

ORDINANCE NO. 1007

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON, ADOPTING FINDINGS AND CONCLUSIONS SUPPORTING THE MAINTENANCE OF AN EMERGENCY MORATORIUM ON THE ACCEPTANCE OF APPLICATIONS FOR NEW DEVELOPMENT OR CERTAIN TYPES OF RE-DEVELOPMENT OF NON-RESIDENTIAL STRUCTURES WITHIN THE WATERFRONT MILLVILLE (WM) ZONE, ADOPTED ON MAY 31, 2005 IN ORDINANCE NO. 1003.

WHEREAS, the City Council has conducted an in-depth review of development along the waterfront in Gig Harbor, which has been detailed in several recently passed Ordinances, including but not limited to Ordinance 965; and

WHEREAS, the City Council's consideration of development along the Gig Harbor waterfront led to the adoption of several ordinances regulating building size; and

WHEREAS, upon further investigation, the Council learned that the Waterfront Millville zone is unique among the waterfront zones because non-residential structures in that zone are limited in size by "gross floor area," while the other waterfront zones limit building size based on building footprint; and

WHEREAS, the calculation of "gross floor area" as defined in the Gig Harbor Municipal Code, does not include areas constructed for and designated as a garage area (it also does not include accessory water tanks and cooling towers, mechanical equipment, unfinished attics regardless of headroom), which may result in the development of excessively large structures that are incompatible with other structures in the same zone; and

WHEREAS, the fact that nonresidential structures in the WM zone are regulated differently from nonresidential structures in the other waterfront zones could result in the development of excessively large structures which are uncharacteristic of the historical development pattern in the WM; and

WHEREAS, on May 31, 2005, the City Council imposed a moratorium for the purposes described in this Ordinance, all as set forth in Ordinance 1003; and

WHEREAS, on June 13, 2005, the City Council ratified the imposition of the moratorium and again voted to impose the moratorium described in Ordinance 1003; and

WHEREAS, on June 27, 2005, the City Council held a public hearing on the maintenance of the moratorium, as required by RCW 35A.63.220 and 36.70A.390; and

WHEREAS, the City Council desires to enter findings and conclusions in support of the continued maintenance of the moratorium for a period of two months after the adoption of the moratorium on May 31, 2005; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF GIG HARBOR, WASHINGTON,
ORDAINS AS FOLLOWS:

Section 1. Findings and Conclusions in Support of Moratorium. The City Council finds as follows:

A. The following findings and conclusions appear in the administrative record supporting this moratorium:

1. The City of Gig Harbor is characterized by views of Gig Harbor bay and the small scale buildings that reflect the historic development of the harbor basin.

2. The City of Gig Harbor's Comprehensive Plan has the stated goal to "Preserve the character of those sites or districts which reflect the style of Gig Harbor's historical development" (Goal 3.13); and

3. The City of Gig Harbor's Comprehensive Plan has the stated objectives to:

a. Develop guidelines which promote compatible development within designated areas. (Objective 3.13.2);

b. Consider standards which encourage building forms consistent with historic designs, (e.g., massing, roof styles and scale," (Objective 3.14.2); and

c. Define and retain "small town" characteristics of historic business districts. (Objective 3.15.1).

4. Large structures recently built in the non-residential zones within the harbor basin have adversely impacted the visual quality of the harbor basin because of their scale in relation to the historic structures that characterize the harbor basin.

5. The City has made substantial progress in addressing these issues during the previous moratorium and adoption of development regulations.

B. The City Council accepted testimony from members of the public as follows:

1. John Vodopich, Community Development Director. Mr. Vodopich explained that the moratorium was adopted on May 31, 2005, and that state law requires that the City Council hold a public hearing for the purpose of developing findings and conclusions to support continuation of the moratorium.

2. Dennis Reynolds, attorney for marina operators on the shoreline, such as Arabella's Landing. Mr. Reynolds asked the Council to consider that the Washington courts have ruled that the City cannot impose a moratorium on property in the shoreline. He referenced *Biggers v. Bainbridge Island*, 103 P.3d 244 (2004), and Mr. Reynolds believes that the Court's holding prohibits any city from adopting a moratorium on any property in the shoreline.

3. Peter Katich, 3509 Ross Avenue. Mr. Katich is in favor of the moratorium because he believes the staff needs adequate time to craft development regulations that are internally consistent. Mr. Kadich is familiar with the *Biggers* case, but he believes that the court's holding has been misinterpreted by Mr. Reynolds.

4. Jill Guernsey, 3224 Shyleen Street. Ms. Guernsey stated that the City Planning Commission was asked by the City Council to review an ordinance covering the subject of the moratorium. This ordinance will determine the manner in which development should be regulated in the Waterfront Millville zone. Currently, the Planning Commission is addressing the issue of building size of residential structures. In addition, the Planning Commission is working on an ordinance that would allow structures to be rebuilt if they were destroyed. This ordinance covers all three waterfront zones.

5. Carol Morris, City Attorney. Ms. Morris explained that she was familiar with the *Biggers*' case. She stated that it was her understanding that the *Biggers*' case applied to a city's adoption of a moratorium based on ordinances (or the crafting of future ordinances) based on the Shoreline Management Act. According to Ms. Morris, the Washington courts have not ruled that cities may not impose moratoria for the purpose of prohibiting the acceptance of development applications while zoning regulations are being crafted.

In *Biggers*, the Bainbridge Island City Council imposed a moratorium in August of 2001 on applications for shoreline substantial development permits and shoreline exemptions under the Shoreline Management Act/Shoreline Master Program, for a period of one year. An ordinance was adopted in October of 2001 to address the issues raised prior to the moratorium, but in August of 2002, the City Council extended the moratorium through March of 2003. A lawsuit was filed by business owners and private citizens.

The trial court determined that the City did not have authority to impose a moratorium under the Shoreline Management Act. The Court of Appeals ruled that:

The moratorium authority derived from RCW 35A.63.220 is limited to planning and zoning in code cities. It does not grant the City authority in this case **because ordinances involving shoreline master programs and shoreline management regulations do not fall within the definition of zoning. . . .**

[The Growth Management Act] states that the provisions of chapter 90.58 RCW [the Shoreline Management Act] take priority over the GMA as long as the provisions are internally consistent with a few specific statutes, none of which apply under these facts. The GMA clearly specifies that chapter 90.58 RCW governs the unique criteria for shoreline development. In other words, the SMA trumps the GMA in this area, and the SMA does not provide for moratoria on shoreline use or development.

Biggers, 103 P.3d at 247 (emphasis added).

Ms. Morris stated that the City's Shoreline Master Program is an overlay zoning measure, which applies in addition to the underlying zoning regulations applicable to property in the WM zone. A review of the Gig Harbor Shoreline Master Program demonstrates that building size, setbacks, and other specific types of zoning standards are not included – that is because the Shoreline Management Act requires the City to include more general policies and regulations in its Shoreline Master Program. For example, the City Council should take judicial notice of WAC 173-26-200(A)(2)(i), which requires that the City's Shoreline Master Program include policies, to be consistent with state shoreline management policies, addressing the master program elements of RCW 90.58.020 and environmental designations. The regulations to be included in the Shoreline Master Program must include environmental designations and include "general regulations, use regulations that address issues of concern to specific uses, and shoreline modification regulations that protect shoreline ecological functions from the effects of human-made modifications to the shoreline." *Id.*

As shown in the "whereas" sections of this Ordinance as well as the City's Zoning Code, the City has adopted this moratorium for the purpose of taking public testimony and allowing the Planning Commission to recommend an ordinance to the City Council for an amendment to the Zoning Code, not the Shoreline Master Program. Under state law, building size limitations are not the type of regulations that need to be included in the City's Shoreline Master Program. In fact, the cities that have adopted limits on building sizes (through gross floor area, footprint limitations or other means) have done so in their zoning code, not the Shoreline Master Program.

Finally, Ms. Morris noted that there is no language in the *Biggers* case to indicate that RCW 35A.63.220 or RCW 36.70A.390 does not provide the City adequate authority to impose a moratorium on property in the shoreline for the purpose of developing a zoning ordinance. This would mean that if the City were required to adopt a zoning measure under GMA (perhaps if a GMA Board case were to address a GMA issue, such as density), if the City adopted a moratorium so that it could hold hearings and make the required amendments to the zoning code or comprehensive plan, the moratorium would apply everywhere in the City but the shoreline zones. Nothing in the *Biggers* case demonstrates that the Court of Appeals wanted shoreline property owners to be able to free of all moratoria, and to be the only property owners in the affected area to have the ability to submit development applications while a moratorium is pending.

Section 2. Moratorium Maintained. After deliberation, the City Council decided that the moratorium adopted under Ordinance 1003 on the acceptance of all non-exempt development permit applications for nonresidential property located in the Waterfront Millville zone shall be maintained for a period of two months, or July 31, 2005.

Section 3. Incorporation by Reference. All provisions of Ordinance 1003 are hereby incorporated by reference as if fully set forth herein.

Section 4. Severability. If any section, sentence, clause or phrase of this Ordinance shall be held to be unconstitutional or invalid by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this Ordinance.

Section 5. Publication. This Ordinance shall be published by an approved summary consisting of the title.

Section 6. Effective Date. This Ordinance shall take effect and be in full force five (5) days after passage and publication of an approved summary consisting of the title.

PASSED by the Gig Harbor City Council and the Mayor of the City of Gig Harbor this 25th day of July, 2005.

CITY OF GIG HARBOR

GRETCHEN WILBERT, MAYOR

ATTEST/AUTHENTICATED:

By: _____
MOLLY TOWSLEE, CITY CLERK

APPROVED AS TO FORM:

By: _____
CAROL A. MORRIS, CITY ATTORNEY

FIRST READING: 7/11/05
DATE PASSED: 7/25/05
DATE OF PUBLICATION: 8/3/05
EFFECTIVE DATE: 8/8/05