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**COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

No. 34113-1-II

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

vs.

**MOX CHEHALIS LLC, THE CITY OF WESTPORT, THE PORT
OF GRAYS HARBOR and THE WASHINGTON
DEPARTMENT OF ECOLOGY, Respondents.**

Appeal from the Superior Court of Washington
for Thurston County, Cause No. **05 2 02251 2**

RESPONDENTS' JOINT RESPONSE BRIEF

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I. INTRODUCTION

This appeal concerns challenges by Friends of Grays Harbor and the Washington Environmental Council (collectively referred to as “FOGH”) to a Shoreline Substantial Development Permit (SSDP) and site plan approval granted by the City of Westport for development of a master planned destination resort on a 355 acre parcel in Westport. FOGH limits its challenge to one prominent feature of the resort, the proposal to include 200 condominium units.

This appeal arises from a unique statutory process created under Ch. 43.21L RCW that was enacted to provide consolidated review of state and local permit decisions for economically significant projects located in economically distressed areas, including Grays Harbor County. Under this statute, the Environmental Land Use Hearings Board (“ELUHB”) reviewed the City’s permit decisions on the administrative record and, with one minor exception, upheld the City’s decisions.

II. ISSUES PRESENTED

A. SHORELINE PERMIT DECISION ISSUES:

1. Whether the City’s decision to issue a Substantial Development Permit for proposed resort’s condominium element is consistent with the Shoreline Master Program and Shoreline Management Act?
 - a. Whether the factual findings of the Planning Commission in approving the SSDP for the condominium element are supported by substantial evidence in the record?
 - b. Whether the City Council erred by rejecting new evidence offered on appeal where City ordinances preclude introduction of such evidence and require it to decide administrative

appeals based “on the record”?

- c. Whether the City correctly rejected FOGH’s contention that condominiums are proposed within the 200 foot setback established by the Shoreline Master Program in approving the SSDP?

B. SITE PLAN APPROVAL DECISION ISSUES:

5. Whether the City correctly took into account the Planning Commission decision to support its findings that shoreline setbacks were met in approving the site plan?
6. Whether the City properly rejected FOGH’s contention that conditions relating the setback had materially changed in approving the site plan?
7. Whether the City correctly interpreted its site plan provisions requiring dedications?

C. ISSUES COMMON TO ALL APPEALS:

8. Whether the City of Westport and the ELUHB correctly interpreted the Shoreline Master Program “building setback” provision as not applying to utility lines or stormwater facilities?
9. Whether jurisdiction existed in the ELUHB and the courts to consider Appellants’ petitions for review?

III. STATEMENT OF CASE

A. MOX CHEHALIS PROPOSED A MASTER PLANNED DESTINATION RESORT PURSUANT TO THE CITY’S COMPREHENSIVE PLAN AND ZONING.

This case concerns a master planned resort known as the Links at Half Moon Bay (“the Resort Project”) proposed by Mox Chehalis LLC in the City of Westport,. The project contains multiple elements, including a resort hotel/convention center, budget hotel, 18 hole championship “Scottish links style” public golf course, and condominiums on a 355.29 acre parcel of property. (“the Property”). FOGH is presently challenging only one such

element of the Resort project, limiting their challenge to the approval of 200 condominiums which are proposed in the northwest portion of the Property. Appellants' Brief at 3.

The Property is zoned "Tourist Commercial" (TC) by the Westport zoning code. **WSH 4401 (Findings 32,33)**. The property is designated by the Shoreline Master Program (SMP) as being within the "urban shorelines environment." *Id.* The uses permitted within the urban shoreline environment are set forth in the underlying zoning designation which, for this Property is the Tourist Commercial (TC) zone, WMC 17.21. The condominiums are a permitted use in the urban environment at this site. WMC 17.21.020(1) permits "residential uses, including one or more hotels, motels, condominiums, . . ." (Emphasis added).¹

B. HISTORIC BACKGROUND

1. The City Prepared a Full Environmental Impact Statement for the Project.

Environmental Review under the State Environmental Policy Act (SEPA), Ch. 43.21C RCW, consisted of a Determination of Significance and Request for Comments on Scoping, a scoping meeting, preparation of a Draft Environmental Impact Statement dated November 1, 2000, a 30-day public comment period which was extended by an additional 14 days, and preparation

¹ The uses proposed by the applicant will have no effect on erosion along the Pacific Ocean or Half Moon Bay. No bulkheads, riprap, seawalls or other shoreline protection structures are proposed. The applicant is required to advise future owners and residents within the project that possible future coastal erosion could adversely impact their properties and possessions.

of a Final Environmental Impact Statement, dated March 23, 2001.

2. The City Approved a Master Plan Ordinance for the Project Which Was Sustained by the Thurston County Superior Court over FOGH' Objections.

Under the City's zoning code, development within the TC District requires approval of a site Master Plan Ordinance, which then becomes the governing zoning for the site. Ch. 17.36A WMC. On October 8, 2002, the City Council approved a master plan ordinance for the Links at Half Moon Bay project. **Ord. 1277, WSH 1597.**²

The Master Plan ordinance specifically addressed and established the development standards for the proposal to locate condominiums on the site. See WMC 16.36A.060(b). The Master Plan ordinance expressly requires that the condominiums be located in the northwest portion, where Mox Chehalis proposes them. The Master Plan Ordinance establishes a height restriction, limiting the buildings to 50 feet or 4 stories (whichever is less) above a parking garage. **WSH 1609.** In adopting the Master Plan Ordinance, the City adopted Findings of Fact that determined the proposed Resort Project is consistent with the City's Comprehensive Plan. **WSH 1600-1604.**

FOGH appealed to the adoption of Ordinance 1277 to Thurston County Superior Court, which affirmed the validity of the City's ordinance in *FOGH v. City of Westport*, No. 02-2-01892-8. **WSH 1621.** The Superior Court's

² Ordinance 1277 is the second Master Plan Ordinance adopted by the City. The City Council first approved a master plan in 2001. FOGH successfully challenged the procedure for adoption of the first ordinance under the appearance of fairness doctrine, resulting in a remand to the City Council that ultimately led to the adoption of Ordinance 1277.

decision addressed many of the same issues FOGH now raises. The Court's decision specifically:

- Rejected FOGH's contention that the location of the condominiums was not in the public interest because of the threat of coastal erosion. **WSH 1640-1641.**
- Rejected FOGH's contention that the location of the condominiums adjacent to Westhaven State Park was contrary to the Comprehensive Plan. **WSH 1642.**
- Rejected FOGH's contention that the condominiums were prohibited because only "low density development was allowed by the Comprehensive Plan. **WSH 1643.**
- Rejected FOGH's SEPA arguments, both for failing to exhaust remedies and on the merits, upholding the validity and adequacy of the EIS. **WSH 1644-5.**

FOGH did not appeal this decision any further. Despite their failure to appeal these rulings when the site master plan was approved, FOGH persists in impermissibly relitigating the same issues in its challenge to subsequent permit decisions relating to the Resort Project.

C. THE CITY OF WESTPORT APPROVED SHORELINE PERMITS FOR THE RESORT PROJECT.

Following the Superior Court's approval of the Master Plan ordinance, the applicant submitted an application for issuance of 1) a shoreline substantial development permit (SSDP) and 2) a shorelines conditional use permit (SCUP).³ **WSH 1.** Before the two shoreline permits were considered by the City, an Addendum to the EIS was adopted by the City on August 8, 2003.

³ The SCUP was sought to authorize construction of the golf course, including 9.96 acres of wetlands fill. No filling was proposed for any of the buildings, including the condominiums, hotels and convention center.

WSH 902. On September 10, 2003, a public hearing was held by the City Planning Commission. FOGH, through their legal counsel and officers, appeared, offered voluminous written exhibits and testified under oath at this hearing. FOGH's counsel cross-examined witnesses and presented argument.

However, FOGH presented no expert testimony to support their erosion theories or argument that the condominiums violated the 200 foot setback.

WSH 4401. On September 30, 2003, the Planning Commission adopted detailed findings of fact and conclusions of law approving both shorelines permits. **WSH 4393.** FOGH appealed to the City Council. **WSH 4412A.**

FOGH's appeal to the City Council purported to raise numerous issues.

WSH 4412A. A document entitled "statement of issues" was filed that listed 54 questions, but failed to provide any analysis of how such questions should be answered. **WSH 4417.** On October 28, 2003 the City Council held a hearing to consider FOGH's appeal on the record created before the Planning Commission. FOGH's counsel declined to address numerous issues raised in his appeal, despite direct questions from the Council.⁴ FOGH instead nearly exclusively confined its appeal argument on an issue not even raised in their

⁴ One Council member asked FOGH's counsel about the contention that the permits were issued under an unlawful procedure, specifically requesting him to identify what was inadequate and where in the record FOGH had objected. CC T at 9-10. Mr. Lowney retorted that: "That's not one of the things that's on my list of things that I'm going to be talking about today." Likewise, when asked where in the record FOGH had submitted expert evidence to support its erosion claims, Mr. Lowney was unable to provide a citation. CC T at 11-12, 14-15. Finally, Lowney could not identify any basis in the record to support his contention that the 200 foot setback line was not met. CC T at 16-17. Rather than relying on the evidence in the record, FOGH offered only unsupported argument of counsel. *Id.*

notice of appeal or issue statement⁵: an unanticipated oral request to admit new evidence in a closed record hearing concerning the impact of a storm event in mid-October, 2003.⁶ The Council considered this request and the applicant's objection, **City Council Transcript (CC T) at 18-24**. The Council was advised and determined that its codes did not allow for submission of new evidence in an appeal that was to be heard "on the record." **CC T at 25**.

After deliberating on FOGH' appeal, the Council voted unanimously to uphold the Planning Commission decision. CC T at 35-36. The City Council adopted a written decision that affirmed the findings of the Planning Commission supporting the SSDP. **WSH 4452**. The City then issued two shorelines permits – 1) a SSDP for the hotels, convention center and condominiums, and 2) a SCUP authorizing construction of the golf course. **WSH 4450-51**. Only the SSDP is before the Court in this appeal.

D. THE CITY APPROVED A DETAILED SITE PLAN FOR CONSTRUCTION OF THE RESORT.

Following the issuance of the two shoreline permits, the City Site Plan Review Board (SPRB) met and considered a site plan application submitted by Mox Chehalis. **BSP 993 - 1060**. The Board approved the site plan application in a decision dated February 2, 2004. **BSP 1061**.

⁵ FOGH's counsel also briefly mentioned wetlands issues in his appeal argument. Such issues were considered by the ELUHB in their open record "de novo" hearing, which FOGH did not appeal. As such, these issues are not before the court.

⁶ The new "evidence" offered by FOGH consisted of a photograph, the Council's resolution declaring an emergency and newspaper articles. Mr. Lowney acknowledged that it did not contain expert opinions and argued that no response would be needed. CC T at 22.

In reviewing the site plan, the SPRB made findings of fact and conclusions of law that supported its decision to conditionally approve the Mox Chehalis site plan for the Links at Half Moon Bay.⁷ **BSP 1062.** These findings included findings that the proposed site plan:

- is in conformity with applicable zoning and other development regulations. Finding 7. **BSP 1065.**
- makes appropriate provisions for the public health, safety and general welfare and for open spaces, drainage, streets and roads, potable water supplies, sanitary wastes, parks and recreation, playgrounds, sidewalks and other features. Finding 8. **BSP 1065**
- is not detrimental to the public's health safety and general welfare. Finding 18. **BSP 1066.**

Following the approval of the Site Plan by the SPRB, an appeal was filed by Friends of Grays Harbor (FOGH) focusing on its recurrent theme that potential coastal erosion should result in denial of the site plan. **BSP 1.** FOGH contended that, 1) the site plan application was inaccurate due to episodic erosion along Half Moon Bay, 2) did not meet applicable setbacks set forth in the City's Shoreline Master Program⁸, and 3) was not in the public interest. *Id.* Finally, FOGH contended that the SPRB was required to reject the site plan because it did not include deeds dedicating rights of way and utilities

⁷ A copy of Ch. 17.36B WMC, which governs site plan approval is attached as Appendix 1.

⁸ The City's shoreline master program is part of the administrative record in this case. WSH 1534-1595. A copy of the relevant portions is attached as Appendix 2.

easements.⁹

On April 8-9, 2004, the Hearing Examiner held an open record public hearing to consider FOGH's appeal. FOGH submitted 84 exhibits that exclusively addressed its coastal erosion and setback contentions.¹⁰ This material included the "evidence" that FOGH had offered before the City Council at the closed record hearing.

The applicant and SPRB offered testimony that supported the SPRB findings that the site plan met applicable setbacks. First, the City presented testimony concerning the prior factual findings made by the Planning Commission that the project met the 200 foot setback requirement as of September 2003. HE T at 44-45, 89; BSP 1072.

Secondly, the City's witnesses demonstrated that conditions at the condominium location had not materially changed as a result of winter storms that caused erosion at Westhaven State Park.¹¹ One of the SPRB members, Jim Mankin, testified that the erosion emergency was to the west of transect 4 and the condominiums are located to the east of transect 4. **Hearing Examiner**

⁹ FOGH also asserted that the SPRB failed to make a finding that the public interest was served by approval of the project. The ELUHB found that this "finding" was limited to determining the adequacy of public works and need not reconsider elements determined under other laws. No party has challenged that element of the ELUHB's decision.

¹⁰ No evidence was submitted regarding its contentions that the site plan did not meet requirements applicable for binding site plans used in lieu of formal subdivisions.

¹¹ FOGH asserts that the erosion during the winter of 2003 occurred at the location of the condominiums. However, the evidence showed that the erosion was to the west of the condominium location, fronting Westhaven State Park. Thus, the vast majority of FOGH's "evidence" was immaterial since it did not relate to the specific project location at issue.

Transcript (HE T) at 46. He further testified that he had personally visited the site, both before and after the storms, and that the marram grass line had not moved. **HE T at 46.**¹² While acknowledging that erosion had occurred to the west of the condominiums adjacent to Westhaven State Park, Mankin testified that the shoreline did not substantially erode in the location of the condominiums.¹³ **Id. at 50.**

The observations of the marram grass line were further supported by the testimony of Randy Lewis and beach profiles prepared by a coastal erosion experts from Pacific International Engineering (PIE), who were retained specifically to monitor erosion in Half Moon Bay. **HE T 90-94.** They showed that the marram grass line had not moved at transect 4, the westernmost position of the condominiums. **BSP 990.** Likewise, the marram grass line was stable at transect 5, the easternmost position of the condominiums. **BSP 991.** In contrast to the speculative assertions presented by FOGH, the transects prepared by PIE measured the shoreline and elevations in Half Moon Bay using

¹² Under cross examination, Mr. Mankin verified that he had personally paced 200 feet in September of 2003 and had been to the site every month since. **HE T at 50-51.** Mankin even demonstrated the accuracy of his paces for the Hearing Examiner, precisely pacing off the length of the hearing room. **HE T at 56-58.**

¹³ Much of FOGH's arguments concerning the erosion was based on FOGH's erroneous belief that the City had constructed a seawall, prominently featured in their Appendix, close to the location of the condominiums. Despite testimony from Mankin to the contrary, FOGH asserted that the seawall was built only 50 feet from the condominium location. **HE T at 54-55.** However, as Mr. Lewis later clarified, the seawall was actually constructed to the west of the location shown on its HPA permit and was actually only two-thirds of the length shown on the construction plans. **HE T at 110.**

precise GPS technology. **HE T at 92.** This “compelling” evidence¹⁴ demonstrated that the beach had not moved between transects 4 and 5, the precise location where the condominiums are located. In rejecting FOGH’s setback contentions, the Examiner found:

The movement is greatest between transect lines 2 and 4. (Exhibit C4) Between transects 4 and 5, the evidence showed erosion to the west and relative stability to the east. The evidence shows the condominiums located south of the shoreline lying between transect lines 4 and 5.

BSP 1072 (emphasis added).

The project manager for Mox Chehalis, Marc Horton, further testified about prior demarcations of the ordinary high water mark, which is coextensive with the marram grass line from which the setback is measured.¹⁵ Horton testified that the closest point from the condominiums to the marram grass line was 204.5 feet. **HE T at 64. See also BSP 931.**

In approving the setbacks, the Hearing Examiner also recognized that, in the future, the applicant will be required to meet the 200 foot setback by verifying the conditions on the ground when construction commences. **BSP 1074.** Indeed, because the building inspector will measure the 200 foot setback in the field as part of the foundation inspection required under the building

¹⁴ Even Mr. Lowney, the attorney for FOGH, characterized the City’s evidence as “compelling”. **HE T at 95.**

¹⁵ This line was determined in 2001 and again in 2003 in connection with shoreline applications. No party, including FOGH, ever provided evidence disputing that line. **HE T at 62.** Mr. Horton described the process for mapping the site using Global Positioning Satellite (GPS) data and computers to overlay the data on maps. This was done for the site plan application as of September 9, 2003. **HE T at 64.**

code, the applicant will not violate the 200 foot setback, even if erosion were to move the marram grass line in the future. *Id.*

E. THE ELUHB AFFIRMED THE CITY'S SHORELINE PERMIT DECISIONS AND REJECTED FOGH'S EROSION AND SETBACK CHALLENGES TO THE SITE PLAN APPROVAL.

Following the City's approvals, FOGH filed petitions for review contesting each decision with the ELUHB. These petitions contained only conclusory assertions of standing and did not allege facts showing how any member was harmed. CP 1223-1262. The Respondents immediately moved to dismiss for lack of jurisdiction. CP 1059. The ELUHB denied the motion. CP 330.

On August 4, 2005, the ELUHB heard arguments and considered Appellant's contentions on the record established before the City of Westport. This considered both the SSDP permit decision and site plan approval.¹⁶ On October 12, 2005, the ELUHB issued two decisions. The first, which is the subject of this appeal, was based on review of the record created by Westport's hearings. This decision affirmed the City's issuance of the SSDP for the condominiums and hotels. It further rejected FOGH's challenge to the approval of the site plan based on insufficient setbacks and erosion concerns.¹⁷

¹⁶ The ELUHB also held a de novo hearing from August 22-26, 2006 to consider challenges to the approval of a shoreline conditional use permit and water quality certification. The ELUHB approved the CUP and imposed conditions on Ecology's approval of the Water Quality Certification in a decision dated October 12, 2005. That decision has not been appealed.

¹⁷ The second decision, which has not been appealed, affirmed the City's decision to issue a conditional use permit for the proposed golf course, allowing up to 9.96 acres of wetlands fill.

IV. JURISDICTIONAL ISSUES

The court should dismiss this appeal because the ELUHB never had any jurisdiction to hear the petitions for review in the first place.¹⁸ In this regard, FOGH failed to properly allege facts supporting standing in their petitions for review. CP 1223. FOGH's recitation of its standing did not allege facts showing how their members are aggrieved or adversely affected by the permit decisions. Hence, the petition did not satisfy RCW 43.21L.060 and the ELUHB erred in not granting the Respondents' motion to dismiss. CP 330.

Moreover, FOGH failed to argue the merits of its appeal before the City Council, and has therefore waived its administrative remedies. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997).¹⁹ Since RCW 43.21L.070 requires exhaustion of remedies, the ELUHB erred by denying Respondents's motion to dismiss.

¹⁸ FOGH also failed to properly invoke the court's jurisdiction by improperly serving their Petition for Judicial Review under RCW 43.21L.140. These issues were previously briefed in the Respondents' Motion to Modify, which was denied without explanation by the Court. Although the Court is free to revisit the decision on the Motion to Modify, the contentions raised herein raise the further issue of whether the ELUHB, as opposed to the court, lacked jurisdiction and erred by refusing to dismiss the petitions for review filed with the Board.

¹⁹ Exhaustion requires more than going through the motions. As the Oregon Supreme Court stated in *Mullineaux v. State Department of Revenue*, 651 P.2d 724 (1982), quoting *Marbet v. Portland General Electric Co.* 561 P.2d 154 (1977):

The requirement that a party must have objected before the agency to errors he asserts on judicial review is one facet of the general doctrine that a party must exhaust his administrative remedies. 277 Or. at 456. See 3 K.C. Davis, *Administrative Law Treatise* § 20.06 (1958). A party does not exhaust his administrative remedies simply by stepping through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute. Exhaustion of administrative remedies is not accomplished through the expedience of default.

V. STANDARD OF REVIEW

A. REVIEW IS BASED ON THE RECORD USING THE STANDARDS SET FORTH IN RCW 43.21L.130.

Unlike other boards in the Environmental Hearings Office, the ELUHB is required to review certain matters on the record created by local government after a due process hearing is provided. The review of the City's decisions approving the SSDP and site plan review are on the record.

Issues of fact are reviewed under the substantial evidence test. RCW 43.21L.130(1)(c). To meet the substantial evidence standard, "there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002); *Young v. Pierce County*, 120 Wn.App. 175, 84 P.3d 927 (2004). As explained in *Affordable Cabs, Inc. v. Department of Employment Sec.*, 124 Wn.App. 361, 367, 101 P.3d 440 (2004):

The substantial evidence standard is deferential; therefore, we view "the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority." *Schofield v. Spokane County*, 96 Wn.App. 581, 586-87, 980 P.2d 277 (1999) (citing *Davidson v. Kitsap County*, 86 Wn.App. 673, 680, 937 P.2d 1309 (1997)). We will not substitute our judgment for that of the agency regarding witness credibility or the weight of evidence.

Issues of law are reviewed de novo after giving due deference to the interpretation of local government concerning matters within their expertise and jurisdiction. See RCW 43.21L.130(1)(b).

B. THE DECISIONS OF THE CITY AND ELUHB ARE ENTITLED TO SUBSTANTIAL DEFERENCE.

Thus, FOGH' interpretation of the standard of review of the ELUHB's record (as opposed to *de novo*) review is accurate as far as it goes but it is incomplete. RCW 43.21L.130 governs this court's review of the City's decision. What FOGH left unexamined, however, is 1) the level of deference afforded findings of fact and issues of law in the decisions on appeal and 2) who gets that deference.

Because only the City held evidentiary hearings on the matters before this court, the City's determinations *of the evidence and facts* must be upheld if supported by substantial evidence, as set forth in RCW 43.21L.130 (1)(c). The adoption of RCW 43.21L.130 expands the degree of weight to require "deference" to reasonable interpretations by the local government of its own Master Program. On such interpretations of law and application of the law to the facts as found, however, the issue is more complex. The general rule is that,

"[i]n the course of judicial review, due deference must be given to the specialized knowledge and expertise of the administrative agency." *Department of Ecology v. Ballard Elks Lodge* 827, [84 Wn.2d 551, 527 P.2d 1121 (1974)] *supra* at 556; cf. *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn. 2d 441, 448, 451, 536 P.2d 157 (1975). Similarly, the United States Supreme Court has shown "great deference" to the interpretation given a statute by the agency charged with its administration and stated "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965); see *Zuber v. Allen*, 396 U.S. 168, 192-93, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969).

Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976)

Although the court always reviews matters of law *de novo*, and is not bound by the interpretations of the agency, due deference or even “great deference” to such interpretations is the rule. *Hayes*, supra; *Redmond v. Central Puget Sound GMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). When a local government entity *alone* administers a state law through its *own* enactments, it is usually afforded deference by the court as the agency with expertise. *Solid Waste Alternative Proponents v. Okanogan County*, 66 Wn.App. 439, 442, 832 P.2d 503 (1992).

In *Hayes*, *Ballard Elks*, and *Hama Hama*, supra, it was the Shorelines Hearings Board (SHB) that received the deference on matters of Shorelines Management Act law. Because the ELUHB sitting in this case is composed of the same members as the SHB (See RCW 43.21L.040), that would normally end the inquiry at least insofar as the Shorelines issues at bench. However, unlike the SHB, the ELUHB reviews City determinations of fact and law on the record, does not hold its own evidentiary hearings and must afford due deference to the local government under RCW 43.21L.130(1)(b). Even when the hearings board holds its own evidentiary hearing, however, the interpretation offered by the local jurisdiction of its own master program should be given great weight by the Board. See *Peterson v. Templin Foundation*, SHB 99-4 (November 10, 1999).

Guidance on the deference issue was recently provided in *Preserve Our Islands v. Shorelines Hearings Board*, 133 Wn. App. 503, 137 P.3d 31 (2006) (hereafter “*POI*”). After describing the deferential review standard set forth

above, the court continued:

[Appellant] POI argues that if any deference is due, it should be accorded to the County rather than the Board because the County wrote the Master Program, and the SMA grants local governments primary responsibility for 'administering the regulatory program consistent with the policy and provisions of {the SMA}.' While this is true as far as it goes, our courts have long recognized that the Board 'draws on its special knowledge and experience as the entity charged with administering and enforcing the {SMA}.' The important distinction here is that the Board hears cases like this one de novo, and it does not accord deference to the local government's decision. This is unlike review under the Growth Management Act (GMA), which requires that the Growth Management Hearings Board defer to the decisions and actions of counties and cities under the GMA. There is no similar provision in the SMA, likely because its passage did not require the compromises necessary to enact the GMA. Because we review the Shorelines Hearings Board's decision, not that of the local government, to the extent we give deference, it is to the Board. This is particularly true where it has applied its 'specialized knowledge and expertise' following an extensive fact-based inquiry. It would be inappropriate for this court to accord deference to the Director of DDES when that was not the posture in which the statute directs the Board to decide the matter

133 Wn. App at 515-516. (Multiple footnotes omitted)

If we apply the *POI* analysis where the ELUHB reviews the City's decision on the City's factual record, exercising its expertise in shorelines law, the following principles emerge:

1. The City is entitled to due deference on issues of site plan review because the City wrote, administers, and held the only hearings on these matters.
2. Shorelines Issues which are before this Court have shared expertise between the City and ELUHB. The City wrote the SMP and has primary responsibility for administering the

regulatory program under the SMA. The ELUHB draws on its special knowledge and experience as the alter ego of the entity charged with hearing appeals of shorelines matters.

3. Unlike in *POI*, however, the ELUHB does not hear the case *de novo* and its ability to apply its specialized knowledge of the law to the facts is constrained. The ELUHB should be given some deference in its interpretation of Shorelines law because of its extensive history and understanding of that law. As the agency that adopted the SMP and held the hearings creating the record, the City should also be given deference on matters of both the interpretation of the local SMP and its application to the facts at hand.

VI. ARGUMENT

A. APPELLANTS MISCONSTRUE THE SHORELINES MANAGEMENT ACT POLICIES.

Nearly all of FOGH's arguments with respect to the policies of the SMA stem from a basic misreading of the nature and operation of the Act. The policies set forth in RCW 90.58.020 are explicitly directed at guiding the *planning* process, not, as Petitioners would have it, at project review.

1. **The Policies Stated in RCW 90.58.020 Are General Policies Expressly Intended to Guide Development of the Shoreline Master Program.**

FOGH focuses their arguments on the policies of RCW 90.58.020, arguing that the Resort project is inconsistent with their interpretation of these

statutory priorities. Brief at 23-33. FOGH misconstrues the application of these statutory priorities. The stated purpose of the Act, and the policies promulgated thereunder, is to promote coordinated *planning* of shorelines uses through a shorelines master planning process. The plain language of the Act confirms this. The real danger to the shorelines, the legislature asserts in the first paragraph of RCW 90.58.020, comes from "unrestricted construction" and "uncoordinated and piecemeal" growth and development. "Therefore," the legislature found,

. . . *coordinated planning is necessary* in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore,[sic] a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state *by planning for and fostering all reasonable and appropriate uses.*

RCW 90.58.020 (emphasis added).

The core requirement of the SMA is to ensure that every portion of the shorelines of this State has a specific Shorelines Master Program ("SMP") in effect, that identifies where and how uses of the shorelines will occur in the future. The Department of Ecology is given responsibility for review of those programs before they became law to ensure protection of the shorelines of the State. RCW 90.58.090.

FOGH ignores the fact that the list of shorelines priorities is explicitly a list of *planning* priorities for developing SMP's, urging instead that this

court apply the policies to individual *project* review. (Appellants' brief at 25).

The statutory language introducing the use priorities reads as follows:

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The Department, in adopting guidelines for shorelines of statewide significance, and local government, *in developing master programs* for shorelines of statewide significance, shall give preference to uses in the following order of preference which,

- (1) Recognize and protect the statewide interest over local interest;
- (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.

RCW 90.58.020, third paragraph (emphasis added).

FOGH has, curiously, left out not only the highlighted language quoted above, but has also left out numbered preferential use (7) set forth above, *“Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.”* The *“any other element”* referred to in this reference to RCW 90.58.100, relates to planning elements in the SMP. This language simply reaffirms that the listing of priorities are references for master planning priorities. This section of the SMA is not a project review statute.

The Westport City Council through its enactment of the SMP determined that a destination resort with 18 hole golf course and condominiums should be built at this location. The Westport SMP not only allows for them, it specifically calls for them. The land use regulations directed

at this type of project was at the heart of a very public process (WSH 00500) that underwent unchallenged environmental review. The Department of Ecology approved the SMP with eyes wide open. The applicant had the firm assurances of the codes as written before it made an application. There is nothing inconsistent between the code and the Shorelines Management Act; indeed, the Department of Ecology's approval of the Westport SMP by definition certifies that it carries out and is consistent with the specific dictates and priorities of the Act.

The approval of the City's SMP has particular significance in this case because the shorelines involved are "shorelines of statewide significance" as defined by RCW 90.58.030(2)(e). Under the SMA, the Department of Ecology has special responsibilities to review the SMP affecting such shorelines, and if a local master program does not meet statutory muster, Ecology may impose its own requirements on shorelines of statewide significance. RCW 90.58.090(5). Ecology's approval of the Westport SMP is therefore a determination that it "provides the optimum implementation of the policy of this chapter to satisfy the statewide interest." *Id.*

FOGH's legal complaints concerning approval of condominiums are, in reality, complaints with the uses permitted by the SMP. FOGH failed to challenge the SMP within the statutory period for doing so. See RCW 90.58.180 (4) and (7). FOGH could have, and was required to challenge any SMP provision that violates the policies of the Act in 1998, when the City, the Port and Ecology planners adopted the SMP, including provisions allowing

condominiums in their present location.

2. Subjective Interpretations of General Shorelines Policies Do Not Disallow What Is Specifically Permitted by Detailed Development and Use Regulations.

An appellant's subjective interpretation of general SMA policies and priorities cannot be relied upon to disallow permitted uses in an approved SMP.

This principle was recently recognized by *POI, supra*, 133 Wn.App. at 537, where the Court stated:

While shoreline policies are important to implementing the SMA, they are "only policies" and, as such, cannot specify what uses and mitigation measures may be appropriate at a given site.

POI, 133 Wn.App. at 537.

The Shoreline Hearings Board has agreed that compliance with the specific development standards and use requirements in the SMP creates a presumption of consistency with the policies of the SMA. *Seaview Coast Coalition v. Pacific County* SHB 99-020, *Ackerson v. King County*, SHB # 95-26, *Young v. Vander Sar*, SHB 95-68 (1995); *Nisqually Delta Association v. City of DuPont*, SHB No. 81-8 (1992); *Eastlake Community Council v. City of Seattle*, SHB 90-8 (1991), affirmed, 64 Wn.App. 273, 823 P.2d 1132 (1992).

3. Specific Development Regulations Govern over General Comprehensive Plan Provisions.

FOGH also argues that its, again, subjective interpretation of certain general policies in the Shorelines Management portion of Westport's comprehensive plan should disallow these condominiums. Even if FOGH's interpretation of these general provisions were to be indulged in legal review

of this case – which neither the City, the Superior Court, nor the ELUHB have so far done – it would not benefit the Appellants. Longstanding Washington law provides that even if there were an actual conflict between the general comprehensive plan goals and the use and development regulations, the more detailed use regulations would apply.

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 757, 765 P.2d 264 (1988). If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994). These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

Citizens for Mount Vernon, 133 Wn.2d at 873.

As well, a comprehensive plan itself calls for the city council to carry out plan goals by instituting zoning, including specifically a mixed-use tourist commercial zone and the city has done that job. (see Comprehensive Plan at chapter 4, section G (4) attached as Appendix 3) FOGH's subjective view that these general goals could be better served with different uses at the site of the condominiums is of no significance. The City, not FOGH, is charged with carrying out those goals with its SMP use and development regulations. The City has done so and the Department of Ecology approved the City's prescribed uses and regulations.

4. The Project Is Consistent with the Policies of the SMA.

FOGH contends that the Resort project is inconsistent with every one

of the stated policies of the SMA. Brief at 24. FOGH is wrong and seek to impose their own agenda in a subjective interpretation of statutory priorities in lieu of the master program adopted by elected representatives of the City of Westport and approved by the Department of Ecology as the “optimum implementation” of the policy of the SMA.²⁰

a. The Resort Project Does Not Promote Local Interests over Statewide Interests.

FOGH contends that the Resort Project puts local concerns ahead of state-wide interests. Aside from the fact that this standard applies to the drafting of master programs under RCW 90.58.020, FOGH fails to explain what this standard means under the law.

FOGH neglects to address the City’s permit requirements that the road leading to Westhaven State Park will be upgraded to facilitate public access to the Park. **WSH 4401 (Finding 33), WSH 4410-11 (Conditions 10, 11).** FOGH neglects the City’s permit requirement that the developer must provide additional access from the existing trail along the Pacific Ocean to the beach area. **WSH 4410 (Condition 6).** They further neglect to address the requirement that the developer permanently dedicate the land underlying that trail to the City. ***Id.* (Condition 7).**

FOGH’s myopic focus on the condominiums neglects the true nature of the Resort project and the increased enjoyment of the City’s shorelines. This

²⁰ FOGH are also wrong in their contention that the City did not give consideration to the policies of the SMA. The City expressly found that, as conditioned, the proposal met the SMA’s policies. WSH 4408.

new major destination resort serves the needs of the Pacific Northwest region and will draw new shoreline recreational users from the Seattle and Portland areas. **WSH 3657**. It is expressly designed to serve statewide tourist interests, not merely local interests.

Furthermore, FOGH omits the fact that the condominium buildings themselves are not located on a “shoreland” at all, as defined by the SMA. RCW 90.58.030(2)(f). The condominiums are located more than 200 feet from the mean high water line and ordinary high water mark, and are located outside any associated wetland. Since the condominium buildings are located on uplands, the impact on shorelines is minimized.

b. The Condominiums Will Not Irreparably Alter the Aesthetic Qualities of the Shorelines.

FOGH’s next argument is again based on their subjective viewpoint, not the findings of the officials responsible for implementing the SMA. In arguing that the condominiums will negatively affect aesthetics, FOGH neglects any reference to specific SMP requirements and chooses to convey the subjective viewpoint of a few opponents. Brief at 30. FOGH further fails to argue, much less prove that the City’s factual findings are unsupported by substantial evidence. In fact, the City considered an analysis of views including photo simulations to support its findings. WSH 910-911; 935-941.

FOGH does not address the findings of the Planning Commission which addressed view impacts. First, the condominiums are situated so that they are landward of views of the water from existing public areas, including the City

trail and Westhaven State Park. WSH 4401 (Finding 29). They will not block a single residential view, which is a value expressly protected by RCW 90.58.320 and WMC 17.32.060(g)(4). *Id.* (Finding 28). While FOGH may be fixated on the condominiums, the rest of the public will continue to be able to view the beach, Half Moon Bay and the Pacific Ocean. *Id.*

These same concerns were analyzed and rejected by the ELUHB. Record Review Decision at 26 (Finding 22). The Court should similarly reject these arguments as the City's findings are supported by substantial evidence, are not an error of law and are not a clearly erroneous application of the law to the facts.

c. The Resort Project Does Not Eliminate, but Increases Access to Publicly Owned Shoreline Areas.

FOGH contends that the project will eliminate access to publicly owned areas of the shoreline. Brief at 33. In so doing, they argue that this parcel, which is privately owned, should be treated as a "de facto park" because it was sold by the Port of Grays Harbor to Mox Chehalis. *Id.* The fact that unknown persons may have trespassed on the property in the past does not convert this privately owned land into "publicly owned shoreline areas". The City found that such use was "unauthorized" by the owners at the time (the Port), resulting in littering and degradation of sensitive areas. WSH 4398 (Finding 15) This finding is supported by testimony of the owners' representative and city

officials. WSH 4269, WSH 1497.²¹

The City's permit decision recognizes that the Resort Project will increase demand for public access to the shorelines and requires that it be provided. WSH 4402 (Finding 35). To accommodate this demand, new pathways for accessing the beach from the public trail are required. WSH 4410 (Condition 6). Moreover, the Resort Project must connect its facilities to the City trail system. WSH 4411 (Condition 8). The frontage improvements and upgrades to Jetty Access Road provide further enhancements of public access to public areas, specifically Westhaven State Park. *Id.* (Conditions 10-11).

d. The Resort Project Will Increase Recreational Opportunities.

FOGH again singles out the condominiums and argues that they will decrease recreational opportunities, despite the overall recreational nature of the Resort Project. Brief at 32. Their reasoning is erroneously based on the premise that the public has ongoing rights to use the private property on which the condominiums are proposed for recreation.

The City's findings recognize that the condominiums are located on private property, which has been subjected to unauthorized use by four wheeled vehicles, campers and hikers. WSH 4398 (Finding 15). Such uses are not legitimate recreational uses that the public has a right to rely upon. Indeed, these uses have been destructive of the sensitive areas located on the Mox

²¹ The condominiums are not located in a defined "shoreline" because they are more than 200 feet from the ordinary high water mark and are not within associated wetlands. RCW 90.58.030; WMC 17.32.020 Hence, no access to publicly owned "shorelines" will be lost by their construction.

Chehalis property. *Id.*

e. Condominiums Are Expressly Allowed in this Location by the Shoreline Master Program.

FOGH contends that the condominiums are not a water dependent use and should therefore be prohibited. Brief at 33. Despite their subjective objections, there is no basis in law for this argument. The SMP, developed to meet the priorities established by RCW 90.58.020 and approved by Ecology, specifically permits condominiums as part of a master planned resort in the TC district. WSH 4401 (Finding 33). This location is specifically allowed for condominiums which are required to meet the 200 foot setback from the marram grass line. *Id.* (Finding 31).

5. Appellants' Challenges to the Decision to Allow the Condominiums under the Westport Comprehensive Plan in Their Present Location Are Barred by Principles of Res Judicata and Collateral Estoppel.

Additionally, the complaints raised by FOGH seeks to relitigate issues that were decided in 2003 by the Thurston County Superior Court, when the court upheld the City's approval of the Master Plan Ordinance. *FOGH v. City of Westport*, Thurston County Sup. Ct. No. 02-2-01892-8. The Master Plan decision was predicated on findings that the Master Plan was consistent with the City's Comprehensive Plan. **WSH 1631**. In contesting Ordinance 1277, FOGH raised the same aesthetic concerns about the scale and location of the condominiums next to Westhaven State Park as they now raise in their brief,

at 33-35.²² **WSH 1643-44.** Likewise, FOGH contended that the condominiums were not allowed under the Comprehensive Plan because they are not “low density” development, which is the same issue raised in their brief at page 35. **WSH 1643.** FOGH also raised the issue of whether future erosion should preclude locating the condominiums adjacent to Half Moon Bay. **WSH 1640.**

In approving the Master Plan Ordinance, the Thurston County Superior Court rejected each of these contentions in 2003. (WSH 1621-1651). FOGH did not appeal. Despite their failure to appeal, FOGH now is relitigating exactly the same issues that were rejected by the Thurston County Superior Court. Under the doctrines of res judicata and collateral estoppel, they are now precluded from again litigating the issues that they previously lost. *Nielson v. Spanaway General Medical Clinic*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998).

6. The Proposal Is Consistent with the City’s Comprehensive Plan Provisions.

Despite having lost these same issues before the Thurston County Superior Court, FOGH makes four arguments based on Comprehensive Plan policies in Chapter 9 of the City’s Comprehensive Plan, which is part of the Shoreline Master Program as well.

First, FOGH raises a new issue on appeal, contending that the Resort

²² In characterizing the Court’s decision, FOGH (Brief at 14) blatantly misrepresents the decision by contending that it rejected their challenges because the Respondents represented that details would be resolved later. FOGH cites WSH 1631 to support this contention, but that is not what the court said. The Court rejected these very same arguments on their merits. Nothing in the court’s decision continued these issues because of future site plan review requirements. The City moves for sanctions against FOGH for violation of their ethical responsibilities to be truthful in their representations to the Court. RPC 3.3; RAP 18.9(a).

Project violates a policy stating that infill “should be encouraged” in order to utilize existing utilities.²³ Brief at 34. This policy is hardly a binding mandate for all future development as it is couched in precatory language. Further, FOGH does not show how this project is inconsistent with this provision.

Secondly, FOGH raises a second new issue on appeal, contending that the project violates a policy that development “should be designed with consideration for aesthetic enhancement.” Brief at 34. This is again not a mandate, but a general policy. Indeed, beauty is in the eye of the beholder and even if FOGH’s witness dislikes the project, that does not compel the Planning Commission to reject the designs prepared by the applicant’s architects.²⁴

Third, FOGH argues that the condominiums are “high-density” development. This same argument was rejected by the Thurston County court. WSH 1643. The applicant proposes 200 condominiums on a parcel that is 300 acres.²⁵ The condominiums are designed using the common practice of “clustering” which is encouraged by sound land use planning principles.

²³ FOGH erroneously contends that a new utility corridor is required, citing to the site plan record which was not before the Planning Commission. FOGH is wrong. The condominiums will use the utility corridor in the existing roadway. WSH 44 (JARPA Ex. 12).

²⁴ FOGH introduces these first two arguments for the first on appeal. This is barred under RAP 2.5(a). The first two arguments are new issues not raised by FOGH in prior administrative proceedings. The general rule is that a party waives an argument on appeal by not raising it in administrative proceedings and therefore the court should not consider these arguments. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002).

²⁵ After adoption of the Master Plan Ordinance, the Applicant reduced the number of condominiums from 400 to 200 to comply with wetland buffering requirements in Ordinance 1277. See WSH 4269, 4277. The Court affirmed Ordinance 1277 which approved a density of 1.34 units per acre as “low density” development. WSH 1602.

Estate of Friedman v. Pierce County, 112 Wn. 2d 68, 80-81, 768 P.2d 462 (1989), quoting, R. Settle, *Washington Land Use and Environmental Law and Practice* §§ 2.12(c), at 68 (1983). The cluster approach yields a net density of .66 units per acre.²⁶ This is much lower density than any other district allowed in Westport.²⁷

Fourth, FOGH repeats their view reduction arguments, Brief at 35-36. FOGH does not cite to the record to support their contentions that the condominiums will impair public views. The record does not support their contention. Because the beach is lower than the condominium location, views from the beach may only be able to see the top of these buildings. WSH 936. Moreover, as the FOGH concedes, the public will still be able to see the entirety of Half Moon Bay and the Pacific Ocean from existing public areas. WSH 4401 (FF 29).²⁸ FOGH's argument here would prohibit any development, even though the shoreline is designated as urban and

²⁶ In his opinion in the Thurston County action, Judge McPhee noted that the City's method of calculating density was consistent with that of other jurisdictions in "measuring the density of clustered residential units." WSH 1643.

²⁷ The Ocean Beach Residential (OBR) district provisions allow "low density development of up to six (6) units per acre. . . ." Similarly, the City has two "R" districts, the R-1 and R-2 districts. These provide "low to medium density" development. *Id.* The zoning code defines the allowable densities in these districts. The "R-1" district is for "Low Density Residential" development, WMC 17.16.020, and allows densities up to eight (8) units per acre. WMC 17.16.030. The "R-2" district provides for "Medium Density Residential" development and allows up to eighteen (18) units per acre.

²⁸ FOGH's concern that the condominiums will block the vista containing 300 acres of wetlands is exaggerated and misses the point. Only 150 acres of wetlands were delineated at the site. WSH 6. Moreover, the 300 acre parcel that comprises the "vista" will become a golf course, a decision that has not been appealed, but will cause much more significant alteration of the view.

condominiums are expressly allowed. If the plaintiffs are correct in their thesis, any time a building is proposed that is visible in a shoreline area, it must be rejected because it alters the natural view and character of the shoreline. This is not the law and FOGH cites no authority supporting this extreme position.

B. THE SHORELINE MASTER PROGRAM AND OTHER LAND USE CODES WERE DESIGNED TO ALLOW THE PROPOSED USES AND STRUCTURES AT THE PROPOSED LOCATIONS.

1. Condominiums Are a Permitted Use at this Location under the Shoreline Master Program.

Chapter 17.21 of the Westport Zoning Code creates the tourist commercial zone which covers *only* the formerly Port-owned property, i.e., the current project site. The explicit purpose for the zone is to permit a master planned resort with golf course and condominiums for this property. Not only does the code permit these things on this property, the city very nearly demands it. See WMC 17.21.010; 17.21.020. In the city's Shoreline Guidelines for the Urban Environment, the SMP again, and even more explicitly, adopts the uses allowed by the zoning code. WMC 17.32.050(a)(5).

The City and ELUHB agree that the proposed condominiums are expressly allowed uses for this property. These uses, at their present location, were approved by the City in the context of the master plan for the project, and sustained by an unappealed decision of the Thurston County Superior Court. When FOGH repeated these same arguments before the ELUHB, these arguments were again rejected.

The law under these circumstances has been enunciated with clarity by

the Shorelines Hearings Board in *Ackerson v. King County*, SHB No. 95-26:

A proposed development that is consistent with specific shoreline use regulations is presumed to be consistent with shoreline policies. *Young v. Vander Sar*, SHB 95-68 (1995); *Nisqually Delta Association v. City of DuPont*, SHB No. 81-8 (1992); *Eastlake Community Council v. City of Seattle*, SHB 90-8 (1991). Absent some showing of extraordinary environmental harm that is not adequately anticipated and dealt with under the use regulations, this board will not intervene to alter the clear policy choices made in enacting the master program. Appellants present nothing more than generalized concerns

Ackerson at Conclusions of Law ¶ VII.

2. Erosion Was Considered in the SMP and Addressed by Adoption of an Appropriate Setback.

Again, as with its challenge to the condominiums, FOGH is trying to re-raise and collaterally attack the approved SMP concerning an issue that was considered and decided without challenge at the shorelines master planning stage. FOGH can hardly claim that when the City and the Department of Ecology approved the SMP, they were not aware of erosion issues. An erosional breach had occurred just five years before the SMP was approved. WSH 00118. The City knew of it, considered it, and developed appropriate setback requirements to ensure that all building in this project site would occur landward of the SMP's conservancy environment between the ocean and the project – into the urban environment; and they slated the property for development as a destination resort with condominiums, hotels and golf course. FOGH cannot now collaterally attack the Master Plan eight years after the fact because they don't like what it calls for.

Shorelines Hearings Board cases have rejected the approach taken by

Appellants in similar cases. *Seaview Coast Coalition v. Pacific County*, SHB 99-020 specifically requires great deference to be afforded to SMP. Permitted uses and an application for such a permitted use will rarely be denied because of possible erosion not caused by the project, especially as here when the effects of such erosion were clearly considered in the SMP:

In this context developments that are permitted outright under a master program that has been duly approved by Ecology can hardly be deemed to result in an adverse cumulative impact that is contrary to the SMA.

Seaview Coast Coalition at Conclusion of Law, ¶ XII.

Seaview further pointed out that the remedy for a dynamic shoreline, where erosion and accretion are ongoing, is to revisit the SMP as such issues come into focus, not to deny permitting to a development that landward of the conservancy zone established to serve as a buffer to such erosion. *Seaview*, Findings of Fact, ¶¶ VII, VIII, Conclusion of Law ¶XIII. In this case, the SMP has established a 200 foot setback to serve as a buffer between the erosion zone and the development. That protection was approved by the Department of Ecology. The appellant now argues for denial of a permit for a building that falls landward of the protection zone and is fully consistent with the specific provisions of the master program. FOGH's argument vitiates the applicants' vested rights and turns land use law on its head. *Westside Business Park, LLC v. Pierce County*, 100 Wn.App. 599, 5 P.3d 713 (2000); *Talbot v. Gray*, 11 Wn.App. 807, 811, 525 P.2d 801 (1974).

One obvious reason that similar contentions have been rejected is that

the buildings themselves do not cause erosion and do not affect it in any way. The purpose of the Shorelines Act is to plan for development impacts on the shoreline, not vice versa. See RCW 90.58.020. Thus unless the evidence proves that erosion will certainly and swallow up the development, the SMP must necessarily control. The speculation offered by FOGH, without support of any experts, is insufficient to allow rejection of uses expressly permitted by the City's regulations.

It is significant that considering the erosion that took place in the winter of 2003-2004, that all actors including the Corps took immediate steps to respond to such events *just as all City and Applicant's experts said that they would*. Daniel testimony at WSH 4235 (Corps is likely to continue to respond to erosion); Osborne Testimony, WSH 4246 (Corps will take additional measures at Half Moon Bay to help mitigate erosion); see also, Bradley written testimony at WSH 4122. The only parties trying to prevent protection of the shorelines and allow the destruction of the existing public facilities are the Appellants here, who went to Federal court in an attempt to get an order demanding the City remain unprotected solely so that they could stop this completely unrelated project.²⁹ HE T at 32-33. Mox Chehalis was not even a party to that action. *Id.*

²⁹ FOGH's spokesman at the site plan appeal was Arthur Grunbaum, who is an officer on FOGH's Board. Mr. Grunbaum was a plaintiff in *Wildlife Forever and Grunbaum v. Lewis*, USDC No. CV03-3747, which challenged the Corps' proposals to place cobbles adjacent to the jetty. The Corps withdrew that proposal in favor of placing sand directly on the beach in eroding areas. Grunbaum also opposed putting sand on the beach in that action. HE T at 33.

3. Appellants' Assertion That Respondents' Expert Testimony Should Be Disregarded Because They Were Proved Wrong by Later Events Misrepresents Both the Testimony and Later Events.

One significant problem with Appellants' argument at pp 36-39 is that it is based on an extraordinary misrepresentation of the record. None of the expert witnesses, (Dr. Bradley, Dr. Osborne, Mr. Daniel or Mr. Hosey) ever testified that there would be no further erosion either at the South Beach or at Half Moon Bay. In fact they testified, repeatedly, to just the opposite. Bradley: "*Some erosion could still occur along the shoreline adjacent to the Westhaven State Park access road which might eventually threaten the road in the future*" WSH 04122; Daniel: Half Moon Bay is "not totally stable," WSH 4239; Osborne: "...not denying erosion is occurring at south beach," WSH 4246; at Half Moon Bay "Measures the *will be taken* will help mitigate any further erosion." WSH 4247. "Based on the most recent information, it is my opinion that it is unlikely that coastal erosion will impact the Links at Half Moon Bay project site in light of the responses already adopted or planned to respond to coastal erosion." Decl. of Hosey, WSH 1664.

What Dr. Osborne did say, repeatedly, is that the coastal geomorphology at Westport was controlled by a managed system in order to protect the navigation channel and jetty. He testified that if it was in danger of serious erosion or failure, the Corps would take steps to rectify it and prevent recurrence of a breach. (WSH 4248-9) As much as counsel tried to press him by asking the question of what would happen if the Corps did nothing, he

answered that such a hypothetical was impossible. The Corps would simply not be able to just stop managing a managed system. WSH 4248-51.

Far from contradicting this testimony, later events fully bore them out. As soon as an important erosion event occurred, the Corps stepped in to attempt to rectify it.³⁰

C. THE CITY DID NOT ERR IN REFUSING TO ADMIT ADDITIONAL EVIDENCE AT THE CLOSED RECORD APPEAL HEARING CONCERNING THE SHORELINE PERMITS.

1. Westport's ordinances require the City Council to base its review on the record and precludes receipt of new evidence.

FOGH contends that the City Council abused its discretion by refusing to admit new evidence in a closed record appeal hearing. Westport's ordinances allow no discretion to abuse, however. Significantly, FOGH's brief has omitted any citation to *Citizens to Preserve Pioneer Park v. Mercer Island*, 106 Wn.App. 461, 24 P.3d 1079 (2001) which it previously cited to the City Council as the basis for admitting new evidence. CC T at 8. Under *Citizens to Preserve Pioneer Park*, which involved counsel for FOGH,³¹ the court held that local ordinances determine whether new evidence may be considered. 106 Wn.App at 476. In allowing limited new evidence under Mercer Island's code, the court distinguished cases where appellate review was to be considered

³⁰ See discussion, *supra*, at note 30.

³¹ Mr. Lowney represented Citizens for Pioneer Park. In the Mercer Island case, he contended that consideration of new evidence was not allowed. 106 Wn.App. at 476. Here he makes the opposite argument. In both cases, he ignores what the Court held to be controlling – the applicable local ordinance. *Id.*

“upon the record only”.³² 106 Wn.App. at 476, citing *Ishmael v. King County*, 68 Wn.App. 466, 471, 843 P.2d 554 (1993); see also, *E.Fork Hills Rural Ass’n v. Clark County*, 92 Wn.App. 838, 965 P.2d 650 (1998); *North/South Airpark Ass’n v. Haagen*, 87 Wn.App. 765, 770-771, 942 P.2d 1068 (1997).

In *Ishmael v. King County*, the local ordinance was very similar to Westport’s code where review is limited to evidence presented below. The court held that no new evidence could be admitted, even for the purpose of determining whether a factual error existed in the record that would support a remand for further factual inquiry. 68 Wn.App. at 472; *Accord, North/South Airpark Ass’n v. Haagen*, 87 Wn.App. 765, 771, 942 P.2d 1068 (1997), review denied, 134 Wn.2d 1027, 958 P.2d 314 (1998) (consideration of new evidence is improper, even if used only to determine whether to remand for additional factual analysis); *E.Fork Hills Rural Ass’n v. Clark County*, 92 Wn.App. 838, 965 P.2d 650 (1998).

FOGH cites no provision of law authorizing the Council, acting as an appellate body, to admit new evidence. To the contrary, the City Council hears appeals pursuant to WMC 17.32.090 which expressly limits review to the record created in the prior open record hearing, stating:

The City Council’s review shall be on the record, with each party entitled to submit a written statement of issues five days prior to the date set for consideration, and provide a ten-minute argument to the council at the day of the hearing, unless additional time is granted by notice prior to the hearing.

³² Additionally, in *Citizens to Preserve Pioneer Park*, the citizens failed to object to the new evidence when it was offered. 106 Wn.App. at 477. Here, the applicant objected to the belated attempt to introduce new evidence. CC T at 18-19.

WMC 17.32.090(2) (emphasis added).

Likewise, the City's ordinances governing land use appeals to the City Council prohibit introduction of new evidence. WMC 2.26.080(C) establishes the scope of review for the City Council as follows:

C. Scope of Review. City council review of facts is ***limited to evidence presented to the examiner.*** (Emphasis added).

The Council was informed that its ordinances did not allow consideration of new evidence. CC T at 21. Thus, it would have been manifest error for the Council acting in an appellate capacity to have reopened the record to receive new evidence. The Council properly declined FOGH's invitation to violate its own ordinances by accepting new evidence.

2. The Planning Commission decision to approve the shoreline substantial development permit was supported by substantial evidence.

In challenging the Planning Commission's findings, the Court must weigh them using the substantial evidence test. RCW 43.21L.130(1)(c). Substantial evidence exists when there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wash.2d 22, 34, 891 P.2d 29 (1995).

At the open record hearing for the shoreline permits, FOGH presented no expert testimony in support of its coastal erosion theories. It did not have any alternative delineation of the marram grass line or ordinary high water mark used to determine setbacks. By contrast, the evidence prepared by the

applicant Mox Chehalis was prepared by qualified experts. Two coastal erosion experts testified, each reaching the conclusion that given ongoing management of erosion in the area, the project site where the condominiums are located would not be likely to suffer from erosion.³³ This unrebutted expert testimony at the Planning Commission hearing provides substantial evidence to support the findings of fact that the proposal met the 200 foot setback (Finding 31) and that it was unlikely that erosion would affect the location of the condominiums (Findings 62-64).

Having failed to present any expert testimony to support its contentions before the Planning Commission, FOGH now relies exclusively on the new evidence that they attempted to offer on appeal to second guess the Planning Commission's adverse findings. Having correctly rejected such evidence under the City's code, the City Council turned to the issue of whether the Planning commission's findings were supported by substantial evidence. Despite the fact that this is the critical test under RCW 43.21L.130(1)(c) to evaluate the Planning Commission's factual findings, FOGH does not address the substantial evidence test in their briefing. By failing to address the substantial evidence test, FOGH has essentially conceded that substantial evidence

³³ None of the witnesses contested the point that erosion was experienced in the general area. However, such erosion was predicted to occur to the west of the condominium site adjacent to the jetty that the Corps maintains to protect navigation. Unlike the non-expert speculation offered by FOGH's legal counsel, the expert witnesses at the shoreline hearing assessed the likelihood of impacts to the actual proposed location of the condominiums and agreed that erosion was unlikely to impact this site. **WSH 1664 (Decl. Of Hosey), WSH 4235-4237 (Testimony of Daniel), WSH 4246 (Testimony of Osborne), WSH 4122 (Testimony of Bradley).**

supports the Planning Commission's findings.

D. THE CITY PROPERLY REJECTED FOGH'S ARGUMENT THAT SETBACKS WERE NOT MET AND APPROVED THE SITE PLAN UNDER WMC 17.36B.

FOGH's claim that the approval of setbacks was erroneous because the doctrine of collateral estoppel should not have been applied. Brief at 39-44. FOGH misconstrues how the City used this doctrine in the Site Plan decision. The doctrine was not the exclusive basis, nor even the major foundation of the City's approval of the site plan and its conclusion that the 200 foot setback was maintained. The Hearing Examiner's decision to reject FOGH's appeal on the setback issues does not even mention collateral estoppel. Instead, the Examiner substantively considered whether the setback was violated and admitted the evidence offered by FOGH. What FOGH fails to acknowledge is that the City found that the proffered evidence failed to prove their contention that setbacks would be violated.

The City Council decision explains why FOGH's setback arguments lacked merit. **BSP 1158-1160.** First, the City Council considered and properly rejected FOGH's setback arguments because it concluded that circumstances had not materially changed after the Shoreline permit was issued, stating:

In any event, the factual circumstances since the Planning Commission found the project complied with the 200 foot setback have not materially changed. Substantial evidence shows that the marram grass line has not retreated in the areas immediate adjacent to the condominiums. The 200 foot setback is measured from the marram grass line. FOGH's evidence pointed to erosion which occurred at West Haven State Park in the winter of 2003. It did not address the area immediately affronting the condominiums which is to the east of transect

four on measurements prepared by Pacific International Engineering. These measurements taken in March of 2003 and again on December 19, 2003, show that the marram grass line along the primary bluff has not been materially altered. Hence, there is no reason to reconsider the issue of compliance with the 200 foot setback requirement. Because there was no material change in the application before the Planning Commission and the Site Plan Review Committee and there is not material change of conditions, the Hearing Examiner correctly rejected FOGH's appeal.

BSP 1159-60 (emphasis added).

The City correctly determined that after the Planning Commission had found that the setback was met as of September 30, 2003, FOGH would have to prove that the circumstances had changed to show a setback violation. Collateral estoppel is only relevant, and was only used by the City to preclude relitigation of the issue of whether setbacks were met as of September 2003.³⁴ Much of FOGH's time during the site plan appeal was spent arguing that the beach had already eroded prior to the Planning Commission decision in October 2003. **HE T at 14.**

In reviewing the issue of setback compliance in the site plan appeal, the

³⁴ All of the elements of collateral estoppel exist to preclude relitigation of compliance with the setback as of the date of the Planning Commission's decision. See *City of Bremerton v. Sesko*, 100 Wn.App. 158, 163, 995 P.2d 1257 (2000); *Davidson v. Kitsap County*, 86 Wn.App. 673, 937 P.2d 1309 (1997) (collateral estoppel applies to facts determined through quasi-judicial administrative proceedings). This applies even while the decision is under appeal. *Nielson v. Spanaway General Medical Clinic*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998); *Lejeune v. Clallam County*, 64 Wn.App. 257, 265-66, 823 P.2d 1144 (1992).

There is no error as FOGH was a party to a formal quasi-judicial hearing, at which it contested the setback issue. Testimony was presented to the Planning Commission under oath. FOGH had the opportunity to introduce evidence, cross examine witnesses and be heard on the setback issue. As such, it would have been manifestly unjust to allow FOGH to collaterally attack the Planning Commission's finding of compliance as of September 2003. The City did not, however, preclude FOGH from attempting to show that circumstances had changed as this is a recognized exception to the doctrine.

Hearing Examiner admitted the Planning Commission's earlier decision as substantive evidence that the setback was met as of September 2003. **BSP 972.** However, the City did not merely rely on the Planning Commission findings, but as noted by the City Council's decision on appeal, the City called several witnesses who testified that the marram grass line adjacent to the condominiums was unchanged at the time of the binding site plan appeal despite winter storm events.

Substantial evidence supports the City's rejection of the FOGH's argument that the site plan violated applicable setbacks. The City introduced beach profiles prepared using sophisticated survey methodology by recognized experts in coastal erosion. **BSP 987-992.** These beach profiles compared the coastline adjacent to the condominium site. The testimony provided showed that the location of the marram grass line was the same distance to the project site as it had been prior to the winter erosion events in 2003. **HE T at 93.**

Indeed, the City Council examined this evidence and found that it supported the Examiner's rejection of the FOGH's set back appeal. **BSP 1159-1160.** Thus, FOGH is simply wrong to contend that the City relied on collateral estoppel in rejecting the setback argument. Instead, the City examined the FOGH's evidence of the so-called "changed conditions" and determined that the conditions were not materially altered from the facts as found by the Planning Commission, i.e. that it met the 200 foot setback. **BSP 1160.** Hence, there was no error in finding that the site plan met applicable

setback requirements.

FOGH's contention that the City has "turned the clock back" to before the winter of 2003 is simply incorrect. The City considered whether conditions had changed over that winter and found that there was no such change. Moreover, the City will actually push the clock forward into the future by verifying compliance with the 200 foot setback line when the buildings actually begin construction. **BSP 1074.**

E. THE CITY CORRECTLY DETERMINED THAT THE "BUILDING SETBACK LINE" APPLIES TO THE CONDOMINIUM BUILDINGS AND NOT OTHER STRUCTURES.

FOGH argues that the City and ELUHB erred in interpreting the "building setback" line. FOGH contends that the "building setback" applies to both buildings and all other structures. Brief at 49. This argument is legally incorrect and misreads the City's code. The City's code was interpreted by the City Planning Commission, City Council and ELUHB applies the setback language as written: to "buildings". WSH 4401; WSH 4453.

FOGH's claim that the Shorelines Hearings Board has "explicitly held that a 'building setback' regulates structures not just buildings." Appellants' Brief at 49. In support of this contention, FOGH cites three cases, none of which support this claim. None of the cases cited involve utilities or road improvements. In fact, the cases do not even discuss the definition of "building setback" in any similar fashion.

First, FOGH cites *Peterson v. Templin Foundation*, SHB No. 99-4,

1999 WL 1094988 (Nov. 10, 1999). This case did not address the application of a building setback. The Board merely mentioned the term “building setback” in passing in describing a limitation of the number of homes to be constructed on one side of the setback line. This is hardly the “explicit” holding that FOGH’s brief promised.

Next, FOGH cites *Champion v. Mason County*, SHB No. 89-67, 1990 WL 197896 at *3 (Oct. 9, 1990). FOGH asserts that Conclusion of Law No. 3 establishes that a fence and wall are regulated by the “building setback.” This claim distorts the holding of this case and mischaracterizes the facts at issue. *Champion* involved a proposal for a variance to construct a boat house waterward of the common line setback. Finding of Fact IV. The Shorelines Hearings Board Decision found that a boathouse was not a reasonable use of the property under a provision of the Mason County Shoreline Master Program which explicitly addressed construction of a “fence or wall” adjacent to the water. The decision did not interpret whether the term “building setback” applied to structures other than a building. It would be unnecessary to do so because a boathouse is clearly a building.

Likewise, the third case cited by FOGH does not make the holding that FOGH promised. *Slater v. Ecology*, SHB No. 87-15, 1997 WL 56657 concerned a variance sought for construction of a deck. The Board’s decision is clear that the setback in the Thurston County Shoreline Master Program prohibited placement of “structures within 50 feet of the shoreline.” See Finding of Fact No. 5 (emphasis added). Thus, *Slater* supports the

interpretation of the City of Westport that a building setback is different than a setback for “structures.” By using the term “structure” the Thurston County Shoreline Master Program in *Slater* provided more protection than the Westport Shoreline Master Program does where it uses the term “building setback.”³⁵

FOGH omits the Shoreline Hearings Board’s jurisprudence that allows utility lines in setbacks. The Board has approved location of utility lines within setback areas in at least two cases. In *In re Kitsap County*, SHB No. 90-15 (May 2, 1991) the Board approved a stipulation allowing utilities and drainage facilities in a building setback area that was providing open space. Likewise, in *City of Spokane v. DOE*, SHB No. 98-06 (August 20, 1998), the Board approved placement of utilities in a greenbelt and building setback area.

The Westport SMP could have used the broader language that other counties have employed, but chose to use language that applies the setbacks to “buildings”, not to the utilities and roads serving those buildings. WMC 17.32.050(a)(8) The reason should be apparent. By subjecting utilities located in the adjacent roadway to a 200 foot setback line, FOGH’s interpretation would require a new road and utility corridor, which by necessity would cross

³⁵ FOGH inexplicitly cites to a 1992 Department of Ecology wetlands guidance document which contains the term “building setbacks.” This guidance document has nothing to do with the issue before the Court. However, language of the “building setback” can be contrasted with the broader restriction in Westport’s wetlands buffer regulations in a different section of the City’s Shoreline Master Program. In contrast to the provisions of WMC 17.32.050(a)(8) that establish a “building setback”, the wetland buffer restrictions explicitly prohibit all structures in the required buffer. WMC 17.32.065(b).

wetlands.³⁶ Instead, Westport opted for a setback definition that allows use of preexisting roadways and utility corridors in Jetty Access Road. FOGH points to later use of the word “structure” when the ordinance discusses the point of measurement. However, the operative language establishes a “building setback” and does not use the word “structure”. The 200 foot setback, as interpreted by the City Council and affirmed by the ELUHB, applies directly to a “building”. By stating that the measurement is to the edge of the structure does not expand the scope of the setback, which applies only to buildings, which are necessarily also structures. This interpretation was confirmed by the City Council’s decision, the body that adopted the language in the first place.

Finally, FOGH’s argument fails for an additional reason. The proposed road improvements, stormwater facilities and utility lines are not in the TC zone where the 200 foot setback applies. They are located in the RP (Recreation Parks) zone which requires only that the setback is shoreward of the ordinary high water mark. BSP 930; HE T at 80; WMC 17.32.050(a)(8). Clearly, the proposed facilities are upland of the ordinary high water mark and would not violate the setback in the RP district. Hence, there is no error.³⁷

³⁶ The Shoreline Master Program guidelines strongly support adoption of regulations that place utilities and other infrastructure in existing corridors and rights of way. See WAC 173-26-241(3)(1). That is exactly where they are located in the current proposal.

³⁷ FOGH also contends that the City used an incorrect methodology to determine compliance with the setback requirement. However FOGH has not shown how this alleged error has prejudiced them in any way, shape or form. The City used a conservative approach, applying the maxim that the shortest distance between two points as a straight line. It, therefore, applied the setback at the closest point of the condominium buildings to the marram grass line. If, indeed, the marram grass line must be averaged over 200 feet to either side, this will only increase the distance to the

F. THE CITY DID NOT ERR IN APPLYING ITS DEDICATION REQUIREMENTS IN THE SITE PLAN DECISION.

The final issue in this matter concerns the requirements for dedication in Chapter 17.36B WMC. Under WMC 17.36B.060, the SPRB has discretion whether to require a dedication or not. Under this section, the SPRB is authorized, but not required to impose dedications as a condition of approval of a binding site plan. Any such “required” dedications, under WMC 17.36B.080 are to be made concurrently with approval of the site plan. Here, the decision of the SPRB did not require any dedications. Thus, there were no dedications “required” by the SPRB to be made concurrent with the approval of the site plan. Hence, WMC 17.36B.080 is not applicable.

Even if WMC 17.36B.080 applied, the City and ELUHB did not err in approving the site plan application. FOGH’s argument that the dedication must be both identified and deeded to the City prior to site plan approval makes no sense. Rather, the applicant satisfied the requirement to dedicate the utility easements by identifying them as dedications in the site plan. This commits the applicant to make the dedications that serve the public interest, but allows the City to verify their location as constructed, and verify that they meet applicable city standards.

FOGH’s interpretation has the effect of requiring dedications be deeded

building. Hence, there is no prejudice from the City’s methodology.

before construction of the improvements to be dedicated.³⁸ This prevents verification of the actual location of the utilities and that they meet City standards and conflicts with provisions of the Westport Municipal Code governing when a deed of dedication is to be made for utility lines. Under WMC 13.04.060, deeds dedicating water system improvements are to be filed after construction, and following City inspection and acceptance.

Moreover, because the permits for this project were subject to appeal, the City appropriately waited until completion of review to require conveyance of easements. The appeal proceedings could alter or change the location of facilities. Therefore, the City correctly followed its long-standing, common sense interpretation that the deeds of dedication be provided after construction to avoid erroneous legal descriptions, the need to file corrected documents or to reconvey incorrect or unused dedications. **BSP 1162.**

FOGH's position ignores what is actually shown on the site plans. They show the areas where dedications for utility easements are proposed. Hence the site plan approval was correct. Moreover, FOGH points to no harm from the process identified by the City. Their proposed remand is unnecessary and designed only to further delay the project. If the Court believes that dedications are required prior to or concurrent with site plan approval, a simple condition requiring filing of a dedication sheet is sufficient.

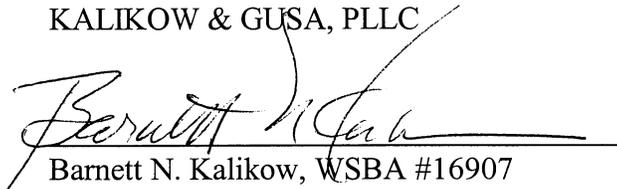
³⁸ FOGH's interpretation requires a deed of dedication to precede approval of the site plan, which may itself require new dedications. This is a logical impossibility. **HE T at 120.**

V. CONCLUSION

The ELUHB correctly upheld the City's approval of a shoreline substantial development permit and site plan approval. FOGH has failed to demonstrate any error of law or finding of fact that is unsupported by substantial evidence. As such, the Court should affirm the ELUHB and City's permitting actions.

Respectfully submitted this 29th day of September, 2006.

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**THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

FRIENDS OF GRAYS HARBOR
and WASHINGTON
ENVIRONMENTAL COUNCIL,

Appellants,

vs.

MOX CHEHALIS LLC, et al.,

Respondents.

NO. 34113-1-11

**DECLARATION OF FILING
AND SERVICE**

PURSUANT TO RCW 9A.72.085, Jeffrey S. Myers declares as follows:

On September 29, 2006, I caused to be filed and served originals and/or copies of Respondents' Joint Response Brief and this Declaration of Filing and Service as follows:

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 29th day of September, 2006, at Tumwater, Washington.


Jeffrey S. Myers

APPENDIX 1

Chapter 17.36BBINDING SITE PLANSSections:

- 17.36B.010 Binding site plan option.
- 17.36B.020 Site plan requirement.
- 17.36B.030 Presubmission conference.
- 17.36B.040 Application content.
- 17.36B.050 Review.
- 17.36B.060 Findings and conclusions.
- 17.36B.070 Amendment.
- 17.36B.080 Dedication.
- 17.36B.090 Development.
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- 17.36B.120 Design standards and improvements.
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- 17.36B.140 Waiver of standards and provisions.
- 17.36B.150 Noncompliance with site plan.
- 17.36B.160 Effect of approval.
- 17.36B.170 Violation.

17.36B.010 Binding site plan option. In lieu of subdivision approval, a subdivider or developer of commercially or industrially zoned property, mobile home parks or condominiums may choose to request approval of a binding site plan pursuant to this chapter and RCW 58.17.035. (Ord. 1146 §2(part), 1998).

17.36B.020 Site plan requirement. Site plan review and approval is required prior to:

- (1) The use of land either for the location of any commercial or industrial building or for any building in which more than one dwelling unit would be contained;
- (2) The acceptance of any dedication of land to the city for transportation, open space, or other purposes which is independent of other development review. Such review shall include the current and proposed use and the development of adjacent and associated lands;
- (3) Development of any mobile home park governed by this code. Such development shall be designed in accordance with the standards set forth in this code; or
- (4) Development of any planned unit district governed by this code which requires divisions of land for sale or lease. (Ord. 1146 §2(part), 1998).

17.36B.030 Presubmission conference. Prior to applying for site plan approval, an applicant may request a presubmission conference. (Ord. 1146 §2(part), 1998).

17.36B.040 Application content. Each application for site plan approval shall contain ten copies of the following information:

- (1) The title and location of the proposed development;
- (2) The names, addresses, and telephone numbers of the applicant, of the owner of the site, of any architect, planner, designer, or engineer responsible for preparation of the plan, and of any authorized representative of the applicant;
- (3) The proposed use of the site and buildings;
- (4) The current zoning of the proposed development site and any other zoning within three hundred feet of the site;
- (5) Total area of the development site and of existing and proposed impermeable surfaces to an accuracy of one-hundredth acre;
- (6) The proposed number of dwelling units in the development;
- (7) The proposed area in square feet of existing and proposed gross commercial floor area;
- (8) A description of existing and proposed commercial or industrial uses;
- (9) A site plan drawing of one or more sheets at a scale of not less than one inch to one hundred feet showing, at minimum:
 - (A) The location of all existing and proposed structures, including buildings, fences, culverts, bridges, roads, and streets,
 - (B) The boundaries of the property proposed to be developed,
 - (C) All proposed and existing buildings and setback lines sufficiently accurate to ensure compliance with setback requirements,
 - (D) All areas, if any, to be preserved as buffers or for open space under the provisions of this title,
 - (E) All existing and proposed easements,
 - (F) The location of all existing and proposed utility structures and lines,
 - (G) Existing and proposed stormwater retention, drainage, and treatment systems,
 - (H) All means of vehicular and pedestrian ingress and egress to and from the site and the size and location of driveways, streets, and roads,
 - (I) The location and design of off-street parking areas, showing their size, locations of internal circulation, and parking spaces,

- (J) Landscaping location and type;
- (10) Contours of sufficient interval to indicate the topography of the entire tract for a sufficient distance beyond the boundaries of the proposed project, as follows:
- (A) Up to five percent slope--two foot contours,
 - (B) Five percent and greater slope--five foot contours. (Ord. 1146 §2(part), 1998).

17.36B.050 Review. The site plan review board (the city public works director; representatives of building, utility, and transportation services; and a member of the city planning commission) shall review the proposed site plan for compliance with the provisions of this chapter and other applicable laws and regulations. The board may require additional information necessary for such review. The board shall determine whether the proposed use is served and makes adequate provision for the public health, safety, and general welfare. (Ord. 1146 §2(part), 1998).

17.36B.060 Findings and conclusions. A proposed binding site plan and any dedication shall not be approved unless the board makes written findings that:

- (1) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds (if applicable), sidewalks, and other features assuring safe walking conditions for students who only walk to and from school;
- (2) The public use and interest will be served by the platting of such binding site plan and any dedication;
- (3) The proposed binding site plan is in conformity with applicable zoning and other development regulations;
- (4) Public facilities impacted by the proposed binding site plan will be adequate and available to serve the binding site plan concurrently with the development of a plan to finance needed public facilities in time to assure retention of an adequate level of service;
- (5) The project is within an approved sewer service area for projects on sewer, and adequate capacity exists or is planned with funding sources in place.

Upon such findings the binding site plan shall be approved. The board may require dedication of land to a public body, provision of public improvements to serve the binding site plan, and/or impact fees as a condition of binding site plan approval. Dedication shall be clearly shown on the plat. The board shall not as a condition of approval of any binding site plan require a release from damages to be procured from other property owners. (Ord. 1146 §2(part), 1998).

17.36B.070 Amendment. A site plan approved by the board shall not be altered unless such amendment is approved by the board. If such amendment is determined to be substantial, the board may require that a new site plan be submitted. (Ord. 1146 §2(part), 1998).

17.36B.080 Dedication. A site plan shall not be finally approved until or concurrent with a dedication of required rights-of-way, easements and land. (Ord. 1146 §2(part), 1998).

17.36B.090 Development. Development permits, including grading permits and building permits, may be issued concurrently with site plan approval, but all such permits shall require a certificate of occupancy under the UBC for use and no such certificate shall be issued unless all dedications and public facilities and services necessary to serve the project and other improvements called for by the site plan are complete and have been accepted by the city, or adequately guaranteed for timely completion through bonds approved by the public works director. (Ord. 1146 §2(part), 1998).

17.36B.100 Duration of approval. (a) Approval of a binding site plan shall be effective for a period of between two and ten years from the date of approval by the board on such terms and interim milestones as the board may deem appropriate. During this time the terms and conditions upon which approval was given will not be changed without the approval of the board.

(b) Whenever a planned use of a land is to be implemented in phases over a period of more than three years, the applicant may submit an application requesting review and approval of a phased development plan. Approval may be granted for an extended period of development upon finding that such plan is of sufficient flexibility to vary with changing circumstances and that such approval is in the public interest. Such application shall outline and such approval shall specify with particularity which aspects of the site plan are vested and which are subject to subsequent changes in city or other standards or regulations. The approval of such phased plan shall identify the duration of the approvals granted. (Ord. 1146 §2(part), 1998).

17.36B.110 Appeals. The decision of the board may be appealed to the city council as record review under Chapter 36.70C RCW. (Ord. 1146 §2(part), 1998).

17.36B.120 Design standards and improvements. All site plans are subject to and shall comply with those construction and facility improvement standards set forth in city development standards or as may be approved through the PUD process. (Ord. 1146 §2(part), 1998).

17.36B.130 Increased public service standards, roads, sewer, water, stormwater. If a building or occupancy permit is sought after final site plan approval which would result in a greater density or different use than that approved for the original development, higher public services may be required as a result. The building permit shall not be granted until the public services serving the lot are built to the higher standard or an agreement and bond to guarantee such construction is accepted by the city. (Ord. 1146 §2(part), 1998).

17.36B.140 Waiver of standards and provisions. To invite innovative design within a PUD, when a proposed site plan would conflict with any engineering standard or provision of the city development code pertaining to sewer, water, road, or stormwater standards, the board may modify such standard or provision upon finding that the proposal is consistent with sound engineering practices, the proposal will better serve the PUD than the city standards, and the city will not otherwise be harmed by the change. (Ord. 1146 §2(part), 1998).

17.36B.150 Noncompliance with site plan. Development of the area subject to the approved site plan shall conform with the approved site plan. Any development, use, or density which fails to substantially conform to the site plan as approved by the board constitutes a violation of this chapter. The city may order stop work on any such violation and may decline to issue any approvals or permits within the plan area until the violation is corrected. (Ord. 1146 §2(part), 1998).

17.36B.160 Effect of approval. A binding site plan shall be governed by the terms of approval of the final plan for a period not less than five years. Approved lots in a binding site plan shall be a valid land use notwithstanding any change in zoning for a period of five years from the effective date of the final decision approving the binding site plan. A final plan shall vest the lots within such plan with a right to hookup to sewer and water for a period of five years after the date of recording of the final plan. Thereafter, hookup to sewer and water shall be available on a first-come, first-served basis as measured by the date of application for building permits, and subject to adequate capacity being available in the system. (Ord. 1146 §2(part), 1998).

17.36B.170 Violation. Any use of land which requires site plan review and approval as provided in this chapter for which approval is not obtained constitutes a violation of this chapter. Where a violation is determined to occur, the city may (1) issue a stop work notice until the violation is cured, (2) refuse to issue any permit or approval on the site until the violation is cured, and/or (3) take such other steps as authorized by the City Code, State Building Code, and/or the laws of the state of Washington. (Ord. 1146 §2(part), 1998).

Chapter 17.40

BOARD OF ADJUSTMENT

Sections:

- 17.40.010 Established.
- 17.40.020 Membership.
- 17.40.030 Appointment.
- 17.40.040 Officers.
- 17.40.050 Meetings.

17.40.010 Established. There is established a board of adjustment which shall have the powers and duties provided in this title. (Ord. 1146 §2(part), 1998).

17.40.020 Membership. The board of adjustment shall consist of five members all of whom shall serve without salary. Their terms shall be for four years, and they may be reappointed, provided no individual shall serve more than eight consecutive years. No member of the planning commission or city council shall be a member of the board of adjustment. (Ord. 1146 §2(part), 1998).

17.40.030 Appointment. The members shall be appointed by the mayor with the consent of the council and shall consist of residents of the city having an understanding of the benefits of zoning to the municipality. In case a vacancy should occur, for any cause, the mayor shall fill such vacancy for the unexpired portion of the term by making an appointment with the consent of the council. The members of the board may be removed by the mayor, subject to the approval of the council, for such causes as he shall deem sufficient, which shall be set forth in a letter filed with the council. (Ord. 1146 §2(part), 1998).

17.40.040 Officers. The board of adjustment shall elect a chairman and vice-chairman from among its members. The secretary of the board of adjustment shall be the city

APPENDIX 2

17.20A.070 Accessory uses. RV temporary occupancy: Between Memorial Day and Labor Day permitted. Between Labor Day and Memorial Day permitted no more than fourteen days in any sixty-day period. (Ord. 1146 §2(part), 1998).

Chapter 17.21

TOURIST COMMERCIAL

Sections:

- 17.21.010 Intent.
- 17.21.020 Permitted uses.
- 17.21.030 Permitting processes.

17.21.010 Intent. The tourist commercial zone is intended to provide a zoning designation which would enable the development planned for the Westport property owned by the Port of Grays Harbor and which is identified in the comprehensive plan as the tourist commercial zone. (Ord. 1146 §2(part), 1998).

17.21.020 Permitted uses. The tourist commercial zone is designed to provide for a master planned destination tourist resort which may include:

(1) Residential uses, including one or more hotels, motels, condominiums, apartments, and other forms of residential use for short-term, intermediate-term and long-term residential uses;

(2) Recreational and gaming facilities, including conference centers, movie and theater facilities, golf courses and other places of public and recreation consistent with state laws and licensing regulations;

(3) Tourist service commercial, including restaurants, lounges, professional and personal services, commercial retail, and service uses developed in conjunction with the primary uses identified in 1 and 2 of this section. (Ord. 1146 §2(part), 1998).

17.21.030 Permitting processes. (a) The entire zone shall be planned as a whole, complete with integrated utility, transportation, land use, and landscaping layout and phasing through the master plan development process, Chapter 17.36A. When approved, the master plan, including the land use map, the development standards for the zone, and the phasing plan, shall be adopted by the city as part of the city development regulations and zoning code.

(b) The city shall process individual building projects through the binding site plan process as provided in Chapter 14.10. (Ord. 1146 §2(part), 1998).

(2) In all other areas within the recreation and parks district the maximum building height shall be thirty feet.

(3) Additional height may be granted for any use allowed in this district through the conditional use procedure.

(b) Sign Limitations. Only publicly owned signs shall be allowed. The signs shall conform to size and construction requirements applicable to the commercial district in Sections 17.36.060 and 17.36.070. (Ord. 1146 §2(part), 1998).

17.30.060 Off-street parking and loading space requirements. (a) Off-street parking requirements: See Section 17.36.220.

(b) Off-street parking location and required improvements: See Sections 17.36.230 and 17.36.240. (Ord. 1146 §2(part), 1998).

Chapter 17.32

SHORELINE MANAGEMENT OVERLAY

Sections:

17.32.010	Purpose.
17.32.015	Administration.
17.32.020	Definitions.
17.32.030	Application of regulations.
17.32.040	Shoreline environments.
17.32.050	Shoreline environment guidelines.
17.32.055	Shoreline use activities.
17.32.060	Shoreline development guidelines.
17.32.065	Wetlands and critical areas.
17.32.070	Nonconformities.
17.32.080	Shoreline permits.
17.32.090	Appeal.
17.32.100	Amendments and boundary changes.
17.32.110	Permit violations.
17.32.120	Notes on the Westport comprehensive land use shoreline and zoning map.

17.32.010 Purpose. This chapter is intended to carry out one of the responsibilities imposed on the city by the Shoreline Management Act of 1971 through an overlay shoreline regulation incorporated in the city's zoning code. (Ord. 1146 §2(part), 1998).

17.32.015 Administration. (a) Administrator. The city public works director or in the public works director's absence, the city administrator, shall be the administrator of this chapter, and shall perform all the duties ascribed to the administrator in this chapter, and shall administer the permit and notification systems.

(b) Interpretation. The terms of this regulation shall be interpreted to be consistent with the State Shoreline Management Act, Chapter 90.58 RCW and the implementing regulations of chapters 173-16, 173-22, 173-26, and 173-27 WAC. (Ord. 1146 §2(part), 1998).

17.32.020 Definitions. As used in this chapter, unless context requires otherwise, the following definitions will apply for purposes of this chapter:

"Adoption by rule" means an official action by the department to make a local government shoreline master program effective through rule consistent with the requirements of the Administrative Procedure Act, Chapter 34.05 RCW, thereby incorporating the adopted shoreline master program or amendment into the State Master Program.

"Act" means Chapter 90.58 RCW the Shoreline Management Act of 1971, as amended.

"Average grade level" means the average of the natural or existing topography of the portion of the lot, parcel, or tract of real property which will be directly under the proposed building or structure. Calculation of the average grade level shall be made by averaging the ground elevations at the midpoint of all exterior walls of the proposed structure.

"Boathouse" means a structure designed for storage of vessels located over water or in upland areas.

"Development" means a use consisting of the 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 Act at any state of water level.

"Development regulations" means the controls placed on development or land use activities by a county or city, such as zoning ordinances, critical areas ordinances, all portions of a Shoreline Master Program other than goals and policies approved or adopted under Chapter 90.58 RCW, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances, together with any amendments thereto.

"Exempt" developments are those set forth in WAC 173-27-070 and RCW 90.58.030(3)(e), 90.58.140(9), 90.58.147, 90.58.355 and 90.58.515 which are not required to obtain a substantial development permit but which must otherwise

comply with applicable provisions of the Shoreline management Act and the Westport shoreline master program.

"Extreme low tide" means the lowest line on the land reached by a receding tide.

"Fair market value" of a development means the open market bid price for conducting the work, using the equipment and facilities, and purchase of the goods, services and materials necessary to accomplish the development.

"Floating home" is a structure designed and operated substantially as a permanently based over-water residence. Floating homes are not vessels and lack adequate self-propulsion and steering equipment to operate as a vessel. They are typically served by permanent utilities and semi-permanent anchorage/moorage facilities.

"Floodplain" is synonymous with 100-year floodplain and means that land area susceptible to being inundated by stream derived water with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon flood ordinance regulation maps or a reasonable method which meets the objectives of the Shoreline Management Act.

"Floodway" means those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually, said floodway being identified, under normal condition, by changes in surface soil conditions or changes in types or quality of vegetative ground cover condition. The floodway shall not include those lands that can reasonably be expected to be protected from flood waters by flood control devices maintained by or maintained under license from the federal government, the state, or a political subdivision of the state.

"Guidelines" means those standards adopted by the department to implement the policy of the Shorelines Management Act.

"Height" is measured from average grade level to the highest point of a structure, excluding antennas, chimneys and similar appurtenances.

"Houseboat" is a vessel, principally used as an over-water residence. Houseboats are licensed and designed for use as a mobile structure with detachable utilities or facilities, anchoring and the presence of adequate self-propulsion and steering equipment to operate as a vessel. Principal use as an over-water residence means occupancy in a single location, for a period exceeding two months in any one calendar year. This definition includes liveaboard vessels.

"Local government" means city of Westport.

"Ordinary high water mark" is a mark that will be found by examining the bend and banks and ascertaining whether the presence and action of waters are so common and

usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland.

(A) In high-energy tidal water environments where the action of the waves or currents is sufficient to prevent vegetation establishment below mean higher high tide, the ordinary high water mark is coincident with the line of vegetation. Where there is no vegetative cover for less than one hundred feet parallel to the shoreline, the ordinary high water mark is the average tidal elevation of the adjacent lines of vegetation. Where the ordinary high water mark cannot be found, it is the elevation of mean higher high tide.

(B) In low-energy tidal water environments where the action of waves and currents is not sufficient to prevent vegetation establishment below mean higher high tide, the ordinary high water mark is coincident with the landward limit of salt tolerant vegetation, which means the vegetation is tolerant of interstitial soil salinities greater than or equal to 0.5 parts per thousand.

"Permit" means any substantial development, variance, conditional use permit or revision authorized under Chapter 90.58 RCW.

"Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation or agency of the state or local governmental unit however designated.

"Primary dune" means the first system of dunes shoreward of the water, having little or no vegetation, which are intolerant of unnatural disturbances. The primary dune is the equivalent of the foreshore dune as identified by the Soil Conservation Service² and in Westport is covered by the dune protection zone which extends up to one hundred feet shoreward of the primary or foreshore dune.

"Priority" for shoreland developments where authorized, is defined at RCW 90.58.020 and shall include uses which permit a significant number of people to use or enjoy the city's shorelines, including water dependent uses, public use and access, and residential uses consistent with environmental protection.

"Shorelands" or "Shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of the SMA.

The following shall be interpreted as the upland extent of shoreline jurisdiction within the city:

(A) The Westhaven Area. The upland extent of shoreline jurisdiction shall be the ordinary high water

mark plus two hundred feet and associated wetlands line of ordinary high water plus two hundred feet for the city core, Westhaven area (see areas "A" to "A" as identified on the Westport comprehensive land use, shoreline and zoning map);

(B) The ocean beach area bounded on the north by Ocean Avenue extended and on the south by the city limits. The upland extent of shoreline jurisdiction shall be a line drawn at the upland toe of the primary dune together with associated interdunal wetlands, easterly edge of the beach deflation plain to the OBR I area (see areas "B" to "B" as identified on the Westport comprehensive land use, shoreline and zoning map);

(C) The ocean beach area bounded on the north by the south boundary of Westhaven State Park and on the south by Ocean Avenue extended. The upland extent of shoreline jurisdiction shall be the 100-year floodplain or a line drawn at the upland toe of the primary dune together with associated interdunal wetlands, whichever location that is further upland, for the property designated TC (see areas "C" to "C" as identified on the Westport comprehensive land use, shoreline, and zoning map);

(d) The East Shore of Westport. The upland extent of shoreline jurisdiction shall be the ordinary high water mark plus two hundred feet and associated wetlands. USCOE designated wetland edge from Firecracker Point east and south to the city limits (see areas "D" to "D" as identified on the Westport comprehensive land use, shoreline and zoning map).

The shoreland boundary has been mapped by the city and the map shall be the primary guide for purposes of this chapter. The map may be amended by request from an owner, with a field delineation more accurately locating the identified boundary.

"Shoreline master program" for the city means the comprehensive plan Chapter 9 together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and development standards identified in Title 17 of the Westport Municipal Code, particularly, Chapter 17.32 herein.

"Shorelines" means all the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them, except (i) shorelines of state-wide significance, (ii) shorelines on streams where the mean annual flow is twenty cubic feet per second or less, and (iii) shorelines on lakes less than twenty acres in size.

"Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance within the state.

"Shorelines of state-wide significance" relevant to the Westport area include the area between the ordinary

high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries and inlets and the shorelands associated therewith.

"Structure" means a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above or below the surface of the ground or water, except for vessels.

"Substantial development" shall mean any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter (as further explained under WAC 173-27-040):

(A) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;

(B) Construction of the normal protective bulkhead common to single-family residences;

(C) Emergency construction necessary to protect property from damage by the elements;

(D) Construction of a barn or similar agricultural structure and practices normal or necessary for farming on shorelands;

(E) Construction or modification of navigational aids such as channel markers and anchor buoys;

(F) Construction on shorelands by an owner, lessee, or contract purchaser of a single-family residence and appurtenance for his own use or for the use of his family, which residence does not exceed a height permitted in the underlying zone and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this chapter;

(G) Construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of a single-family residence, the cost of which does not exceed two thousand five hundred dollars, if in salt water, or not to exceed ten thousand dollars if in fresh water. A dock is a landing and moorage facility for watercraft and does not include storage facilities, decks, or other appurtenances. Any subsequent construction exceeding two thousand five hundred dollars and occurring within five years of completion of the prior construction shall be considered a substantial development;

(H) Operation, maintenance, or construction of canals, waterways, drains, reservoirs developed as part of an irrigation system for the primary purpose of using system

waters, including the return flow and artificially stored ground water from the irrigation of lands;

(I) The marking of property lines or corners on state-owned lands, when such marking does not significantly interfere with normal public use of the surface of the water;

(J) Operation and maintenance of dikes, ditches, drains, or other facilities existing on June 4, 1975 which are part of an agricultural drainage or diking system;

(K) Any project with a certification from the Governor pursuant to Chapter 80.50 RCW;

(L) Site exploration activities, as defined in RCW 90.58.030(3)(e)(xi), needed to prepare for a development application as long as said exploration activities do not interfere with normal public use of surface waters of the state, have no significant adverse impacts to the environment, the site is restored to pre-existing conditions, private entities post a performance bond, and the exploration activity is not subject to the permit requirements of RCW 90.58.550;

(M) Removing or controlling aquatic noxious weeds, as defined in RCW 17.26.020, through the use of an herbicide or other treatment method, as recommended by Department of Agriculture or Department of Ecology, per Chapter 43.21C RCW.

(N) Watershed restoration projects as reviewed and approved by the administrator; and

(O) Any other exemption as described or further explained in WAC 173-27-040.

Use, Conditional. "Conditional use" means a use, development, or substantial development which is classified as a conditional use or is not classified within the applicable master program. Conditional uses generally conform to the policies and management objectives of an environment, but because of potential problems inherent with the specific use or activity, may not be appropriate in every situation. Conditional uses are allowable only if sufficient care is taken to avoid predictable negative impacts through the application of project/site specific conditions. These conditions may include limitations on the scope and scale of the proposed use. A conditional use may be found to be not permissible after a specific case review.

Use, Permitted. "Permitted use" means a use that conforms to the Westport shoreline management program, and may be undertaken subject to the policies and requirements of this chapter and applicable permits.

"Variance" means a means to grant relief from the specific bulk, dimensional or performance standards set forth in Westport's shoreline management program.

"Water-dependent use" means a use or portion of a use which cannot exist in any other location and is dependent

on the water by reason of the intrinsic nature of its operations. Examples of water-dependent uses may include ship cargo terminal loading areas, ferry and passenger terminals, barge loading facilities, ship building and dry docking, marinas, aquaculture, float plane facilities and sewer outfalls.

"Water-enjoyment use" is a recreational use, or other use facilitating public access to the shoreline as a primary characteristic of the use; or a use that provides for recreational use or aesthetic enjoyment of the shoreline for a substantial number of people as a general characteristic of the use and which through the location, design, and operation assures the public's ability to enjoy the physical and aesthetic qualities of the shoreline. In order to qualify as a water-enjoyment use, the use must be open to the general public and the shoreline-oriented space within the project must be devoted to the specific aspects of the use that fosters shoreline enjoyment. Primary water-enjoyment uses may include parks, piers and other improvements facilitating public access to shorelines of the state; and general water-enjoyment uses may include single-family residential, restaurants, museums, aquariums, scientific/ecological reserves, resorts, and mixed-use commercial; provided that such uses conform to the above water-enjoyment specifications and the provisions of the Shoreline master program.

"Water-oriented use" is any combination of water-dependent, water-related, and/or water-enjoyment uses. Water-oriented uses, together with single-family residential uses, and serves as an all-encompassing definition for priority uses under the Shoreline Management Act. Residential uses and particularly single-family residential uses are priority uses under the Shoreline Management Act and are considered water-oriented uses in the city. Nonwater-oriented, except single-family residential uses, serves to describe those uses which have little or no relationship to the shoreline and are not considered priority uses under the Act. Examples include professional offices, automobile sales or repair shops, mini-storage facilities, multifamily residential development, department stores, and gas stations.

"Water-related use" is a use or portion of a use which is not intrinsically dependent on a waterfront location but whose economic viability is dependent upon a waterfront location because: (A) of a functional requirement for a waterfront location such as the arrival or shipment of materials by water, or the need for large quantities of water; or (B) the use provides a necessary service supportive of the water-dependent commercial activities and the proximity of the use to its customers makes its services less expensive and/or more convenient. Examples include manufacturers of ship parts large enough that transporta-

tion becomes a significant factor in the product's cost, water-transported foods. Examples of water-related uses may include warehousing of goods transported by water, seafood processing plants, hydroelectric generating plants, gravel storage when transported by barge, oil refineries where transport is by tanker, and log storage. Westport considers multifamily and mixed use residential developments to be water-related in that much of Westport's attraction is as a seashore and water sports-oriented destination resort community. As such, residential structures for sale, long-term lease, and other term occupancy all facilitate the water-related nature of the Westport economy.

"Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

Wetlands are further explained in the "Washington State Wetlands Identification and Delineation Manual" as prepared by the Department of Ecology, Publication No. 96-94 date March 1997.

Wetlands, Associated. "Associated wetlands" means those wetlands which are in proximity to and either influence or are influenced by tidal waters or a lake or stream subject to the Shoreline Management Act. (Ord. 1189 Atch. A §2, 1999; Ord. 1146 §2(part), 1998).

17.32.030 Application of regulations. These regulations shall apply to all the lands in the city identified as shorelines, and shall apply to every person, firm, corporation, local and state governmental agency, and other entities which would develop, use, and/or own lands, shorelands, or waters under the control of these regulations. Further, these regulations apply to all existing and future conditions within the area of jurisdiction except as provided in Section 17.32.070.

(1) All structures or other development within the shorelines of Westport are required to comply with Chapter 17.32 WMC herein, whether or not the development is "substantial" or "exempt" as defined in Section 17.32.020.

(2) All "substantial development" not otherwise exempt pursuant to Section 17.32.020 shall obtain a shoreline substantial development permit as required by Section 17.32.080.

(3) Any request for a variance or conditional use under Section 17.32.080 shall obtain a shoreline substantial development permit as set forth in Section 17.32.080. (Ord. 1146 §2(part), 1998).

17.32.040 Shoreline environments. Westport has identified three shoreline environments with the city:

(1) Urban shoreline is a designation in areas served by sewer, water, and other city services to enable intensive use and to manage development in order to maintain shorelines for a wide variety of intense uses. Within the urban shoreline environment designation, there are six shoreline use zones:

(A) Ocean Beach Residential Zone (OBR). The purpose of the OBR zones is to identify and provide for low-density residential uses on sewer. (The OBR-1 zone includes land within shoreline areas, but the OBR-II zone does not.) (See also WMC 17.18A and 17.18B.)

(B) Recreation and Parks (RP). The RP zone includes public shorelands identified for parks or recreation. (See also WMC 17.30.)

(C) Tourist Commercial (TC). The TC zone is designed to accommodate major tourist and recreational facilities, including a potential destination resort. (Not all TC zoned properties are within shoreline areas.) (See also WMC 17.21)

(D) Mixed Use/Tourist Commercial (MUTC). The MUTC-1 and MUTC-2 zones are designed to foster a mix of commercial and residential uses to promote a compact, urban center. (The MUTC zones contain lands both shoreline and nonshoreline areas.) (See WMC 17.20A.)

(E) Marine Industrial (MI). The MI zone provides for water-oriented and water-dependent uses (See WMC 17.26.)

(F) Residential (R-1 and R-2). The residential zones, where located in shoreline areas, provide water-oriented opportunities.

(2) Conservancy shoreline is a designation to conserve and protect significant natural resources, including ocean beaches, two hundred feet shoreward of the marram grass line including the dune protection zone) and estuary wetlands (as discussed in 17.32.120(C)).

(A) Dune Protection Zone (DP). The DP zone extends from the marram grass line shoreward two hundred feet, the purpose of which is to identify and protect the foredune area along the Pacific Ocean Beach.

(3) Natural shoreline is a designation reserved for natural resource areas which areas intended to remain free

of human influence. Natural shorelines are further explained in WAC 173-16-040(4)(b)(i). (Ord. 1146 §2(part), 1998).

17.32.050 Shoreline environment guidelines. (a)
Urban Shoreline Environment.

(1) Purpose and Intent. The purpose of an urban shoreline is to designate areas in which there is or should be a mix of compatible uses. In general, residential densities will be higher, industrial and commercial uses will be service, natural resource, or community oriented, and public access to the water will be encouraged for recreational purposes.

(2) Designation. The shorelines identified in subsection (a)(2) of this section described at 17.32.120 shall be designated "urban" which shall be a zoning overlay, supplemental to the underlying zone.

(3) Map. The urban shoreline boundary is identified on the map entitled "City of Westport Comprehensive Land Use, Shoreline and Zoning Map" dated October, 1997, is adopted as the official zoning map for the city and is part of the city zoning code and development regulations.

(4) Management Objectives. The urban shoreline environment contains considerable salt marsh areas as well as the existing Westport airport, marina, the Westhaven district, and other developed areas of Westport. This environment is intended to demark the expanding urban areas of Westport, to protect the salt marsh, the Westport airport, and the marina, and in the Westhaven area, to accommodate the major commercial and sport fishing requirements of the Westport area. All of these resources and uses are important to the local economy and will be protected.

(5) Permitted Uses. Since the urban shoreline environment is an overlay zone, development shall be consistent with Westport's underlying zoning designations, to the extent located in shoreline areas:

- (A) OBR1 (ocean beach residential-1 zone), see WMC 17.18.A.
- (B) RP (recreation and parks zone), see WMC 17.30.
- (C) TC (tourist commercial zone), see WMC 17.21.
- (D) MUTC-1, MUTC-2 (mixed use/tourist commercial zones), see WMC 17.20A.
- (E) MI (marine industrial zone); see WMC 17.26.
- (F) R-1 and R-2 (residential zones), see WMC 17.16.

(6) Conditional Uses. The following uses may be permitted when they comply with this chapter and the criteria for shoreline conditional uses in Section 17.32.80: Shipping, mineral extraction and storage; forest products processing; heavy industries; ship construction and repair;

barge berthing; ship berthing; port terminal facilities; nonappurtenant signs; agricultural uses and structures; outfall; diking; bank line erosion control; new shoreline works and structures; causeways; and landfills consistent with the other requirements of this chapter.

(7) Standards.

(A) All structural developments intended for human occupancy in the urban shoreline shall be located in areas of the shoreline outside of the high energy zones (also known as high velocity or "V" zones) which are subject to potentially dangerous flooding or erosion, as identified on the FEMA map for the city dated May 5, 1981, Panel No. 530067 0005 C.

(B) Roads, utilities, and other infrastructure intended for dedication to the public shall be located outside of the high energy zones identified on the map which are subject to potentially dangerous flooding or erosion or flooding to the extent possible. Where a high energy area must be crossed, construction must be done consistent with the nature of the hazards likely to be encountered, and in a manner which does not increase or change the likely area of disturbance.

(C) Grading and filling operations consistent with the permitted uses shall be permitted shoreward of the primary dune, where such dune is ascertainable. Modifications in the primary dune are permitted only where other alternatives are not available and then only when necessary to serve a public purpose (e.g., road, public access, utility, or safety measure) and not merely private or recreational purposes. Grading and filling will not be permitted for the purpose of creating new land out of the waters of the state.

(D) Shoreline protective structures, docks, and piers. Shoreline protective structures, docks, and piers are permitted within the harbor area (any urban shoreline lying easterly of the main jetty) and any extension of the main jetty necessary to protect the main jetty or improve its functioning. The normal maintenance and repair of existing shoreline works and structures shall be exempt from the requirement to obtain a shoreline substantial development or conditional use permit pursuant to RCW 90.53.030 (3)(e)(i).

(E) All projects within the MUTC and the tourist commercial zones abutting the shoreline shall make provision for access or use of the shoreline area for the enjoyment of the owners, tenants, and guests of the project, or where appropriate, the public as a whole.

(8) Setbacks. In OBR and TC zones the building setback shall be two hundred feet from the edge of the marram grass line. The line shall be determined as the average of the marram grass line measured two hundred feet on either side of the structure to be constructed. In all

other zones, the setback shall be shoreward of the line of ordinary high water except for those uses approved for over water -- marinas, ferry terminals, water-dependent industry.

(b) Conservancy Shoreline Environment.

(1) Purpose and Intent. The conservancy environment is intended to protect areas for purposes that directly use or depend on natural systems. While it is not intended that such areas will be preserved in their natural state, the activities which occur in these areas shall be compatible the natural systems. It is the intent of this classification to allow uses which depend on the natural ecological system for production of food for recreation, for recognized scientific research, or for public access for recreational uses. Recreation uses will be water dependent and designed to maintain the quality of the natural elements of the areas.

(2) Designation. The shorelines described at 17.32.120 and identified on the map described below shall be designated "conservancy."

(3) Map. The shoreline boundary is identified on the map entitled "City of Westport Comprehensive Land Use, Shoreline and Zoning Map" dated October, 1997 is adopted as the official zoning map for the city and is part of the city zoning code and development regulations.

(4) Management Objectives. The conservancy environment is intended to establish an eastern line of limitation for the expanding urban areas of Westport and to protect the salt marsh in the eastern portion of the city.

(5) Permitted Uses. The permitted uses in the conservancy environment are those fostered by the lands, wetlands, shorelands, and water of that environment. The following uses are permitted subject to compliance with the city of Westport shoreline master program policies and regulations: Oyster culture; aquaculture; commercial fishing and shellfish harvesting; navigational aids; public boat ramps; boating; public fishing areas; passive and subsistence agriculture; local market farming; tree farms; wildlife refuges; living resource production and habitat.

(6) Conditional Uses. Except on the Pacific Ocean Beach, the following uses may be permitted when they comply with the Master Program Policies and Regulations and the criteria for conditional uses in the City of Westport Shoreline Master Program: Single-family dwelling; parks, pathways, and other public accesses; piling and mooring dolphins; outfalls, bankline erosion control; shoreline protective structures; new shoreline works and structures; landfills associated with approved shoreline permits and consistent with the other regulations of this master program.

the requirements of Chapter 173-15 WAC: Permits for oil or natural gas exploration activities conducted from state marine waters.

(C) Ocean research should be located and operated in a manner that minimizes intrusion into or disturbance of the coastal waters environment consistent with the purposes of the research and the intent of the general ocean use guidelines.

(D) Ocean research should be completed or discontinued in a manner that restores the environment to its original condition to the maximum extent feasible, consistent with the purposes of the research.

(E) Public dissemination of ocean research findings should be encouraged.

(6) Ocean Salvage. Ocean salvage uses share characteristics of other ocean uses and involve relatively small sites occurring intermittently. Historic shipwreck salvage which combines aspects of recreation, exploration, research, and mining is an example of such a use.

(A) Nonemergency marine salvage and historic shipwreck salvage activities should be conducted in a manner that minimizes adverse impacts to the coastal waters environment and renewable resource uses such as fishing.

(B) Nonemergency marine salvage and historic shipwreck salvage activities should not be conducted in areas of cultural or historic significance unless part of a scientific effort sanctioned by appropriate governmental agencies.

(f) Estuary Management Regulations.

(1) The estuary management land use map is adopted as an appendix to the city land use map, provided that the city map shall prevail as to designation of urban areas.

(2) The permitted land uses and criteria for development in all urban shorelines within the city shall be determined by this Chapter 17.32 WMC and the city zoning ordinance which shall take precedence over any conflict in the estuary plan.

(3) The permitted land uses and criteria for development in the estuary management units 36, 37, 38 and 39 for conservancy areas shall be as set forth in 17.32.120(3c) and the attachments thereto. Where a conflict exists between the allowable uses and limitations set forth in the estuary plan and the other provisions of this title, the provisions of the more restrictive shall be given precedence.

(g) Public Access.

(1) Except as provided below in subsections (g)(2) and (g)(3) of this section, shoreline substantial developments or conditional uses shall provide public access where any of the following conditions are present:

(A) Where a development or use will create increased demand for public access to the shoreline, the

development or use shall provide public access to mitigate this impact.

(B) Where a development or use will interfere with an existing public access way, the development or use shall provide public access to mitigate this impact. Developments may interfere with accesses on their development site by blocking access or by discouraging use of existing on-site or nearby accesses.

(C) Where a use, which is not a priority shoreline use under the Shoreline Management Act, will locate on a shoreline of the state, the use or development shall provide public access to mitigate this impact.

(D) Where a use or development will interfere with a public use of lands or waters subject to the public trust doctrine, the development shall provide public access to mitigate this impact.

The shoreline permit file shall describe the impact, the required public access conditions, and how the conditions address the impact.

(2) An applicant need not provide public access where one or more of the following conditions apply.

(A) Unavoidable health or safety hazards to the public exist which cannot be prevented by any practical means;

(B) Inherent security requirements of the use cannot be satisfied through the application of alternative design features or other solutions;

(C) The cost of providing the access, easement or an alternative amenity is unreasonably disproportionate to the total long-term cost of the proposed development;

(D) Unacceptable environmental harm will result from the public access which cannot be mitigated; or

(E) Significant undue and unavoidable conflict between any access provisions and the proposed use and/or adjacent uses would occur and cannot be mitigated.

(3) In order to meet any of the conditions in subsections (g)(2)(A) through (g)(2)(E) of this section, the applicant must first demonstrate and the city determine in its findings that all reasonable alternatives have been exhausted, including but not limited to:

(A) Regulating access by such means as maintaining a gate and/or limiting hours of use;

(B) Designing separation of uses and activities (e.g., fences, terracing, use of one-way glazings, hedges, landscaping, etc.); and

(C) Developing provisions for access at a site geographically separated from the proposal such as a street end, vista or trail system.

(4) View Protection.

(A) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state

that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where this master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

(B) Shoreline uses and activities shall be designed and operated to avoid blocking, reducing, or adversely interfering with the public's visual access to the water and shorelines.

(C) Public lands such as street ends, rights-of-way and utilities shall provide visual access to the water and shoreline in accordance with RCW 35.79.035 and RCW 36.87.130.

(h) Signage.

(1) In all environments public safety signs and signs not exceeding two square feet posted to warn against hunting, fishing, trespassing, and hazards are permitted. Signs erected by a public agency to warn of hazards; traffic requirements; or to notify the public of fish, shellfish and game regulations; or interpretive and educational signs are permitted within all environments.

(2) All signs shall be located and designed to minimize interference with vistas, viewpoints and visual access to the shoreline. No sign shall be placed in a required view corridor. No sign shall be placed on trees or other natural features.

(3) Signs related to specific on-site uses or activities shall not exceed thirty-two square feet in surface area. On-site freestanding signs shall not exceed six feet in height. When feasible, signs shall be flush-mounted against existing buildings.

(4) Sign plans and designs shall be submitted for review and approval at the time of shoreline permit approval.

(i) Stormwater Management.

(1) All shoreline development, both during and after construction, shall minimize any increase in surface runoff through control, treatment and release of surface water runoff so that the receiving water quality and shore properties and features are not adversely effected. Control measures include but are not limited to dikes, catch basins or settling ponds, oil interceptor drains, grassy swales, planted buffers and fugitive dust controls. (Ord. 1189 Attch. A §4, 1999; Ord. 1146 §2(part), 1998).

17.32.065 Wetlands and critical areas. (a) Adoption of Documents.

(1) State. For purposes of the shoreline master program, the city adopts the Washington State Manual, as prepared by the Department of Ecology, Publication No. 96-94, dated March, 1997.

17.32.090 Appeal. All of the various actions which may be taken during the administration and enforcement of these regulations may be appealed. All of the actions fall into two categories, those actions which will be automatically reviewed at the state level, and those which will not be so reviewed.

(1) State-level Appeal. The appeal procedure contained in the Shorelines Management Act itself provides the avenue of appeal for all state reviewable actions. See RCW 90.58.180 (21-day deadline from the date of filing with WDOE), which provides for a procedure to appeal the city's final decision to the State Shorelines Hearing Board, or in the case of appeals involving single-family residences, to panel composed of three board members, per RCW 90.58.185.

(2) Local-level Appeal. For the nonstate review actions, appeal may be filed to the Westport city council within ten days of the decision date of the action being appealed, by filing a notice of appeal with city clerk. Such actions may include judgments or interpretations made by the administrator. The city council's review shall be on the record, with each party entitled to submit a written statement of issues five days prior to the date set for consideration, and provide a ten-minute argument to the council at the day of the hearing, unless additional time is granted by notice prior to the hearing. The city council shall render its decision on the appeal within thirty days of the date that the appeal is filed with the city clerk. The city clerk shall prepare forms for use by the appellants. The administrator will keep careful record of the date and nature of each decision. The success or failure of each appeal effort shall be made public record and shall be used in future decisions of a similar nature. The city council shall note such use or shall record the explanation as to why an earlier appeal action was not used. Appeals of the action of the city council are appealable to the State Shorelines Hearings Board within twenty-one days of the date the final decision was filed, as provided in RCW 90.58.140(b), as described in subsection (1) of this section. (Ord. 1146 §2(part), 1998).

17.32.100 Amendments and boundary changes. In accordance with the regulations of Chapter 173-26 WAC, any of the provisions of this chapter, or the shoreline management jurisdiction boundary lines, or environment boundary lines may be amended. Such amendment shall first occur in the form of a regular ordinance amendment according to the regular legislative rules of the city council, except that before the city council may entertain any amendments, there must first be a public hearing held by the planning commission at which the matter of amendment is presented to the public and their comment entertained.

(2) Local. Under Resolution 497, the city adopts criteria for wetlands and other critical areas. In addition, the following standards shall apply to wetlands located within shoreland areas.

(b) Wetland Buffers. Except as provided below, a buffer of undisturbed vegetation shall be maintained between the wetland and the nearest structure, including stormwater treatment and detention facilities, which shall also be placed outside of the wetland buffer.

(1) Urban Shorelines. Within urban shoreline environments, the required buffer for category A wetlands shall be one hundred feet wide surrounding the wetland; the required buffer for category b wetland shall be fifty feet wide surrounding the wetland; the required buffer for category C wetlands will be as follows:

<u>Lot Size</u>	<u>Buffer Zone</u>
≥ 7,500 sq. ft. and < 10,000 sq. ft.	15 feet
≥ 10,000 sq. ft. and < 20,000 sq. ft.	25 feet
≥ 20,000 sq. ft.	50 feet

(2) Conservancy Shorelines. Within conservancy and natural shoreline environments, the required buffer shall be one hundred feet wide surrounding the wetland.

(c) Wetland Fill. Except as provided below, the filling of wetlands is prohibited.

(d) Exceptions to Wetland Buffer and Fill Restrictions. (1) Urban Shoreline Environment. Exceptions to wetland buffer requirements and wetland fill prohibitions may be made when necessitated by water-dependent structures, public use needs, or when joining an existing city road or utility network, pursuant to the additional requirements identified in Section 17.32.055:

- (A) Erosion control;
- (B) Docks, piers, and other water/land connectors;
- (C) Ports and water-related industries;
- (D) Shoreline works and structures;
- (E) Marinas;
- (F) Roads and railroads;
- (G) Bridges and water control devices;
- (H) Utilities;
- (I) Recreation;
- (J) Restoration.

In the event the wetland buffers preclude a reasonable use of the land, a variance to permit such reasonable use may be granted, upon application.

(2) Conservancy and Natural Shoreline Environments. The only exceptions to wetland buffer and fill requirements shall be to maintain an existing structure or if the imposition of wetland buffers and prohibition against the wetland fill render the lot unbuildable, and in

APPENDIX 3

THE CITY OF WESTPORT

COMPREHENSIVE PLAN

Adopted April 28, 1998
Last revised February 23, 1999 by Ord. 1189



This Comprehensive Plan was funded in part through a cooperative agreement with the National Oceanic and Atmospheric Administration with funds appropriated for the Coastal Zone Management Act of 1972

4. The city should review the need for and, if feasible, construct retention basin(s) where needed as a of addressing drainage-related problems.
5. Major new developments involving significant areas of impervious surfaces should be reviewed, at a minimum, through the SEPA review procedure to determine their impact on storm water runoff and the drainage system.

G. LAND USE DESIGNATIONS AND LAND USE PLAN MAP

The land use plan map (October 1997 edition, Figure 1) allocates space for the various categories of land use anticipated by this plan. It does so on the basis of the goals, objectives, and policies of the plan and, as such, the plan map implements these policies. The reader is cautioned that comprehensive plan decisions will be based on policies, not on any mapped illustrations of these policies. The Alternative 1 Land Use Map of the Port of Grays Harbor Comprehensive Plan (Industrial Properties 1996 Master Plan) is included in Appendix A to serve as an illustrative guideline for development of Port property.

The space set aside for each land use classification has been done broadly and the boundaries between each classification should be viewed as transitional between the various areas. Thus, the boundaries should be considered flexible rather than rigid, unless specifically stated. A more important consideration is whether or not they conform to and implement the policies of this land use element and the rest of this plan.

The following descriptions of the land use classifications are intended to clarify the intent of each classification and to aid in the development of appropriate implementation devices. These descriptions are particularly intended to assist in making day-to-day decisions affecting land use patterns. Since conditions may arise which will demand minor changes in the planned land use pattern, these descriptions have been made sufficiently broad to accommodate such changes without an amendment to the plan itself. However, any major deviation from the land use plan or plan map should be preceded by a considered amendment to this plan, looking at all aspects of the proposal and its impacts on all the integrated aspects of the plan.

The statements under each classification should be considered policies. Zoning applications consistent with these policies shall be considered in compliance with this plan, notwithstanding any other policy.

The following descriptions apply to the designations on the preceding land use plan map. Where conflicts arise between the map and the following descriptions, the latter should be followed.

1. Residential (R1 and R2)

The single-family residential districts are residential zones requiring a low to medium density of population and providing protection from hazards, objectionable influences, building congestion, and lack of light, air, and privacy. Certain essential and compatible public service facilities are permitted in this district.

Generally, this designation should be located in the older and more geologically stable areas of the city, areas substantially developed as conventionally-constructed, single-family neighborhoods, and areas where residential amenities, such as views and forest cover, are found. See Figure 1.

2. Ocean Beach Residential (OBR1 and OBR2)

This designation is intended to provide flexibility and control over the development of presently undeveloped areas in the southwestern parts of the city, to encourage innovative design of major residential development, and to prevent premature or inefficient provision of city facilities in presently undeveloped residential areas. This designation should allow low-density urban residential development of up to six (6) units per acre, as well as recreational uses. The "ocean beach residential" designation should be applied to areas where land is available for residential development.

3. Mobile - Manufactured Homes

a. Areas designated R1", m" or RC are intended to provide residents of mobile home structures access to a traditional low-density neighborhood environment with protections and amenities similar to the "residential" areas.

b. Mobile home areas should be designated primarily in the geologically older and more stable parts of the city in areas substantially developed as mobile home neighborhoods under existing development patterns.

4. Mixed-Use/Tourist Commercial (MUTC1 and MUTC2)

It is the intent of the Mixed-Use/Tourist Commercial (MUTC) zone that there be a mixture of tourist commercial and higher density residential uses in close proximity. Mixed use can include, but is not limited to, mixed use buildings with retail or office uses on the lower floors and residential above, or uses which mix commercial and residential structures in the same or neighboring parcels. Individual projects may be single purpose or mixed use.

The MUTC designation should be viewed as incorporating two significant sub areas: 1) a Community Business District, and 2) Tourist Commercial activity. Map reference: see areas designated on map at Figure 1.

5. Tourist Commercial (TC)

The tourist commercial zone is intended to provide a zoning designation which would enable the development planned for the Westport property owned by the Port of Grays Harbor and which is identified in the comprehensive plan as the tourist commercial zone. This area is identified on the map at Figure 1 and the alternative uses are illustrated in the map in Appendix A.

6. Marine Industrial (MI)

The marine industrial designation is intended to allocate space for the development of industrial uses and related activities which can benefit from Westport's marine location and character, and is intended to encourage the continued development of marine-oriented activities, protected from incompatible uses. Marine-related ferry, transport and storage, processing, construction, repair, and distribution activities are all encouraged. Shoreline areas and access should be reserved for water or marine-dependent activities.

The marine industrial area should be centered around the off loading activities near the Westhaven area. This includes the southeastern section of the Westhaven area. In general, then, this designation covers not only present areas of marine industrial or commercial-related activities, but also areas where expanded marine facilities would serve these activities.

7. Public

This designation sets aside areas in public ownership or areas where direct public ownership or control may be necessary to protect the city.

This designation is applied to all publicly-owned land where the use of land is of a public nature and to all other lands where public ownership or control may be necessary to protect the city. Public ownerships should be accommodated within a public use district to allow efficient maintenance and expansion of these uses.

8. Shorelines

This designation is intended to identify areas where compliance with state law affecting the shorelines and wetlands of Westport will regulate further development through the shoreline management process. These areas are designated in this plan so that development permits are handled in a smooth and expeditious manner. Map reference: see areas designated on page 16. The designations appropriate for Westport are:

a. Urban shoreline. The urban shoreline is an overlay zone for the Dune Protection, RP, R1, R2 MUTC, M1, OBR1, and Tourist Commercial zones in the City of Westport, which also fall within the "shorelines of the state," as that term is used in the State Shoreline Management Act, Chapter 90.58 RCW. The statement of intent in RCW 90.58.020 is incorporated by reference.

b. Conservancy. Land extremely sensitive to development due to wetland or flooding characteristics, including all lands between the line of ordinary high water and the marm grass line on Pacific Ocean beaches. On Pacific Ocean beaches the conservancy zone is considered too unstable for development due to active ocean beach movement.

c. Natural shoreline. Land which should remain free from human disturbances and be preserved and/or restored to its natural or original condition.