

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 THE LOG FOUNDATION, EASTLAKE
4 COMMUNITY COUNCIL, and FLOATING
5 HOMES ASSOCIATION; and 1926
6 FAIRVIEW AVENUE E HOMEOWNERS
7 ASSOCIATION,

8 Petitioners

9 v.

10 CITY OF SEATTLE DEPARTMENT OF
11 PLANNING AND DEVELOPMENT, and
12 LAKE UNION INVESTMENTS, LLC

13 Respondents.

SHB No. 15-003c

ORDER ON MOTIONS FOR PARTIAL
SUMMARY JUDGMENT AND MOTION
FOR DISMISSAL

14 **INTRODUCTION**

15 On February 18, 2015, Petitioners The Log Foundation, Eastlake Community Council
16 and Floating Homes Association filed a petition with the Shorelines Hearings Board (“Board”).
17 The February 18th petition was assigned matter number SHB No. 15-003. On February 19, 2015,
18 Petitioner 1926 Fairview Avenue E Homeowners Association filed a petition with the Board.
19 The February 19th petition was assigned matter number SHB No. 15-004. On February 20, 2015,
20 Petitioners Lynn Hoskins, Daniel Reddy, Stefanie Graen, Jeff Granger, and Chet Leroy filed a
21 petition with the Board. The February 20th petition was assigned matter number SHB No. 15-
005. The petitions challenge a decision by the City of Seattle Department of Planning and
Development (City) dated January 29, 2015. The City’s January 29th decision approves a
Shoreline Substantial Development Application submitted by Respondent Lake Union

1 Investments, LLC. The Shoreline Substantial Development Permit (SSDP) will allow a 30-foot
2 wide by 140-foot long boat ramp to be constructed for access to Lake Union by amphibious tour
3 vessels and the construction of a 3-foot by 32-foot dock as moorage for an emergency response
4 vessel.

5 On March 9, 2015, a telephonic prehearing conference was held in this matter by the
6 presiding officer.¹ A Prehearing Order, dated March 12, 2015, was issued, and the following
7 legal issues were set for hearing:

- 8 1. Whether the SSDP is inconsistent with the policies in RCW 90.58.020 concerning
9 public access and recreation?
- 10 2. Whether the SSDP is inconsistent with the goals and policies of Chapter 23.60 of the
11 Seattle Municipal Code concerning public health, traffic, public recreational use of
12 the shoreline and impacts to surrounding land and water uses?
- 13 3. Whether the City erred in approving the proposed boat ramp as an allowed use within
14 the Urban Environment?
- 15 4. Whether the SSDP is inconsistent with the goals and policies of Chapter 25.08 of the
16 Seattle Municipal Code and whether the Board has jurisdiction over Chapter 25.08?
- 17 5. Whether the SSDP is inconsistent with the City's Shoreline Goals and Policies
18 concerning public recreational use of the shoreline?
- 19 6. Whether the City's issuance of a State Environmental Policy Act (SEPA)
20 Determination of Nonsignificance (DNS) was clearly erroneous with regard to the
21 Project's potential impacts to noise, public safety, air quality and public health, water

¹ The Petitioners for SHB 15-005, Hoskins, Reddy, Graen, Granger, and LeRoy, failed to appear at the prehearing conference. Matter SHB 15-005 was initially consolidated into SHB 15-003c, however, following the issuance of the Prehearing Order, an Order to Show Cause was issued to the Petitioners for SHB 15-005. The Board did not receive any filings from Petitioners Hoskins, Reddy, Graen, Granger, or LeRoy in response to the Order to Show Cause or in response to the cross-motions for summary judgment that are addressed in this Order. By separate Order dated May 5, 2015, the Board dismissed Petitioners Hoskins, Reddy, Graen, Granger, and LeRoy and SHB 15-005 due to the petitioners' failure to participate.

1 quality, fish and wildlife, and traffic and its imposition of conditions relating to these
2 elements of the environment?

3 Petitioners The Log Foundation, Eastlake Community Council and Floating Homes
4 Association (hereinafter “The Log Foundation”) filed a motion for partial summary judgment on
5 Issue 3. Respondents, Lake Union Investments, LLC and the City filed a joint motion for partial
6 summary judgment on Issue 3 and a motion to dismiss Issue 4 for lack of jurisdiction.²

7 For the cross-motions for summary judgment, David Mann appeared on behalf of the
8 Petitioners The Log Foundation. Patrick Williams appeared on behalf of the Petitioners 1926
9 Fairview Avenue East Homeowners Association. Thomas Backer appeared on behalf of
10 Respondent City of Seattle. Courtney Kaylor, John McCullough and Katie Kendall appeared on
11 behalf of the Respondent Lake Union Investments, LLC. The Board considering this matter was
12 comprised of Board Member Tom Morrill, presiding, Board Member Dave Somers, and Board
13 Member Jennifer Gregerson.³ The Board reviewed the following pleadings submitted by the
14 parties:

- 15 1. Log Foundation’s Motion for Summary Judgment.
- 16 2. Declaration of David S. Mann, with Exhibits 1-7.
- 17 3. Lake Union Investments, LLC and City of Seattle’s Joint Response to Log
18 Foundation’s Motion for Summary Judgment.
- 19 4. Declaration of Courtney A. Kaylor, with Exhibits 1-2.
- 20 5. Log Foundation’s Reply in Support of Summary Judgment.

21 ² Although the Respondents refer to the motion concerning Issue 4 as a motion to dismiss, the motions were supported by declaration and exhibits. Because matters outside the pleading were presented and considered by the Board, the analysis for this Order will proceed as for a motion for partial summary judgment. *See* CR 12(b) and (c).

³ Pursuant to the authority of RCW 90.58.185, this case was heard by a three-member panel of the Board.

1 The Ducks currently access Lake Union at the Sunnyside Public Boat Launch on the
2 northern shore of Lake Union. *Id.* at 3. The Project Site will be the replacement location for the
3 Ducks ingress and egress of Lake Union. *Id.* The Project Site will not be open for general
4 access by the public. It will be gated and locked and only accessible for Ride the Ducks
5 operations, and those operations will not include any loading or unloading of passengers at the
6 Project Site. *Id.* at 4.

7 The City determined in its decision on the SSDP that the Project is a shoreline recreation
8 use. *Id.* at 7. A shoreline recreation use is a permitted use in the UM Environment. SMC
9 23.60.720(I). The City also decided in its SEPA determination that the potential noise impacts of
10 the Project could be mitigated through existing noise ordinance controls and additional
11 conditions imposed by the City. Mann Decl., Ex. 1 at 23-24.

12 ANALYSIS

13 SUMMARY JUDGMENT STANDARD

14 Summary judgment is a procedure available to avoid unnecessary trials where there is no
15 genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

16 The summary judgment procedure is designed to eliminate trial if only questions of law remain
17 for resolution, and neither party contests the facts relevant to a legal determination. *Rainier*
18 *Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*,
19 117 Wn.2d 1004 (1991).

20 The party moving for summary judgment must show there are no genuine issues of
21 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*

1 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
2 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
3 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
4 then the non-moving party must present evidence demonstrating that material facts are in
5 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
6 *reconsideration denied* (1991). In a summary judgment proceeding, all facts and reasonable
7 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
8 Wn.2d 291, 300, 45 P.3d 1068 (2002).

9 Issue 3: Is the Boat Launching Ramp an Allowed Use in the UM Environment?

10 The Log Foundation has moved for partial summary judgment on Issue 3 which
11 questions whether the City erred in approving the proposed boat launching ramp as an allowed
12 use within the UM Environment. Petitioner 1926 Fairview Avenue E Homeowners Association
13 supports the Log Foundations' motion. The Respondents oppose the motion and ask for
14 summary judgment in their favor on Issue 3.

15 The Log Foundation begins by asserting that the Project is not a use that is specifically
16 identified in the SMP, and thus it is prohibited under SMC 23.60.014.A which provides that:
17 "To be permitted in the Shoreline District, a use must be permitted in both the shoreline
18 environment and the underlying zone in which it is located." According to the Log Foundation,
19 the Project is a private commercial boat ramp and such a use is not listed as an allowed
20 commercial use within the UM Environment.

1 As noted above, however, the City did not approve the Project as an allowed commercial
2 use, but rather approved the SSDP on the basis that the Project is a shoreline recreation use. *See*,
3 Mann Decl., Ex. 1 at 7. A shoreline recreation use is a specifically permitted use in the UM
4 Environment. SMC 23.60.720(I). The question then is whether the Project falls within the
5 definition of shoreline recreation.

6 The definition for shoreline recreation under the SMP is set forth in SMC 23.60.936-“S.”
7 which states:

8 "Shoreline recreation" means an open-space use which consists of a park or
9 parklike area which provides physical or visual access to the water. The
10 following and similar uses are included: fishing piers, swimming areas,
11 underwater diving areas or reefs, boat launching ramps, bicycle and pedestrian
12 paths, viewpoints, concessions without permanent structures, floats and
13 bathhouses.

14 The Log Foundation argues that the proposed use for the Project, as a private commercial
15 boat ramp, does not meet the definition of shoreline recreation set forth in SMC 23.50.936-“S.”.
16 The Log Foundation reads the definition of shoreline recreation to apply only to boat launching
17 ramps that are open to the general public. The Log Foundation argues that the first sentence in
18 the definition of shoreline recreation modifies the entire definition, and thus all shoreline
19 recreational uses must be in a “park or parklike area” that is open to the public.

20 Lake Union Investments and the City argue that the definition of shoreline recreation
21 clearly states that a boat launching ramp is shoreline recreation. The Respondents argue that the
definition is clear on its face as it includes a list of specific uses that “are included” in the
coverage of shoreline recreation, one of which is boat launching ramps. Moreover, the

1 Respondents argue that the definition does not state that a shoreline recreational use must be
2 public. Rather, the definition refers to open-space uses that take place in a “park or parklike
3 setting” and provide physical or visual access to the water. According to the Respondents the
4 Project meets that definition.

5 In determining the intent of the City Code, the Board looks at the language of the specific
6 regulation and related regulations. *See Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11,
7 43 P.3d 4 (2002). The definition of shoreline recreation is not specifically limited to public
8 parks. The definition generally covers “open-space uses” which consist of a park or parklike
9 area which provide physical or visual access to the water. SMC 23.60.936-“S.” The definition
10 goes on to state that certain specific uses, including boat launching ramps, are included in the
11 type of uses that would be considered shoreline recreation. *Id.* The language in the definition
12 does not specifically require a boat ramp to be a public boat ramp. Moreover, the inclusion of
13 boat launching ramps in the specific list indicates that such facilities are assumed to be an “open-
14 space use” and are assumed to provide access to the water in a park or parklike area. The
15 language in the definition refers to “physical” access to the water not “public” access.

16 The City’s interpretation of the definition of shoreline recreation is a reasonable
17 interpretation of the plain meaning of the language, and is not inconsistent with the purposes set
18 forth in the Seattle SMP which include encouraging water dependent uses and access to the
19 water. *See SMC 23.60.002(B)*. The City’s interpretation is also not inconsistent with the stated
20 purpose of the UM Environment which is to preserve areas for water-dependent and water-
21

1 related uses while still providing some views of the water from adjacent streets and upland
2 residential streets. SMC 23.60.220.9.a.

3 Moreover, the City's interpretation gives meaning to all of language in SMC 23.60.936-
4 "S.", whereas the Log Foundation's interpretation would render the second sentence in SMC
5 23.60.936-"S." as superfluous. Under the Log Foundation's proposed interpretation, each
6 component in the list must be analyzed to determine if it meets the general criteria set forth in the
7 first sentence, which removes the purpose for having a specific list and renders no meaning to
8 the phrase, "[t]he following . . . uses are included." Such an interpretation violates the principle
9 that a provision "must not be construed in a manner that renders any portion thereof meaningless
10 or superfluous." *See Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

11 Finally, if the code provision were considered ambiguous, the City's interpretation of
12 SMC 23.60.936-"S." would deserve deference as the City is charged with interpreting and
13 applying its SMP. *See Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568,
14 612, 90 P.3d 659 (2004). The City's interpretation that the Project is a shoreline recreational use
15 even if the boat launching ramp is not open to the general public, is not unreasonable
16 considering: (1) the use of the ramp by the Ducks is a water dependent use, (2) the use will
17 provide physical access to the water, (3) the Ducks provide tours of Lake Union to the public,
18 and (4) the project includes the planting of natural vegetation, including Evergreen trees and low
19 shrubs. In light of the SMP definition of shoreline recreation and the purposes of the SMP and
20 UM Environment, the City's interpretation that the Project is an allowed use is reasonable.

1 Accordingly, the City and Lake Union Investments’ motion for summary judgment on
2 Issue 3 is GRANTED and the Log Foundation’s motion for summary judgment on Issue 3 is
3 DENIED.

4 Issue 4: Board Jurisdiction over Consistency with Noise Ordinance

5 The Respondents have moved to dismiss Issue 4 on the ground that it is beyond the
6 Board’s jurisdiction. In Issue 4, Petitioners raised the question whether the SSDP is inconsistent
7 with the goals and policies of Chapter 25.08 of the Seattle Municipal Code. The Respondents
8 argue that the Board does not have jurisdiction over Chapter 25.08 because the provisions in
9 Chapter 25.08 are not a part of the City’s SMP.

10 The Board has a long history of cases addressing the Board’s jurisdiction to review a
11 shoreline substantial development permit for compliance with local government’s land use codes
12 and comprehensive plans. *See Laccinole v. City of Bellevue*, SHB 03-025, (Order Granting
13 Summary Judgment and Order of Remand, 2004) (Review of Board decisions on this issue, pp.
14 21 through 29). The Board has jurisdiction only where the land use code or comprehensive plan
15 has been incorporated into the SMP and where Ecology has reviewed and approved the
16 provisions of the land use code or plan in its review of the SMP as required by RCW
17 90.58.090(1). *See Faben Point Neighbors v. City of Mercer Island*, SHB No. 98-63 (Order
18 Granting Summary Judgment, 1999). The Board concludes that neither of these criteria is met
19 concerning Chapter 25.08 of the Seattle Municipal Code.

20 The Log Foundation argues that the permit must comply with the City’s Noise Ordinance
21 to ensure compliance with SEPA, and thus the Board has jurisdiction to determine whether the

