No. 38631-3

IN THE COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

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

REPLY BRIEF OF APPELLANTS

Dennis D. Reynolds
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax

Counsel for Appellants

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

A. The Interpretation of "Covered Moorage" is to be Reviewed De Novo and Without Deference to the City..... 1

B. The City Mischaracterizes the Examiner's Findings and Ignores the Context of the Matter Before the Court. 6

C. This Appeal is Not About Policies or "Impacts" to the Aquatic Environment Because No New Development is at Issue. However, Use of a Canopy on an Accessory Pontoon Style Free Floating Boat Lift Moored at a Commercial Marina is Consistent with Policies Found in the Shoreline Management Act and the Bainbridge Island Shoreline Master Program. 15

D. Should the City Prevail on Appeal, Attorneys' Fees Are Not Applicable in These Circumstances..... 21

III. CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Buechel v. State Department of Ecology,
125 Wn.2d 196, 884 P.2d 910 (1994) 18

Cockle v. Dep't of Labor and Indus.,
142 Wn.2d 801, 16 P.3d 583 (2001) 2

Cowiche Canyon Conservancy v Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992) 2

Dept. of Ecology v. Ballard Elks Lodge,
84 Wash.2d 551, 527 P.2d 1121 (1974) 19

HJS Dev., Inc. v. Pierce County,
148 Wn.2d 451, 61 P.3d 1141 (2003) 2

Holmes Harbor Water Co., Inc. v. Page,
8 Wn. App. 600, 508 P.2d 628 (1973) 5

Milestone Homes v. City of Bonney Lake,
145 Wn. App. 118, 186 P.3d 357 (2008) 3-4

Morin v. Johnson,
49 Wn.2d 275, 300 P.2d 569 (1956) 5

Mower v. King County,
130 Wn. App. 707, 125 P.3d 148 (2005) 23-24

Nisqually Delta Ass'n v. City of DuPont,
103 Wn.2d 720, 696 P.2d 1222 (1985) 17, 20

Peter Schroeder Architects v. City of Bellevue,
83 Wn. App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131
Wn.2d 1011 (1997) 3

Prekeges v. King County,
98 Wn. App. 275, 990 P.2d 405 (1999) 23

Sleasman v City of Lacey,
159 Wn.2d 639, 151 P. 3d 900 ..... 2-3, 5-6

West Coast, Inc. v. Snohomish County,
104 Wn. App. 735, 16 P.3d 30 (2000) 23

STATUTES

Code sections 15

Land Use Petition Act, RCW 36.70C.130(1)(b) 1

RCW 4.84.370 ..... 21-22, 24

RCW 4.84.370(1) 22-24

RCW 36.70C.020(1) 24

RCW 90.58.020 ..... 10, 17-19

RCW 90.58.030(2)(e) 19

RCW 90.58.140 19

RCW Chapter 24

RCW Chapter 4 24

RCW Chapter 36 24

OTHER AUTHORITIES

Notice of Inclusion under RGP No. 1 8

Shoreline Management Act. Response Brief, pp.22-32 14

WAC 173-26-176 (2) 18

WASHINGTON STATE BAR ASS'N REAL PROPERTY DESK BOOK at
93-7 5

I. INTRODUCTION

The City of Bainbridge Island's ("City") Response Brief overreaches in its advocacy, both in its legal argument and representations of fact. Specifically, the City's brief incorrectly maintains that its "interpretation" (actually legal argument) is deserving of deference; the brief mischaracterizes the course of proceedings, the context, and the Hearing Examiner's findings; and the brief wrongly suggests the City is entitled to attorneys' fees. Accordingly, this Court should overrule the Hearing Examiner's ruling affirmed by the Superior Court that the fabric canopies attached to the floating boat lifts constitute "new covered moorage" prohibited by the Bainbridge Island Municipal Code.

II. ARGUMENT

A. The Interpretation of "Covered Moorage" is to be Reviewed De Novo and Without Deference to the City.

Bainbridge Island asks this Court to establish a rule of presumptive validity of Staff interpretation of the City Code. No law supports this approach, nor should this Court accept the City's suggestion. The Land Use Petition Act, RCW 36.70C.130(1)(b), only allows for such deference that is "due the construction of the law" by a local jurisdiction with expertise. The City cannot demonstrate a preexisting policy of treating fabric canopies as "new covered moorage." Consequently, no deference is

due and this case of first impression should be reviewed *de novo*. *See HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

Bainbridge Island bears the burden of showing that its interpretation was a matter of preexisting policy entitled to deference. *Sleasman v City of Lacey*, 159 Wn.2d 639 at 647, 151 P. 3d 900 (200& (citing *Cowiche Canyon Conservancy v Bosley,* 118 Wn.2d 801 at 815, 828 P.2d 549 (1992)). The City has failed to meet its burden. In the instant case, the City had no preexisting policy of interpreting "covered moorage" to include fabric canopies attached to pontoon-style boat lifts. The City acknowledged as much at the hearing before the Examiner. Tr. 10, Tape 1 (8/30/07); see also Tr. 15, Tape 1 (8/30/07); CP 200, and in its Response Brief. In *Cowiche Canyon*, the Washington Supreme Court refused to give deference to an agency interpretation where it was applied in only "one or two instances in 14 years." *Cowiche Canyon*, 118 Wn.2d at 815.

Here, the absence of a preexisting policy is that much more dramatic – it is nonexistent. Consequently, the City's nonexistent enforcement policy did not provide Mr. McNabb or his marina business notice that a fabric canopy on a floating boat lift would be judged to be prohibited "covered moorage" under the Municipal Code subjecting him

to civil or criminal penalty for such use.[1] The record demonstrates that these devices are commonly used in commercial marinas. Tr. p.6 (Tape One) (8/30/07). If the City wants to change the status quo to outlaw them, instead of making the users criminals, it can amend the municipal code to prohibit these devices. However, it is improper for Bainbridge Island to threaten civil and criminal penalties by straining interpretation of the municipal code to compel property owners to abandon use of common these benign articles of personal boating equipment.[2]

The City cites to this Court's decision in *Milestone Homes v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008), for the proposition that courts should give weight to the contemporaneous construction of an ordinance by the official charged with its enforcement in a "doubtful case," even if one of first impression. The City's reliance upon this *dicta* is misplaced.[3] For one, this is not a doubtful case – the fabric canopies at issue cannot reasonably be construed as "new covered

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[1] The Washington Supreme Court has made it clear that "a nonexistent enforcement policy cannot provide notice" to the resident and, therefore, will not be given deference. *Sleasman v. City of Lacey*, 159 Wn.2d 639 at 647.

[2] How the City has acted in this matter involves serious questions of process which are not resolved by an "it is our law and we get to interpret it the way we want" approach. Due process standards require the City to interpret and enforce its codes as written, without adding new criteria on a case-by-case basis. *Peter Schroeder Architects v. City of Bellevue*, 83 Wn. App. 188, 920 P.2d 1216 (1996), *rev. denied*, 131 Wn.2d 1011 (1997).

[3] In its opinion in *Milestone Homes*, this Court was careful to point out that the ordinance in question was unambiguous and thus required no construction by an official. Thus, this Court's statement in *Milestone Homes* relied upon by the City is at most *dicta*.

moorage." Second, no deference is accorded an interpretation that is wrong, which is the case here. Third, the City's current position is in fact not one made by an official charged to make it, but rather argument by legal counsel. Finally, the context of this appeal is one of code enforcement with threatened civil and criminal penalties. The law relied upon by the City set out in the *Milestone Homes* case relates to processing and approval of land use applications, which is not the situation where liberty and property are at stake, as here.

The record demonstrates that before the Examiner City Staff viewed use all floating boat lifts (with or without canopies) as prohibited because they were an "expansion of existing marina facilities," and thus a prohibited "intensification of use." Tr. pp.14-15 (Tape One) (8/30/07). The Examiner rejected this proposition when determining the boat lifts were not "new development" but accessory uses which did not constitute an impermissible expansion of Appellants' marina. Examiner's Decision, Findings VIII and IX (REC 0657-0658). Thus, there is no true staff construction of the Code before the Court, only legal argument that a boatlift with a fabric canopy is somehow new "covered moorage."[4] The

[4] The City's position for this contention was established via a "clarification" issued pursuant to a motion for reconsideration filed by the City's legal counsel, not through staff testimony. On 1/22/08, the City filed a Motion for Reconsideration, seeking reversal of the Original Decision, and further seeking "clarification" that: (1) Covered boat lifts are not exempt from shoreline permitting and exemption requirements; (2) All accessory

City cannot merely "bootstrap a legal argument into the place of agency interpretation." *Id.; see also Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 900 (2007).

The City urges liberal construction of its shoreline use regulations, but these laws constitute a zoning code for the shorelines. WASHINGTON STATE BAR ASS'N REAL PROPERTY DESK BOOK at 93-7. Washington law requires that restrictions on the use of land in a code enforcement context be construed narrowly. *Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 604, 508 P.2d 628 (1973) ("Restrictions on the right to use land will not be extended to forbid any use not clearly expressed."). This rule was recently affirmed by the Washington State Supreme Court in *Sleasman v. City of Lacey*, *supra*, quoting from its 1956 decision in *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). While the City urges the State Supreme Court ruling in *Sleasman* be ignored, this approach is not faithful to the doctrine of supremacy established for the

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uses to marinas and public launches are not per se exempt from shoreline permitting; (3) Extensions or enlargements of marina piers, docks and slips must meet shoreline regulations; and (4) Only boatlifts located between slips in the Marina are exempt from shoreline regulation. In other words, boatlifts tied directly to the Marina main piers or dock, particularly on the outside of the two long piers and docks, and boatlifts tied to residential piers and docks are not exempt from shoreline regulations. City's Motion for Reconsideration at 3 (Ex.65, REC06663). On 1/23/08, the City filed a Supplement to its Motion for Reconsideration, contending for the first time that all "covered boatlifts" are prohibited by BIMC § 16.12.340(D)(9), whether necessary uses or not, the City claimed that the definition of "covered moorage" in the City Code includes boatlifts with a canopy (Ex.66, REC0669-0671). On 2/8/08, the Examiner issued a decision denying the City's Motion for Reconsideration (the "Decision"). Ex.68 (REC0682-0683). The

Washington judicial system. It is also inconsistent and in conflict with the rules of statutory construction for a code enforcement action, which do not allow liberal construction. *See Sleasman, supra.* Thus the City position should be rejected and this Court should review the question of "covered moorage" do novo without deference to the City's interpretation.

B. The City Mischaracterizes the Examiner's Findings and Ignores the Context of the Matter Before the Court.

The City mischaracterizes the Examiner's findings in presenting its version of the facts and/or ignores them in its legal argument. For example, the City states that the Examiner concluded that "the boat lifts become part of and *indistinguishable from the docks* to which they are attached," City of Bainbridge Island's Response Brief at 6 (emphasis added), to contend that these devices are "new covered moorage on a dock or pier." This statement is taken out of context and is not an accurate reflection of the Examiner's findings. More accurately, the boat lifts are not actually on the mooring fingers or dock; rather they float in the water and are tied to the dock. CP 16. The pictures in the record demonstrate this point. *See* Exhibit 2F (REC0010), Exhibit 2E (REC0010), and Exhibits 52 and 53 (REC0576-0578).

Examiner, however "clarified" his Original Decision, ruling that "covered boatlifts are prohibited," citing BIMC § 16.12.340(D)(9) and BIMC § 16.12.180(B)(6). REC0683.

The Examiner entered an unchallenged finding that the "lifts are not used as a separate structure. They are used as part of a slip, which is rented." REC 0656-57. The Examiner also found that the boat lifts are "*an accessory to the individual slip.*" CP 16. The Examiner entered further 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's reference to the floating boat lifts being "part of" and "indistinguishable from" the docks to which they are tied simply meant that they are "merged with the slips….," (REC 658), for purposes of assessing whether these devices are properly deemed accessory uses. When all of the Examiner's findings are considered and read together, it is clear that the lifts themselves are not piers or docks, nor "on" the existing piers, floats or docks, but a use within an already developed marina slip created by the marina's structural components.

The Examiner found that the boat lifts were not new "development" because they are "totally contained within the marina and within the original slips" already approved by the City. CP 16. The Examiner's rulings and findings on these points have not been appealed by either party and are verities. These finding cannot be used to argue that a boat lift with a canopy is actually part of a dock, pier or float or a new

obstruction characterized as "covered moorage." Truly new coverage moorage would be an obstruction or interference, but the boat lifts are not, as the Examiner correctly found. It is nonsensical to argue devices that are not new development or an obstruction cannot somehow be regulated by simply labeling them "new covered moorage."

Bainbridge Island does not inform this Court that it entered into an agreement with Appellants that compromises its contentions. Before the Examiner, Appellant and the City agreed that the owners of the boat lifts would seek inclusion of the devices under a Regional General Permit ("RGP") issued by the Army Corps of Engineers, No. RGP1, Exhibit 17; (REC0088-0089); Stipulation, Exhibit 59, paragraph 2.10, p.6 (REC0607). The RGP authorizes "watercraft lifts ***and canopies*** in certain ... marine/estuarine waters within the State of Washington...." (emphasis supplied). As set out in the record, issuance of a Notice of Inclusion under RGP No. 1 is perfunctory. McNabb, Tr. pp.9-10 (Tape Two) (8/30/07). Since federal approval allows canopies, the City's argument is precluded by its agreement with Appellants, unless for some reason a boat lift owner fails to attain coverage under the RGP. Even then, the lifts with canopies are not prohibited for the following reasons.

In their opening brief, Appellants made the fundamental argument that the pontoon-style boat lifts at issue, with a fabric cover or canopy, are

not by themselves "boat moorage." The City, in its response brief (at p.14), defines the term "boat moorage" as a place where a boat may be secured, made fast, or fixed in place and then contends that somehow the boatlift itself is the place of moorage, thereby constituting a new dock or moorage pier. But here, the canopy is attached to the floating boat lift, and the place where the boat lift is moored is the existing dock or float, which in Appellant's facility has no roof. In other words, the marina provides created boat moorage space but it is the dock or pier which actually constitutes the "boat moorage." If the docks had a roof to protect vessels, that would constitute "covered moorage" under the Bainbridge Island Municipal Code. However, that is not the context before the Court.

The thrust of the City Code as to boat houses and covered moorage is "new" boathouses and "new" covered moorage. BIMC § 16.12.340(D)(9). The ordinances also are directed towards "new marinas and expansion areas in existing marina...." BIMC §16.12.180(B)(6). There is no factual testimony in the record that there has been any expansion of Appellants' marina and the Examiner found no new development requiring a shoreline permit approval. The Examiner entered findings of fact (now verities on appeal) that the floating boat lifts are not "new substantial development."[5]

[5] The City correctly points out in its response brief, p.30, n.16, that Appellants concede that the boat lifts are a development. This concession was made in the context of a contention that the lifts were permissible accessory uses and thus not new development

The Examiner's findings undermine the City's contention that "new covered moorage" is before the Court.

In this instance, the Examiner found that the boat lifts with canopies are part and parcel of the marina development which was approved because it meets shoreline use policies for promoting recreational use and do not interfere with the normal public use of the waters of the state. *See* RCW 90.58.020; CP 16. Further, while the City urges that its use prohibition on new covered moorage apply to boat lifts with canopies because of visual impacts, the Examiner determined that these devices are accessory uses related to boating that "provide physical or visual access to [the waters of the state] to substantial numbers of the public." Finding No. VIII (REC 0657). It is nonsensical to preclude a use which provides visual access to members of the public because it can be seen at times within an approved commercial marina which moors boats with boating equipment.

Ignoring the Examiner's findings, the Superior Court construed the intent and purpose of the amendment to the Bainbridge Island Shoreline Master Program prohibiting new covered moorage or boat houses as demonstrating concerns with "visual barriers". CP 200-1. However, a "concern" cannot *ipso facto* be applied to every conceivable circumstance

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subject to further regulation under the City Code. The Examiner agreed with Appellants

or category to result in a prohibition. In other words, it is a starting point, not an ending point. Therefore, this Court should make further examination past any premature conclusion that a lift with a fabric canopy can be a visual impact. Otherwise, every floating device and piece of equipment within the marina are equally a visual impact, but potentially constitute a new boat usage or covered moorage.

The City Code addresses new "boat houses" or "covered moorage." Obviously, the term "boat house" and covered moorage encompass a structure. Both the Bainbridge Island 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 §§ 18.06.110 and 16.12.030(35). The floating pontoon-style boat lifts with canopies are not buildings or structures in any sense of these words. Common sense suggests that buildings are typically not covered with fabric. Adding a fabric canopy to a floating boat lift does not turn it into a "boat house," "covered moorage," or other such 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 City makes several leaps of logic that simply do not square with the plain language of the City Code. The canopies are devices –

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on this point.

personal property. They are easily dismantled. In order for a boat to exit the marina, the cover is taken off and laid on the dock or carried with the vessel while it sails. When the vessel returns, the cover is reinstalled. These circumstances are very different from construction and use of a permanent roof over slips and moorage floats to protect vessels, or constructed frame boat houses, or creation of new docks with a roof, and are more akin to tarpaulins.

Bainbridge Island places much emphasis on the fact that a cloth canopy could fall within a broad dictionary definition of a "roof." It is true that the term "roof" is broadly defined as "the top cover of anything." It is also correct that a broad definition of "roof" could include a canopy of "leaves." However, this Court must focus on the context, which is not a car roof, the top cover of "anything," a lean-to's canopy of leaves, or the like. The Code addresses new boat houses or new covered moorage. These terms have distinct meanings and understandings within the context of the use of marine waters of the state. One does not moor a lean-to or car.

As pointed out in its opening brief, the City excludes "vessels" from its definition of a "structure" under its shoreline use regulations. BIMC § 16.12.030(A)(176). Bainbridge Island urges that this is of no import, because a boat lift "is not a vessel." Response Brief, p.28 (n.14). The City misses the point. A boat lift is a piece of personal property for

vessel use, not a structure like a boat house or covered moorage placed over a dock. Since the City Council decided not to regulate vessels as structures, how is it reasonable to construe the Code to prohibit use of certain vessel equipment because City Staff somehow believe it is properly considered a "boat house" or "covered moorage?" With due respect, it is not. In fact, the exclusion of vessels from the definition of regulated structures under the Bainbridge Island SMP confirms this point.[6]

The City next contends that the prohibition of covered moorage "on" a dock applies, either because the slip is "indistinguishable" from the dock or the word "on" is not limited to "on top of." Once again, the context the City Council addressed via its prohibitions is new marina construction or expansion of an existing facility. There is no new construction at issue. As pointed out in the opening brief, specific regulations apply to docks but not to the slip. To apply generalized dictionary definitions to a specific context misses the forest because of the trees. Vessels do not moor "on" a dock. Under the City's view, vessels would be subject to regulations specific to a dock facility, *e.g.*, trash

[6] To the extent construction of the law is required, not simply its application, the goal is to determine 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 reasonable expectation and purpose as expressed in the ordinance or fairly to be inferred therefrom, of the ordinary person who sits in the municipal legislative body and enacts law for the welfare of the general public. 8 Law of Municipal Corporations, § 25.71 at 224.

receptacles, lighting standards, and fire safety requirement. This is nonsensical.

The City decries that if its interpretation is not upheld, a boat owner or tenant could "circumvent the law" by "sliding" a covered structure into a slip. Appellants do not agree. The Appellants' narrow position is that the articles of personal property and boating equipment before this Court are not a "new boat house" or "new covered moorage." A framed boat house with or without sides would be a structure which, if new, is prohibited by the City Code if "slid into a slip." However, one does not dismantle a boat house for each boating experience as must occur for the canopies in question.

According to the City, its position is supported by the "policies" of the City's Shoreline Master Program ("SMP") and the Shoreline Management Act. Response Brief, pp.22-32. The problem is that the City approved a commercial marina which included permission to use "boat lifts" (albeit not the type before this Court) because the facility is consistent with these policies, including policies as to views and protection of fish and the aquatic environment. Under the doctrine of finality, the City cannot collaterally attack this approval.

In this regard, the City backdoors the situation, attempting to apply policies for construction of new marinas (Response Brief, pp.24-25),

emphasizing those designed to consider views from "upland lots and public view corridors." There are no public view corridors applicable to Appellants' facility and no upland owners have complained about the lifts with cloth canopies. No Code provision is cited that each incremental accessory use is judged by policies for new construction. If there were, the Examiner found that floating boat lifts actually facilitate physical and visual access to the waters of the state, so use these devices is consistent with the polices of concern to Bainbridge Island.

C. This Appeal is Not About Policies or "Impacts" to the Aquatic Environment Because No New Development is at Issue. However, Use of a Canopy on an Accessory Pontoon Style Free Floating Boat Lift Moored at a Commercial Marina is Consistent with Policies Found in the Shoreline Management Act and the Bainbridge Island Shoreline Master Program.

The City argues that the boat lifts constitute an "expansion" area of Appellants' existing marina whether viewed separately or as part of the dock or slip. Response Brief, p. 18. The City used this argument before the Examiner to contend that Appellants were in violation of the City's use regulations and that its SMP and Shoreline Management Act ("SMA") policies for "new development" apply. The Examiner disagreed, however, holding that the boat lifts are normal accessory uses, part and parcel of the slips which have already been approved. Thus, there is no support in the record for the City's proposition. The City's reliance upon SMA and SMP

policies applicable to new development is off-base, because the cited Code sections apply only to "new development." *See* BIMC § 16.12.040(A).

Notwithstanding that a fabric cover dies not constitute new development, there is nothing in the record demonstrating that a boat lift with a canopy, on balance, has significant negative impacts to fish life or habitat or aesthetics. In fact, the Examiner found that use of the floating lifts resulted in "substantial environmental benefits." Finding No. IV (REC 0657). The City's witness, Mr. Machen, conceded that the floating boat lifts have environmental benefits which balance any perceived impacts, so there is no net increase of impacts. Tr. pp.11-12 (Tape One) (8/30/07).[7]

The environmental profile of a canopy on a boat lift is not materially different than compared to a vessel covered with a tarp. The record demonstrates that a boat with a tarpaulin has more shade impacts than a vessel on a covered boat lift with a canopy because of the "lift" accomplished by the device. McNabb testimony, Tr. pp.11-12 (Tape One) (8/30/07). A floating boat lift canopy only partially covers a boat, that is, there are no sides, so sun light angles through to the water. *Id.*

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[7] The Examiner entered no finding as to any negative impact of floating lifts, with or without a fabric cover, on aesthetics or the marine environment. The Examiner affirmatively held that floating boat lifts are accessory uses at a commercial marina with benefits to the aquatic environment. For instance, the lifts minimize use of chemicals to clean and protect a boat. Brachvogel testimony, TR, p.7 (Tape Two) (8/30/07).

A boat lift with a fabric canopy does not block the views across the interior of the marina unless the boat is moored on the lift. When moored, there are no sides to block views. The only possible "view blockage" is from a bird's vantage point. McNabb testimony, Tr. p.11 (Tape Two) (8/30/07). Thus, a lift with a canopy does not block the views across the marina any more than a vessel in a slip with a boat cover.

Any view impacts from outside the facility were factored in during approval of the shoreline permit for the development. While the City contends tarps are "wrapped tightly" on a boat, many boats moored in slips without a floating lift have tarp roofs on aluminum poles which Bainbridge Island does not contend is prohibited. A canopy used on a lift is a boat cover by design, made of the same materials as boat covers or "tarps." Users of the marina expect to see moored vessels, boat lifts, canopies, tarps and covers. There is nothing in the record which shows that customers, tenants and guests even care about boat lifts with canopies.

While SMA and SMP policies are not in play, the City's argument is not an accurate statement of the law. The SMA declares that it "is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020. According to this State's highest court, the SMA does not prohibit development of the state's shorelines, but calls instead for

"coordinated planning...recognizing and protecting private property rights consistent with the public interest." *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (emphasis added); *see also* RCW 90.58.020. The policy of the SMA as set forth in RCW 90.58.020 strikes a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shoreline. This balance is recognized by the Washington Supreme Court. *See Buechel v. State Department of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

There is an admitted policy of the SMA to "protect" the valuable and fragile shorelines of the state, RCW 90.58.020, but this is not the "primary policy behind the SMA." As set out above, the courts have stated many times that the SMA balances use and development of the shorelines of the state with protection of the aquatic environment. The interpretive guidelines for amendment of shoreline master programs likewise set out the policies of the SMA to balance use and development and protection of the shorelines. *See* WAC 173-26-176 (2) ("The prohibition of all use of the shorelines also could eliminate their human utility and value...The act's policy of achieving both shoreline utilization and protection is reflected in the provision that 'permitted uses in the shorelines of the state shall be designed and conducted in manner to

minimize in so far as practical, any resultant damage to the ecology and environment and the public's use of the water.' ")

The courts have recognized that if the sole purpose of the SMA were to preserve shorelines in their natural state, to the exclusion of all development and modification, there would be no purpose in devoting a whole chapter of the Washington Administrative Code to discussion of permit issuance for development of shorelines of the state, and the permitting scheme set up under the SMA would be superfluous. *See* RCW 90.58.140; *see also Dept. of Ecology v. Ballard Elks Lodge*, 84 Wash.2d 551, 557, 527 P.2d 1121 (1974).

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development or continued use, repair and maintenance of existing structures or developments: "***Alterations*** of the natural conditions of the shorelines and shorelands ***shall be*** recognized by the department." RCW 90.58.020. (Emphasis supplied.) The counterbalance to this shoreline development is the requirement that "[p]ermitted uses in the shorelines of the state...be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area..." RCW 90.58.020. One "preferred use" of the shoreline is a "marina" because it fosters recreational use of the waters of the state.

While it is true that the Eagle Harbor shoreline is a shoreline of statewide significance, so are all Puget Sound shorelines. *See* RCW 90.58.030(2)(e). In this regard, the SMA does not elevate the preservation of undeveloped shorelines above all other SMA goals and policies without adequate justification or basis, even on shorelines of state-wide significance. This point was emphasized by the Supreme Court in *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985), wherein the Court stated:

> Designation of a shoreline as of "state-wide significance" does not prevent all development. That designation provides greater procedural safeguards, but permits limited alteration of the natural shorelines, with priority given to "residences, ports, ***shoreline recreational uses*** including . . . industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state...

(emphasis supplied). Thus, under the SMA and cases construing its policies, designating a shoreline as being of state-wide significance only "provides greater procedural safeguards;" it does not prohibit "limited alteration of the natural shorelines" for reasonable and appropriate shoreline uses, especially the preferred water-dependent uses such as marinas. *Nisqually Delta Ass'n v. City of DuPont*, *supra,* at 726. The accessory boat lifts with a canopy are consistent with the SMA and the

SMP, and their policies for allowance of water dependent recreational and commercial uses.

D. Should the City Prevail on Appeal, Attorneys' Fees Are Not Applicable in These Circumstances.

Bainbridge Island fails to meet a number of the criteria under RCW 4.84.370 and, therefore, is not entitled to attorney fees under the statute.

To begin with, the City mischaracterizes the record when it states that "the City determined that Appellants' property contained a number of Code violations or unpermitted activities." Response Brief, p.3. While the City expressed "enforcement concerns," and the Director of Planning and Community Development upheld some of those, in the appeal to the Examiner none of consequence survived except use of boat lifts with fabric canopies. As the record indicates, the City entered into a stipulation which resolved all of the alleged "violations" prior to hearing, in Appellants favor, with the exception of the City's treatment of pontoon-style boat lifts. Stipulation, Exhibit 60, REC 0602-0644.[8] On this point,

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[8] The City's Notice of Violation to Bainbridge Island Marina and its President, Darrell McNabb, alleged 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; (3) use of an "unpermitted" covered boathouse, three "covered" boat lifts, and multiple pontoon-style boat lifts not legally established; and (4) illegal configuration of the marina. Exhibit 5, REC 0019-020. The City imposed enforcement fees at $180.00 per hour, and threatened civil penalties, permit revocation, criminal proceedings and an injunction for non-compliance with its directives. *Id.* None of the four allegations were

the Examiner concurred, over the City's objections, that the boat lifts were legally permissible accessory uses. On a motion to reconsider, via a "clarification," the Examiner agreed with the City that the lifts which used a fabric-type canopy were prohibited "new covered moorage." On that single sub-issue alone did the City "prevail" before the Examiner.

Thus, it is disingenuous for the City to suggest that it is entitled to attorneys' fees as it was the "prevailing or substantially prevailing party" before the Examiner, within the meaning of RCW 4.84.370. In these circumstances, allowing the City its attorney's fees it would punish a property owner who was successful on all but one issue before the Examiner, and award the City for its overzealous enforcement action.

Without regard to the course of proceedings, for other reasons, the City overreaches once again when it suggests that it is entitled to attorneys' fees under RCW 4.84.370, should it prevail before the Court of Appeals. RCW 4.84.370(1) provides:

> Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city or town to *issue, condition, or deny a development permit* involving a site-specific rezone,

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resolved in the City's favor before the Examiner except the three "covered" boat lifts. Appellants did agree to voluntarily move some material already stored on the property to a different location on the parcel and remove some tools. The City agreed that the marina met all conditions of approvals issued by agencies with jurisdiction, including the configuration of the marina. *See* Exhibit 60, REC 0602-0644.

> zoning, plat, condition use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision…

(Emphasis added). To begin with, RCW 4.84.370(1) makes clear that attorneys' fees are available to the prevailing party in the context of a permitting process, not for code enforcement as we have in the instant case. *Prekeges v. King County*, 98 Wn. App. 275, 990 P.2d 405 (1999) (application for conditional use permit); *West Coast, Inc. v. Snohomish County*, 104 Wn. App. 735, 16 P.3d 30 (2000) (developer's application requesting modification of preliminary plat approval). A permitting process reflects a municipality's decision to approve or deny a development proposal. Alternatively, code enforcement speaks to the City's ability to change the status quo, that is, to prohibit what already exists.

Moreover, code enforcement is not considered a "similar land use approval or decision," as allowed for under the attorneys' fees statute. RCW 4.84.370(1). The attorneys' fee statute discloses the types of development permits that are covered by the statute, including site-specific rezone, zoning, plat, condition use, variance, shoreline permit, building permit, site plan, or *similar land use approval or decision*. RCW 4.84.370(1) (emphasis added). As the City impliedly concedes, the instant case does not correspond with any of the explicitly authorized types of development permits. City of Bainbridge Island's Response Brief at 38-39.

The City's reference to *Mower v. King County*, 130 Wn. App. 707, 721, 125 P.3d 148 (2005) is misguided. *Mower* involved a property developer who was granted preliminary plat approval for a proposed development and was held to be in violation of the associated environmental regulations. *Mower*, 130 Wn. App. at 711. The County's action was in the context of the plat's development permitting process. *Id.*

Here, the City's actions amount to code enforcement. Independent of a permit application by McNabb, in March 2006, the City served on Appellants a Letter of Violation alleging, among other things, that the pontoon-style boat lifts and attached fabric canopies were not legally established. CP 6. The City, through code enforcement, sought to change the status quo of the marina. Accordingly, the City is not eligible for attorneys' fees under RCW 4.84.370(1).

The City goes too far once again by lifting the definition of "land use decision" from RCW 36.70C.020(1) and applying it to the criteria listed in RCW 4.84.370(1). If the attorneys' fees statute at hand, RCW 4.84.370, had wanted to use the same definition of "land use decision" as another RCW Chapter, it would have either incorporated the definition or made reference to the definition in the statute. There is no evidence, nor reason to believe that the Legislature intended to use the definition of "land use decision" from RCW Chapter 36, and apply that definition to

RCW Chapter 4. The City manufacturers an artificial connection between the two statutes. Should the City happen to prevail on appeal, the City is not entitled to an award of attorneys' fees under RCW 4.84.370.

III. 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 22nd day of May, 2009.

By _____

Dennis D. Reynolds, WSBA #04762
DENNIS D. REYNOLDS LAW OFFICE
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110
(206) 780-6777 Phone
(206) 780-6865 Fax
E-mail: dennis@ddrlaw.com
Counsel for Appellants

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 Rosemary A. Larson Inslee Best Doezie & Ryder, PS 777 – 108th Avenue NE P.O. Box 90016 Bellevue, WA 98009-9016 (425) 455-1234, tel / (425) 635-7720, fax *Attorney for Respondent City of Bainbridge Island*	☐ *Legal Messenger* ☐ *Hand Delivered* ☐ *Facsimile* ☑ *First Class Mail* ☐ *UPS, Next Day Air* ☐ *Email*

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DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

DATED at Bainbridge Island, Washington, this 22nd day of May, 2009.

Joy K. Lawrence
Paralegal