

FINDINGS AND DECISION
OF THE HEARING EXAMINER FOR THE CITY OF SEATTLE

In the Matter of the Petition of

PHIL SWIGARD, et al.,
Petitioners,

v.

FILE NO. F-80-007

MARK FREEMAN, et al.,
Respondents.

AND

KATHRYN A. LYNCH, et al.,
Petitioners,

v.

FILE NO. F-81-004

MARK FREEMAN, et al.,
Respondents.

Introduction

A petition for fact-finding was filed by petitioners in File No. F-80-007 on September 24, 1980, regarding floating home fee increases demanded by respondents for moorage at 2017, 2019 and 2025 Fairview Avenue East to be effective November 1, 1979.

A petition for fact-finding was filed by petitioners in File No. F-81-004 on June 12, 1981, regarding floating home moorage fee increases demanded by respondents to be effective July 1, 1981.

The two petitions were consolidated for hearing held before the Hearing Examiner February 9, 1982. Post-hearing memoranda were then submitted.

The petitioners were represented at hearing by Lawrence B. Ransom, Perkins, Coie, Stone, Olsen and Williams. The respondents were represented by Clinton H. Hattrup, Olwell, Boyce and Hattrup.

After due consideration of the evidence, the following findings of fact and conclusions shall constitute the decision of the Hearing Examiner.

Findings of Fact

1. The moorage is composed of three docks. Approximately 47,775 sq. ft. of the moorage is privately owned, approximately 44,100 sq. ft. is leased from the State and approximately 25,325 sq. ft. is in a street right-of-way and used under a street use permit.

2. The moorage accommodates 52 floating homes. Three categories of moorage fees are charged depending upon the desirability of the location. The fees charged for the three main categories in 1977 were \$140, \$150 and \$160 per month.

3. Respondents raised those, effective November 1, 1979, to \$189, \$202 and \$215, respectively.

4. Petitioners submitted the demand to review by a fact-finder under the provisions of Ordinance 107012, predecessor to Ordinance 109280, (Chapter 7.20, Seattle Municipal Code). The fee increases were found to be unreasonable.

5. The demanded amounts were lowered in August, 1981, to \$176.04, \$188.55, and \$201.12.

6. Judgments were obtained against petitioners by respondents for delinquent rent representing the amount of the rent increases from March, 1980, to January, 1982.

7. Another round of increases was imposed effective July 1, 1981, to \$218.29, \$233.80 and \$249.39.

8. The fee for one floating home, belonging to Peterson, has been increased from \$167.50 in 1977 to \$271.80 at the last demanded increase.

9. Expenses incurred by respondents directly attributable to the operation of the floating home moorage totalled \$16,673 in 1975, \$16,559 in 1976, \$22,092 in 1977, \$22,669 in 1978, \$23,884 in 1979, \$21,873 in 1980 and \$18,670 in 1981 without payment of a lease fee to the State. If the lease fee charged the previous year were included, the total for 1981 would be \$22,020.

10. Respondents agreed that dues paid to the Lake Union Association would not be claimed as expenses attributable to the operation of the moorage for the purpose of determining a fair rent increase. Billings for legal services were entered into evidence but the record reflects no evidence that they were paid by respondents.

11. Income attributable to the moorage received each year totalled \$68,613 in 1976, \$79,156 in 1977, \$90,394 in 1978, \$88,985 in 1980, and \$92,452 in 1981.

12. The 46 judgments for delinquent moorage fees in the record included \$24,462.62 attributable to 1980 and \$20,754.48 to 1981. The total income earned in 1981 would, then, be \$113,206.

13. The net income from the moorage, assuming a lease payment to the State of \$3,449.60 and including the portion of the judgements attributable to 1981 in income, would be \$91,186.

14. The subject moorage is more desirable than others on Lake Union because of its location.

15. The docks at the subject moorage are in need of some repair. Some deterioration in the condition of the docks has occurred in the last few years. The docks are in better condition than those at the Lakeshore Moorings facility.

16. The record shows no capital improvements to the moorage in the last six years.

17. The moorage for 52 floating homes is the largest on Lake Union. The next largest has 20 fewer spaces.

18. The subject moorage has experienced 100 percent occupancy for years.

19. Monthly rental rates for floating home moorage on the east side of Lake Union range from \$117 to \$228. The latter rate is under dispute. Rates of \$197, \$207 and \$217 were found to be reasonable after fact-finding for a moorage in poorer condition which had recently changed ownership.

20. The rent paid for the State-owned lands leased by respondents was \$3449.60 in 1980 for 1981. The lease expired at the end of October, 1981, and agreement has not been reached regarding the terms of the new lease. A substantial increase has been proposed by the State. The fee is unknown, however, and no payment was made in 1981.

21. The annual street use permit fee has been \$681.84 since at least 1975.

22. No figures were provided reflecting respondent's capital investment in the moorage. A request was made following the hearing by the examiner for this information. The dollar value of capital investment is deemed to be an amount on which a reasonable return is received.

23. The Consumer Price Index (CPI) was 159.7 in November, 1975, 182.5 in November, 1977, 227.6 in November, 1979, and 282.3 in July, 1981.

24. The percentage increase in moorage fees demanded slightly exceeded the percentage increase in the CPI for 1977-1979 period and was equal to the CPI increase for 1977-1981.

25. The percentage increase in moorage fees between 1975 and 1977, just before the date of the "equity" ordinance (107012), was more than twice the rate of increase in the CPI.

26. The moorage fees paid to respondents for moorage over lands leased from the State amounted to approximately \$34,210 in 1980. This was based on 18 floating homes totally over State leased land and fractions of four more. The expense in 1980, excluding the State lease fee, attributable to those floating homes amounted to approximately \$6,909. Adding to the expense the lease fee of \$3,450, the net income for 1980 on the land leased from the State was \$23,850 and the return on dollars expended was 172.7 percent or 691 percent on the amount paid on the lease without consideration of the income added by the judgments obtained. With the judgments attributable to those homes for 1980 added, approximately \$8,006, the net income would be \$31,856, the return on total dollars expended 308 percent and on the lease fee paid 923 percent.

27. Moorage fees paid to respondents in 1980 for the eleven floating homes over the street right-of-way amounted to \$22,800 with expenses, not including the permit fee, of \$407.52 per home and net profit on those eleven sites of \$17,635. The rate of return on total dollars expended was 341 percent and on the permit fee for use of the land, 2586 percent.

Conclusions

1. The Hearing Examiner is directed by Section 7.20.060, Seattle Municipal Code, to hold a public hearing "for the purpose of making a factual determination as to whether a demanded moorage fee increase is reasonable in amount; that is whether such moorage fee increase is necessary to assure a fair and reasonable return to the moorage owner."

2. Respondents urge that the "return" referred to is to be calculated on the basis of fair market value and, therefore, declined to provide figures as to their initial, and any subsequent, capital investment. Under Ordinance 107012, the predecessor to Chapter 7.20 (Ordinance 109280) at Section 6, the test of the reasonableness of the fee increase is whether the moorage fee constituted a "fair and reasonable return upon the current value of the property of the owner...." One of the factors listed to be considered was the current fair market value of the moorage.

3. Reference to "current value" or "fair market value" is conspicuously absent from Chapter 7.20, as amended (Ordinance 109280). A common rule of statutory construction and followed by the Washington Court is that when a material change is made in the wording of a statute, a change in legislative intent must be presumed. In re Bale, 63 Wn.2d 83, 385 P.2d 545 (1963). Using that rule we must conclude that the current market value is no longer to be the basis upon which the return is computed.

4. The Chapter offers several factors which the hearing examiner is to consider, along with others deemed relevant, in arriving at a fair and reasonable return. Of those listed only three have potential application to the instant case. The others do not apply because the expense of operating the moorage has not changed since 1977, no capital improvements have been made in recent years, no evidence was adduced regarding change in services provided and deterioration in the facilities has occurred, but not in a substantial degree.

5. Evidence is in the record which allows consideration of the other three factors: comparability with fees charged for other floating home moorage sites, change in the CPI and reasonable return on leased land. The record shows that the level of fees instituted in 1977 are within the range of fees charged by other moorages. The data provided was not adequate to make any statistical analysis of the subject fees' relationship to the others. Secondly, the change in the CPI, some 55 percent higher than 1977, taken alone, could justify a moorage fee increase to recognize the loss of purchasing power of the new profit. Finally, the return of 172-691 percent on the State leased land assuredly provides more than a "reasonable" return for that portion of the moorage. If the license to use the street right-of-way makes that "leased land" under the terms of the ordinance the return on that portion of some 341-2,586 percent is also more than "reasonable".

6. The determination of whether the increases are necessary to assure a fair and reasonable return is hampered by the absence of a figure for respondents' capital investment in the moorage. The examiner can only infer that the return on that investment is reasonable or respondents would have provided that amount when requested to do so. Furthermore, Section 7.20.070 provides that the examiner may make a finding against the party refusing to provide requested information regarding facts such as the amount of capital investment. Since the return at the 1977 level of fees is deemed reasonable and the return on the leased portions are more than reasonable, no fee increase is justified in spite of the increase in the CPI. That factor could be used to justify an increase where nothing else had changed, e.g., no improvement in service, but the rate charged would no longer provide a reasonable return because of inflation. In the instant case, the several hundred percent rate of return on the leased portion, even reduced by the increase in the CPI, is reasonable and the return on the respondent-owned portion is presumed to be reasonable. Therefore, the demanded increase is not necessary to assure a fair and reasonable return. No increase is permitted under the Chapter.

7. Respondents suggested at hearing that the Chapter requires a decision allowing at the least an increase based on the CPI factor which may be imposed under Section 7.20.050 without challenge. That argument seems to have been abandoned in the post-hearing memorandum for one which urges a fee increase reflecting the increase in the CPI without regard to the adjustment factor. Section 7.20.050(c) may be read to allow the moorage owners to choose between a "safe" increase which may be imposed without challenge or to demand more and risk a finding under Section 7.20.060 that no increase is necessary for a reasonable return. Respondents chose the latter course and are found not to be entitled to an increase under that section.

Decision

The floating home moorage owners are not entitled to the demanded moorage fee increases.

Entered this 12th day of March, 1982.

M. Margaret Klockars
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Deputy Hearing Examiner

Notice of Right to Appeal

The decision of the Hearing Examiner in this case is the final administrative determination by the City. Any further appeal must be filed with the Superior Court within 14 days of the date of this decision. Vance v. Seattle, 18 Wn.App. 418 (1977); JCR 73 (1981).

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DECISION AND ORDER
ASSESSING ATTORNEYS'
FEES

Petitioners, by their attorneys, Lawrence B. Ransom, Perkins, Coie, Stone, Olsen and Williams, filed Petitioners' Motion for Attorneys' Fees in the above-entitled matter. Respondents, by their attorneys, Rodney T. Harmon, Olwell, Boyle and Hattrup, filed Respondent's Memorandum on Attorneys' Fees in response to the motion. Oral argument on the motion was heard April 27, 1982.

Based upon the Motion for Attorney's Fees, affidavits, Respondent's Memorandum on Attorney Fees, argument and the files herein the Hearing Examiner hereby finds:

1. On March 12, 1982, the Hearing Examiner entered a decision on the above-entitled fact-finding petitions permitting no moorage fees increase.

2. Copies of final offers were filed with the Hearing Examiner by the parties. In File No. F-80-007, petitioners offered to pay "an increase which would reflect the properly 'factored' CPI increase...rounded up to the next highest dollar." In F-81-004, petitioners offered to pay an amount determined by applying "the proper CPI factor to a base of the amount of moorage fee computed through our offer regarding F-80-007 above" rounded to the next highest dollar.

3. The amount of moorage fees increases permitted after fact-findings was less than petitioner floating home owners' offers.

4. Petitioners' attorneys expended 62 hours in representing petitioners in matters relating to the fact-finding petitions. The work was done by Lawrence B. Ransom at a billing rate of \$75 per hour.

5. Respondents do not contest the reasonableness of the hourly rates billed.

6. The increase in moorage fees demanded amounted to a total of approximately \$4000 per month.

7. The Petitions for Review of Floating Home Moorage Fee Increase were filed September 24, 1980, and June 12, 1981.

8. The fact-finding hearing lasted seven hours.

9. Petitioners' attorney expended more than six hours in response to respondents' continuance motion. Three hours of the total represented time spent providing a more specific statement of attorneys' fees, at respondents' request.

10. One hearing on consolidated fact-finding petitions under Chapter 7.20, Seattle Municipal Code, had been held by the Office of Hearing Examiner prior to the hearing of the instant case.

11. Petitioners intervened in an action in King County Superior Court for a Writ of Prohibition, Mark Freeman v. Leroy McCullough, 81-2-13265-1, to restrain the Hearing Examiner from proceeding with hearings on the petitions for fact-finding and requiring the Hearing Examiner to dismiss the actions. Mr. Ransom and Judd H. Lees assign 39.25 hours of their time to that case, which represents one-half of the actual time expended since the case was consolidated with another, Jeffrey v. McCullough. The rate billed for that time was \$70 per hour.

12. The basis for the petition for the Writ of Prohibition was the alleged unconstitutionality of the City ordinance providing for fact-finding hearings.

13. Petitioners made disbursements of \$281.85 for costs which included filing fees of \$150, messenger service and copying charges.

The Hearing Examiner concludes:

1. Section 7.20.090, Seattle Municipal Code, directs the Hearing Examiner to assess reasonable attorney fees against the moorage owner if the fee increase permitted is equal to or less than the petitioners' offer. Reasonable attorney fees must be assessed against the moorage owners in the instant case.

2. The expenditure of 60 hours representing petitioners on the fact-finding petitions is not unreasonable given the length of pendency of the cases, the amount of dollars at risk and the dearth of precedent under the ordinance.

3. Section 7.20.090, Seattle Municipal Code, authorizes the assessment of reasonable attorney fees. As a general rule, the word "costs" does not include attorneys' fees. State ex rel. Macri v. City of Bremerton, 8 Wn.2d 93, 11 P.2d 612 (1941). Further, when the City Council specifically provided for attorneys' fees, its failure to mention "costs" is presumed to indicate its intention to exclude them. See Dominick v. Christensen, 87 Wn.2d 25, 548 P.2d 541 (1976). Therefore, no reimbursement for costs may be assessed.

4. The Office of the Hearing Examiner has no jurisdiction to award fees in the petition for a Writ of Prohibition from Superior Court.

Based on the foregoing, respondents are hereby ordered to pay \$4,500 as and for reasonable attorneys' fees to counsel for petitioners.

Entered this 13th day of May, 1982.

M. Margaret Klockars
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Deputy Hearing Examiner

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