



# CITY OF EDMONDS

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HEARING EXAMINER

MIKE COOPER  
MAYOR

BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

RE: Meadowdale Marina, LLC

Administrative Appeal

APL2011-0001

APPEAL OF NONCONFORMING USE  
INTERPRETATION

## Summary

The appeal is sustained and the Appellants meet the criteria for reconstructing their damaged building under ECDC 17.40.020(F) and ECDC 23.10.220(D)

The Appellant appeals an interpretation by the Edmonds Building Official of a nonconforming use provision that requires the demolition/removal of a wooden building located on the Meadowdale Marina. The building was completely destroyed by a January, 2011 storm. The specific nonconforming use provisions at issue are ECDC 17.40.020(F) and ECDC 23.10.220(D). Both provisions provide that the repair of a nonconforming structure is authorized so long as the damage is less than 75% of the replacement cost. In a formal interpretation, the Building Official impliedly determined that “structure” only encompasses the wooden building and not the entire marina facility. Under the Building Official’s interpretation, since the wooden building was completely destroyed, its damage exceeds 75% of its replacement value and it cannot be repaired or replaced.

The building official’s February 22, 2011 interpretation requires a marina facility designed to accommodate two buildings to permanently accommodate only one. This would constitute a significant loss of development potential with no corresponding public benefit. “Structure” as used in the nonconforming use provisions should include all of the component parts of the Meadowdale Marina, including the wooden building. Under this interpretation of structure, replacement of the wooden building would only cost 18% of the replacement value of the entire marina complex. This is well below the 75% threshold of ECDC 17.40.020(F) and ECDC 23.10.220(D).

## Testimony

*[This summary of testimony is not to be construed as any finding made by the Examiner. It is merely a summary of what was said so that the reader may understand what was presented.]*

David Mann, attorney, presented the Appellant’s appeal. He acknowledged that the wooden building on the pier structure was extensively damaged but this is not a significant portion of the pier facility as a whole. The Appellant agrees that it applied for a shoreline permit in

1 repair the pier facility. The permit was approved in 2008 for reconstructing the entire marina facility.  
2 Condition 2 of the decision states that if overwater structures exceed the damage threshold they  
3 cannot be replaced. Mr. Mann emphasized this pertains to the entire marina facility, not just the  
4 wooden structure. He noted that the wooden structure collapsed in 2010 winter storm. The larger  
5 metal building was not damaged. The original Meadowdale application describes in detail what the  
6 facility is, which includes all structures associated with the marina facility, not just the wooden  
7 building. The City's staff report recognizes that the permit application was for the entire marina. In  
8 assessing the threshold for repair, the replacement value of the entire structure must be considered.  
9 Replacement cost at the time of construction is 8.2 million dollars. The replacement value for the  
10 wooden building is 1.4 million dollars.

11 Mr. Mann reasoned that just looking at the wooden building in assessing repair thresholds is  
12 erroneous for three different reasons. First, the 2005 application was for the marina as a whole.  
13 Second, the 2005 decision contemplated that if the "structures" were damaged more than 75% the  
14 repair threshold would be exceeded. Finally, treating the wooden building in isolation ignores the  
15 fact that the building is functionally a part of the marina. Mr. Mann noted that there is a case on  
16 point, *Preserve Our Islands v. King County*, where the court determined that for a repair of a dock the  
17 value of the entire marina facility had to be considered, which included 100 acres of associated  
18 facilities.

19 Mr. Mann also noted that the staff is incorrect in arguing that the building has moved. The building  
20 wasn't moved by the Appellant. It was moved by a storm. If it is argued that anytime a building  
21 collapses it "moves", the repair allowances of the nonconforming use provisions would be rendered a  
22 nullity. Page 2 of the City staff report recognizes that in rebuilding the building may be moved back  
23 to its original location, recognizing that a structure can be moved when it is damaged.

24 David Drebin, real estate appraiser, testified on behalf of the Appellant. He is a state certified  
25 appraiser. He has appraised numerous commercial marine waterfront facilities, including the  
26 Preserve Our Islands facility as well as a NOA facility and piers 62 and 63 in Seattle and piers in  
Anacortes. Commercial marinas, especially saltwater marinas, are very expensive, largely due to  
shoreline regulations. Mr. Drebin's appraisal report was admitted as Exhibit 13.

Mr. Drebin inspected the marina as best he could. There was a fence denying access. He used  
Assessor data for the facility. He also viewed a prior appraisal and similar sales in the vicinity. He  
used a cost approach appraisal, which is the preferred method for special purpose sales. He noted that  
he had to consider that a significant portion of the land is submerged and in fact leased from DNR.  
Taking all these factors into consideration he formulated a depreciated cost analysis. He came up  
with a replacement cost less depreciation, which was \$8,645,000 as shown in the first page of the  
appraisal and the last page of the appraisal. The appraisal separates land from improvements. He  
also determined a replacement cost immediately prior to the storm, which was \$2,887,000. The  
depreciated value after the storm was \$2,537,500, the difference being the loss of the depreciated  
wooden building. The replacement cost at the time of destruction is \$8,645,000. The repair cost for  
the damaged portion after the storm is \$350,000, the depreciated value of \$350,000. If you replaced it

1 with a new building, the new building would be \$1,400,000. The value of the wood building the day  
2 before the storm divided by the value of the whole property before the storm is 12.1%. The "as is"  
3 value of the entire depreciated facility after the storm divided by the replacement cost new is 29.35%.

4 Mr. Drebin testified that under the *Preserve Our Islands* case the value of the entire facility was  
5 required to be considered and he sees no reason why the same would not apply to the subject project.  
6 Use of Assessor information as done by the City is not accurate. The replacement value in the 2009  
7 appraisal report used by the City is based upon considerations that are clearly not accurate. The 2009  
8 report described the wooden building as a barn structure with a dirt floor. The wooden building  
9 actually had a finished floor with a restaurant and was over water and construction over water is  
10 orders of magnitude more expensive than land. That's why he used a per square foot cost based upon  
11 the value of overwater structures.

12 In cross examination, Mr. Drebin stated he attempted to inspect the property on May 4, 2011. He did  
13 not access the site. He viewed the property from the bank on the opposite side of adjoining railroad  
14 tracks. He made no inspection by watercraft. No one affiliated with the property owner has been able  
15 to access the property since the storm, because there are holes on the dock. Mr. Drebin has several  
16 photographs of the interior of the wooden building before it was destroyed. The photos were  
17 probably taken shortly after the current owner purchased the property, but Mr. Drebin is not sure  
18 when. Mr. Drebin acquired his information on the condition of the building within a year before the  
19 storm from "Milo". Milo noted that the wooden structure had wooden floors as corroborated by the  
20 photographs. Milo believed that the building was repairable. The wooden building after the storm is a  
21 jumble of sticks. He hasn't seen whether some of the restaurant fixtures are repairable or even  
22 present, either before or after the storm. Mr. Drebin determined that the value of the entire marina  
23 had to be used in applying the City's nonconforming use provisions because that's consistent with the  
24 *Preserve Our Islands* case, which is "on all fours" with this case. Mr. Drebin agrees with the City  
25 that the wood frame building has zero value after the storm, but he disagrees strongly that is the  
26 proper measure for assessing repair limits for nonconforming structures. The wooden building could  
not be sold separately. The day before the storm the wooden building had a depreciated value of  
\$350,000. The replacement cost before the storm is 1.4 million dollars for the wooden building. He  
doesn't know what the repair cost would be for the wooden building. To repair the building today it  
would cost 1.4 million dollars. The pier has zero value today. The metal building still retains 50% of  
its value if you had to replace it today. The metal building is located on concrete supports and the  
two figures in the last page of the appraisal report are for the building and the concrete supports. The  
top line is for the building. The 350,000 value in column two is based solely upon depreciation and  
the fact the building has been destroyed is accounted for at the bottom of the column where the entire  
\$350,000 amount has been deducted. The 12.1% and 48.49% on the last page are based upon the  
value of the entire marina before the storm. The difference between the two percentages is that in one  
you're using 1.4 million in the numerator and the other you're using the \$350,000 figure. The pier  
has zero value before and after the storm. The depreciation for the wooden building was not based  
upon any information acquired within a year of destruction or a site visit. No inspection was done by  
watercraft because watercraft use was not offered for the appraisal.

1 In redirect, Mr. Drebin testified that if the building was valued at zero both before and after the storm,  
2 the repair would still be well within the 75% repair maximum. The City code does not define repair  
3 or replacement costs. The appraisal report employs three different methodologies for assessing the  
4 75% requirement. The first two pages use cost value new verses depreciated value after the storm,  
5 which comes to 70.65%. The other two methodologies are identified in the last page of the report.  
6 The primary difference from the City's calculations is that he is using the entire value of the marina.

7 Roger Hertrich, citizen, testified that he has been to both buildings of the marina over the years.  
8 Towards the later years there were some holes but you could still use both buildings. He made  
9 purchases from the concrete building and it was considered as one with the wooden building. He  
10 considers it a historic structure. It's reminiscent of structures that existed when salmon fishing was  
11 top notch in the Sound. In the original shoreline hearings the neighbors were asserting environmental  
12 problems. Each of the councilmembers had some association with the neighbors who opposed the  
13 project. The hearing in front of the Council was very political and neighborhood opposition was  
14 based upon the desire to stop the train whistles necessitated by the crossing of the project access. The  
15 neighborhood opposition is what led to the destruction of the facility because it couldn't be repaired  
16 on time. The wooden building was only a partial part of the marina facility. He considered the  
17 wooden and concrete building to be one facility because they were so close together and you would  
18 visit both.

19 Alvin Rutledge, citizen, testified that the building has been there a long time. There's a neighborhood  
20 park in the corner. He would like to know if the repair policy has been enforced before. He also  
21 noted that the former City representative had taken a different position on the repair policy and that he  
22 should be consulted on this matter.

23 Jeff Taraday, Edmonds City Attorney, noted that there is no debate on whether the wood building is  
24 completely destroyed. He noted that the 2006 permit decision, p. 8, Conclusion b(1) states that "if  
25 either" building is damaged or destroyed to the point it exceeds repair maximums the buildings may  
26 not be reconstructed. The focus is on individual buildings not the entire marina facility. The property  
owners rely entirely on the remaining value of the metal structure and concrete pier. The wooden pier  
had no value before or after the storm. All that's left is the metal building and concrete pier. The  
shoreline permit did not cover the metal building and concrete pier. The first page of the Examiner's  
decision states that the permit was for the replacement of the wooden portions of the facility. The  
Examiner inquired whether the appeal was moot because the permit had lapsed and Mr. Taraday  
responded that whether or not the permit had lapsed was not germane to the appeal. Mr. Taraday  
showed some Google earth maps to show that the facility has been subject to constant decay. The  
maps show that in 2005 the wooden pier probably had some value but more recent photos show that  
they no longer have that value, including a year before the storm.

## Exhibits

1 The May 12, 2011 staff report along with its attachments were admitted into the record during  
2 the hearing. Attachments 1-12 to the staff report were admitted as corresponding Exhibits 1-12.  
3 A summary appraisal report dated May 16, 2011 and prepared by David Drebin was admitted as  
4 Exhibit 13. Written comments dated May 19, 2011 from David Mann were admitted as Exhibit  
5 14.

## 6 **Findings of Fact**

### 7 **Procedural:**

- 8 1. Appellant. The Appellants is Meadowdale Marina, LLC.
- 9 2. Hearing. The Examiner held a hearing on the application at 1:00 pm on May 19, 2011, in the  
10 City of Edmonds City Council Chambers.

### 11 **Substantive:**

12 3. Description of Appeal. The Appellant appeals a formal interpretation issued by the Edmonds  
13 Building Official dated February 22, 2011 and admitted as Exhibit 4. The Building Official  
14 concludes that a wooden nonconforming building destroyed by a storm on January 16, 2011 and  
15 located on the Meadowdale Marina may not be replaced. ECDC 17.40.020(F) and ECDC  
16 23.10.220(D) provide that the repair of a nonconforming structure is authorized so long as the  
17 damage is less than 75% of the replacement cost. In Exhibit 4 the Building Official determined  
18 that the value of the wooden building prior to destruction was \$67,000 and its replacement cost  
19 was \$573,000. Since the replacement cost far exceeded the value of the building, the Building  
20 Official determined that it exceeded the 75% threshold imposed by ECDC 17.40.020(F) and could  
21 not be replaced.

22 4. Background. The Meadowdale Marina is located at 16111 76<sup>th</sup> Pl. W. The marina is  
23 composed of a pier structure, approximately two-thirds of which is an old timber structure. The  
24 remaining pier is newer and composed of concrete and steel. Both structures are structurally tied  
25 together. On the pier are two buildings. One building is a metal warehouse that was used to store  
26 boats. An older wooden building abuts the metal building. The wooden building is the structure  
that was destroyed by the January 16, 2011 storm. It was historically used to support recreational  
fishing. The wooden building abuts the metal building, but does not share any walls and is not  
connected to it by any interior doors.

In 2005 the Appellant applied for a shoreline substantial development permit to replace the  
wooden portions of the marina with a concrete and steel structure. This would make the entire pier  
of similar construction and likely prolong its life significantly. At the time of application, both the  
wooden and metal buildings were nonconforming (and still are) because the City's shoreline  
master program prohibits buildings to be placed waterward of the ordinary high water mark in the  
CW zone.

1  
2 At Page 8 of his decision on the shoreline substantial development permit, the Hearing Examiner  
3 concluded as follows:

4 *Because both of the buildings located on the pier are nonconforming, the*  
5 *buildings may be maintained and even repaired and remodeled, but the footprint*  
6 *or volume of the buildings may not be expanded in any way. Furthermore, if*  
7 *either of these buildings is damaged or destroyed to the point that it meets the*  
8 *thresholds identified in either ECDC 17.40.020 or ECDC 23.10.220, the building*  
9 *may not be reconstructed.*

10 It does not appear that any work has been done on the marina since the Examiner's 2005 decision.  
11 The condition of the wooden pier has deteriorated significantly since the Examiner's decision and  
12 the wooden building was completely destroyed by a storm on January 11, 2011.

13 5. Valuation. As discussed in the conclusions of law, the value of the wooden building and the  
14 replacement cost of the marina facility are germane to the application of ECDC 17.40.020 in  
15 determining whether the Appellant may replace the wooden building. The values formulated by the  
16 Appellant and City differ, but using either sets of figure yield the same result, i.e. the wooden  
17 building can be replaced under the interpretation adopted in this decision. Nonetheless the correct  
18 figures should still be used for ECDC 17.40.020.

19 There are two values necessary to apply ECDC 17.40.020 and ECDC 23.10.220(D). The first is the  
20 replacement cost of the wooden building. The staff report notes that a 2009 appraisal concludes that  
21 replacement cost is \$132,000 and that the replacement cost using international building code  
22 formulas is \$573,440. The Appellant's appraiser submitted a report setting the replacement cost at  
23 \$1.4 million dollars. The Examiner finds that the appraisals are the more accurate valuations  
24 because they are based upon more project specific review than the generic tables of the building  
25 codes. The two appraisals (Ex. 8 and Ex. 13) have differing strengths and weaknesses. The 2009  
26 appraisal was based upon site inspections while the 2011 appraisal was not due to the dilapidated  
and dangerous condition of the structure. The Examiner does not find this to be a critical short  
coming because Mr. Drebin was able to get details on the condition of the building prior to the  
January 2001 storm from its owner. A more critical and determinative shortcoming is that the 2009  
appraisal is based on the square foot value of a barn structure with a dirt floor. The actual building  
had a finished floor and was used for a restaurant. More importantly, the 2009 appraisal did not  
factor in the added value of the building being an overwater structure. Mr. Drebin testified the  
overwater feature significantly adds to value due the difficulties and costs in acquiring permits. For  
these reasons, the value of the wooden building is determined to be 1.4 million dollars.

The only valuation on the replacement cost of the marina facility as a whole was prepared by Mr.  
Drebin and calculated to be 7.7 million dollars. The expertise and Mr. Drebin and his methodology  
more than adequately support this determination and it is found to be a verity for purposes of this  
appeal.

1  
2 **Conclusions of Law**  
3

4 **Procedural:**

5 1. Authority of Hearing Examiner. As shall be further discussed, the subject of the appeal is the  
6 building official's determination of replacement and repair costs under both ECDC 17.40.020(F)  
7 and ECDC 23.10.220(D). ECDC 17.40.020(F) expressly provides that the building official's  
8 determination is appealable as a Type II staff decision. There is no similar express classification  
9 for determinations made pursuant to ECDC 23.10.030, but ECDC 20.01.003(A) classifies formal  
10 interpretations as Class II decisions. This would include the ECDC 23.10.030 interpretations made  
11 by the building official<sup>1</sup> that are the subject of this appeal. The Building Official's determinations  
under both nonconforming use provisions in Ex. 4 will be referred to as a formal interpretation in  
this decision since that classification is correct for both. ECDC 20.01.003(B) provides that Type II  
decisions are appealable to the Hearing Examiner, who is tasked with conducting an open record  
appeal hearing and making a final decision that is appealable to court.

12 2. Applicable Nonconforming Use Standards. As discussed in the findings of fact, the  
13 Appellant may not replace its wooden building unless authorized by the City's nonconforming use  
14 provisions. There are two similar provisions that apply – ECDC 17.40.020(F) (applicable to all  
15 development in the City) and ECDC 23.10.220(D) (part of the City's shoreline master program and  
16 only applicable to developments along the shoreline). 23.10.030(A) and (C) provide that all  
17 developments within the shoreline area must comply with both the shoreline master program  
regulations (in this case ECDC 23.10.220(D)) as well as those that have more general applicability  
(in this case ECDC ) ECDC 17.40.020(F). Consequently, the wooden building must qualify for  
repair/reconstruction under both ECDC 17.40.020(F) and ECDC 23.10.220(D).

18 ECDC 17.40.020(F) provides in relevant part as follows:

19 *F. Restoration. If a nonconforming building or structure is destroyed or is*  
20 *damaged in an amount equal to 75 percent or more of its replacement cost at the*  
21 *time of destruction, said building shall not be reconstructed except in full*  
22 *conformance with the provisions of the Edmonds Community Development*  
*Code...*

23 ECDC 23.10.220(D) provides in relevant part as follows:  
24

25 \_\_\_\_\_  
26 <sup>1</sup> ECDC 20.01.003(A) provides that the "director's" interpretation is a Class II permit, but ECDC 20.01.001(A)  
clarifies that the interpretation can be made by the director's designee.

1           *D. If a nonconforming development is damaged to an extent not exceeding 75*  
2           *percent replacement cost of the original structure, it may be reconstructed to*  
3           *those configurations existing immediately prior to the time the structure was*  
              *damaged...*

4       3.    Key Issue. The key issue of this appeal is what constitutes the “replacement cost” in both  
5       ECDC 17.40.020(F) and ECDC 23.10.220(D). The Appellant asserts that the “replacement cost”  
6       is the replacement cost of the entire marina, including its land. The City asserts that the  
7       “replacement cost” is only the replacement cost of the wooden building. If the Appellant is correct  
8       in its interpretation, it can replace the wooden building even if it relies upon the City’s valuations.  
9       Similarly, if the City is correct in its interpretation the Appellant is prohibited from replacing the  
10       building, even if it uses Mr. Drebin’s valuations.

11       4.    Preserve Our Islands. At hearing Mr. Mann argued that *Preserve Our Islands v. King*  
12       *County*, SHB No’s 04-009 and 04-010 (2004), conclusively establish that “replacement cost”  
13       means replacement of the entire marina facility and its associated land. These cases indirectly  
14       support the arguments made by Mr. Mann and Mr. Drebin, but are not as on point as asserted. The  
15       cases are persuasive on the point that replacement value should be based upon replacement of the  
16       entire structure, but are not persuasive on including the underlying land in that valuation.

17       *Preserve Our Islands*<sup>2</sup> concerned an appeal of a denial of a shoreline substantial development  
18       permit to replace an existing but non-functional conveyor and barge loading dock used to export  
19       sand and gravel on Maury Island in King County. The barge loading dock and conveyor was part of  
20       a 235 acre site used to mine and export sand and gravel. The dock was used to export sand and  
21       gravel from 1968 through 1978. The barge dock deteriorated significantly over the years and could  
22       no longer be used by the time the owners of the facility applied for a shoreline substantial  
23       development permit in 1997 to repair and restore the dock and conveyor system. The dock and  
24       conveyor belt were nonconforming uses, so the owners had to establish that the repair/restoration  
25       they proposed was authorized by King County nonconforming use provisions, in particular KCC  
26       25.32.050(B), which provides in pertinent part a follows:

*A use or development, not conforming to existing regulations, which is destroyed,*  
              *deteriorated, or damaged by more than 50% of its fair market value at present or*  
              *at the time of its destruction, by fire, explosion or other casualty or act of God,*  
              *may be reconstructed only so far as it is consistent with existing regulations.*

              Similar to this case, a major issue in the construction of KCC 25.32.050(B) was whether the “50%  
              of its fair market value” referred to the dock/conveyor belt or encompassed more of the gravel  
              operations. King County argued that the fair market value only applied to the dock and conveyor  
              belt. Mr. Drebin, as a witness in that case, argued that in order to have a viable gravel barge  
              operation the dock and conveyor belt had to be attached to at least 50 acres of property. Therefore,

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<sup>2</sup> The two *Preserve Our Islands* cases were consolidated into a single decision.

1 replacement value would be based upon replacement of the dock/conveyor and at least 50 acres of  
2 gravel extraction operations. Another appraiser used the replacement cost of the entire 235 acre of  
3 operation to evaluate the 50% requirement. The Shoreline Hearings Board agreed that the  
4 surrounding operations had to be applied to the 50% requirement, but didn't identify whether the  
5 analysis of Mr. Drebin or that of the other appraisal applied. Rather, the Board concluded that  
6 "under either of these costs to repair the wooden dock, the project complies with the 50% test and  
7 could be reconstructed as a nonconforming use."

8 Although there are certainly parallels between *Preserve Our Islands* and this case, a close  
9 inspection reveals some significant distinguishing features. First, the most compelling point to the  
10 Board was legislative history. The Board quoted a statement in a staff report that accompanied the  
11 adoption of KCC 25.32.050(B) that provided as follows:

12 *The 50% rule, as proposed, would apply to an entire 'use or development,' rather*  
13 *than to a building – thereby avoiding hardship to a use or development within*  
14 *which a single building is destroyed.*

15 The Board concluded that the legislative history above "is conclusive evidence that the proper  
16 measure of 'fair market value at present' under KCC 25.32.050(B) is the value of the non-  
17 conforming use or structure in terms of value to the whole, or the amount its absence would detract  
18 from the value of the whole". *Preserve Our Islands*, Conclusion No. 41. The Board also noted that  
19 the legislative history is consistent with standard appraisal practices in evaluating "fair market value  
20 at present", quoting from *The Appraisal of Real Estate* that "...the value of a component is  
21 measured in terms of its contribution to the value of the whole property or as the amount that its  
22 absence would detract from the whole." *Id.* Unlike the *Preserve Our Islands* case, there is no  
23 legislative history in this administrative record that provides any light on the interpretation of the  
24 City's nonconforming use standards. There is no "conclusive evidence" on the proper measure for  
25 the City's 75% rule.

26 Perhaps a more significant distinguishing feature is that the City's two nonconforming use  
provisions base the relevant valuation on the "replacement cost" of a structure or building whereas  
the operative term of KCC 25.32.050(B) is "fair market value at present" for a use or development.  
The King County ordinance is clearly directed at fair market valuation concepts of a use or  
development while the City's ordinances are focused upon the replacement value of structures.  
There is nothing in the record to suggest that appraisal principles applying to fair market valuation  
of entire uses or developments are directly applicable to evaluating the replacement cost of a  
structure. Mr. Drebin testified that the same methodology should be used, but when asked by Mr.  
Mann why, Mr. Drebin testified that the *Preserve Our Islands* case was "on all fours" with the case  
at hand. Mr. Drebin did not state that he based this conclusion on accept appraisal methodology or  
even applications in other nonconforming use projects. The record shows that Mr. Drebin's opinion  
was entirely based upon his reading of the *KCC 25.32.050(B)* case. No deference will be given to  
Mr. Drebin's legal analysis of a shoreline hearings board case.

1 In point of fact, Mr. Drebin’s legal conclusions are contradicted by the only direct appraisal  
2 evidence in the record on what constitutes replacement value. Mr. Drebin’s appraisal states that he  
3 applied “replacement cost” as defined in the *Dictionary of Real Estate of Appraisal*, 3<sup>rd</sup> edition. His  
4 appraisal report contains a page full of appraisal definitions. It inexplicably doesn’t include the  
5 definition of “replacement cost”, which would presumably be the centerpiece of his evaluation.  
6 Fortunately, the other appraisal in this record, the one done in 2009, Ex. 8, quotes only one  
7 definition and that happens to be the “replacement cost” definition cited by Mr. Drebin, as follows:

8 *the estimated cost to construct, at current prices, a building with utility equivalent*  
9 *to the building being appraised, using modern materials and current standards,*  
10 *design and layout.*

11 The *Dictionary of Real Estate* definition for replacement cost focuses exclusively on the costs of  
12 constructing a new building. It is the methodology most consistent with the focus of the City’s  
13 nonconforming use provisions on structures and buildings. *Preserve Our Islands* does not compel a  
14 conclusion that the value of the land of the Meadowdale Marina must be factored into replacement  
15 cost.

16 5. Interpretation of “structure” in ECDC 17.40.020(F) and ECDC 23.10.220(D). Both ECDC  
17 17.40.020(F) and ECDC 23.10.220(D) apply to a “structure”. The structure in this case is the  
18 marina facility as a whole instead of just the wooden building.

19 At the outset it should be recognized that both the wooden building and the entire marina facility  
20 itself both qualify as a “structure” under the City’s zoning code definition of the term, which  
21 provides in relevant part as follows:

22 *Structure means a combination of materials constructed and erected permanently on*  
23 *the ground or attached to something having a permanent location on the ground....*

24 More information is necessary to determine which structure, the wooden building or marina facility  
25 as a whole, qualifies as a “structure” for purposes of ECDC 17.40.020(F) and ECDC 23.10.220(D).

26 In construing “structure”, the most important inquiry is legislative intent. Unfortunately, unlike the  
*Preserve Our Islands* case, no legislative history is readily available to interpret the City’s  
nonconforming use provisions. Despite this, the purpose and intent of the provisions are fairly self-  
evident. As suggested in the quoted legislative history of the King County provision, *supra*, the  
purpose of nonconforming use provisions is to reduce the hardship<sup>3</sup> on the property owner. This

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<sup>3</sup> More than anything else, “hardship” in the context of the 75% provisions is the loss of investment backed expectations, i.e. the fact that the property owner can no longer realize a full return on their investment in a structure because a portion of the structure is damaged. This type of hardship is of the same type protected against in the interpretation of “structure” as applying to the whole when dealing with an integrated facility. For example, in this case the hardship would be that the Appellants cannot realize a full return on their marina investment because the wooden portion of the building could not accommodate a building for which it was designed.

1 focus on hardship is consistent with the judicially recognized purpose of nonconforming use  
2 provisions, which is to avoid potential constitutional due process challenges to zoning legislation  
3 arising from deprivations of property rights<sup>4</sup>. *McMillan v. King County*, \_\_\_\_ Wn. App. \_\_\_\_  
4 (2011, Division 1). The fundamental factor of any due process analysis is a balancing of hardship  
5 on the property owner verses public benefit. *See, e.g., Presbytery of Seattle v. King County*, 114  
6 Wn.2d 320, 331, 787 P.2d 907 (1990). However, weighed against protecting the property owner  
7 from hardship is the fact that it is the policy of zoning legislation to phase out nonconforming uses.  
8 This is because nonconforming uses are disfavored under the law. *Id. at McMillan*.

9 As the repair cost to a structure approaches 75% of its replacement cost, there is little to distinguish  
10 the hardship on a property owner with someone who is faced with developing a vacant lot<sup>5</sup>. Given  
11 those circumstances, there is no reason to provide the nonconforming structure owner more  
12 favorable treatment than a vacant lot owner who must comply with current zoning regulations.  
13 Since nonconforming uses are disfavored and the policy is to phase them out, the balance of equities  
14 dictate that at the 75% threshold the property owner must be subjected to the same zoning  
15 regulations as everyone else.

16 Seen in this light it's clear that the value of the underlying land to a structure has nothing to do with  
17 this balance of equities. There may very well be a certain amount of land necessary to make a  
18 structure function efficiently, but when comparing the equities of making a structure owner comply  
19 with new zoning regulations after damage, the only relevant consideration is how close that  
20 structure owner is to the status of a vacant land owner<sup>6</sup>.

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21 <sup>4</sup> To be abundantly clear, nothing in this decision should be construed as expressly or impliedly concluding that  
22 upholding the building official's 2/22/11 determination would violate the constitutional rights of the Appellant. The  
23 constitutional underpinnings of nonconforming use provisions serve as a guide for interpreting them as a matter of  
24 general applicability, in this case that "structure" should include what could be construed as collection of separate  
25 structures when they're functionally integrated. As applied, this interpretation may or may not be necessary to avoid  
26 a constitutional violation. The degree of harm (burden on the owner) must be very high to qualify as a constitutional  
violation. Incorporating an assessment of degree of harm into the interpretation to make it more closely aligned with  
constitutional principles would make the provision unworkable, since assessments of constitutional violations are  
highly subjective and it is difficult to predict in many circumstances how a court would rule.

<sup>5</sup> The converse is also correct. As the repair costs approaches zero, there is little to distinguish the property owner  
from someone with an existing nonconforming structure who is allowed to continue the use. The 75% threshold  
essentially serves as the dividing line between which class of property owners applies.

<sup>6</sup> Indirectly, land can be construed as playing a factor when it serves as the link to buildings that are functionally  
dependent upon each other. Buildings separated by land would arguably not qualify as a single structure under the  
ECDC definition, but could nonetheless be highly dependent upon each other. For example, a power building can be  
critical to the functioning of an oil refinery spread out over dozens of acres. If the building was completely  
destroyed and the owner was not allowed to rebuild it, the owner would no longer have reasonable use of his  
property. Those situations can be addressed through the variance process, which is ideally suited for assessing the  
unique circumstances of a piece of property and its relationship to the hardships it places upon the owner. The  
inclusion of land value in the 75% requirement should be avoided, because the land value can significantly distort  
the comparison between a developed and vacant land owner.

1 This balancing of equities does not so neatly pencil out when a portion of an integrated structure is  
2 singled out for the 75% threshold. Singling out a structure in this fashion can detract from the value  
3 and/or functionality of the entire structure. In this regard, a property owner is in a different position  
4 than a vacant land owner. Compliance with current zoning regulations will result in the added costs  
5 of disruption to other parts of the structure and/or a diminution of its overall value. The courts have  
6 already recognized this concept in the area of expansions of nonconforming uses in buildings.  
7 Nonconforming uses may expand to other parts of a building if those other parts were designed to  
8 accommodate the nonconforming use. *See Bellingham v. Keller*, 92 Wn.2d 726 (1979).

9 The *Preserve Our Islands* case also supports the consideration of a structure within the context of a  
10 larger whole. As previously discussed, *Preserve Our Islands* doesn't dictate the consideration of  
11 land values in the 75% threshold analysis because this isn't consistent with the technical definition  
12 of "replacement cost" and the purpose and intent of the City's nonconforming use provisions.  
13 However, *Preserve Our Islands* also supports the more general concept that impacts on a  
14 development as a whole is a relevant balancing factor in the equities of nonconforming use  
15 provisions.

16 A final factor dictating the consideration of the whole is the efficient use of land. Limiting the full  
17 development of an integrated structure displaces market demand for that development elsewhere.  
18 This adds to development costs. Further, in the case of shoreline development it can lead to an  
19 increase in environmental impacts by pushing demand from an area already developed to untouched  
20 shoreline.

21 Given all the considerations above, the "structure" in this case is the entire Meadowdale Marina  
22 facility. The wooden building is physically integrated into the marina facility as a whole. As to  
23 functional integration, it is important to note that the wooden pier was not subject to the Building  
24 Official's 2/22/11 demolition order. Of course, it couldn't be because the wooden pier is necessary  
25 to access the metal building. Consequently, the Building Official's order would result in the  
26 allowance of only one building on a pier facility that was designed to accommodate two. This  
would be a very unfortunate result, given that it would deprive the market of a rare opportunity for  
overwater development with arguably minor environmental shoreline impacts<sup>7</sup>. Applying the 75%  
threshold to the wooden building only would be unfair to the property owner and a waste of  
development potential with no corresponding public benefit. The term "structure" in the  
nonconforming use provision applies to the marina facility as a whole.

6. Application of ECDC 17.40.020(F) and ECDC 23.10.220(D) to Meadowdale Marina.  
As found in Finding of Fact No. 5, the repair cost of the wooden building is 1.4 million dollars and  
the replacement cost of the entire marina facility is 7.7 million dollars. Replacement "new", as

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<sup>7</sup> There would be a minor aesthetic impact, although the visual encroachment would not be that significant given the  
existence of the current structure. Railroad track crossings may also increase, which in turn could potentially disrupt  
enjoyment of the shoreline with more train whistles and/or crossing improvements. It doesn't appear likely that the  
difference between one and two buildings would make any difference in this regard.

1 opposed to depreciated value, is used for the replacement cost term in the nonconforming use  
2 provisions in line with the *Dictionary of Real Estate* definition for replacement cost previously  
3 quoted. Replacement new is also used for quantifying the damage to the structure under the  
4 nonconforming use provisions. Replacement new serves as the best value to compare hardship  
5 verses development by a vacant lot owner as discussed in Conclusion of Law No. 5, since the vacant  
6 lot owner too would have to build a new structure. The repair costs the wooden building are only  
7 18% of the replacement costs of the marina facility, well below the 75% threshold of ECDC  
8 17.40.020(F) and ECDC 23.10.220(D)<sup>8</sup>.

6 7. Application of Hearing Examiner Decision to Interpretation. At hearing the City argued that  
7 the Hearing Examiner's 2005 decision, Ex. 6, required that the 75% threshold would apply to  
8 individual buildings as opposed to the entire marina facility, i.e. the interpretation advocated by City  
9 staff in this proceeding. The City bases its argument on Page 8 of the decision, which references  
10 specific buildings as follows:

10 *Furthermore, if either of these buildings[the metal and wooden buildings] is*  
11 *damaged or destroyed to the point that it meets the thresholds identified in either*  
12 *ECDC 17.40.020 or ECDC 23.10.220, the building may not be reconstructed.*

12 It will be presumed that the Hearing Examiner intended to write his decision in a manner that is  
13 consistent with applicable regulations at the time. The City Attorney is correct in his hearing  
14 comments that the Examiner did not need to mention individual buildings in the statement above if  
15 the Examiner understood ECDC 17.40.020 and ECDC 23.10.220 to apply to the marina as a whole.  
16 Equally clear, though, is that the Examiner's reference to ECDC 17.40.020 and ECDC 23.10.220  
17 means that he wanted those ordinances followed. The Examiner made no express interpretation of  
18 ECDC 17.40.020 and ECDC 23.10.220. He just required compliance with those regulations.  
19 Compliance in this case means that the wooden building can be reconstructed.

18 8. Movement of Building. The Appellant asserts that the City has taken the position that since  
19 the debris of the wooden building has moved from the building site (by act of the storm) that the  
20 building cannot be replaced. It does not appear that staff took that position. References were made  
21 to Hearing Examiner provisions prohibiting the movement of the building in the staff report, but the  
22 staff report does not conclude that since the building was moved by the storm it can't be replaced.  
23 The staff report and arguments made at the hearing were all focused on the degree of destruction of  
24 the building. At any rate, any movement created by the storm would not constitute movement as  
25 contemplated in the Examiner decision. The building was not moved, it was leveled. Only pieces  
26 of the building were moved as they were ripped by wind and perhaps wave from its structure and

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<sup>8</sup> Both the staff and Appellant have focused their attention exclusively on the repair costs of the wooden building.  
The wooden pier needs to be repaired as well. If the structure is to be viewed as a whole, technically repair costs for  
the wooden pier should be added to the costs of replacing the wooden building in evaluating the 75% threshold. Mr.  
Drebin's appraisal states that the wooden pier has zero value. In a worst case scenario, if this means that the wooden  
pier must be replaced, the replacement cost according to Mr. Drebin's appraisal is \$3,075,000. Adding this to the  
repair cost of the wooden building results in repairs totaling 58%, which is still well below the 75% threshold.

1 foundation. There was no movement involved that would prevent repair under the terms of the  
2 2005 Hearing Examiner decision.

3 **DECISION**

4 The appeal is sustained. The Building Official's February 22, 2011 determination is reversed and  
5 the building is found to meet the criteria for reconstruction<sup>9</sup> under ECDC 17.40.020(F) and ECDC  
6 23.10.220(D).

7 DATED this 5th day of June, 2011.

8 

9 Phil A. Olbrechts  
10 City of Edmonds Hearing Examiner

11 **Appeal Right and Valuation Notices**

12 This land use decision is final and only subject to appeal to superior court as governed by Chapter  
13 36.70C RCW. Appeal deadlines are short (21 days from issuance of the decision) and the courts  
14 strictly apply the procedural requirements for filing an appeal.

15 Affected property owners may request a change in valuation for property tax purposes  
16 notwithstanding any program of revaluation.  
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22 <sup>9</sup> The staff report makes the argument that ECDC 17.40.020(F) and ECDC 23.10.220(D) only allows the repair of  
23 buildings and that this is distinguishable from replacing a building that is completely destroyed. The language of  
24 both provisions does not support this interpretation. ECDC 17.40.020(F) expressly applies to buildings that have  
25 been damaged or "destroyed". ECDC 23.10.220(D) only mentions that it applies to buildings that have been  
26 damaged, but there is no limit to the amount of damage. Further, since the marina as a whole must be considered in  
the application of these provisions the relevant inquiry would be whether the entire marina facility has been  
destroyed as opposed to just the wooden building. ECDC 17.40.020(F) and ECDC 23.10.220(D) both allow  
"reconstruction" if the 75% threshold is met. Reconstruction includes the replacement of an entirely destroyed  
building that is part of a larger marina facility.