use of a translucent canopy for a boat lift, which could be employed if the City would abandon its position that a lift with such a canopy is prohibited “covered moorage.” Tr. 9-10, Tape 2 (8/30/07).

The boat lifts are not larger than the slips in which they are installed. CP 16; Tr. 10, Tape 2 (8/30/07).

They lift the boat in and out of the water by filling with or emptying water. Tr. 2, Tape 2 (8/30/07). For example, to lift a boat, water is pumped into the pontoons, and the lift sinks. The boat is moved onto the device, the water is pumped out, and the boat is lifted, “creat[ing] a cradle where the boat is suspended above the water and the boat lift stays in contact with the water.” CP 15-16; Tr. 25, Tape 2 (9/28/06); Tr. 2, Tape 2 (8/30/07). The lift itself is level with the dock. Tr. 6, Tape 2 (8/30/07).

Approximately three of the boat lifts in the Marina have peaked fabric canopies that are open on all sides. Tr. 24, Tape 2 (9/28/06); Tr. 12, Tape 1 (8/30/07); Tr. 10, Tape 2 (8/30/07) (Marina owner testifying that he does not permit canopied floating lifts to have sides); *see* Ex. 2E and CP 173-77 (photographs of canopied pontoon boat lifts). The canopies are supported by aluminum poles that attach to the boat lifts themselves – not to any marina structure, including the mooring fingers or dock. Tr. 24, Tape 2 (9/28/06). The peak of the tallest canopy measures about 11 to 12 feet from the water’s surface. Tr. 6, Tape 2 (8/30/07); Tr. 10-11, Tape 2 (8/30/07). They are also easily dismantled – for example, in order for a sail boat to exit the marina, the canopy is removed and placed on the dock

or carried with the vessel while it sails. CP 165. When the vessel returns, the canopy is reinstalled on or over the boat. CP 165.

After considering oral argument and briefing on the issue, the Examiner rendered his decision on the pontoon-style boat lifts on January 3, 2008. CP 14-18. The Examiner found that the use of these boat lifts resulted in “substantial environmental benefits such as eliminating the need to paint the bottoms of boats to prevent corrosion and fouling of the bottom of the boat.” CP 16; *see also* Tr. 11-12, Tape 1 (8/30/07) (testimony of City of Bainbridge Senior Planner that boat lifts provided “environmental benefits” because if a boat is “not sitting in the water then you don’t have the typical fouling and having to clean off that boat or scrape the bottom”); Tr. 7, Tape 2 (8/30/07) (owner of boat with lift “does not have to paint the bottom of his boat with toxic paint;” also, some marine ecology attaches to the lifts themselves); Tr. 9, Tape 2 (8/30/07) (“[a] boat lift eliminates having to do maintenance on the boat,” such as “[h]aving to scrape it, scratch it [and] have divers in the water scrubbing bottoms [of boats],” which, in turn, means less zinc, tin, and copper leaking into water).

The Examiner also found that the lifts “do not interfere with normal public use and enjoyment of the overlaying lands subject to [the Shoreline Management Act],” and that they do not constitute

“development” as contended by the City but rather “an accessory to the individual slip.” CP 16. In response to the City’s alternative contention that regardless of whether the boat lifts constitute a “substantial development,” the lifts’ owners still must obtain a statement of exemption, the Examiner disagreed. CP 16-17. Rather, the Examiner re-iterated that the boat lifts were a permissible “accessory use” to the marina, defined as those uses that “are water dependent, related to boating, necessary for marina operations or which provide physical or visual access to substantial numbers of the public.” CP 17 (quoting BIMC § 16.12.180(B)(4)). “The appellant argues that docks and boat lifts are a common part of a marina operation. Generically, they are.” CP 17.

Based on these findings, the Examiner concluded that the boat lifts as used in this particular case – inserted into individual slips that have previously received a permit – constitute “an accessory use incidental and related to the primary use, and would not require a separate permit or request for an exemption.” CP 17-18.

On January 22, 2008, the City filed a Motion for Reconsideration, seeking reversal of the Examiner’s decision, and seeking “clarification” on various aspects of the Examiner’s ruling. CP 22-28. The next day, the City also filed a Supplement to its Motion for Reconsideration (CP 19-21) purportedly seeking clarification – but really arguing for the first time –

that all “covered boatlifts” are prohibited by Bainbridge Island Municipal Code (BIMC) § 16.12.340(D)(9), which provides that “[n]ew boat houses and new covered moorage shall not be permitted on piers or docks.”

“Covered moorage,” in turn, “means boat moorage, with or without walls, that has a roof to protect a vessel or vessels.” BIMC § 16.12.030(A)(48).

The City’s motion did not re-argue that permits were needed for the boat lifts, but rather argued that the definition of “covered moorage” included, and therefore prohibited, the canopied boat lifts at issue here. CP 19.

On February 8, 2008, the Examiner denied the City’s Motion for Reconsideration, but did, however, “clarif[y]” the original decision to provide that “covered boatlifts are prohibited” under BIMC § 16.12.340(D)(9), cited above, and § 16.12.180(B)(6), which provides that “new marinas and expansion areas in existing marinas shall not have covered moorage.” CP 30. While acknowledging that “[v]ery little argument was addressed to covered lifts,” the Examiner stated that the BIMC provisions “address[] a prohibition against covered structures which exist on piers or docks, and cannot be interpreted to allow an individual to slide covered moorage inside a slip, so that it is not resting on the dock.” CP 30. In other words, according to the Examiner, the uncanopied boat lifts can stay, but the canopied boat lifts must go. The

Marina appealed the Examiner's decision regarding the canopied boat lifts to the Kitsap County Superior Court. CP 1-34.

After briefing and argument, the Superior Court upheld the Hearing Examiner's decision. CP 198-201. It ruled that "the proper construction of the term 'covered moorage' is purely a legal question," and, therefore, it would review the question "*de novo*" while at the same time "giving deference to the interpretation of" the City so long as the interpretation was "a matter of preexisting policy, not merely a legal argument inserted in place of agency interpretation." CP 199. The court appeared to agree with the City that it had a preexisting policy of interpreting the Code to preclude canopied floating boat lifts (CP 200), but that, in any event, the Hearing Examiner's decision "was not erroneous even assuming no deference is owed to the City's interpretation of its own ordinance." CP 200. Like the Hearing Examiner, the court "conclude[d] that BIMC § 16.12.180(B)(6) is intended to prohibit, and clearly does prohibit, covered boatlifts." CP 201.

The Marina filed a motion for reconsideration, CP 202-10, which the Superior Court denied after "clarify[ing] the Court's decision [that] the cloth canopies at issue here constitute 'covered moorage' under BIMC § 16.12.030(A)(48) which is prohibited under BIMC § 16.12.340(D)(9) as new covered moorage, not as a structure." CP 211-12. After the Superior

Court entered an order and judgment dismissing the petition for review, CP 213-16, this timely appeal followed, CP 217-32.

V. ARGUMENT

A. Standard of Review for LUPA Appeals.

The Land Use Petition Act (LUPA) governs review of land use decisions. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). A land use decision is “a final determination by a local jurisdiction’s body . . . with the highest level of authority to make the determination, including those with authority to hear appeals[] on . . . [a]n application for a project permit.” RCW 36.70C.020(1)(a). In this case, the Court reviews the decision of the Hearing Examiner which, functioning as an appellate body, had the City’s highest level of decision making authority. BIMC § 2.16.130(F)(6).

A party who seeks relief under LUPA has the burden of establishing that one of the six standards of RCW 36.70C.130(1) is met. *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

Two of those standards are applicable here:

- (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; [and]
- (d) The land use decision is a clearly erroneous application of the law to the facts[.]

RCW 36.70C.130(1)(b)&(d).

Standards (b) and (d) present questions of law that this Court reviews de novo. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). Statutory construction is also a question of law that courts review de novo, *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001), and courts interpret local ordinances the same as statutes. *State v. Villarreal*, 97 Wn. App. 636, 641-42, 984 P.2d 1064 (1999). “[L]and-use ordinances must be strictly construed in favor of the landowner.” *Sleasman v. Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007).

The clearly erroneous test in standard (d) involves applying the law to the facts. *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001). Under that test, a court determines whether it is left with a definite and firm conviction that a mistake has been committed. *Id.*

B. The City’s Interpretation of “Covered Moorage” Is Not Entitled to Deference.

“Ordinances with plain meaning are not subject to construction. Only ambiguous ordinances may be construed.” *Sleasman*, 159 Wn.2d at 643. The City Code’s prohibition of “covered moorage” in certain circumstances seems unambiguous. However, to the extent construction

of the law is required, not simply its application, the goal is to determine the legislative purpose and intent. 8 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.71, at 224 (3d ed. 2000). To do this, a court should be guided by the ordinance's purpose, as expressed in the text of the ordinance or fairly inferred therefrom, and the reasonable expectation of the ordinary person who sits in the municipal legislative body and enacts law for the welfare of the general public. *Id.*

A court generally defers to a City's interpretation of an ambiguous ordinance, *if* the City "has ***adopted and applied*** such interpretation as a matter of agency policy." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992) (emphasis added); *accord Sleasman*, 159 Wn.2d at 643. While the interpretation does not have to be memorialized as a formal rule, it cannot be "an isolated action" by the agency, nor may it be an "attempt[] to bootstrap a legal argument into the place of agency interpretation." *Cowiche Canyon*, 118 Wn.2d at 815; *accord Sleasman*, 159 Wn.2d at 643 ("claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation").

Here, even assuming that the Code provisions are ambiguous, the City had no preexisting policy of interpreting "covered moorage" to include canopies attached to individual floating boat lifts in commercial marinas. Indeed, at the hearing before the Examiner, the City admitted

that “other than the legal position it has taken in this proceeding,” it had not “created an interpretation on how to deal with these devices when they [a]re used within an approved commercial marina.” Tr. 10, Tape 1 (8/30/07); *see also* Tr. 15, Tape 1 (8/30/07); CP 200 (Superior Court’s memorandum decision, “[t]he administrative record addresses, but does little to clarify, whether the City in fact implemented a policy with respect to covered or uncovered boat lifts after the municipal code took effect in 1992”). Thus, the City has not shown that it had either adopted *or* applied an interpretation of the City Code that would preclude pontoon-style boat lifts that include an attached fabric canopy, like those at issue here.

C. The Fabric Canopies Attached to the Floating Boat Lifts Do Not Constitute Precluded “Covered Moorage.”

The City of Bainbridge Island’s Shoreline Master Program (SMP) regulates marina use and defines a marina as a “commercial . . . facility with the primary purpose of providing moorage for six or more vessels which consists of a system of piers, buoys or floats.” The SMP includes regulations of “boating facilities,” which include “marinas.” BIMC § 16.12.180(A)(31). The Code allows “accessory uses” in marinas, BIMC § 16.12.180(B)(4), and, as described above, the Examiner correctly ruled that the boat lifts are “accessory uses” because they are “incidental and related to the primary use” of the marina – they are not “development” or

a “structure” regulated under the City’s Shoreline Master Program. CP 16, 18. That ruling has not been appealed by either party.

The boat slips in which the lifts are used are simply spaces in water. Adding a fabric canopy to a floating boat lift does not turn it into a “boat house,” “covered moorage,” or new development precluded by the City’s shoreline use regulations. All that is involved are vessels and boating equipment as part of the approved marina moorage use.

The Examiner entered findings that the boat lifts are part of the slip (not the dock) and “they do not interfere with the normal public use and enjoyment of the water’s overlying lands subject to the SMA.” CP 16. The Examiner also found that the boat lifts were not new “development” because they are “totally contained within the marina and within the original slips.” CP 16. Thus, any impacts associated with the use of the boat lifts or accessory boating equipment already occurred in conjunction with the development of the marina itself. This situation is therefore quite unlike a situation involving the erection of new covered moorage or the expansion of an existing facility.

Nevertheless, in contradiction to his own findings, the Examiner further ruled on clarification that the canopied boat lifts ran afoul of other Code provisions that address “covered moorage.” The Examiner relied on

BIMC § 16.12.340(D)(9) and § 16.12.180(B)(6). BIMC

§ 16.12.340(D)(9) provides as follows:

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

BIMC § 16.12.180(B)(6) provides, as follows:

New marinas and expansion areas in existing marinas shall not have covered moorage.

Also relevant is BIMC § 16.12.030(A)(48), which defines “covered moorage” as

boat moorage, with or without walls, that has a roof to protect a vessel or vessels.

The Superior Court affirmed, apparently accepting the City’s contention that it should consider broad SMA polices addressing views, aesthetics, and possible environmental impacts. According to the City, because the SMA addresses these concerns, the canopied lifts must be regulated because they can be seen by the public from certain vantage points. CP 150-52. Of course, the marina itself can be seen by the public, but the impacts associated with its development and use have been accepted and allowed in return for the benefits provided to the public from the ability to access and use the waters of the State.

In any event, the cited Code provisions do not prohibit the canopied boat lifts at issue here. *First*, BIMC § 16.12.030(A)(48) defines “covered moorage” as “boat moorage” with a roof, but the floating pontoon-style boat lifts at issue here are not, by themselves, “boat moorage.” While a marina provides boat moorage space, the docks actually constitute the “boat moorage,” and if the docks “ha[d] a roof to protect a vessel or vessels,” that would constitute “covered moorage” under the Code. But here, the canopy is attached to the floating boat lift, which is not “boat moorage.” Indeed, if a boat lift were itself “boat moorage,” it would be subject to additional regulations – for example, each boat lift would be required to have a trash receptacle. WAC 173-310-050 (one trash receptacle required at “marinas, boat launching areas, boat moorage and fueling stations and public and private piers”).

What is before this Court are not structures or new development, but the use of boating equipment within already constructed and approved boat slips. Because the City did not appeal the Examiner’s Findings of Fact, it is a verity that the floating boat lifts are not a “substantial development.” Bainbridge Island’s shoreline use regulations define a “substantial development” to include any development over a certain amount (BIMC §16.12.030(A)(178)), and the term “development” as

embracing “construction or exterior alteration of structures” BIMC

§ 16.12.030(A)(52). The City’s SMP defines a structure as follows:

“Structure” means a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above, or below the surface of the ground or water, *except for vessels*. (WAC 173-14-030(15) or its successor.)

BIMC § 16.12.030(A)(176) (emphasis added).

The stated definition of a structure excludes a vessel. It is several steps too far to conclude that a boat lift with a cloth canopy is somehow a structure when the lift itself is not. The fabric canopy is simply personal property – boating equipment. Thus, within the context before this Court, there is no “structure” that falls within the prohibitions set out in the City Code for covered moorage or boat houses. The Court must construe and apply the law as written, not expand the Code language to matters not encompassed by the City’s shoreline use regulations like the Examiner and the Superior Court did.

Second, even if a floating boat lift constitutes “boat moorage,” BIMC § 16.12.030(A)(48)’s definition of “covered moorage” does not encompass the fabric canopies on the boat lifts here. Put another way, the presence of fabric canopies does not transform the boat lifts into “boat moorage . . . that has a roof to protect a vessel.” Numerous examples of

covered moorage structures exist in Washington State and, quite unlike the canopies here, these covered moorage structures are built on piers or pilings with covered walkways with a roof, typically a long continuous roof over many slips. *See* CP 179-80, 182-83 (photographs of examples). The Department of Natural Resources' regulations define "covered moorage" as "slips and mooring floats that are covered by a single roof with no dividing walls" (WAC 332-30-106(11); *see* CP 179-80 (photographs of examples)), and they define "enclosed moorage" as "moorage that has a completely enclosed roof, side and end walls similar to a car garage, i.e., boat house" (WAC 332-30-106(15); *see* CP 185-86 (photographs of examples)). The canopies at issue here are very different from these structures, which have roofs over the floats, mooring fingers, and walkways that comprise a marina facility.

Moreover, a fabric canopy on a floating boat lift is not the equivalent of a "roof." The term "roof" means "the cover of *a building*" Merriam-Webster Online Dictionary, *at* www.merriam-webster.com/dictionary/roof (last visited Feb. 12, 2009) (emphasis added). The term "building," in turn, means "a usually roofed and walled structure built for permanent use (as for a dwelling)." Merriam-Webster Online Dictionary, *at* www.merriam-webster.com/dictionary/building (last visited Feb. 12, 2009). This definition tracks the definition of "building" found in

the BIMC. For example, both the Zoning Code and the Shoreline Master Program define a building as “any *structure* with a roof, designated for shelter of persons, animals, or property.” BIMC §§ 16.12.030(A)(35), 18.06.110 (emphasis added). These floating pontoon-style boat lifts are not buildings or structures in any sense of those words. Nor would one suggest that buildings are typically covered with fabric.

To classify the fabric canopies as “covered moorage” would create absurd results. For example, hundreds, if not thousands, of vessels moored in waters subject to Bainbridge Island’s jurisdiction are covered by tarpaulins. If the mere presence of a fabric canopy that covers a boat and is not attached to a pier or dock is enough to trigger the Code’s prohibition of “covered moorage,” all of these boat owners will be in for a surprise.

City laws should be “construed to effect their purpose and courts should avoid unlikely, strained, or absurd results in arriving at an interpretation.” *Cherry v. Metro Seattle*, 116 Wn.2d 794, 802, 808 P.2d 746 (1991). To interpret the City’s Code to preclude owners from using a fabric boat cover that is not attached to a dock or pier would certainly be “strained” and “absurd.” Protective fabric canopies are common accessories for boats within commercial marinas. There is no meaningful basis to differentiate between a vessel with an attached tarp or canopy

moored at a boat slip in a marina from one using a floating lift with a similar canopy of the same type of material.

Third, even if the fabric canopies do transform the boat lifts into “covered moorage,” they are still not prohibited by the Code. For starters, BIMC § 16.12.180(B)(6) precludes covered moorage only in “[n]ew marinas and expansion areas in existing marinas.” Bainbridge Marina is not a “new marina[]” – it was approved pursuant to permits in 1982, and construction was completed in 1992. CP 4-5. Nor have the boat lifts been tied to boat slips in an “expansion area[]” of the Marina. The boat slips in which the canopied boat lifts are found were fully constructed by 1992, which was four years before Bainbridge Island adopted BIMC § 16.12.180(B)(6). In other words, the canopied boat lifts are not in a “[n]ew marina” or an “expansion area[] in [an] existing marina[.]” BIMC § 16.12.180(B)(6) is simply inapplicable.

In addition, BIMC § 16.12.340(D)(9) precludes “new boat houses and new covered moorage . . . *on* piers or docks.” (Emphasis added). Here, however, it is undisputed that the canopies are attached to the boat lifts and neither the canopy nor the boat lift is “on” the pier or the dock. While the boat lift is utilized in the boat slip and tied to the dock, it is not *on* the dock – rather, it is on the water. In contrast, boat houses and covered moorage constructed on piers and docks are large structures that

require shoreline substantial development permit review and approval – they are not merely accessory uses exempt from these requirements, like the boat lifts here.

When a statute or ordinance specifically designates the things or classes of things upon which it operates – here, “new boat houses and new covered moorage . . . on piers or docks” – an inference arises that all things or classes of things omitted from the ordinance were intentionally omitted. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999); *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). By limiting the Code to preclude “new boat houses and new covered moorage . . . *on* piers or docks,” the Code cannot also then preclude new covered moorage that is not actually on a pier or dock. Had the drafters of the Code so intended, they would have written BIMC § 16.12.340(D)(9) to prohibit new covered moorage on, attached to, or related to piers or docks.

The Examiner apparently concluded that the purpose of BIMC § 16.12.340(D)(9) would be circumvented if boat owners were allowed to “slide covered moorage inside a slip.” CP 30. However, this is not the context before this Court. The floating boat lifts within Bainbridge Marina have not been constructed or placed on the mooring fingers, and this has always been the case – they are within a boat slip. The fabric

canopy is not attached to the dock, but to the lift itself, which is simply a piece of common personal property, boating equipment.

In short, even if the canopied pontoon-style boat lifts fall within the definition of “covered moorage,” which they do not, they are still not prohibited by the Code because they (a) are not in a “new marina[]” or an “expansion area[] in [an] existing marina[]” (BIMC § 16.12.180(B)(6)), nor (b) are they “on” a dock or pier (BIMC § 16.12.340(D)(9)). The boat lifts are not on nor do they cover any of the components that make up the marina, including the floats, piles, mooring fingers, or walkways.

Finally, the Code’s focus is on the prohibition of covered moorage at “new marinas and expansion areas in existing marinas” (BIMC § 16.12.180(B)(6)), and “new boat houses and new covered moorage . . . on piers or docks” (BIMC § 16.12.340(D)(9)). The obvious intent is to address new construction, not prohibit existing practices or conditions. It is not reasonable to believe that when it enacted the Bainbridge Island Shoreline Master Program in 1996 and the prohibitions on covered moorage, the City Council, elected by a community of citizens who live on an island and own boats, envisioned precluding boat owners from using fabric canopies to protect their vessels.

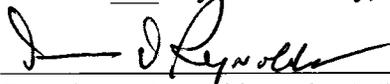
For sure, no intent is expressed in the City Code to regulate tenants’ use of boating equipment at a commercial marina or to otherwise

regulate boat owners. In this regard, the Code addresses actions of owners, developers, or operators of marine facilities, not their customers, but here the use the City finds offending is that of the customer. The novel interpretation of the Code currently offered by the City and applied to Bainbridge Marina's customers, which was upheld by the Examiner and the Superior Court, simply goes too far by construing legislatively enacted prohibitions on new structures to include boating equipment owned and used by third parties renting marina slips for their personal use.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's dismissal of Bainbridge Marina's Petition for Review and the Hearing Examiner's ruling that the canopies attached to the floating boat lifts constitute "covered moorage" prohibited by the Bainbridge Island Municipal Code.

RESPECTFULLY SUBMITTED this 17 day of February, 2009.

By 
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

Rod P. Kaseguma	<input type="checkbox"/> <i>Legal Messenger</i>
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DATED at Bainbridge Island, Washington, this 17th day of February, 2009.



Christy A. Reynolds
Legal Assistant