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Analysis and Commentary on the Wysong/Ziemba Dock Proposal,
No. PLN 50280C SSDP SVAR

To: The City of Bainbridge Island
280 Madison Avenue North
Bainbridge Island, WA 98110

And To: Our Neighbors on Bainbridge Island

Dear All:

We have the following concerns about the applicants' proposal to place an enormous dock in Little Manzanita Bay.

A. Little Manzanita Bay

Little Manzanita Bay is Bainbridge Island's smallest, least disturbed, most biologically diverse estuary. It is extremely shallow and, for that reason, has never been developed in the fashion of deep-water ports like Eagle Harbor and Port Blakely.

There is a salmon stream entering the Bay just a few hundred feet south of the proposed project. The bay supports an extraordinary variety of wildlife. Presented here are personal observations of the fish and wildlife in the bay over more than 40 years. The applicants present virtually no information regarding most of the species that are dependent on the bay.

There are two road ends (Numbers 47 and 48 on the City's map) that provide access to the public to the waters

accurate map, there is no chance that any reviewer could possibly assess the radical impact this dock would have on the rights of other tideland owners (I am one), boaters, swimmers or the public.

- b. Also, without an accurate description of the current use of the bay – in conjunction with a map— there is no way that this application conveys the impact of this proposal, which is no less than to attempt to convert the entire upper bay from its current public and natural uses, to private use.
- c. Without accurate maps and photographs, one cannot evaluate the measure of truth (or in this case the falsity) of statements such as no uses will be displaced and no views impacted, that the other owners on Manzanita Bay have similar docks that reach deep water, and the like. I assume that it is the intent of the applicants to obscure the fact that we are dealing with Little Manzanita Bay, not Manzanita Bay. There are NO similar docks anywhere in Little Manzanita Bay.
- d. Without an accurate map or survey, one cannot tell which properties will be affected. Similarly, one cannot tell the extent of the misrepresentation that no use will be impaired. In this regard, I noticed that there was only one photograph or artist's representation submitted by the applicants. It took me about 45 minutes find the photograph, so I doubt that most reviewers of the proposal will find it either. Regardless, it is absolutely untrue that the views of other property owners would not be affected. Having no accurate map or related photographs helps perpetuate the misrepresentation by the applicants in this regard.
- e. Without an accurate map or photographs that include the adjacent ownership, points of access (like the road ends on Dock Street and Woodland Avenue) or a correlating description of the uses of the bay, it is impossible for the average person – or a city planner – to evaluate the applicants'

statements that the traditional uses of the bay will not be interrupted. It is clear to those who of us who live there that normal use by both private resident, boaters, and the public will be overwhelmingly interrupted.

2. I was surprised at the nearly nonexistent information concerning the environmental qualities of the bay.

The applicants make passing reference to a very few of the species that use the bay, but there is no detail in that which is provided. This seems to reflect an intent NOT to address ecological functions of the bay, which are many and important.

It is my recollection that the City has created extensive analyses of the estuaries on Bainbridge Island in conjunction with the study and adoption of the Shoreline Master Program. Would it not be reasonable to extract the information relating to Little Manzanita Bay from these documents and incorporate it into the file?

3. In the file there is a document entitled "Design Criteria." I cannot tell who filled this out, but I assume it is an applicants' document. It is impossible for people who are not intimately familiar with the shoreline development and variance criteria to evaluate what is conveyed in this document without reference to "the rules" that are supposed to be applied to applications of this sort. I cannot see how this project could be assessed as ready for evaluation without a full description of the applicable standards and how they might be met (or not met) by this application. I had a discussion with Dave Greetham about one such standard – that relating to an applicant's dock not exceeding the average length of neighboring docks within 500 feet. That standard is not referenced by the applicants, nor are any others, except passing reference to the "No Net Loss" standard, which I discuss further on.

4. There is no information here concerning lighting, electricity, impairment of navigation, etc. I noticed a vague reference to lighting and “reflectors” (nowhere depicted or described). Any lighting would be a marked departure from what currently exists because there is now no light pollution from anywhere in the bay.
5. There are references in the documents to two meetings apparently held between the applicants and the City. The meeting dates were June 28, 2018 and sometime in August 2018. There are no notes concerning what was said, what presentations were made, what representations were made, or the like. I have made a FOIA Request for these notes, but nothing was provided to-date. Would it not be good to include the notes in the file so that we can understand the exchange that took place on these two dates?
6. There is a document entitled a “No Net Loss Report.” I do not understand this. There is no analysis or no assessment of what exists now by way of environmental functions, public use, or aesthetic qualities, so it is unclear to me how one could use this report to determine the effect of the proposed dock on what would be lost. This is especially true given the deficiencies in the maps, engineering, photographic depictions, and failure to analyze in any way the current uses of the bay either by people, animals, birds or fish.
7. The “fall back” proposal (the 100-foot dock) shares all of the deficiencies of the larger proposal except in scope. The fact that no representations – engineering, photographic, or in relation to the ownership of adjacent tidelands – have been presented strongly suggests that the hope is to have this lesser proposal pass muster as a “compromise” from the larger proposal. This is a tactic one often sees in business and government permitting. Start with something truly outrageous so that the “compromise” – even if also outrageous – appears more “reasonable.” The tactic is employed by people who are trying to get

something they are not entitled to. With this in mind, the failure to have documents or photographs from which the backup proposal can be assessed is a glaring deficiency in the file as I read it.

8. There is an engineering memo. Frankly, I don't understand it. It seems to say that the City engineers have determined that the project is ready for review. With the deficiencies identified above I can't see how this is accurate. In addition, I note that there is virtually no analysis, graphic depictions, photographs, etc. of the "backup plan."
9. There are some notes on the environmental checklist. Whose handwriting is this, and what were the circumstances on which the notes were made?
10. Finally, it does not appear that any of the file from the earlier proposal, which was just a few years ago, is included in this file. Should not all of those documents, including any analysis or decision-making by the City be included? It seems like our neighbors will now have to reinvent the wheel. I am quite sure that there were detailed comments on the biology of the bay, its species, environmental importance and the like. Why are these not in the file?

D. Misrepresentations in the Application

The applicants have the obligation to fairly present the proposal in order that the ensuing discussion of the merits and demerits of the project will proceed with all parties having a fair understanding of the impacts of the project on existing uses. Unfortunately, the applicants have chosen another path. Starting from its representation that numerous other homeowners have deep- water docks on the bay, the applicants seek to mislead both by affirmative misstatement and omission.

In fact, there are no other deep-water docks on Little Manzanita Bay. Little Manzanita Bay is highly distinct from Manzanita Bay, which is deeper, has a much steeper gradient between upland and tideland, and does not have

an important salmon stream or associated ecological functions attached to it. Nor are there any road ends on Manzanita Bay, and there is not a history of public shallow water usage.

There is only a single picture presented in the application concerning what the structure might look like. It is presented from the perspective of a driver on Manzanita Road, is not the scale, presents neither the floats, lift, or boats that are envisioned by the project, and in no way projects a fair representation of the impact to the neighbors and the public whose rights are sought to be taken.

There are no depictions of the ever-increasing obstruction that the proposal would present to use of the waters of the upper bay (which would still be navigable, swimmable, and fishable) as the tide drops.

There is no analysis of any sort concerning the ecological effects of the dock.

The maps submitted are carefully designed **NOT** to include the road ends at Woodland Drive and Dock Street.

We presume that this is because the applicants have sought to avoid any analysis of the impact of its proposal on public use of the bay. It is also true that no notice was posted at either road end, thus ensuring that many of the public who use the road ends to access Little Manzanita Bay have been deprived of an opportunity to comment.

In short, the applicants seek to have their project evaluated on an unfair presentation where most of the impacts are hidden by the application.

E. Under the Law and Standards Applicable to Shoreline Usage, the Applicants' Proposal Is Not and would Never Have Been Legal Given the Uses that Have Developed in the Bay.

The applicants ignore both the law and the intent of the laws relevant to shorelines of statewide significance. As is common with such ignorers, the applicants cherry pick soundbites from certain portions of certain regulations in the hope that the City (and the rest of us) will simply miss the gravamen of each of the laws bearing on the application.

1. The Public Trust

For as long as the oceans have existed, the tide has ebbed and flowed. For as long as evaporation has taken place, the excess moisture in the atmosphere has fallen to earth to create rivers that return the water to the sea. For as long as freshwater has met the ocean, unique and wonderful species have occupied those estuaries where the freshwater mixes with salt. For as long as man has proliferated, he has imposed upon those estuaries and the life they give to the ecology of the ocean. We now live in an era where the degradation to these estuaries can no longer be ignored. We do not ignore it on Bainbridge Island.

Prior to the existence of the Shoreline Management Act (SMA) and its implementing regulations, the common law recognized severe limitations on the rights of upland and even tideland owners whose uses would conflict with the natural ecology, its processes, the rights of neighbors, and the rights of the public. In Washington, the elevation of private rights has never legally been allowed to supplant those of the public when the two conflict over water related use of tidelands.

More than 30 years ago, in *Orion v. State*, 109 Wash. 2d 621 (1987), the Supreme Court described the limits on private ownership of tidelands where assertion of private rights conflicted with the natural and public uses.

“The public trust doctrine has always existed in Washington... [It] emanates from the public authority which requires the State to maintain its dominion in trust for the people (emphasis added.)

“The public trust doctrine resembles a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land’s dependent wildlife.” (747 P.2d 1072–3).

“Therefore, Orion [the tideland owner there] had no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as the incidental rights and purposes recognized previously by this court” which include “rights of fishing,

boating, swimming... and other related recreational purposes.” Quoting *Wilbour v. Gallagher*, 77 Wash. 2d 306, 316, 462 P.2d 232 (1969), cert. denied 400 U.S. 878, 91 S.Ct. 119 (1970).

This application does not preserve the public trust. The applicants’ proposed use would impair both the wildlife dependent on Little Manzanita Bay, the fishery, and the public’s rights of boating, swimming, and other recreational purposes like paddle boarding, canoeing, and walking on first-class tidelands owned by the State.

2. The Shoreline Management Act of 1971

Nearly 50 years ago, Washington recognized the need to codify the principles of the Public Trust Doctrine into a more easily applicable set of rules that would govern proposed shoreline projects. In the era of Dan Evans and Scoop Jackson, Washington recognized the need for limits to what could, and should, be placed on the shoreline, in estuaries, and in navigable waters.

The Washington population in 1971, when the Shoreline Management Act was passed, was 3.4 million people. Today it is estimated to be just shy of 8 million people. Bainbridge Island has experienced an even greater percentage increase, rising from approximately 7,000 people in 1971 to over 25,000 today.

Even in 1971, with the State’s population just over 40% of what it is today, the people of Washington realized that, without serious consideration of what the future might hold, they would likely lose not just the recreational access to the waters of Washington, but also the fish, birds, clams and other species that enrich the experience of living here.

The SMA was unique at the time because it laid out a series of analytic imperatives: a triage system for protecting the shoreline and its use against the types of development that had gone unchecked in the past. These imperatives codified a mandatory framework by which each project must be judged. The principles are statutory, and they may not be undermined or frustrated by any contrary local decisions, interpretations or regulations. These mandatory principles ensure that any proposed project:

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
5. Increase public access to publicly owned areas of the shoreline
6. Increase recreational opportunities for the public in the shoreline
7. Provide for any other elements as defined in RCW 90.58.100 deemed appropriate or necessary

A guiding principle of the Shoreline Management Act is this: “In the implementation of this policy the public’s opportunity to enjoy the physical and aesthetic qualities of the shoreline shall be preserved ...”

RCW 90.58.020.

The applicants’ proposal fails all of the SMA’s mandatory principles:

1. It pays no regard to the statewide or public interest.
2. It destroys the natural character of Little Manzanita Bay.
3. It elevates the short-term interests of two property owners who have recently moved to Bainbridge over every other interest.
4. It degrades the resources and ecology of the shoreline.
5. It decreases public access to the entirety of the upper bay and directly impedes the public’s established non-invasive uses of the bay primarily in the form of swimming, kayaking, paddle boarding, sailing, birdwatching etc.

6. It substantially impairs the recreational opportunities for all others.
7. It meets none of the objectives of RC W 90.58.100.

F. The Shoreline Master Program (SMP).

In 2014, the City amended the SMP. The city was required to do so because, like other local jurisdictions, the City is the implementing authority charged with carrying out the purposes of the Shoreline Management Act. The logic behind this allocation of implementing authority to local jurisdictions is that individual communities are better able to assess local concerns, monitor growth, and recognize threats to critical habitats, such as Little Manzanita Bay. While regulations adopted to implement the 7 fundamental purposes of the SMA may be more restrictive than the SMA, they may not be less so. (SMP 1.3.4.5).

And, no decision implementing any regulations under the SMP may violate the 7 guiding principles of the SMA which are set forth above.

While there are other sections applicable to this application, the following are particularly pertinent:

➤ 4.1.1.1

“The Shoreline Management Act of 1971 designates certain shoreline areas as shorelines of statewide significance “(SSWS). Because the shorelines are resources from which all people in the State derive benefit, preference is given to uses which favor public and long-range goals.”

Little Manzanita Bay is a shoreline of statewide significance.

- 4.1.1.3 – This provision adopts in whole the first 6 imperatives of the shoreline management act listed in paragraph E.2. above.
- 4.2.4 – Public access – Visual and Physical
- 4.2.4.1 the provisions of this section are intended to:

1. Promote and enhance the public interest with regard to rights to access waters held in public trust by the state while protecting private property rights and public safety.
2. Protect the rights of navigation and space necessary for water -dependent uses.
3. To the greatest extent feasible consistent with the overall best interests of the state and the people generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the state, including the use of the water.
4. Regulate the design, construction, and operation of permitted uses in the shorelines of the state to minimize, in so far as practical, interference with the public's use of the water.

The SMP also provides implementing goals and regulations that are applicable to evaluation of any proposed project.

➤ Purpose

- Protecting and restoring shoreline resources and helping to assure public access to the shoreline.
- Insuring, at a minimum, no net loss of shoreline ecological functions and ecosystem – wide processes.
- Adhering to and fostering the policies of the SMA.

➤ 1.3.4.5 “in the event of conflict between [the SMP] and other laws [like the public trust or the SMA], “the regulations that provide more protection must be enforced.””

➤ 1.3.6.4 the policies ... “Will be used” by the city in applying the regulations.

➤ 3.3.1.3 Management Policies

- .1 Uses that impact the ecological functions of critical saltwater habitats should not be allowed..."
- .2 New overwater structures... Must be limited to the minimum size necessary to support the structures intended use while protecting and conserving aquatic resources
- .3 Diverse public access opportunities... Should be compatible with the existing shoreline and aquatic uses
- .5 "In appropriate areas fishing and water recreation should be protected from competing uses
- .6 All developments and uses of the navigable waters, tidelands or betterments should be located to avoid and designed to minimize interference with navigation
- .7 Development and uses on navigable waters, tidelands or bed and should be located to avoid and designed to minimize impacts to public views
- .8 Development and uses on navigable waters, tidelands or bed and should be designed and located for the safe unobstructed passage of fish and wildlife, including species whose life cycles are dependent on migration and would be impacted by in water development

The proposed dock cannot meet the overriding goals and regulations of the SMP because the proposal:

- Violates the essential purposes of the SMA
- Adversely affects the ecological function of critical saltwater habitat for numerous species
- Restricts navigation and fishing by wild species (ecological function) and by humans (public rights)
- Interferes with navigation and its attendant public rights (*see, Orion*)
- Destroys public and private uses
- Seeks to "privatize" long-established (and hard won) public enjoyment and traditional uses – swimming, kayaking, canoeing, paddle boarding, fishing, birdwatching, etc. – in the upper bay.

G. The Applicants Cannot Meet (In Fact Do Not Address) the Requirements for a Variance

In order for the applicants to secure a permit for the proposal, they must meet all the requirements for a variance.

WAC 173-27-170(1) provides that:

Variance permits should only be granted where denial would result in thwarting the public policy enumerated in RCW 98.508.020 (the guiding principles).

As we have seen, the application violates each of these principles.

WAC 173-27-170(3) provides that variance applications must establish all of the following:

(a) that the standards set forth in the master program “preclude all reasonable use of the property.”

(b) that the proposal is consistent with the use of section 2(b) through 2(f)

(c) that the public rights of “navigation and the use of the shoreline will not be adversely affected.”

The applicants have not attempted to demonstrate qualifications for a variance— they indeed are, living and enjoying the waterfront property which they bought with the regulations in place.

The application violates each provision of 2(b) through 2(f)

The application promises to substantially impair the public’s right of navigation and use of the shoreline.

H. The SMP’s Requirements for Environmental Quality and Conservation

We have seen that the SMP follows the triage criteria of the SMA. What is less known is that the SMP carries additional restrictions that are designed to protect Bainbridge Island’s unique and threatened shoreline resources.

While paragraph 4.1.1.3 teaches the 6 SMA imperatives, it adds the following:

4.1.1.3.3.b “preserve resources and values of shorelines of statewide significance for future generations”

4.1.1.3.3.c “actively promote aesthetic considerations when contemplating new development or redevelopment of existing facilities”

4.1.1.3.4.a “minimize development activity that will interfere with... aesthetic values”

4.1.1.3.4.b “all shoreline development should... avoid disturbance of... and minimize adverse impacts on Fish and Wildlife Service resources including spawning, nesting, rearing and habitat areas and migratory routes.”

4.2.4.1.3 “to the greatest extent feasible... protect the public’s opportunity to enjoy the physical and aesthetic qualities of the shoreline of the State including the use of the water”

4.2.4.4.3 shoreline development, uses and activities should not usually impair or detract from the public’s physical and visual access to the water

(Emphasis added.)

The SMP also has an additional overlay of triage priorities:

- Avoid
- Minimize
- Rectify
- Reduce
- Compensate

This triage system is a mandatory mitigation sequence under both SMP 4.1.2.1 and 4.1.2.4.

The proposal cannot survive the SMP's goals, regulations or mitigation sequences for the reasons that the proposal attempts to impair important public and environmental resources, converts them to completely private use. Its effect on the public's use and enjoyment, both physical and aesthetic, is devastating. The simple answer here is the best (and first) choice. "Avoid." In other words, just say no.

5.3.3.1: And, of course, this same priority array precludes the location of boating facilities (Avoid) in:

- a. Critical saltwater habitat, including ... spawning areas for forage fish (such as herring, surf smelt or sand lance).
- b. Subsistence, commercial and recreational shellfish beds.

5.3.3.3. Design, locate, construct, and maintain floating facilities to:

- a. Avoid ... noise, light, and glare
- b. Assure that their structures and operations will be aesthetically compatible with the area visually affected and will not unreasonably impair shoreline views from adjacent properties or the public visual access to the shore.

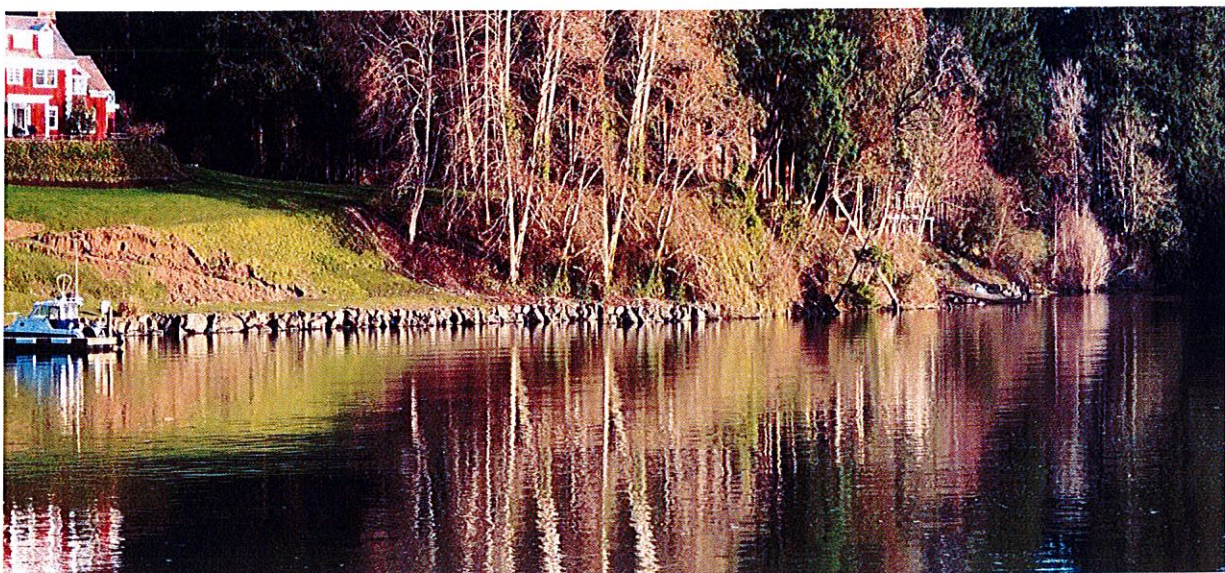
5.3.3.6. Ensure the location and design of floating facilities does not unduly obstruct navigable waters and avoids adverse effects to recreational opportunities or the under and enjoyment of the water or beach of adjoining properties.

The applicants' feeble attempt to address these mandatory regulations is this:

"Most houses in the area face the Olympic Mountains, and the proposed dock does not interfere with any of these views." (Narrative at pg. 3.)

This assertion is patently false. Most of the homes on the bay do not have a view of the Olympics. The same is true of a number of houses on the East side—like the Sanders home.

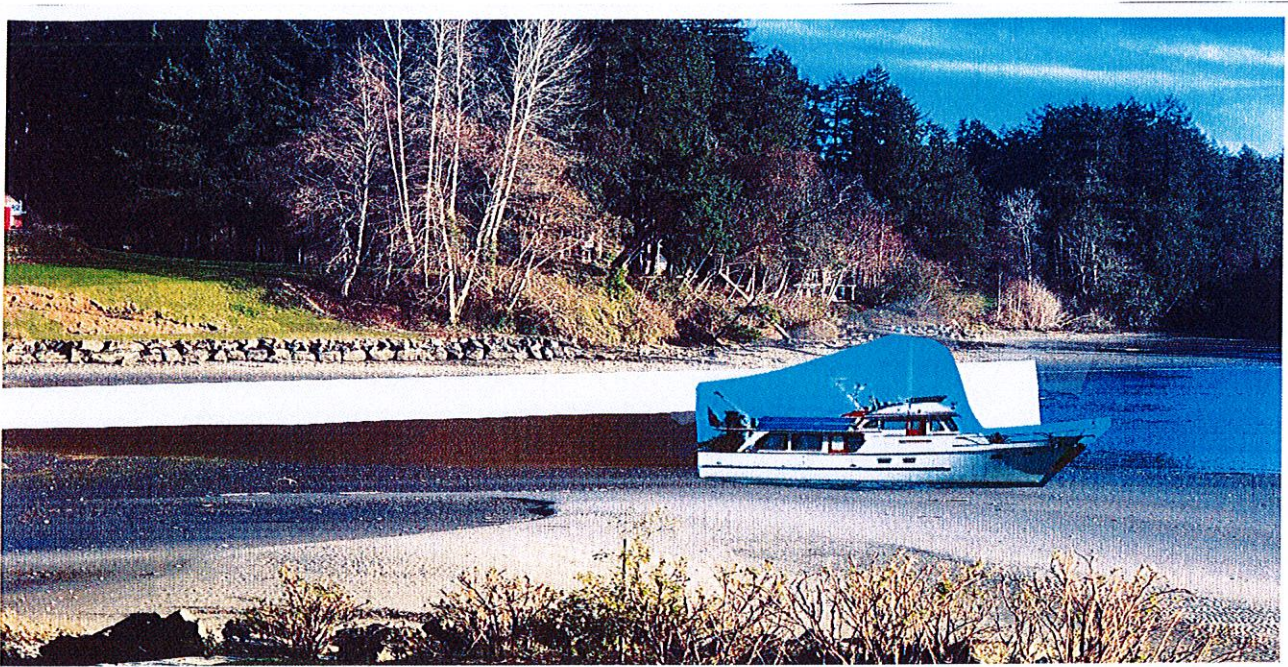
The view from our home is depicted below:



And the impairment to the view presented by the applicants' dock would be something like this when the tide is in:



And something Like this when the tide is out:



I apologize if these photos are not “to scale.” I don’t know how to make them to scale with my iPhone and printer. (It is also not our burden. Rather, it is the applicants’.) The photos do accurately convey the impact of the dock on our view.

I. As the Tide Falls

Among the many misleading aspects of the application is the failure to describe the effects of the falling tide on users of the bay.

The tide averages 12 or more feet, and because of the shallowness of the bay, approximately 40% of the time, the water is restricted to a narrow band, sometimes a few inches and sometimes a few feet deep. It is wadable, fishable, kayakable and swimmable. It is used by people, mammals and fish. As the tide ebbs, the barrier presented by the applicants’ proposed dock, would create an ever-greater obstruction to the upper bay such

that almost no human use would be made of it. Similarly, as the tide drops, the access by animals and fish would likewise be restricted.

When the tide goes out to beyond the minus one-foot line, the applicants' floating parking structure would present an impediment to anyone attempting to walk on the public tidelands of the bay. The structure itself would resemble something like a bright, silver horizontal tower crane dangling a trio of shipping containers in the middle of an otherwise completely natural tideland.

J. Herring, Forage Fish and Salmon

Little Manzanita Bay is:

- A critical area
- Fish and wildlife habitat
- Habitat of local importance
- A recreational shellfish harvesting area
- A known herring spawning area
- An estuary of importance for outgoing salmon and cutthroat trout

Little Manzanita Bay has long been known as a herring spawning area (Battelle 2003, Pentilla 2007.) It is also well known that pocket estuaries such as Little Manzanita Bay are most utilized by juvenile herring (Beamer 2008). Battelle (2007) identifies the need for and usage of pocket estuaries by surf smelt and sand lance.

Juveniles of all these species use pocket estuaries as preferred habitat, and Battelle has identified important spawning areas for both surf smelt and sand lance from the entire range of Agate Pass south to Battle Point.

Little Manzanita Bay is the principal pocket estuary lying directly in the middle of this spawning habitat.

MacLennan (2010) describes how the combination of habitats control the natural processes leading to the success of salmon rearing, foraging and migration. It is long been known that the stream entering into Little Manzanita Bay is a spawning ground for anadromous fish. The estuary is likely more important as a nurse for

sand lance, surf smelt and juvenile salmonids. Chinook salmon, for instance, are more than 10 times more abundant in pocket estuaries than other near shore habitat (Beamer 2003). And, “because the juvenile rearing is one of the limiting factors for the island (Haring 2000), the protection of these features is essential to salmon recovery.” (Herrera Addendum to Summary of Science Report 2011, p.24). Herrera along with all the other scientists that have examined Bainbridge Island, demonstrates the importance of pocket estuaries and shallow nearshore environment for the raising of juvenile Chinook salmon and the forage fish upon which they feed.

Recent declines in some Puget Sound forage fish population—particularly Pacific herring—may indicate a reduction in the emerging fish fry available for Chinook salmon. Duffey et al, *Ontogenic Shifts of Juvenile Chinook Salmon in Nearshore and Offshore Habitats of Puget Sound* (2010).

“The most estuarine dependent species in the juvenile phase is Chinook salmon (quoting Healey 1982) because they spend the most time rearing and feeding in their habitats.” Redman, S. Meyers, D., Averill, D. 2005. *Regional Nearshore and Marine Aspects of Salmon Recovery in Puget Sound. Shared Strategy for Puget Sound.* June 28, 2005.

Of course, we all recognize that each species plays an important part in the food chain that constitutes the “ecological process” designed to be protected by the SMA and the SMP. Zier and Gaydos described in “The Growing Number of Species of Concern Suggests Ecosystem Decay Is Outpacing Recovery” (Salish Sea Ecosystem Conference, 2016). That and many other studies identify a direct link between the decline of forage fish and the largest predators, like Chinook salmon and even the South Sound Orca pods which are disappearing before our eyes because of the decline in the Chinook population.

Just before the applicants filed this proposal, the Governor’s Southern Resident Orca Task Force came out with its Final Report and Recommendations. Recommendation Number 1 is: “Significantly increase investment in restoration and acquisition of habitat in areas where Chinook salmon stocks most benefits Southern Resident Orcas,” by, among other things, “Emphasize large scale estuary restoration programs and prioritize grant making for restoration that increases Chinook recovery in the short term.” (Final Report at pg. 4).

I personally can attest to over 40 years of fishing in Little Manzanita Bay. I have caught Coho, Chinook, and cutthroat trout in the exact location of the proposed dock. I have observed herring spawning every year that I have lived on Little Manzanita Bay (11). I have observed large schools of juvenile herring using the bay—including the exact location of the dock. And, I have observed schools of salmon, cutthroat, and even seals feeding on forage fish in every year I have lived there.

K. Marine Birds

The applicants provide virtually no analysis of the birds that use Little Manzanita Bay. What little they provide demonstrates confusion by the applicants about the species that live in and use the bay.

Battelle (2003) identifies 20 species (or categories) of migrating birds commonly wintering on Bainbridge Island.

I provide the following partial assessment of birds regularly using Little Manzanita Bay in the exact location of the proposed dock. The applicants have provided none.

PARTIAL LIST OF MARINE BIRDS DEPENDENT ON LITTLE MANZANITA BAY

(All of these birds have been observed by me personally using the water exactly in the location of the proposed dock)

Species	Usage	Regular	Infrequent
Bald Eagle	Year around fishing and foraging, both in the water and on the tide flats when the water ebbs. Eagles nest in trees across Manzanita Road from the Smart residence.	X	
Osprey	Year around fishing and foraging. During nesting season, ospreys dive as many as 25 times/day into the water between my house where the dock is proposed, taking fish and feeding young.	X	

Species	Usage	Regular	Infrequent
Peregrine Falcon	Peregrines tend to show up when the large migration of ducks are present.		X
Diving Ducks <ul style="list-style-type: none"> • Bufflehead • Scoter • Goldeneye 	Heavy usage during winter months using all portions of the bay	X	
<ul style="list-style-type: none"> • Hooded Merganser • Red Breasted Merganser 	These diving ducks—especially red-breasted mergansers—show up in force, especially during Northern migrations before breeding season. They fish voraciously on forage fish. I have seen flocks of more than 100. They chase the small fish into water as shallow as a foot or two. The proposed dock would be located exactly in their habitat.	X	
Grebes <ul style="list-style-type: none"> • Red breasted • Horned • Western 	Similar behavior to bufflehead, scoter and Goldeneye, though usually single or in pairs	X	
Dabbling Ducks <ul style="list-style-type: none"> • Mallard 	Every day use all year long. Feeding in the exact location of the dock.	X	
<ul style="list-style-type: none"> • Wigeon 	Regular winter-long residence. Dependent on the shoreline with water less than one foot deep for most feeding. The proposed dock would be directly in their habitat	X	
Canada Geese	Regular year-round feed and resting in the bay. Flocks of up to 25 use the exact location of the proposed dock.	X	
Common Loon	Regular winter presence. The loons tend to stay in deeper water but are voracious feeders on the forage fish reared in the bay and will come close when big schools of forage fish are present.	X	
Great Blue Heron	Regular year-round usage of the shore, including wading out into the bay up to one foot deep. Herons	X	

Species	Usage	Regular	Infrequent
	prefer locations farther from the uplands and at lower tides, so the location of the applicants' float seaward from its present location would likely impact the herons' feeding habitat to a greater degree than it does now.		

Most of our neighbors are not wildlife scientists. It is not our burden to catalog and demonstrate the likely effects of the dock on the ecosystems in the bay. We are, however, keen observers of the natural processes that go on here. And modest reading discloses the importance of the bay.

A simple example of the importance of fish and bird habitat is found in the following passage about surf scoters:

"Surf scoter populations have been declining ... Declines in herring stocks ... have coincided with surf scoter population changes (Buchanan 2006) ... body mass and stable isotopes indicate that surf scoters that feed at herring spawning events are heavier and in better physical condition when northward migration begins (Anderson, et al. 2005) (Herrera, January 1011, p. 34). Fair analysis would lead to similar conclusions for many species.

But the applicants have chosen to present nothing about the importance of the bay for any dependent bird species.

Over the course of our lives we can recognize an attempt to avoid the obvious ecological impacts of a proposal made by someone who cares more about adding to their property value than protecting the natural environment. We encourage the city to require the applicants to make a complete list of all of the ecological processes and all of the impacts that likely attend the proposed dock.

L. The Applicants Cannot Satisfy the No Net Loss Standard

Under the SMP, the “no net loss standard” is the touchstone by which every proposed development must be measured. “The no net loss standard is intended to prevent new adverse impacts to the shoreline ecological functions.” Herrera (2011, page 45).

It is the applicants’ burden to show no net loss, not the neighbors or the public to prove otherwise.

Here, the applicants must demonstrate no net loss in at least the following:

1. Ecological functions dependent upon the water, including: forage fish, spawning and nursery, predation by a large predator fish on forage fish such as herring, sand lance and surf smelt, fishing by birds, fishing by people,
2. Navigation and the fisheries, including the incidental rights of swimming, boating, kayaking, canoeing, birdwatching etc.
3. Public use – both present and future
4. Public and private aesthetic enjoyment of the bay
5. Public access to the bay including access by people in small boats and from road ends Nos. 47 and 48.

Perhaps the most stunning feature of the application is that, except in the phony math of its “mitigation plan,” it does not try to address the no net loss standard by any analysis. It completely avoids navigation and the fisheries. It avoids ecological function. It nowhere mentions the triage of imperatives under the SMA. It does not address the impact on public use. It supports this application with limited and misleading information that seems designed to obscure a rational assessment of how this dock would fundamentally alter the use of Little Manzanita Bay.

M. It Is a Certainty that the Proposal will result in Significant Net Loss to the uses of the Upper Bay.

There are 3 categories of loss that are easily demonstrable and obvious:

- Navigation and the fisheries
- Public use and access
- Loss of aesthetics and the natural character of the bay both public and private

The dock also presents probable and potentially severe interruption of ecological functions of the bay. Because the applicants have not bothered to investigate any of the most important ones: forage fish, including herring, juvenile fish usage of the estuary, anadromous fish, marine birds, or birds of prey (Ospreys and Eagles), it is impossible to quantify that which appears obvious to anyone who has lived on the bay for any substantial period. We emphasize that it is the applicants' obligation to correctly evaluate the ecological functions and demonstrate no net loss, not the opponent's obligation to disprove such ecological impairment.

N. The Quarry Spalls Gambit

The applicants or their predecessors built a bulkhead out of rock that disintegrated because it was the wrong type of rock for building bulkheads. Some of the pieces of rock ended up on the beach. The applicants and their advocate refer to the disintegrated bulkhead as "Quarry Spalls". This disintegrated rock has nothing to do with the dock. It is not "over water" as claimed in the applicants' mitigation plan. The spalls exist on the beach simply because of the owners' or their predecessors' long-term failure to maintain their bulkhead. But the applicants have included the removal of the spalls – in the creation of a 23 x 24 foot area (optimistically termed a "pocket beach") -- in order to create the fiction that, once removed, these spalls can assist them in meeting the "no net loss" requirements of the SMP.

This sleight-of-hand is advanced in order to mask the fact that even by their own calculations, the project cannot result in no net loss. In the case of navigation, impairment to public use and aesthetics, the assertion is empirically false. The Quarry Spalls Gambit is an attempt to wish away the difference between a 240-foot dock and an 83-foot dock. Besides, the math is simply wrong.

O. Creative Math

The applicants' "mitigation plan" is a test of our credulity.

In order to purportedly show "no net loss" due to the new overwater structure, the applicants call removal of a portion of their bulkhead, the creation of a "pocket beach," and rock removal from the beach "overwater removal". How these items can fall into the category of "overwater removal" when they are not overwater has yet to be explained. As Abraham Lincoln said in reference to dogs, "calling a tail a leg does not make it a leg." Not content to misrepresent the overwater removal portion of the analysis, the applicants fail to even mention the boats or the lifts that are part of their parking structure.

1. The dock, the lifts, and the boats.

The lifts are not described anywhere. The applicants have agreed between them that they may store boats on their dock and lifts up to 50 feet long (see joint agreement between Wysong and Ziemba) 50-foot length x 16-foot beam (about average) equals 800 ft.² X 2 boats equals 1600 ft.² 1600+1161 (their calculation) equals 2761 ft.², to which would have to be added the extra burden and overwater square footage of the boatlift machinery which has nowhere been described. Subtracting even the applicants' manipulated overwater removal number shows a net loss – just in overwater burden – of over 1500 ft.²

2. The time the dock, the lifts, and boats will impair public use and enjoyment is demonstrably great.

The applicants' own numbers also demonstrate significant net loss to navigable waters and public interest. Taking the applicants' own claims, it contends that it can use its current dock 42% of the time in summer. The 240 dock will be usable 94.75% of the summer.

So ... it is easily determinable that:

- a. The impediment to navigation by others will increase by 52.75% of all hours.
- b. The float will be resting on public tidelands 5.25% of all hours (previously it was none), where it will impede anyone from using them.
- c. The aesthetic impairment, however measured, will increase to 100% of the Daylight hours.
- d. The (as yet undescribed) light pollution or other interruption to the nighttime enjoyment of the bay will be increased by 100% of the nighttime hours.
- e. The applicants further state: "90% of the use of the dock will be during daylight hours of the boating season from May 1st to August 31st."

If that is true, then the "benefit" to the owners comes at a "cost" of the total sum of paragraphs 1-5. The cost is paid entirely by the of users whose views, navigation, incidental rights, and property values are diminished.

P. The "Fallback" 100-Foot Dock

The application so stunningly fails all of the tests of the public trust, SMA and SMP, that is probable that the real reason for advancing it is so that the City will grant the applicants the right to have the elevated parking garage for two 50-foot boats located on its own tidelands, as opposed to those owned by the public.

The applicants hope that by suggesting a development and use completely inconsistent with the ecology and use of the bay, the governing authority will grant it a "compromise," and two 50-foot boats on an elevated parking structure will be placed in Little Manzanita Bay.

We recommend that the city not accept this invitation to "compromise."

The application does not provide any information concerning the look, the magnitude, or the impact of the backup plan. There is not even a picture of what it might look like, let alone an analysis of how it might affect the interests described above. Rather, the applicants' description is limited to 15 words.

As I have stated before, it is my belief that the proposal for the 240-foot dock is simply a stalking horse for the backup plan.

On this record – a record that is completely undeveloped – the City must reject the backup plan.

Q. The Record

It is unclear what record is included in the present application. I request and demand the inclusion of at least the following:

1. All comments and analyses contained in the 2016 application.
2. A survey and map depicting the accurate location of the proposed dock, machinery, and boats 50 feet long as they would exist at each hour of the tide between the mean high tide and mean low tide, as well as at least one depiction of the appearance and location of the finished product at tide below mean low tide at least to where the applicants say its proposal dock will extend.
3. All correspondence and communications between the applicants and the Suquamish tribe, including communications by representatives of the applicants.
4. Maps depicting the location and existence of the road ends Number 47 and 48.
5. An accurate artist representation to scale of what the finished product would look like with two 50-foot boats raised in the air on their elevated parking structures—from all perspectives.
6. An accurate artist representation to scale of the proposed backup project.
7. The reports listed on the bibliography (attached hereto) at minimum.
8. Notes of the meetings which took place between the applicants and the City from June 28, 2018 and August 2018 (not provided by the City in my FOIA request).

9. The decisions in *Orion v. State*, 109 Wash. 2d 621, 740 7P 3rd 1062 (1987), *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987) and *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969), cert. denied 400 U.S. 878, 91 S.Ct. 119 (1970).

10. The bibliography attached.

I assume that the easiest way to include these items in the record is by electronic transfer. If not, please let me know what procedure is necessary in order to make the inclusions.

R. Conclusion

As I have written before, the proposed dock is as illegal as it is a bad idea. Sometimes bad ideas are also illegal.

In this case, the proposal violates the public trust in which both the applicants and the government are required to prevent any use that negatively affects the activities of dependent wildlife, navigation, or the fisheries, together with the public's right of boating, swimming, kayaking, canoeing, birdwatching, etc.

The proposal violates all of the 7 imperatives of the Shoreline Management Act by invading critical habitat, fundamentally altering the shoreline of statewide significance, and elevating private short-term interests over the public's interest.

The proposal violates the similar, if not identical, goals of the SMP while at the same time an entirely failing the no net loss standard.

The proposal cannot meet the test for a variance under WAC 173-27.

Finally, the proposal is a clear stalking horse for the "compromise" hundred-foot dock – which fails for similar reasons, though it would of course have a "lesser impact."

On the record presented, the City must reject the backup plan because its effects remain almost entirely undescribed.

Yours truly,

A handwritten signature in black ink, appearing to read "Will Smart". The signature is fluid and cursive, with the first name "Will" and the last name "Smart" clearly distinguishable.

William C. Smart
Anne K. Smart
Olivia E. Smith

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