

**DECISION OF THE HEARING EXAMINER  
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

**Michael Morgan**

**SPB15435-60**

From an Administrative Decision  
Of the Director, Dept. of Planning and  
Community Development

**Introduction**

Michael Morgan appealed the administrative decision issued by the Director, Department of Planning and Community Development, regarding the denial of the programmatic buoy application for approval of a recreational buoy in Fletcher Bay.

A public hearing on the appeal was held April 7, 2011. Mr. Morgan represented himself and Josh Machen, Planning Manager, represented the Director, Department of Planning and Community Development.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

**Findings**

1. The City of Bainbridge Island processed a programmatic shoreline substantial development permit intended to bring buoys in waters around Bainbridge Island into compliance with the SMP by recognizing buoys in existence prior to the requirement for permits and provide an inexpensive and streamlined permitting mechanism for those installed since 1996 without a permit and future buoys. The programmatic SSDP included twelve conditions for approval of applications for the buoys.

2. In October 2010, Leann McDonald applied on behalf of Michael Morgan (hereafter "Applicant") for approval of a recreational mooring buoy in Fletcher Bay adjacent to Applicant's property at 8815 Woodbank Drive NE. The buoy had been installed since 1996. On February 14, 2011, the Director, Department of Planning and Community Development ("Director"), issued her Notice of Administrative Decision,

Exhibit 1, Attachment. A letter accompanying the Notice of Administrative Decision explained that the denial was based on Condition No. 3 of the programmatic buoy approval that prohibits approval of buoys under the programmatic permit if they are located in a location that is mapped or meets the definition of being an Aquatic Conservancy Shoreline designation. The letter stated that Fletcher Bay meets the definition of an “Aquatic Conservancy Shoreline area.” Exhibit 1, Attachment. Applicant appealed the administrative decision on February 25, 2011.

3. The “inner” part of Fletcher Bay is mapped in the City’s Shoreline Management Plan as an Aquatic Conservancy Area. Applicant’s buoy is located in the “outer” portion of the bay that is not so mapped.

4. An area is designated Aquatic Conservancy environment if it fits any of four regime descriptions “whether or not it is mapped as such.” Section 16.12.140J.2. Regime I is tidal lagoons, defined as “Bodies of saline water...with a constricted or subsurface outlet that is subject to periodic, but not necessarily daily, exchange of water with Puget Sound or a tidal inlet. The connection between the sea and the lagoon may be subsurface through permeable gravel or sand berms.” The section states there are two currently identified tidal lagoons, Tolo Lagoon and Battle Point Lagoon.

5. The Director’s determination was based on previous work done by the department. In October 2004, Peter Best, then a planner with the Department of Planning and Community Development, contacted Hugh Shipman, a shoreline geologist employed by the state Department of Ecology familiar with Bainbridge Island and Puget Sound, for assistance in determining whether Fletcher Bay is a “tidal lagoon”. Exhibit 3, Attachment A.

6. Best offered his opinion to Mr. Shipman that Fletcher Bay meets the criteria of a tidal lagoon and described Fletcher Bay as characterized by a spit at its mouth, extending from south to north, consistent with the direction of net-shore drift from Point White to Battle Point. He said that behind the spit is a tidal delta of sand and gravel formed by the velocity of flooding tides with a basin behind the delta with a depth of maybe –12 feet MLLW which always stores water at low tide. Beyond this basin, he said that Fletcher Bay is best characterized as a low-gradient sand and/or mud flat. He reported that local residents advised him that Fletcher Bay is tidally influenced above a tidal elevation of approximately +2 feet MLLW. Two major fish-bearing streams drain into the end of Fletcher Bay and several seasonal drainages discharge through the rest of the bay and make it an estuarine environment.

7. Mr. Shipman responded, in part:

This definition (the BI SMP definition of ‘tidal lagoon’) would seem to include bodies of water for which the connection to the main body of Puget Sound is significantly restricted, but where marine influence still dominates the hydrology. I would interpret this to preclude more open inlets such as Eagle Harbor or Manzanita Bay, where tidal exchange is largely unrestricted, but I would expect it to apply to features such as

Fletcher Bay or the tidal water body behind the Point Monroe sand spit. The definition is also clearly written to extend to the aquatic systems at Battle Point and Tolo Lagoon, where there is even greater restriction of tidal exchange between the features and the open marine environment.

Exhibit 3, Attachment B.

8. Mr. Shipman did say that there are other terms that might be applied to Fletcher Bay such as pocket estuary, estuarine lagoon, restricted stream-mouth estuary, barrier estuary, drowned stream-valley estuary with an enclosing spit. “Which term is used may depend on the situation and the need to emphasize salinity regime, tidal exchange, ecological character, or geological history.”

9. In December 2004, Best advised the then director that he believed that Fletcher Bay meets the classification criteria for tidal lagoons and that the map for Fletcher Bay is in error and recommended that Fletcher Bay in its entirety should be mapped as an Aquatic Conservancy shoreline environment designation “because it meets the designation criteria under Regime I and contains the types of sensitive environmental features that the Aquatic Conservancy designation is meant to protect.” Exhibit 3, Attachment C. He offered that the shallow, low-velocity, estuarine waters of the bay serve as an important nursery where outmigrating juvenile salmon undergo physiological transformation, spend time rearing, seek refuge, and migrate and serve nursery functions for important forage fish and other fish and invertebrates, along with important functions for birds and wildlife and where oysters are able to exist without cultivation.

10. At some point after this communication to the then director, planning staff was advised to regard all of Fletcher Bay as Aquatic Conservancy indicating that the director agreed with the recommendation. Testimony of Machen. The map remained unchanged.

11. Section 16.12.140J.1 states the purpose of the designation:

The aquatic conservancy environment is intended to preserve those portions of the marine waters of the city whose existing natural state is relatively free of human influence, or whose resources, biological diversity, or other features are particularly sensitive to human activity, or whose unique historical, archaeological, cultural, or educational features merit special protection.

\* \* \*

12. The inlet to Fletcher Bay is much larger than that for the two lagoons specified in the Regime I description and Fletcher Bay is a navigable waterway with watercraft moored in the bay year round. More than two thirds of the properties on the bay have floats, piers and/or buoys. Testimony of Morgan. The bay has a long history of moorage and recreational boating use. Testimony of Beierle.

13. The decision to treat the entirety of Fletcher Bay was not accompanied by any formal process in that there was no public notification, map change, public hearing or adoption of a formal ruling.

14. Staff anticipate that the status of Fletcher Bay will be clarified as part of the City Council's action on the update to the City's Shoreline Master Program.

15. Section 16.12.140J.3 requires the city to map the limits of the designation. It provides that "(w)here there is a conflict between the map and criteria, the criteria will prevail provided a report is prepared by a qualified professional verifying that the map is in error. The report will be the responsibility of the party requesting the map change."

### **Conclusions**

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Section 2.16.095.

2. Grounds for appeal asserted by Applicant are that:

- 1) Permitting the buoy would be consistent with current use of Fletcher Bay;
- 2) The outer portion of Fletcher Bay is different from the designated and mapped Aquatic Conservancy Areas; and
- 3) Due process was denied in the designation change to Aquatic Conservancy.

3. The Code provides that where there is a conflict between the map showing the aquatic conservancy area and the criteria, the criteria prevail over the mapping, "provided a report is prepared by a qualified professional verifying the map is in error." If that provision is to be read literally, because the Applicant seeks to rely on the map and it is the Department that perceives a conflict between the map and the criteria, it is the Department that must have such a report prepared. The Department argues that the provision applies only when someone claims that the mapping of aquatic conservancy area includes property that does not meet the criteria, so the party making that claim must provide such a report to have designation removed. That may have been the intended result, but the language used does so limit the requirement for expert verification.

4. The issue then is whether the memo from Mr. Shipman constitutes a "report prepared by qualified professional verifying that the map is in error" as required by the Code. There was no dispute that Mr. Shipman is qualified to render an opinion as to whether the entirety of Fletcher Bay is a "tidal lagoon", the relevant criterion. His statement that "I would expect it to apply to features such as Fletcher Bay or the tidal water body behind the Point Monroe sand spit" leaves a question in this reviewer's mind as to whether it is his definitive opinion that the map is in error for failing to include the entire lagoon. In fact, the meanings given in several dictionaries for the word "would" include expressing "futility", softening the force of a statement, and expressing an uncertainty, any of which raises a real question as to whether Mr. Shipman's opinion was that the map is in error because Fletcher Bay *is* in fact a tidal lagoon. See, e.g., Webster's New World Dictionary, 2d. College Edition (1982), Random House Webster's College Dictionary (1992), Webster's New World Dictionary (2002). While the Director apparently believed that he had the required report, over the six or so years since the

Director informally decided that the map was in error, no action to correct the error such as to amend the map or the Code to specifically refer to Fletcher Bay that would give notice to property owners or the public was taken. Though Applicant's ability to present evidence in the appeal of the denial of a permit could be viewed as correcting such violation, it should be recognized that on appeal he must overcome the substantial weight to be given to the Director's decision, where if he had been aware of a proposed map change or Code amendment he merely would have needed to convince the Director or the City Council that the existing mapping is indeed correct. Whether this offends due process need not be decided.

5. As mentioned above, the hearing examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F.2. The "substantial weight" requirement means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Though Applicant presented facts that showed that the characteristics of Fletcher Bay are different from those of the named tidal lagoons, he did not provide expert testimony that would have allowed the hearing examiner to conclude that the bay is not a tidal lagoon. But, because the decision of the Director is based on an informal decision made by a previous director that relied on a "report" with an ambiguous statement of opinion by the expert, this reviewer is convinced that it was a mistake to rely on that earlier informal decision without obtaining clarification from the expert. The only recourse is to vacate the denial and remand the matter to the Director for a new decision based on a report containing an expert opinion that the map is in error, or not.

6. In light of this outcome, the issue of whether Applicant was denied due process in the informal decision to treat the entirety of Fletcher Bay as an Aquatic Conservancy area without the notice and opportunity to be heard that would have been associated with a formal map change or Code amendment need not be addressed

### **Decision**

The Director's Administrative Decision is vacated and the matter is remanded for a new decision consistent with the requirements of the Code.

Entered this 21st day of April 2011.

/s/ Margaret Klockars  
Margaret Klockars  
Hearing Examiner *pro tem*

### **Concerning Further Review**

*NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.*

The decision of the hearing examiner shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.