

February 20, 2013

**CITY OF BAINBRIDGE ISLAND, WASHINGTON  
HEARING EXAMINER**

**REPORT AND DECISION**

**Project:** Patrick Living Trust Shoreline Substantial Development/Conditional Use Permit

**File number:** SCUP17718

**Applicant:** Peter O'Connor  
147 Finch Place SW, Suite 3  
Bainbridge Island WA 98110

**Owner:** Patrick Living Trust  
4461 Pleasant Beach Drive  
Bainbridge Island WA 98110

**Request:** Construction of a 762 square foot accessory dwelling unit above an existing garage.

**Location:** 4461 Pleasant Beach Drive

**Environmental Review:** This project is categorically exempt from a SEPA threshold determination under WAC 197-11-800 (1) (b.) (i.)

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**FINDINGS OF FACT**

Site Characteristics

- I. Assessor's Record Information:
  - a. Tax Lot Number: 4164-004-001-0005.
  - b. Owners of record: Patrick Living Trust
  - c. Site size: 19,886 square feet

- d. Land use: Single-family residential
- 2. TERRAIN: The topography is generally flat with 5-6 foot drop to the shoreline.
- 3. SOILS: The soils along this stretch of shoreline are Neilton gravelly loamy sand, which is a deep well drained soil.
- 4. SITE DEVELOPMENT: The site is completely developed with a single-family residence, detached garage, a pool and a shed.
- 5. ACCESS: Access to the site will be from public roads and on easements granted to the applicants.
- 6. PUBLIC UTILITIES:
  - a. Water – South Bainbridge Water System.
  - b. Sewer – Sewer District Seven
  - c. Storm drainage – Existing system – outfalls at beach.
- 7. PUBLIC SERVICES:
  - a. Police - Bainbridge Island Police Department.
  - b. Fire - Bainbridge Island Fire District.
  - c. Schools – Bainbridge School District
- 8. EXISTING USE: Single-family residence and accessory uses.
- 9. SURROUNDING USES: The surrounding uses are all single-family residential.
- 10. EXISTING ZONING/SHORELINE MASTER PROGRAM DESIGNATION:  
The development area is zoned Residential, Two units Per Acre (R-2). The City Shoreline Master Program designates the project area as Semi-rural environment.
- 11. SURROUNDING ZONING/SHORELINE MASTER PROGRAM DESIGNATION:  
The surrounding vicinity is zoned R-2. The City Shoreline Master Program designates all of the surrounding waterfront parcels as Semi-rural environment.
- 12. EXISTING COMPREHENSIVE PLAN DESIGNATION:  
The City Comprehensive Plan Land Use Map designates the area as Open Space Residential, two residences per acre.
- 13. SURROUNDING COMPREHENSIVE PLAN DESIGNATION:  
The City Comprehensive Plan Land Use Map designates the surrounding area as Open Space Residential, two residences per acre.

#### Application History

- 14. On March 12, 2012, the applicant was granted a pre-application conference waiver. On

October 23, 2012, Peter O'Connor applied for the Shoreline Substantial Development/Conditional Use Permit. A Notice of Application was sent to property owners within 500 feet of the subject property and published in the paper of record on November 16, 2012 (Exhibit #7). In addition the site was duly posted. One written public comment was received regarding the proximity of the existing/proposed addition to the northern property line (Exhibit #9).

### Major Issues

15. The application is for a permit to construct an accessory dwelling unit above an existing garage located within shorelines jurisdiction about 100 feet landward of the Ordinary High Water Mark (OHWM). The existing garage is sited at a zero setback from the northern side lot line. The residents to the north of the applicant property, Henry Warner and Jill Lehman, own a house located mostly waterward of the garage and thus do not oppose the additional structural height from a visual standpoint. But they object to placement of the new addition on the lot line because they are skeptical that the second-story addition can either be built or maintained without trespassing on their property, depositing debris and disturbing their landscaping.

16. Side line setback requirements exist in the Bainbridge Municipal Code both within the shoreline master program and the zoning code. BIMC Table 18.12.020-2 imposes a standard residential zoning side line setback of 5 feet. Calculation of the shoreline program setback is a more convoluted exercise. The shoreline residential development regulations stated at BIMC 16.12.260(B) specify two possible procedures depending on surrounding circumstances:

*7. In the semi-rural environment where there are adjacent primary residences within 25 feet of the side property line on both sides of the property and both are less than 50 feet from the OHWM, the average setback of the adjacent properties may be used as the required depth of the native vegetation zone, provided that:*

*a. The property is not upland of an aquatic conservancy environment;  
and*

*b. The setback from OHWM may not be less than 25 feet.*

*8. Side yards within 200 feet of OHWM, except in the urban environment, shall total at least 30 percent of the lot width and shall remain free of above-ground structures and impervious surfaces except that fences up to four feet high shall be allowed.*

17. Looking at the top sheet of the applicant's site plan (Exhibit #2) one can readily determine that both residences immediately flanking the applicant property are located closer than 25 feet from the respective side lot lines. Moreover, the Lehman/Warner residence to the north looks to be roughly 35 feet from the OHWM, while the residence to the south appears to be sited at about a distance of 50 feet from the OHWM. If the the southern structure is indeed within 50 feet, subsection (7) of BIMC 16.12.260(B) would likely provide the applicable shoreline setback requirement, which would be calculated based on the average of the two adjacent setbacks. But since the Lehman/Warner house is not exactly parallel to the lot line, a precise calculation of the setback would probably

require survey measurements to achieve any degree of precision. A ballpark setback estimate would fall in the 10 to 15 foot range.

18. On the other hand, if the adjacent residence to the south lies further than 50 feet from the OHWM, then subsection (8) would apply, as suggested by the Staff Report. The shoreline program side yard setback would then need to be "at least 30 percent of the lot width." This would offer the possibility of a simpler computation were it not for the fact that the applicant parcel is irregular on all four sides, ranging in width from about 100 feet at the shoreline to about 125 feet just east of the garage. After all the essential calculations are completed, this would generate a side line setback requirement of somewhere between 30 and 38 feet.

19. In addition to articulating different lot line setback requirements, the shoreline and zoning codes also offer slightly different statements of City nonconforming use policy. These provisions come into play because, no matter what setback standard is applied, the existing Patrick garage qualifies as a nonconforming structure. Staff testified to the existence of a long-standing tradition within the Planning Department to interpret the zoning and shoreline nonconforming use provisions so that they produce different outcomes, a matter to be explored at greater length within the Conclusions section below. The January 31, 2013, hearing was continued a further week to avail the parties an opportunity to brief the legal issues concerning how the differences between the shorelines and zoning code provisions should be resolved.

20. The remaining relevant shoreline policies and regulations require that accessory dwelling units undergo conditional use permit review and that impacts to neighboring views be addressed. No view issues have been raised. The existing garage upon which a second story is proposed to be added lies at a greater distance from the shore than adjacent waterfront residences and thus does not intrude into their views. Properties located east of Pleasant Beach Drive are uphill and look over the subject parcel.

21. A requirement that the upper story addition meet the 5-foot zoning setback would necessitate a partial redesign of the central part of the proposed ADU. The western half of the existing garage jogs away from the lot line and appears to be compliant. Achieving the permitted 800 square feet of ADU floor space while meeting the setback would most likely involve extending the proposed dining and storage areas further south and relocating the bathroom. An unopened but as yet unvacated section of road right-of-way currently precludes expansion to the east. Imposition of a 30 foot setback would of course prevent constructing any ADU as an addition above the garage.

## CONCLUSIONS

1. This is at bottom a minor construction proposal that has been rendered difficult by the complexity of the applicable codes and an interpretation regimen that undertakes to magnify, rather than reduce, points of possible regulatory difference. Because it deals with two important questions of administrative practice -- how to choose between competing regulations dealing with a single development standard and the need to achieve consistency in the treatment of nonconforming uses -- this modest application elicits a more detailed discussion than its immediate consequences would otherwise merit.

2. As articulated within Attorney Ryan Vancil's brief submitted on behalf of the Lehman-Warner position, the rules of statutory construction evince a state policy to harmonize and simplify multipart regulatory systems to achieve a rational outcome overall. In addition, both in Washington and nationally, a robust case law has arisen around the admittedly vexing issues concerning nonconforming uses, the basic principles of which need to be manifested in the local decision making process. Many years of misinterpreting key regulatory concepts cannot of course give rise to a claim for deferential treatment.

3. There is a genuine conflict between the competing side line setback regulations governing residential development on waterfront properties.. The zoning code imposes an exact numerical requirement, while the shoreline program offers a formula based on a menu of variables. The approaches are fundamentally different. While it may be contended that the setback choice should not in any case fall below the 5-foot zoning minimum, this argument does not answer the basic question as to which code approach should be applied.

4. The zoning code supplies a variety of potential references for resolving such regulatory conflicts. Of these the most relevant to the instant situation are the zoning code amendments adopted in 2011 setting forth dimensional standards and describing how they are to interrelate with other code provisions. The following quotation from BIMC 18.12.010 provides the language critical to our inquiry:

*A. All development in the city of Bainbridge Island shall be subject to the dimensional standards in Tables 18.12.020-1, 18.12.020-2, and 18.12.020-3 and BIMC 18.12.030, unless those standards are explicitly varied by another provision of the Bainbridge Island Municipal Code....*

*C. In addition, the following sections of the BIMC may impose additional dimensional requirements or allow exceptions to dimensional requirements, and in the case of a conflict with the information in Tables 18.12.020-1, 18.12.020-2, or 18.12.020-3 the more specific provision or criteria shall apply:*

*....2. Chapter 16.12 BIMC, Shoreline Master Program.*

5. Table BIMC 18.12.020-2 imposes the 5-foot side yard setback applicable to the Patrick parcel located in the R-2 zone. BIMC 18.12.010 provides a simple mechanism for dealing with other code provisions that recite conflicting dimensional standards, and it calls out the BIMC Chapter 16.12 shoreline regulations as a concrete instance. The standard for determining which standard governs is that “the more specific provision or criteria shall apply”. Moreover, the dimensional standards of the 18.12 Tables are to apply “unless those standards are explicitly varied by another provision” of the BIMC.

6. Given the language quoted above, it is hard to justify drawing any conclusion other than that the zoning setbacks must trump similar competing shoreline program provisions. The shoreline program nowhere states that it is explicitly to be given preference over other regulations. Indeed, precisely to the contrary, one of the requirements for issuance of a shoreline conditional use permit is a finding that the “proposed use is consistent the provisions of the zoning ordinance (BIMC Title 18)”.

7. An identical outcome is mandated by the instruction that “the more specific provision or criteria shall apply”. What could be more specific than an invariable 5-foot setback requirement? Not a formula based on a set of malleable variables, and certainly not a formula where the irregularity of the parcel makes the variables nearly impossible to compute. The shoreline setback formula may have its virtues, but specificity is not one of them.

8. But for many years the Planning Department's position has been that the shoreline code is *categorically* more specific than the zoning code. Mr. Machen of the Planning Staff summarized this view in a November 26, 2012, email to Henry Warner, stating that the “shoreline regulations are considered more specific than zoning, as zoning applies to the entire island, where the shoreline regulations only apply to those properties within 200 feet of the 'shoreline'.” This approach appears to date back to at least 2001 and a pair of Planning Department code interpretation memos wherein it was opined that the “SMP regulations is (sic) considered a more specific ordinance than the zoning ordinance” because they only “affect a specific group of parcels” while the zoning regulations “affect generally everyone on the island.”

9. There are fundamental problems with the 2001 memo's analysis. It zeroes in on the indisputable fact that the universe of parcels within SMA jurisdiction is smaller than the zoning universe. It is far more limited in extent. But, unfortunately, that is not a circumstance that the term “specific” actually targets. The word refers to something definite in character, not something limited in scope. It is entirely possible to have a small universe of vaguely defined (non-specific) entities. One suspects that a wrong turn was taken when the 2001 memo undertook to emphasize the more specific “ordinance” as a whole instead of the actual code language usage referring to a “provision or criteria”. The code language focuses on the particular application of two (or more) standards at a particular location in order to ascertain which provides the more clearly defined result. By improperly substituting the broad generality of “ordinance” for the particularity of “provision” the code interpretation lost contact with the critical concept of specificity as applied to the development parcel itself.

10. The second major conceptual issue raised by the Staff analysis was its assignment of different meanings to the nonconforming use provisions within the shorelines and zoning codes. This seems especially strange since the key operative language in each regarding nonconforming structures is nearly the same. BIMC 16.12.390(A)(2)(a) states that an “expansion which increases the nonconformity shall not be allowed without a shoreline variance,” while the analogous zoning provision appearing at BIMC 18.30.030(A) mandates that “changes to the structure that would alter or increase the nonconformity are not permitted.” Thus both ordinance provisions prohibit an alteration that “increases the nonconformity”.

11. The 2001 code interpretation memos also attempted to deal with the question of what an increase in nonconformity encompasses. With respect to a nonconforming setback, everyone seems to agree that an alteration that further decreases the setback distance (moving a wall closer to the lot line) or expands the nonconformity parallel to the lot line (extending the wall length laterally) is prohibited. But Staff views the 2001 memo as taking the position that increasing the height of a nonconforming structure (making the wall taller) is permitted. In Staff's view extending vertically is allowed while extending horizontally is not.

12. The 2001 memos mostly comprise a thicket of examples where variables are shuttled in and out, and it is possible to question whether the Patrick fact situation is completely analogous to any one of the examples cited. But since 2011 this debate has been moot. Subsection (1) of BIMC 18.30.030(A) directly answers the question as to whether a new vertical extension of an existing nonconforming structure is permitted: “Any vertical or horizontal extension of a nonconforming wall must meet the applicable standards.” So there you have it. The City's clearly articulated legislative policy is that a second story addition to a one-story building possessing a nonconforming setback must meet the current legal setback standard.

13. It needs to be fully appreciated that nonconforming development provisions constitute a rather special and unique regulatory category. These provisions are neither use standards nor dimensional requirements. Rather, nonconforming development provisions express a policy for dealing with historical anomalies – uses and structures that were originally legal but now fail to comply with recently adopted more stringent requirements. Their continued existence is to be merely tolerated, not encouraged:

The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that conditions should be reduced to conformity as completely and as speedily as possible.... The nonconformity is in no case allowed to increase. It is permitted to continue until some change in the premises is contemplated by the owner, when, in so far as expedient, the authorities take advantage of this fact to compel a lessening or complete suppression of the nonconformity. *Bartz v. Board of Adjustment*, 487 P.2d 782, 5 Wn.App. 497, at 500 (1971).

14. Allowing an expansion of the height of a nonconforming structure is contrary to the principle stated in *Bartz* that a “nonconformity is in no case allowed to increase.” The 2011 zoning code amendments bring City policy into alignment with that principle. More critically, there is simply no rational argument to be made that the City should have conflicting nonconforming development policies governing different portions of the BIMC. The essential policy principles informing the regulation of all instances of nonconforming uses are exactly the same. All the City's earlier code provisions should be interpreted so as to harmonize with the more recent 2011 zoning code amendments that operate to clarify and eliminate latent ambiguities.

15. The standards for granting a shoreline conditional use permit are set forth at BIMC 16.122.380(C):

*1. Uses classified as conditional uses may be authorized; provided, that the applicant can demonstrate all of the following:*

*a. The proposed use will be consistent with the policies of RCW 90.58.020 or its successor and the policies of the master program.*

*b. The proposed use will not interfere with the normal public use of the public shorelines.*

*c. The proposed use of the site and design of the project will be*

*compatible with other permitted uses within the area.*

*d. The proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is located.*

*e. The public interest suffers no substantial detrimental effect. (WAC 173-14-140(1) or its successor.)*

*f. The proposed use is consistent with the provisions of the zoning ordinance (BIMC Title 18) and the comprehensive plan (Ordinance No. 94-21).*

16. Residential uses sited along appropriately zoned stretches of the shoreline raise no policy questions under RCW 90.58.020 or under Bainbridge Island's shoreline master program, comprehensive plan or zoning code. Accessory dwelling units are permitted so long as they do not require a variance. BIMC 18.09.030(I)(5) provides the most detailed compendium of the City's ADU standards, specifying that an ADU may be added to a garage, may not exceed 800 square feet of floor area, and must meet all other applicable zoning code standards "including, but not limited to, ...setbacks." The Patrick proposal can comply with all ADU requirements if it is redesigned to meet the 5-foot zoning side line setback.

17. The proposed ADU is located within shorelines jurisdiction but will have no shoreline impacts as such. It will not affect public shoreline use and have no adverse impact on the Semi-rural shoreline designation or the public interest.

18. If redesigned to meet the 5-foot side line setback requirement, the Patrick ADU proposal will be compatible with the nearby permitted residential use to its north. If the setback is not imposed and the ADU is constructed flush with the property line, it seems inevitable that trespass would occur on the adjacent Lehman-Warner parcel from construction and maintenance activities. No visual impacts resulting from the proposed two-story edifice have been alleged or identified.

## **DECISION**

The Shoreline Substantial Development/Conditional Use Permit application of the Patrick Living Trust (file no. SCUP17718) is APPROVED, subject to the following conditions:

1. The site plan and cross section drawings received October 23, 2012, shall be revised to provide the ADU with a 5-foot setback from the northern side lot line. The revised drawings shall be submitted to the Department of Planning and Community Development for review and approval consistent with applicable code design and construction requirements and the terms of this decision. Construction shall comply with the revised site plan and cross section drawings, as approved.
2. No materials shall be delivered to, work performed from or construction debris be littered on the adjacent private property north of the subject parcel, unless a written easement or agreement consenting thereto is obtained from the property owner.

ORDERED February 20, 2013.



Stafford L. Smith, Hearing Examiner  
City of Bainbridge Island

The decision of the City issued by the Hearing Examiner may be appealed to the Shorelines Hearings Board in accordance with the provisions of BIMC 16.12.380(C)(7).

(Please note: Washington Department of Ecology has final decision authority for a Shoreline Conditional Use application. Within eight days of the City's decision on the application, the application packet is forwarded to the Department of Ecology. The Department of Ecology shall approve, approve with conditions, or deny the application within 30 days.)

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.