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FILED
COURT OF APPEALS DIV. #1
2010 APR -9 AM 10:36

No. 64326-6

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

CHRIS HUGHES, dba ADMINISTRATORS & CONSULTANTS, LLC,

Respondent,

v.

FRIENDS OF THE SAN JUANS,

Appellant,

SAN JUAN COUNTY, a political subdivision of the State of Washington;
SHORELINES HEARINGS BOARD, an agency of the State of
Washington,

Necessary Parties.

On Appeal from the Superior Court of the
State of Washington for San Juan County

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT CHRIS HUGHES**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ISSUE ADDRESSED BY AMICUS	1
ARGUMENT	2
I. THE BOARD MAY NOT VACATE A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT ON THE BASIS OF HYPOTHETICAL ENVIRONMENTAL IMPACTS	2
II. CONSIDERING HYPOTHETICAL ENVIRONMENTAL IMPACTS PREJUDICES PERMIT APPLICANTS	5
A. Considering Hypothetical Environmental Impacts Unfairly Shifted the Burden of Proof to Hughes	5
B. Considering Hypothetical Environmental Impacts Caused the Board To Abandon the SMA for an Erroneous Precautionary Approach	6
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
<i>Buechel v. Dep't of Ecology</i> , 125 Wn.2d 196 (1994)	5
<i>Danny v. Laidlaw Transit Servs., Inc.</i> , 165 Wn.2d 200 (2008)	3
<i>Ferry County v. Concerned Friends of Ferry County</i> , 155 Wn.2d 824 (2005)	8
<i>Jefferson County v. Seattle Yacht Club</i> , 73 Wn. App. 576 (1994)	2
<i>May v. Robertson</i> , 153 Wn. App. 57 (2009)	2-4, 6
<i>Nisqually Delta Ass'n v. City of DuPont</i> , 103 Wn.2d 720 (1985)	6
State Statutes	
RCW 90.58.020	6
RCW 90.58.140(7)	5
WAC 173-27-150	3
WAC 461-08-500(3)	5
WAC 461-08-505(2)	2
County Code	
San Juan County, Wash. Code 18.50.070(F)	3
Miscellaneous	
Aldisert, Ruggero J., <i>Logic for Lawyers: A Guide to Clear Thinking</i> (3d ed. 1997)	5

	Page
Charest, Stephen, <i>Bayesian Approaches to the Precautionary Principle</i> , 12 Duke Envtl. L. & Pol’y F. 265 (2002)	7
Doremus, Holly, <i>Precaution, Science, and Learning While Doing in Natural Resource Management</i> , 82 Wash. L. Rev. 547 (2007)	7
Marchant, Gary E. & Mossman, Kenneth L., <i>Arbitrary and Capricious: The Precautionary Principle in the European Union Courts</i> (2005)	8
Sunstein, Cass R., <i>Laws of Fear: Beyond the Precautionary Principle</i> (2005)	7
Trouwborst, Arie, <i>Evolution and Status of the Precautionary Principle in International Law</i> (2002)	7
Volokh, Eugene, <i>The Mechanisms of the Slippery Slope</i> , 116 Harv. L. Rev. 1026 (2003)	3

INTRODUCTION

The Shorelines Hearings Board (Board) may not vacate a shoreline substantial development permit on the basis of hypothetical impacts to the environment. A hypothetical impact is, by definition, speculative, and the Shoreline Management Act (SMA) requires more than speculation to vacate a permit. To the extent that the Board's decision to vacate Chris Hughes' permit is based on hypothetical environmental impacts, that decision is erroneous.

The Board decision under review here contains two fatal flaws relating to hypothetical environmental impacts: (1) The Board's decision to vacate the permit is not supported by the Board's findings and conclusions relating to eelgrass impacts; and (2) the Board's focus on hypothetical environmental impacts unfairly required Hughes to prove an "absence of impacts" pursuant to an excessively precautionary permit review process. For these reasons, the Court should affirm the decision of the San Juan County Superior Court upholding Hughes' permit.

ISSUE ADDRESSED BY AMICUS

Whether the Board may vacate a shoreline substantial development permit on the basis of hypothetical environmental impacts? Addressing Br. of Appellant at 1, Issues Pertaining to Assignments of Error No. 3.

ARGUMENT

I

THE BOARD MAY NOT VACATE A SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT ON THE BASIS OF HYPOTHETICAL ENVIRONMENTAL IMPACTS

The Court must determine whether substantial evidence supports the Board's decision when viewed in light of the whole record before the Board. *May v. Robertson*, 153 Wn. App. 57, 74 (2009). Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise. *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588 (1994). Under this standard, generalizations about potential environmental impacts are not sufficient to qualify as substantial evidence. *See May*, 153 Wn. App. at 92-94 (refusing to vacate shoreline permit on the basis of "generalities" not tied to fact-based evidence). The Board may not rely on hypothetical environmental impacts in vacating a shoreline substantial development permit. *See id.*; WAC 461-08-505(2) (Board considers only evidence that is "material and relevant.>").

When Chris Hughes applied for a shoreline substantial development permit to build a dock, he triggered San Juan County's Shoreline Master Program (SMP) review process, which required him to show that the

proposed dock would minimize adverse impacts to fish and wildlife. CP 17; San Juan County, Wash. Code 18.50.070(F). Hughes satisfied this burden. The county evaluated Hughes' proposal and, following negotiations over development conditions, approved the permit. CP 18-19; *see* WAC 173-27-150. After approval, however, Friends of the San Juans (FSJ) appealed the permit to the Board, arguing that Hughes' dock should not be permitted because shoreline development at Hughes' site could cause eelgrass beds to thin, sparking a chain reaction and contributing to a "global crisis" of eelgrass decline. AR Vol. 3, Ex. C at 11-12; *see* AR Vol. 3, Petitioner Friends of the San Juans' Pre-hearing Brief at 4; Br. of Appellant at 13-16, 21. But without concrete evidence supporting this proposition, FSJ's argument is just a parade of horrors, and cannot be grounds to overturn the county's permit approval. *See May*, 153 Wn. App. at 92; *see, e.g., Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 221 (2008) (rejecting assumption that ruling would give rise to innumerable bad outcomes); *see also* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1029-30 (2003) (explaining that slippery slope arguments are not always dispositive, and must be evaluated sensibly).

The recent Court of Appeals decision in *May v. Robertson* confirms this point. In *May*, a case similar to this one, the Mays appealed the approval

of the Robertsons' pier to the Board, arguing that the pier would cause adverse impacts to eelgrass. *May*, 153 Wn. App. at 65-66. The Court found that the Mays failed to prove that the Robertsons' proposed pier would adversely impact eelgrass. *Id.* at 86-94. Instead, the Mays' evidence proved "only that overwater structures . . . *can* impact the ecological functions of [the] habitat *in general*," which is insufficient to overturn a permit. *Id.* at 88 (citation omitted) (emphasis added).

In the present case, the Board concluded that "[t]he evidence was *insufficient* for the Board to determine with *any certainty* the extent and long-term consequences of the damage that would result" from Hughes' dock. AR Vol. 3, Ex. C at 24 (emphasis added). "Even the experts before the Board were unsure of the extent of the [eelgrass] loss that would occur." AR Vol. 3, Ex. C at 24. The Board also acknowledged that Hughes' dock "*would be as favorable to the environment as is possible under available current technology.*" AR Vol. 3, Ex. C at 8 (emphasis added). But the Board held, notwithstanding a lack of sufficient evidence, that "the elimination of eelgrass at the proposed dock site could contribute to the *potential* decline of the eelgrass bed." AR Vol. 3, Ex. C at 24 (emphasis added). As the Board's own findings and conclusions indicate, this is pure surmise, and the Board should not have vacated the permit on this basis.

II

CONSIDERING HYPOTHETICAL ENVIRONMENTAL IMPACTS PREJUDICES PERMIT APPLICANTS

A. Considering Hypothetical Environmental Impacts Unfairly Shifted the Burden of Proof to Hughes

There are good reasons for the Board not to base its decisions on hypothetical environmental impacts. One reason is that the SMA requires *FSJ*, not Hughes, to prove that the dock is inconsistent with the SMA or SMP. RCW 90.58.140(7); WAC 461-08-500(3); *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 205 (1994) (“[T]he person requesting the review has the burden of proof.”). The Board’s consideration of hypothetical environmental impacts effectively shifted the burden of proof to Hughes. This shift is apparent in the Board’s decision where the Board concluded that Hughes’ dock will cause impacts to eelgrass *contingent upon “the absence of evidence to the contrary.”* AR Vol. 3, Ex. C at 24 (emphasis added). As a result, the Board created a new standard of proof, accepting FSJ’s environmental fears as truth on the basis of nothing more than Hughes’ failure to dispel them.¹ See AR Vol. 3, Ex. C at 24. In short, the Board

¹ The logical fallacy known as the “argument from ignorance” is committed when a proposition is taken as true simply because it has not been proved false. Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Thinking* 190 (3d ed. 1997).

ignored FSJ's statutory burden of proving that the dock is inconsistent with the SMA, and instead required Hughes to show that the proposed dock would *not* impact eelgrass. *See* AR Vol. 3, Ex. C at 24. That FSJ presented only insufficient evidence of cumulative environmental impacts does not justify the Board's decision to place the burden of proof upon Hughes.

B. Considering Hypothetical Environmental Impacts Caused the Board To Abandon the SMA for an Erroneous Precautionary Approach

Additionally, by concluding that Hughes may not build a dock in the absence of evidence disproving hypothetical environmental impacts, the Board erroneously abandoned the policy objectives of the SMA. The SMA provides for private uses of shoreline property, even those that change the natural character of the shoreline environment. *See Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726 (1985). And the SMA requires a party who challenges such development on the grounds of environmental impacts to show the connection between the proposed development and the alleged impacts through relevant evidence. *See May*, 153 Wn. App. at 92-94. As such, a shoreline project that has not been shown to pose a certain threat to the environment and advances the policy objectives of the SMA should be approved. *See* RCW 90.58.020 (ensuring that shoreline development shall "minimize" impacts to the environment "insofar as practical").

Unfortunately, the Board had a different understanding of the SMA here—a precautionary approach that is out of step with the SMA. The Board’s approach neglects traditional notions of legal causation, and restricts human activity even if causal chains between that activity and environmental impacts are unclear. *See* Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* 4 (2005); Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* 11-12 (2002). Ultimately, employing this approach means that environmental restrictions on shoreline development will not be based on verified impacts to the environment, but on arbitrary, normative judgments about how hypothetical impacts should be treated. *See* Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 Wash. L. Rev. 547, 560 (2007).

Unlike the SMA, the Board’s precautionary approach unwisely rejects the idea that causal connections between the use of shoreline property and environmental impacts must be established as a precondition to restricting development. *See* Stephen Charest, *Bayesian Approaches to the Precautionary Principle*, 12 Duke Envtl. L. & Pol’y F. 265, 265-66 (2002). Instead, it tasks shoreline property owners, like Hughes, with proving that their proposed developments are absolutely environmentally safe. This will always be impossible to do because all human activity involves some degree

of risk. See *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 844 (2005) (J.M. Johnson, J., dissenting) (“It is notoriously difficult to prove a negative.”); Gary E. Marchant & Kenneth L. Mossman, *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts* 16 (2005) (“It is impossible to prove the negative of the absence of risk; moreover, every action . . . has the potential to create some risk in at least some context.”). And it raises the question: What, precisely, must Hughes do to obtain a shoreline substantial development permit if designing the best dock possible—a dock that FSJ failed to prove would cause cumulative impacts to eelgrass—is not enough?

The Board erred by engaging in excessively precautionary permit review, and vacating the permit on the basis of hypothetical environmental impacts. The Court should affirm the decision of the San Juan County Superior Court and uphold Hughes’ shoreline substantial development permit.

CONCLUSION

Parties who challenge a property owner’s shoreline permit must affirmatively establish that the permit is inconsistent with the SMA and/or SMP. The Board erred in vacating the permit after concluding that FSJ’s evidence did not prove cumulative eelgrass impacts with any certainty. The

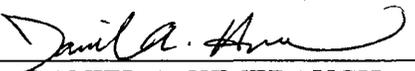
Board erred in assigning Hughes the burden of disproving cumulative eelgrass impacts. And the Board's overall approach to permit review threatens to impede permit applicants from obtaining approval for projects that serve the purposes of the SMA.

The decision of the Superior Court should be affirmed.

DATED: April 8, 2010.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, CANDYCE L. HOWARD, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. On April 8, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT CHRIS HUGHES were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 2, 2010, at Bellevue, Washington.


CANDYCE L. HOWARD