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DIVISION II

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STATE OF WASHINGTON
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No. 38631-3-II

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 MCNABB, husband and wife,

Appellants,

vs.

CITY OF BAINBRIDGE ISLAND,

Respondent.

CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF

INSLEE, BEST, DOEZIE & RYDER, P.S.
Rod P. Kaseguma, WSBA # 6622
Rosemary A. Larson, WSBA # 18084
Attorneys for City of Bainbridge Island
777 - 108th Avenue N.E., Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
Telephone: (425) 455-1234
Fax: (425) 635-7720

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I. NATURE OF THE CASE

This appeal arises out of the City's code enforcement action against Appellant, who operates a commercial marina in the City. The City's Shoreline Master Program prohibits "covered moorage" on piers and docks, and also states that expansion areas in existing marinas shall not have covered moorage. *BIMC 16.12.340D.9; BIMC 16.12.180B.6*. The Master Program defines "covered moorage" as "boat moorage, with or without walls, that has a roof to protect a vessel or vessels." *BIMC 16.12.030A.48*. The City issued a Notice of Violation to Appellant, based in part on the City's determination that twelve-foot tall canopy-covered boat lifts attached to the marina's docks are prohibited "covered moorage." When Appellant appealed the City's decision to the Hearing Examiner, the Examiner upheld the City's determination on this violation. Likewise, when Appellant appealed to Superior Court, the Court upheld the City and the Examiner.

The City, the Examiner, and the Superior Court are correct. Under the plain meaning of the City's Shoreline Master Program, the canopied boat lifts are prohibited "covered moorage." Even if the Master Program is deemed ambiguous on this point, principles of ordinance interpretation support the City's, Examiner's, and Superior Court's conclusion that the canopied boat lifts are prohibited covered moorage. The City's and the Examiner's interpretation of the Master Program is consistent with the Master Program's

purpose to protect the shoreline, gives effect to all language used in the pertinent Master Program provisions, and avoids the unreasonable result that the covered moorage prohibition is circumvented simply by attaching a covered boat lift to a dock. Accordingly, the Court should affirm the Hearing Examiner and the Superior Court.

II. STATEMENT OF ISSUES

1. Whether Appellants met their burden under RCW 36.70C.130(1)(b) to prove that the Hearing Examiner's decision, that covered boatlifts are prohibited by BIMC 16.12.180B.6 and BIMC 16.12.340D.9, is an erroneous interpretation of the law, after allowing for such deference as is due the construction of an ordinance by the City?
2. Whether Appellants met their burden under RCW 36.70C.130(1)(d) to prove that the Hearing Examiner's decision, that covered boatlifts are prohibited by BIMC 16.12.180B.6 and BIMC 16.12.340D.9, is a clearly erroneous application of law to the facts?

III. STATEMENT OF THE CASE

A. Description of the Appellant's Property.

The City consists of the entire Bainbridge Island, located in Central Puget Sound. Appellant's property is on the shoreline of Eagle Harbor in the City, at 4200 Eagle Harbor Drive, Bainbridge Island ("Appellant's Property"). CP 4; REC 0284. Appellant's Property is developed with a commercial marina and boat yard, which includes a 4,400 square foot shop and office building, a 900 square foot office building, and associated storage and

parking. REC 231.

When Appellant's Property was first developed, the Property was in unincorporated Kitsap County. In 1981, Kitsap County granted Appellant permits authorizing the site's development with a commercial marina, including a Shoreline Substantial Development Permit, an Unclassified Public Use Permit, and a Conditional Use Permit. CP 4; REC 0094-131. Appellant completed construction of the marina facilities approved under those permits in the early 1990's. REC 0096.

In 1992, the City annexed the entire territory of Bainbridge Island, and assumed jurisdiction over Appellant's Property.¹

B. The City Determined that Appellant's Property Contained a Number of Code Violations or Unpermitted Activities.

In Washington, the regulation of shoreline use and development is multi-tiered: (1) the Shoreline Management Act, Chapter 90.58 RCW ("SMA"); (2) regulations adopted and administered by the Department of Ecology to implement the SMA; and (3) "shoreline master programs" adopted by each local jurisdiction pursuant to the SMA and implementing regulations. The City has adopted its Shoreline Master Program ("SMP"), which is codified at Chapter 16.12 BIMC.

In 2004, Appellant was interested in expanding and altering the commercial marina on the Property. As part of the City's review of

¹ Appellant has stated that in 1992, the City inspected Appellant's Property, and determined that it was in compliance with the pertinent shoreline regulations at that time. REC 0473 (App. Hearing Brief, p. 4).

Appellant's Property for Appellant's proposal, the City determined that a number of violations of the City's SMP existed on the Property. TR 3-4 (09/28/06 Tape 1).

On January 4, 2005, the City and Appellant attended a pre-application conference regarding the proposed marina expansion and other activities on the site. REC 231; TR 3-4 (09/28/06 Tape 1). The same day, the City sent Appellant a letter stating that a number of code violations or activities that were not included in the prior permits existed on the Property, including outdoor storage in a residentially-zoned area, residential use of a recreational vehicle, reconfiguration of the marina's docks, a boat-house style float, and the addition of multiple boat lifts, both covered and uncovered. REC 0013.

Appellant met with City staff to discuss the violations listed in the City's letter, and agreed to bring the Property into compliance. REC 0016-7. When Appellant did not, the City issued a Notice of Violation regarding the same violations, including the covered and uncovered boat lifts. REC 0019-20. Appellant requested that the City's Director of Planning and Community Development review the Notice of Violation. REC 0033-4, 0042-5. After reviewing the Notice and materials provided by Appellant, the Director noted that Appellant had removed the recreational vehicle from the Property and documented that a previously-issued permit authorized the "boat-house style float." REC 0137, 0165. On July 27, 2006, the Director sustained the Notice

of Violation as to the other items, including the requirement that the covered and uncovered boat lifts be removed. REC 0164-5.

C. The Hearing Examiner Determines that the City's Shoreline Master Program Prohibits the Covered Boat Lifts.

Appellant appealed the Director's decision to the Hearing Examiner. REC 0167-79. After the first day of the hearing, the parties stayed the proceedings to discuss a resolution of the matter. TR 1-4 (10/04/06). In August 2007, the parties entered a Stipulation, which resolved most of the issues raised in the Notice of Violation. REC 0602-11. Only the issues concerning the covered and uncovered boat lifts remained. REC 0607 (Stipulation, p. 6, ¶ 2.11).

On August 30, 2007, the Hearing Examiner held the continued hearing on the remaining issues relating to the covered and uncovered boat lifts. The boat lifts at the Appellant's marina are pontoon-style boat lifts, which are attached to the marina's docks. TR 24 (9/28/06). The boat lifts fit within the docks' boat slips. The boat lifts vary in size, but generally they have dimensions similar to or larger than the boats that they support. TR 10 (8/30/07 Tape 2); see REC 0010. Appellant indicated that although the boat lifts are not larger than the slips, the slips can be up to 60 feet, and gave an example of a 23-foot long lift for a smaller boat. TR 10 (8/30/07 Tape 2).

The boat lift covers are made of dark, opaque fabric or vinyl, and are supported by metal poles attached to the corners of the boat lifts. *Id.*; TR 13

(8/30/07 Tape 1); REC 0010 (Ex. 2E, Photograph of covered boatlifts). The canopy covers have a peaked or pitched roof shape. *Id.* The canopies cover at least the same dimensions as the boat lift. *Id.*

The boat lifts float on the water. Water is pumped into the pontoons, causing the lifts to sink so that a boat may be driven onto the lift. TR 25 (9/28/06). When the boat is in place, water is discharged from the pontoons, and the lift holding the boat rises two to three feet above the surface of the water. *Id.*; TR 6 (8/30/07 Tape 2). The boat is then stored suspended above the water. TR 25 (9/28/06). When the boat lift is in use, the top of the canopy roof is approximately twelve to fifteen feet above the water's surface. TR 12 (8/30/07 Tape 1)(City Planner testifies boat lift covers are 15 to 20 feet off the water); TR 11 (8/30/07 Tape 2)(Appellant testifies that covered boat lifts are 12 feet off water).

The covered boat lifts remain in fixed locations in Appellant's marina; they do not move in and out of the marina. TR 25 (9/28/06).

Upon conclusion of the hearing, the Hearing Examiner entered a decision dated January 3, 2008. REC 0655-59. The Examiner entered a number of findings of facts regarding the boat lifts, finding that when the boat lifts are attached to the mooring slips, the boat slips become part of and indistinguishable from the docks to which they are attached:

The testimony seemingly indicates that these pontoon style

boatlifts are used to store the boats above water. The pontoons are filled with water, so that they are water level. The boat is driven up on to the lift, then the water is let out of the pontoon and the boat is lifted out of the water and remains out of the water until the owner wishes to use the boat again. ...

... The lifts are not used as a separate structure. They are used as part of the slip, which is rented. They are attached to the slip and surrounded on three sides by the slip. The rear section opens for the boat to pull up on to the lift.

VI.

When the boats leave the mooring slips, the lifts remain. The boat lifts never leave the mooring slips except for repair or for permanent removal at the end of the lease. Therefore, they do not interfere with normal public use and enjoyment of the water's overlaying lands subject to the SMA. ...

... The marina's original application has previously undergone a significant regulatory review and approval process for the commercial marina and within the approval was the use of "boat lifts." The specific type of boat lifts, which are currently being used, were not contemplated at the time of the original approval process, but boat lifts as a category of the above items were seemingly approved. These boatlifts have, as the City has stated, become part of and are indistinguishable from the docks to which they are tied. They are merged with the slips. ...

REC 0656-8.² The Examiner then concluded that the boat lifts in this case "have become part of and are basically indistinguishable from the slips to which they are tied and which have been previously approved. REC 0658.

² Appellant states that the Examiner entered findings that the boat lifts are part of the slip, not the dock. Appellant's Opening Brief ("App. Brief"), p. 17. This is not accurate. To the extent relevant, the Examiner entered a finding that the "boat lifts have, as the City has stated, become part of and are indistinguishable from the docks to which they are tied." REC 0658. At the hearing, Appellant's counsel recognized that when the boat lifts are used, "the

The Examiner held that the boat lifts in this case are an accessory use to the primary use which was previously permitted, and therefore did not require a separate permit or permit exemption. REC 0659.

Because the Hearing Examiner's decision did not address whether the City's Master Program prohibits covered boat lifts, the City moved for reconsideration and clarification.³ REC 0661-71. The Examiner agreed that his original decision had not addressed covered boat lifts, and ruled:

Bainbridge Island Municipal Code 16.12.180(b)(6) provides in pertinent part:

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

It is my belief that that provision clearly prohibits covered boatlifts, and I should have said so. It is also my belief that the intent of the Bainbridge Island Municipal Code 16.12.340(D)(9) is to prohibit covered boatlifts. The language addresses a prohibition against covered structures which exist on piers and 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. The intent of the Code is to prohibit covered moorage. It is very clearly stated. ...

REC 0691.⁴

D. The Superior Court Affirms the Examiner's Decision that the City's Shoreline Master Program Prohibits Covered Boat Lifts.

boats are still moored in the marina at the floats that were approved. Are they not?" TR 2 (8/30/07 Tape 2).

³ Appellant states that on reconsideration, the City argued for the first time that covered boat lifts are prohibited by BIMC 16.12.340D.9. App. Brief, p. 10. Again, this is not accurate. The City has always taken the position that the boat lifts are "covered moorage," prohibited by the SMP. See REC 0233-4 (Staff Report); TR 14-5 (8/30/07 Tape 1).

⁴ Together, the Hearing Examiner's January 3, 2008 decision and the Examiner's decision on reconsideration are referred to as "the Examiners' Decision."

Appellant appealed the Examiner's Decision to Superior Court under the Land Use Petition Act, challenging the Examiner's determination that the City's Shoreline Master Program prohibits covered boat lifts. The Superior Court affirmed the Examiner's Decision. The Superior Court stated the issue as "whether a two-sided sloped canopy on a pontoon-style boatlift is a 'covered moorage' that is prohibited pursuant to [BIMC] §§ 16.12.180(B)(6) and 16.12.340(D)(9)." CP 198. The Superior Court held:

At oral argument, the City took the position that, when read together, BIMC § 16.12.180(B)(6), § 16.12.030(48), and § 16.12.340(D)(9) clearly evince an intention to codify a prohibition of all "roofs," a policy which has consistently been interpreted by the City to include canopies. With reference to "covered moorage," the City places particular emphasis on the "with or without walls" language of § 16.12.030(48).

Reading the language of § 16.12.030(48) for its plain meaning, the Court finds that the use of the word "roof" in the defining "covered moorage" to be compelling evidence that the City contemplated the prohibition of any structure, with or without walls, which would constitute a visual barrier. Moreover, the Hearings Examiner's decision in favor of the City on the question of "covered moorage" was not erroneous even assuming no deference is owed to the City's interpretation of its own ordinance. ... Like the Hearings Examiner Pro Tem, this Court concludes that § 16.12.180(B)(6) is intended to prohibit, and clearly does prohibit, covered boatlifts.

CP 200-1.

Appellant moved for reconsideration. The Superior Court denied Appellant's motion, stating:

The Petitioner's argument appears to relate to the sentence at page

3, line 22 of the decision where the word "structure" is used. To clarify the Court's decision, the cloth canopies at issue here constitute "covered moorage" under BIMC § 16.12.030(48) which is prohibited under § 16.12.340(D)(9) as new covered moorage, not as a structure.

CP 211.

Appellant now appeals to this Court.

IV. AUTHORITY AND ARGUMENT

A. Standard of Review.

This matter is an appeal of a land use decision pursuant to the Land Use Petition Act, Chapter 36.70C RCW ("LUPA"). Under LUPA, the Court reviews the land use decision on the basis of the administrative record. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn.App. 118, 125, 186 P.3d 357 (2008). The Court may grant requested relief only if the party seeking the relief carries the burden of establishing that:

(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;

...

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

RCW 36.70C.130(1).⁵ Thus, Appellant bears the burden in this appeal to establish that the Examiner's Decision violates subparagraph (b) or (d) above.

RCW 36.70C.130(1)(b) presents a question of law that the Court

⁵ Appellant only alleges that the Examiner's Decision violates subparagraphs (b) and (d) of RCW 36.70C.130(1). *App. Brief, p. 13-4.*

reviews de novo. *Pinecrest Homeowners Ass'n. v. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). However, considerable judicial deference must be given to the construction of an ordinance by the officials charged with its enforcement. *Milestone Homes v. City of Bonney Lake*, 145 Wn.App. at 127 ("[i]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the official charged with its enforcement").⁶ Here, the City's and the Examiner's interpretation of the City code is entitled to deference.

Regarding RCW 36.70C.130(1)(d), under the "clearly erroneous" standard, a reviewing court may overturn a determination only when the court, on the entire record, is left with the definite and firm conviction that a mistake has been made. *King County v. Wash. St. Boundary Rev. Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1993); *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). In making such an assessment, the court defers to factual determinations of the highest forum below that exercised fact-finding authority (here, the Hearing Examiner). *Cingular Wireless LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

Here, Appellant cannot establish that the Examiner's Decision violates

⁶ See also *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 377-78, 739 P.2d 668 (1987); *Neighbors of Black Nugget Road v. King County*, 88 Wn.App. 773, 778, 946 P.2d 1188

the standards of RCW 36.70C.130(1)(b) or (d); the Superior Court properly affirmed the Examiner.

B. The City, the Hearing Examiner, and the Superior Court Properly Determined that the Boat Lifts with Roof Canopies Are Prohibited by the City's Shoreline Master Program.

1. The Shoreline Master Program Unambiguously Prohibits the Boat Lifts with Roof Canopies.

A court's objective in construing a legislative enactment is to determine the legislative intent. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). If the statute's or ordinance's meaning is plain on its face, then the court gives effect to that plain meaning as an expression of legislative intent. *Id.*; *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (Feb. 8, 2007)("An unambiguous ordinance will be applied by its plain meaning, ... while only ambiguous ordinances will be construed").

The plain meaning of a statute or ordinance:

is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."

Udall, 159 Wn.2d at 909; *Griffin v. Thurston County Board of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008)("We may also discern plain meaning [of an ordinance] from related provisions and the statutory scheme as a whole").
When terms are defined in the pertinent legislation, that definition controls.

(1997), *rev. denied* 135 Wn.2d 1003, 959 P.2d 126 (1998)(Courts give considerable deference to enforcing agency's interpretation of ordinance).

If a term is not defined in the statute, then it is appropriate to review dictionary definitions to discern the "plain meaning" of the terms. *Hazelwood v. Bremerton Ice Arena*, 137 Wn.App. 872, 882, 155 P.3d 952 (2007)("Legislative definitions set forth in the statute control, but absent a statutory definition, we may give a term its plain meaning by reference to a standard dictionary").⁷

Here, the City's Shoreline Master Program is unambiguous: boat lifts with roof canopies are prohibited "covered moorage." The SMP states:

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 16.12.340D.9. In addition:

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

BIMC 16.12.180B.6.⁸

"Covered moorage" is a defined term in the City's SMP:

⁷ See also *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *Sleasman v. City of Lacey*, 159 Wn.2d at 643-4 (Court looks to dictionary definition to determine whether land is "developed" as term is used in city ordinance); *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d at 57 (Court relies on dictionary to determine unambiguous meaning of ordinance).

⁸ The City code defines the term "marina" to mean "a commercial or public facility with the primary purpose of providing moorage for six or more vessels, which consists of a system of piers, buoys, or floats. *BIMC 16.12.030A.104*. There is no question that Appellant's Property contains a marina. It is undisputed that Appellant's facility is a "commercial facility" with "moorage for six or more vessels," and "consists of a system of piers ... or floats." See App. Brief, p. 16.

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

BIMC 16.12.030A.48.

The City's SMP does not define "boat moorage" or "moorage." Dictionaries define "moorage" as "a place where a ship may be moored," and "moor" as "to secure or make fast (a vessel or aircraft) by means of cables, anchors, or other contrivances. 2. to fix in place, secure." *American Heritage Dictionary of the English Language* (1981); see *Webster's New Collegiate Dictionary* (Ninth Ed. 1989)(defines "moorage" as a "place to moor," and "moor" as "to secure a boat by cables, lines or anchors"). Thus, "boat moorage" means a place where a boat may be secured, made fast, or fixed in place.

Likewise, the term "roof" is not defined in the SMP. The dictionary defines "roof" as:

1. The exterior surface and its supporting structures on the top of a building.
2. **The top covering of anything:** *the roof of a car.*
3. a. A vaulted inner structure: the roof of the mouth. b. The highest point; summit: the roof of the world. ...

American Heritage Dictionary (1981)(emphasis added; italics in original); *Webster's New Collegiate Dictionary* (Ninth Ed. 1989)(definition of "roof" includes "the cover of a building," "(1) the highest point : SUMMIT (2) : CEILING," "something resembling a roof in form or function," and "to provide (a roof) with a protective exterior").

Under these definitions, the term "covered moorage" in the City's SMP plainly includes a dock with an attached, canopy-covered boat lift. The boat lifts are places where boats and vessels may be moored (secured in place by lines, cables or other contrivances). The boat lifts are secured to the dock or boat slip by cables, lines or other means. The boat lifts become part of, indistinguishable from, and merged with the docks to which they are secured. REC 0658.⁹ Even Appellant recognizes that when the boat lifts are used, the boats are moored at the floats to which the lift is attached. TR 2 (8/30/07 Tape 2). Regardless of whether the boat lifts are viewed separately or as part of the dock or slip, they meet the definition of "boat moorage."

The aluminum poles and canopies on the boat lifts constitute a "roof;" they are the top covering of the boat lift, and they provide protection for the boat lift and any vessel secured to the boat lift. The boat lift does not have walls, but under BIMC 16.12.030A.48, "covered moorage" is boat moorage "with or without walls." Nothing in the definition of "roof," or of "covered moorage," prevents a roof from being constructed of fabric or vinyl. Again, regardless of whether the covered boat lifts are viewed separately or as part of the dock or slip, they are "covered moorage" under BIMC 16.12.030A.48, which is prohibited under BIMC 16.12.340D.9 and BIMC 16.12.180B.6.

⁹ Appellant did not challenge the Hearing Examiner's findings on this point. As noted by Appellant, unchallenged factual findings are verities on appeal. *In re Contested Election of Schoessler*, 140 Wn.2d 368, 365, 998 P.2d 818 (2000).

Appellant alleges that "covered moorage" must consist of a long pier or dock, with a single roof extending over moorage locations for multiple boats. App. Brief, p. 21. But the SMP definition of "covered moorage" is not so limited; the definition clearly contemplates that "covered moorage" may provide moorage for a single boat. *BIMC 16.12.030A.48* (defines "covered moorage" as "moorage, with or without walls, that has a roof to protect a vessel or vessels")(emph. added). Appellant cites to Department of Natural Resources regulations that contain a definition of "covered moorage," but the City did not use that definition in its SMP. App. Brief, p. 21, citing WAC 332-30-106(11). The pertinent issue is not whether the boat lifts meet the DNR definition in Chapter 332-30 WAC, but whether the boat lifts meet the SMP's definition of covered moorage in BIMC 16.12.030A.48.

Appellant argues that a fabric canopy on a boat lift is not the equivalent of a "roof" because a boat lift is not a building. App. Brief, p. 21-22, citing Merriam-Webster Online Dictionary (www.merriam-webster.com/dictionary/roof). However, even Appellant's cited online dictionary provides a broader definition for "roof." That source actually defines "roof" as:

1 a. (1): the cover of a building (2): material used for a roof : ROOFING **b:** the roof of a dwelling conventionally designating the home itself <didn't have a *roof* over my head> <they share the same *roof*> **2 a:** the highest point : SUMMIT **b:** an upper limit : CEILING **3 a:** the vaulted upper boundary of the mouth **b:** a covering structure of any of various parts of the body <*roof* of the skull> **4:** something suggesting a roof: as **a:** a canopy of leaves and

branches **b**: the top over the passenger section of a vehicle.

Merriam-Webster Online Dict. (www.merriam-webster.com/dictionary/roof) (last viewed 03/18/09). Thus, even based on Appellant's source, a "roof" is not limited to a cover for a "building." In fact, at the hearing before the Hearing Examiner, Appellant's counsel referred to a boat lift canopy as a "roof." TR 6 (8/30/07 Tape 2).

Appellant alleges that even if the boat lifts in this case are "covered moorage," they do not violate BIMC 16.12.340D.9 ("new covered moorage shall not be permitted on piers or docks"), because the boat lifts are not "on" Appellant's docks. App. Brief, p. 23-4. Appellant reads BIMC 16.12.340D.9 too restrictively, in contradiction to the plain meaning of that provision. Appellant would limit the term "on" in that section to mean "on top of." However, the word "on" has a broader meaning:

1. Used to indicate: a. Position upon and above the surface of; position in contact with and supported by the surface of: The vase is on the table. b. **Contact with any surface, regardless of position:** a picture on the wall. c. **Location at or along:** a house on the beach. d. **Proximity:** a town on the border. e. **Attachment to** or suspension from: beads on a string. ...

American Heritage Dictionary (1981)(emphasis added; italics in original);
Webster's New Collegiate Dictionary (Ninth Ed. 1989)(definitions of "on" include "used as a function word to indicate a position in contact or juxtaposition with (a fly [on] the ceiling) ... used as a function word to

indicate a part (as of the body) that supports and is in contact with something underneath ... used as a function word to indicate connection, association or activity with or regard to ...").

Here, the boat lifts are attached to, in contact with, located at, and used in connection with the docks in Appellant's marina. Under the plain, ordinary meaning of the word "on," the boat lifts are "on" the docks or floats. Put another way, the boat lifts are attached to and used in connection with moorage provided by docks, and provide the "roof" or top covering for that moorage. The SMP is not ambiguous; boat lifts with canopy roofs are covered moorage on a pier or dock, prohibited by BIMC 16.12.340D.9.

Appellant also alleges that even if the canopied boat lifts are "covered moorage," they do not violate BIMC 16.12.180B.6 ("new marinas and expansion areas in existing marinas shall not have covered moorage"), because the boat lifts are not in a new marina or expansion area of an existing marina. App. Brief, p. 23. However, the boat lifts expand or enlarge the total area of water covered and impacted by fixed overwater structures, just as would adding new floats to the marina. TR 15 (08/30/07 Tape 1); REC 0233. The City properly determined that the covered boat lifts are an expansion area of Appellant's existing marina. REC 0233; TR 15 (08/30/07 Tape 1).

The City's SMP is not ambiguous: the boat lifts with canopy roofs are "covered moorage" prohibited by BIMC 16.12.340D.4 and 16.12.180B.6.

The City, the Hearing Examiner, and the Superior Court all reached this conclusion. This determination is not an erroneous interpretation of the SMP, and is not a clearly erroneous application of the SMP. The Examiner's and the Superior Court's decisions should be affirmed.

2. Even if the City's Shoreline Master Program Is Deemed Ambiguous, Principles of Statutory Construction Support the Examiner's Decision that the Master Program Prohibits Boat Lifts with Roof Canopies.

Even if the Shoreline Master Program is determined to be ambiguous on the issue of whether boat lifts with canopies are prohibited "covered moorage," rules of statutory interpretation apply to municipal ordinances. *Griffin v. Thurston County Board of Health*, 165 Wn.2d at 55; *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991); EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 20.39 (3d ed. 1998) (In general, municipal ordinances are essentially local statutes, and are to be construed by the same rules governing the construction of statutes).

The primary goal of statutory construction is to ascertain and give effect to the purpose and intent of the legislative body. *Milestone Homes v. City of Bonney Lake*, 145 Wn.App. at 126 ("Our goal in construing zoning ordinances is to determine legislative purpose and intent"); *Quadrant Corp. v. Growth Mgmt. Hrgs Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). Related statutes must be considered in relation to each other. *State v.*

Alvarez, 74 Wn.App. 250, 259, 872 P.2d 1123 (1994); *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992)(Statutes are read in their entirety, not in a piecemeal fashion). The rule that the spirit or intent of legislation should prevail over express but inept language requires a statute to be construed as a whole to ascertain the purpose and effect of a single section. *Dando v. King County*, 75 Wn.2d 598, 603, 452 P.2d 955 (1969).

An ordinance must be interpreted so that no portion is rendered superfluous or meaningless. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)(ordinances must be construed so that all the language used is given effect, with no portion rendered meaningless or superfluous). Courts cannot add words or clauses to a statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002); *Applied Ind. v. Mellon*, 74 Wn.App. 73, 79, 872 P.2d 87 (1994)(In construing a statute, it is always safer not to add to, or subtract from, the statute's language unless it is imperatively required to make it a rational statute). And, courts do not interpret statutes in a manner that leads to absurd or illogical results. *Whatcom County v. City of Bellingham*, 128 Wn.2d at 547; *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986)("statutory interpretation that renders an unreasonable or illogical consequence should be avoided").

Further, "[i]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the official charged with its enforcement." *Milestone Homes v. City of Bonney Lake*, 145 Wn.App. at 127 (applies rule to land use ordinance, even after *Sleasman*). Considerable judicial deference must be given to the construction of an ordinance by the officials charged with its enforcement. *Mall, Inc. v. Seattle*, 108 Wn.2d at 377-78; *Neighbors of Black Nugget Road v. King County*, 88 Wn.App. at 778 (Courts give considerable deference to enforcing agency's interpretation of ordinance). Under this standard, the agency's interpretation is upheld if it is plausible and not contrary to legislative intent. *Pitts v. DSHS*, 129 Wn.App. 513, 523, 119 P.3d 896 (2005).

Again, the SMP states:

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 16.12.340D.9. In addition, "[n]ew marinas and expansion areas in existing marinas shall not have covered moorage." *BIMC 16.12.180B.6*. The SMP defines "covered moorage" as "boat moorage, with or without walls, that has a roof to protect a vessel or vessels." *BIMC 16.12.030A.48*.

The City's (and the Examiner's and Superior Court's) interpretation of the SMP is consistent with the purpose and intent of the SMP, reads the SMP

as a whole, gives effect to all terms used in the definition of "covered moorage," and avoids unreasonable or illogical results.

a. The Examiner's Decision that the SMP Prohibits Boat Lifts with Roof Canopies Is Consistent with the Purpose of the SMP, and Reads Related SMP Provisions Together.

The City's Shoreline Master Program was enacted to implement the Shoreline Management Act within the City. *BIMC 16.12.010* ("The shoreline master program is intended to implement the Shoreline Management Act by planning for and guiding the orderly development of the shoreline, protecting shoreline resources and helping to assure public access to the shoreline").

The Shoreline Management Act, enacted in 1971 by initiative of the citizens, is designed to protect Washington's shorelines as fully as possible. The SMA's policy is based on recognition that shorelines are among the most valuable and fragile of the state's natural resources, there is great concern relating to shoreline use, protection, and preservation, and increasing pressure of additional uses being placed on them necessitates coordination and management to protect the resource. *RCW 90.58.020*; *Buechel v. Dep't. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *Bellevue Farm Owners Assoc. v. Shorelines Hgs. Bd.*, 100 Wn.App. 341, 350. 997 P.2d 380 (2000).

The SMA is broadly construed in order to protect the shorelines as fully as possible. *Buechel*, 125 Wn.2d at 203; *RCW 90.58.900*. The SMA's primary purpose is "to protect the state shorelines as fully as possible." *Lund*

v. Dept. of Ecology, 93 Wn.App. 329, 337, 969 P.2d 1072 (1998); *Samson v. City of Bainbridge Island*, 2009 Wash. App. LEXIS 454 (Feb. 24, 2009).¹⁰

Moreover, the SMA distinguishes shorelines of statewide significance from other shorelines, and states an even stronger policy in favor of protecting and preserving these shorelines. *RCW 90.58.020*.¹¹ For shorelines of statewide significance, the public interest is "paramount." *RCW 90.58.020*.¹²

In implementing the SMA's policy, "the public's opportunity to enjoy the physical and aesthetic qualities of the natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best

¹⁰ In the SMA, the legislature finds that much of the shorelines "are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest." *RCW 90.58.020*. *RCW 90.58.020* states the SMA's general policy:

"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. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."

¹¹ The Eagle Harbor shoreline is a "shoreline of statewide significance," as are all City shorelines. *RCW 90.58.030(2)(e)(iii)*.

¹² "The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. ... [L]ocal government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which: (1) Recognize and protect the statewide interest over local interest; (2) Preserve the natural character of the shoreline; (3) Result in long term over short term benefit; (4) Protect the resources and ecology of the shoreline;" *RCW 90.58.020*.

interest of the State and the people generally.” *RCW 90.58.020*.¹³

The City's (and the Examiner's and Superior Court's) interpretation of the SMP is consistent with the SMP's purpose of implementing the SMA policies, and reads the SMP as a whole. Consistent with the SMA, the SMP contains polices designed to ensure protection of fish and wildlife habitat and shoreline views from adjacent properties. For example, BIMC 16.12.070, relating to environmental impacts, states: “All shoreline uses and activities shall be located, designed, constructed and managed to minimize adverse impacts to fish and wildlife resources including spawning, nesting, rearing, and habitat areas.” *BIMC 16.12.070.C.6*. BIMC 16.12.340, relating to piers, docks, recreational floats, and mooring buoys, addresses fish and wildlife habitat impacts with regard to such structures: “Piers, floats, and docks should be sited and designed to minimize possible adverse environmental impacts, including potential impacts on ... fish and wildlife habitat.” *BIMC 16.12.340B.4*. Shading from the placement of structures over the water adversely affects fish habitat, which Appellant acknowledges. REC 233; TR

¹³ “... Permitted uses in the shorelines of the state shall be designed and constructed in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.” *RCW 90.58.020*.

Consistent with the SMA's policies, Courts hold that shoreline regulations can properly impose requirements that protect aesthetic considerations such as views, and have upheld local decisions that deny dock development based on impacts to the environment or scenic views. *See e.g., Bellevue Farm Owners*, 100 Wn.App. at 356, 365 (Court states that “Washington courts have upheld shoreline master plans that describe preservation of scenic views in general terms,” and upholds dock permit denial, in part based on aesthetic and

11-2, 13-4 (08/30/07 Tape 1); TR 10 (8/30/2007 Tape 2).

BIMC 16.12.340 promotes the protection of shoreline views: “Piers, docks, and floats should be designed to cause minimum interference with ... views from adjoining properties.” *BIMC 16.12.340B.3*. Similarly, BIMC 16.12.180, relating to boating facilities such as marinas, provides: “Public access, both visual and physical, shall be an integral part of all marina design and development commensurate with the particular proposal and must include the following: (a) Views from upland lots and public view corridors shall be preserved. ...” *BIMC 16.12.180D.9*.

The Examiner's Decision that covered boat lifts are prohibited "covered moorage" is consistent with and supported by the policies designed to protect fish and wildlife habitat, and shoreline views and aesthetic qualities. The covered boat lifts have tall, dark-colored roofs that shade the water and therefore adversely impact fish and wildlife habitat. The boat lift roofs block views of the water from shoreline and upland areas, and views across the piers and docks of the marina. REC 0010-1, 232-4; TR 11-3 (08/30/07 Tape 1). Impacts resulting from covered boat lifts are greater than those resulting from boat lifts with no covers. TR 14 (08/30/07 Tape 1). Appellant agrees that shading from overwater structures poses an environmental concern, and that canopied boat lifts obstruct views. TR 10-1

scenic impacts).

(08/30/07 Tape 2). The Examiner's Decision, that the SMP prohibits covered boat lifts, is consistent with the policies of the SMA and with the purpose and intent of the SMP.

b. Other Principles of Statutory Construction Support the Examiner's Decision that the SMP Prohibits Boat Lifts with Roof Canopies.

The City's (and the Examiner's and Superior Court's) interpretation of the SMP gives effect to all terms used in the definition of "covered moorage." *Sleasman v. City of Lacey*, 159 Wn.2d at 646 ("Full effect must be given to the legislature's language, with no part rendered meaningless or superfluous"); *Whatcom County v. City of Bellingham*, 128 Wn.2d at 546. Appellant alleges that covered moorage must consist of a long pier or dock, with a single roof extending over moorage for multiple boats. App. Brief, p. 21. However, nothing in the SMP limits "covered moorage" to a particular structural design, such as one that accommodates multiple boats. To the contrary, BIMC 16.12.030A.48 defines "covered moorage" as "boat moorage, with or without walls, that has a roof to protect a vessel or vessels." The SMP's definition clearly contemplates that covered moorage may provide moorage for a single boat, as do the boat lifts in this case. Appellant's interpretation renders the word "vessel" meaningless; the City's interpretation gives effect to the entire phrase "a vessel or vessels."

The Examiner's Decision avoids reading language into the SMP. *State*

v. Delgado, 148 Wn.2d at 727; *Applied Ind. v. Mellon*, 74 Wn.App. at 79. Appellants argue that a "fabric covers" on a boat lift is not the equivalent of a roof because a boat lift is not a building, but nothing in the definition of covered moorage limits moorage to a building, and nothing in the definition exempts fabric roofs. *BIMC 16.12.030A.48*. Appellant's position requires the addition of language to the SMP, which the City Council did not include.

The City's (and the Examiner's and Superior Court's) interpretation of the SMP avoids unreasonable and illogical results. *Whatcom County v. City of Bellingham*, 128 Wn.2d at 547; *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d at 6. The Examiner concluded that the intent of BIMC 16.12.340D.9 "is to prohibit covered boatlifts," and that "the language [of BIMC 16.12.340D.9] addresses 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." REC 0683. In other words, the Examiner concluded that interpreting BIMC 16.12.340.D.9 to prohibit only structures "on top of" a pier or dock is illogical and leads to an unreasonable result. This conclusion is correct. BIMC 16.12.340D.9 prohibits "covered moorage." "Covered moorage" is a boat moorage, with or without walls, that has a roof to protect a vessel. *BIMC 16.12.030A.48*. As discussed above, a covered boat lift is "covered moorage;" the lift is secured to a dock by cables or lines, the lift

becomes part of and indistinguishable from the dock or slip, the boats are secured to the lift, and the lift protects the boat with a roof. In any event, the covered moorage prohibition should not be interpreted as allowing a covered structure to be placed inside the boat slip, and thereby circumvent the code's clear prohibition against such covered structures.¹⁴

Appellant asserts that it is the docks that constitute "moorage," not the boat lifts. According to Appellant, if the canopies were attached to the docks, that would be prohibited, but because the canopies are attached to the boat lift, there is no covered moorage. App. Brief, p. 19. This is an unreasonable interpretation of the SMP, which ignores that the boat lifts meet the SMP's definition of "covered moorage." Further, this position ignores that the Hearing Examiner entered unchallenged findings and conclusions that the boat lifts are attached to, and become part of and indistinguishable from, the docks. REC 0658.

Similarly, Appellants take the position that the covered boat lifts are not

¹⁴ Appellant's attempt to characterize the boat lifts as "boating equipment" instead of a structure does not change this conclusion. See App. Brief, p. 20. Regardless of whether the boat lifts are called "boating equipment," they fall within the definition of "covered moorage." And in fact, the SMP defines "structure" as "a permanent or temporary edifice or building, or **any piece of work artificially built or comprised of parts joined together in some definite manner**, whether installed on, above, or below the surface of the ground or water, except for vessels." *BIMC 16.12.030A.176*; App. Brief, p. 20. To the extent relevant, a boat lift meets the definition of structure. The Examiner did not rule otherwise. REC 0655-59. While the SMP's definition of "structure" excludes "vessels," a boat lift is not a vessel. *BIMC 16.12.030A.196* ("Vessel" means "a ship, boat, barge, or any other floating craft which is designed and used for navigation and does not interfere with normal public use of the water"). However, the Examiner did find that the boat lifts become part of the dock,

prohibited covered moorage, because they are not "on," and do not cover, the marina's components, such as "floats, piles, mooring fingers, or walkways." App. Brief, p. 25; see also App. Brief, p. 23 (arguing a boat lift is "not on the dock -- rather, it is on the water").¹⁵ However, "covered moorage" is "boat moorage ... that has a roof to protect a vessel or vessels." To protect a vessel, all or some portion of the roof must be over the water, since that is where the vessels are. The roof cannot be only over "floats, piles, mooring fingers, or walkways." The roof's purpose is not to protect the floats; the purpose is to protect the boat. Appellant's position is an unreasonable, illogical interpretation of the SMP.

Appellant alleges that interpreting the term "roof" to include the covers on the boat lifts would result in the prohibition of simple tarpaulins placed on top of thousands of vessels in the City's waters. App. Brief, p. 22. Appellant's fear is another unreasonable interpretation and application of the SMP. The tarps described by Appellant fit snugly across the top of a vessel; they do not extend above the vessel. When placed on a vessel, such tarps bear no resemblance to the large roof canopies on the boat lifts in this case, which run the length of the boat lift, and rise twelve feet above the water. Appellant's claim that there is no meaningful basis to distinguish between a

which undoubtedly qualifies as a structure.

¹⁵ As previously discussed, the word "on" is not limited to "on top of." City's Response Brief, Section IV.B.1.

vessel covered by a tarp and the boat lifts with roof canopies belies common sense.

Appellant alleges that the Examiner's Decision is contradictory, because the Examiner first ruled that boat lifts are an accessory use to development authorized by the 1982 Kitsap County permits and so do not require a new shoreline substantial development permit or exemption, but then ruled that canopied boat lifts were "covered moorage" prohibited by the SMP. App. Brief, p. 16-7, 19-20.¹⁶ However, the Examiner's rulings are not contradictory. Regardless of whether a structure or use requires a shoreline substantial development permit or statement of exemption, and regardless of whether a use is an "accessory use," the structure or use must be consistent with the Shoreline Management Act, the implementing regulations, and the City's SMP. *BIMC 16.12.360A.1* ("A development, use, or activity shall not be undertaken within the [SMA jurisdiction] ... unless it is consistent with

¹⁶ Appellant emphasizes that the Examiner found that the boat lifts in this case were not a "development" that required a new permit or permit exemption, reasoning that the lifts themselves were not an obstruction and did not interfere with normal public use of the shoreline, because they were an accessory use to already-permitted marina. In fact, at the hearing, Appellant agreed that the boat lifts were "development" under the SMA and SMP, but contended that the boat lifts did not require a permit because they were an "accessory use" to the marina, which already had permit. TR 2 (08/30/07)(Appellant's counsel states: "I'm an officer of the court and we looked at that. I don't think I can in good faith make an argument that the pontoons are not a development, because that language is so broadly construed in the Shoreline Management Act and Master Program. Our position which we did brief is that these devices are properly construed as accessory uses to the marina use thus there is no need to obtain a Shoreline Substantial Development Permit ..."). Appellant's current argument contradicts their prior position. However, regardless of whether the covered boat lifts are a new "development" or an "accessory use," the boat lifts must comply with all pertinent SMP provisions, including BIMC 16.12.340 and 16.12.180.

the policy and procedure of the Shoreline Management Act, applicable state regulations and the shoreline master program"); *BIMC 16.12.040A* ("All new shoreline uses and shoreline modification activities, including those that do not require a shoreline substantial development permit, must conform to all applicable goal provisions, general provisions, ... specific shoreline use provisions and shoreline modification activity provisions"); *WAC 173-27-040(1)(b)*("To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act"). For example, a new rest room or grocery store building may be an "accessory use" to the permitted marina, but the building must comply with all pertinent provisions of the SMP. Likewise, the outdoor storage on Appellant's Property is an "accessory use" to the primary marina use, but the outdoor storage must comply with the SMP's provisions.¹⁷ *BIMC 16.12.180*, regulating boating facilities such as Appellant's marina, specifically states that "marina and nonmarina boating facilities ... must comply with *BIMC 16.12.340*" *BIMC 16.12.180A*. Thus, while boat lifts may be an accessory use, covered boat lifts are prohibited by under *BIMC 16.12.340D.9* and *16.12.180B.6*.¹⁸

Thus, even if the SMP was deemed ambiguous as to whether canopied

¹⁷ By way of example, buildings and outdoor storage cannot be located in the native vegetative zone, regardless of whether they are "accessory uses." *BIMC 16.12.090B*.

¹⁸ Docks are allowed as part of a marina, but even Appellants would agree that a dock

boat lifts are prohibited covered moorage, principles of ordinance interpretation support the City's, Examiner's and Superior Court's determination.

3. The City's Interpretation of the Shoreline Master Program Is Entitled to Substantial Deference.

Appellant asserts that the City's interpretation of the Shoreline Master Program is not entitled to deference, citing *Sleasman v. City of Lacey, supra*, and *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). App. Brief, p. 14-5. Appellant also cites *Sleasman v. City of Lacey* for the proposition that "land use ordinances must be strictly construed in favor of the landowner." App. Brief, p. 14. Neither case requires the conclusion that the City's interpretation of the SMP is not entitled to deference, or that the SMP must be construed in favor of the land owner.

In *Sleasman*, a local ordinance prohibited "land clearing" except under stated conditions, and defined land clearing as "removal of trees and/or ground cover from any undeveloped or partially developed lot" *Sleasman*, 159 Wn.2d at 642. The Court held that the ordinance was unambiguous. In a footnote, the Court stated that if the ordinance was ambiguous, then it must be construed in favor of the Sleasmans "because land-use ordinances must be strictly construed in favor of the land owner." *Sleasman*, 159 Wn.2d at 643, n. 4.

with a roof would be prohibited "covered moorage."

A subsequent court has characterized the language in the *Sleasman* footnote as dicta, and followed a city's interpretation of its own ordinance, even though it did not favor the land owner. In *Milestone Homes v. City of Bonney Lake, supra*, the plaintiff developer included land that was already platted into lots in a subdivision application, alleging that with this land, the application met city code density requirements. The city code defined "subdivision" as a division of land "for the purpose of development or transfer." *Milestone Homes*, 145 Wn.App. at 128. The city council denied plaintiff's application, interpreting the code's definition of "subdivision" as not allowing the inclusion of already platted land, because those lots were not going to be developed or transferred. *Id.* at 129. In affirming the city and holding that the ordinance was unambiguous, the Court explained *Sleasman*:

In *Sleasman*, the Supreme Court determined that the ordinance at issue was unambiguous. *Sleasman*, 159 Wn.2d at 643. The court stated in a footnote, however, that if the ordinance was ambiguous, it had to be interpreted in favor of the property owner because land-use ordinances must be strictly construed in favor of the landowner. *Sleasman*, 159 Wn.2d at 643 n.4. As support, the court cited the following language from *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956):

It must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

Sleasman, 159 Wn.2d at 643 n.4.

The superior court relied on this language from *Sleasman* in reversing the city council's decision here. As Bonney Lake notes, however, **this language was dictum in *Sleasman* given its finding of an unambiguous ordinance.** Moreover, *Sleasman* ignored a previous statement from *Morin* that the court cited with approval in *Development Services v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387 (1999)(emphasis omitted): "[I]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement." *Morin*, 49 Wn.2d at 279. As the *Development Services* court explained, "[T]he law does not require strict construction in favor of the landowner. So long as the proposed use is within the scope of the ordinance, a zoning ordinance is construed to effectuate its plain purpose and intent." *Dev. Servs.*, 138 Wn.2d at 117; see also *Pinecrest Homeowners Ass'n*, 151 Wn.2d at 290 (Supreme Court's review of city ordinances must accord deference to city council's expertise); *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn.App. 461, 475, 24 P.3d 1079 (2001)(courts generally accord deference to an agency's interpretation of an ambiguous ordinance). LUPA expressly incorporates this deferential standard. See RCW 36.70C.130(1)(b) (party seeking relief must show that land use decision is erroneous interpretation of the law, "after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise").

Milestone Homes, 145 Wn.App. at 127-8 (emphasis added). Further, the

Court stated:

Moreover, if the zoning ordinances were ambiguous, we would defer to the city council's interpretation of the Code. Milestone's plan would frustrate the Code's goal of preserving single-family neighborhoods with large lots. And in construing ambiguous zoning ordinances, we are guided by the reasonable expectation and purpose of the ordinary person who enacts law for the welfare of the general public. Those who enacted the Bonney Lake Municipal Code did not reasonably expect that new subdivisions in an R-1 district would include lots from an

adjacent and preexisting plat so that maximum density requirements could be circumvented.

Milestone Homes, Inc., 145 Wn.App. at 130 (emphasis added).

Other courts have deferred to the local agency's interpretation of its own regulations, even when that interpretation was not favorable to the property owner. See *Development Services of America v. City of Seattle*, 138 Wn.2d 107, 116-18, 979 P.2d 387 (1999)(court upholds city's decision construing zoning ordinance as prohibiting property owner's proposed helistop use, citing *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956)). In this case, similar to *Milestone Homes*, those who enacted the City's SMP did not reasonably expect that marina owners would allow canopied boat lifts to be attached to docks, to circumvent the covered moorage prohibition. Principles of ordinance interpretation, including the rule that courts give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement, support the Examiner's Decision.

Moreover, this case involves the application of the City's Shoreline Master Program. No Washington Court has ever applied the principle that zoning (or even land use) ordinances are construed in favor of the land owner in the context of a shoreline master program, and for good reason. Shoreline master programs are enacted by local jurisdictions to implement the state Shoreline Management Act. See *BIMC 16.12.010*. The SMA is designed to

protect the state's shorelines as fully as possible. The SMA is based on policies that shorelines are among the most valuable and fragile of the state's natural resources, there is great concern relating to shoreline use, protection, and preservation, and increasing pressure of new uses being placed on them necessitates management to protect the resource. *RCW 90.58.020; Buechel*, 125 Wn.2d at 203; *Bellevue Farm Owners Assoc.*, 100 Wn.App. at 350. The SMA is broadly construed to protect the shorelines as fully as possible. *Buechel*, 125 Wn.2d at 203; *RCW 90.58.900*. A rule requiring construction in favor of the land owner, regardless of impacts on shorelines, has no place in the context of a shoreline master program.

Milestone Homes distinguished both *Cowiche Canyon* and *Sleasman* in another important respect. Like Appellant in this case, the *Milestone Homes* plaintiff cited *Sleasman* (which in turn relied on *Cowiche Canyon*) for the proposition that the city must show adoption of its interpretation as a matter of administrative policy, or a "pattern of enforcement," before the city's interpretation is entitled to deference. *Milestone*, 145 Wn.App. at 129. Before holding that it was not bound by *Sleasman's* discussion of ambiguous ordinances, the *Milestone* Court distinguished *Sleasman* and *Cowiche* :

In *Sleasman*, the court found no such pattern where the City applied the ordinance at issue to single-family residences for the first time in the case at bar. *Sleasman*, 159 Wn.2d at 647. Similarly, there was no pattern of enforcement in *Cowiche Canyon* where the evidence showed that development similar to

that under scrutiny had occurred previously without regulation. *Cowiche Canyon*, 118 Wn.2d at 814-15.

Here, there is no evidence that a developer has ever tried to include parts of a previous subdivision in a plat for a new subdivision to satisfy the density requirements for the new development. Bonney Lake argues persuasively that it cannot show a pattern of enforcement because no developer has ever submitted a similar plat application that includes already platted and developed lots.

Milestone, 145 Wn.App. at 130.¹⁹

Thus, the *Cowiche Canyon* and *Sleasman* "pattern of enforcement" rule does not apply in situations where there is no evidence that any applicant has attempted to apply the code in the manner giving rise to the City's current interpretation. As a practical matter, this makes sense; there would be no reason for a city to interpret its code in a particular manner, if no owner had ever attempted to assert a different position.

Here, the City has interpreted its SMP as prohibiting covered moorage, which includes covered boat lifts, in a consistent manner. TR 9-10, 14-5 (08/30/07 Tape 1). While the City has not had the occasion to apply its interpretation in the context of covered boat lifts in a commercial marina

¹⁹ In *Cowiche Canyon*, Department of Ecology attempted to rely on a conclusory statement made during trial testimony (which had been ruled inadmissible) to establish that it had interpreted the term "substantial development" in the pertinent statute to include bridge removal. *Cowiche Canyon*, 118 Wn.2d at 814. However, the record established that the Department had no agency interpretation that included bridge removal in that term, and the Department took no action regarding the removal of bridges from the same railroad right-of-way as in the current case. Instead, the Department was "attempt[ing] to bootstrap a legal argument into the place of agency interpretation." *Cowiche Canyon*, 118 Wn.2d at 815.

because no applicant has attempted to apply for or otherwise locate covered boat lifts in a commercial marina until Appellant's code enforcement situation, this does not preclude the Court from granting the City's interpretation deference. *Milestone*, 145 Wn.App. at 130. Just as in *Milestone Homes*, the City can not show a prior interpretation in an identical situation, because no one has ever taken Appellant's position.

C. The City Is Entitled to An Award of Attorneys' Fees Under RCW 4.84.370.

The City requests an award of its reasonable attorneys' fees incurred in this matter before the Court of Appeals, pursuant to RCW 4.84.370(2). RCW 4.84.370 provides:

(1) ... reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals ... of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, ...; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Under RCW 4.84.370, a party to a land use decision matter, who

prevailed before the local administrative agency, the superior court, and the appellate court, is entitled to an award of reasonable attorneys' fees incurred at the court of appeals level. *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 413-6, 120 P.3d 56 (2005). This includes a local agency whose land use decision is upheld by the Superior Court and Court of Appeals. *RCW 4.84.370(2)*.

Although *RCW 4.84.370* does not define "land use approval or decision," LUPA does define the term "land use decision:"

(1) "Land use decision" means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on: ...

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property.

RCW 36.70C.020(1).²⁰ Thus, the City's action against Appellant to enforce the SMP is a "land use decision." See *Mower v. King County*, 130 Wn.App. 707, 721, 125 P.3d 148 (2005)(awarding attorneys' fees under *RCW 4.84.370* to county whose enforcement decision was upheld by superior court and Court of Appeals). The City has prevailed at all levels of review on the issue

²⁰ LUPA and *RCW 4.84.370* were enacted as part of the same legislation, in the same chapter entitled "Appeals." See *Laws 1995 Ch. 347 § 701-15 (LUPA), § 718 (RCW 4.84.370)*.

that Appellant appealed to Superior Court and to this Court, i.e., whether the SMP prohibits covered boat lifts. Pursuant to RCW 4.84.370(2), the City is entitled to an award of its attorneys' fees and costs incurred before this Court.

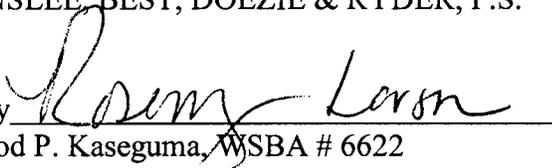
V. CONCLUSION

The City respectfully requests that the Court deny Appellant's appeal, and affirm the Hearing Examiner's and the Superior Court's Decisions which, in turn, affirmed the decisions of the City. In addition, the City requests an award of its attorneys' fees and costs incurred in the appeal before this Court, pursuant to RCW 4.84.370(2).

DATED this 23rd day of March, 2009.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By


Rod P. Kaseguma, WSBA # 6622
Rosemary A. Larson, WSBA # 18084
Attorneys for City of Bainbridge Island

CERTIFICATE OF SERVICE

I, Carol Cotto, hereby certify that on this 23rd day of March, 2008, I caused to be served a true and correct copy of CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF on the individual(s) named below in the specific manner indicated:

Dennis D. Reynolds
Davis Wright Tremaine
1201 Third Avenue, Suite
2200
Seattle, WA 98101-3045

- Via Messenger
- U.S. Mail
- Fax: (206) 757-7700

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COURT OF APPEALS
DIVISION II
09 MAR 26 PM 12:06
STATE OF WASHINGTON
BY _____ DEPUTY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 23rd, 2009, at Bellevue, Washington.

Carol Cotto
Carol Cotto