



BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

March 16, 2020

VIA E-MAIL TO pcd@bainbridgewa.gov; dgreetham@bainbridgewa.gov;
pbest@bainbridgewa.gov

David Greetham, Planning Manager
Peter Best, Senior Planner
280 Madison Ave. N
Bainbridge Island, WA 98110

RE: Wysong-Ziemba Dock Application, PLN 50280C

Dear Mr. Greetham and Mr. Best:

On behalf of my clients, a group of neighbors in Little Manzanita Bay, , I submit the following in opposition to the proposed Wysong-Ziemba residential dock, shoreline substantial development permit (SSDP) application and variance number PLN 50290C.

For the reasons described below, the proposed dock does not comply with the requirements of the Bainbridge Island Shoreline Master Program. The Department should deny the permit and the variance.

I. Non-Compliance with Critical Saltwater Habitat Rules

The SMP provides special protections for “critical saltwater habitat” and areas adjacent to critical saltwater habitat. BICC 16.12.060.B (critical areas). Critical saltwater habitat includes:

Subsistence, commercial and recreational shellfish beds; and
areas with which priority species have a primary association.

WAC 173-26-221(2)(c)(iii)(A).

In Puget Sound, intertidal areas associated with a pocket beach are considered priority habitat for salmonids. *See* WDFW, “Priority Habitats and Special List,” August 2008. Juvenile salmonids use these areas for protection and foraging.

In their letter to the U.S. Army Corps of Engineers, dated November 13, 2016 (uploaded to City website September 16, 2019), the applicants confirm the existence of a pocket beach on the property.

The applicants' document titled "Shoreline Variance Criteria," undated but uploaded on September 10, 2019, also confirms the existence of a pocket beach on the property.

The presence of the pocket beach means this project area constitutes critical saltwater habitat.

In addition, the applicants' eelgrass/macroalgae habitat survey, conducted October 3, 2015 and uploaded on September 10, 2019, confirms the presence of "several clam field clusters ... within the surveyed site. All instances were observed as close as 140 feet waterward of the existing bulkhead to as far as 300 feet waterward of the existing bulkhead. All within the -1 MLLW to -4 MLLW depths." Some of the clams are depicted as lying beneath the actual footprint of the proposed pier.

These recreational shellfish clusters provide a second reason to conclude this project area constitutes critical saltwater habitat.

Under the SMP, no dock can be built over a critical saltwater habitat area unless the applicant can show that *all* of the following criteria are met:

- i. Avoidance of impacts to critical saltwater habitats by an alternative alignment or location is not feasible; and
- ii. The project, including any required mitigation, will result in no net loss of ecological functions and processes associated with critical saltwater habitat;

BIMC 16.12.060.J.1.b.

Here, the applicants have failed to demonstrate that an alternative alignment or location is infeasible. For example, the applicants have failed to demonstrate why a mooring buoy would not be feasible instead of an expanded new dock. Mooring buoys are not only an allowed use, they are a "a preferred use, over docks, where feasible." BIMC 16.12.050.3.b. There is already a buoy at the property. The applicants should simply use it.

The applicants also fail to show that an alternative location—in the form of a shorter dock, such as one confined to the footprint of the existing dock—would not be feasible. The other properties on Little Manzanita Bay make use of shorter docks. There is no reason the applicants cannot do the same.

Also, the applicants do not make the required showing that the project will result in no net loss of ecological functions and processes associated with critical saltwater habitat. The displacement of clams, which the applicants' own survey shows, is an example of an unmitigated ecological loss that could be avoided with a shorter dock or a mooring buoy.

Another example of unmitigated impacts are the impacts to juvenile salmonids and forage fish caused by the longer dock. As the comments of Wayne Daley and others indicate, the immediate vicinity of this project is critical habitat for spawning herring (a forage fish) and juvenile salmonids. Even if the dock is fully grated, there will still be some shading impacts to salmonids

and forage fish. The fact that grating may create less of an impact than no grating does not mean that a grated dock has no harmful impacts. The applicants fail to quantify, or even acknowledge, these impacts.

The applicant claims, in its “decision criteria” document, that there will actually be a net gain of ecological function, because of the removal of an opaque dock (to be replaced by a larger, grated structure), the replacement of creosote pilings with steel pilings, the replacement of a float that grounds with a pier that is elevated, and the replacement of 108 existing rubber tires with eight dock floats.

This analysis is deficient, because it only measures the benefits of the project, not the costs. There is no discussion here of whether the longer structure will increase shading impacts to nearshore species, including juvenile salmonids and benthic creatures. Nor is there any discussion of increased prop wash caused by larger boats using the new dock more often than the existing dock. Nor is there any discussion of the increased predation of salmonids that will occur when the juveniles are forced to swim farther out to sea to avoid the dock, as described in Mr. Daley’s comment.

The Battelle report of Bainbridge Island habitat management areas provides further evidence that this project will have adverse impacts. In Little Manzanita Bay, the report recommends removing existing shade-causing structures (or maximizing light penetration through them), which this project fails to do, because this project *expands* shade-causing structures. The report also recommends reducing the number of docks or overwater structures, which this project clearly does not do.

In sum, the proposed dock will violate the requirements of BIMC 16.12.060.J.1.b, because alternative configurations are feasible, and because the project’s harms outweigh its benefits. Therefore, the SSDP application should be denied.

II. Failure to Provide Habitat Management Plan

The SMP requires a habitat management plan for development within a Class I Fish and Wildlife Conservation Area. BICC 16.12.060.I.3.b.i.

A “Class I Fish and Wildlife Conservation Area” includes “habitats recognized by federal or state agencies for federal and/or state listed endangered, threatened, and sensitive species documented in maps or databases available to the city of Bainbridge Island and which, if altered, may reduce the likelihood that the species will maintain and reproduce over the long term.” BICC 16.12.060.I.2.a.iii.

The National Marine Fisheries Service (NMFS) has designated the nearshore marine areas of Puget Sound as critical habitat for the endangered Puget Sound Chinook Salmon, from the line of extreme high tide out to a depth of 30 meters. *See* 50 CFR § 226.212(c)(5), (16).

Therefore, the project is within critical habitat for salmon, which would make it a Class I Fish and Wildlife Conservation Area. Therefore, a habitat management plan is required. None has been submitted. The permit application should be denied.

III. Failure to Follow Mitigation Sequence

The SMP requires all shoreline projects to achieve “no net loss” of ecological function by using the mitigation sequence. BCC 16.12.030.B.2.a (environmental impacts).

The mitigation sequence, in order of priority, requires:

- (A) Avoiding the impact altogether by not taking a certain action or parts of an action;
- (B) Minimizing impacts by limiting the degree or magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce impacts;
- (C) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (D) Reducing or eliminating the impact over time by preservation and maintenance operations;
- (E) Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and
- (F) Monitoring the impact and the compensation projects and taking appropriate corrective measures.

BICC 19.12.030.B.2.d (regulations—mitigation).

In addition, “Mitigation actions shall not have a significant adverse impact on other preferred shoreline uses promoted by the policies of the Shoreline Management Act.” *Id.*

Here, the applicants claim that the use of a joint-use dock (as opposed to two single-family docks) constitutes an environmental benefit. They also argue that the removal of creosote pilings and tires, and the reduction of a rock bulkhead and boulders, constitute mitigation.

This appears to be an assertion, by the applicants, that they are providing compensatory mitigation. But compensatory mitigation is stage E in the mitigation sequence. The applicants have made no effort to engage in stages A or B of the sequence, by simply continuing to use the existing dock or by using a shorter dock or mooring buoy. Skipping straight to phase E, compensatory mitigation, constitutes a failure to follow the mitigation sequence and is ground for denying the project.

In addition, “When compensatory mitigation measures are required, all of the following shall apply:

(A) The quality and quantity of the replaced, enhanced, or substituted resources shall be the same or better than the affected resources; and

(B) The mitigation site and associated vegetative planting shall be nurtured and maintained such that healthy native plant communities can grow and mature over time; and

(C) Unless the Single-Family Residential Mitigation Manual is being used for single-family residential development and accessory structures pursuant to subsection B.2.b.iv of this section, the mitigation shall be informed by pertinent scientific and technical studies, including but not limited to the Shoreline Inventory and Characterization Report, the Shoreline Restoration Plan and other background studies prepared in support of this program; and

(D) The mitigation activity shall be monitored and maintained to ensure that it achieves its intended functions and values, pursuant to subsection B.2.e of this section, Regulations – Surety.

Here, there appears to be no effort by the applicants to provide for nurturing vegetation, no reliance on technical or scientific studies (including the Shoreline Inventory and Characterization Report and Shoreline Restoration Plan), nor any mitigation monitoring plan. So, the applicants have failed to provide the bare minimum requirements even for stage E compensatory mitigation.

Nor can the applicants claim an environmental benefit by comparing their proposal to an even worse proposal that does not exist (two new, individual docks). Environmental benefits must be judged by reference to the *status quo* not some speculative future development that does not exist.

The project should be denied for lack of compliance with the mitigation sequence and the requirements for compensatory mitigation (assuming compensatory mitigation were appropriate, which it is not). Instead, the applicants should provide *actual* mitigation by using the existing footprint.

IV. Dock Length Variance Criteria Are Not Met

The SMP provides that a dock may not exceed the average length of surrounding docks within 500 feet. BICC 16.12.050.C.5.g.ii.B.

Here, the two other docks within 500 feet are roughly 58 and 110 feet in length, respectively, for an average of 84 feet. The applicants acknowledge that 84 feet is the maximum length. However, the applicants are seeking a variance for this limit. Absent the variance, the project cannot be approved.

For a variance to be granted, each of the following criteria in BICC 2.16.165.G.4.a, b. must be met. Here none of them are:

- **The strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes all reasonable use of the property.**

The applicant argue that the 84-foot limit only allows access to water of sufficient depth to access navigable water 63% of the time. “At all other times, the dock and docks are resting on the substrate. Since BIMC 16.12.050(C)(5)(b) and (c) strongly discourage outright contact with the substrate, the applicable portions of the Master Program preclude all reasonable use of the property.”

Boat grounding, while certainly discouraged, is not unlawful. In fact, the applicant has boats at the existing dock that ground. The idea that grounding a boat “precludes all reasonable use of the property” is nonsense. Boat grounding does not even preclude reasonable use of a dock, much less reasonable use of an entire property.

The “property” here is not the dock but the residential parcels. Obviously, all reasonable use of the residential parcels is not precluded by an 84-foot dock limit. In fact, one of the adjacent properties has an even shorter dock and many other properties have no dock at all, yet there is no suggestion that reasonable use of those properties is precluded.

- **The hardship described in subsection G.4.a.i of this section is specifically related to the property, and is the result of unique conditions such as irregular lot shape, size, or natural features and the application of the master program, and not, for example, from deed restrictions or the applicant’s own actions.**

The applicants claim that “The water in front of the subject properties is some of the shallowest in Manzanita Bay and a 240-foot pier is the minimum necessary to keep boats from resting on the substrate at low to medium tides, and from damaging it when entering or leaving the dock.”

The applicants are intentionally conflating Manzanita Bay with Little Manzanita Bay. In Little Manzanita Bay, the applicants’ property is not unique. All properties in Little Manzanita Bay must contend with the shallow natural features. And such features are common in other bays and shoreline areas around the island.

Because there is nothing unique about the applicants’ property relative to the other properties in Little Manzanita Bay and other shallow nearshore areas around the island, there is no basis to grant a hardship variance.

- **The design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program and will not cause adverse impacts to the shoreline environment.**

The applicants argue that Manzanita Bay is already almost completely developed with single-family houses, most of which have private docks “providing access to navigable water during

virtually all tide levels.” The applicants claim their dock is a joint-use dock similar in length and design to those docks.

Again, the applicants are deliberately conflating their bay with a different bay. It is true that there are many docks on Manzanita Bay well over 200 feet in length that appear to reach deep water at all tide levels. However, Little Manzanita Bay has no such docks. Most of the large docks in Manzanita Bay cannot even be seen from Little Manzanita.

Notably, the applicants fail to acknowledge that half the shoreline in Little Manzanita Bay is designated Shoreline Residential Conservancy, in which new piers and docks are only a conditional use, not a use permitted outright (and where there are no docks at all at present).

The applicants’ dock is not compatible with existing uses, because no uses of this magnitude exist.

In addition, as described above and in more detail in the comment of Mr. Daley, the applicants’ project will cause adverse effects to the shoreline environment. Note that under the variance rules, adverse effects cannot be mitigated away. The rule is no adverse effects at all, not “no net” adverse impacts.

- **The variance will not constitute a grant of special privilege not enjoyed by the other properties in the area.**

The applicants argue that the private docks in Manzanita mostly have access to deeper water, so this is not a special grant of privilege.

As described above, this argument is false. This dock would be a special privilege in Little Manzanita Bay. No one else has anything remotely approaching the scale of this dock.

- **The variance is the minimum necessary to afford relief.**

The applicants argue the 240-foot dock will result in the dock grounding 5.25% of the time, down from 36%. But they provide no support for these numbers.

Even assuming the dock-grounding numbers are accurate, there is no explanation for why a 240-foot dock is the minimum necessary to prevent grounding. As we discussed above, the applicants could use their existing mooring buoy and their current dock if they wish to access larger vessels. There is no need for a 240-foot dock.

- **The public interest will suffer no substantial detrimental effect.**

The applicants point to a supposed increase in net ecological function, and the elimination of the rock wall and boulders. However, increasing the dock’s length will not actually benefit salmon. It will hurt salmon.

Even if salmon were benefitted (which they will not be), there is more to the public interest than just salmonid protection:

As many neighbors have commented, there will be tremendous view impacts from the proposed dock, including destroying the pristine appearance of Little Manzanita Bay, negative impacts on both resident and migratory birds and negative impacts on human-powered navigation within Little Manzanita Bay and up the creek leading to the Miller-Kirkman Preserve.

In addition, increased prop wash (from more boat traffic) and the increased overwater footprint will both cause adverse impacts to benthic organisms, including shellfish, which are documented on this shoreline.

- **In the granting of all shoreline variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if shoreline variances were granted to other developments in the area where similar circumstances exist, the total of the shoreline variances should also remain consistent with the policies of Chapter 90.58 RCW or its successor and should not produce substantial adverse effects to the shoreline environment.**

The applicants argue that this variance will not increase future demands for variances, because most properties supposedly already have access to deeper water. However, that claim is not true of Little Manzanita Bay. In Little Manzanita, this would be the first deep-water dock. Moreover, its 240-foot length would allow the developer's neighbors to seek much longer docks of their own under the 500-foot-radius dock length-averaging rule. The applicants argue that these properties are "constrained" by the narrowness of the bay such that they have "no access to navigable water under any circumstance," but that is not correct. There are numerous other properties in Little Manzanita Bay that would physically be able to build their own lengthy docks if these applicants build a 240-foot dock.

V. Conclusion

This project fails to protect critical saltwater habitat; is not supported by a habitat management plan; does not follow the mitigation sequence; and violates all of the criteria for the granting of a variance. The Department should deny the SSDP and variance.

Very truly yours,

BRICKLIN & NEWMAN, LLP



Dave Bricklin, WSBA No. 7583

Alex Sidles, WSBA No. 53822

Attorney for Little Manzanita Bay Neighbors

(206) 264-8600

bricklin@bnd-law.com, sidles@bnd-law.com