September 23, 2013

CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER

FINDINGS, CONCLUSIONS AND RECOMMENDATION TO CITY COUNCIL

Project: McNabb (Bainbridge Marina)
Site-Specific Rezone Application

File number: REZ 13220

Applicant: Darrell McNabb
P.O. Box 10325
Bainbridge Island, WA 98110

Owner: Darrell & Vannee McNabb
P.O. Box 10325
Bainbridge Island, WA 98110

Request: The applicant requests a Site-specific Rezone to the City's Official Zoning Map, to change the zoning of 2 parcels totaling 1.59 acres from Residential, Two Units per Acre (R-2), to Water Dependent-Industrial (WD-I). The properties are located at 4200 Eagle Harbor Drive, Bainbridge Island.

The applicant submitted a Comprehensive Plan amendment applications (CPA 13220B) concurrently with the site-specific rezone request, as specified in BIMC Section 2.16.140.E. The Comprehensive Plan amendment application was submitted as part of the City's 2013 amendment cycle and is being reviewed pursuant to BIMC Section 2.16.190. The Comprehensive Plan amendment application requests a change in the land use designation for the two subject parcels from Open Space Residential (OSR-2) to Water Dependent-Industrial (WD-I) on the Land Use Map of the Comprehensive Plan.

Location: 4200 Eagle Harbor Dr. NE
Parcel A: Tax Parcel No.: 352502-2-003-2007 (aggregated with Lots 001 and 002 under Tax Parcel No 352502-2-086-2007)
Parcel B: Tax Parcel No.: 352502-2-004-2006

Current Zoning Designation: Residential-2 (R-2) Two Units Per Acre

Current Comprehensive Plan Designation: Open Space Residential-2 (OSR-2)

Environmental Review: Based on review of a State Environmental Policy Act (SEPA) checklist, a Determination of Nonsignificance (DNS) was issued on March 29, 2013.

Planning Commission Recommendation: The Planning Commission considered the Comprehensive Plan amendment request (CPA 13220B) submitted by Mr. McNabb at a study session on May 23, 2013 and conducted a public hearing on June 27, 2013. The Planning Commission recommended approval of the change in the land use designation for Parcel A, and conditional approval of the change in the land use designation for Parcel B.

FINDINGS OF FACT

Site Characteristics

1. ASSESSOR'S RECORD INFORMATION:
   Parcel A: Tax Parcel No.: 352502-2-003-2007 (aggregated with Lots 001 and 002 under Tax Parcel No 352502-2-086-2007)
   Parcel B: Tax Parcel No.: 352502-2-004-2006

2. TERRAIN:
   Parcel A (eastern) slopes gently down from Eagle Harbor Drive, from south to north. Parcel B (western) slopes moderately from the southwest to north, becoming steeper in the northwestern portion of the property and toward the water. City records and maps indicate a landslide hazard area (as defined in BIMC Chapter 16.20 *Critical Areas*) may exist and ta landslide hazard buffer area therefore may apply. Some vegetation exists near the road on both properties.

3. SITE DEVELOPMENT:
   The "Marina" lots (tax parcels # 352502-2-001-2009, 352502-2-002-2008) were developed with a marina and boatyard and associated facilities under Kitsap County permits. Parcel A (tax parcel # 352502-2-003-007) contains a retaining wall, developed under a City of Bainbridge Island permit. Parcel B (tax parcel (tax parcel 352502-2-004-2006) is developed with a caretaker unit and office and associated uses and also contains two small historic cabins.

4. ACCESS:
   The subject properties are located on the south side of Eagle Harbor and obtain road access from Eagle Harbor Drive.

5. PUBLIC SERVICES:
   a. Police- Bainbridge Island Police Department
   b. Fire- Bainbridge Island Fire Department
   c. Schools- Bainbridge Island
   d. Water- Private Well, Class I
   e. Sewer- On-site septic

6. SURROUNDING USES, COMPREHENSIVE PLAN DESIGNATION & ZONING:

a. North: Eagle Harbor
b. East: Japanese-American Memorial Park, WD-I, Water Dependent Industrial
c. South: Single-family residential/ OSR-2/ R-2
d. West: Single-family residential/ OSR-2/ R-2

Procedural History

7. Darrell McNabb has owned four properties on the south side of Eagle Harbor since 1977, before the City of Bainbridge Island incorporated. Zoning and permit issuance on Bainbridge Island were then regulated by Kitsap County. The four parcels comprise approximately 2.71 acres and include associated tidelands. The two parcels subject to this rezone application total approximately 1.59 acres.

8. In 1980, Mr. McNabb applied to Kitsap County for a Shoreline Substantial Development Permit (SSDP346) for a marina, dry boat storage and a boat repair facility. In July, 1981, Mr. McNabb also applied to Kitsap County for an Unclassified Public Use Permit (UPUP) to construct and operate a marina and boatyard. A Final Environmental Impact Statement for the application package was issued in August, 1981. The Kitsap County Hearing Examiner approved the UPUP/Site Plan in November, 1981, and the Kitsap County Board of Commissioners approved SSDP 346 in November, 1981. Marina and boatyard uses were subsequently established on Tax Parcels 352502-2-001-2007, 352502-2-002-2006 and 352502-2-004-2006. Parcels 001 and 002 are currently zoned Water Dependent-Industrial and Parcel 004 is zoned R-2.

9. In 1990 the citizens of Bainbridge Island voted to incorporate, and the City of Bainbridge Island assumed authority for zoning and permitting for the entire Island. Mr. McNabb continued to pursue with the City completion of the development projects authorized under the County permits. A rich trove of historical materials documents thirty years of effort both to define what Kitsap County approved in 1981 and to ascertain Mr. McNabb's success in complying with the original regulatory framework. In 2006 the City and Mr. McNabb engaged in a contested code enforcement episode. The City stipulated in October, 2007, and reaffirmed in January, 2013, that a County-approved site plan as elaborated in various updates remains in full force and effect.

10. Two of the properties owned by Mr. McNabb are currently designated on the City's zoning map as Water Dependent-Industrial, and two others as Residential/2 units per acre (R-2). Over the years the City and Mr. McNabb have disagreed whether these latter two parcels had been incorrectly deemed zoned Residential by the City. While the current zoning map designates them as R-2, a review of the City's previous Comprehensive Plan Land Use Maps, Zoning Maps and associated ordinances indicates that the properties were not consistently so described. In some instances, the properties were shown as residentially zoned, in others as Water-Dependent Industrial. Mr. McNabb is seeking to have all properties designated WD-I so that he can expand the current marina and boatyard operations and bring the zoning into conformance with the land use permits and site plans approved by Kitsap County.

11. Because the most recent zoning maps show the application properties as residentially zoned, Mr. McNabb is presently legally constrained in his efforts to submit permit applications for further water-dependent industrial development. In 2005 the City advised Mr. McNabb that further development of the residentially zoned properties would require a Comprehensive Plan amendment and rezone, and in response Mr. McNabb submitted at that time a Comprehensive Plan amendment request to effect such change.

12. In 2005 the City was employing a two-phased process for reviewing Comprehensive Plan amendment requests, with phase I to determine which amendments warranted further review under phase II. Amendment requests that were not forwarded to phase II were deemed denied. In the case of Mr. McNabb's 2005 amendment request, staff recommended that the request should not be forwarded to phase II, preferring instead to integrate review of the request into the City's upcoming Shoreline Master Program update then scheduled in begin in 2007. The Planning Commission concurred, forwarding its recommendation to the City Council. But the City Council did not adopt this recommendation, voting in November 2005 to forward the McNabb request to phase II and directing staff to review it in the context of its relationship to the Pritchard Park and the Japanese American Memorial sites to the east. Planning Director Larry Frazier informed Mr. McNabb that phase II review would begin in the fourth quarter of 2006.

13. The McNabb amendment request was deferred by the Planning Department and never processed. Nor in the City's recently completed Shoreline Master Program Update were the McNabb properties reviewed within the framework of the original 2005 amendment request. In January, 2013, the City entered into a broad settlement agreement with Mr. McNabb, specifying that he could submit a new amendment request as part of the 2013 Comprehensive Plan amendment cycle and the City would process such request in good faith.

14. The January, 2013, settlement agreement between the City and Mr. McNabb also provided that Mr. McNabb could pursue a change in the shoreline designation for Parcel B through the SMP Update process. Mr. McNabb submitted written and oral public comments to such effect to the City Council in early 2013. The City Council declined to change the Parcel B shoreline designation to Urban and on May 15th forwarded the City's draft SMP Update to the Department of Ecology (DOE) for its review. The Department of Ecology opened a public comment period on the City's draft SMP Update that commenced on July 23, 2013.

15. Mr. McNabb submitted Comprehensive Plan Amendment and Site-specific Rezone applications to the Department of Planning and Community Development on February 13, 2013. After a review of the SEPA checklist, the City's SEPA Responsible Official issued a Determination of Nonsignificance (DNS) on March 29, 2013. As a site-specific amendment, the DNS was mailed to property owners within 500 feet of the subject properties as required by BIMC Section 16.04.130.A.2. The comment and appeal period ended on April 19, 2013. No SEPA appeals were filed.

16. The Planning staff recommended that rezoning Parcel B from Residential to Water Dependent-Industrial should be contingent on Mr. McNabb securing a change in the shoreline designation to Urban through the SMP Update process now being conducted by DOE. This proposed contingency mimics the Planning Commission recommendation for the companion Comprehensive Plan land use map amendment affecting Parcel B. Within the instant proceeding Mr. McNabb's attorney has requested deletion of the contingency tying the effectiveness of the Parcel B rezone to a shoreline redesignation. At the end of the August 9, 2013, rezone public hearing the Examiner left the record open for the receipt of briefing from the City and the applicant on potential legal consequences arising from inconsistencies between zoning and shoreline regulations affecting the same parcel. As argued within the applicant's brief, the City Attorney's memorandum should be regarded as an "advocacy document", not as a formal legal opinion.

Regulatory Requirements

17. The process for reviewing a site-specific rezone application is specified in BIMC Section 2.16.140.H. All the italicized regulatory standards quoted below must be met for a rezone application to be approved.

The following criteria shall be considered in any review for a site-specific rezone in order to establish a recommendation to approve, disapprove or approve with conditions:

1. *The site-specific rezone will not be materially detrimental to the public welfare or injurious to the property or improvements in the immediate vicinity and zone in which the property is located;*

Allowing a further expansion of the current marina and boatyard development would be generally consistent with the existing development pattern for this section of the south shore of Eagle Harbor. The property to the east is zoned WaterDependent-Industrial. The property to the west is zoned residential but much of the shoreline is presently developed with non-residential uses of a water-dependent industrial nature, including three other marinas. The WD-I zoning regulations undertake to mitigate offsite impacts and include a number of zone-specific performance standards designed to control pollution, noise and lighting impacts, waste storage and disposal, air quality emissions, ground and soil contamination, outdoor storage and trash disposal. The Kitsap County Health District did not comment on either the CPA or rezone applications for the McNabb property.

Parcel A is directly south of Mr. McNabb's two existing Water Dependent-Industrial properties that are currently developed with the marina and its associated facilities. Changing the land use designation for this parcel from Residential to Water Dependent-Industrial would allow for an orderly extension of the existing marina and boatyard. In addition, Parcel A is no longer an appropriate or attractive location for single-family residential development due to its adjacency to an existing water-dependent industrial use.

Parcel B is located west of the currently developed Water-Dependent Industrial property with which it shares about 200 feet of upland boundary. In addition to a caretaker and office unit accessory to the marina facilities, nearly half of the marina boat slips lie within the tidelands extension of Parcel B. Changing the zoning designation from Residential to Water Dependent-Industrial on Parcel B would accommodate a further upland expansion of the existing marina and boatyard facilities from the adjacent parcel even if no new shoreline development were contemplated.

2. *The site-specific rezone is warranted because of changed circumstances and the proposed designation is appropriate for reasonable development of the subject property, or because of a need for additional property in the proposed zone, and the proposed designation is appropriate for reasonable development of the subject property;*

The site-specific rezone is appropriate for the property because it would allow for normal expansion of the current marina and boatyard operations, bringing the zoning into conformance with the land use permits and site plan approved by Kitsap County in 1981 and recognized as valid by the City. The changed circumstance of greatest importance is that, after many years of controversy, the applicant and City have resolved most of the disputed issues concerning the regulatory framework applicable to this site. This process has been aided by recent surveys of the applicant's parcels that have corrected longstanding confusion as to the precise locations of existing site development.

3. *The subject property is suitable for development in general conformance with zoning standards under the proposed zoning designation;*

The McNabb property has been approved for water-dependent commercial development since 1981 and its Eagle Harbor location is suitable for such use. The site's overall existing development pattern could be further extended under the proposed WD-I zoning consistent with required standards.

4. *The property will be served by adequate public facilities including roads, water, fire protection, sewage disposal facilities and storm drainage facilities for the intensity to which it is being rezoned;*

The McNabb parcels lie outside the City's water and sewer service area and are currently served by a Class 1 private well and an on-site septic system. The property is accessed by Eagle Harbor Drive. As noted by the City's Development Engineer, facilities will be evaluated for adequacy when a specific development proposal is submitted. No obvious infrastructure deficiencies have been identified. The Health District offered no comments on the rezone application.

5. *The site-specific rezone is in accord with the comprehensive plan;*

In general policy terms, this rezone application is consistent with the vision stated in the City's Comprehensive Plan in that it promotes the continuation of a working waterfront and the expansion of an existing facility, rather than creation of new facilities at a commercially undeveloped location. As such, it is consistent with Goal 6 of the Land Use Element of the Comprehensive Plan, which identifies the purpose of the Water Dependent-Industrial District as the continuation of water-dependent industrial uses so that the Island's remaining working waterfront can be preserved. Further, Policy W 6.5 states in part that expansion of existing facilities should be encouraged over the addition of new facilities. Bainbridge Island has an active boating community but extensive stretches of high-bank and erosional shorelines where private single-dock development is either infeasible or expensive and environmentally impactive. It is anticipated that the Island will have a continued, and indeed growing, need for marina and boatyard facilities.

In the immediate context, concurrent approval by the City Council of the McNabb Comprehensive Plan map amendment applications constitute a necessary predicate for a finding of consistency. Logically, the Comprehensive Plan amendments precede the rezone approval. The rezone cannot be granted without the Plan changes. Thus, as will be discussed below in the Conclusions section, the terms of the rezone must conform to the terms of the Plan amendment, not the other way around. The finding of consistency with the Comprehensive Plan presupposes Council approval of the Plan amendments and a harmonious relationship between the two actions.

6. *The site-specific rezone complies with all other applicable criteria and standards of the city;*

Future uses consistent with the 1981 Kitsap County permits and approved site plans are authorized for the McNabb parcels. Specific proposals will need to comply with the current development standards contained in the Bainbridge Island Municipal Code.

7. *The site-specific rezone would not devalue surrounding or nearby property;*

The McNabb parcels are bounded on the east by City parks property. Properties immediately to the

west are zoned residential but in actuality developed with marina facilities similar to and compatible with current development on the McNabb property, as well as its anticipated future expansion.

8. *The site-specific rezone will not result in an adverse environmental consequence.*

A Final Environmental Impact Statement for the Kitsap County applications issued in August, 1981, provided environmental review of the impacts of full development of the marina and boatyard as proposed and remains valid for those impacts reviewed. Approval of the current rezone application would authorize build-out of the 1981 proposal. Additional environmental review would be required for future WD-I development applications proposing impacts beyond the scope of the 1981 permits.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction over this rezone proceeding for purposes of making a recommendation to the City Council. Public notice hearing requirements have been met.

2. As documented within the findings above, the requirements stated at BIMC 2.16.140.H for rezone approval are rather easily met by the McNabb application, provided questions of underlying Comprehensive Plan consistency are addressed. Review of the McNabb rezone request apart from the need to reconcile the various regulatory regimes affecting the property raised no serious issues. Boatyard and marina uses have been authorized on this property since 1981 and its actual development pattern is consistent with these earlier approvals. Existing uses are harmonious with the proposed Water Dependent-Industrial zoning designation and in conflict with the current R-2 Residential designation. As the attorney for the applicants related in his August 22, 2013, letter, "All my clients are seeking is to have the zoning match the uses that are allowed by the land use approvals issued by Kitsap County, which the City of Bainbridge Island concedes are in full force and effect."

3. The problems posed by this rezone application thus arise entirely from its broader regulatory context. BIMC 2.16.140.H(5) predicates the rezone approval upon a finding that the "site-specific rezone is in accord with the comprehensive plan." Since the current Comprehensive Plan designation for the subject property is Open Space Residential-2 (OSR-2), approval of the rezone presupposes concurrent (or prior) amendment of the Plan from a residential to the Water Dependent-Industrial designation in order for the consistency requirement of BIMC 2.16.140.H(5) to be met. And, in a general sense, this process is indeed going forward as required: CPA 13220B is a concurrent Comprehensive Plan amendment request to effect a WD-I designation on the McNabb parcels.

4. But the devil is in the details. The proposal to rezone Parcel A presents no obstacles to approval because it involves an entirely upland property; the Planning Commission has recommended unconditionally that Parcel A be redesignated to WD-I in the Comprehensive Plan. Parcel B, however, also possesses some 200 feet of Eagle Harbor shoreline plus associated tidelands. This Parcel B shoreline area also lies just east of the mouth of Taylor Creek. On the City's existing (pre-Update) shoreline map, while the shoreline immediately east of Parcel B is designated Urban and further west is Semi-rural, the mouth of Taylor Creek (including the Parcel B frontage) is currently designated Natural. In the City's SMP Update presently under review by DOE, the area at the mouth of Taylor Creek has been recommended for a Shoreline Residential Conservancy designation. But neither the old Natural nor the new Shoreline Residential Conservancy designations support marina and boatyard development.

5. In response to this potential conflict between zoning and shoreline use designations, the

Planning Commission accepted the staff recommendation to make approval of the change in Parcel B's Comprehensive Plan designation to WD-I conditional on first obtaining from DOE a change in the adjacent shoreline designation to Urban. Since the City's SMA Update presently before DOE proposes a residential shoreline designation for Parcel B, the effect of the Planning Commission condition is to require the applicant to convince DOE through the public comment process to reject the City's own officially preferred designation – a daunting task any way you slice it. Hence the applicant's attempt to obtain through the instant rezone an approval unburdened by the recommended disabling contingency.

6. Whatever the ultimate merits of designating the Parcel B shoreline as Urban or Natural (or something in between), it seems clear that a rezone approval that creates an inconsistency between the zoning and Comprehensive Plan designations would cause more problems than it would solve. The zoning and Plan designations need to be harmonious. Under Washington's land use scheme the Plan designation is primary, and the zoning implements the Plan. It is not the function of a rezone approval to leverage a Plan change, no matter how desirable that change may seem. Thus the conditions of rezone approval must not conflict with parallel conditions placed on the concurrent Plan amendment.

7. Having noted that critical limitation, there nonetheless may be more flexible and less drastic ways to resolve the problems attendant to potential regulatory inconsistencies affecting a single piece of property. First, a conditional rezone need not adopt the specific substantive requirements recommended by the Planning Commission for placement on the concurrent Plan amendment. It is sufficient simply to require the rezone to be activated by the same set of contingencies imposed on the Plan amendment – whatever such contingencies ultimately may turn out to be. This approach recognizes that the City Council Plan amendment approval could involve revision of the Planning Commission recommendation.

8. In reviewing the Planning Commission recommendation on the proposed CPA 13220B Comprehensive Plan amendment, the City Council might wish to take into account the fact that additional marina and boatyard development can occur on Parcel B without further construction on the shoreline itself. This is because after approval of the Parcel A rezone the entire eastern flank of Parcel B will lie adjacent to McNabb properties zoned WD-I. Marina and boatyard development to the east could be extended onto upland portions of Parcel B without triggering a requirement for a shoreline permit. But the absolute terms of the Planning Commission recommended condition preclude this kind of unconflicted upland marina and boatyard development from taking place because the condition requires all of Parcel B to remain in residential zoning until the shoreline designation is changed.

9. A more targeted solution consistent with the facts on the ground might involve the following: approval of the immediate Comprehensive Plan and zoning redesignation of Parcel B to WD-I subject to a condition that no shoreline permit applications will be processed or approved until the shoreline designation is changed to Urban. This would avoid the potential conflicts between shoreline and zoning permitted uses that are of concern to the Planning Commission without unnecessarily tying up the whole parcel in the process.

In closing, it is important to emphasize that the foregoing scenario for altering the proposed Plan amendment condition merely offers a friendly suggestion to help untangle a regulatory snarl that has plagued Island residents for more than thirty years. The Hearing Examiner has no jurisdiction regarding the Comprehensive Plan amendment process, and this suggestion cannot and does not comprise part of the formal rezone recommendation.

RECOMMENDED DECISION

The Hearing Examiner recommends that the Bainbridge Island City Council APPROVE the McNabb Site-Specific Rezone (file no. REZ 13220), subject to the following conditions precedent:

For Parcel A: Water Dependent-Industrial (WD-I) zoning shall become effective immediately upon City Council approval of Comprehensive Plan amendment CPA 13220B.

For Parcel B: Water Dependent-Industrial (WD-I) zoning shall become effective upon City Council approval of Comprehensive Plan amendment CPA 13220B and satisfaction of, or subject to, any contingencies and conditions stated therein limiting or modifying such approval.

Recommended September 23, 2013.

Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.