No.

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

TAZMINA VERJEE-VAN and BRIAN VAN,

Petitioners,

vs.

PIERCE COUNTY, acting through its Department of Planning and Land Services and Office of Pierce County Hearing Examiner,

Respondent.

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#49329-2-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Tazmina Verjee-Van and Brian Van, petitioners, respectfully request that this Court accept review of the Court of Appeals decision in case number 49329-2-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioners respectfully request that this Court review the Court of Appeals decision, affirming the trial court's decision that a neighboring pier, which interferes with petitioners use and access to their pier, was constructed legally although no permits were ever obtained to construct the pier and the pier was built on a parcel owned by another entity. Additionally, the Court of Appeals' decision affirmed the trial court's decision that the conditions imposed on petitioners' pier did not amount to an unconstitutional taking even though petitioners lost valuable property interests in their deeded land without due process.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on February 27, 2018 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision that held that petitioners' neighbors' pier was legally constructed when no permits were obtained to construct the pier on a parcel owned by another entity?

2. Did the Court of Appeals err in affirming the trial court's decision that the doctrine of finality precluded review of the illegal pier when the pier was constructed on a parcel owned by another entity and not on the neighbor's parcel?

3. Did the Court of Appeals err in affirming the trial court's decision that the conditions imposed on petitioners' shoreline permit did not amount to an unconstitutional taking when such taking occurred without due process of law?

IV. INTRODUCTION

The Shoreline Master Program (SMP) for Pierce County, dated March 4, 1974, governs shoreline management within Pierce County. The SMP applies to all shoreline development on Lake Tapps, a shoreline of state-wide significance. The Shoreline Management regulations are codified at Pierce County Code (PCC), Title 20.

PCC 20.02.030 states as follows:

> Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits.

Petitioners appealed the imposition of two conditions imposed by Pierce County Planning and Land Services (PALS) on their request for a shoreline exemption, which the Hearing Examiner, Superior Court, and Court of Appeals affirmed. The Hearing Examiner arbitrarily imposed conditions already satisfied by petitioners from an earlier appeal, and the neighbor's illegal pier impedes petitioners' ability to enjoy and use their waterfront access on Lake Tapps.

Additionally, the Hearing Examiner's decision amounts to an unconstitutional taking of property without due process. The Hearing Examiner's decision involves an erroneous interpretation of the law, the decision is not supported by substantial evidence, the decision is a clearly erroneous application of the law to the facts, and the decision violates the petitioners' constitutional rights. See RCW 36.70C.130(1)(b)(c)(d) and (f).

This appeal raises issues regarding the validity of a land use decision under the Land Use Petition Act (LUPA). In a separate but related appeal, Tazmina Verjee-Van v. Pierce County, Case No. 48947-3-II, the Court of Appeals affirmed the Superior Court's decision which denied appellant's petition for a writ of mandamus wherein petitioners sought court assistance to require Pierce County to uniformly apply the Shoreline Management regulations to all structures subject to the Shoreline Management Act, including the Borgert pier. See decision dated December 27, 2017. A petition for review to this Court of that decision was filed January 26, 2018.

Petitioners respectfully urge this Court to accept their petition, to ultimately reverse the Court of Appeals' decision and remand this matter with instructions to enter an order determining that the Borgert pier is an illegal and unpermitted structure and that petitioners' relief should be granted.

V. STATEMENT OF THE CASE

A. Procedural History and Background

1. Administrative Appeal AA7-14

On September 18, 2014, petitioners appealed a PALS' denial of their shoreline exemption application related to the construction of a pier on Lake Tapps in their waterfront access. The appeal contested PALS' determination that petitioners' proposed pier did not satisfy the 10-foot side yard setback requirements. CP 370. On April 7, 2015, the Hearing Examiner granted petitioners' appeal holding that petitioners' proposal satisfied the side yard setback requirements in compliance with Pierce County Code (PCC) Ch. 20.56. CP 254-66. The only issue petitioners appealed was the side yard setback as that was the only issue PALS stated was lacking for petitioners' exemption to be granted. CP 264. Pierce County did not appeal this administrative decision in favor of petitioners.

Relying upon the Hearing Officer's decision under AA7-14 that petitioners' proposed pier was exempt from a shoreline development permit, and based upon the PALS' staff report and testimony of Mike Erkkinen that all requirements had been satisfied for their pier, petitioners constructed a pier in their legally designated water access to Lake Tapps.

2. Administrative Appeal AA9-15

On June 30, 2015, PALS issued a new decision regarding petitioners' pier and stated that in order to obtain an exemption to construct a pier, petitioners' pier must have a minimum separation of 20 feet from a pier associated with the

adjacent property owner. CP 267-70. The only pier referenced in this exemption letter is the Borgert pier, which violates the ten-foot side yard setback requirement and encroaches into petitioners' water ingress and egress. Id. On July 13, 2015, petitioners appealed the PALS' decision. CP 242-51.

On November 18, 2015, a public hearing was held before the Honorable Stephen K. Causseaux, Jr., Hearing Examiner, regarding appellant's appeal of the following conditions imposed by PALS:

> Appeal of two conditions imposed by a Pierce County Planning and Land Services Department (PALS) Administrative Official on a shoreline exemption. The conditions require: 1) that the pier length be shortened from the proposed 30 feet to a length that provides a minimum separation of 20 feet from piers associated with adjacent waterfront properties; and 2) that all portions of the recently constructed pier that are less than 20 feet from an adjacent pier or more than 30 feet in length be removed no later than 30 days of the effective date of the Exemption. The subject site is located adjacent to 4225 Lakeridge Drive East, within the SE ¼ of Section 17, T20N, R5E, W.M., in Council District #1.

CP 209.

On December 14, 2015, the Hearing Examiner denied the Vans' appeal. CP 208-606. The Vans appealed the administrative decision to the Superior Court pursuant to Chapter 36.70C RCW. CP 881-932. On June 24, 2016, the Superior Court heard argument on the LUPA appeal. See RP 1-46. On August 1, 2016, the Superior Court issued a decision denying the LUPA petition for review. CP 861-66, 867-68. The Court of Appeals affirmed the Superior Court's decision on February 27, 2018. This petition for review follows.

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B. Facts

The petitioners have a possessory ownership interest in property located at 4225 Lakeridge Drive East, Lake Tapps, Washington. CP 258. Petitioners received a license from Cascade Water Alliance (CWA), a public entity, to construct the pier on parcel 0520174000, that is the subject of this case. CP 259.

After petitioners received a favorable decision from the Hearing Examiner in Administrative Appeal, AA7-14, related to an exemption for their proposed pier, petitioners constructed a five-foot-wide, 26-foot-long pier. CP 216. The petitioners' pier is located within the lateral lines established by a survey of their parcel. Id. Petitioners' pier does not exceed the length, width and setback guidelines set forth in the Shoreline Use Regulations (SUR) that would prohibit an exemption and is consistent with the pier exemption previously ruled upon in AA7-14. CP 216-217.

In the pier appeal, appellant Brian Van was advised by Mike Erkkinen, from Pierce County Planning and Land Services (PALS), that the only issue petitioners needed to resolve was the encroachment of their dock into the side yard setbacks. CP 62:11-63:3. Before building the dock, Mr. Van obtained all necessary permits for the entire project. CP 60:9-14. All of the shoreline work on petitioners' property has been permitted. CP 63:4-8.

Mr. Van researched to determine whether the Borgert pier had obtained the proper permitting to construct the pier on Cascade Water Alliance's parcel. He learned that no record exists that such permitting occurred, that no license from Cascade Water Alliance had been obtained to construct the pier, and no

notice was provided to construct a pier on Cascade Water Alliance's parcel. CP 66:23-75:24.

The application for the pier at issue notes that the Borgert parcel is 5065200060. CP 273-78. The Cascade Water Alliance is 0520174000. CP 212. The application for the proposed pier was for construction on Borgert's parcel, not the Cascade Water Alliance parcel. CP 71. Although no application was ever made for construction of a pier on Cascade Water Alliance's parcel, this is where the subject pier is located.

Mr. Erkkinen of PALS also acknowledged that no records of the Borgert pier exemption were sent to any of the required entities entitled to have notice of the construction. CP 28:21-29:23. Further, he acknowledged that the Borgert pier was constructed without first obtaining any necessary permits or associated environmental and Mr. Erkkinen acknowledged that the Borgert pier was not constructed or permitted appropriately. CP 30:21-34:12. Mr. Erkkinen also acknowledged that the Borgert pier extended into petitioners' lateral lines. CP 22:14-23, 38:16-20.

Respectfully, Pierce County's application of the Pierce County Code and the Shoreline Management Act is arbitrary and capricious as Pierce County failed to apply these regulations to the Borgert pier, yet did so to the petitioners' pier. Accordingly, this Court should grant petitioners' petition for review, and ultimately reverse the Court of Appeals' decision that affirms the earlier decisions related to administrative appeal AA9-15.

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VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioners respectfully request that this Court accept review of this case as it involves a decision of the Court of Appeals that involves an issue of significant public interest as the Court of Appeals' decision ignores the applicability of the Shoreline Management Act to construction of structures on shorelines of statewide significance. RAP 13.4(b)(4). Further, the Court of Appeals' decision involves a significant question of law under our State Constitution. RAP 13.4(b)(3).

A. REVIEW UNDER LUPA

RCW 36.70C.130 sets forth the standards for granting relief for land use decisions. Here, petitioners challenge the Hearing Examiner's findings and conclusions pursuant to RCW 36.70C.130(1)(b), (c), (d), and (f).

> LUPA governs judicial review of land use decisions. RCW 36.70C.030. Under LUPA, a court may grant relief from a land use decision only if the party seeking relief has shown:
>
> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
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> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). This court reviews rulings under RCW 36.70C.130 de novo. Knight v. City of Yelm, 173 Wn.2d 325, 336, 267 P.3d 973 (2011).

Durland v. San Juan County, 182 Wn.2d 55, 64-65, 340 P.3d 191 (2014).

Respectfully, petitioners urge this Court to accept their petition for review.

B. SHORELINE DEVELOPMENT MUST FOLLOW ALL REQUIREMENTS OF THE SHORELINE MANAGEMENT ACT.

The Shoreline Master Program (SMP) for Pierce County, dated March 4, 1974, governs shoreline management within Pierce County. The SMP applies to Lake Tapps, which is a shoreline of state-wide significance. The Shoreline Management Act is codified at RCW Chapter 90.58. Pursuant to RCW 90.58.210(1), the Pierce County Prosecutor is responsible for enforcement of the Shoreline Management Act (SMA). The local Shoreline Management regulations are codified at Pierce County Code (PCC), Title 20.

Pierce County Code § 20.02.030 states as follows:

> Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits. (Emphasis added)

Pierce County Code § 18.25.030 defines a "structure" as follows:

> "Structure" means anything that is constructed in or on the ground or over water, including any edifice, gas or liquid storage tank, and any piece of work artificially built up or composed of parts and joined together. For the purposes of this regulation, structure does not include paved areas, fill, or any vehicle.

Based on the foregoing definition, the Borgert pier, which was built on Cascade Water Alliance's parcel, is a "structure."

C. THE HEARING EXAMINER'S CONCLUSION THAT THE BORGERT PIER IS A LEGAL STRUCTURE IS CLEARLY ERRONEOUS.

The Court of Appeals' decision rests on the premise that the previous owners of the Borgert property, "the Winnes constructed a pier on their property without acquiring a shoreline exemption from Pierce County or submitting an application for a permit". Court of Appeals' decision at 2 (emphasis added). The Court of Appeals' decision continues by stating that after subsequently requested permits were obtained, the building permit and shoreline exemption were never appealed, and, subsequently, Borgert purchased this property from the Winnes. Court of Appeals' decision at 2.

The Court of Appeals' decision is not supported by the facts in this case because the Borgert pier was not constructed on the Borgert/Winne property. Rather, it was constructed on the parcel owned by Cascade Water Alliance and on shorelines of state-wide significance without any permit or shoreline exemption.

1. THE BORGERT PIER WAS BUILT ON THE CASCADE WATER ALLIANCE PARCEL, AND NO PERMITS WERE OBTAINED AND THE REQUIREMENTS FOR CONSTRUCTION HAVE NEVER BEEN COMPLETED.

Title 18 of the Pierce County Code sets forth the general provisions for development within Pierce County. PCC § 18.20.010. Pursuant to Pierce County Code § 18.30.020, "[t]he property owner or authorized agent shall obtain applicable permits and approvals prior to commencing development." (Emphasis

added). Pierce County Code § 18.140.030 addresses permits, approvals, and uses. In part it states as follows:

> Pierce County regulations require acquisition of permits or approvals before certain activity may be performed. It shall be unlawful to conduct these regulated activities without first obtaining a written permit or approval.

PCC §18.140.030(A) (emphasis added).

The Borgert pier, which was built by the former owner, Julie Helmka Winne, on the Cascade Water Alliance parcel, was constructed without any properly obtained permit or a shoreline exemption letter from Pierce County. CP 219. No pier has ever been built on the Winnes/Borgert parcel. Further, Pierce County Code § 18D.20.020(C)(1)(a) states that the County cannot give authorization for any non-exempt action. Here, the County seeks to make something exempt in which it has no lawful authority to do so, and authorized the construction of a pier on property owned by another entity without any application, permit, or shoreline exemption.

What all lower courts and tribunals failed to acknowledge was that the pier was built on Cascade Water Alliance's parcel rather than on Borgert's parcel, and it was constructed without any application, without any required review, and without any notice to adjacent property owners, which is critical to its legality. See Save Flounder Bay v. Mousel and City of Anacortes, SHB No. 81-15 (failure of city to give mandatory notice requires granting of substantial development permit to be reversed).

None of these documents exist in the Borgert pier file because the requirements were never met. CP 30:21-31:23, 64:23-75:24.

Although the County asserts that the Borgert pier was authorized pursuant to an exemption, no code provision in the Pierce County Code authorizes the granting of a shoreline exemption to build a pier on an adjacent parcel of land on shorelines of statewide significance without first following the permitting process, nor is such authority granted pursuant to the Shoreline Master Plan or the Shoreline Management Act. RCW 90.58.140. *See also* PCC § 20.02.030 (no construction . . . shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits.)

The Hearing Examiner noted that a determination of nonsignificance (DNS) was issued for the Borgert pier. CP 220. The DNS requirements are set forth in WAC 197-11-340. Pursuant to the DNS related to the Borgert pier, the following language is included:

> NOTE : Pursuant to RCW 43.21C.075 and Pierce County Environmental Regulations Chapter 18D.10.080 and Chapter 1.22 Pierce County Code, decisions of the Responsible Official may be appealed. Appeals are filed with appropriate fees at the Planning and Land Services Department, located at the Development Center in the Public Services Building. Appeals must be filed within 14 days of the date of publication of the Notice of Determination of Nonsignificance.
>
> NOTE : The issuance of this Determination of Nonsignificance does not constitute project approval. The applicant must comply with all other applicable requirements of Pierce County Departments and other agencies with jurisdiction prior to receiving construction permits.

CP 276-77.

This DNS, by its terms, sets forth mandatory requirements that must be satisfied before any proactive action can be taken. Further, the "note" states that issuance of this Determination of Nonsignificance does not constitute project approval. CP 277. Even though the County, in the DNS, sets forth what must be

completed before the project is approved, the County failed to adhere to its own requirements as no evidence exists that any of the above requirements were met. Had the County followed its requirements, the pier proposal ultimately would have been rejected because the pier is built on Cascade Water Alliance's parcel, not the Borgert parcel.

After the DNS was written, no further action was taken and the County presented no evidence to establish a final decision was ever rendered. Significantly, a County determination of nonsignificance (DNS) under SEPA must be sent to affected Indian Tribes. An approval of a shoreline substantial development permit where this is not done must be reversed. See Southpoint Coalition v. Jefferson County, SHB No. 86-47.

Although the Hearing Examiner ruled in Finding of Fact No. 14 that a final decision was made, such finding is not supported by the evidence because none of the Pierce County Code requirements were followed with respect to constructing the pier on Cascade Water Alliance's parcel. PCC § 20.76.060, sets forth compliance regulations and references Chapter 18.140. Noncompliance with the Code causes a project to be null and void. Pierce County Code § 18.140.030(C).

Clearly, the Borgert pier is unlawful as the code requirements were never followed, and the County adamantly refuses to require that this pier be brought into compliance even though the County is mandated to enforce shoreline development pursuant to RCW 90.58.210(1).

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D. THE DOCTRINE OF FINALITY DOES NOT APPLY AS NO FINAL DECISION HAS BEEN MADE FOR CONSTRUCTION OF A PIER ON CASCADE WATER ALLIANCE'S PARCEL.

Although the Hearing Examiner, Superior Court and Court of Appeals held that the doctrine of finality precludes review, no final decision has been made for the Borgert pier because the pier at issue is on Cascade Water Alliance's parcel, not Borgert's parcel.

RCW 36.70C.020 defines a "land use decision" as follows:

> [A] final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:
>
> (a) An application for a project permit . . .

RCW 36.70C.020(2). During petitioners' appeal to the Superior Court, the Court noted the significance of the issue surrounding the legality of the Borgert pier: "The legality of the Borgert pier, as being built without valid permits, is central to the Vans' argument. If the Borgert's pier is illegal, then all decisions from the examiner must fail as to the Vans' pier." CP 863. No law exists that authorizes the permitting of a pier for one parcel of land to be constructed on a neighboring parcel without some process being followed. Here, no process was followed. The pier on Cascade Water Alliance's parcel is unlawful, and all decisions of the Hearing Examiner fail because of this unlawful pier.

Although it is clear that the Borgert pier was constructed on Cascade Water Alliance's parcel, what is also clear is that it was not constructed lawfully nor was a "final decision" ever rendered that would necessitate the starting of the timeline in which to appeal. In fact, no decision has ever been made regarding the

propriety of building the pier on the Cascade Water Alliance parcel. Pursuant to PCC § 18.140.030(c) noncompliance with the code causes a project to be null and void.

Further, a permit issued without environmental factors, and, therefore, being in violation of SEPA is null and void. See Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107. Compliance with SEPA is required prior to permit issuance. See Brachbogel, et al. v. Mason County & Twanoh Falls Beach Club, Inc., SHB No. 45.

Additionally, the cases on which the Court of Appeals relies are clearly distinguishable as permitting and construction occurred on the designated land parcels and final decisions were issued. But even more importantly, none of these cases dealt with the mandatory Shoreline regulations. See Durland v. San Juan County, 182 Wn.2d 55, 340 P.2d 192 (2014); Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002) and Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000). To the extent a final decision was made relating to a pier on Borgert's parcel, the above decision may have some relevance. But because no pier was built on Borgert's parcel, the doctrine of finality does not apply.

On page 11 of the Court of Appeals' decision, the Court stated as follows:

> The land use decision regarding the Borgert pier may not be reviewed in the absence of a timely appeal under LUPA because the County's decision on shoreline exemption was a final agency decision. The Vans did not appeal the shoreline exemption permit regarding the Borgert pier. Thus, the Examiner's finding of fact 14 that "[a]ppellants cannot now challenge the legality of the [pier] located on the Borgert parcel," is supported by substantial evidence because a final decision was in fact made, as discussed above. To the extent this finding draws a legal conclusion under

> the doctrine of finality, it is fully consistent with Nykreim and LUPA, as discussed above. Consequently, the Examiner did not err by concluding that under the doctrine of finality, the Borgert pier must be deemed legal. (Emphasis added).

Respectfully, the Court of Appeals' decision as well as the Examiner's decision regarding Finding of Fact 14, are clearly erroneous because the pier is not located on the Borgert parcel. As such, the doctrine of finality does not apply and this pier cannot be deemed legal.

E. THE HEARING EXAMINER'S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF APPELLANT'S PROPERTY RIGHTS.

Washington State Constitution, Article I, Section 16 states that "No private property shall be taken or damaged for public or private use without just compensation having been first made". Further, "the takings clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation." Isla Verde International Holdings, Inc. v. City of Camas, 99 Wn.App. 127, 990 P.2d 429 (1999), Burton v. Clark County, 91 Wn.App. 505, 514, 958 P.2d 343 (1998). "The purpose of the takings clause is to 'bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Id.

The Court of Appeals determined that the taking the petitioners argued was a regulatory taking, as opposed to an exaction claim. The Court further noted that a regulatory taking is subject to two threshold inquiries. First, "'whether the regulation denies the owner a fundamental attribute of ownership,' such as the right to possess, exclude others, dispose of property, or 'make *some* economically

viable use of the property.'" Court of Appeals' decision at 13-14 (citing Guimont v. Clarke, 121 Wn.2d 586, 602, 854 P.2d 1 (1993).

The Court of Appeals asserts that petitioners are not deprived of the right to enjoy their property because they were allowed to construct a pier, just not a pier of their choosing. The problem with this analysis, however, is that the petitioners' enjoyment of their property is substantially diminished because of the illegal pier that encroaches upon their ingress and access. Petitioners do not enjoy the same property rights as their neighbor, Borgert, because the Borgert pier interferes with petitioners' use of their property. As such, this regulatory taking implicates fundamental attributes of petitioners' ownership.

The Court of Appeals also suggests that petitioners cannot satisfy the initial threshold because they cannot show that the regulatory requirement "destroys all economically viable uses of their property," citing Jones v. King County, 74 Wn.App. 467, 478, 874 P.2d 853 (1994). Under Jones, however, the issue was whether the taking creates a "physical invasion" of the property, or a "total taking" by destroying all economically viable use, not both. Petitioners are not asserting that the regulation destroys all economically viable use, but the Borgert pier clearly creates a physical invasion of petitioners' property because the illegal pier interferes with petitioners' use and enjoyment of their property. Accordingly, petitioners establish an unconstitutional taking and the Court of Appeals' decision is in error.

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VII. CONCLUSION

Based on the arguments, records and files contained herein, petitioners respectfully request that this court accept review of this matter.

VIII. APPENDIX

A-001 Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107

A-005 Brachbogel, et al. v. Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45

A-022 Gig Harbor Fishing Co. LLC v. Gig Harbor Marina, Inc., SHB No. 15-008

A-042 Save Flounder Bay v. Mousel and City of Anacortes, SHB No. 81-15

A-072 Southpoint Coalition v. Jefferson County, SHB No. 86-47

Respectfully submitted this 29th day of March, 2018.

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Attorneys for Petitioners

By: _____
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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 29th day of March, 2018.

Lee Ann Mathews

Filed
Washington State
Court of Appeals
Division Two

February 27, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TAZMINA VERJEE-VAN and BRIAN VAN, Appellants, v. PIERCE COUNTY, acting through its Department of Planning and Land Services and Office of the Pierce County Hearing Examiner, Respondents.	No. 49329-2-II (Linked with No. 48947-3-II) UNPUBLISHED OPINION

BJORGEN, C.J. — Tazmina Verjee-Van and Brian Van (the Vans) appeal the superior court's denial of their petition under the Land Use Petition Act (LUPA), chapter 36.70A RCW. In their petition, the Vans challenge conditions imposed by Pierce County on a shoreline permit exemption issued for the Vans' pier. The Vans argue that: (1) the hearing examiner erred by determining that the legality of a neighboring pier owned by Neil Borgert was not reviewable under the doctrine of finality and (2) the conditions imposed on their shoreline permit exemption amount to an unconstitutional taking. In addition to the County, Borgert and Dan and Phyllis Abercrombie, adjacent property owners on either side of the Vans, are respondents arguing in favor of the County's exemption conditions. Pierce County, Borgert, and Dan and Phyllis Abercrombie also request attorney fees and costs on appeal.

We affirm the superior court and we award reasonable attorney fees and costs to Pierce County, Borgert, and the Abercrombies.

FACTS

A. Borgert Pier

The Vans own property on the shoreline of Lake Tapps, which is next to a lot previously owned by Kelly Winne and Julie Helmka-Winne (the Winnes) and which is presently owned by Neil Borgert. At some point before or during April 1998, the Winnes constructed a pier on their property without acquiring a shoreline exemption from Pierce County or submitting an application for a permit. On April 18, 1998, Helmka-Winne submitted a shoreline exemption request for the pier as constructed. On April 20, Helmka-Winne submitted an application for a building permit for the pier, and on July 9, the County issued a building permit to the Winnes for the pier as built. The County also approved the Winnes' shoreline exemption request on June 13, 2001. The building permit and shoreline exemption were never appealed. In December 2003, Borgert purchased the property from the Winnes.

B. First Hearing Examiner Ruling AA7-14

On May 23, 2014, the Vans submitted an application to the Pierce County Planning and Land Services Department (County) for an exemption from the requirement for a shoreline substantial development permit to construct a 30 foot long by 5 foot wide pier and access ramp on Lake Tapps. On September 5, the County denied the request, stating that the Vans' proposed pier "was closer than ten feet from a side property line extended at a right angle to the shoreline," and therefore was "not exempt from the [permit] requirement . . . per Pierce County Code (PCC) . . . [c]hapter 20.56 Piers and Docks." Clerk's Papers (CP) at 382. On September 18, the Vans appealed the County's denial of their requested exemption to the County's hearing examiner (Examiner) under number AA7-14.

On March 18, 2015, the Examiner held a hearing and took testimony regarding the denial of the Vans' requested exemption. The Vans argued that the County's method of measuring an extended property line by "continu[ing] the [subject] property line to the bulkhead and then waterward from the bulkhead at an angle of 90 degrees," was inappropriate as applied to their property because it was located on a cove, or curved shoreline, as opposed to a straight shoreline. CP at 255, 257. On April 7, the Examiner ruled that the County's method of determining side property lines conflicted with state precedent and granted the Vans' appeal with regard to the side property line dispute. The Examiner also concluded that "insufficient evidence was presented to determine whether the pier satisfies all the criteria for an exemption as set forth in the SMA [Shoreline Management Act], WAC [Washington Administrative Code], SMP [Shoreline Master Program], and SUR [Shoreline Management Use Regulations]. Therefore no decision is made thereon." CP at 264. No party appealed this decision.

C. Second Hearing Examiner Ruling AA9-15

On April 17, 2015, Mike Erkkinen, senior planner for the County, e-mailed the Vans stating that "insufficient evidence has been presented in this matter for staff to determine if the proposed pier meets provisions in the [SMP] and [SUR]," and asked the Vans to provide "an updated site plan." CP at 369. On May 1, the Vans' attorney sent a letter to the county prosecutor's office replying:

> Given that the hearing examiner ruled that the County's decision was clearly erroneous, no other conditions exist that the Vans need to meet to satisfy the exemption requirements, and no other property owner has been required to do what Mr. Erkkinen seeks to require of the Vans. As such, the Vans will not be submitting any additional material for their pier as all of the material requested was previously provided in their pier application that was originally submitted to PALS.

CP at 368.

On May 3, the County received a report that a pier was being constructed on the Vans' property. On May 11, the County conducted a site visit of the Vans' property and found that a pier resembling the Vans' proposed pier had been constructed on the property. This pier, however, was 34 feet long rather than the proposed 30 feet. On June 30, the County granted the Vans a conditional exemption from the SMA substantial development permit requirement, subject to the following requirements:

> 1. The pier length shall be shortened from the proposed 30 feet to a length that provides a minimum separation of 20 feet from the piers associated with the adjacent waterfront properties.
>
> 2. All portions of the recently constructed pier that are less than 20 feet from an adjacent pier or that are more than 30 feet in length shall be removed no later than 30 days from the date of this Exemption.

CP at 250. At the time of the site visit, the Vans' pier was 9 feet 3 inches from the Borgert pier. On July 13, the Vans appealed the County's conditional exemption to the Examiner. This administrative appeal was identified as AA9-15.

On November 18, 2015, the Examiner held a hearing and took testimony regarding the denial of the Vans' conditional exemption. At the hearing, Erkkinen testified that "a 20-foot separation [between piers] is necessary to provide ingress and egress for both property owners." CP at 211. On December 14, the Examiner issued a decision upholding the two conditions in the County's conditional shoreline exemption.

First, the Examiner rejected the Vans' argument that because the Borgert pier was illegally constructed, they were not required to maintain the 20-foot separation from it. The Examiner's basis for this ruling was expressed in finding 14, which states:

14. Appellants cannot now challenge the legality of the [pier] located on the Borgert parcel. Following passage of the Land Use Petition Act (LUPA) by the Washington State Legislature, our Washington [State] Supreme Court has required appeals of land use actions to comply with the time limits set forth in LUPA. The court has consistently held that legal challenges to land use action must be brought within the LUPA statute of limitations of 21 days (except in shoreline cases appeals to the Shorelines Hearings Board must be brought within 30 days). In Department of Ecology v. City of Spokane Valley, et. al., 167 Wn. App. 952 (2012), our Court of Appeals held that the granting or denial of an exemption from the substantial development permit process may be challenged under LUPA as the Department of Ecology did in that case. Since no challenges to the Borgert Dock were filed during the LUPA appeal period of 21 days, our courts and LUPA consider the exemption approval a final land use decision. In Chelan County v. Nykreim, 146 Wn.2d 904 (2002), our Supreme Court quoted from its decision in Wenatchee Sportsman Assn. v. Chelan County, 141 Wn.2d 175 (2002), as follows:

> This court has also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding in development of his property. To make an exception . . . would defeat the purpose and policy of the law in making a definite time limit. (pp. 931, 932).

Such is especially true in the present case where Mr. Borgert purchased his parcel with the dock permitted and built (except for SEPA review). The Court in Nykreim continued:

> To allow Respondents to challenge a land use decision beyond the statutory period of 21 days is inconsistent with the Legislature's declared purpose of enacting LUPA. Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner. (p. 933).

The Supreme Court then extended LUPA's scope and review to include ministerial decisions such as building permits that require no notice whatsoever:

> Building permits are subject to judicial review under LUPA. Historically, actions on building permits have been characterized by this court as ministerial determinations, which answers the question whether LUPA applies to ministerial land use decisions. 136 Wn.2d at 929.

> See also Durland v. San Juan County, 182 Wn.2d 55 (2014), wherein the court prohibited a challenge to San Juan County's issuance of a building permit for a garage addition. In that case petitioners did not receive notice of the building permit until subsequent to the expiration of the administrative appeals period. Furthermore, decisions interpreting LUPA hold that a structure approved for construction under a faulty building permit or other permit becomes a valid, legal use and not a nonconforming use. In issuing the exemption [to the Vans], PALS had to consider the Borgert [pier] as a legal, permitted structure.

CP at 220-21.

Second, the Examiner determined that the condition requiring a 20-foot separation between adjacent piers was consistent with SUR and SMA policies, approved by the Pierce County legislative authority, and properly addressed concerns regarding the safe ingress and egress of watercraft. The Examiner denied the Vans' appeal, holding that they must "strictly comply with the two conditions imposed on the [SMA permit] exemption" by the County. CP at 225.

D. LUPA Petition

On January 4, 2016, the Vans filed a LUPA petition in superior court, appealing the Examiner's denial of their appeal of the County's June 30, 2015 administrative decision granting the conditional shoreline exemption. On June 24, the superior court heard argument in this case and, on July 26, filed its decision denying the Vans' LUPA petition, stating in part:

> The legality of [t]he Borgert [p]ier, as being built without valid permits, is central to [t]he Vans argument. If [t]he Borgert's pier is illegal, then all decisions from the [E]xaminer must fall as to [t]he Vans' pier. This Court finds [t]he Vans argument, as to the legality of the [Borgert pier], is another attempt to raise an issue which has already been ruled upon by the Court in denying [the Vans'] attempt to obtain a writ of mandamus (Court's decision filed March 30, 2016). The subject matter of the writ was to challenge the legality of the County's action in allowing the Borgert's [pier] to be built and remain in its current location.

> The Court's decision of March 30, 2016, is under appeal, but until an appellate court rules, the Court's March 30, 2016, decision still stands.
>
> . . . .
>
> The two conditions imposed by Mr. Erkkinen were not unreasonable and ensured unobstructed moorage space for each property owner. [The Vans] argue that [t]he Borgert's [pier] is in fact illegal and interferes with the lateral line case law of Washington State.
>
> Once again, the Court has previously ruled on the legality of the Borgert's pier and has ruled that [the Vans] did not timely file any action, under [LUPA], in contesting its construction. The legality of Borgert's [pier] is not an issue before this court.

CP at 863-66.

On August 19, the Vans appealed the superior court's July 26, 2016 denial of their LUPA petition.

ANALYSIS

I. STANDARD OF REVIEW

LUPA governs judicial review of land use decisions. RCW 36.70C.030. Under RCW 36.70C.020, the action here on appeal is a land use decision. Under LUPA, we may grant relief from a land use decision only if the party seeking relief has shown:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief. RCW 36.76C.130(1). We review rulings under RCW 36.70C.130 de novo. *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

The Vans assign error to the Examiner's findings of fact 8, 10, 13, 14, and 15 and conclusions of law 4, 6, 8, and 9. We review whether substantial evidence supports the findings of fact and whether those findings support the conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013). Substantial evidence is evidence sufficient to persuade a rational fair-minded person that the premise is true. *Id.* at 341-42. We view the evidence in the light most favorable to the prevailing party below, here the County. *Id.* at 342. We further defer to the finder of fact on issues of conflicting evidence, witness credibility, and the persuasiveness of the evidence. *Id.* The party challenging a finding of fact bears the burden to show that it is not supported by the record. *Id.* We review conclusions of law de novo. *Id.*

Our Supreme Court has also made clear that it is not the appellate court's "obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). We have previously held that a party waives its challenge to a finding of fact by failing to properly assign error to a finding. *In re Muller*, 197 Wn. App. at 487. Although the Vans offer some argument associated with their challenged findings of fact and conclusions of law, their arguments consist of conclusory assertions and citation to the entire Examiner ruling for AA9-15. Br. of Appellant at 7-10. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn.

App. 375, 384, 285, P.3d 154 (2012). Therefore, we do not independently address the Vans' challenges to findings of fact 8, 10, 13, and 15 and conclusions of law 4, 6, 8, and 9. However, we address below the Vans' challenge to finding of fact 14 as it relates to their arguments about finality.

II. FINALITY

A. Final Decision

The Vans contend that there has never been a final administrative decision regarding the Borgert pier, and therefore the doctrine of finality does not apply in this case. If the Vans are correct in this regard, then they may argue in this appeal that the Borgert pier is illegal and that the conditional shoreline exemption is therefore without legal basis. We disagree with the Vans' assertion.

In order to appeal an administrative decision under PCC 1.22.090, there must be a final decision. Agency action is final "'when it imposes an obligation, denies a right, or fixes a legal relationship as a consummation of the administrative process.'" *Evergreen Washington Healthcare Frontier LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 449, 287 P.3d 40 (2012) (internal citations omitted) (quoting *Wells Fargo Bank, N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 356, 271 P.3d 268 (2012)). Our Supreme Court has stated that "[a] final agency action 'implies a definitive act of the agency, action which is binding until and unless it is set aside by a court.'" *Jones v. Dep't of Health*, 170 Wn.2d 338, 357, 242 P.3d 825 (2010) (quoting Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE § 13.20, at 335 (2d ed. 1997)).

In this case, the 2001 approval of the shoreline exemption for the Borgert pier constituted a final agency action that could have been appealed. The County approved a shoreline

exemption on June 13, 2001 for what would eventually be Borgert's "5 x 24 as built [pier]." CP at 52. The County's approval of the exemption request indicates that the County determined that the pier comported with applicable county regulations. The effect of a shoreline exemption is to relieve the applicant of any obligation to obtain a shoreline substantial development permit for the proposal. PCC 20.76.030(A)-(B). Because the 2001 shoreline exemption communicated a definitive act of an agency fixing a legal relationship, it was a final administrative action that Verjee-Van could have appealed.

B. Doctrine of Finality

Under the doctrine of finality, failure to appeal a final decision subject to LUPA will preclude further review. In *Chelan County v. Nykreim*, the County attempted to revoke land use decisions 14 months after they had been made because they had been erroneously approved. 146 Wn.2d 904, 914-15, 917-18, 52 P.3d 1 (2002). The Supreme Court held that even if the original land use decision was erroneous, the judicial "policy of finality of land use decisions," and the provisions of LUPA precluded further review of that decision through a declaratory judgment action after the deadline for an appeal under LUPA had passed. *Id.* at 932-33. The court explained that it has:

> [R]ecognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "if there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property. . . . To make an exception . . . would completely defeat the purpose and policy of . . . making a definite time limit."

Id. at 931-32 (alterations in original) (quoting *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000)).

A final local government decision on a request for a shoreline exemption may be challenged under LUPA. *Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 964, 275 P.3d 367 (2012); RCW 36.70C.020(2)(a). Consequently, the same policies favoring finality in *Nykreim* are also at play in this setting.

The land use decision regarding the Borgert pier may not be reviewed in the absence of a timely appeal under LUPA because the County's decision on shoreline exemption was a final agency decision. The Vans did not appeal the shoreline exemption permit regarding the Borgert pier. Thus, the Examiner's finding of fact 14 that "[a]ppellants cannot now challenge the legality of the [pier] located on the Borgert parcel," is supported by substantial evidence because a final decision was in fact made, as discussed above. To the extent this finding draws a legal conclusion under the doctrine of finality, it is fully consistent with *Nykreim* and LUPA, as discussed above. Consequently, the Examiner did not err by concluding that under the doctrine of finality, the Borgert pier must be deemed legal.

The Vans' principal challenge to the condition of the shoreline exemption requiring a minimum separation from adjacent piers is that the Borgert pier is illegal. However, under the doctrine of finality the Borgert pier must be deemed legal and, thus, the Vans' remaining challenges to the exemption conditions are those in their challenges to conclusions of law 4, 6, 8, and 9. For the reasons set out above, they have waived those challenges. Therefore, we hold that the Examiner properly determined that the 20-foot pier separation condition was appropriate based on the policy concerns relating to safe use of watercraft and navigability.

C. Res Judicata

Borgert and the Abercrombies also argue that the Vans' argument regarding the legality of the Borgert pier is barred under the doctrine of res judicata. However, our decision in the linked case, *Tazmina Verjee-Van v. Pierce County*, No. 48947-3-II, slip op. at 2017 WL 6603662 (Wash. Ct. App. Dec. 27, 2017) (unpublished) and our analysis above in the present appeal establish the legality of the Borgert pier under the doctrine of finality. Therefore, it is not necessary to reach the res judicata argument raised by Borgert and the Abercrombies.

III. REGULATORY TAKINGS

The Vans also claim that the County's requirement to maintain a 20-foot setback between their pier and neighboring piers amounts to an unconstitutional regulatory taking. We disagree.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. *Burton v. Clark County*, 91 Wn. App. 505, 515, 958 P.2d 343 (1998). Similarly, the Washington Constitution article I, section 16 states that "[n]o private property shall be taken or damaged for public . . . use without just compensation having been first made." A regulation of the use of land may result in a constitutional taking. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329, 87 P.2d 907 (1990) (citing *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987)).

The Vans argue that the requirement to maintain a 20-foot distance between piers constitutes a regulatory taking, relying on our opinion in *Isla Verde International Holdings., Inc. v. City of Camas*, 99 Wn. App. 127, 990 P.2d 429 (1999). However, *Isla Verde* concerned an ordinance that required a property developer to set aside a portion of its property as open space to preserve areas for wildlife and recreational purposes. 99 Wn. App. at 138-39. We

characterized that ordinance as an "exaction," because it required a private party "to dedicate a significant portion of its property for a public benefit." 99 Wn. App. at 138-39. The state Supreme Court affirmed, but on other grounds. It concluded that the open space condition violated RCW 82.02.020 and did not reach arguments on its constitutionality. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 745, 49 P.3d 867 (2002).

In the present appeal, the Vans do not contend that they have been required to set aside part of their land for the public's use, but rather that the County's regulations have deprived them of the use of part of their property. Division One of this court has explained that a regulatory taking occurs when "'government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs.'" *Berst v. Snohomish County*, 114 Wn. App. 245, 255-56, 57 P.3d 273 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)). Therefore, by arguing that the County has engaged in a taking by operation of its regulations, the Vans have raised a regulatory taking claim, not an exaction claim, and their reliance on *Isla Verde* is misplaced.[1]

In *Guimont v. Clarke*, the Supreme Court set out the showing needed to sustain a regulatory taking claim. 121 Wn.2d 586, 854 P.2d 1 (1993). The court noted that regulatory taking claims are subject to two threshold inquiries. *Id.* at 594-95, 600-01. First, a court considers "whether the regulation denies the owner a fundamental attribute of ownership," such as the right to possess, exclude others, dispose of property, or "make *some* economically viable

[1] Furthermore, the Vans confirmed that they were alleging a regulatory taking in this appeal at oral argument. Wash. Court of Appeals, *Verjee-Van v. Pierce County*, No. 49329-2-II, *oral argument* (July 6, 2017), at 8 min., 30 seconds (on file with the court).

use of the property." *Id.* at 602. Second, "if the regulation does not implicate fundamental attributes of ownership, the court will proceed to the next threshold inquiry, analyzing whether the regulation goes beyond preventing a public harm to producing a public benefit." *Id.* at 601. The court reasoned that "if the regulation either goes beyond preventing a public harm to producing a public benefit, or infringes upon a fundamental attribute of property ownership, further takings analysis is necessary." *Id.* at 595. "If the regulation does not destroy a fundamental attribute of ownership and does no more than protect the public health, safety, and welfare, then the regulation is not subject to a takings challenge." *Robinson v. City of Seattle*, 119 Wn.2d 34, 50, 830 P.2d 318 (1992).

The Vans assert that the County's conditions on their permit exemption deprive them of their right to enjoy their property and that they are harmed because "the value of their property is less than the value of their neighbor[], Neil Borgert." Br. of Appellant at 21-22. In considering this assertion, we note that if the Vans associate the lack of enjoyment of their property with the absence of a pier, the County's conditions on the Vans' permit exemption do not forbid the Vans from constructing a pier, but only one that violates certain conditions. Therefore, the Vans may still construct and enjoy a pier on their property. Additionally, the right to enjoy one's property is not unlimited. Division One of this court has explained that "[p]roperty owners do not have a right to use and enjoy their property so as to create a nuisance or interfere with the general welfare of the community" *In re Property Located at 14255 53rd Ave., S., Tukwila, King County, Washington*, 120 Wn. App. 737, 748, 86 P.3d 222 (2004).

In this case, the Vans have not satisfied either of the threshold inquiries under *Guimont*. Turning to the first threshold inquiry, the Vans make no argument that the County's decision has

somehow interfered with their rights to possess their property, dispose of their property or exclude others from it. In addition, the Vans provide no citation to the record to demonstrate the effect of this regulatory requirement on the value of their property. Importantly, even if the Vans had provided evidence of an economic harm, the first threshold inquiry under *Guimont* asks whether the regulation denies the owner the right to make some economically viable use of the property. *Guimont*, 121 Wn.2d at 601; *see also Lucas v. South Carolina Coastal County*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Thus, in order to meet the first prong of the *Guimont* threshold analysis under a theory of economic harm, the Vans must demonstrate that the regulatory requirement "destroy[s] all economically viable use[s]" of their property. *Jones v. King County*, 74 Wn. App. 467, 478, 874 P.2d 853 (1994). At oral argument, the Vans conceded that the challenged regulation did not deprive them of all reasonable economic use of their property. Wash. Court of Appeals, *Verjee-Van v. Pierce County*, No. 49329-2-II, *oral argument* (July 6, 2017), at 10 min, 45 seconds (on file with the court). Thus, the Vans have failed to make the first threshold showing.

As to the second prong of the *Guimont* threshold analysis, the record demonstrates that the regulation at issue is intended to promote public safety and welfare. At the hearing before the Examiner in the administrative appeal AA9-15, Erkkinen testified that the 20-foot separation requirement was imposed to allow for adequate ingress, egress, and mooring at both the Vans' and Borgert piers. The concern for sufficient clearance permitting ingress and egress serves public safety by avoiding collisions between watercraft. Similarly, Erkinnen's comments regarding mooring touch upon general welfare concerns: allowing both property owners to enjoy full use of their structures. Therefore, we hold that the Vans have not established either

prong of the *Guimont* threshold analysis, and consequently the Vans' regulatory taking claim fails.

IV. ATTORNEY FEES

The County, Borgert, and the Abercrombies request an award of reasonable attorney fees and costs on appeal as the prevailing parties. We hold that they are entitled to that award.

Under RCW 4.84.370, a prevailing party on appeal of a land use decision is entitled to an award of reasonable attorney fees and costs if that party was the prevailing or substantially prevailing party at the administrative level and in all prior judicial proceedings. In this case, the County prevailed before the Examiner and in superior court by defending its conditional permit exemption. Therefore, we hold that the County is entitled to an award of reasonable attorney fees and costs as the prevailing party on appeal.

Further, Borgert and the Abercrombies, as joint respondents, prevailed on the issue of whether the doctrine of finality applies to the Borgert pier at each stage of the litigation. *See* CP at 230. Our Supreme Court has explained that "[a] 'prevailing party' is any party that received some judgment in its favor." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010). The court further reasoned that "[i]f neither party completely prevails, the court must decide which, if either substantially prevailed," based on "the extent of the relief afforded [to] the parties." *Id.* (citing *Riss v. Angel*, 131 Wn.2d 612, 663-64, 934 P.2d 669 (1997)). Therefore, because Borgert and the Abercrombies prevailed on the issue of finality, we hold that they are also entitled to an award of reasonable attorney fees and costs as prevailing parties on appeal.

CONCLUSION

We affirm the superior court and award reasonable attorney fees and costs on appeal to the County, Borgert, and the Abercrombies.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bridgewater, C.J.

We concur:

Melnick, J.

Sutton, J.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY THE CITY OF PORT ANGELES TO THE PORT OF PORT ANGELES	
ALICE P. BALL, Appellant, vs. CITY OF PORT ANGELES and THE PORT OF PORT ANGELES, Respondents.	SHB No. 107 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a substantial development permit issued by the City of Port Angeles to the Port of Port Angeles, came before the Shorelines Hearings Board (Walt Woodward, presiding officer) in the Commissioners' Meeting Room, Clallam County Courthouse, Port Angeles, Washington, at 10:00 a.m., March 1, 1974.

Appellant appeared pro se; Port of Port Angeles through Tyler Moffett, and the City of Port Angeles made no appearance. Richard

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Reinertsen, Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted. Appellant and counsel made closing arguments.

From testimony heard, exhibits examined, arguments considered, transcript reviewed and exceptions denied, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I.

On July 30, 1973, the Port of Port Angeles applied for a substantial development permit under chapter 90.58 RCW, from the City of Port Angeles for dredging, bulkheading and filling for ship moorage at the Port's Terminal No. 1, in Port Angeles Bay, Washington. After due public notice and at a public hearing, the City Council of the City of Port Angeles approved the permit on September 18, 1973. On October 15, 1973, appellant filed a request for review of the permit with the Board and on November 9, 1973, both the Attorney General and the Department of Ecology certified the request for review as reasonable.

II.

By stipulation of appellant and the Port of Port Angeles, the shorelines of Port Angeles Harbor are of state-wide significance.

III.

Appellant failed to prove that the permit is inconsistent with chapter 90.58 RCW or WAC 173-16. As of September 18, 1973, there was not in existence any discernible or ascertainable master program of the City of Port Angeles.

IV.

The City Council of the City of Port Angeles, in granting the

permit failed to consider environmental factors of the proposed project as required by chapter 43.21C RCW, did not submit a finding of no significant environmental impact and did not prepare or consider an environmental impact statement.

V.

An Conclusion of Law hereinafter recited which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board comes to these

CONCLUSIONS OF LAW

I.

The Shorelines Hearings Board has jurisdiction under chapter 90.58 RCW to review the permit and asserts jurisdiction to consider environmental aspects as specified in chapter 43.21C RCW.

II.

Uncontroverted testimony convinces this Board that the City Council of the City of Port Angeles granted the permit with total disregard for environmental factors and that this disregard is a violation of chapter 43.21C RCW, thus making the permit null and void.

III.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Shorelines Hearings Board issues this

ORDER

The substantial development permit issued by the City of Port Angeles on September 18, 1973 to the Port of Port Angeles is hereby vacated without prejudice.

DONE at Lacey, Washington this 28th day of May, 1974.

SHORELINES HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

W. A. Gissberg
W. A. GISSBERG, Member

Mary Ellen McCaffree
MARY ELLEN McCAFFREE, Member

Robert F. Hintz
ROBERT F. HINTZ, Member

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BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY MASON COUNTY TO TWANOH FALLS BEACH CLUB, INC.	SHB Nos. 45 and 45-A
M. W. BRACHVOGEL, et al. and RANDY E. AND CAROL R. McILRAITH, et al., Appellants, vs. MASON COUNTY and TWANOH FALLS BEACH CLUB, INC., Respondents, STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY and SLADE GORTON, ATTORNEY GENERAL, Amici Curiae,	FINDINGS OF FACT, CONCLUSIONS AND ORDER

This matter, a request for a reversal of a substantial development permit granted by Mason County to Twanoh Falls Beach Club, Inc., came before members of the Shorelines Hearings Board at a formal hearing in

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Olympia, Washington conducted at 10:00 a.m. on March 12, 1973. Board members present were: Walt Woodward, Chairman, W. A. Gissberg, presiding officer, James T. Sheehy and Robert F. Hintz.

The appellants, M. W. Brachvogel, et al., were represented by John Petrich, and Phillip M. Best represented Randy E. and Carol R. McIlraith, et al. Twanoh Falls Beach Club, Inc. was represented by Mary Ellen Hanley. Mason County was not represented. Robert V. Jensen appeared as amicus curiae. The proceedings were recorded by Richard Reinertsen, an Olympia court reporter.

The Board entered its Proposed Findings, Conclusions and Order on June 11, 1973, which Proposed Order conditionally approved the substantial development permit issued by Mason County to respondent, Twanoh Falls Beach Club, Inc. Exceptions were duly filed with the Board by appellant, M. W. Brachvogel, et al. The Board asked for further oral argument or written statements of the parties on appellants' numbered Exception VII relating to the Board's proposed Conclusion II. That proposed Conclusion was that the granting of the permit was not a major action requiring an environmental impact statement under the State Environmental Policy Act (SEPA). Briefs were submitted by the parties on that question and supplemented by oral argument before certain Board members on July 25, 1973.

Having carefully considered all of the Exceptions and the contentions of the parties, the Board concludes that appellant Brachvogel's Exception VII is well taken and should be and therefore is granted. We believe the recent case of Juanita Bay Valley Community Association vs. City of Kirkland, 9 Wn. App. 59 (June 4, 1973) to be controlling and

that it prevents this Board, as a matter of law, from making the initia determination that the issuance of the permit was not a major action under SEPA. We are unable to ascertain, from an examination of the record, whether that determination was made by Mason County. The mere fact that no environmental impact statement was prepared is not in itself proof that the County made a determination that none was required, nor can we indulge in such a presumption. Further, the record does not affirmatively show (and we believe that it must) that the County considered the environmental factors in the project before determining whether or not an environmental impact statement must be prepared. The record reveals that some factors affecting the environment were before the County, in written form and we are asked by respondents to presume that the County Commissioners did not neglect their duty of considering them. We express no opinion whether the factors before them were comprehensive and sufficient. See Hanly vs. Mitchell, 460 F.2d 640 (2d Cir. 1972). We are unable to ascertain what they did consider or whether they gave any consideration.

Here too we cannot presume that the County considered environmental factors. We cannot do so because of the strong, directive language of SEPA found in RCW 43.21C.030.

In remanding this matter to Mason County, we adhere to those Proposed Findings and Order which relate to and are relevant to the Shoreline Management Act. However, we, as stated in Hanly vs. Mitchell, supra, do not "regard the remand as pure ritual."

We direct that the determination to be made under SEPA be made in good faith after full consideration. We suggest that the County

Commissioners address themselves to a consideration of the environmental factors mentioned in the dissent of Mr. Sheehy to the Proposed Findings, Conclusions and Order heretofore provided to the parties to this request for review.

If the County determines that no environmental impact statement is required because the quality of the environment will not be significantly affected, this Board can review that question again.

Accordingly, from the evidence presented (testimony and exhibits) and assisted by arguments by counsel and from a review of the transcript of the hearing, the Shorelines Hearings Board makes the following:

FINDINGS OF FACT

I.

On November 13, 1972, the Mason County Board of County Commissioners, after public hearings conducted on four separate dates, granted Shorelines Management Substantial Development Permit No. 24 to Twanoh Falls Beach Club, Inc. for a development on the shoreline of Hood Canal located on a site seven and eight-tenths miles southwest of Belfair, Washington. In authorizing the permit, the Board was acting as the "local governmental agency" under the Shoreline Management Act of 1971 and followed procedures established pursuant to the requirements of that Act. Development authorized by the permit was to "repair and replace piling, float, etc. destroyed by ice and construct a new float, provided property line of Twanoh Falls development be adequately posted, the current county boating ordinance posted conspicuously on dock, along with 'no skiing from west side of pier' signs to be posted". In addition, the following standard conditions were imposed:

1. This permit is granted pursuant to the Shoreline Management Ac of 1971 and nothing in this permit shall excuse the applicant from compliance with any other Federal, State or local statutes, ordinances or regulations applicable to this project.

2. This permit may be rescinded pursuant to Section 14(7) of the Shoreline Management Act of 1971, in the event the permittee fails to comply with any condition hereof.

3. Construction pursuant to this permit will not begin or is not authorized until forty-five (45) days from the date of filing of the final order of the local government with the Department of Ecology or Attorney General, whichever comes first; or until all review proceedings initiated within forty-five (45) days from the date of filing of the final order of the local government with the Department of Ecology or Attorney General, whichever comes first; or until all review proceedings initiated within forty-five (45) days from the day of such filing have been terminated.

II.

The site consists of 372 lineal feet of waterfront on Hood Canal containing approximately 56,000 square feet between the bulkheaded shoreline and the State highway. The site is jointly owned by members of the Twanoh Falls Beach Club, Inc. who are eligible for membership by reason of ownership of one or more lots in a 397 lot subdivision on the hillside lying south of the State highway abutting the beachfront property. About 150 of these lots are improved and capable of occupancy. Improvements now existing on the beachfront property consist of a

bulkhead, cabana dressing rooms, playground equipment and a line of piles extending approximately 434 feet northward into Hood Canal near the southwestern edge of the property. The piles have been used to anchor a floating walkway and a 120 foot floating dock with a capacity to moor 18 to 20 small craft.

III.

The hearings before the Mason County Board of County Commissioners revealed opposition to the proposed development by owners of adjacent property and by others. Opposition was based upon hazards to swimmers caused by overconcentration of small boat movements, water skiing activity and contamination of the water, and by the creation of excessive noise and by motor oils.

IV.

The record is silent as to whether the County Commissioners considered environmental factors in the project and whether they determined that it is or is not a major action significantly affecting the quality of the environment. The County did not require the preparation of an environmental impact statement.

V.

The Hood Canal Advisory Commission is a citizens group which consists of three members from each of three counties: Mason, Kitsap and Jefferson. Members from each of the counties are appointed by the respective County Boards. The Advisory Commission meets monthly concerning environmental matters and problems in areas bordering Hood Canal. From time to time its advice is sought by the County Boards of its three constituent counties. In response to a request by Mason County

Board of County Commissioners, the Hood Canal Advisory Commission reviewed Application No. 24 by Twanoh Falls Beach Club, Inc., viewed the site and subsequently recommended that the application for a substantial development permit as proposed by the applicant be denied.

VI.

The existing development, including the floating walkway extending 442 feet into Hood Canal and the 120 foot mooring float at right angles thereto were installed in 1965 without a U. S. Army Corps of Engineers' permit or a State Hydraulic Permit. Facilities have been in continuous use since that date and no notice of violation has been made by the U. S. Army Corps of Engineers or the State of Washington.

VII.

Hood Canal shorelines are shorelines of state-wide significance having high aesthetic, recreational and ecological values. The shoreline in the vicinity of this application is intensively developed with residential structures occupied year round or seasonally by summer residents.

VIII.

Mason County has completed its shoreline inventory as required by the Shoreline Management Act of 1971; development of its master program is in process. Evaluation of Application No. 24 by the County Board was based upon the policies set forth in Section 2 of the Act and the guidelines issued by the Department of Ecology on June 20, 1972.

IX.

The Twanoh Falls Beach Club, Inc. has made the application to the Department of the Army, Seattle Corps of Engineers for the work

contemplated in its Application No. 24 to Mason County for a substantial development permit.

X.

The plan for the project as set forth in the Corps of Engineers application was utilized in the Application for Substantial Development No. 24. That plan calls for repair and preservation of existing bulkhead and pier and the driving of additional piles in Hood Canal. Under the plan, the existing 24 piles would be supplemented by 39 additional piles and the conversion of the floating walkway to a rigid pier or walkway extending 434 feet into Hood Canal. The surface of the walkway would be 15.8 feet above mean lower low water. The walkway would be protected on both sides by three foot high handrails. The plan includes the existing float 120 feet long reached by a thirty foot ramp, extending eastward from the walkway at a point 370 feet out from the existing rock bulkhead. A new finger float 120 feet long reached by a thirty foot ramp would extend eastward from the end of the walkway at a point approximately 430 feet out from the existing bulkhead.

From these Findings of Fact, the Shorelines Hearings Board comes to these

CONCLUSIONS

I.

Appellants contend that in granting a conditional substantial development permit to Twanoh Falls Beach Club, Inc., the Mason County Board of Commissioners should have complied with the Administrative Procedures Act because in granting said permit it was acting as an agency of the State. Such contention is without merit; County

Commissioners need not comply with the Administrative Procedures Act.

II.

Mason County did not comply with SEPA and is required to do so prior to the issuance of any substantial development permit.

III.

The conditional permit granted by the Mason County Board of Commissioners and the application by the Twanoh Falls Beach Club, Inc. for a U. S. Army Corps of Engineers' permit was for a total development incorporating previous improvements installed with or without a permit. Hood Canal and its bordering lands constitute shorelines of state-wide significance. The area involved here possesses high scenic and recreational values, generally recognized and appreciated as a finite and precious resource by residents and visitors alike.

This is a dispute between homeowners of individual properties utilized for dwelling and recreational purposes on the one hand and joint or corporate owners of adjacent property utilized exclusively for recreational purposes. The focus of water-oriented activities by the owners and guests of 150 improved nearby properties on 372 lineal feet of commonly owned waterfront has produced a sharp contrast with the density of persons and their recreational pursuits on the adjoining and nearby properties which generally support lower concentrations of persons and activities on a front foot basis. It must be recognized that superb recreational environments will have peak periods of attraction and use. In these circumstances the rate of use can be self-regulating: over-crowding discourages more activity unless the capacity of the facility is expanded.

IV.

The potential demand for use of the Twanoh Falls Beach Club, Inc. facilities could be more than double the current rate of use since less than half of the lots of the potentially participating members are developed for occupancy. Some reasonable control of use and activities should be established.

V.

The limited shoreline resource can provide a direct recreation opportunity to people in each of three ways, each of which must be considered as a legitimate opportunity to enjoy this finite resource: (1) through private ownership; (2) through joint or community ownership, and (3) through public ownership. Public ownership of waterfront recreational facilities offers the highest benefit cost ratio, yet the amount of public ownership must necessarily remain quite limited. Joint or community ownership of waterfront presents the next highest benefit cost ratio, providing an effective means for multiple use and enjoyment of the shoreline resources.

VI.

The development as modified by this order is consistent with the policy of the Shoreline Management Act and the guidelines of the Department of Ecology. Therefore, the Shorelines Hearings Board makes thi

ORDER

1. The permit is remanded to the Mason County Commissioners to consider the environmental factors in the project and to make a determination, based on such consideration, as to: (a) whether the project is or is not a major action significantly affecting the quality

of the environment; (b) whether or not to require the preparation of an environmental impact statement, and (c) to reconsider the issuance of the substantial development permit in light of such determinations.

2. Upon reconsideration of the issuance of the permit, as above provided, and if the same shall be granted, this Board requires the following additional conditions thereto:

(a) That the rigid piers supporting the walkway extend no farther than 430 feet from the existing rock bulkhead;

(b) That only one 120 foot finger float be installed extending eastward from the end of the pier, and

(c) That use of the pier and beach facilities be limited to the owners and guests of the existing 397 platted lots.

DONE at Lacey, Washington this 10th day of August, 1973.

SHORELINES HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

RALPH A. [illegible]WICK, Member

W. A. GISSBERG, Member

Robert F. Hintz
ROBERT F. HINTZ, Member

Tracy J. Owen
TRACY J. OWEN, Member

JAMES T. SHEEHY, Member

DISSENT

I dissent from the Conclusions of Law and Order which the majority of this Board have entered. Both the applicant, Twanoh Falls Beach Club, Inc., and the Board of commissioners of Mason County have failed to compl with the purpose and spirit of the Shoreline Management Act of 1971 (SMA) and the State Environmental Policy Act of 1971 (SEPA). A substantial development permit as granted by the Mason County Commissioners should either be reversed and denied altogether, or remanded to the Board of Mason County Commissioners for substantial compliance with both Acts.

I agree with the majority that the permit must be remanded for compliance by the Commissioners with SEPA, but I dissent from the majority's Conclusion No. VI that the development as modified by its order is consistent with the policy of the SMA and the guidelines of the Department of Ecology.

Before approving this or any other pier application for Hood Canal we should know how the plan would fit in with a master program for the Canal. Another way of stating this is that a type of zoning should be promulgated by the Mason County Commissioners which would deal with location, spacing, length, buffer zones and density of use. No master program for the portion of Hood Canal lying within Mason County has been developed. The SMA provides that in preparing such a master program, local government shall give preference to uses in the following order of preference as stated in RCW 90.58.020:

"1. Recognize and protect the statewide interests over local interests;

"2. Preserve the natural character of the shoreline;

"3. Result in long-term over short-term benefit;

"4. Protect the resources and ecology of the shoreline;

"5. Increase public access to publicly owned areas of the shorelines;

"6. Increase recreational opportunities for the public in the shoreline;

"7. Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary."

The majority appears to approve of this type of development in its Conclusion No. V because it provides access to the beach with a higher "benefit cost ratio" than individual private ownership of the shoreline. It is questionable whether this particular use comes within any of the preferred uses under the SMA and this argument standing alone provides no justification for approval under the SMA.

RCW 90.58.140 provides that until such time as an applicable master program has become effective, a permit shall be granted only when the development proposed is consistent with the guidelines and regulations of the Department of Ecology. The proposed development is inconsistent with those guidelines. For instance, the guidelines relating to piers (WAC 173-16-060(19)), provides in part as follows: (1) That the use of floating docks should be encouraged in those areas where scenic values are high; (2) That those agencies faced with the granting of pier applications should establish criteria for their location, spacing and length with regard to the geographical characteristics of the particular area; (3) That the capacity of the shorelines sites to absorb the impact of waste discharges from boats, including gas and oil spillage,

should be considered.

The evidence before this Board does not convince me that the existing floating dock needs to be converted to a permanent pier and it appears that the Mason County Commissioners have developed no set of standards of criteria for the location, spacing and length of piers on Hood Canal. Neither does there seem to be any evidence that the impact of waste discharges has been investigated in any meaningful way, either by the applicant or the County Commissioners.

As measured by the guidelines of the Department of Ecology promulgated in December, 1972, for use with SEPA determinations, the project will also significantly affect the quality of the environment. The Board has taken the position that the permit application is for a total development incorporating previous improvements installed with or without a permit. The evidence before the Board indicated that the floating dock that now exists has had a great impact on the mouth of the creek on which it was built. Where once there was an abundant oyster bed, now there is none; where once the fish population in the creek was plentiful, now it is very small, if in fact it does exist; where once a significant smelt fishery was found on this shore, now there is none; where once the view of the tidelands and the waters of Hood Canal were unobstructed, now it is framed by unsightly piling. The additional construction would only increase these detrimental effects. These effects are irreversible for at least as long as the pier exists in its present location.

It appears that the only systematic evaluation for this pier application was made by the Hood Canal Advisory Commission and this

official citizens' group concluded and recommended to the Mason County Commissioners that the application for permit be denied on the basis that a float pier was preferable in an area of such scenic beauty as Hood Canal; that the pier was located at one edge of the property rather than the center, causing a significant interference in the use of the adjoining property; and finally, that the pier was too long in relation to the size of the beach it served.

There has been little or no systematic evaluation by the Board of Commissioners of Mason County nor this Board as to how this particular pier will actually benefit the people it is intended to benefit or how it will relate to a total picture of development of this type for Hood Canal. There is a question whether this project is needed at all for adequate recreational use of the area by the members of the Beach Club. The boat moorage facilities themselves will not change. Most of the individual beachowners adjacent to or near the project in this matter use the buoy method of mooring their boats which has no appreciable effect on the environment. Since a public launch facility is available nearby at Twanoh State Park, I see no reason why this method could not be used by members of the Beach Club. At the very least, I see no reason why the Club cannot continue with the existing floating dock. Although there was a claim made that the existing dock has a somewhat higher maintenance cost than a permanent pier, the testimony was vague on this particular issue and it did not appear that the cost was excessive when considered on a per-lot basis.

There has been an inadequate evaluation of the effects on the shoreline by reason of the upland use and the large numbers of people

which would be using the relatively small stretch of beach. In the recent decision of the Count of Appeals in the case of Merkel v. Port of Brownsville, 8 Wn. App. 844 (Div. II 1973), the Court held that a single improvement or project having an interrelated effect on both uplands and shorelines cannot be divided into segments for purposes of complying with the provisions of SEPA and SMA. This case applies to the Twanoh Falls Beach Club, Inc. improvement as the application for a pier is an integral part of the total recreational home development. In considering the numbers of people which would be entitled to use the relatively small area of beach, there could well be a density of use on this particular segment of shoreline which would greatly exceed the density of use on many, if not all, of our State parks. In fact, when all lots in the platted upland are sold and occupied and all owners and their families have joined in membership in the Beach Club, the density of use in the shoreline involved in this matter could eventually reach a figure which would constitute an inescapable, intolerable and unjust nuisance to the property owners adjacent to and in close proximity to the Twanoh Falls Beach Club.

Until we are provided with some kind of data or criteria, such as has not been provided in this case, this Board will be unable to make an intelligent and informed decision concerning pier applications. Private beach clubs should not be automatically allowed to construct environmentally damaging structures merely because they claim to give more people access to a limited area of beach. The project should be evaluated to determine whether or not it is really needed and how many people would really benefit by the construction. This should be

compared with how many people would be directly and detrimentally affected. It appears that the plan as approved will provide for moorage for only fifteen (15) boats, but more than fifteen (15) adjoining owners would be detrimentally affected by this project. There is no buffer zone between this pier and adjoining property such as we require for State parks and industries. No less should be required in this type of project.

For all of the foregoing reasons it is my belief that the permit should be either denied or remanded to the Board of Commissioners of Mason County for proceedings in conformity with both SEPA and SMA.

JAMES T. SHEEHY, Member
SHORELINES HEARINGS BOARD

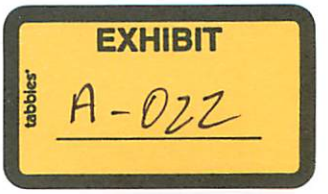
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

GIG HARBOR FISHING COMPANY LLC, Petitioner, v. GIG HARBOR MARINA, INC. and CITY OF GIG HARBOR. Respondents.	SHB No. 15-008 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Petitioner Gig Harbor Fishing Company (GHFC) appeals a decision by the City of Gig Harbor Hearing Examiner granting a Shoreline Substantial Development Permit (SSDP) to Gig Harbor Marina, Inc. (Marina) to restore a marine, diesel fuel dock. The Shorelines Hearings Board (Board) held a hearing in this appeal in the City of Gig Harbor on July 30-31, 2015.

The Board was comprised of Board Members Rob Gelder, Kay Brown, and Lily Smith. Administrative Appeals Judge Carolina Sun-Widrow presided for the Board. Attorney Amanda Nathan represented GHFC. Attorney Dennis Reynolds represented the Respondent Marina. Attorney Bio F. Park represented the Respondent City of Gig Harbor (City).

On the basis of the evidence presented at the hearing, the parties' arguments, and the Board's site visit to see the proposed fuel dock location and GHFC's adjacent dock, the Board issues the following decision affirming the Hearing Examiner's decision granting the SSDP.



FINDINGS OF FACT

1.

In June 2014, the Marina submitted to the City an application for an SSDP, site plan review approval, design review approval, and State Environmental Policy Act (SEPA) checklist to restore a marine, fuel service facility (fuel dock). The fuel dock was proposed to be located on a new float connected to an existing dock at 3313 and 3323 Harborview Drive in Gig Harbor. Katich Testimony, Exs. R-7, R-24, R-25.

2.

The proposed fuel dock is located on a parcel owned by the Marina that slopes down easterly from Harborview Drive to the tidelands on Gig Harbor Bay, which are owned by the Department of Natural Resources (DNR). Exs. R-1, R-2, p. 2. The Marina's upland parcel, referred to as Arabella's South Dock, contains parking lots, buildings, two buried fuel tanks, and a partially overwater restaurant on a fixed timber wharf. The fuel dock will be connected to the existing Bayview Marina located east and waterward of Arabella's South Dock. Bayview Marina is an existing private marina that provides permanent moorage for about 20 boats on a 325-foot-long floating pier. Moist Testimony. Finger piers extending from the north side of the pier provide moorage slips, and the pier's south side provides side tie moorage. A fixed timber pier and aluminum gangway connects Bayview Marina's floating pier to the upland Arabella's South Dock. Exs. R-3, p. 4; R-10; P-1.

3.

The portion of the Bayview Marina pier where the fuel dock will be located is mostly

surrounded by other docks. To the northwest is Arabella's Landing Marina, also owned by the Marina. To the east are the open waters of Gig Harbor Bay, and to the west is the upland property comprised of Arabella's South Dock. To the south and southeast is petitioner GHFC's dock, which is connected to upland property to the southwest improved with a single family home and a historic net shed. GHFC's dock was referred to as the Whittier dock during the hearing because De Whittier is the owner of the dock and upland property. Exs. R-3, p. 3-4; P-1. Both the Whittier dock and the Bayview Marina dock are located on leased DNR aquatic lands. Exs. R-2, p. 6; R-34.

4.

The fuel dock is to be located within a commercial waterfront area improved with water-dependent uses. The project site is in the Waterfront Millville zoning classification with a Historic District Overlay under the Gig Harbor Municipal Code (GHMC). That zoning allows for medium intensity, mixed uses, including marine dependent ones. *See* GHMC 17.14, Ex. R-9, p. 3, 7. The Gig Harbor Shoreline Master Plan (GHSMP) designates the site as "City Waterfront" Shoreline Environment, which allows for waterfront, residential, and commercial uses. *See* GHSMP 5.2.5. The goal of the City Waterfront designation is to preserve water-dependent uses such as boatyards and marinas, allow for a continued mix of uses, enhance public access to the shoreline, and protect existing shoreline ecological functions. *Id.* A marine fuel facility is a permitted use under the City's GHSMP. *See* GHSMP 7.11.10.

5.

The fuel dock will consist of an existing concrete float six feet wide and 110 feet long, and a new two-feet-wide, 74-feet-long concrete float added to the north side of the existing float. Three new diesel only fuel dispensers will be installed on the new concrete float: a low flow dispenser, a high flow dispenser, and a high flow satellite dispenser. The landward end of the existing concrete float will have a fuel service attendant's booth. Exs. R-9, R-10. The fuel dock will mostly serve boats larger than 35 feet long because that is the typical size of diesel powered boats. The fuel dock will not sell gasoline. Layton Testimony; Moist Testimony. The project will also remove and replace damaged piling cross supports under the pier, and also remove an existing finger pier that extends perpendicularly from the existing concrete float towards the Whittier dock. The underground fuel tanks on the Marina's uplands will be recommissioned, and a new double wall fuel service pipe will be installed from the tanks to the fuel dock. Exs. R-3, R-25.

6.

The fuel dock and the adjacent Whittier dock are separated by a waterway measuring 56.39 feet at its narrowest point. From that point, the width of the waterway increases both landward to over 70 feet and waterward to over 100 feet. The GHSMP requires a minimum setback of 24 feet between boating facilities. The City planner, Mr. Peter Katich, testified that the fuel dock complies with the GHSMP's setback requirement. The Whittier dock is approximately 17 feet from the property line, and the existing concrete float that will become part of the fuel dock is approximately 40 feet from the property line. Thus, the Marina provided

substantially more setback than did GHFC. Exs. P-4; R-32, R-35; Katich Testimony; Layton Testimony; Moist Testimony; Moore Testimony.

7.

The proposed fuel dock's Ingress/Egress Signage and Operation Plan calls for a 70 feet long fueling waiting area at the waterward end of the fuel dock on the south side of the Bayview pier. Ex. R-11, Attachment 1. Boats can leave the fuel dock by backing all the way to the bay in the waterway between the fuel dock and the Whittier dock. After clearing the end of the Whittier dock, boats can continue to back out in the wider channel between the Bayview pier and the covered Harborview Marina to the south. An alternative egress route would be for boats to back out until the end of the Whittier dock and turn around bow facing out toward the bay. The choice between these alternatives depends on the boat size and the skills of its operator. Babich Testimony; Layton Testimony; Moore Testimony.

8.

The former owner of the subject property operated a fuel dock known as the old Philpot fuel dock. Philpot's fuel dispensing service was located near the waterward end of the current Bayview Marina pier. After the property was sold, the Philpot fuel dock was removed and the upland fuel tanks and fuel conveyance system were decommissioned. Ex. R-9, p. 1; Moist Testimony; Katich Testimony. In the past Gig Harbor had four marine fueling facilities, but it has none presently. Under the City's prior GHSMP, marine fueling facilities required a shoreline conditional use permit. In order to encourage restoration of marine fueling facilities, the City Council eliminated the conditional use permit requirement for such facilities when it adopted its

current GHSMP. The current GHSMP, which became effective on December 27, 2013, is applicable here. Katich Testimony; Ex. R-2, p. 7.

9.

The City reviewed the application under SEPA, the Shoreline Management Act (SMA), and the GHSMP. It posted and published notice of the proposed project, and mailed notice to property owners within 300 feet of the site. The City issued a mitigated determination of non-significance (MDNS) for the proposed action. No appeals of the MDNS were filed. Katich Testimony; Exs. R-2, R-6, R-7, R-11, R-13. The City received one written comment expressing concerns about operation of the fuel delivery to the upland underground storage tanks. Katich Testimony; Ex. R-2, p. 5.

10.

City planner Peter Katich submitted a staff report to the City hearing examiner recommending approval of the SSDP conditioned upon compliance with the SEPA mitigation measures, including compliance with the Marina's Best Management Practices Plan, Habitat Management Plan and Informal ESA Report, and restrictions on fuel truck delivery times. Exs. R-9, p. 11, attachment G, R-15, R-21; Katich Testimony. The City hearing examiner reviewed the staff report and conducted a public hearing on the Marina's application on February 5, 2015. Ex. R-2, p. 3, 12; Katich Testimony.

11.

On February 25, 2015, the City hearing examiner issued a decision granting the Marina's request for an SSDP, site plan review approval, and design review approval for the fuel dock,

subject to conditions. On April 1, 2015, GHFC filed a petition for review of the hearing examiner's decision.

12.

The Board heard extensive testimony regarding the issue of ingress and egress by boats to the proposed fuel dock. GHFC presented the testimony of Vernon Moore, an experienced commercial and private vessel operator, in support of its position that the fuel dock will be difficult to safely access. Mr. Moore is familiar with the proposed fuel dock and Whittier dock, having brought in vessels to both docks many times. He currently moors a research boat (the "Sea 3") at the Whittier dock. In reviewing the proposed fuel dock, Mr. Moore looked at the site plan drawings and brought in several boats in late 2014 to moor at the Whittier dock. The diesel powered boats ranged in size from 39 to 78 feet long (11 to 14.5 foot beam), and were not equipped with bow or stern thrusters. Mr. Moore explained thrusters as mounted propeller systems that help boats steer side to side. He also testified that boats built after 2000 will typically have thrusters, but that commercial fishing boats and older boats typically will not. Mr. Moore took photographs from the boats as he entered and exited the Whittier dock and passed another boat docked at the location of the proposed fuel dock. Ex. P-3a through p. Mr. Moore is aware of the 56.39 feet separation between the two docks at the narrowest point, but pointed out that the distance would be reduced by the width of boats moored on either dock. Depending on wind and current conditions, Mr. Moore stated he would either not feel comfortable steering his boat, or would not attempt it, if there was a 24 to 28 feet separation between his boat and another boat moored at the fuel dock. Finally, Mr. Moore generally testified as to his concerns with the

steering difficulties of boats with no thrusters backing out of the fuel dock, the increased number of kayakers in Gig Harbor, and the tendency of ubiquitous single propeller boats without thrusters to veer toward port side, or toward the Whittier dock, when backing out of the fuel dock. Moore Testimony.

13.

GHFC also presented the testimony of Kae Paterson, a boater for nearly 50 years who is familiar with the proposed fuel dock and Whittier dock, having moored boats in Gig Harbor for nearly as long. She is concerned about the tight space between the fuel dock and Whittier dock, and that boaters backing out of the fuel dock would not be able to see kayakers. She believes that locating the fuel dock at the end of the Bayview pier parallel to shore would be better. Paterson Testimony.

14.

A different perspective regarding the potential difficulties posed by fuel dock ingress and egress was presented by the Marina's witnesses. Mr. Randy Babich, a commercial fisherman familiar with Gig Harbor Bay and fuel docks in general, operates vessels 55-58 feet long (average 15 foot beam). Mr. Babich does not have vessels moored at the Whittier dock or any of the Marina's docks. Mr. Babich testified that he is not concerned with ingress and egress to and from the fuel dock because most boaters have maneuvered in much narrower waterways with only 25-30 feet separation between docks, and because it was not uncommon for boats to back out for much longer distances. Mr. Babich also testified that he would exit out of the fuel dock

by backing out, turn around in the wider area past the Whittier dock, and head towards the bay bow out. Babich Testimony.

15.

Mr. Jeffrey Layton, a licensed civil engineer specializing in coastal engineering whose firm was retained by the Marina to design and obtain the permits necessary for the fuel dock, also testified regarding ingress and egress. Mr. Layton testified that navigating in and out of the fuel dock was not much different than entering into a double-loaded slip, or a finger pier with boats moored on both sides. Mr. Layton also demonstrated and testified to the distance between boats of different sizes moored at the Whittier dock and boats entering and exiting the fuel dock. Ex. R-35. Mr. Layton prepared exhibit R-35, which depicts a shaded gray area between the two docks extending roughly from the landward end of both docks, past their waterward end, and into the outer harbor line. The shaded grey area represents unobstructed navigable waters, taking into account a 15-foot moorage zone along the fuel dock and the Bayview pier. As to the narrowest 56.39 feet width of the waterway between the Whittier and fuel docks, the exhibit shows that the width expands landward to over 70 feet and more than 100 feet waterward. Exs. R-2, p. 11, R-25, P-4. Depending on the size of boats moored at the Whittier dock and boats coming to fuel, Mr. Layton testified that a fueled boat would back out approximately 110 to 150 feet from the fuel dock (depending on which fuel pump it used) to clear the end of the Whittier dock and turn bow out per Mr. Babich's testimony as to how fueled boats would exit. GHFC's expert, Mr. Moore, also testified that boats 40 to 50 feet long could similarly exit. Larger boats with lengths of 60 feet or more and 17-foot beams would most likely exit by backing all the way

out to the bay rather than turning around. Layton testimony. But the same larger boats would have less distance to back out because they would be fueling from the high flow fuel dispenser located toward the seaward end of the fuel dock. Layton Testimony. Moreover, boats longer than 60 feet long would not be common— the typical length of diesel boats at the fuel dock would be in the 35 to 60 feet range. Moist Testimony.

16.

The Marina's general manager, John Moist, also testified that the available navigable waters between the two docks provides a workable area for boats to enter and exit the fuel dock. Mr. Moist stated that the Marina has trained dock hands adept at helping large boats 50 to 60 feet long get into their moorage space safely. Mr. Moist is familiar with the fuel dock's Best Management Practices (BMPs) and the Fuel Dock Ingress/Egress Signage and Operation Plan attached to the BMPs. Ex. R-15. The BMPs sets forth standards for fueling practices, oil spill prevention and response, and management of chemicals and waste.

17.

Mr. Moist testified that the Marina will ensure safe ingress and egress and fueling practices by affixing signage of fuel dock rules on the dock and posting its ingress/egress plan and map on its website. The Marina's BMPs calls for an attendant to be at the fuel dock during all fueling operations. Signage will inform boaters whether the fuel dock is open or closed, advise boaters to wait for the attendant's directions, and inform them that boats cannot turn around or raft at the fuel dock or waiting area. The operation plan allows two boats to fuel stern to bow, depending on the boat lengths involved. As to the exit plan for two fueling boats, Mr.

Moist testified that the boat closest to shore will wait until the boat behind it finishes fueling and exits, unless the shoreward boat operator feels it is safe to back out with a fueling boat immediately behind. Mr. Moist stressed that captains are ultimately in charge of their boats, and that attendants cannot control a boat's path or always ensure that boats will abide by the signage rules. He also acknowledged that there are many kayakers in the area, and that it was incumbent upon boat operators to be aware of surroundings in the congested inner harbor. Finally, Mr. Moist testified that in his 14 years managing three marinas in Gig Harbor, there were only four or five accidents, only one of which required a minor repair. Moist Testimony.

18.

Mr. Katich, the City planner that recommended approval of the SSDP, testified that the City relied on DNR's determination that the proposed fuel dock location and the fuel dock's Ingress/Egress Signage and Operation Plan provided adequate space for safe ingress and egress. Ex. R-2, p. 6; Katich Testimony. Specifically, DNR approved the fuel dock location and considered access to both the fuel dock and Whittier dock. Ex. R-2, p. 6. DNR's requirements for its approval were incorporated into the Marina's BMPs. *Id.*

19.

The Board finds that the fuel dock, as approved and conditioned in the SSDP, provides sufficient space for safe ingress to and egress from the fuel dock. The Board was persuaded by the testimony of the Marina's witnesses, especially that of Mr. Layton who testified that access to the proposed fuel dock will not be more difficult than typically faced by boaters in marinas.

The Board finds that the BMPs and the Dock Fuel Ingress/Egress Signage and Operation Plan further enhance safe ingress and egress.

20.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over this matter under RCW 90.58.180. GHFC has the burden of proving that approval of the SSDP is inconsistent with the requirements of the SMA and/or the City's GHSMP. RCW 90.58.140(7). The scope and standard of review for this matter is *de novo*. WAC 461-08-500(1).

2.

The pre-hearing order entered in this case identified four issues agreed to by the parties:

1. Does the proposal meet the requirements for an SSDP under the SMA, the City's GHSMP, and applicable land use regulations?

2. Does the proposal comply with the policies and requirements regarding public navigation rights under the SMA and GHSMP?

3. Does the proposal unreasonably restrict GHFC's use of its aquatic leasehold and/or the safety and movement of the boats moored in its leasehold?

4. Does the failure to name the City as a party warrant dismissal of the appeal under WAC 461-08-350(2)?[1]

The crux of Issues Nos. 1-3 is whether the fuel dock approved in the SSDP issued to the Marina poses a hazard to public navigation and/or unreasonably restricts the use of GHFC's aquatic leasehold. The Board concludes that it does not.

3.

An SSDP shall be granted only when it is consistent with: (a) the policies and procedures of the SMA; (b) the provisions of the SMA implementing regulation; and (c) the applicable master program adopted or approved for the area. RCW 90.58.140(2); WAC 173-27-150(1).

4.

The SMA sets forth multiple policies for state shorelines, including protection against "adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life," and protection of "public rights of navigation and corollary rights incidental thereto." RCW 90.58.020. Although protecting the public's right of navigation is a fundamental policy, the SMA also seeks to balance that right with development of the shorelines for reasonable and appropriate use by declaring that development proceed in a manner which, "while allowing for limited reduction of rights of the public in navigable waters, will promote and enhance the public interest." *Id.* Thus, case law and past Board decisions have recognized that a development proposal's interference with public navigation does not automatically

[1] At the hearing the Marina moved to withdraw legal issue no. 4 on the condition that the City state on the record that it was served, notwithstanding that it was not named as a party in the caption of GHFC's petition for review. The City stated that it was served with the petition, and the motion to withdraw was granted. The Board accordingly amends the case caption to add the City as a party respondent. *See* WAC 461-08-430, -440.

prohibit development. Rather, in assessing impacts to navigation, this Board must balance all reasonable uses of the water in allowing a limited reduction of the public's right to navigation. *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979); *Mukai v. City of Seattle*, SHB Nos. 00-029 and 00-032, COL 12 (2001).

5.

The GHSMP requires a minimum 24 feet separation between adjoining boating facilities in saltwater bodies unless the moorage structure is built pursuant to an agreement between adjoining owners. GHSMP 7.11.4(2) (boating facilities shall be located no closer than 12 feet from the property or lease line). The Board concludes that the fuel dock location complies with this separation requirement. The uncontroverted evidence showed that the fuel dock will be 56.39 feet from the Whittier dock at the narrowest point between the two docks. Moreover, the City recently amended its GHSMP to list marine fuel facilities as a permitted shoreline use in order to promote development of such facilities within the city and achieve the GHSMP goal of encouraging a variety of water-dependent activities, including commercial fishing and recreational boats. *See* GHSMP 7.1.1 (Permitted Use Table); GHSMP 7.11; SMP 7.11.10. 7.11; Ex. R-2, p. 3. Therefore, the remaining question is whether approval of the fuel dock complies with provisions in the GHSMP and the SMA that relate to public navigation hazards. Section 7.11.7 (7) of the GHSMP states in part that "[c]ommercial, industrial or public recreational docks, piers . . . shall be spaced and oriented to the shoreline in a manner that avoids or minimizes . . . [h]azards and obstructions to navigation, fishing, swimming and pleasure boating." GHSMP 7.11.7(7)(a).

6.

GHFC primarily argues that the fuel dock location poses a hazard to public navigation because boaters must back out from the fuel dock in a busy, narrow channel, often with boats moored on both sides and many kayakers paddling in the area. GHFC particularly focuses on the hazards that the proposed location will present to inexperienced boaters. The focus on novice boaters is not well taken since boaters have varying degree of skills, and the location and design of the fuel dock is neither inherently dangerous nor poses an unreasonable risk of collision for the general population of boaters. Similarly, the Board is not persuaded that the fuel dock unduly impacts the safety of kayakers since the testimony demonstrated that kayakers are present all over the bay, thus suggesting that kayaker safety is an issue that the whole harbor faces, not just the fuel dock site. Gig Harbor is a busy waterfront, and it is incumbent upon *all* boaters and kayakers to exercise due caution and to make prudent maneuvering choices.

7.

The narrowest 56.39 feet separation between the fuel dock and the Whittier dock, referred to by Mr. Moore as the "choke point," is indeed a point or a small area of constriction. From that narrowest point, the width of the waterway between the two docks expands both landward and waterward. The 56.39 feet separation complies with the GHSMP's setback requirements between boating facilities. Lack of visibility for boats backing out and concerns over maneuvering difficulties will be alleviated by the Marina's Ingress/Egress Signage and Operation Plan, and the harbor's no wake zone and speed limit of 3 miles per hour. The presence of the fuel dock attendant ready to direct boats and the fuel dock information posted on the

Marina's website will also help boaters moor safely, especially those who are not as experienced or familiar with the harbor. Finally, DNR approved the proposed fuel dock and the Ingress/ Egress Signage and Operation Plan.

8.

GHFC cited *Mukai* and *Harborview Marina* to support its claim that the location of the fuel dock creates a navigational hazard for fueling boats and boats entering and exiting the Whittier dock. But those cases are distinguishable. In *Mukai*, the navigational conflict was between Spinnaker's 52-slip moorage and Parkshore's 42-slip marina located in Lake Washington. The waterway distance between the Spinnaker fixed pier and the tips of Parkshore finger piers was only 36 feet, and Parkshore boaters had to make an "L" turn into the narrow waterway to enter or exit their finger pier slips. The difficulty in entering and exiting their slips caused Parkshore boaters to not leave their slips as often as they would like. *Mukai*, SHB Nos. 00-029 and 00-032 at FF 5, 11; COL 13. The Board in *Mukai* concluded that both Parkshore's and Spinnaker's navigation rights were affected, and that on balance, modifying Spinnaker's 93-foot fixed pier was necessary since it unreasonably interfered with navigation given the narrow waterway between the two moorage facilities. *Id.* at COL 13. In contrast, the distance between the fuel dock and the Whittier dock is 56.39 feet at its narrowest, and boats entering and exiting either dock would not be required to turn since they can also back straight out. If boats chose to turn, the configuration of the two docks would not require a ninety degree "L" turn within that narrowest point of the channel.

In *Harborview Marina v. City of Gig Harbor*, SHB No. 99-013 (2000), a condominium owner's association (Harborview) appealed a shoreline substantial development permit authorizing a 110-foot-extension of an existing fishing dock further into Gig Harbor Bay. *Harborview Marina*, SHB No. 99-013 at FF II, III. Harborview's private covered marina and the Philpot gas fuel dock were located adjacent to the fishing dock, whose extension would have come within 13 to 22 feet of the Philpot fuel dock. The Board ultimately concluded that the proposed dock extension should be shortened and narrowed because it interfered with safe public navigation around the fuel dock, not because it impeded navigation of boaters moored in the Harborview marina slips. *Id.* at COL VIII, IX. The Board specifically concluded that although extending the fishing dock would complicate access to the Harborview slips and require careful maneuvering, "other slips with a similar challenge have found the access tight, but workable," and that that Harborview was "not entitled to favored treatment simply because it exists." *Id.* at COL VI. Unlike the facts in *Harborview Marina*, the proposed fuel dock will not add any structures extending into the waterway between the fuel dock and Whittier dock, but will remove the existing finger pier that extends into the waterway, creating more room to maneuver. Moreover, the narrowest 56.39 feet separation between the fuel dock and the Whittier dock complies with the GHSMP's setback requirements between boating facilities, and is over 30 feet longer than the distance between the Philpot gas dock and the proposed fishing dock in *Harborview Marina*.

9.

GHFC also argues that the Marina should have considered other sites for the proposed

fuel dock that would not have required fueling boats to back out in a confined water channel. GHFC presented testimony that the location perpendicular to the end of the Bayview pier was a preferable or safer alternative site under certain wind and current conditions due to better visibility and more maneuvering space. Paterson Testimony; Moore Testimony. But GHFC provides no legal authority for the Board to require the Marina to consider alternative sites in an application for an SSDP. So long as public right to navigation is not impaired and the fuel dock complies with other policies of the SMA and GHSMP, the Marina need not consider alternative sites.

10.

Even if consideration of alternative sites was required, the Marina presented evidence at the hearing that it had discussed with the City the end of the Bayview pier as an alternative site for the fuel dock. That location, however, would require further extension of the fuel line, and in the event of an oil spill or fire, one occurring in the outer harbor would be more difficult to contain than one closer to shore. Stronger winds and currents in the outer harbor also create navigability challenges with the end of the pier location, and weigh against siting the fuel there. Moist Testimony; Layton Testimony.

11.

GHFC also asserts that the fuel dock will unreasonably restrict the movement of boats seeking to enter and exit the Whittier dock. In support of this claim, GHFC relies on Vern Moore's and Kae Peterson's testimony that entering and exiting the Whittier dock will be more difficult with large boats fueling adjacent to the dock. But Mr. Moore testified that the narrower

waterway between the two docks still provided sufficient room to maneuver despite his discomfort in operating in the tight space. He also specifically testified that 40-to 50- foot long boats could exit the waterway by backing out past the end of the Whittier dock and turn bow facing out. This is consistent with Mr. Layton's and Mr. Babich's testimony that boats could exit the fuel dock and Whittier dock in a number of ways depending on the size of the boat and the operator's skill. Although careful maneuvering is required, the situation is not unworkable because the turning and backing movement required is similar to coming in and out of double loaded slip configurations that is the norm in Pacific Northwest marinas. Layton Testimony.

12.

Even if GHFC satisfied its burden of proving that the fuel dock unreasonably restricted movement of its boats, the competing interests in this context would be those between two adjacent private pier owners. Consistent with its prior decisions, the Board concludes that to the extent the SMA requires any balancing of ingress and egress issues between neighboring piers, the City performed that balancing through the requirement of a 12-foot setback from any adjacent property or lease line in its GHSMP. *See Foreman v. City of Bellevue*, SHB No. 14-023, COL 27 (2015); *Yousefian v. City of Mercer Island*, SHB No. 12-010, COL 10 (2013). That setback requirement provides a 24 feet separation between adjacent boating facilities. As discussed, the location of the fuel dock complies with this setback.

13.

In sum, GHFC did not present sufficient evidence to meet its burden of proving that the Marina's fuel dock will impair safe navigation or unreasonably restrict movement of boats

moored at the Whittier dock. GHFC did not demonstrate that the fuel dock is inconsistent with the GHSMP or the SMA's policies and implementing regulations.

14.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing findings and conclusions, the Board enters the following:

ORDER

The Shoreline Substantial Development Permit to restore the Marina's diesel fuel dock as granted and conditioned by the City of Gig Harbor Hearing Examiner is AFFIRMED.

SO ORDERED this 28th day of September, 2015.

SHORELINES HEARINGS BOARD

KAY BROWN, Member

ROB GELDER, Member

LILY SMITH, Member

Carolina Sun-Widrow, Presiding
Administrative Appeals Judge

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT ISSUED BY THE CITY OF ANACORTES TO HAROLD W. MOUSEL, SAVE FLOUNDER BAY, AN UNINCORPORATED ASSOCIATION, SHELDON ROTCHEL and ROBERT WARFIELD, Appellants, v. HAROLD W. MOUSEL and THE CITY OF ANACORTES, Respondents.	SHB No. 81-15 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a substantial development permit issued by the City of Anacortes to Harold W. Mousel came before the Shorelines Hearings Board, Nat W. Washington, Chairman, presiding, Gayle Rothrock, David Akana, Richard A. O'Neal, Frank Hansen, and Robert Landles, at a hearing in Anacortes on July 27 and 28, 1981.

Appellants were represented by their attorney J. Richard Aramburu;

respondent Harold W. Mousel was represented by his attorney James E. Anderson; respondent City of Anacortes was represented by Stephen Mansfield, City Attorney. Court Reporter Lois Fairfield reported the proceedings.

Having heard the testimony, having examined the exhibits, having viewed the site of the proposed development, and being fully advised, the Shorelines Hearings Board makes the following

INTRODUCTION

Although we have concluded that the subject substantial development permit is invalid due to inadequate public notice, we recognize that the issue is one of first impression which is not finally settled by our decision.

A full hearing has been held. In an effort to avoid the necessity of a second hearing on the merits, in the event our decision on notice is not upheld, we are making Findings of Fact and Conclusions on all the issues presented to us.

FINDINGS OF FACT

I

Respondent Harold W. Mousel on April 8, 1981, was granted a shoreline substantial development permit (No. 85) by the City of Anacortes, through its Planning Commission, to develop a marina within the confines of Flounder Bay. The permit is for the construction of 54 private, open-mooring berths and 52 automobile parking spaces. The mooring berths will be located on waters of the state, but the underlying land is the property of respondent. The parking spaces

will be on property of the respondent located on the artificial spit jetty which extends in a westerly direction from the mouth of the harbor and separates Flounder Bay from the open water of Burrows Bay. The location and nature of the proposed development is more particularly set forth in attachment "A" hereto.

II

Flounder Bay was at one time a natural bay protected by a natural spit running in an easterly-westerly direction with a harbor entrance at each end of the spit. To assist in understanding the situation there is appended as Attachment "B" an aerial photograph of Flounder Bay and its environs, which is appellant's exhibit 11(a) in reduced size.

Before the advent of the Shoreline Management Act, the natural bay was remodeled into an artificial harbor with a shape approximating a right triangle in which the hypotenuse is not straight but is deeply undulating.

The whole configuration of the shoreline presents an unnatural picture of geometrically precise curves and straight lines. The entire shoreline, except for a small portion which is bulkheaded, is protected by unsightly but highly practical rock riprap.

The northerly shore along the undulating hypotenuse of the triangle consists of four artificially constructed peninsulas called cays which provide waterfront residential sites and four artificially developed narrow embayments, called lobes, which provide water frontage, boating access, and moorage for the residential sites.

The natural sand spit which once formed the southerly margin of the bay has been heightened and widened by fill material and is protected on both sides by rock riprap. The natural entrance at the westerly end of the spit has been completely filled. Thus, the southerly leg of the triangle which separates Flounder and Burrows Bays is now an artificially constructed jetty which protects the harbor. It also provides access and automobile parking to serve many of the existing boat mooring berths and has sufficient space to provide access and parking for the proposed marina development.

The entire westerly shore of the triangular bay supports an assortment of boat mooring facilities including two large, covered moorages.

The moorage facilities now in Flounder Bay are capable of mooring about 500 boats. In addition to the development being proposed by respondent Mousel, there is a pending proposal by Skyline Marina for an additional 108 moorage berths, as shown by Figure 2-2 of Exhibit A-3.

III

The City of Anacortes has established a fairway 130 feet in width for passage of boats in and out of the harbor. The entrance to the harbor is only about 85 feet in width. The marina, as authorized by the substantial development permit issued by the city, will not encroach upon the fairway.

IV

Appellants contend the proposal will increase traffic and make navigation in the bay more difficult and more dangerous and in

addition will (1) cause a substantial deterioration of water quality, (2) increase noise levels, (3) increase air pollution, (4) cause substantial aesthetic deterioration, (5) limit recreational use of the bay and cause a reduction of open water for boats seeking refuge from storms. However, appellants' chief contention and the contention to which the bulk of appellants' evidence was directed is that respondents' proposed marina development will result in congestion of boat traffic such that navigation in the bay will be made difficult and dangerous.

V

Under the Anacortes Shoreline Master Program (ASMP), the area in which the proposed development will be located has been designated as Urban II (map between pages 16 and 17). At page 11 the ASMP provides that it is the intent to "encourage the location of water dependent or water related uses attractive to the public in Urban II." Marinas are specifically identified as a permitted use. It has also been zoned to provide for marinas.

VI

The proposed development will result in a deterioration of water quality, an increase in noise levels, and an increase in the levels of air pollution. The additional mooring floats will cause some reduction of surface water circulation which will result in an increase in the accumulation of unsightly floatable waste material. However, the deterioration in the quality of the environment resulting from these adverse impacts will not be substantial and will be more

than offset by the benefits to navigation which will result from the increased availability of moorage.

VII

Whether the increases in the ratio of moored boats to open water in Flounder Bay will result in increasing or decreasing the quality of the view from the adjacent residential area and from the immediate perimeter of the bay depends on the preference of the individual observer. To some, the sight of closely moored boats of many sizes, shapes, and colors adds an interesting nautical dimension to a view, particularly when there is a vista of open water, islands and mountains in the background. To others, the sight of closely moored boats is a clutter and an intrusion on an otherwise natural scene. The later point of view is most apt to prevail when a pristine natural bay or harbor is involved, and such is not the case here. The impairment of view, if any, will be minimal.

VIII

The proposed development will lessen the area of open water in the bay and might tend to adversely affect somewhat the small boat recreational use of the bay itself for recreational boating. However, the evidence presented at the hearing did not establish that the small bay itself is used to any substantial degree for recreational boating.

IX

The proposed marina extension will reduce the amount of open water available in the bay for use as a refuge for boats and seaplanes during storms, but it was not established that there would not be ample, open water remaining to adequately accommodate this use.

X

Flounder Bay, with its largely man-made protective spit and narrow 85 foot entrance, was obviously designed and constructed to reduce wave action and to produce a safe moorage for boats. It is now being successfully used for this purpose.

As a general rule, the expansion of an existing marina rather than the construction of a new facility results in less total adverse impact on the environment. Unless there are compelling non-environmental reasons against it, protection of the environment would be furthered by utilizing Flounder Bay to the maximum practical extent for boat moorage. The City of Anacortes has opened the door to such use by allowing all of the bay south of the south boundary of the 130 foot fairway to be utilized for moorage and moorage access.

XI

The proposed marina development will narrow the navigation channel bayward from the narrow entrance to the bay. It will, to some extent, restrict the freedom of movement of boats in the channel and will cause some reduction in the safe speed of boats operating within the narrowed channel. During heavy boating activity on holidays and weekends in July and August, the result will be some increase in traffic congestion within the bay. The evidence did not establish that the lowered speed and resulting increase in traffic congestion would result in an unreasonable threat to navigational safety.

XII

Boats moored in the segment of the proposed marina development located between the turn in the channel and the entrance to the bay

will partially obscure the view from boats approaching the turn from both directions. Boats approaching the turn while traveling near the center of the channel (the deepest part) will, because of the wide angle of the turn (about 120°) have a line of sight which is long enough to allow ample time and distance for evasive action.

The soundings and measurements taken by appellants' witness Richard Threet (exhibit A-7) indicates that the fairway (channel) adjacent to the proposed marina is about 12 to 13 feet deep at the center, becoming somewhat more shallow at the outer margins. The depths at the outer margins varies between 9 and 11 feet.

XIII

The only element of the proposed marina which might pose an unacceptable navigational risk is the placement of 14 berths in such a way that boats leaving them must back into the fairway. This is not desirable and should be avoided, if possible.

The question to be determined is whether the increased risk of collisions or groundings will be offset by the benefits to navigation which will result from the increased availability of moorage.

The Port of Bellingham which has about 1,000 berths with some boats as long as 80 feet has a section of 40 berths opening directly into the main channel. It is the only marina in the area which has such an arrangement. No safety or congestion problems have resulted from this arrangement at the Bellingham facility. Some witnesses expressed fears regarding the 14 berths opening directly into the fairway, but it was not shown that this berthing arrangement poses any

more than a minimal safety risk. In all probability there are ways this minimal risk could be lessened; such as by instituting traffic control measures. Safety measures might well be instituted by the cooperative efforts of the owners and lessees of moorage space, or in the alternative, they could be instituted by the City of Anacortes.

The minimal safety risk, although requiring attention, is offset by positive factors of public benefit. The Anacortes area is an area of high boating use where there is a high, unmet demand for moorage. Environmentally acceptable areas available for moorage are limited, making it environmentally preferable to add additional berths to existing moorage facilities rather than developing new areas.

XIV

The subject development as applied for did not include dredging. It appears, however, that some additional dredging will be necessary if all of the proposed mooring berths are to be made usable for other than shallow draft boats. An already-existing substantial development permit (No. 56) issued by the City of Anacortes on April 26, 1978, will allow the necessary additional dredging to take place. The environmental impact statement mistakenly stated that no additional dredging would be required. This mistake is of minimal environmental importance, since by issuing the existing shoreline development permit, the City of Anacortes indicated that it had already been determined that the dredging was compatible with ASMP and chapter 90.58 RCW. WAC 173-14-060 provides that a substantial development permit once issued is operative for five years from the date of

issuance, unless the permit itself specifies an earlier termination date. Substantial development permit No. 56 (exhibit A9(b)) does not provide for an earlier termination date.

XV

In addition to the substantive issues heretofore discussed, the appellants raised a basic procedural issue by contending that the city did not give any notice of the filing of the application for the substantial development permit as required by RCW 90.58.140(4)(b). It was admitted by the environmental hearings officer of the city of Anacortes that notice of filing was not given by the city as required by RCW 90.58.140(4)(b) and section 11(b) of the ASMP. In fact the city completely failed to follow the notice requirement of RCW 90.58.140(4)(b) and its own posting requirements set forth in section 11(b) of ASMP. No notices were posted on the subject property or anywhere in the vicinity of the proposed development, and no notices were mailed to owners of record within 300 feet of the subject property.

Two notices were posted in the central business district at the post office and the City Hall, both of which are much further than 300 feet from the subject property. No claim was made by appellants that the notice of filing was not properly published in a newspaper of general circulation in the City of Anacortes.

Sheldon Kotchel, president of Save Flounder Bay, an unincorporated association consisting of some of the residents of the Skyline Community and some of the owners and renters of moorage space in the

existing marinas, responded on March 20, 1981, to the EIS of the proposed marina on behalf of the association's members. He is also an individual appellant in this matter.

R. L. Carlson, president of the Board of Trustees of Skyline Beach Club on March 12, 1981, responded to the EIS on behalf of the members of the club and spoke in opposition to the development at the hearing before the planning commissioners. The owners of lots in the Skyline residential development are automatically members of the club. In speaking at the planning commission hearing, Mr. Carlson stated that each of the approximately 1000 members had been polled regarding their views on the subject of additional commercial moorage in Flounder Bay. The notice however did not specifically mention the proposed Mousel development. He stated that about 528 ballots were returned. There were 332 votes against additional moorage and 196 votes for. The trustees of the club voted to actively oppose the proposed marina.

Mr. and Mrs. Robert Griesel, residents of Skyline, and owners of a condominium moorage responded to the EIS on expressing opposition to the Mousel Marina. (They indicated in their letter that as of March, 1981, many other people were aware of the proposed marina and would attend the planning commission meeting to express opposition.)

Opposition to the proposed development was expressed both by responses to the EIS and by statements at the public hearing before the planning commission. Five written citizen responses were made to the EIS, four being opposed and one being in support of the project. Six citizens expressed opinions at the public hearing on April 8,

1981, three expressing opposition and three expressing support. A broad segment of the residents in the immediate area and the owners and lessors of moorage space in the bay had by February and March of 1981 gained actual notice of the application and the hearing.

The application for the permit was filed on May 24, 1979, but broad public awareness does not appear to have been generated until February and March of 1981. It was during this period between May, 1979, and March, 1981, that the city made one of its most important decisions relating to the project. This was the decision to establish the width of the fairway channel at 130 feet.

XV

CONCLUSIONS OF LAW

NOTICE ISSUE

I

As discussed in Finding of Fact XV the environmental officer of the City did not give notice of the filing of the permit application as required by RCW 90.58.140(4)(b), WAC 173-14-070 and Section 11 of ASMP.[1] Section 11 of ASMP provides in part as follows:

> (b) Upon receipt of the application, the Environmental Officer shall instruct the applicant to publish notices of the application once a week for two consecutive weeks in a newspaper of general

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1. The issue of notice arose late in the hearing during the cross-examination of the environmental officer of the city. The issue had not been set forth in the pre-hearing order. Respondent Mousel, however had already opened up the issues of hearings and notice by moving to dismiss appellants' case on the ground that they had failed to exhaust their administraitve remedy before the planning commission. This issue likewise had not been set forth in the pre-hearing order.

circulation in the City of Anacortes. In addition, the Environmental Officer shall post at least four copies of the notice prominently on the subject property or in conspicuous public places within 300 feet thereof. Within thirty days of the final publication of notice, any interested person may submit his views upon the application, in writing, to the Environmental Officer. All persons submitting views or requesting notice shall be entitled to receive a copy of the action taken on the application. (Emphasis added.)

(c) As a part of the substantial development permit review process, the Planning Commission may, at their discretion, provide for a public hearing on the application, particularly when: (Emphasis added.)

(i) the proposed development has broad public interest.

(ii) the proposed development will require a shoreline conditional use or a variance from the provisions of this Master Program.

(A hearing shall not be more than 15 days after the initial 30 day review period.)

(d) Not more than 5 working days after the 30 day review period, or following a hearing, if necessary, the Environmental Officer shall recommend approval or denial of the permit to the Planning Commission who shall approve or deny the permit at their next meeting. If the Planning Commission does not act on the permit the decision of the Environmental Officer shall stand. (Emphasis added.)

RCW 90.58.140(4) provides in part as follows:

(4) Local government shall require notification of the public of all applications for permits governed by any permit system established pursuant to subsection (3) of this section by ensuring that:

(a) A notice of such an application is published at least once a week on the same day of the week for two consecutive weeks in a legal newspaper of general circulation within the area in which the development is proposed; and

(b) Additional notice of such an application is given by at least one of the following methods:

(i) Mailing of the notice to the latest recorded real property owners as shown by the records of the county assessor within at least three hundred feet of the boundary of the property upon which the substantial development is proposed;

(ii) Posting of the notice in a conspicuous manner on the property upon which the project is to be constructed; or

(iii) Any other manner deemed appropriate by local authorities to accomplish the objectives of reasonable notice to adjacent landowners and the public. (Emphasis added.)

Such notices shall include a statement that any person desiring to submit written comments concerning an application, or desiring to receive a copy of the final order concerning an application as expeditiously as possible after the issuance of the order, may submit such comments or such requests for orders to the local government within thirty days of the last date the notice is to be published pursuant to subsection (a) of this subsection. Local government shall forward, in a timely manner following the issuance of an order, a copy of the order to each person who submits a request for such order.

If a hearing is to be held on an application, notices of such a hearing shall include a statement that any person may submit oral or written comments on an application at such hearing.

WAC 173-14-070 provides as follows:

NOTICE REQUIRED. Upon receipt of a proper application for a shoreline management substantial development, conditional use, or variance permit, local government shall insure that notices thereof are published at least once a week on the same day of the week for two consecutive weeks in a newspaper of general circulation within the area in which the development is proposed. In addition, local government shall insure that additional notice of such application is given by at least one of the following methods:

(1) Mailing of the notice to the latest recorded real peroperty owners as shown by the records of the county assessor within at least three hundred feet of the boundary of the property upon which the substantial development is proposed.

(2) Posting of the notice in a conspicuous manner on the property upon which the project is to be constructed or,

(3) Any other manner deemed appropriate by local authorities to accomplish the objectives of reasonable notice to adjacent landowners and the public. (Emphasis added.)

> An affidavit that the notice has been properly published, and/or as applicable, posted or deposited in the U.S. mail pursuant to this section shall be affixed to the application. All such notices shall include a statement that within thirty days of the final newspaper publication, any interested person may submit his written views upon the application to the appropriate local government or notify the local government of his desire to receive a copy of the action taken upon the application. All persons who notify the appropriate local government of their desire to receive a copy of the final order shall be notified in a timely manner of the action taken upon the application. If a hearing is to be held on an application, notices of such a hearing shall include a statement that any person may submit oral or written comments on an application at such hearing. (Emphasis added.)

II

The effect of failing to follow the notice procedures set out in RCW 90.58.140(4) or the failure to follow the notice procedure set out by a shoreline master program, as far as can be determined, has not been directly ruled upon by the Shorelines Hearings Board or by the Courts.

In the recent shoreline case of Whittle v. City of Westport, SHB No. 81-10 (1981), the issuance of a substantial development permit was reversed on a number of grounds including the failure of the City to give notice as required by its own regulations. Whether the failure to substantially comply with 4(b) notice requirement would alone have been enough to bring about a reversal was not before the Board and was not decided in that case. In this case, however, this issue is squarely before us.

III

It is clear that RCW 90.58.140(4) requires the giving of two separate and distinct kinds of notice when an application for a substantial development permit is filed. One type of notice is prescribed in subsection (4)(a). It serves primarily to give notice to the general public of the area. It consists of the publication of a notice in a newpaper of general circulation in the area (hereinafter referred to as "4a notice"). The other distinct type of notice is set forth under subsection (4)(b). It primarily serves to notify adjacent property owners and those members of the public who use the shoreline for recreation and commercial purposes (hereinafter referred to as "4b notice").

Local agencies are given three optional methods for giving 4b notice, (1) mailing to adjacent property owners; (2) posting in a conspicuous manner on the property on which the substantial development is proposed; or (3) any other manner deemed appropriate by local authorities to accomplish the objectives of reasonable notice to adjacent landowners and the public.

The local authorities of Anacortes (City Council and Mayor) elected to give the required 4b notice by utilizing the third option set forth in (4)(b)(iii). They deemed that it would be appropriate to give notice to the adjacent landowners and the public by posting at least four copies of the notice prominently on the subject property or in conspicuous public places within 300 feet thereof.

IV

Public hearings in the permit process are encouraged by RCW 90.58.140, WAC 173-14-080, and section 11(c) of ASMP, but are not mandatory. The shorelines act appears to recognize that public input is more effective if it comes early in the process before the minds of those who influence decisions have become set. This means that public input to be truly effective at this stage needs to be directed initially at the staff personnel who will study the proposal and make the highly important recommendation to the final local decision maker or makers. It is apparently for this reason that public notice is required to be given at the very beginning of the process, when the permit application is first received, rather than waiting for notice to first be given for a public hearing which, if held, usually takes place near the end of the permit granting process.

It is particularly important in Anacortes that public input reach the environmental officer before he determines what his recommendation to the planning commission will be. This is true not only because it is broadly recognized by observers of the administrative process that staff recommendations have an excellent chance of being accepted, but for the additional specific reason that section 11(d) of ASMP provides that the recommendation of the environmental officer will stand if the planning commission fails to expeditiuosly act on the permit.

V

The requirement that 4b notice be given is a substantial and mandatory provision. It is not a mere technicality which can be

avoided by waiver or estoppel. It clearly appears to have been brought about by a strong recognition on the part of the legislature that notice published in a newspaper may give constructive notice but that in actual practice it seldom gives real notice to the people who are most directly concerned.[2] Those most directly concerned are the property owners adjacent to a proposed shoreline development and the members of the public who utilize the immediate area for recreational or commercial purposes.

VI

The Shoreline Managment Act originally provided for notice only by publication in a newspaper (4a notice), but the legislature in 1976 amended RCW 90.58.140(4) by specifically requiring that additional notice directed primarily at adjacent landowners and members of the public utilizing the shoreline for recreational and commercial purposes be given. This amendment, which established the 4b notice requirement, was a part of substitute House Bill 676 which passed unanimously in both the House and the Senate.

The history of the notice provision in State Environmental Policy Act (SEPA), Chapter 43.21C RCW, further indicates the concern the legislature had for giving adequate notice on matters relating to the environment and further indicates legislative distrust of relying mainly on published notice.

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2. The Kitsap County Superior Court case of Trask v. City of Winslow, No. 69405 (1976) was a shoreline case involving WAC 173-14-070 and a notice of application given only by publication. The Judge in his memorandum decision commented on the published notice stating, "It is common knowledge that few people read such newspaper notices..."

In 1973 the legislature established a limitation period for commencing action based on a violation of SEPA. For the purpose of stating the limitation period, it was required only that notice be published in a newspaper of general circulation in the area. However, in 1974 the legislature added a requirement that notice also be mailed to abutting property owners. (Section 2 Chapter 179, Laws of 1974 1st Ex. Sess.) In 1977 the legislature strengthened the mailing provision and in addition provided for posting notice on the property in a conspicuous manner as an alternative to mailing. (Section 1 Chapter 278 Laws of 1977, 1st Ex. Sess.)

VII

Proper 4b notice makes it probable that neighboring property owners and those members of the public who use the shoreline area for recreation and commercial purposes will receive actual notice of the proposed development at an early stage in the proceedings. Early notice will afford them the opportunity of making a meaningful input at an early stage. Since a public hearing is optional under the Shoreline Management Act, a written statement, which the statutory notice invites, may be the only way members of the public will have of expressing a viewpoint.

Only by actually receiving early notice as provided by section 4b can neighboring property owners and users of the subject shoreline be assured of an opportunity to provide input into the SEPA process which in some way is usually involved in processing a shoreline substantial development permit. SEPA encourages and provides for notice and public hearings, but notice and hearings are not mandatory.

VIII

We conclude that it was intended by the legislature that substantial compliance with RCW 90.58.140(4)(b) be mandatory and not discretionary, and that unless substantially complied with, would deprive any local quasi-judicial officer or body of jurisidiction to issue a permit.

IX

Although not required by the Shorelines Management Act to do so, the planning commission exercised its option of holding a public hearing on the permit application as provided by WAC 173-14-080 and section 11(c) of ASMP. The hearing was held on April 8, 1981. Appellants Kotchel and Warfield attended the hearing, but did not participate. The environmental officer of the city gave his report which was favorable to the project and a few people spoke for and against it. After adjourning the hearing, the commission went into session. After some discussion the commission voted to approve the permit with conditions as appealed. The minutes indicate that the permit and conditions were adopted, without amendment, as presented.

A hearing at this late stage was of limited value for providing meaningful public input. From the minutes of the hearing and meeting (exhibit R-9) it appears that the environmental officer had already determined to recommend issuance of the permit, and that the permit in final form with conditions had already been prepared for submission to the commission. It was to prevent meaningful public input from being limited to a presentation at a late-stage public hearing, such as this

one, that notice inviting public participation is required by statute and regulation to be given when a permit application is first filed. In a very practical way, RCW 90.58.140(4)(b) further encourages meaningful particpation by requiring more than just the traditional notice by publication. The City Council of Anacortes in a very practical way also did its part to encourage meaningful public input at an early stage in the permit process. By the enactment of section 11b of ASMP the council required conspicuous visual notice to be posted where it would most likely attract the attention of nearby property owners and members of the public utilizing the shoreline and water area for recreational and commercial purposes.

X

The attendance of appellants Kotchel and Warfield at the non-mandatory hearing held on April 8, 1981, did not amount to a waiver and does not estop them from raising the issue that the city completely failed to give the mandatory 4b notice which should have been given in May of 1979, when the permit application was filed. Neither did the submission by appellant Kotchel on March 21, 1981, of a letter of response to the Draft EIS amount to a waiver or estoppel of his right to object to the failure of the city to give the mandatory notice.

The fact that broad public awareness of the project had been gained by February and March of 1981 does not excuse the failure to give the mandatory 4b notice, particularly since consideration of the decision regarding the permit began when the permit was filed in May of 1979.

XI

On the strongly contested issue of navigation safety the evidence was conflicting and almost evenly balanced. The issue was close but it was determined that on the basis of the evidence presented the appellants had not sustained their burden of proof.

It was a close question before the Board and may well have been a close question as far as the city decision makers were concerned. It was a close issue which might possibly have been decided the other way by the environmental officer and the planning commission had other interested persons been alerted to the pendency of the permit application by notice posted according to the law.

Had the planning commission concluded that the marina would pose an unacceptable hazard to navigation, the positon of the parties might well have been reversed, with the city and Mr. Mousel being appellants with the burden of proof on this close issue.

XII

The giving of a notice in substantial compliance with RCW 90.58.140(4), WAC 173-14-070 and section 11 of ASMP is mandatory and jurisdictional. The failure of the city to substantially comply with the 4b notice requirement was fatal to the jurisdiction of the planning commission. Consequently, the substantial development permit issued by the commission is invalid.

XIII

It appears that there has been no case which has determined the legal consequences of failing to substantially comply with the notice

provisions of RCW 90.58.140(4), so it has been necessary for us to base our decision largely on our own interpretation of legislative intent. We note, however, that our decision is consistent with a respectable body of law developed in the field of zoning which is closely related to shoreline management.

The general rule regarding notice provisions relating to hearings on variances or special exceptions (conditional use) in connection with municipal zoning is that statutory notice requirements are mandatory and jurisdictional, and that a failure to substantially comply will invalidate the granting or denying of the requested permit. This general rule is well set forth in Anderson, American Law of Zoning, second edition and annot., 38 ALR 3d 167.

Anderson section 20.17, p 491 states:

> The tolerance of informality which is reflected in the judicial decisions which relate to pleadings, rules of evidence, and other aspects of board procedure, are less evident where notice and hearing are involved. These are regarded as essential ingredients of administrative justice, and substantial or even literal compliance with requirements as required. Statutory notice and hearing requirements are regarded as mandatory.

The following is set forth in annot., 38 ALR 3d 167, 174:

> Requirements respecting notice of hearing on an application to a zoning body or board for a variance or special exception are commonly set forth in zoning enabling statutes and/or in the local ordinances adopted pursuant thereto, and in construing such requirements, the courts have generally adopted the view that they are mandatory and jurisdictional. Thus, in a number of cases it has been held or recognized that failure to comply with the requirements of a statute or ordinance respecting notice of hearing on an application for a variance or special exception is fatal to the

jurisdiction of a zoning body or board, and that such failure to comply will invalidate the granting or denial of the requested variance or exception by such body or board.[2]

The Washington Supreme Court in Glaspey and Sons, Inc., 83 Wn. 2d 707,521 p.2d 1173 (1974) gave a strict interpretation to notice provisions for zoning hearings, which indicates that Washington should be considered among the states following the general rule which regards statutory notice requirements as being mandatory. The case involved the adoption of amendments to a proposed zoning ordinance in Yakima County, and the question was whether the notice adequately set

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2. See Also: Hart v. Bayless (Ariz. 1959) 346 P. 2d 1101, 1108, where it is stated:

> (9) This court has held that, where a jurisdictional notice is required to be given in a certain manner, any means other than that prescribed is ineffective. See Yuma County v. Arizona Edison Co., 65 Ariz. 332, 180 P.2d 868. This is so even though the intended recipient of that notice does in fact acquire the knowledge contemplated by the law. Such a rule is no mere "legal technicality"; rather it is a fundamental safeguard assuring each citizen that he will be afforded due process of law. Nor may the requirement be relaxed merely because of a showing that certan complaining parties did have actual notice of the proceeding.

Gallagher v. Board of Appeals (Mass 1966) 221 N.E. 2d 756, 758, where it is stated:

> A defect in the general notice to the public cannot be overcome by the appearance of some citizens and the absence of objection to the notice. All citizens are entitled to the statutory notice and the opportunity to be heard after it is given.

forth the purpose of the hearing. The court held that the notice was not adequate, that consequently procedural due process had not been accorded and that the resulting amendment was invalid in its inception

The court at page 712 stated the basic reason for giving adequate notice:

> ...adequate notice of a public hearing has another, more subtle, reason that goes beyond merely enabling the opposition to give vent to its feelings. (1) It is important that a board have an opportunity to reach an "informed" decision. (2) That reason is thwarted if interested parties are prevented from presenting their view because of a board's failure to adequately disclose the true "purpose of the hearing." (3) In short, failure properly to disclose the purpose of a hearing will create a potential information vacuum. (4) Unfortunately, the interested parties as well as the public at large will be deprived on an "informed" resolution of problems that are the subject of the hearing. (Numbering supplied.)

The above statement makes four key points relating to an inadequate statement of purpose, but the basic principles set forth could apply with equal force to a potential information vacuum caused by inadequate notice.

Courts which give a strict interpretation to notice provisions for the adoption of zoning ordinances generally give the same strict interpretation to notice provisions relating to variances and conditional use. For this reason zoning notice decisions, whether involving the adoption of zoning ordinances or the granting of variances or conditional uses may be considered for guidance in interpreting the notice provisions of the Shoreline Management Act. The Glaspey case may thus be looked to for guidance in interpreting the notice provisions of . RCW 90.58.140(4)(b).

There are jurisdictions which do not strictly adhere to the general rule that compliance with notice requirement is mandatory and jurisdictional. This more liberal interpretation is set forth in annot. 38 ALR 3d 167, 185 as follows:

> While the general rule that the notice requirements of a statute or ordinance governing the granting of variance or special exceptions are mandatory and jurisdictional as indicated in section 3 supra, would appear to be widely accepted by the courts, the extent and natuare of its application has been somewhat varied, ranging from seemingly strict adherence thereto and an apparent view that noncompliance with such rule may not be excused or cured, to the view that rigid enforcement of the rule is not always required and that, in proper circumstances, noncompliance therewith is excusable or curable.

A review of the cases presented in support of the above proposition disclose none with factual circumstances comparable to those in the case before us.

SUBSTANTIVE ISSUES

XIII

The issuance of the subject permit for an expansion of existing facilities in Flounder Bay is in conformance with the general policy expressed by the Shorelines Hearings Board in Citizens Interested in LaConner v. Skagit County, SHB No. 166 (1975) as follows:

> Generally speaking, the environmental impact would be less if expansion of an existing marina could be attained rather than the building of a new marina at an otherwise undeveloped site.

In Eickhoff v. Thurston County, 17 Wn. App 774 (1977), 565 P.2d 1196 the same general policy was expressed:

> The approval of the expansion of the marina, taking into consideration that the result of approval would have less adverse impact on nature than the creation of an additional totally new marina, was a proper action.

The Shorelines Hearings Board when the Eickhoff case, SHB No. 104 (1975) was before it stated the policy as follows:

> Such representatives of the public interest have concluded that the proposed expansion of Zittel's Marina is in the best interests of the people of Thurston County in that additional marina facilities are undeniably needed and that such expansion will have a lesser adverse effect on the overall shorelines of Thurston County than the establishment of new and/or other independent facilities.

XIV

Flounder Bay is located in a high boating use area, and is a non-natural shoreline area. Its designation, therefore, in the ASMP as Urban II which specifically encourages and provides for marinas was in keeping with the policy act set forth in WAC 173-16-060(5)(c) which provides:

> (c) Master programs should identify locations that are near high--use or potentially high--use areas for proposed marina sites. Local as well as regional 'need' data should be considered as input in location selection.

The issuance of the subject substantial development permit for an expansion of marina facilities in Flounder Bay was likewise in keeping with the policy of WAC 173-16-060(5)(c).

XV

RCW 90.58.020 provides in part as follows:

> In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic

> qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. (Emphasis added.)

Flounder Bay is not a natural shoreline area within the meaning of RCW 90.58.020, but even where it is necessary to alter natural conditions, marinas are among the uses to be given priority. Consequently, the issuance of the subject substantial development permit is in accord with above set forth policy of RCW 90.58.020.

XVI

Under the circumstances set forth in Finding of Fact XIV, the likelihood that further dredging may become necessary does not constitute piecemeal development as envisaged by RCW 90.58.020.

XVII

Based on the evidence presented to it at the hearing, although the issue was close, the Board has concluded that the issuance of the substantial development permit No. 85 was consistent with Chapter 90.58 RCW and the ASMP, but due to failure of the City to give the

mandatory 4b notice, the granting of the substantial development permit should be reversed.

XVIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The action of the City of Anacortes in granting the Shoreline Substantial Development Permit No. 85 is reversed and remanded to the City for further consideration.

DONE this 23rd day of October, 1981.

SHORELINES HEARINGS BOARD

Nat W. Washington
NAT W. WASHINGTON, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

(See Dissenting Opinion)
DAVID AKANA, Member

Richard A. O'Neal
RICHARD A. O'NEAL, Member

Robert L. Landles
ROBERT LANDLES, Member

(See Dissenting Opinion)
FRANK HANSEN, Member

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL DEVELOPMENT PERMIT GRANTED BY JEFFERSON COUNTY TO OLYMPIC SEA FARMS, INC.,	
SOUTH POINT COALITION, Appellant,	SHB NO. 86-47
State of Washington DEPARTMENT OF ECOLOGY and DEPARTMENT OF FISHERIES, Appellant-Intervenors	
v.	ORDER GRANTING SUMMARY JUDGMENT
JEFFERSON COUNTY and OLYMPIC FARMS, INC., Respondents,	
and	
State of Washington DEPARTMENT OF NATURAL RESOURCES, Respondent-Intervenor	

This matter, having come before the Board by Motion for Summary Judgment filed by Appellant South Point Coalition ("South Point"), and the Board having considered the following:

1. South Point's Motion for Summary Judgment filed March 16, 1987, together with Memorandum in Support and Exhibits A, B, C, D, E, F (affidavit of S. Ralph), and affidavit of R. Meinig and its Exhibits 1, 2, 3, 4; and

2. Respondents Jefferson County, Olympic Sea Farms, Inc., and Washington State Department of Natural Resources' Memorandum in Opposition filed March 31, 1987, and Exhibits A (affidavit of K. Perjancic) and B (minutes of Jefferson County Board of Commissioners' meeting September 8, 1986);

And being fully advised, the Board finds it to be uncontested that the affected Tribes, the Clallam and Skokomish Tribes represented by the Point No Point Treaty Council, were not sent the County's Determination of Non-significance ("DNS") and the environmental checklist. Pursuant to WAC 371-08-031(2) of the Board's procedural rules, and Civil Rule 56 of Superior Court, judgment as a matter of law should be granted, based on that finding alone. See Moe v. DOE, SHB No. 78-15 (1978). The undisputed facts are:

I

FINDINGS OF FACT

1. On June 16, 1987, Olympic Sea Farms, Inc. ("Olympic") filed with Jefferson County an application for a shoreline substantial

development permit. Olympic sought a permit to place 22 salmon net pens at South Point in the Hood Canal, approximately five miles south of the Hood Canal Bridge at the site of the former ferry terminal.

2. A Notice of Application was published in the Port Townsend Leader starting June 18, 1986 and for two weeks thereafter. Notices were sent to adjoining property owners and a notice was posted.

3. On July 21, 1986, the Jefferson County Board of Commissioners, after review of the environmental checklist and other materials, determined it was the lead agency for the project under SEPA, issued a DNS for the project, determining that an environmental impact statement was not required, and provided a comment period until August 6, 1987.

4. Neither the DNS nor the environmental checklist were sent to the affected tribes, the Clallam and Skokomish Tribes represented by the Point No Point Treaty Council.

5. The proposed project involves other agencies with jurisdiction to approve or deny its placement or operation, in addition to Jefferson County.

6. On September 22, 1987, after proceedings on September 8 and 15, 1987, the Jefferson County Board of County Commissioners issued a conditioned Shoreline substantial development permit to Olympic Sea Farms, Inc. A hearing had been held before the Jefferson-Port Townsend Shoreline Management Advisory Commission on August 6, 1986 on

the application, with additional Shoreline Commission proceedings that same month.

7. On October 27, 1986, appellant South Point Coalition filed a timely appeal with the Board.

8. A pre-hearing conference was held on December 16, 1986, before Judith A. Bendor, member and presiding, with all parties represented. As a result of the conference and written materials received and considered, pre-hearing orders were issued. A formal hearing was scheduled for May 18-27, 1987 and June 1-5, 1987.

9. On March 16, 1987, Appellant's Motion for Summary Judgment was filed. The Memorandum in Opposition was filed on March 31, 1987.

10. The Board reviewed the file herein, deliberated, and authorized that the presiding member deliver an oral opinion to the parties for their convenience. This was done by telephone conference on April 17, 1987; all parties were represented.

From the facts, the Board reaches the following legal conclusions:

II

CONCLUSIONS OF LAW

1. Jefferson County is the lead agency which issued the DNS, determined that an EIS should not be prepared, and provided a comment period on that decision. The County failed to notify affected Clallam and Skokomish Tribes of this decision, thereby violating the mandatory requirements of WAC 197-11-340(2)(b) which states:

> The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under 197-11-510. (Emphasis added)

2. A key goal of the State Environmental Policy Act ("SEPA") is to ensure that governments plan, decide, and implement the substantive provisions of the Act after being informed of environmental concerns. RCW 43.21C.020(2), 43.21C.110(1)(e) and (1); See Settle The Washington State Environmental Policy Act (1987) section 5(d) p. 33.

3. SEPA is a statute which places a heightened emphasis on clear procedures geared to informed governmental decision-making. Providing notice of a proposed action is central to ensuring participation, such that governments have the opportunity to engage in an informed process. See Glaspey & Sons v. Conrad, 83 Wn.2d 707, 521 P.2d 1173 (1974).

4. An informed process is vitally important to the integrity of SEPA, and therefore important for all Washingtonians, not just for those who may not have received notice and might thus be individually prejudiced. See Norway Hill Preservation & Protection Association v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976). This Board's Order, founded on SEPA, therefore does not and need not

address whether prejudice to a particular party may have occurred in this instance, despite respondents' contentions to this effect, e.g., Strand v. Snohomish, SHB No. 85-4 (1985).

5. In shorelines matters, the evidence considered by this Board may differ from that considered by the local permitting entity. New or additional information may be introduced. San Juan County v. Department of Natural Resources, 28 Wn.App. 796 626 P.2d 995 (1981). However, our review function cannot perform mandated procedural requirements assigned to local government. This has led us, in certain cases, to invalidate local decisions where notice requirements were not met, e.g., Save Flounder Bay, et al. v. City of Anacortes and Mausel, SHB 81-15 (1982); Schwinge v. Town of Friday Harbor, SHB 84-31 (1985).

6. The soundness of such an approach is even clearer when SEPA compliance issues are part of shorelines cases. A consistent theme when reviewing for SEPA compliance is an insistence on procedural regularity. The emphasis is on informed choice. For threshold decisions, this means that prima facie compliance with the procedural requirements of SEPA must occur before the deciding agency reaches its ultimate decision. Sisley v. San Juan County, 89 Wn.2d 78, 569 P.2d 712 (1977); Norway Hill, supra; Juanita Bay Valley

Community Association v. Kirkland, 9 Wn.App. 59, 510 P.2d 1140 (1973).

We conclude, therefore, that the information gathering function essential to an informed threshold decision cannot be performed at a later date by this Board. Strict compliance with the consultation requirements of WAC 197-11-340(2)(b) is necessary to the validity of a threshold decision. [1]

7. Respondents' claims that constructive notice has occurred and therefore compliance has resulted, is ultimately legally unpursuasive. The requirement to send the notice is clear and unambiguous, and has not been fulfilled. The unambiguous language of the regulation leaves no room for construction; its plain meaning is to be given effect. See, King County v. The Taxpayers of King County, 104 Wn.2d 1, 700 P.2d 1143 (1985); Bavarian Properties, Ltd. v. Ross, 104 Wn.2d 73, 700 P.2d 1161 (1985).

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1. Where, as here, there is more than one agency with jurisdiction the responsible official's initial DNS determination is merely tentative. WAC 197-11-340. Other entities must be notified, provided the DNS and environmental checklist, and their responses considered. WAC 197-11-340(2)(b). If, after this comment cycle, "significant adverse impacts are likely", the DNS must be withdrawn. WAC 197-11-340(2)(f). WAC 197-11-340(3)(a)(ii).

8. Respondents' contention that affected Tribes' concerns are the same as those of non-tribal gill netters is speculative, unsupported by the record before the Board, and ultimately legally irrelevant. The regulation requires that notice to the Tribes shall be given.

9. Respondents' contention that newspaper articles notifying the public about the permit applicaton somehow supplant WAC 197-11-340(2)(b) SEPA notice requirements for the Tribes is misplaced. The WAC mandatory language requires specific notice to the Tribes and to agencies, political subdivisions, as well as notice under 197-11-510 In addition, many of the newspaper articles cited by respondents occurred on dates after the County's July 21, 1986 threshold decision and DNS issuance, and even after the DNS comment closure date of August 6, 1986.

10. Even if the Tribes might have been afforded notice through the United States Army Corps of Engineers Section 10 Permit process, as respondents contend, such procedure in no way abrogates Washington residents' rights to an informed threshold decision by State or local government through State Environmental Policy Act procedures .

11. We hold the County's failure to comply with WAC 197-11-340(2)(b), by failing to notify the affected Tribes

about the DNS and to notify them about the opportunity to comment on it, as a matter of law deprives the County of an informed decision under SEPA. Therefore, the DNS shall be vacated and the substantial development permit reversed and remanded.

III

The Board further finds that there remain genuine issues of material fact regarding the following legal issues:

1. Was the content of the notices of the shoreline substantial development permit application, as required by WAC 173-14-070, so inaccurate or otherwise defective as to merit reversal? (Appellant's Issue II A.)

2. Did the shoreline permit application process fail to provide affected Tribes notice and the opportunity to comment, so as to contravene the Shoreline Management Act ("SMA") or the implementing regulations, so as to merit reversal under Chapter 197-11 WAC? (Appellant's Issue II B.)

3. Did the Jefferson County Board of Commissioners fail to consider the impact of the proposed net pens on existing commercial fishing operations, or on navigation, so as to contravene the SMA or SEPA, and thereby merit reversal? (Appellant's Issue II E.)

4. Has the proposed project changed so substantially since DNS issuance, so as to require under SEPA or WAC 197-11-340(3)(a) or (c) the vacating of the DNS, and a remand to the County for a new threshold determination? (Appellant's Issue II F.)

5. If errors were committed regarding notice of the shoreline permit application (Appellant's Issues II A. and B.), were the cummulative effects sufficient to merit reversal? (Appellant's Issue II D.)

The Board, therefore, declines to issue Summary Judgement on the above five issues.

ORDER

Appellant's Motion for Summary Judgment is GRANTED in part, and DENIED in part.

Jefferson County's approval of the Shoreline Substantial Development Permit is hereby reversed and remanded for proceedings consistent with this Order.

DONE this 26th day of May, 1987.

SHORELINES HEARINGS BOARD

JUDITH A. BENDOR, Presiding

LAWRENCE J. FAULK, Chairman 5/20/87

WICK DUFFORD, Member

NANCY BURNETT, Member

LES ELDRIDGE, Member

DENNIS McLERRAN, Member

HESTER LAW GROUP, INC., P.S.

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