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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 34113-1-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

**FRIENDS OF GRAYS HARBOR and WASHINGTON
ENVIRONMENTAL COUNCIL,**

Appellants,

v.

**CITY OF WESTPORT, MOX-CHEHALIS LLC, PORT OF GRAYS
HARBOR, and STATE OF WASHINGTON DEPARTMENT OF
ECOLOGY,**

Respondents.

APPELLANTS' REPLY BRIEF

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Friends of Grays Harbor and Washington Environmental Council (collectively, “FOGH”) submit this Reply Brief in support of their appeal.

I. The ELUHB Had Jurisdiction to Hear FOGH’s Petition.

Respondents claim that the ELUHB never had jurisdiction because FOGH failed to establish standing through its petition for review or by exhausting administrative remedies.¹ (Resp. Br. 13 & n.18; *see also* RCW 43.21L.060(2)(d).) Their first challenge is based solely on the pleadings, in which FOGH and WEC asserted they have members who live in the Westport area and recreate in the vicinity of the proposed condominiums. (Petitions for Review (quoted in July 7, 2005, ELUHB Order 3).) The ELUHB correctly found that FOGH and WEC adequately pled standing in their petitions because the construction of eight condominium towers would have certain and adverse impacts on their members’ aesthetic and recreational enjoyment of the state parks and the surrounding shoreline area. (*See id*; July 7, 2005, ELUHB Order 6.) Neither RCW 43.21L nor judicial policy requires a more detailed petition for review.²

Respondents’ second standing argument is equally without merit. FOGH appealed the Planning Commission’s decision to the City Council before seeking review by the ELUHB. WSH 4452-53 (citing WMC

¹ Respondents failed to cross-appeal from the ELUHB’s decision and are therefore precluded from challenging jurisdiction *of the ELUHB* on appeal. *See* RAP 2.5(a).

² If the Court finds that the pleadings were insufficient to confer jurisdiction, it should remand for additional fact development. (*Cf.* July 7, 2005, ELUHB Order 6.)

17.32.090). FOGH therefore complied with the City's procedure and exhausted every local administrative remedy. July 7, 2005, ELUHB Order 6; see also *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868-69, 947 P.2d 1208, 1212 (1997) ("doctrine of exhaustion looks to determine whether administrative remedies have been pursued").³

II. Standard of Review.

This Court's application of the proper standard of review has three components: (1) the decision to review; (2) the standards of review to apply; and (3) the degree of deference to give to the City's factual findings and legal conclusions. In determining the standard of judicial review, the Court should look for guidance on this issue of first impression to decisions under LUPA, RCW 36.70C, because it served as a model for the ELUHB statute. In short, the Court should apply the standards in RCW 43.21L.130(1) to the City's original SSDP and BSP decisions.

A. The City's Permit Decisions Are Reviewed *De Novo*.

As explained in the Opening Brief, the Court's review here is analogous to its review of a local government's land use decision under LUPA. (Open. Br. 22.) Like a superior court's LUPA review, the ELUHB decided the appeal of the City's final BSP and SSDP decisions on the City's administrative record. See *HJS Dev., Inc. v. Pierce County*, 148

³ Respondents' jurisdiction claims were briefed extensively before the ELUHB, which rejected both of them. (See CP 330, 1059; FOGH's response briefs.)

Wn.2d 451, 467, 61 P.3d 1141, 1149 (2003). Respondents never address FOGH’s principal argument that, because of the statutes’ similarity, this Court reviews the City’s permit decisions *de novo*.⁴ In asking this Court to review both the City’s and the ELUHB’s decisions (Resp. Br. 15), Respondents ignore LUPA’s importance as a guide for the Court’s review based on the numerous parallel provisions between the two statutes, including identically worded standards of review. *Compare* RCW 43.21L.130(1) *with* RCW 36.70C.130(1).⁵ Accordingly, this Court “stands in the shoes of the [ELUHB],” and reviews the City’s decision “*de novo* on the basis of the administrative record.” *HJS Dev.*, 148 Wn.2d at 468, 61 P.3d at 1149; *Wells v. Whatcom County Water Dist. No. 10*, 105 Wn. App. 143, 150, 19 P.3d 453, 456 (2001).

1. The Court Reviews the City’s Decisions Applying the Standards in RCW 43.21L.130.

Although the ELUHB statute’s “exclusive process” for reviewing the City’s permit decisions provides for judicial review without specifying the standards for such review (Open. Br. 21), the parties agree that this Court should apply the standards set forth in the ELUHB statute, RCW

⁴ This is likely because Respondents argued before the ELUHB that RCW 43.21L was “based on” LUPA. (*See* Dec. 30, 2004, Mot. to Dismiss 5.)

⁵ Indeed, the only relevant difference between the statutes is the insertion of the ELUHB as a consolidated reviewing tribunal prior to judicial review. For nearly every LUPA provision there is a parallel ELUHB section. *See, e.g.*, RCW 43.21L.005/36.70C.010; RCW 43.21L.020/36.70C.030; RCW 43.21L.060/36.70C.060.

43.21L.130(1). (Open. Br. 22-23; Resp. Br. 14-15.) This also follows from LUPA case law, in which appellate courts apply the LUPA standards to their *de novo* review of the local government’s decision. *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867, 873-74 (2002); *HJS Dev.*, 148 Wn.2d at 467-68, 61 P.3d at 1149. The ELUHB statute, buttressed by LUPA case law, makes clear that for FOGH to prevail, it need only “establish[] that *one* of these standards has been met.” *Isla Verde Int’l*, 146 Wn.2d at 751, 49 P.3d at 874 (citing RCW 36.70C.130) (emphasis added).

The issues raised by FOGH on appeal – especially consistency of the condominiums with the SMA’s policies and the WSMP⁶ – primarily involve the application of law to fact, and are therefore reviewed under the clearly erroneous standard. RCW 43.21L.130(1)(d). The City’s decisions are clearly erroneous if the Court is “left with the definite and firm conviction that a mistake has been committed,” *i.e.* that the City “misapplied the law.” *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277, 280 (1999); *City of University Place v. McGuire*, 144

⁶Respondents are incorrect in stating that FOGH’s appeal is limited to the condominiums. (Resp. Br. 1) For example, if the shoreline setback is properly applied to all structures, other portions of the Project, including structures associated with the golf course, may well be prohibited. Moreover, the limited scope of this appeal results from the fact that FOGH *prevailed* in its 401 water quality certification challenge in the ELUHB’s open record hearing. That decision essentially halted the golf course development pending additional water quality assurances. See *Friends of Grays Harbor v. City of Westport*, ELUHB No. 03-001, 2005 WL 2822808 (Oct. 12, 2005).

Wn.2d 640, 652, 30 P.3d 453, 459 (2001). Respondents instead emphasize the deferential “substantial evidence” standard. (Resp. Br. 15, 39-40.) Although this standard is appropriate for the City’s purely factual determinations, it is not relevant to FOGH’s appeal because FOGH only needs to satisfy *one* of the RCW 43.21L.130(1) standards to prevail, and the issues here only challenge the City’s application of law to the facts and legal interpretations. *Compare* RCW 43.21L.130(1)(b), (d) *with* .130(c).

2. Deference to Legal Conclusions.

Respondents urge the Court to defer to the City’s (and the ELUHB’s) interpretation of law and application of law to the facts. (Resp. Br. 15-18.). The appropriate degree of deference in reviewing the City’s decisions, however, is provided by the standards of the ELUHB statute and by judicial gloss on the deference owed to agencies with specialized expertise. Still, Respondents overstate this degree of deference.

a. Deference to the City’s Legal Interpretations.

Legal interpretations of state and local statutes are reviewed *de novo*. *HJS Dev.*, 148 Wn.2d at 468, 471, 61 P.3d at 1149, 1151. Although the Court is not bound by the City’s interpretations, *Preserve Our Islands v. Shorelines Hearings Bd.* (“*POI*”), 133 Wn. App. 503, 515, 137 P.3d 31, 37 (2006), under the ELUHB statute, it must “allow[] for such deference *as is due* the construction of a law by an agency with expertise,” RCW

43.21L.130(1)(b) (emphasis added). The statute's deference provision, therefore, merely codifies existing judicial deference standards. *See POI*, 133 Wn. App. at 515, 137 P.3d at 37.

In arguing for "great deference" (Resp. Br. 15-18), Respondents overstate the deference due to the City's interpretation of the local shoreline master program. The WSMP is interpreted no differently than a statute. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 730, 696 P.2d 1222, 1227-28 (1985). Deference is generally appropriate for an agency's construction of an ambiguous statute it is charged with administering; however, when the statute is unambiguous, courts give *no deference* to the agency's interpretation. *Erection Co. v. Dep't of Labor and Indus.*, 121 Wn.2d 513, 521-22, 852 P.2d 288, 292-93 (1993). That is because statutory interpretation "is solely a question of law and within the conventional competence of the court." *American Legion v. City of Walla Walla*, 116 Wn.2d 1, 5, 802 P.2d 784, 786 (1991).

Where interpretation of an SMP is required, the Shorelines Hearings Board has found that its interpretation by a local government is merely a "relevant and important" factor. *Peterson v. Templin Found.*, SHB No. 99-4, 1999 WL 1094988 at *6 n.4 (Nov. 10, 1999) (citing *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910, 915 (1994)) (giving "substantial weight" but not "any particular degree of

deference”).⁷ Moreover, *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn. App. 439, 442, 832 P.2d 503, 505 (1992), relied upon by Respondents (Resp. Br. 16), does not even address deference afforded a local governments’ interpretation of its master program.⁸

In interpreting the SMA, local governments are afforded *no* deference. This is because the City handles a wide variety of permitting and land use issues, *see* <http://ci.westport.wa.us/boards.htm>, and, unlike the SHB, has no “specialized knowledge and expertise” on shoreline issues. Instead, the City’s primary responsibility under the SMA is to plan for and administer the *WSMP*, not the SMA. RCW 90.58.050, .080(1).

b. Deference to the City’s Application of Law to the Facts.

The ELUHB statute requires no deference to the City’s application of law to the facts beyond the “clearly erroneous” standard. RCW 43.21L.130(1)(d). Courts regularly use this standard under LUPA when local governments apply controlling law to the facts of the case. *See, e.g., McGuire*, 144 Wn.2d at 647, 30 P.3d at 456 (application of diminishing asset doctrine to property at issue); *Citizens to Preserve Pioneer Park LLC*

⁷ One important reason for this lack of deference is that “the interpretation of a master program by local government may conflict either with that of Ecology . . . or with the [SHB] itself.” *See Ackerson v. King County*, SHB No. 95-26, 1996 WL 226594 at *12 (March 19, 1996) (dissent ¶ XIV). The same is true for local interpretation of the SMA.

⁸ *Solid Waste* involved a provision of SEPA, RCW 43.21C.090, which requires only that courts give “substantial weight” to an agency’s determination of whether an EIS is required, *i.e.* an agency’s application of SEPA to the facts, not its interpretation of SEPA.

v. City of Mercer Island, 106 Wn. App. 461, 473-74, 24 P.3d 1079, 1086-87 (2001) (application of variance criteria and discussion of difference between reviewing findings of fact and mixed questions of law and fact). Thus, because FOGH's challenges to the Links Project primarily involve mixed questions of law and fact, this Court should review them under the clearly erroneous standard.

c. No Deference to the ELUHB's Legal Conclusions Is Warranted.

Deference to the ELUHB's legal or factual determinations is not an issue in this appeal because, as discussed above, the Court reviews the City's decisions on the merits, not the ELUHB's.⁹ Describing the ELUHB as the "alter ego" of the SHB, Respondents urge the Court to defer to its review of shoreline issues. (Resp. Br. 16-18.) But Respondents' argument ignores the critical distinction between the SHB and the ELUHB in this case. Whereas the SHB conducts *de novo* review and exercises fact finding jurisdiction, *POI*, 133 Wn. App. at 516, 137 P.3d at 37-38, here the ELUHB conducted a closed record appeal, ELUHB Majority at 11-

⁹ The ELUHB statute's provision for judicial review, RCW 43.21L.140, does not support the proposition that this Court should review the ELUHB's decision based on the record before the ELUHB. Instead, this provision merely gives courts jurisdiction to review challenges under the statute, and is primarily focused on expediting judicial review. Indeed, review by this Court "shall be restricted to the decision record of the permit agency and the [ELUHB] proceedings." RCW 43.21L.140(4). This confirms that the Court's review on the merits of the permitting decision is properly limited of the City's decision. The Court can also address issues that arose during "board proceedings," such as the ELUHB's jurisdiction, as long as they are properly appealed.

12.¹⁰ Accordingly, this Court should review the City's permit decisions, apply the standards in RCW 43.21L.130(1) and defer to the City's legal and factual conclusions only to the extent provided by these standards.

III. The Condominiums Are Contrary to the Policies of the SMA.

A. The SMA's Use Preferences Apply to the Links Project.

In its Opening Brief, FOGH explained that the proposed condominiums are inconsistent with nearly every use-preference policy of the SMA. (Open. Br. 23-33.) Respondents assert that the policies are intended only as a guide for local governments' shoreline planning and are inapplicable to the review of specific projects like the Links at Half Moon Bay. (Resp. Br. 18-20.)

Respondents' argument that the shoreline policies do not even apply to the Project highlights the City's inadequate shoreline review.¹¹ They cite no case law in support of their argument because none exists. Indeed, in most, if not all, of the SMA cases cited by Respondents, the

¹⁰ Respondents' argument that ELUHB deserves deference on shorelines issues makes no sense and is unsupported by the ELUHB statute. While different boards within the Environmental Hearings Office have overlapping membership, the roles of the boards are distinct. For example, the ELUHB hears all types of land use appeals, much like a superior court, and was not intended to develop specific expertise in shorelines issues like the SHB. ("An agency's legal interpretation in areas outside of its expertise is entitled to no deference."). See *Dana's Housekeeping, Inc. v. Dep't of Labor and Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147, 1151 (1995).

¹¹ It is a legitimate question whether the City Council seriously considered the SMA's policies, as it never addressed consistency in approving the SSDP. WSH 4453; CC Tr. 31-36. This is unsurprising given the City's incorrect yet steadfast position that the policies are inapplicable to its review of the Project and approval of the SSDP. (Resp. Br. 18-20, 24.)

Supreme Court, the Courts of Appeals and the SHB have all directly applied the policies to their review of shoreline developments and permits. *See, e.g., Hayes v. Yount*, 87 Wn.2d 280, 295-96, 552 P.2d 1038, 1047-48 (1976) (shoreline permits must “contain sufficient detail to enable the local government and the board to determine consistency with the polic[ies] . . . set forth in RCW 90.58.020”); *POI*, 133 Wn. App. at 536-38; 137 P.3d at 48-49; *Peterson*, 1999 WL 1094988 at *1, *4-*5; *Seaview Coast Conservation Coalition v. Pacific County*, SHB No. 99-20 (Jan. 28, 2000) (CL III-X); *Ackerson*, 1996 WL 226594 at *6 (CL VII). If Respondents’ argument were correct, the SHB and the courts would *never* need to apply the SMA’s policies to project challenges. Accordingly, this Court’s review involves a substantive application of the SMA’s policies to the City’s SSDP approval. (Open. Br. 25-26 (citing cases).)

Respondents also ignore that state and local laws require developments on state shorelines to be consistent with the SMA’s policies. *See* RCW 90.58.140(1); WMC 17.32.080(c)(1)(A); *see also* ELUHB Dissent at 10-11. Thus, it is irrelevant if the WSMP or local zoning code approves a specific development because that development must still be consistent with the SMA’s use preferences. *POI* is not to the contrary. (*See* Resp. Br. 22.) In that case, the SHB determined that the proposed barge-loading facility for the long-existing gravel mine was shoreline

dependent and compatible with other preferred uses. *POI*, 133 Wn. App. at 537, 137 P.3d at 49. Here, in contrast, the condominiums are not dependent on the shoreline, would be built in a minimally developed area, and the overwhelming weight of the evidence shows they are not compatible with the SMA's preferred shoreline uses. These facts also rebut any presumption that WSMP-compliant developments are consistent with the SMA.¹²

B. The City's Conclusion that the Condominiums Are Consistent With the SMA Was Clearly Erroneous.

In this case, like any other challenge to an SSDP, the Court must evaluate whether the City properly applied the SMA's policies to the facts of the Project under the clearly erroneous standard. RCW 43.21L.130(1)(d). FOGH's claim that the condominiums are inconsistent with the SMA's preferred shoreline uses is amply supported by the evidence in the City's record. (Open. Br. 23-33.) These facts speak for themselves. In short, a five-story, eight-building complex isolated from the Project's other development and located adjacent to a natural shoreline

¹² While *Ackerson* does support the presumption of SMA consistency in some circumstances (Resp. Br. 22, 33), FOGH has demonstrated that the condominiums are not consistent with the WSMP. (Open. Br. 33-36.) Moreover, the facts in that case, involving a joint use pier, are vastly different from those at issue here. The environmental impact of eight buildings adjacent to a state park greatly outweighs that of replacing a joint use pier. Thus, the presumption of consistency is not warranted because the WSMP does "not adequately anticipate[] and deal[] with" this substantial environmental impact. *Ackerson*, 1996 WL 226594 at *6 (CL VII). Rather, the City dismisses the impact without serious scrutiny.

and undeveloped state parks is flatly inconsistent with the objectives and policy provisions of the SMA. (*See id.*)

Respondents point to three conditions the City imposed on the Project as proof that it promotes statewide interests and increases access to shorelines. (Resp. Br. 24, 26-27.) Yet these improvements are entirely unrelated to the condominiums and can be made regardless of whether they are ever constructed. The condominiums themselves would not increase shoreline access. Moreover, Respondents would prioritize serving future tourist needs of the Northwest *region* rather than protecting the existing State Parks Complex and surrounding shoreline areas that are already valued as critical *statewide* resources and heavily visited in their existing, natural state.

With respect to the natural character of the shoreline and its physical and aesthetic qualities, Respondents argue that the eight condominium buildings would have minimal impact (Resp. Br. 25-26) when the evidence plainly demonstrates that they would substantially impair, or block altogether, views from Jetty Access Road, Lighthouse Park Trail, the parking lot, and Half Moon Bay. Indeed, except for the views from the tip of Westhaven State Park looking north and west, the condominiums will significantly impair all views of this natural shoreline. *See* WSH 18, 78, 82. The Planning Commission's determination of view

impact was clearly erroneous because it only considered this limited perspective. (Open. Br. 30-31; *see also* ELUHB Dissent at 14 (“The condominiums block a central portion of the vista.”).)

The condominiums, which are upscale residential units, WSH 3656, 3688, do not increase recreational opportunities for the public. Regardless of other components of the Project, the buildings themselves would only decrease public recreation and aesthetic enjoyment of the parks and shoreline area.¹³ (Open. Br. 29-32.) This property has long been publicly owned and accessed without trespass restrictions. WSH 3164, 3168-69, 3182, 3184. The condominiums, in addition to eliminating public access to part of the property, would impair inland vistas, reduce public enjoyment of the “secluded dunal wilderness,” BSP 416, and obstruct birdwatching opportunities from Westhaven State Park and the oceanfront trails. Finally, because Respondents concede that the condominiums are not water dependent, they return to their refrain that compliance with the WSMP means consistency with the SMA. (Resp. Br. 28.) As discussed above, any such presumption is rebutted by the facts of the case.

¹³ Respondents attempt to minimize the condominium’s impact on the shoreline by wrongly asserting that the property is not in the shoreline area. (Resp. Br. 25.) Yet the Project is within the 100-year flood plain and is consequently under “shoreline” jurisdiction. WMC 17.32.020 (definition of “shorelands” at (C)); RCW 90.58.030(f)(i); *Seaview Coast Conservation Coalition v. Pacific County*, SHB No. 99-020, 1999 WL 1094980 at *4 (Nov. 8, 1999) (¶ V); WSH 1603 (golf course in shorelines area).

IV. The Condominiums Are Inconsistent with the WSMP.

At the ELUHB proceedings, FOGH raised, and both the majority and dissent addressed, the issue of consistency of the Project with the WSMP. ELUHB Majority at 25, 27 (CL 21, 24); ELUHB Dissent at 7-8. As with SMA consistency, the facts speak for themselves, particularly with respect to the half-mile separation of the densely packed condominiums from the rest of the Project development and their placement in an area that will impede currently unobstructed vistas in the northwest corner of the property.¹⁴ (*See* Open. Br. 34-36.) The City's failure to find the development inconsistent with its own master program was clearly erroneous. *See* ELUHB Dissent at 7-8.

Respondents contend that the development the City has authorized in the Tourist Commercial ("TC") zone trumps any inconsistent provisions of the WSMP. (Resp. Br. 23.) This is wrong for three reasons. First, the WSMP was adopted pursuant to the rules of the SMA and can only be amended with state oversight, not by a unilateral, local permitting process. RCW 90.58.090(1). Second, the City's zoning code explicitly requires that it deny an SSDP if the proposed development is not

¹⁴ Respondents' claim that the condominiums' density is 0.66 units per acre (Resp. Br. 31) is misleading and nonsensical. The total condominium area is 6.04 acres (the actual footprint is only 2.83 acres), WSH 908, resulting in a true density of between 33 and 70 units per acre. The entire Project area cannot be used for the density calculation because most of it is set aside for the golf course and the condominiums cannot feasibly be constructed on the large tract of protected wetlands. (*See* PC Tr. 79 (WSH 4277).)

consistent with the WSMP. WMC 17.32.080(c)(1)(C); *see also* RCW 90.58.140(1). Finally, neither the TC zone nor the Master Plan Ordinance were designed to approve specific buildings or locations; such details must be proposed and vetted through the BSP and SSDP processes. WMC 17.21.020(1); WSH 1609 (general location for up to 400 units), 1620, 1630-33. Here, FOGH challenges the detailed plans proposed in the July 2003 JARPA.¹⁵

The issue in this case is not, contrary to Respondents' urgings, that the City "very nearly demands" the condominiums be built on the northwest corner of the property. (Resp. Br. 32.) That the City badly wants this development to go forward is apparent from the record, particularly the Council's SSDP and BSP decisions. WSH 4452-53; BSP 1151-63. Yet the question for the Court is whether the City may misapply state and local law to achieve its transparent goal.

¹⁵ Respondents are also wrong to assert that FOGH's challenge to the condominiums' WSMP consistency is barred for claim and issue preclusion (Resp. Br. 28-29) because the requisite identity of subject matter and issues is not present. In the 2003 Thurston County action, FOGH challenged the broad October 8, 2002, Master Plan Ordinance No. 1277, not the specific development proposal that was later submitted in the 2003 JARPA. As the court made clear, the City Code allowed Ordinance 1277 to provide general standards which would be followed by project revisions and more specific development actions. WSH 1630-33 (oral opinion at 7-10 (quoting WMC 17.36A.040(2))). Indeed, the number of units was reduced *after* the ordinance was enacted. (Resp. Br. 30 n.25.) Because the City and developer could specify project details later, the court rejected FOGH's claim that the ordinance was overly vague. (WSH 1630-33; Open. Br. 14; Resp. Br. 29 n.22.)

V. The City Council Erred in Excluding New Erosion Evidence.

Even though in the month between the Planning Commission decision and FOGH's appeal to the City Council a major erosion emergency occurred near the proposed location for the condominiums, the Council refused to consider any evidence regarding the new erosion. The Council had the authority to admit this new and highly relevant evidence, and its refusal to do so was an abuse of discretion.

A. The City Council Had Authority to Hear the Newly Discovered Erosion Evidence.

Respondents wrongly argue that the City Code foreclosed new evidence from being admitted by the Council. (Resp. Br. 37-39. *But see* CC Tr. 19, 24.) The Code sections they cite merely reiterate that the appeal was based “on the record” established before the Planning Commission and not a *de novo* evidentiary hearing.¹⁶ However, the Code only prohibits “additional” evidence, not “newly discovered” evidence.¹⁷ FOGH's erosion evidence is the latter type, as the erosion emergency occurred after the open record hearing and decision. Case law cited by Respondents underscores the admissibility of newly discovered evidence

¹⁶ WMC 2.26.080(C) is apparently numbered 2.26.080(3) in the Code version published on the City's website. (*See* FOGH Reply Br. App.)

¹⁷ WMC 2.26.070(6) provides: “All appeals of [Planning Commission] decisions shall be closed record appeals. The appeal is on the record with no *additional* evidence or information allowed to be submitted and only appeal arguments heard” (emphasis added). *See also* CC Tr. 1, 4, 24 (describing hearing as “closed record review”).

and the distinction between “new” and “additional” evidence. In *East Fork Hills Rural Ass’n v. Clark County*, 92 Wn. App. 838, 843-46, 965 P.2d 650, 652-54 (1998), this Court held that a local Board hearing an appeal “solely on the original record” had the authority to admit “newly discovered” evidence pursuant to Civil Rule 59(a)(4), which allows a new trial to be granted on the basis of such evidence, and RAP 9.11(a), which authorizes an appellate court to supplement the trial court record in extraordinary circumstances. Those circumstances existed here. (*See* Open. Br. 12-13.) Moreover, the state statute governing local project review allows for a “closed record appeal” with “limited *new* evidence or information submitted.” RCW 36.70B.020(1) (emphasis added).

B. The City Abused its Discretion by Excluding Relevant Evidence from the October 2003 Erosion Emergency.

The evidence that FOGH attempted to introduce at the City Council hearing (CC Tr. 8, 18-25) is highly relevant because it vividly confirms that the shoreline area near the proposed condominiums is at risk for major erosion events and that building 200 condominiums at this location is not a “reasonable and appropriate use” of the shoreline. RCW 90.58.020. Respondents’ argument that their experts repeatedly testified that erosion was a possibility at the site (Resp. Br. 36-37) misses this point. Philip Osborne’s and Jeffrey Bradley’s testimony that the Corps

could be counted on to prevent catastrophic erosion in its “managed system” by stabilizing the beach actually supports FOGH’s argument. They predict that the Corps would take such action if, as it seems likely, more major erosion events occur at the site. Indeed, Respondents and their experts seem to count on this government intervention to protect the condominiums from being undercut by future erosion.¹⁸ This reliance, in combination with the recent erosion event, underscores the reasons why the condominiums are not a “reasonable and appropriate” use for this shoreline location.

Respondents also contend the Planning Commission’s conclusion that erosion was unlikely to affect the condominium site was supported by substantial evidence. (Resp. Br. 40.) But this ignores the erosion emergency immediately after the decision, which undermined the experts and Respondents’ evidence of shoreline stability. In addition, the finding was based on expert testimony that the Corps would prevent significant beach erosion in the future. WSH 4407-08 (FF 62-63). As discussed above, the Commission’s reliance on Corps intervention and stabilization of Half Moon Bay demonstrates it misapplied the law to the facts in

¹⁸ At the same time, Mox did not propose any beach armoring as part of its Project (Resp. Br. 3 n.1), nor has the City studied its impacts in the EIS. Yet the beach armoring on which Respondents rely (and thereby implicitly include in the Project design) would unequivocally be permanent in nature and diametrically opposed to the SMA’s preference for “preserv[ing] the natural character of the shoreline.” RCW 90.58.020.

concluding the condominiums were a “reasonable and appropriate use” consistent with the SMA’s policies.¹⁹ WSH 4408 (CL 1).

Even if the Court determines that the City Code prohibited the Council from hearing FOGH’s new erosion evidence, it should still find that the City abused its discretion by affirming the Planning Commission’s decision. In its appellate capacity, the Council may “remand the matter for further consideration.” WMC 2.26.080(4); *see also* CC Tr. 5, 25. In light of the importance of this new erosion evidence, the Council abused its discretion by not, at minimum, remanding to the Planning Commission for additional fact finding on the emergency erosion events.

VI. The City Wrongly Applied Collateral Estoppel and Erroneously Applied the Law on Setbacks to the Facts in its BSP Approval.

In its BSP decision, the City Council relied heavily on two legal determinations to reject FOGH’s appeal of setback compliance. The City first concluded that setback is a WSMP requirement, not a BSP issue, and the Hearing Examiner was not authorized to review the Planning Commission’s September 2003 setback finding. BSP 1158. Second, the Council held that collateral estoppel precluded the Hearing

¹⁹ Reliance on the Corps is suspect given its legal obligations under the Clean Water Act and NEPA and failure to prevent the beachfront trail north of the condominium site from washing into Half Moon Bay in October 2003. (*See* Open. Br. App. (BSP 671-81).)

Examiner from deciding setback compliance. BSP 1159. Both of these decisions were in error.²⁰ (*See* Open. Br. 39-44.)

The Council based its decision alternatively on a conclusion that the setback had not been “materially changed” by the October 2003 erosion, and, as a result, “there is no reason to reconsider the issue of compliance with the 200 foot setback requirement.” BSP 1159-60. Respondents now argue that this conclusion, not collateral estoppel, was the “major foundation” of the City’s BSP approval and that it was supported by substantial evidence. (Resp. Br. 41, 43.) This is wrong for several reasons. First, the Hearing Examiner found that the evidence “showed erosion” in the shoreline “between transect lines 4 and 5,” which is directly in front of the condominiums. BSP 1072 (¶ II). The Examiner also found significant erosion between transect lines 3 and 4, *id.*, which, had the City used the right setback methodology, would have constituted a significant change in circumstances requiring the setback to be revisited. Such factual findings should have been afforded deference by the Council

²⁰ Respondents never defend the first of the Council’s legal conclusions and therefore concede it is wrong. They attempt to minimize the importance of collateral estoppel by claiming the Council only used it to “preclude relitigation of the issue of whether setbacks were met as of September 2003.” (Resp. Br. 42.) Yet the setback compliance as of September 2003 was irrelevant to the Council’s decision because, as FOGH has repeatedly attempted to show, the shoreline was irreparably changed shortly afterward. This material change also made collateral estoppel inapplicable.

and undermine its finding that the “marram grass line has not retreated in the areas immediate[ly] adjacent to the condominiums.” BSP 1159.

Throughout both the SSDP and BSP review processes the City misapplied the Code’s methodology for measuring setback.²¹ (Open. Br. 50; ELUHB Majority at 20 (CL 14).) Consequently, *any* setback determination by the City Council, the Hearing Examiner or the Planning Commission was a clearly erroneous application of the law to the facts and should be reversed by this Court.

Finally, it is anomalous that the City steadfastly refuses to consider new evidence regarding setback compliance, yet at the same time, insists that a final setback determination can be made as late as the pouring of the foundation. BSP 1074, 1158-59; Resp. Br. 44. This is another example of the City interpreting the WSMP in a manner directly at odds with the plain language of the statute. Setback compliance is explicitly a BSP issue (Open. Br. 47-48) and delaying it would preclude the public from participating in the wetland protection process triggered if the condominiums were to be relocated, *see* ELUHB Majority at 20 (CL 14).²² This last minute relocation suggested by the ELUHB is also contrary to

²¹ Respondents only address this obvious error in a footnote later in their brief and assert that the mistake was harmless. (Resp. Br. 47-48 n.37.) Because the City has never applied its setback methodology correctly, the record does not substantiate their claim.

²² Respondents never address FOGH’s arguments on the setback timing issue (Open. Br. 47-48) and therefore concede their validity.

the City's Code. See WMC 17.36B.040(9)(A) (BSP must show "the location of all existing and proposed structures").

VII. The City Must Dedicate Rights-of-Way and Easements Concurrent With BSP Approval.

The plain language of the City's Code obligates the City to dedicate "*required* rights-of-way, easements and land" at the same time it approves a BSP. WMC 17.36B.080 (emphasis added). This is not inconsistent with WMC 17.36B.060, which allows the SPRB to "*require* dedication of *land*" as a condition of BSP approval (emphasis added).²³ Here, the project design itself requires a right-of-way and/or easement along Jetty Access Road for access to and provision of utility and water service for the condominiums. See BSP 1036. This is different from the optional "dedication of land" the SPRB is authorized to impose as a BSP condition. The analysis of the Hearing Examiner, BSP 1075-76 (¶ VII), was correct, and the City Council erred in reversing it, BSP 1161-62.

Respondents assert that their own Code provision "makes no sense" and is too complicated to carry out in conjunction with other Code requirements.²⁴ (Resp. Br. 48-49; see also BSP 1075.) However, as the

²³ Contrary to Respondents' claim (Resp. Br. 48), it appears the City did require dedications. See BSP 1035-40 (Water/Sewer/Easements in BSP application); BSP 1063 (utility easements required by SPRB); WSH 1607 (road dedication).

²⁴ The City's rationale that delayed dedication was appropriate because the permits were subject to appeal is without merit. (Resp. Br. 49.) All City land use permits are subject to appeal under the City Code and state statutes, including LUPA and the ELUHB statute. In addition, the City's preference to obtain title to required rights-of-ways and easements after construction (Resp. Br. 49) is also at odds with other Code provisions. The City

Hearing Examiner held, “[t]hese limitations do not excuse the [SPRB] from enforcing the standards under WMC 17.36B.080.” BSP 1076.

There are many important reasons why the Code requires concurrent dedication. (See Open. Br. 44-45.) Dedications are difficult to enforce after BSP approval. See *Richardson v. Cox*, 108 Wn. App. 881, 891, 26 P.3d 970, 976 (2001); *Forrester v. Fisher*, 16 Wn.2d 325, 133 P.2d 516 (1943). Concurrent dedication also allows for public involvement in the SPRB’s determination that “[a]ppropriate provisions are made” for road, potable water and sanitary waste services, *i.e.* those *requiring* a dedication. WMC 17.36B.060(1); BSP 1076. Provision of these vital services is particularly important here given the threat of erosion damage to the roadway and the record of disagreement between the City and Mox as to whether and to what extent dedication is required. The Council’s interpretation of WMC 17.36B.080 to require only identification of dedications at BSP approval is contrary to the plain language and structure of WMC 17.36B and the purposes of concurrent dedication and should be reversed.²⁵

may not issue a development permit without certifying that “all dedications . . . necessary to serve the project . . . are complete.” WMC 17.36B.090.

²⁵ The City’s erroneous interpretation deserves no deference. See *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 781, 11 P.3d 322, 326 (2000) (history of erroneous legal interpretation by city did not alter statute’s plain meaning). If the City wants to effectuate its desired delay of dedications lawfully, it must amend the Code.

VIII. The Setback Line in the Tourist Commercial Zone Applies to All Structures of the Links Project.

The plain language of WMC 17.32.050(a)(8) requires an interpretation that “setbacks” in the TC zone apply to all “structure[s] to be constructed.” Broad application of the setback requirement is necessary, as Respondents have acknowledged, to protect an area that “has experienced erosion and accretions over the years.” (July 18, 2005, ELUHB Reply Br. on Shorelines Issues 10.) In addition, state regulations governing SMP approval identify setbacks as a means of protecting shorelines. WAC 173-26-231(3)(a)(i); *see also* WSH 1531.

In addition, the structure of the City’s Zoning Code supports the equivalency of “setbacks” and “building setbacks.” In the same section, the Code refers to “setbacks” in other zones and lists exceptions to them, including marinas. WMC 17.32.050(a)(8). Thus, not only does the City use “setback” and “building setback” interchangeably in the same Code section, but it clearly applies them to non-building structures such as marinas. If the setback was only applicable to buildings, there would be no need to exempt a marina. Moreover, in the TC zone, if the City had meant to exempt non-building structures, it could have done so explicitly, as it did for other areas. *See, e.g., id.*; WMC 17.32.050(b)(8), 17.30.040(b)(2). Finally, Respondents have not explained why setbacks

should apply only to buildings in the TC and OBR zones, but to all structures elsewhere. *See, e.g.*, WMC 17.20A.060(3), 17.32.050(b)(9)(E). The shoreline protection function of setbacks clearly applies more generally to all structures.

The interchangeability of general “setbacks” and “building setbacks” and their applicability to all structures in the City’s Zoning Code is supported by cases cited in FOGH’s Opening Brief. In *Slater v. Dep’t. of Ecology*, SHB No. 87-15, 1997 WL 56657 (Nov. 6, 1987), the SHB applied a setback regulating “structures” to both a deck *and* a home, while referring to it both as a “setback” and a “building setback.” *Id.* (FF III, V, VI; CL I). Accordingly, the City erroneously interpreted the Code, and the issue should be remanded for application of the setback requirement to all “structures” of the Project within the TC zone.

IX. Conclusion.

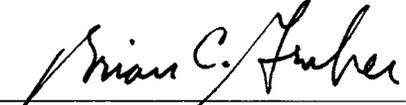
For all of the reasons above and in FOGH’s Opening Brief, Appellants respectfully request that the Court reverse the City’s approval of the SSDP and BSP and set aside both permits.

Respectfully submitted, this 31st day of October, 2006,

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COURT OF APPEALS

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STATE OF WASHINGTON

BY JN
CITY

No. 34113-1-II

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

**FRIENDS OF GRAYS HARBOR and WASHINGTON
ENVIRONMENTAL COUNCIL,**

Appellants,

v.

**CITY OF WESTPORT, MOX-CHEHALIS LLC, PORT OF GRAYS
HARBOR, and STATE OF WASHINGTON DEPARTMENT OF
ECOLOGY,**

Respondents.

APPELLANTS' REPLY BRIEF

APPENDICES

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Boards & Commissions

Westport Planning Commission

Kelci Williams, Chairperson
Pat Tow, Secretary

Larry Giese
William Leraas
Bob Shelton
Mike Murphy

The Westport Planning Commission is established by RCW 34.63 and WMC 2.24. The Commission consists of five members that serve four year terms. Each member is appointed by the Mayor with the confirmation of the City Council. The Planning Commission acts on land use issues, long plat subdivisions, zoning issues and any other appropriate matters that the Council may feel needs reviewing. Meetings are held the third Tuesday of each month at 5:00 p.m. in the Westport City Hall Council Chambers.

Civil Service Commission

John Cowan, Chairman
Debbie Spivey, Secretary

Jack Williams
Jackie Roller
Suzanne Horton
Harry Dahl

The Civil Service Commission is established by RCW 41 and WMC 2.36. The Commission consists of five members that serve six year terms. Each member is appointed by the Mayor with the confirmation of the City Council. The Civil Service Commission is responsible for the selection, testing and employment of police officers and police clerks. Meetings are held the third Wednesday of each month at 5:00 p.m. in the Westport City Hall Council Chambers.

Chapter 2.26 LAND USE HEARING EXAMINER

Sections:

- 2.26.010 Office established.
- 2.26.020 Appointment and term.
- 2.26.025 Qualifications.
- 2.26.030 Standards of conduct.
- 2.26.040 Rules.
- 2.26.045 Time computation.
- 2.26.050 Examiner's decision.
- 2.26.060 Reconsideration by examiner.
- 2.26.070 Appeal of examiner's decision.
- 2.26.080 City council action on appeals.
- 2.26.085 Reconsideration by the city council.
- 2.26.090 Annual report.
- 2.26.100 Fees and costs.
- 2.26.110 Commencement of referral.

2.26.010 Office established.

There is established an office of hearing examiner. The examiner shall hear and decide matters assigned to him by the city council, including but not limited to the following land use matters:

- (1) Matters prescribed by the city of Westport long subdivision ordinance, WMC Title 14;
- (2) Matters prescribed by the city of Westport master plan, Chapter 17.36A WMC;
- (3) Matters prescribed by the city of Westport MUTC regulations, Chapter 17.20A WMC, or MI regulations, Chapter 17.26 WMC, involving land uses over 40,000 square feet in area;
- (4) Shorelines master program, Chapter 17.32 WMC, involving projects over 5,000 square feet or \$25,000 in value;
- (5) Plat vacations or amendments pursuant to Chapter 58.17 RCW;
- (6) Appeals of threshold determinations pursuant to SEPA ordinance, Chapter 15.22 WMC, or Chapter 43.21C RCW and Chapter 197-11 WAC;
- (7) Conditional use permits and variances pursuant to Chapter 17.44 WMC;
- (8) Appeals of binding site plan review board decisions in accordance with the provisions of WMC 17.36B.110 as it currently exists or is hereinafter amended;
- (9) Other types of matters referred by the city of Westport planning commission involving unusual or complex cases;
- (10) All hearing examiner hearings (except those covered in subsection (2) of this section) are considered to be open record hearings that create the city record through testimony and submission of evidence and information. An open record hearing may be held on an administrative appeal to be known as an "open record appeal hearing."

The hearing examiner shall replace the planning commission or board of adjustment in the performance of their duties in considering land use matters assigned. The hearing examiner shall have the same authority assigned by law to the planning commission or board of adjustment. Where the planning commission or board of adjustment was previously assigned the duty to make a recommendation to the city council, the decision of the hearing examiner shall be a recommendation to the city council. In all other cases (except those covered by subsection (8) of this section), the hearing examiner shall have

final decision authority, subject to appeal to the city council as provided by this chapter. In the event any provisions of this chapter are inconsistent with any provisions contained elsewhere in the Westport Municipal Code, the provisions contained in this chapter shall be considered superior and shall control. (Ord. 1299 § 1, 2003; Ord. 1257 § 1, 2001; Ord. 1249 § 5, 2001)

2.26.020 Appointment and term.

The term of appointment for the examiner and deputy examiners, and the terms revoking the appointment, shall be pursuant to the contract executed between the mayor and the examiner, and approved by the city council. Temporary examiners pro tem may be appointed for such terms and functions as the mayor deems appropriate, including disqualification of the regular examiner for a conflict of interest. (Ord. 1249 § 5, 2001)

2.26.025 Qualifications.

The land use hearing examiner shall have substantial experience in the field of land use and planning. (Ord. 1249 § 5, 2001)

2.26.030 Standards of conduct.

(1) In order to assure an appearance of fairness on matters considered by the examiner or by the council on appeal, no person shall have an ex parte (one sided) contact with the examiner or council regarding such matter, and no person, including government officials and employees, shall attempt to interfere with or influence the examiner or council outside a public hearing; provided, that a city official or employee may, in the performance of his official duties, provide information to the examiner when the action is disclosed at the hearing or meeting.

(2) No examiner shall conduct or participate in any hearing or decision on which the examiner may have a direct or indirect financial or personal interest or in which such conduct or participation would violate any rule of law applicable thereto. (Ord. 1249 § 5, 2001)

2.26.040 Rules.

The examiner may prescribe rules for the scheduling and conduct of hearings and other rules of procedure. Application for the consideration of cases to be heard by the examiner shall be made to the clerk-treasurer's office, and shall include the appropriate application fee. (Ord. 1249 § 5, 2001)

2.26.045 Time computation.

In computing any period of time prescribed by this chapter, the day of the act from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a city legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or city legal holiday. (Ord. 1249 § 5, 2001)

2.26.050 Examiner's decision.

(1) Within 10 working days of the conclusion of a hearing, unless a longer period is mutually agreed to by the applicant and the examiner, the examiner shall render a written decision that shall include findings and conclusions based on the record.

(2) Where the hearing examiner is the final decision authority, the decision of the examiner shall be final and conclusive on the fifteenth day after the date of the decision unless a notice of appeal to the council is filed pursuant to WMC 2.26.070.

(3) Where the hearing examiner's decision is a recommendation to the city council, the decision shall be forwarded to the city council within seven days for consideration as

provided by ordinance.

(4) The hearing examiner's decision shall be issued not later than 120 days after a complete permit application is filed, pursuant to RCW 36.70B.090, and not later than 90 days after an administrative open record appeal is filed. (Ord. 1299 § 2, 2003; Ord. 1257 § 2, 2001; Ord. 1249 § 5, 2001)

2.26.060 Reconsideration by examiner.

Any aggrieved person or agency of record, oral or written, that disagrees with the decision of the examiner may make a written request for reconsideration by the examiner within 10 days of the date of the written decision. The request for reconsideration shall be filed with the clerk-treasurer upon such forms prescribed by the department. If the examiner chooses to reconsider, the examiner may take such further action as he or she deems proper and may render a revised decision, within five working days after the date of filing. Filing a request for reconsideration is not a prerequisite to filing an appeal pursuant to WMC 2.26.070. (Ord. 1249 § 5, 2001)

2.26.070 Appeal of examiner's decision.

The final decision by the examiner may be appealed to the city council by any aggrieved person or agency directly affected by the examiner's decision, except threshold determinations, in the following manner:

(1) The appellant must file a complete written notice of appeal with the clerk-treasurer upon forms prescribed by the clerk-treasurer's office, and pay the appeal fee within 14 days of the date of examiner's final decision; provided, that if the examiner was requested to reconsider the decision, the appeal must be filed within 10 days of the date of the examiner's decision on the reconsideration request.

(2) The notice of appeal shall concisely specify the error or issue which the city council is asked to consider on appeal, and shall cite in the notice of appeal or accompanying memorandum, by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. Issues, which are not so identified, need not be considered by the city council. Memoranda shall not include the presentation of new evidence and shall be based only upon facts presented to the examiner.

(3) The city shall notify parties of record that an appeal has been filed and that copies of the notice of appeal and appellant's memorandum may be obtained from the clerk-treasurer. The notice to parties shall also state that parties of record wishing to respond to the appeal may submit written memoranda to the city council within 14 days from the date that notice is mailed by the city.

(4) The appellant may submit a responsive memoranda within seven days from the date that memoranda from parties of record is due.

(5) The timely filing of a notice of appeal shall stay the effective date of the examiner's decision until the appeal is adjudicated by the mayor or until the appeal is withdrawn.

(6) All appeals of hearing examiner decisions shall be closed record appeals. The appeal is on the record with no additional evidence or information allowed to be submitted and only appeal arguments heard. (Ord. 1249 § 5, 2001)

2.26.080 City council action on appeals.

(1) General. When an appeal has been timely filed and the deadline for receipt of memoranda has expired, the clerk-treasurer's office shall deliver to the city council a copy of the examiner's decision and the evidence presented to the examiner, and an audio recording of the hearing before the examiner. The city council may view the site either individually or together, only to gain background information on the general appearance of the property; no one other than the city staff can accompany city council members during the view. When city council members have read the decision, memoranda and evidence, and heard the recording, the clerk-treasurer shall schedule a date for a closed record

appeal meeting by the city council at which time the city council shall render a decision. The date of the closed record appeal meeting should be not later than 53 days following the date the appeal was filed.

(2) Public Notice of Closed Record Appeals. The clerk-treasurer shall mail written notice to all parties of record to apprise them of the meeting date before the city council. "Parties of record" are persons who have:

(A) Given oral or written comments to the examiner; or

(B) Listed their names, as persons wishing a copy of the decision on a sign-up sheet, which is available during the examiner's hearings.

(3) Scope of Review. City council review of facts is limited to evidence presented to the examiner.

(4) City Council Decision on Appeal. At the closed record appeal meeting the city council may adopt, amend and adopt, reject, reverse, and amend conclusions of law and the decision of the examiner, or remand the matter for further consideration. If the city council renders a decision different from the decision of the examiner, the city council shall adopt amended conclusions accordingly. The city council's decision on the appeal shall be issued not later than 60 days following the date the appeal was filed, unless the parties to an appeal agree to extend the time period. (Ord. 1249 § 5, 2001)

2.26.085 Reconsideration by the city council.

The city council's decision is final and no reconsideration requests shall be considered. (Ord. 1249 § 5, 2001)

2.26.090 Annual report.

The examiner shall annually report in writing to and meet with the mayor and council for the purpose of reviewing the administration of land use policies and regulating ordinances. The report shall include a summary of the examiner's decisions since the prior report. (Ord. 1249 § 5, 2001)

2.26.100 Fees and costs.

The cost and fees for presenting a matter to the land use hearing examiner shall be paid in advance, and are as follows:

(1) Category A Issues – \$200.00. Category A issues involve relatively simple requests and appeals, including plat vacations, appeals of threshold decisions, variances and conditional use matters, and appeals of hearing examiner decisions. The application fee for these projects is therefore considered a deposit toward the actual costs, and the applicant will be responsible for all costs incurred in the processing of these issues;

(2) Category B Issues – \$500.00. Category B issues involve more complex and larger projects, including long plats, MUTC or MI projects in excess of 40,000 square feet, and shorelines issues in excess of 5,000 square feet or \$25,000. The application fee for these projects is therefore considered a deposit toward the actual costs, and the applicant will be responsible for all costs incurred in the processing of these issues;

(3) Category C Issues – \$1,500. Category C issues involve large and complex projects, including master plans, MUTC or MI issues in excess of \$1,000,000 and complex matters referred by the planning commission. These issues may also require extended hearings and complex and detailed written decisions. The application fee for these projects is therefore considered a deposit toward the actual costs, and the applicant will be responsible for all costs incurred in the processing of these issues. (Ord. 1249 § 5, 2001)

2.26.110 Commencement of referral.

All applicable matters, as required by this chapter, which are scheduled for hearing on a date to be held after the effective date of the ordinance codified in this chapter shall be

referred to the hearing examiner for review. (Ord. 1249 § 5, 2001)



FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY yn
ATTORNEY

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

**FRIENDS OF GRAYS
HARBOR and WASHINGTON
ENVIRONMENTAL
COUNCIL,**

Appellants,

**v.
CITY OF WESTPORT, MOX-
CHEHALIS LLC, PORT OF
GRAYS HARBOR, and STATE
OF WASHINGTON
DEPARTMENT OF
ECOLOGY,**

Respondents.

NO. 34113-1-II

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 2101 Fourth Avenue, Suite 1230, Seattle, Washington 98121.

On October 31, 2006, I served a true and correct copy of the **APPELLANTS' REPLY BRIEF and APPENDICES** on the persons listed below by First Class mail, postage prepaid, addressed as follows:

Charles B. Roe, Jr
Perkins Coie
111 Market St. NE, Suite 220
Olympia, WA 98501

Barnett A. Kalikow
Kalikow & Gusa, PLLC
1405 Harrison Ave. NW , Suite 207
Olympia, WA 98502

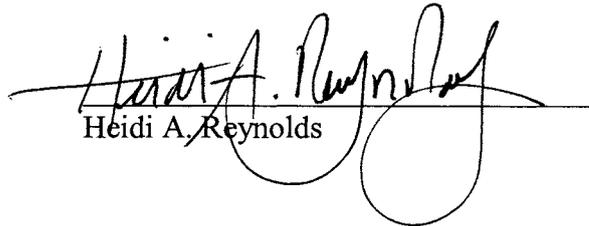
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Thomas J. Young
Joan Marchioro
Assistant Attorney General
Department of Ecology
P.O. Box 40117
Olympia, WA 98504-0117

I, Heidi A. Reynolds, declare under penalty of perjury that the
foregoing is true and correct.

Executed on this 31st day of October, 2006, at Seattle, Washington.


Heidi A. Reynolds