

**BEFORE THE HEARING EXAMINER FOR THE CITY OF BLACK DIAMOND**

Phil Olbrechts, Hearing Examiner

RE: Mike Kasper  Shoreline Substantial Development Permit – Lake Sawyer Dock    PLN16-0015	<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION</b>
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**INTRODUCTION**

The applicant requests approval of a shoreline substantial development permit for the construction of a 56-foot long dock on the eastern shore of Lake Sawyer for a lot located at 30201 234<sup>th</sup> Ave SE. The dock is approved for a length of 45 feet with conditions.

The primary issue of this application was the allowed length of the dock. The other 12 docks in the cove ranged in length from 30 to 43 feet in length, with one outlier at 57 feet and another outlier at 20 feet. According to uncontested testimony of Cynthia Wheeler, the 57 foot dock has not been authorized by a shoreline permit. There are two city shoreline regulations that directly address dock length. One regulation provides that the maximum dock length shall be the point at which 11 feet of water depth is reached, not to exceed 60 feet. City of Black Diamond Shoreline Master Program (“SMP”) Ch.5(F)(2)(b)(18). The other regulation provides that all dock lengths shall be minimized to the maximum extent feasible. SMP Ch.5(F)(2)(b)(17). The staff report takes the position that the regulation requiring minimization of dock length is met if the length is less than the maximum length authorized by SMP Ch.5(F)(2)(b)(17). If all docks that meet the maximum length standards of SMP Ch.5(F)(2)(b)(18) are construed as reducing length to the maximum extent feasible as required by SMP Ch.5(F)(2)(b)(17), there is no need for SMP Ch.5(F)(2)(b)(17). Ordinances must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *G-P Gypsum Corp. v. State, Dept. of Revenue*, 169 Wn.2d 304 (2010). Satisfying the maximum dock length of SMP Ch.5(F)(2)(b)(18) does not automatically mean that dock length has been reduced to the maximum extent feasible as required by SMP Ch.5(F)(2)(b)(17). The feasibility analysis required by SMP Ch.5(F)(2)(b)(17) necessarily entails an assessment of the needs of the applicant verses the objectives of the SMP.

At hearing staff made a more compelling argument that the maximum allowed length is necessitated because at some point around October of each year the water in the applicant’s cove becomes too shallow for any dock owner within the cove to use their docks. That is a compelling argument, but it begs the question whether a dock of 56 feet as opposed to 30 or 40 feet would make any material difference. The bathymetry data presented by the City, Attachments 6 and 7, shows that the proposed dock only extends half way into an area of the applicant’s cove that is less than five feet in depth. Given that the water depth doesn’t change

more than five feet over the entire length of the proposed dock, what difference, if any does a dock that is 56 feet in length make over a dock that is 30 feet in length? How many extra days of usage does this extra 26 feet in length give to the applicant? There is no evidence in the record that the added length would make any material difference. Given the shallow depths at the proposed dock site, the applicant has made no showing that the extraordinary length of the proposed dock has been reduced “to the maximum extent feasible”. In the absence of any meaningful analysis on what is necessary to meet the needs of the applicant, the only pertinent evidence in the record is the dock length that other property owners have historically found necessary for dock use. Recognizing that the proposed dock appears to be in the shallowest end of the cove and the 43 length of one adjoining dock, that length is determined to be 45 feet.

Information that should have been presented for this application are how dock length correlates with dock use. The applicant should have identified what water depth it needs to use its water craft at the dock and why its proposed 56 feet is necessary to accommodate that depth. If the applicant is able to establish that a 56 foot dock will give it two months of additional usage over a 45 foot dock, that is a compelling argument for a 56 foot long dock. At that point, the value of that additional two months would be weighed against the objectives of the City’s shoreline regulations, which include protecting navigation, environmental resources and shoreline aesthetics. Given that the “extent feasible” language is not clearly defined in the City’s shoreline regulations and that this appears to be a case of first impression on the issue, the applicant is free to resubmit an application for a dock longer than 45 feet if the required information is provided.

### **ORAL TESTIMONY**

*Note: This summary of testimony is provided solely for the convenience of the reader. Nothing in this summary should be construed as a finding of fact or conclusion of law or suggest that any evidence or information is of any significance. No assurance is made as to accuracy. For an accurate rendition of the testimony at the hearing, a copy of the hearing recording should be obtained.*

Alex Campbell, planner for the City of Black Diamond, summarized the proposal. Mr. Campbell noted that the project was not exempt from a shoreline substantial development permit because its value exceeded \$10,000. The proposed 56 foot length is the minimum extent feasible because the length is not out of character with surrounding dock length and is the minimum necessary to accommodate use by the applicant. The applicant's property is set back further from the lake than surrounding properties so a longer length is necessary to use the dock throughout the year, including the summer months when water depth diminishes. Department of Ecology bathymetric data (attachments 6 and 7) qualify as the report required by shoreline regulations to assess water depth for complying with maximum dock length. The data in attachments 6 and 7 is an average of the median high and median low water levels of Lake Sawyer from 1995. Attachments 6 and 7 represents the most current data on Lake Sawyer water depth. The applicant's proposed 8 foot dock width at the flag end must be reduced to six feet to comply with shoreline regulations. This reduction in width will reduce the overall surface area to 296 square feet. In response to examiner questions, Mr. Campbell did not know how much water depth would be gained by a 56 foot depth as opposed to 40 feet.

Cindy Wheeler, neighbor, noted that she was a member of the citizen advisory committee that put together the current version of the City's shoreline management program. The effort took three years. She noted that the Attachment 8 photograph is a Google earth photograph and that as such it is slanted and docks appear longer than they are. She noted that her dock is represented in Attachment 8 as 33 feet when it is in fact 30 feet and that the dock adjoining the proposed dock to the south, which she called the Saben dock, is 40 feet, not 43 feet as depicted in Attachment 8. The 57 foot dock depicted in Attachment 8 was placed without a required shoreline permit and that's why its unusually long. All of the dock owners in the subject cove were able to use their docks and boatlifts last year during the drought well past Labor Day into late September. In order to assure year round boat use, someone has to assume responsibility for the weir that controls water flow into Lake Sawyer, which was constructed in the 1950s and no one is taking care of it. Ms. Wheeler noted that a couple other neighbors support the dock, but both at a shorter length. Under current regulations all existing docks have to be maintained and repaired at its current size. It would be unfair to allow newcomers to build longer docks. The 60 foot length allowed in the shoreline regulations was intended for the shallow northwest boot of the lake. The lake is used by the public through several points of public access. Fisherman cruise the shoreline and long docks will interfere with their navigation. The 1995 bathymetry data from DOE doesn't qualify as the required report by shoreline regulations for assessing water depth. Ms. Wheeler concluded by noting it was of concern that information requested of the applicant (the depth report required by shoreline regulations) was not provided and instead staff produced its own information.

In rebuttal, Mr. Campbell noted that the measurements for the dock lengths in Attachment 8 are based upon GIS data from King County and are accurate to a couple feet. As noted on Attachment 8, the photograph is an orthophotograph, which means it isn't skewed. Water levels as acknowledged by Ms. Wheeler do get very low in October and it doesn't make sense from the staff perspective to build docks that aren't usable in low water months. Docks should be appropriately sized for the entire year. Docks can be expanded via new shoreline permit applications so new dock builders do not enjoy any special advantage over existing dock owners. Joint use docks are not feasible in the proposed location because the adjoining properties are already built.

In rebuttal, Mr. Kasper, applicant, noted that his property is in the furthest inward point of the cove. He referred to photographs from Ms. Wheeler's presentation that showed docks much closer to the lake center that still have shallow conditions. In response to examiner questions, Mr. Kasper noted that the 56 dock length is based upon a Waters and Wood assessment (his surveyor) that 56 feet is necessary to get to a 10 foot depth.

## **EXHIBITS**

The May 5, 2016 staff report in addition to its eight attachments were admitted into the record during the hearing as Exhibit 1. A site plan from Waters and Wood dated March 3, 2016 was admitted as a new Attachment 9 to the staff report. 72 photographs presented by Ms. Wheeler were admitted as Exhibit 2.

## FINDINGS OF FACT

### Procedural:

1. Applicant. Mike Kasper
2. Hearing. A hearing was held on the subject application at 5:30 p.m. on May 11, 2016 at the Black Diamond City Council Meeting Chambers.

### Substantive:

3. Site/Proposal Description. The applicant requests approval of a shoreline substantial development permit for the construction of a 56-foot long, 312 square foot dock on the eastern shore of Lake Sawyer for a lot located at 30201 234<sup>th</sup> Ave SE. Included in the proposal is a freestanding boatlift with associated 24 foot translucent canopy. The total valuation of the proposal is \$34,600. The deck surface will be 18 inches above the ordinary high water mark. The applicant also proposes a finger float eight feet in width at the waterward end of the dock. The proposed dock and associated boatlift will be setback from the northern and southern property lines approximately 18.5 feet.

4. Characteristics of the Area. The surrounding area is composed of water front lots in a small cove as depicted in Attachment 8 to the staff report.

5. Adverse Impacts. As conditioned and mitigated, the proposal will not create any significant adverse impacts to the environment or surrounding properties. Impacts are more specifically addressed as follows:

- A. Ecological Function. The staff report and administrative record contain no information on the potential ecological impacts of the proposed docks. However, the SEPA mitigation measures indirectly show that the impacts have been considered and addressed. As recognized in several shoreline hearing board decisions and several supporting scientific studies, one of the most significant environmental impacts created by docks is shading, which can alter the migratory patterns of endangered fish and thereby increase the threat of predation. *See, Fladseth v. Mason County*, SHB No. 05-026; *McCauley v. Mason County* SHB No. 06-033. As noted in *Fladseth*, docks can increase the mortality of endangered fish as follows:

*Shorelines consist of discrete segments, and uninterrupted sections of the beach are an important part of the near shore environment. Shallow water has been recognized as refuge from predation for smaller fish, especially when there is an absence of complex habitat features such as woody debris or submerged vegetation. The Board, therefore, finds it logical to assume that the near shore area of Hood Canal provides much of the refuge area for juvenile fish from predators.*

*Juvenile fish will often try to avoid PRFs by swimming around them. The increased energy for the fish to avoid the PRFs and the greater potential for predation eventually leads to a decrease in their survivability. The recovery of near shore functions is part of the salmon recovery plan for this area.*

*Fladseth v. Mason County*, Finding of Fact No. 18 (citations omitted), SHB No. 05-026.

It is because of the types of concerns raised in *Fladseth* that grating is typically required for docks and translucent covers for boatlifts and also why joint use of docks is encouraged, to reduce the shading created by the unchecked proliferation of single-use docks. Shading also disrupts the growth of eelgrass and kelp beds, critical habitat for a variety of endangered fish (at least in saltwater). However, the environmental checklist notes that there are no endangered species in Lake Sawyer. Despite this, the SEPA mitigation measures still require grating and a translucent boat lift covering. The SEPA mitigation measures also require the replanting of any disturbed areas due to construction and the applicant has proposed additional voluntary mitigation measures that consist of planting the shoreline area with 2 trees and 3 shrubs native to the State of Washington upon permit approval by WDFW. Given these circumstances, the absence of any evidence of adverse environmental impacts, and staff's determination there is no net loss of ecological function, it is determined that there are no significant adverse environmental impacts associated with the proposal.

- B. Light Impacts. Ms. Wheeler asserts in uncontested written testimony that the proposal would be the only lighted dock in the vicinity. A lighted dock would certainly disrupt the aesthetics of the shoreline if all surrounding docks and over-water structures are not lighted. The environmental checklist notes that only low voltage (12 volt) Malibu landscaping lights will be used. Those lights will be considered part of the project description. In order to reduce light impacts to non-significant levels, a condition of approval will be added prohibiting the use of the lights except when necessary to access the dock at night and/or to the extent necessary to prevent a navigation hazard.
- C. Aesthetics. The approved dock length of 45 feet is at most only five feet longer than the 40-43 foot dock located to the south and does not protrude significantly further into the lake than other docks in the vicinity given that the applicant's property is located at the deepest inland point of the cove. Given this factor and the prevalence of docks surrounding the proposal, the proposal does not create any significant adverse aesthetic impacts.
- D. Navigation. As noted under aesthetics, as limited to 45 feet the dock will not protrude further into Lake Sawyer than surrounding docks to any material degree. Given this factor and the prevalence of docks in the vicinity of the project site, the proposal will not adversely affect navigation.

- E. Water Quality. Water quality will not be adversely affected. The environmental checklist reveals that the pilings will be composed of galvanized steel and the applicant will use a containment boom during dock construction. The SEPA mitigation measures also require best management practices to minimize pollution of waters during construction and the preparation of a Temporary Erosion and Sediment Control Plan in association with the building permit application.
6. Necessity of 56 dock length. For the reasons identified in the Introduction section of this decision, the record does not establish a pressing need for a 56 foot dock length. The record doesn't even establish that the 56 feet is necessary to reach a depth of 11 feet. Nothing in the administrative record documents that any determination was made that 56 feet is necessary to reach a depth of 11 feet. It was only after the applicant was asked where the 56 feet came from at the end of the hearing that the applicant revealed that the 56 feet was determined by his surveyor to be necessary to reach 11 feet. At this point Mr. Campbell noted that the applicant's survey, Attachment 9, has topographical lines to support this position. Attachment 9 has in fact no topographical lines depicted waterward of the high water mark. The applicant's statement that the 56 feet will take the dock to a depth of 11 feet is directly at odds with Attachments 6 and 7, which show that the average depth at the end of the dock is less than five feet. Especially given that the City's shoreline regulations require a report documenting that the length is necessary to reach 11 feet, the evidence presented for this application cannot be considered to establish that the proposed 56 foot length is necessary to reach a depth of 11 feet.

## CONCLUSIONS OF LAW

### Procedural:

1. Authority of Hearing Examiner: Ch. 6(E)(2) provides that shoreline substantial development permits shall be processed as Type 3 applications. BDMC 18.08.060 provides that the Hearing Examiner shall make final decisions on Type 3 applications after holding an open record hearing.

### Substantive:

2. Shoreline Designation: Shoreline Residential.

3. Review Criteria and Application. Ch. 6(F)(1) of the SMP provides that a shoreline substantial development permit application most conform to the policies and procedures of the Shoreline Management Act ("SMA", Chapter 90.58 RCW), applicable state regulations and the City's SMP. Applicable policies and regulations are quoted below in italics and applied through corresponding conclusions of law.

**RCW 90.58.020:** . . . *[I]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to ensure the development of these shorelines in a manner which, while*

*allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse impacts to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.*

4. The policy of the SMA is clearly met. As determined in Finding of Fact No. 5, the proposal will not create any adverse impacts, including adverse impacts to navigation, aquatic life or aquatic vegetation while at the same time enabling reasonable use of private water front property. Under these circumstances the public interest is promoted and enhanced.

**SMP Ch. 5(F)(2)(a)(1):** *New piers and docks should be allowed only for public access and water-dependent uses.*

5. The definitions section of the SMP expressly identifies moorage facilities associated with residential use as “water dependent”. The proposal is consistent with the policy since it is water dependent.

**SMP Ch. 5(F)(2)(a)(2):** *New piers and docks should be restricted to the minimum size necessary and permitted only when the applicant has demonstrated that a specific need exists to support the intended water-dependent use.*

6. For the reasons identified in the Introduction section of this decision, the applicant has not made a showing that the dock length is the minimum size necessary for its water-dependent use. In the absence of any pertinent evidence establishing what dock length is necessary for the applicant’s reasonable use, the most compelling information is the length of surrounding docks, as they generally suggest what lengths have worked for other cove residents. Acknowledging that the applicant’s property is further inland than surrounding docks and that one of the two other closest inland docks is approximately 43 feet in size, it is determined that a 45 foot dock is the minimum necessary for the recreational needs of the applicant.

**SMP Ch. 5(F)(2)(a)(3):** *Piers and docks should be discouraged where conflicts with recreational boaters and other recreational water activities would be created by their construction.*

7. The policy is met. As determined in Finding of Fact No. 5, with length limited to 45 feet the proposal will not interfere with navigation.

**SMP Ch. 5(F)(2)(a)(4):** *The further proliferation of single-purpose, single-owner piers and docks should be discouraged. Preference should be given to joint-use structures in shoreline areas unless the applicant demonstrates why a joint-use structure is not feasible.*

8. In this instance, the proliferation of single-owner docks could have been avoided not by the construction of another joint-use dock on the applicant’s property as suggested in the staff report, but rather by the applicant avoiding dock construction altogether on his lot by acquiring joint use rights to one of the adjoining docks. In the examiner’s experience in reviewing dock applications in Mason and San Juan County, the joint use policy above is addressed by having

the property owner establish that he or she requested joint use from adjoining property owners and was denied. Absent this approach, it is recognized that the policy is a “should” and not a “shall” and also that, more likely than not, the adjoining dock owners won’t be inclined to allow the applicant to use their docks. Under these circumstances the policy is found to be met, but in future applications staff should be encouraging applicants to seek out joint use of existing docks, as this practice does achieve the policy objective of reducing the proliferation of single-user docks.

**SMP Ch. 5(F)(2)(a)(6):** *Preference should be given to fixed-pile piers elevated above the OHWM. Floating docks should be allowed if the applicant can demonstrate why a fixed pier is not feasible or will result in greater impacts.*

9. There were no design drawings submitted into the record<sup>1</sup>, however the staff report suggests that the dock will involve a fixed pier.

**SMP Ch. 5(F)(2)(a)(7):** *Recreational floats should be allowed where they are intended to support public or private recreational uses, or in lieu of fixed piers adjacent to residential land uses.*

10. As previously noted, there were no design drawings submitted into the record so the exact configuration and design of the dock is unclear. The staff report notes that the waterward end of the dock will involve an 8 foot wide “flag” section. It is unknown if the flag section will be floating or fixed. In either event, the policy would allow the flag section as a float if that is the intent since the dock will be used for private recreational use.

**SMP Ch. 5(F)(2)(a)(8):** *Mooring buoys should be encouraged as a low-impact moorage option.*

11. The policy is not mandatory and not as critical at the project site, as the surrounding area is already fully developed with docks. The use of a moorage buoy instead of a dock for the last parcel in the cove without a dock (see Attachment 8) will not make any significant difference in the adverse impacts created by the installation of moorage for the project site.

**SMP Ch. 5(F)(2)(a)(9):** *New covered moorage should not be allowed.*

12. The proposal provides for a boat lift with a translucent cover, which is expressly allowed by SMP regulations as detailed below.

**SMP Ch. 5(F)(2)(a)(10):** *Overwater structures, including piers, should only be authorized after consideration of:*

- a. The effect such structures would have on wildlife and aquatic life, water quality, scenic and aesthetic values, environmental sensitive resources, submerged lands, and submerged vegetation.*

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<sup>1</sup> The SEPA checklist makes reference to attached building plans, but they were not attached to the checklist admitted into the record.

b. *The effect such structures have on water circulation, recreational boating, sediment movement and littoral drift and shoreline access.*

13. As discussed in Finding of Fact No. 5, the proposal will not adversely affect aquatic life, water quality, aesthetic values or navigation. It is also evident that the proposal will not adversely affect shoreline access, water circulation or littoral drift. Although the administrative record does not contain an excess of direct information on whether all of the factors have been considered as required above, it is evident from the SEPA and recommended staff conditions, as well as the inherent nature of the project that all pertinent factors have been considered.

**SMP Ch. 5(F)(2)(a)(11):** *Overwater structures and mooring buoys should be designed to cause minimum interference with navigable waters and the public's safe use of the lake and shoreline.*

14. As determined in Finding of Fact No. 5, the proposal will not interfere with navigation of Lake Sawyer. Public use of the shoreline is unaffected as the dock will be built upon a privately owned shoreline.

**SMP Ch. 5(F)(2)(a)(12):** *Use of non-reflective materials in construction shall be required.*

15. As conditioned.

**SMP Ch. 5(F)(2)(a)(13):** *The proposed size of the structure and intensity of use or uses of an overwater structure should be compatible with the surrounding environment and land and water uses.*

16. As limited by this decision to 45 feet in length, the proposal is compatible with surrounding docks and uses for the reasons identified in Conclusion of Law No. 6.

**SMP Ch. 5(F)(2)(a)(15):** *Lighting facilities should be limited to the minimum extent necessary to located the pier or dock at night.*

17. The lighting of the proposal is conditioned and proposed to be used only to the extent necessary to access the dock at night with lights of minimal intensity.

**SMP Ch. 5(F)(2)(a)(16):** *Lighting on piers, docks and floats shall avoid light spillage over onto the water surface.*

18. The applicant proposes low wattage landscaping lights that he asserts in the environmental checklist will not spill over onto the water surface.

**SMP Ch. 5(F)(2)(b)(1):** *All new, reconstructed, repaired, or modified overwater structures must comply with all regulations contained in this SMP and all other regulations as stipulated by State and Federal agencies, local Tribes, or others that have jurisdiction.*

19. Staff asserts in the staff report that it has reviewed the proposal and determined it complies with regulations outlined by the SMP, State Agencies, Federal Agencies, local Tribes,

and other applicable regulatory agencies. The applicant will have to apply for permits with the Washington Department of Fish and Wildlife (WDFW) assuring conformance to state hydraulic permit requirements. As conditioned by this decision and proposed by the applicant, there is nothing in the record to suggest any noncompliance issues. The applicant will also have to apply for a building permit, assuring compliance with City building code standards.

**SMP Ch. 5(F)(2)(b)(2):** *Mitigation shall be provided for all new, reconstructed, or modified overwater structures to ensure no net loss of ecological function.*

20. As determined in Finding of Fact No. 5, the proposal will not result in any significant adverse ecological impacts, so it is concluded there will be no net loss of ecological function. The SEPA mitigation measures were instrumental to the determination that the proposal would not adversely affect ecological function.

**SMP Ch. 5(F)(2)(b)(3):** *New piers and docks shall be allowed only for public access and water-dependent uses, which includes a structure associated with a single family residence provided that it is designed and intended as a facility for access to watercraft and otherwise complies with the regulations contained in the this section.*

21. As previously noted, the proposal expressly qualifies as a water dependent use in the definitions section of the SMP. The proposal is further consistent with the regulation above as it is designed for access to watercraft and is otherwise consistent with applicable SMP regulations.

**SMP Ch. 5(F)(2)(b)(4):** *Piers and docks may be permitted accessory to a development provided:*

- a. *The applicant has demonstrated to the satisfaction of the Shoreline Administrator that a shared or joint-use pier is not feasible.*
- b. *No more than one (1) pier/dock for each single-family residence or lot is permitted.*

22. There is no existing dock on the applicant's property and as indicated in the staff report, the City's Shoreline Administrator is satisfied that a joint use dock is not a feasible alternative.

**SMP Ch. 5(F)(2)(b)(7):** *Proposed overwater structures which do not comply with the dimensional standards contained in this chapter may only be approved if they obtain a variance.*

23. The current proposal shows a finger or 'flag' at the furthest waterward portion of the dock that is 8 feet wide. Pursuant to the dimensional standards for docks outlined in the SMP, the maximum width of any portion of a new dock is 6 feet. Based on staff conversations with the applicant, they are willing to reduce the width of the finger or 'flag' to 6 feet to meet the dimensional standards of the SMP. A recommended condition of approval has been incorporated into the staff report that requires the width of the finger or 'flag' be reduced to 6 feet.

**SMP Ch. 5(F)(2)(b)(8):** *Fixed pile piers elevated at least two (2) feet above the OHWM shall be preferred. Floating docks shall be allowed if floating elements are not located within the first*

*thirty (30) feet of the shoreline measured waterward of the OHWM, unless the applicant can demonstrate why adherence to this restriction is not feasible and an alternative design would result in less ecological impact.*

24. The SEPA Checklist submitted in association with this proposal indicated that the deck surface will be 18 inches above the Ordinary High Water Mark (OHWM). A recommended condition of approval has been incorporated into this staff report that states the deck surface should be a minimum of 24 inches above the OHWM, unless the applicant can demonstrate why adherence to this restriction is not feasible or how the proposed alternative of 18 inches would result in less ecological impact.

**SMP Ch. 5(F)(2)(b)(10):** *All overwater structures shall be constructed and maintained in a safe and sound condition. Abandoned or unsafe overwater structures shall be removed or repaired promptly by the owner.*

25. The applicant will have to obtain a building permit from the City of Black Diamond for the proposal, ensuring adherence with this standard.

**SMP Ch. 5(F)(2)(b)(11):** *Wooden components that will be in contact with water or over water shall not be treated or coated with herbicides, fungicides, paint, pentachlorophenol, arsenate, creosote, or similar toxic substances. Structures shall be made out of materials that have been approved by applicable state and federal agencies.*

26. The staff report asserts that there will be no wooden components in contact with the water as a result of the proposal. However, the standard doesn't just apply to materials in contact with the water but to any overwater structures. Since there are no design plans in the record it isn't clear whether the overwater dock elements beyond the steel pilings comply with the criterion above. Consequently, a condition of approval will be added to this decision requiring compliance with the criterion above.

**SMP Ch. 5(F)(2)(b)(13):** *Covered moorage with a solid roof and structural elements is not permitted, however one boat canopy with a translucent covering and one boat lift per lot is permitted, except for joint use docks, where one boat lift and one canopy per ownership interest is permitted. Up to two lifts for personal watercraft shall also be permitted.*

27. The proposed boat lift canopy will have translucent covering as authorized by the criterion above.

**SMP Ch. 5(F)(2)(b)(14):** *No portion of a deck of a pier shall, during the course of the normal fluctuations of the elevation of the water body, protrude more than six (6) feet above the OHWM.*

28. As conditioned.

**SMP Ch. 5(F)(2)(b)(16):** *No pier, moorage, float, or overwater structure or device shall be located closer than fifteen feet from the side property line extended, except that such structures may abut property lines for the common use of adjacent property owners when mutually agreed*

to by the property owners in a contract recorded with King County Records, a copy which must accompany an application for a building permit or a shoreline permit.

29. The proposed dock and associated boatlift will be setback from the northern and southern property lines approximately 18.5 feet.

**SMP Ch. 5(F)(2)(b)(17):** *All pier and dock lengths shall be minimized to the maximum extent feasible and comply with regulations as stipulated by State and Federal agencies, local Tribes, or others that have jurisdiction.*

30. For the reasons outlined in the Introduction section of this decision and Finding of Fact No. 6, the applicant has not demonstrated that the length of the dock has been minimized to the maximum extent feasible. There is nothing in the record to explain why a 56 foot dock as opposed to a 40 or 45 foot dock is more suited to meet the needs of the applicant. As determined in Finding of Fact No. 6, the applicant has provided no evidence that a 56 foot dock length would get the dock to an 11 foot depth or any depth that would make it more convenient to launch the applicant's watercraft. In point of fact, Attachment 6 and 7 don't reveal much difference in depth between a dock that is 45 feet as opposed to 56 feet, as both are located in waters with an average depth of less than five feet. Given the evidence in the record it is entirely plausible, even likely, that a 56 foot long dock will not provide for any significantly extended temporal period of lake access as compared to a dock that is of a length more comparable to surrounding docks. Contrary to the position of the applicant and staff, a 56 foot long dock is not comparable in length to the surrounding docks depicted in Attachment 9. Of the thirteen docks identified in Attachment 9, only one is longer than 50 feet and one other longer than 40 feet. The one dock longer than 50 feet, according to the uncontested testimony of Cindy Wheeler, was illegally constructed. In the absence of any evidence of what the needs of the applicant are (i.e. what type of water craft he has and what depths he needs for lake access) and how dock length affects those needs, the lengths of the docks found acceptable to other property owners in the cove serves as the most objective standard for ascertaining dock length "*minimized to the maximum extent feasible*". For the reasons outlined in Conclusion of Law No. 6, that length is 45 feet.

**SMP Ch. 5(F)(2)(b)(18):** *The length, width, and total area of moorage structures are provided in Table V below:*

**SMP Ch. 5(F)(2)(b)(19)(dock):**

a. *Maximum Length\*: The point at which 11 ft. of water depth is reached, not to exceed 60 ft. All measurements are based on the OHWM as determined in the field.*

*\*Footnote: The proposed length must be the minimum necessary to support the intended use. The total dock length includes approach ramp and floating element(s). A report prepared by a qualified professional that includes verifiable survey information demonstrating the average water depth is required for all docks or piers over forty (40) feet in length. Existing public piers may be repaired or replaced to their previous length. Piers or docks extending further waterward than adjacent piers or docks must demonstrate that they will not have an adverse impact on navigation.*

b. *Maximum Width\**: 4 ft. required within the first 30 feet from the OHWM, 6 feet required elsewhere.

*\*Footnote: Includes all walkways and additional fingers. The proposed width must be the minimum necessary to support the intended use. All pier and dock primary walkways or decks must incorporate materials and a design that allow adequate minimum of 50% of light to transmit through the material. Floats must have a minimum 2-foot strip of grating down the center that allows 50% of light to transmit through. The maximum width of a ramp connecting a pier to a float should be minimized to the maximum extent practical and shall also meet the light transmittal standard. An exception to the maximum width standard may be granted in order to meet the American's with Disabilities Act standards and considerations. A demonstration of need must be shown in order to allow this exception.*

c. *Maximum Surface Area\**: 400 sq. ft. (single owner)

*\*Footnote: The proposed surface area of the overwater structure must be the minimum necessary to support the intended use. Maximum surface area includes all walkways, ramps, and additional fingers associated with the dock or pier, as well as any float associated with the property or properties (see additional standards for floats below). Joint-use docks and piers must be utilized by two or more residential property owners.*

31. The proposed dock length as limited to 45 feet by this decision is clearly within the maximum dock length set by the regulation quoted above as the length is less than 60 feet and as shown in Attached 7 and 8 it reaches depths that are five feet or less. As to width, the proposal includes a finger or 'flag' at the furthest waterward portion of the dock that is 8 feet wide. A condition of approval requires this width to be reduced to 6 feet to be consistent with the criterion above. With the reduction in width the proposal is only 296 square feet in area, less than the 400 square foot maximum required above. The reduction length to 45 feet required by this decision will further reduce the area of the proposal.

## DECISION

The shoreline substantial development permit application described in Finding of Fact No. 3 is consistent with all applicable shoreline regulations as outlined in the Conclusions of Law of this decision and is approved, provided that the proposal is constructed as described in this decision and complies with the following conditions:

1. The proposed boatlift (including canopy area) should be realigned to extend no further into Lake Sawyer than the most waterward portion of the dock.
2. The finger (or 'flag') at the end of the waterward portion of the dock must be reduced from 8 feet wide to a maximum of 6 feet wide, pursuant to the SMP development standards for overwater structures.
3. The deck surface should be a minimum of 24 inches above the OHWM, unless the applicant can demonstrate why adherence to this restriction is not feasible or how the proposed alternative of 18 inches would result in less ecological impact.
4. The length of the dock shall be reduced from 56 feet to 45 feet.

5. Dock lights may only be turned on at night as necessary to access the dock. Some of the dock lights may also be left on to prevent navigation hazards to the extent authorized by staff.
6. Wooden components that will be in contact with water or over water shall not be treated or coated with herbicides, fungicides, paint, pentachlorophenol, arsenate, creosote, or similar toxic substances. Structures shall be made out of materials that have been approved by applicable state and federal agencies.
7. No portion of a deck of a pier shall, during the course of the normal fluctuations of the elevation of the water body, protrude more than six (6) feet above the OHWM.
8. The dock shall be constructed with non-reflective materials.

Dated this 25th day of May, 2016.



Phil A. Olbrechts  
City of Black Diamond Hearing Examiner

### **Appeal Right and Valuation Notices**

This land use decision is final and subject to appeal to Washington State Shoreline Hearings Board, subject to the procedural requirements of the Shoreline Management Act, Chapter 90.58 RCW.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.