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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINES SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY SNOHOMISH COUNTY TO GARY HANSEN and GORDON McLEOD, State of Washington, DEPARTMENT OF ECOLOGY, Appellant, v. SNOHOMISH COUNTY, GARY HANSEN and GORDON McLEOD, Respondents.	SHB Nos. 86-55 and 86-56 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter involves the State of Washington Department of Ecology's appeals of Shohomish County's issuance of substantial development permits to Gary Hansen (our SHB No. 86-55) and to his next-door neighbor, Gordon McLeod (our SHB No. 86-56), for the building of a bulkhead and dock on each of their properties on Lake Stevens.

The appeals were consolidated. A pre-hearing conference was held on February 4, 1987, from which a Pre-Hearing Order issued. Appellant DOE filed a motion for summary judgment on May 21, 1987. Respondent's responses in opposition were filed and after oral argument before the Board, an Order of Denial was issued.

A formal hearing was held on June 26, 1987, in Everett, Washington. Present for the Board were Judith A. Bendor (Presiding), Lawrence J. Faulk (Chairman), Members Wick Dufford, Nancy Burnett and Dennis McLerran. Assistant Attorney General Patricia Hickey O'Brien represented appellant DOE. Assistant Prosecuting Attorney Sue A. Tanner represented respondent Snohomish County. Attorney Fred Weedon represented respondent Gary Hansen. Attorney Drew Nielsen represented respondent Gordon McLeod. Court reporter Lesley E. Gray of Allied Court Reporting recorded the proceedings.

Pre-hearing memoranda were received. Witnesses were heard; exhibits were admitted and examined. Argument was made. From the foregoing, the Board makes these

FINDINGS OF FACT

I

Lake Stevens is a shoreline of statewide significance located east of the City of Everett in Snohomish County. The lakeshore has undergone extensive residential development. Very little waterfront property remains in a natural state. The lake's entire perimeter is

punctured at close intervals by docks and piers. There are over 300 such structures jutting into the water, principally in connection with individual residences.

II

In 1980 a preliminary plat, rezone and shoreline management permit were sought for a planned residential development at Cedar Cove, a 5.93 acre tract comprising one of the last undeveloped parcels on Lake Stevens.

On April 7, 1980, following a public hearing, the Snohomish County Land Use Hearing Examiner recommended approval of these applications. The Hearing's Examiner set forth the following as his Finding of Fact No. 26:

> No dredging or dock construction is contemplated. The County's Shoreline Management Program (SMMP) requires joint use docks in residential subdivisions. (SMMP, p. F-44)

He, then, stated the following as his Conclusion No. 15:

> The project as proposed meets all regulations of the county's Master Program regarding residential development and piers.

In his Disposition section, the Hearing Examiner recommended the following among other conditions of approval:

> 1. No docks or piers shall be allowed with any lot in the instant plat without issuance of a Substantial Development Permit.

III

On April 28, 1980, the Snohomish County Commissioners, by resolution, approved the recommendations of the Hearing Examiner. The Cedar Cove proposal, as adopted, included a large lot for multi-unit residential construction, waterfront community tracts, and seven parcels for single-family residences.

IV

The Snohomish County Shoreline Management Master Program (SCSMP) was in effect in the 1970s, several years prior to the County's approval of the Cedar Cove subdivision in 1980. The SCSMP environment designation for the area is "Suburban". The approved Cedar Cove plat map shows no docks whatsoever. No single joint-use moorage facility has ever been applied for or constructed for the development.

Common areas exist within Cedar Cove on Tracts 997 and 999. These areas are several hundred feet from appellants' properties. Dock construction on these tracts would be problematic due to the lake's shallowness, peat deposits, and wetlands. Vehicular access to would be difficult to provide. We find that the construction of a single joint-use moorage facility for the entire subdivision is unlikely ever to occur.

V

In December 1984, Gary and Judith Hansen purchased Lot 7 of Cedar Cove plat, located at 11817 7th Street NE, Lake Stevens. This lot is

waterfront property, with about 87 feet of lakeshore. The Hansen family lives there in a single-family home. Prior to purchase, respondent Gary Hansen reviewed the plat map and found no restrictions or conditions regarding docks. His title report contained no information suggesting any prohibition on dock construction.

On April 3, 1986, he applied to Snohomish County for a shoreline permit for a single-family dock and bulkhead. In May 1986, after pilings were driven, Hansen was notified by the County that he should cease construction until the shoreline permit was received. He complied with this instruction and the project still remains uncompleted. The County approved the permit on October 31, 1986. On December 5, 1986, the Department of Ecology filed an appeal with this Board.

The proposal is for a dock which is 105 feet long by 8 feet wide, with a 12 foot by 20 foot covered platform at the end. (The bulkhead is not at issue herein.)

VI

Gordon and Sandra McLeod own a single-family home which is located on Lot 8 of the Cedar Cove plat, at 11811 7th Street NE, Lake Stevens. This lot, located next door to the Hansens, has about 72 feet of lakeshore. They purchased the home approximately two years ago. Their title report, like the Hansens', contained nothing to alert them to restrictions relative to the docks.

On March 16, 1986, after learning that a shoreline permit was necessary prior to construction, Gordon McLeod applied to Snohomish County for a shoreline permit for a dock and bulkhead. The pilings were driven later that spring. Snohomish County approved the application on October 31, 1986, and, shortly thereafter, the McLeods completed their project. DOE filed an appeal of the dock aspects of the permit on December 5, 1986.

The McLeod dock is 90 feet long by 10 feet wide, with a boat slip on one side.

VII

Neither permittee is the developer of the Cedar Cove Plat. Lots 7 and 8 are individual parcels and not, in themselves, new subdivisions.

VIII

Because development of the Lake Stevens shorelines is very nearly complete, the construction of docks for boat moorage on these parcels is unlikely to have any substantial cumulative effect. The proliferation of docks along the shore of this water body has already occurred.

Moreover, we are not convinced that any appreciable navigational advantage will be derived from disallowing these new residential docks or that any adverse environmental effects will attend their construction.

IX

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Facts, the Board enters these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these appeals.

II

We review these permits for consistency with the Shoreline Management Act (SMA) and the applicable shoreline master program. RCW 90.58.140.

III

The Department of Ecology has opposed these permits principally on the assertion that the docks applied for are prohibited by the SCSMP.

IV

The SCSMP uses the terms dock and pier interchangeably. In the Introduction to the Shoreline Pier Use Activity Section, the program states:

> On lakes, a proliferation of piers along the shore can have the effect of substantially reducing the usable water surface. (F-44)

The ensuing Pier Policies state in pertinent part:

> 3. Give priority to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to the cooperative use of piers and docks.
>
> 4. Encourage cooperative use of piers and docks as a means of reducing the proliferation of single-purpose private piers. (F-44)

V

In the Suburban designation, piers are allowed subject to the General Regulations. (SCSMP at F-45). General Regulation No. 2, at issue herein, states:

> A single, joint-use moorage facility shall be required of all new subdivisions, motels, and multi-family residences. (F-44)

It is this provision which, Ecology argues, prohibits approval of the Hansen and McLeod docks.

VI

Neither Ecology nor respondents take the position that the quoted General Regulation No. 2 makes the construction of a single joint-use moorage facility mandatory for all new subdivisions. The parties agree the language means that <u>if</u> the subdivider/developer provides moorage for a new subdivision, the Regulation requires that it be a single joint-use facility.

However, the parties' views diverge when it comes to examining how the Regulation affects events further down the road when the subdivision is no longer "new" and when individual lot purchasers seek to secure boat moorage for their individual waterfront properties.

Ecology's position is that, even if no single joint-use moorage was or ever will be provided, General Regulation No. 2 implicitly forbids single family residential docks.

The respondents argue, to the contrary, that there is no express prohibition on single family docks, and that such a prohibition should not be implied -- at least in the situation where a joint-use moorage for the subdivision has not been provided and is unlikely ever to exist.

Respondents' position is in accord with what was clearly the opinion of the Snohomish County Hearing Examiner. On reflection, we conclude that respondents' position is the correct one.

VII

Master program provisions must be interpreted in light of the policies of the enabling legislation, the SMA. The statute, in general, emphasizes preservation of navigational rights, protection of the natural environment and access of people to the water. RCW 90.58.020. Through planning the overall objective is to limit shoreline development to types of facilities which need to be on the water and to concentrate them largely in places where development has already occurred. Uses which are "reasonable and appropriate" within this framework are to be fostered. See Department of Ecology v. Ballard Elks, 84 Wn. 2d 551, 527 P.2d 1121 (1974).

Piers are among those developments specifically listed as entitled to priority in allowing alterations of the natural condition of shorelines. RCW 90.58.020. Single family residential docks, below a certain cost, are expressly exempted from the permit requirements of the statute. RCW 90.58.030(3)(e)(vii); RCW 90.58.140(2).

Moorage piers or docks are, thus recognized as generally "reasonable and appropriate" under the SMA, except where competing policy considerations make them unsuitable in specific areas. See Caminiti v. Boyle, 107 Wn 2d 62, ____ P.2d _____ (1987). Given this statutory background, any prohibition relating to piers and docks in an implementing master program should be clearly expressed.

VIII

We conclude that the language of General Regulation No. 2 is not the clear expression of a blanket prohibition on docks and piers for single-family residences within subdivisions created after adoption of the SCSMP. Such a meaning is not a necessary implication of stating that a single joint-use moorage facility shall be required of all new subdivisions.

The language should be applied on a case-by-case basis, depending on the facts. If for a subdivision a joint-use moorage facility is in place or likely to be built, this fact should be significant in determining whether any single-family pier is "reasonable and appropriate" within the subdivision. However, where joint-use moorage

does not exist and probably will not be built, to imply a prohibition on single family piers would effectively prevent any convenient boating access to the water for purchasers of the individual lots for all time. The language of General Regulation No. 2 is far from a plain statement that in such circumstances such a result was intended.

Accordingly, we hold that single-family residential piers are not prohibited by General Regulation No. 2 (SCSMP at F-44).

IX

The remaining issue is whether the Hansen and McLeod docks are consistent with the SCSMP, if General Regulation 2 does not prohibit them outright.

It is true, as noted, that the SCSMP general policies encourage community piers and discourage the proliferation of single purpose private piers. Nonetheless, private single purpose piers are permitted in the "Suburban," as well as other environments, and the non-proliferation policy is in the nature of a goal not a positive command.

Therefore, the question is whether rigid adherence to the policy goal makes sense in light of the specific factual setting. Here we believe it does not. In Knapp v. Hammer and Kitsap County, SHB 85-17 (1986), we stated:

> Joint-use docks are intended to concentrate development and thus save open water space for navigation. This aim is not advanced here where no substantial navigational advantage will be achieved. . . . Further, the joint-use policy tends to lack realism in Port Madison Bay given the level of dock development already there. The planning process appears to have viewed the addition of a new dock by Hammer "with a practical eye on the densely developed portion of shoreline in the immediate vicinity." (citing Ballard Elks, supra).

These remarks apply with equal force to the factual situation on Lake Stevens and the County's permit process in the instant cases.

We conclude that the Hansen and McLeod docks are consistent with the SCSMP.

X

We conclude that the Hansen and McLeod docks are consistent with the policies of the SMA.

XI

Because of the result we have reached, it is unnecessary to address respondent's arguments on estoppel.

XII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Shoreline Substantial Development permits issued to Gary Hansen and Gordon McLeod are AFFIRMED.

SO ORDERED this 31st day of December, 1987.

SHORELINES HEARINGS BOARD

(See separate Opinion)
JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

12/31/87
LAWRENCE J. KAULK, Member

NANCY BURNETT, Member

DENNIS MC LERRAN, Member

JUDITH A. BENDOR - CONCURRING AND DISSENTING OPINION

I

I concur with the factual findings, and with the conclusions of law on the Shoreline Management Act and the proposed docks' consistency with it (VII and X).

I dissent in part from the Opinion, concluding that the permits should be denied. The Snohomish County Shoreline Master Program's General Regulation No. 2 is clear and unambiguous. It requires a joint-use dock in this instance. This conclusion is reached without resort to inference.

II

General Regulation No. 2, states:

> A single, joint-use moorage facility shall be required of all new subdivisions, motels, and multi-family residences.

This use activity regulation establishes a minimum performance standard compatible with the Policies. (SCSMP at C-1).

III

The SCSMP states in the Introduction to the Shoreline Pier Use Activity Section, that:

> On lakes, a proliferation of piers along the shore can have the effect of substantially reducing the usable water surface. (F-44)

The ensuing Pier Policies state in pertinent part:

> 3. Give priority to the use of community piers and docks in all new major waterfront subdivisions. In general, encouragement should be given to the cooperative use of piers and docks.

4. Encourage cooperative use of piers and docks as a means of reducing the proliferation of single-purpose private piers. (F-44)

The SCSMP policies are intended to establish county-wide policies for the conduct of each activity. (SCSMP at C-1). The use regulations are specifically applied to the particular shoreline environments, in this case the Suburban environment.

IV

The SCSMP Introduction and Policies recite clear concerns about the proliferation of docks, essentially a cumulative impacts concern, and encourage cooperative use in all situations, be it a single family home or otherwise, and in all environments. The SCSMP does not require that a new subdivision or any development have a pier or dock. In fact, when the County approved the Cedar Cove subdivision in 1980, no piers or docks were proposed.

V

When a statute's language is plain, unambiguous and certain, as is true for General Regulation No. 2, no judicial construction shall be done. The meaning is to be discovered from the words themselves. See, Clark v. Horse Racing Commission, 106 Wn.2d 84, 720 P.2d 831 (1986). "Shall" is an unambiguous term and presumptively creates an imperative obligation, Clark, supra. The General Regulations are to be read to implement the policies, not -- in the face of "shall" language -- to have elliptical exceptions carved within them. (See SCSMP C-6).

It is not this Board's proper role, by deft statutory construction, to contravene a legislatively enacted SMP.[1] If Snohomish County has adopted a general regulation which is more stringent than required in the SMA, and there are now serious concerns as to the wisdom of that provision, the proper recourse is a legislative one.

VI

Arguments were made that since these permit applicants own a single-family home, they therefore do not come within the language of General Regulation No. 2 for new subdivision. This argument is without merit. The residences are part of a County-approved subdivision. To give respondents' argument credence would allow easy evasion of the SCSMP's clear intent to prevent proliferation -- encouraging one-by-one permit applications after subdivision approval. Such classic piecemeal decision-making would not promote the goals of the SMA, and would contravene the policies of the SMP..

VII

Respondents permittees have urged the application of equitable estoppel against the application of the SCSMP, because the County did not include the dock restrictions on the fact of the map, or otherwise may have assured respondents-permittees that there would be no problem

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1 A direct challenge to an SMP is governed by RCW 34.04.070, relegating such actions to Superior Court for Thurston County.

receiving a permit. In fact, the County granted the permits. It is DOE that has appealed. The SCSMP is a matter of state law as well. There is no pursuasive evidence that DOE behaved in any way meriting estoppel.

Moreover, to apply estoppel against the government would encroach upon its sovereignty and interfere with its duty to see that the SCSMP is properly enforced for the public good. See, Finch v. Mathews, 74 Wn.2d 161 (1986). There was no pursuasive evidence presented that, absent estoppel, the government will cause the permittees a manifest injustice.

The heavy burden necessary to have equitable estoppel applied has not been shown. Alternative remedies may exist in other arenas.

VIII

It can nonetheless be observed that the majority opinion is necessarily a limited one, bound tightly to the specific facts of this case.

JUDITH A. BENDOR
Member