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ADMINISTRATIVE INTERPRETATION

Re: Clarifying the City of Sequim's prohibition on private marinas under Sequim's Shoreline Master Program

From: Barry Berezowsky, Department of Community Development Manager/Shoreline Administrator

Date: May 25, 2018

EXECUTIVE SUMMARY:

The question of whether private marinas are allowed under the City of Sequim's Shoreline Master Program (SMP) has been raised due to the Port of Port Angeles's recent publicized actions related to the potential sale of the John Wayne Marina to a private party. The Port through its public comments has questioned whether the City has prohibited private marinas in its shoreline jurisdiction or whether it has the power to do so.

Pursuant to SMP Section 7.3.7, the City's Shoreline Administrator issues this Administrative Interpretation clarifying the City's SMP regarding private marinas, finding in favor of the City's position that private marinas are prohibited.

The City's SMP is a planning document intended to provide guidelines for existing and future uses within its shoreline jurisdiction. The inconsistency alleged by the Port of Port Angeles involves Use Table 6.1 and Section 6.3.6. The Shoreline Administrator finds that the SMP is internally consistent, and that this is evident when Table 6.1 and Section 6.3.6 are viewed together in their entirety and in context.

Moreover, the Shoreline Administrator finds that the City's police power gives the City the authority to prohibit private marinas within its shoreline jurisdiction. Such prohibitions have been upheld by Washington courts and Shoreline Hearings Boards. The Shoreline Management Act (SMA) is intended to prioritize public access whenever possible. The City is obligated to protect current public access points through its SMP. Given that

John Wayne Marina is the City's only public access point, the City prohibited private marinas to protect against future diminishment of public access.

BACKGROUND:

The Shoreline Management Act, RCW 90.58, and associated management guidelines, require local governments to develop local Shoreline Master Programs to protect State shorelines from adverse environmental impacts and inappropriate development. SMPs also serve to preserve and enhance public access to the shoreline environment.

The State Department of Ecology (Ecology) and local governments work together to develop SMPs, which regulate shoreline development. Local governments have primary responsibility for initiating and administering the SMP. Ecology's role is supportive and focused on ensuring compliance with the Shoreline Management Act.

The City of Sequim adopted its most recent SMP in 2013 (Ord. 2014-001) after extensive public outreach and approval by Ecology. The Port of Port Angeles's involvement throughout the review and adoption process should not be overlooked due to the question under consideration here. The SMP record shows the Port raised a concern about the prohibition on private marinas¹ during the review and adoption process but failed to convince the City to eliminate the prohibition, and the City Council's decision was not appealed.

The Port of Port Angeles developed John Wayne Marina in 1985 on 23 acres of property donated by the family of the iconic western actor John Wayne. According to the "History of the Port of Port Angeles" on the Port's official website, the land donation came with two conditions: that the land be developed as a public marina and that construction begin by 1980 (emphasis added). While the project was delayed a few years, the Port delivered on the condition that the facility be open to the general public.

The Marina has approximately 300 boat slips, showers and restrooms, a fueling dock, and pump-out facilities. It has picnic areas and a ramp providing beach access, which allows recreational activities such as fishing, boating, sailing, and canoeing. There are also meeting room facilities and a restaurant available for public use. It is also the only area within the City's shoreline jurisdiction that provides public access.

When the Port applied for its shoreline substantial development permit in 1982, the decision was appealed because opponents said the permit provided inadequate public access. The question of public access was heard by the Shoreline Hearings Board

¹ The concern related only to *allowing* private marinas, not whether the City had the *authority* to prohibit them, which appears to be what the Port is actually questioning.

(SHB). The SHB determined that the Marina, as proposed by the Port, "...is inconsistent with SMP Sections XVI.C.1, 4 and Appendix 1 (e & f) because public access is reduced by the loss of a boat launch in favor or restricted access for marina customers." *Findings of Fact, Conclusions of Law & Order*, SHB Nos. 82-8 & 82-7, pg. 20.

In its decision, the SHB required an increase in public access. The SHB required a new boat launch/ramp and public areas for picnicking and viewing the shoreline to ensure the Marina provided recreational activities for boaters and a variety of opportunities for the public to "access" and enjoy Sequim's shoreline as required by the SMA. *Findings of Fact, Conclusions of Law & Order*, SHB Nos. 82-8 & 82-7. There should be no dispute that the Marina, as approved by the SHB, was conditioned and constructed to function as a public marina.

DISCUSSION & ANALYSIS:

After approximately 36 years of operating the Marina for the benefit of the general public, the Port's recent publicized inquiry into whether to sell the facility to a private party has raised deep concerns throughout Sequim and east Clallam County. Residents and users of the marina are concerned they will lose to the private sector a rare and valuable public asset that was built and maintained by local taxpayers. In the ensuing public commentary, the issue was raised whether Sequim's SMP actually can and/or does prohibit "private" marinas.

The City asserts that it does have the authority to prohibit private marinas within its shoreline jurisdiction, and, in fact, that it *has* prohibited private marinas through adoption of its current SMP. For purposes of this administrative review, the first question to answer is what is meant by "private marinas" in the City's SMP and specifically Table 6.1 on page 50. Private marinas are not defined in the City's SMP; therefore, one must use the plain meaning of the word "private" as a modifier to the term "marina".

A marina, as defined in RCW 79A.60.010 (12) "...means a facility providing boat moorage space, fuel, or commercial services. Commercial services include but are not limited to overnight or live-aboard boating accommodations."

The word "private" is defined as something that is "intended for or restricted to the use of a particular person, group, or class," or "belonging to or concerning an individual person, company, or interest."

Using these two definitions together, "private marina" means a marina that is intended for or restricted to the use of a particular person, group or class of

people. A private facility, whether it be a marina or some other facility, is not intended for general public use. The City's prohibition on private marinas was likely meant to ensure that the only public access to the City's shoreline, which is via John Wayne Marina, would not be jeopardized if the Marina ever came under private ownership. The below excerpt from the City's Inventory and Characterization Report, Appendix B of the City's SMP, illustrates this thinking:

Most of the tidelands within the shoreline area are privately owned. John Wayne Marina is the only existing portion of the shoreline available for public use. Other existing public access points are limited to view access. View access is available along W. Sequim Bay Rd. and a small portion of Washington Harbor Rd. These areas, however, are also areas of anticipated future development.

City of Sequim Inventory and Characterization Report, pg. 15, emphasis added.

In response to this situation, and in furtherance of the basic premise of the SMA, the City opted to prohibit private marinas as depicted in Table 6.1. This Table consists of a list of permitted uses, which are denoted with a P, and prohibited uses, which are denoted by an X. Private marinas are associated with an X and therefore, prohibited according to Table 6.1.

The Port contends that there is internal inconsistency between the Table and language contained in the City's SMP, Section 6.3.6 Marinas/Boating Facilities. Upon closer review, however, there is no internal inconsistency. Section 6.3.6.1 reads as follows:

The following standards or use regulations are directed toward the John Wayne Marina and potential future marina or boat launch developments or expansions on Sequim'[s] shoreline....

City of Sequim Shoreline Master Program, pg. 80, emphasis added.

As a planning document, the SMP must look into the future, typically at least 20 years, to guide development. The City had to consider the expansion of its shoreline jurisdiction and the possibility of a private marina coming within that jurisdiction through expansion. Section 6.3.6.1, when read in conjunction with the provision claimed by the Port as internally inconsistent, demonstrates the context in which the entire section should be read.

The provision referenced by the Port, Section 6.3.6.3 reads as follows:

New marina development or expansion of existing private marina facilities shall be allowed only in the Urban and associated Aquatic shoreline environments through a Shoreline Conditional Use Permit.

The mere reference to “expansion of existing private marinas” does not mean that private marinas are allowed in the City’s current shoreline environments. Section 6.3.6.1 references the “following standards” as applied to expansions of the City’s shoreline. This provision means that Sections 6.3.6.3 must be read in conjunction with Section 6.3.6 in its entirety, including Section 6.3.6.1. To do otherwise renders the language in 6.3.6.1 irrelevant, contrary to canons of statutory construction. Because of these canons, Section 6.3.6.3 must also be read to mean that if the City’s shoreline jurisdiction expanded and encompassed an existing private marina, that marina would be a legal non-conforming use unless the City chose to amend Table 6.1. Until Table 6.1 was amended, a private marina would not be allowed to expand because it cannot increase its degree of nonconformity.

The Port seems to be alluding to this result as the “area of conflict” within the SMP due to Section 6.3.6.3’s reference to private marina expansions must be done pursuant to a conditional use permit. However, as stated above, all sections must be read in their entirety to provide context.

In the current SMP, Table 6.1 unambiguously prohibits private marinas based upon current conditions. If conditions changed, such as expansion of the City’s shoreline jurisdiction, it follows that the City would want to review its SMP in light of any new uses associated with the expansion. A quick update to Table 6.1 would accomplish many changes the City may want to see, such as allowing private marinas as a conditional use, without the need for significant text amendments. To claim internal conflict based merely on speculation of future changed conditions, however, is insufficient to defeat an otherwise reasonable agency interpretation.

Moreover, under 6.3.6.1 marinas are allowed only in the urban designation, which is totally encompassed by John Wayne Marina. Therefore, there is no available shoreline to accommodate a new marina, public or private, unless the City expands its shoreline jurisdiction *and* increases its urban designation.

Because no private marinas exist within the City’s current SMP jurisdiction, the phrase “expansion of existing private marina facilities” renders it meaningless at this time.

SMPs, like zoning and other land use controls, are designed to address uses that currently exist or may be proposed today. They are also meant to provide a “comprehensive vision of how the shoreline will be used and developed over time”. *City of Sequim, SMP*, pg. 1. Over time, an existing lawfully established private marina could be annexed/incorporated into the City. Under this circumstance, the language in 6.3.6 provides the pathway to potentially expand an existing, lawfully established private facility. Thus, there is no internal inconsistency.

Plain language interpretation seeks to avoid absurd results. To interpret the City's SMP as the Port suggests is a strained reading and would lead to absurd results. The record clearly demonstrates the City's intent to protect public shoreline access as required under the SMA, and its regulations demonstrate that intent.

A final area of clarification is necessary to avoid the misinterpretation of language found on page 49, which states as follows:

The following table indicates the allowable uses and shoreline modifications; where there is a conflict between the chart and the written provisions in Chapters 4, 5, or 6 of this master program, the written provisions shall apply. Emphasis added.

This language states that if a conflict exists, the phrase "written provisions shall apply" may be relied upon by a party to argue that the language in 6.3.6.3 is more specific than the notation with an "X" next to private marinas in Table 6.1. This argument, however, is a red herring because there is no internal conflict as stated above and for the reasons set forth below.

First, use of the word "chart" is likely a scrivener's error based upon the basic grammatical structure of the sentence. Again, one must read the passage in its entirety for context. The passage begins with "[t]he following table..." and continues with "where there is a conflict between the chart and the written provisions..." the written provisions prevail. The word "the" is a definite article referencing back to the previously referenced noun – in this case "table". Again we turn to the plain meaning of the word at issue; "the" means "a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance". Thus, under this interpretation, if there is an inconsistency between the table and the written provisions, the written prevail; however there is no internal inconsistency, which makes this argument moot.

Second, this type of language is not unusual and is often found in regulatory documents to protect against assumptions that generalized portrayals of information or generalized information summarized in map, table, figure or chart form have any regulatory effect. For example, all City planning maps contain a statement warning the user that the map is a generalized depiction of information and is not to be used without "field verification" and the parcel map may "contain inaccuracies" and the City does not provide any "warranty regarding the positional accuracy of any map feature...."

By virtue of the disclaimers, the City is protecting itself from a party using the map for an unintended use. The map disclaimer is no different than the language found in the "disclaimer" language of the SMP. Many of the figures in the SMP are not to scale or provide general depictions of the different shoreline designations identified within the

City's shoreline environments. While many of these figures are labelled with the words "approximate boundary", their specific locations are also described in the SMP text in much more detail under a section titled "Boundary Description" that includes parcel numbers as geographic locators. Therefore, the illustrations of "boundaries" and the specific location as described in the text of the SMP is an example of a "conflict" that is resolved by looking to the text of the SMP for clarification per the language cited by the Port and found on page 49.

To the contrary, Table 6.1 contains a matrix consisting of each shoreline designation and a list of "uses" that are permitted or prohibited in each shoreline area. There is no ambiguity to be found in this table. Indeed, during the SMP process, the Port's request to allow private marinas suggests that the intent of the X in the use table was crystal clear. Allowed uses are identified with a "C" for conditionally permitted, a "P" for permitted outright and an "X" for prohibited. Public marinas are associated with a "C", meaning conditionally permitted within the urban shoreline designation, and private marinas are associated with an "X" in the urban shoreline designation, and therefore prohibited. Again, there is nothing ambiguous about Table 6.1's meaning and the plain language of the SMP supports this interpretation. Therefore, private marinas are substantively prohibited in the shoreline environment text, and the SMP does not need to be examined for clarification.

LEGAL ANALYSIS:

While the City does not believe it is obligated to do so, it has nonetheless opted to outline its legal rationale supporting its authority to prohibit private marinas.

The City has authority under its police powers to regulate the land use through zoning and the water and shoreline use through the SMP. This is what is actually being questioned by the Port, and the answer is clearly in the affirmative.

The question of whether local governments can regulate the use of land through regulations is well settled. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Land use regulation encompasses a wide variety of laws that impose restrictions on the rights of landowners. These regulations may include rules relating to the types of uses that can be located in a particular zoning district to the size of buildings, the number of parking spaces and the amount and type of landscaping, among other things. Fundamentally, all land use regulation is intended to burden a landowner's use of their real property in some way.

While zoning regulations are used to restrict certain kinds of development (as well as the rate of development), restrictions are generally implemented for the sake of

promoting some larger public good, such as making a commercial area more pedestrian-friendly, our air and water cleaner and, in this case, providing opportunity for public recreational activities and maintaining public access to our shorelines. Protecting public access is a basic premise of the SMA.

The City of Sequim currently prohibits many “private” land uses from locating in various areas of the City. For example, single-family detached residences are not allowed to locate in the City’s commercial zoning districts, and light industrial uses are not allowed to locate in the City’s residential zoning districts. Restricting uses through zoning or the SMP is not unusual and provides the legal basis upon which the City is authorized to prohibit private marinas from locating in the City’s shoreline environment.

Examples of the legal authority for cities to regulate the types of uses in its shoreline environment can be found in a number of cases. For example, the City of Bainbridge Island prohibited the development of “private” docks in Blakely Harbor, and this prohibition was appealed and made its way to Division II of the Court of Appeals. In *Samson v. City of Bainbridge Island*, 149 Wn. App. 33 (2009) the court upheld the city's prohibition of private docks in Blakely Harbor, concluding that the amendment was consistent with statutory guidelines. The court held that private docks in the harbor are not a preferred use, that the amendment was consistent with the city's shoreline master program and comprehensive plan, and that the amendment did not violate the "public trust" doctrine. In so holding, the court reasoned as follows:

[T]he City’s amendment to its SMP prohibiting private docks in this shoreline of statewide significance is consistent with statutory guidelines because it promotes the public’s ability to enjoy Blakely Harbor’s aesthetic qualities and to navigate its waters. The amendment elevates the public interest over local interest, and preserves the unique character of the harbor.... it protects the public interest in navigation and recreational use of the harbor.

149 Wn. App. at 39, emphasis added.

Shoreline Hearings Board cases also support prohibiting private docks and other similar prohibitions because of the limitations imposed on public access. As an example, the *Samson* court quoted a Shorelines Hearings Board decision from 1998, *Spencer v. City of Bainbridge Island*, No. 97-43 (Wash. Shoreline Hr’gs Bd. Feb. 5, 1998), which involved a permit application for a boathouse.

We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the

latter, which would limit public access in, rather than promote public access to the waters of the state.

149 Wn. App. at 50-51, emphasis added.

The *Sampson* court continued its analysis, reasoning that “only recreational uses that facilitate public access to shorelines are priority uses” and concluded that the legislature declined to provide any special preference for private docks. *Id.*

This lack of preference leads to another Division II case, *Lund v. Dep’t of Ecology*, 98 Wn. App. 329 (1998). There, appellant Lund sought to reverse denial of his permit for a proposed overwater structure, which was prohibited by Tacoma’s SMP. The court denied the permit because the Tacoma SMP substantively denied overwater construction. Lund argued that such prohibitions violated his private property rights. The court disagreed.

[Protecting private property rights] is secondary to the SMA’s primary purpose, which is “to protect the state shorelines as fully as possible.” *Buechel*, 125 Wn.2d at 203. The Legislature contemplates the protection of private property rights “only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.”

98 Wn. App. at 337, emphasis in original.

The various cases cited above support the City’s prohibition of private marinas within its shoreline and the City’s rationale, which is in direct response to its interest in maintaining and enhancing public access within its limited shoreline environment. See, 4.2.2 Public Access Element, SMP, pg. 25-26. John Wayne Marina provides the only public access to the City’s shoreline. Allowing the Marina to be operated as a private facility jeopardizes the public’s access to the shoreline.

CONCLUSION:

The City’s SMP is internally consistent. Table 6.1 and associated language in Section 6.3.6, when read together, demonstrate the City’s need to address current land and shoreline uses, as well as its need to address future planning. Further, the language contained in the Inventory and Characterization solidifies the City’s intent behind the SMP language.

The City has authority to prohibit private marinas based upon its police power and the SMA. One must avoid conflating the concept of private *ownership* with private marinas as a *use*. The City cannot prohibit the Port from selling John Wayne Marina to a private entity. It can, however, prohibit the buyer from *operating the property as a marina*. **It is the function of a marina, i.e., use, that the City prohibits under private ownership.** If the Port chose to sell the marina to a private party, that party could engage in any other use currently allowed under the City's SMP in the urban designation, provided it can meet public access and other SMP requirements.

APPEALS: As a Type 1 administrative decision, this decision can be appealed to the Sequim City Council. An appeal must follow SMC 20.01.240.