

NO. 34780-6-II

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

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KELLY and SALLY SAMSON, husband and wife; and ROBERT and  
JOANNE HACKER, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND; STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY; and CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

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DIVISION II  
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STATE OF WASHINGTON  
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BRIEF OF APPELLANTS

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## I. INTRODUCTION

This appeal is about whether the City of Bainbridge Island (“the City”) and the Department of Ecology (“DOE”) violated specific procedural and substantive mandates of the Shoreline Management Act (“SMA”) when imposing on an ad hoc basis a private dock ban on a 3½ mile segment of its 45 miles of shoreline within Blakely Harbor. Ecology adopted the amendment to the Bainbridge Island Shoreline Master Program (“SMP”) (“SMP Amendment”) on February 13, 2004, without subjecting its decision to the normal rigors of the decision-making process through application of promulgated criteria for amendment of shoreline master programs, called the “DOE Guidelines.” DOE ignored its Guidelines for a wrong reason, to perpetuate the City’s illegal moratorium on over-water structures which the courts had already ruled invalid.

The first major flaw in the adoption of the SMP Amendment was the failure of DOE to follow the mandated SMA approval process. It is undisputed that DOE failed to consider and “make written findings and conclusions regarding the consistency of the proposal with the policy of RCW 90.58.020 *and the applicable guidelines*” as mandated by the SMA. RCW 90.58.090(2)(d). The Central Puget Sound Growth Management Hearings Board (“Board”) excused this glaring omission, leaped into the breach, and made its own determination of consistency with the

Guidelines in lieu of DOE, a role outside of its authority as a quasi-judicial body.

The second major flaw in the adoption of the City's SMP Amendment is the dock ban itself.<sup>1</sup> In the proceedings below, the City and DOE took the position that prohibition of docks is more consistent with the SMA than a plan allowing for individual permit by permit consideration of dock applications. Such permitting in Blakely Harbor, they say, would be "piecemeal" regulation, even though it is a common process throughout Washington and docks are designated a preferred use in the SMA. *See* RCW 90.58.140. It is the City's ad hoc, single harbor SMP Amendment that is the prototype of the "uncoordinated and piecemeal" planning that the SMA intended to prevent.

Without doubt, all of us love shorelines and we cannot help but think of the shorelines we know and frequent as unique. For example, here are descriptions of two harbors in the City of Bainbridge Island:

*Manzanita Bay* is the only harbor located on the west side of the Island. It has unique natural resources, including the largest salmon run on the Island. It is the least used of the four harbors. As such, it offers a relatively pristine anchorage that remains quiet during the bustling summer months when other harbors become crowded.

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<sup>1</sup> The term "dock ban" is not merely rhetorical. The City itself referred to the SMP Amendment as a "ban." *See, e.g.*, Tab 30 (Ex. C-53).

Harbor Management Plan, C2.3, at 29.

*Blakely Harbor* is the last relatively undeveloped harbor in Central Puget Sound. It has unique aquatic and shoreline natural resources which should be preserved. It is the most rural and least developed harbor on Bainbridge Island.

Harbor Management Plan, C2.3, at 28.

Which one, if any, justifies a permanent ban against all private docks? The City chose, without explanation, to ban docks in Blakely Harbor and leave Manzanita Harbor and the remainder of its shorelines as is. The City's rationale for the dock ban in Blakely Harbor is arbitrary and misplaced. The SMA eschews prohibitions by stipulating that "permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, *any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.*" RCW 90.58.020 (emphasis supplied).

## II. ASSIGNMENTS OF ERROR

Appellants assign error to the "Order and Judgment Dismissing Petition for Judicial Review of Administrative Decision" (CP 176-81) and to the "Order Denying (1) Petitioners' Motion to Supplement the Administrative Record or for Remand, and (2) Petitioners' Second Motion to Supplement the Administrative Record or for Remand" (CP 182-84),

specifically to the following conclusions in such Orders (grouped by subject matter): Order and Judgment of Dismissal, consistency with SMA, paragraphs (1), (3) - (4), consistency with DOE Guidelines, paragraphs (5) - (9), consistency with Bainbridge Island Comprehensive Plan and SMP, paragraph 10, constitutional and public trust violations, paragraphs (12) - (15), and Orders Denying Motions to Supplement the Record, CP 176-181, including Order and Judgment of Dismissal (paragraph 17).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is DOE's failure to consider and apply its Shoreline Master Program Guidelines to the City's dock ban an act that is outside of its statutory authority, an unlawful procedure, an erroneous interpretation of the law, inconsistent with a rule of the agency, or arbitrary and capricious?

2. Did the Board act outside of its statutory authority, engage in unlawful procedures, erroneously interpret the law, act inconsistently with a rule of the agency, or act in an arbitrary and capricious manner when it determined for itself whether the City's dock ban violated DOE's Guidelines in the absence of any prior findings and conclusions on this issue by Ecology?

3. Is the City's dock ban consistent with the policies of the SMA, RCW 90.58.020?

4. Is the City's dock ban consistent with its own Shoreline Master Program and Comprehensive Plan policies?

5. Is the Board decision that the dock ban is consistent with DOE's new guidelines for amending shoreline master programs supported by substantial evidence?

6. Is the Board's decision that the dock ban complies with the internal consistency requirements of the Growth Management Act supported by substantial evidence?

7. Did the trial court err in denying Appellants' request to supplement the administrative record with newly discovered evidence pertaining to the City's assessment of reasonably foreseeable dock development in Blakely Harbor and in denying Appellants' request to remand the matter for consideration of such evidence?

8. Does the City's dock ban violate Washington's public trust doctrine?

9. Is the City's dock ban in conflict with the SMA and in contravention of Article XI, Section 11, of Washington's Constitution?

10. Is the City's dock ban a violation of Appellants' rights under the due process and equal protection provisions of the U.S. and Washington Constitutions?

#### **IV. STATEMENT OF THE CASE**

##### **A. Blakely Harbor.**

Blakely Harbor is a residential harbor located along the southeastern shore of Bainbridge Island, extending from Jasmine Point on the north to Restoration Point on the south. Tab 30 (Ex. C-2.1, p. 5).<sup>2</sup> Its environmental designation in the City's SMP is "semi-rural," a non-restrictive category. It is one of four major harbors on Bainbridge Island, the others being Eagle Harbor, Port Madison, and Manzanita Bay. Tab 30, C-2.3, pp. 26-30. Blakely Harbor is a "shoreline of state-wide significance," as are all "areas of Puget Sound and the Strait of Juan de

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<sup>2</sup> Citations to the Administrative Record are to the Tab numbers in the Index and Certification of Record filed with this Court on June 19, 2006.

Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of mean low tide.” RCW 90.58.030.

The history of the Harbor is industrial and commercial. Tab 30, Ex. C-222, App. C, p. 1-9. Waterfront land uses in Blakely Harbor are now predominantly single-family residential, with approximately 34 existing single-family residences as of 1997 and 35 as of 2002. Tab 30 (Ex. C-222, p. 2). Other land uses include a golf course at Restoration Point and a City park at the head of the Harbor. Tab 30 (Ex. C-2.1, p. 8).

There are currently six existing docks in Blakely Harbor. Tab 30 (Ex. C-2.1, p. 5). Only four are functional. The most recent dock was built in 2002. *See Bottles*, SHB No. 03-004. It was the first dock built in Blakely Harbor since 1977.

#### **B. City Update of Its Shoreline Master Program.**

The City’s current Shoreline Master Program (“SMP”) was adopted and approved in 1996 by DOE. It allows property owners to file applications for shoreline permits or exemptions for new over-water structures, including piers, docks and floats in the “semi-rural” shoreline designation as permitted uses, which includes Blakely Harbor. *See, e.g.*, BIMC § 16.12.150, .340, .360, and .380.

In 2000, DOE adopted new SMP Guidelines and, in 2001, the City began updating its SMP, citywide, in response to the new Guidelines.

Those Guidelines were invalidated by the Shorelines Hearing Board in *Association of Washington Business v. Washington Department of Ecology*, SHB No. 00-037 (2001).

After the invalidation, DOE adopted new SMP Guidelines. *See* Ch. 173-26, WAC (2003). Proposed Rule-Making for these Guidelines was filed on June 17, 2003; a Rule-Making Order was adopted on December 17, 2003; and the Guidelines became effective on January 17, 2004. *Id.* WSR 04-01-117 (Order 03-02) Pursuant to the SMA, as amended by the Legislature, the City has until December 1, 2011 to update its SMP to be consistent with the new Guidelines. *See* RCW 90.58.080(2)(a)(iii) (2003).

To date, the City has not completed a citywide update of its SMP. The only change it has adopted is the contested dock ban in Blakely Harbor.

**C. City Adoption of Moratorium on Docks in Blakely Harbor.**

In 2001, two citizens of Blakely Harbor filed applications for approval of a private dock. Tab 30 (Ex. C-210, p. 7). Once the dock applications were filed, the South Bainbridge Community Association urged a moratorium on new dock applications. Tab 30 (Ex. C-27).

On August 8, 2001, the City Council approved a moratorium against dock applications within Blakely Harbor on an emergency basis, Ordinance No. 2001-32. On August 22, 2001, also on an emergency basis, the City Council adopted Ordinance No. 2001-34, imposing an Island-wide moratorium on over-water structures and repealing Ordinance No. 2001-32. Tab 30 (Ex. P-1). Thereafter, the City extended the moratorium several times, until September 1, 2003, when it allowed the Island-wide moratorium to expire. See Ordinance Nos. 2001-45, 2002-29, and 2003-34. However, the City Council on August 28, 2003 by adoption of Ordinance No. 2003-34 (Version B) continued the moratorium in Blakely Harbor to March 1, 2004.

The City's moratorium against docks in Blakely Harbor was struck down as invalid in a letter opinion issued on June 16, 2003, in *Biggers v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0. Judgment was entered on August 6, 2003. Tab 31. The City appealed the judgment on August 8, 2003 and stayed the lower court decision. On December 21, 2004, this Court upheld the lower court's invalidation of the moratorium. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 103 P.3d 244 (2004). The Supreme Court accepted the case for review and affirmed both the Trial Court and Court

of Appeals decisions invalidating the City's moratorium. *Biggers v. City of Bainbridge Island*, \_\_\_ Wn.2d \_\_\_, 169 P.3d 14 (2007).

**D. Adoption of Permanent Ban on Private Docks in Blakely Harbor.**

Within a month of the trial court's decision invalidating the City's moratorium against private dock applications, the City drafted an ordinance amending its SMP to ban private docks in Blakely Harbor outright. This ordinance was discussed at the City Council Land Use Committee, on July 9 and July 16, 2003. *See* Ordinance No. 2003-30. Tab 30 (Ex. C-25). The reason given for enacting the Blakely Harbor dock ban before completing the more extensive City-wide SMP update was "to protect Blakely Harbor in case the moratorium is ultimately invalidated." Tab 30 (Ex. C-53). Correspondence to DOE from the City requested "speedy review and approval of the ban." *Id.* The proposed SMP Amendment was timed for adoption and approval before the moratorium expired in Blakely Harbor on March 1, 2004. The entire process for adopting the ban from start to finish was compressed into two months. Tab 30 (Ex. C-210 and 211).

To support the ban, the City relied upon a study called the Blakely Harbor Cumulative Impact Assessment (the "Assessment"). Tab 30 (Ex. C-2.1). The Assessment is a general literature survey of the effects of

historic dock construction, or other waterfront developments, such as a large seawall constructed at Lincoln Park in Seattle. The Assessment does not correlate general observations from other areas to the site specific conditions within Blakely Harbor. Tab 30 (Ex. C-2.1, p. 24).

The Assessment assumed that 45 docks could be built within Blakely Harbor under the “predicted build-out assumption,” and 59 docks under the “maximum build-out assumption.” Tab 30 (Ex. C-2.1). The evidence of minimal historical dock construction in Blakely Harbor since passage of the SMA in 1971 through the date of the City’s action played no part in the build-out assumptions. No economic or probability analysis was prepared to determine whether the projections of 45 and 59 docks were realistic or reasonably foreseeable. The Assessment did not consider a cap on docks in lieu of a ban, ignoring analysis of “. . . how many docks are too many . . .” Tab 30 (Ex. C-21, p. 25).

**E. DOE Approval of SMP Amendment Banning Docks in Blakely Harbor.**

On December 11, 2003, the City sent the proposed SMP Amendment to DOE for its review and approval. Tab 30 (Ex. C-210). DOE performed no independent analysis and held no public hearing or meetings to take comments. Tab 30 (Ex. C-211). The staff person in DOE responsible for reviewing the City’s SMP Amendment had

previously provided a “comment letter” to the City, in August 2003, expressing support for the Amendment prior to DOE’s receipt of any analysis for the dock ban. Tab 30 (Ex. C-68).

On February 13, 2004, DOE approved the City’s SMP Amendment. Tab 30 (Ex. C-211). DOE ignored its Guidelines, so it made no findings as to the consistency of the dock ban with the substantive criteria set out in WAC Chapter 173-26. *Id.* Neither did it make any findings as to the consistency of the SMP Amendment with its prior Guidelines.

**F. Appeal to Central Puget Sound Growth Management Hearings Board.**

On April 23, 2004, Appellants filed a Petition for Review with the Board challenging the SMP Amendment for Blakely Harbor and, derivatively, the DOE decision approving the SMP Amendment. Following a hearing on the merits, the Board issued its Final Decision and Order upholding the challenged SMP Amendment. Tab 41, Final Decision and Order.

**G. Appeal to Thurston County Superior Court.**

On February 15, 2005, Appellants filed a petition for review under the Administrative Procedure Act (“APA”) with the Thurston County Superior Court to review the Board’s Decision, CP 5-83. On April 17,

2006, the lower court affirmed the Board in all respects, and dismissed the petition. CP 176-181. Before ruling, the Superior Court refused to supplement the record with deposition excerpts of the author of the Assessment as to the number of private docks that could realistically be developed in Blakely Harbor taking into account local circumstances and regulatory requirements of local, state and federal agencies with jurisdiction. CP 182-182.

## V. ARGUMENT

This appeal addresses the City of Bainbridge Island's "Plan B" to stop the permitting of docks in Blakely Harbor. "Plan A," the moratorium which lasted from August 22, 2001, until March 1, 2004 in Blakely Harbor, was invalidated in a split decision by the Supreme Court. *See Biggers*, \_\_\_ Wn.2d \_\_\_, 169 P.3d 14 (2007). Plan B, the hurry-up dock ban, is even more fraught with legal flaws.

The dock ban presents inconsistencies with the SMA that are similar to the moratorium, e.g., overriding the policies treating docks as preferred uses. In addition, however, the ban was adopted and approved by DOE without consideration of the applicable DOE Guidelines for amendment of local master programs, which is an express and indisputable mandate of the SMA. RCW 90.59.090 (2)(d).

**A. Standard of Review.**

The APA governs judicial review of challenges to Board actions. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005). The APA establishes nine criteria for challenging an agency's action. Appellants challenge the trial court's decision and the decision of the Board based on the following eight criteria, RCW 34.05.570(3)(a)-(f), (h), (i). The "burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a).

Appellate review is based on the record before the Board. *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 202-03, 884 P.2d 910 (1994). Courts must review the state agency decisions below to determine whether they are supported by substantial evidence in light of the entire record, are arbitrary and capricious, or involve an error of law. RCW 34.05.570(3); *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, *opinion amended by* 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *Buechel*, 125 Wn.2d at 202 ("Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises."); *Heinmiller*, 127 Wn.2d at 607 (quoting *Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994)).

A decision is arbitrary and capricious if it is “willful and unreasoning action in disregard of [the] facts and circumstances.” *Buechel*, 125 Wn.2d at 202 (quoting *Skagit County v. Dep’t of Ecology*, 93 Wn.2d 742, 749, 613 P.2d 115 (1980)).

The legal determinations of the Board are reviewed *de novo* under an error of law standard which permits a reviewing court to substitute its interpretation of the law for that of the agency. *Overlake Fund v. Shoreline Hearings Bd.*, 90 Wn. App. 746, 954 P.2d 304 (1998). While courts accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, they are not bound by an agency’s interpretation of a statute. *Quadrant Corp.*, 154 Wn.2d at 233. Here, the core issue is ignoring statutes and regulations, not interpreting them.

**B. Mandatory Statutory Requirements.**

The statutory framework for determining whether the City’s SMP Amendment is valid is stated in the SMA:

Local governments shall develop or amend a master program for regulation of uses of the shorelines of the state *consistent with the required elements of the guidelines adopted by the department [DOE]* in accordance with the schedule established by this section.

RCW 90.58.080(1) (emphasis added).

Once the local SMP is submitted to DOE for approval, DOE must

[m]ake written findings and conclusions regarding the consistency of the proposal *with the policy of RCW 90.58.020 and the applicable guidelines . . . .*

RCW 90.58.090(2)(d) (emphasis added).

The Growth Management Act (“GMA”) restates these requirements for SMP amendments and adds an additional requirement of “internal consistency,” RCW 36.70A.480(3).

**C. The Ban on Docks in Blakely Harbor Is Invalid Because of the Failure of Ecology to Consider and Apply Its Guidelines for Amendment of SMPs, a Non-Discretionary Task Reserved Only to the DOE**

The SMA, in mandatory terms, requires DOE to determine whether amendments to a shoreline master program are consistent with its Guidelines. *See* RCW 90.58.090. The trial court and the Board erred in holding that the Guidelines in effect when DOE approved the SMP Amendment did not apply and in substituting the Board’s judgment for a determination never made by DOE. On this basis alone, the Court should reverse the trial court’s decision upholding the SMP Amendment.

It is well settled law in Washington that public agencies must follow their own regulations. *See, e.g., Skamania County v. Woodall*, 104 Wn. App. 525, 16 P.3d 701 (2001); *Deffenbaugh v. Dep’t of Social & Health Servs.*, 53 Wn. App. 868, 871, 770 P.2d 1084 (1989). Courts have

not hesitated to invalidate agency action for failure to follow its own regulations. *Id.* DOE's failure to consider or apply its Guidelines to the City's SMP Amendment compels the same result. *See* RCW 34.05.570(3)(b)(h).

**1. DOE Failed to Consider the Consistency of the SMP Amendment With Its Guidelines.**

Central to the implementation of the SMA is the requirement that DOE adopt guidelines for development of master programs and that local governments develop and amend their programs consistent with the required elements of the guidelines adopted by DOE. RCW 90.58.060(1), RCW 90.58.080(1).

Although the SMA mandates otherwise, the Board concluded that DOE's "review of the Amendment in the context of the policies of the SMA (RCW 90.58.020)" alone was the correct and appropriate basis for review. Tab 41, Decision at 13. There is no legal basis for this approach or conclusion nor is there a sound policy reason to defer to an agency decision never made.

As provided in the Washington Administrative Code:

[T]he policy of RCW 90.58.020 and these guidelines constitute standards and criteria to be used by the department in reviewing the adoption and amendment of local master programs under RCW 90.58.090 . . .

WAC 173-26-171(3). *See also* RCW 90.58.090(2)(d).

The Guidelines have specific criteria for the regulation of new private dock construction and use, WAC 173-26-171, *et. seq.* (Tab 30, Ex. C-211), but were ignored. Notwithstanding this oversight, Ecology argued before the Board for the first time that it would be “unfair” to apply the new Guidelines because at the time the City adopted and submitted its SMP Amendment to DOE, the new Guidelines were not in effect. DOE’s Trial Response Br. at 7. DOE made no interpretation to this effect at the time of the City’s submittal of its SMP Amendment. Instead, DOE simply ignored its new Guidelines and chose to operate in a regulatory vacuum to help the City continue its illegal moratorium.

The Guidelines provide *inter alia* (1) the criteria for state review of SMP amendments (WAC 173-26.171(2)); (2) guidance on how to resolve the conflicts and tension that inhere in the policies of RCW 90.58.020 relating to utilization and protection of shorelines (WAC 173-26-176(2)); and (3) the governing principles that guide development of master program policies and regulations, including achievement of policies by means other than regulation of development (WAC 173-26-186). For the SMP Amendment, this means looking at provisions relating to regulation of docks and whether policies designed to achieve no net loss of

ecological functions can be satisfied by existing regulations and mitigation standards for docks. WAC 173-26-186(8); WAC 173-26-241(3)(b).

There is no provision in the SMA allowing DOE to “opt out” of its statutory obligation. Without consideration of the DOE Guidelines that contain the criteria for ensuring compliance with the policies and provisions of the SMA, those most affected by the agency’s failure to comply with its statutory and regulatory mandate, waterfront property owners like Appellants, were deprived of the ability to provide effective and meaningful comment on the SMP Amendment at issue - including whether a ban was even required. The Board’s action is erroneous and unfair to the public.

**2. The Board Unlawfully Determined for Itself the Consistency of the SMP Amendment With the DOE Guidelines.**

Instead of remanding the SMP Amendment to DOE to determine consistency with the DOE Guidelines, the Board determined for itself whether the SMP Amendment complied with the DOE Guidelines. This was error. The SMA requires that DOE alone determine whether SMP amendments are consistent with the DOE Guidelines. RCW 90.58.090. DOE “is designated the state agency responsible for the program of regulation of the shorelines of the state, including coastal shorelines and the shorelines of the inner tidal waters of the state . . . .” RCW 90.58.300.

DOE and not the Board has primary jurisdiction to make this determination under the SMA. *See Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 345, 962 P.2d 104 (1998); *Dioxin/Organochlorine Ctr. v. Dept. of Ecology*, 119 Wn.2d 761, 775, 837 P.2d 1007 (1992) (citing *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 302-03, 622 P.2d 1185 (1980)) (the doctrine of primary jurisdiction applies where a claim originally is within the jurisdiction of the courts, but the enforcement of that claim “requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body”).

While the Board has authority to review the decision of DOE to determine whether it is consistent with the policies of the SMA and the applicable guidelines (RCW 90.58.190(2)(c)), and while the court has jurisdiction to review the decision of the Board (RCW 34.05.510), neither can review a decision that has not been made by DOE.

**3. The Trial Court and Board Erred in Holding That the SMP Amendment Was Consistent With DOE’s Guidelines.**

In view of DOE’s failure to fully consider the City’s SMP Amendment against its Master Program Guidelines, Appellants believe that the trial court decision should be reversed, the SMP Amendment vacated, and this matter remanded to DOE (and the City) for further

consideration. However, in order to provide the Court with an indication as to how this omission materially prejudiced Appellants, as well as the general public, we briefly address the inconsistency of the SMP Amendment with the applicable DOE Guidelines through several examples: cumulative impacts and allowable uses within the shoreline classification system.

**a. Cumulative Impacts.**

The DOE Guidelines address how “cumulative impacts” are to be addressed, an issue which was a linchpin in the City’s justification for the SMP Amendment:

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act. . . . and fairly allocate the burden of addressing cumulative impacts among development opportunities.

WAC 173-26-186(8)(d). Evaluation of such cumulative impacts must consider several elements, including “*reasonably foreseeable* future development and use of the shoreline.” WAC 173-26-186(8)(d)(ii) (emphasis added).

The City’s evaluation of cumulative impacts was not based upon “reasonably foreseeable” future development and use of the shoreline –

only what was theoretically possible over the next several centuries. Instead, the City relied upon assumed “predicted” and “maximum” build out scenarios that are unlikely and unrealistic (45 and 59 docks respectively), that are not supported by any probability analysis, and that bear no relationship to the history of actual dock construction in Blakely Harbor or other local circumstances.<sup>3</sup>

First, it assumes a rate of dock development in Blakely Harbor based on dock development in the other three residential harbors that is contrary to all factual evidence in the record, including the best and most reliable evidence of future dock development—past dock development. As the record demonstrates, in 1997 there were 34 single family residences along the shorelines of Blakely Harbor and five private docks. Tab 30 (Ex. C-222, App. C, p. 5). In 2002 there were 35 single family residences and six private docks, only four of which were functional. Tab 30 (Ex. C-2.1, p. 9).

Second, there are practical reasons to believe that the “relatively low level of dock development” in Blakely Harbor will continue into the foreseeable future. The Bainbridge Island Land Trust and South

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<sup>3</sup> The author of the Assessment admitted in a deposition subsequent to the City’s approval of the dock ban that, based on information available when the Assessment was done, the predicted scenarios in the Assessment are not reasonably foreseeable. Instead, a build-out scenario of ten or fewer docks is more likely. Deposition of Peter T. Best, at 237-38, CP 96-174.

Bainbridge Community Association is having success in limiting dock development through conditions and covenants on waterfront developments within Blakely Harbor, and the Bainbridge Island Park District has acquired nearly 40 acres at the head of Blakely Harbor for a low impact public park. *See* Tab 30 (Ex. C-27, C-128, p. 2; Ex. C-166). Blakely Harbor's geography and topography is such that very long docks, in excess of 300 to 400 feet in length, would need to be constructed to achieve the appropriate depth to float a moored boat under all tidal regimes. *See* Tab 30 (Ex. C-2.1, C-2.2). Docks of this length are expensive and difficult to build, which partly explains why so few docks currently exist in Blakely Harbor. Tab 30 (Ex. C-196). Furthermore, there are existing eel grass beds that would further limit dock construction. Tab 30 (Ex. C-2.1, C-2.2).

The DOE's and the Board's blind reliance on the City's assumptions about predicted dock construction in Blakely Harbor is arbitrary, capricious and unlawful, as well as in conflict with applicable regulations for assessing SMP amendments. Further, mere assumptions based on speculation are not evidence of actual expected or predicted impacts, let alone, substantial evidence. *See, e.g., Little & King*, 160 Wn.2d. 696, 705, 161 P.3d 345 (2007) ("Mere speculation is not substantial evidence . . .").

The City also failed to consider another mandatory element of the cumulative impact analysis, the “beneficial effects of any established regulatory programs under other local, state and federal laws.” WAC 173-26-186(8)(d)(iii). The Board’s holding that the beneficial effects of regulatory programs were clearly incorporated into the Assessment is not supported by substantial evidence. For one, the Assessment doesn’t make this statement. Two, this was confirmed by a key local City official. In her deposition, the City’s Department of Planning and Community Development Director conceded that as a result of modern regulatory systems at the local, state and federal level, she is unaware of any significant adverse impacts associated with any private dock construction anywhere in Bainbridge Island. Tab 30 (Ex. C-196).

The City also failed to “fairly allocate the burden of addressing cumulative impacts among development opportunities,” as required by the DOE Guidelines. WAC 173-26-186(8)(d). The SMP Amendment focused on only one kind of potential impact, construction of docks, and on only one group of property owners – waterfront property owners in Blakely Harbor. The City should have addressed its regulation of Blakely Harbor in the context of a City-wide SMP update, instead of singling out one type of use and only a small portion of property owners on 3½ miles of the City’s 45 miles of shoreline.

In short, the City failed to assess cumulative impacts consistent with the process and requirements in WAC 173-26-186(8)(d). The Board and the trial court's post hoc "no harm, no foul" conclusion to the contrary involves an erroneous interpretation and application of the DOE Guidelines which is not supported by substantial evidence. RCW 34.04.570(3)(e).

**b. Allowable Uses Within the Shoreline Classification System.**

DOE's Guidelines establish "six basic environments" that must be used to classify all shoreline areas within the City, none of which contemplate the prohibition of docks, WAC 173-26-211(4)(b).

The most restrictive landward designation in the Guidelines is the "natural" environment, which has as its purpose "to protect those shoreline areas that are relatively free of human influence or that include intact or minimally degraded shoreline functions intolerant of human use." WAC 173-26-211(5)(a)(i). The "natural" designation includes "largely undisturbed portions of shoreline areas such as wetlands, estuaries, unstable bluffs, coastal dunes, spits, and ecologically intact shoreline habitats." WAC 173-26-211(5)(a)(iii). There is no mention of prohibiting docks, and single-family residential development may be allowed as a

conditional use within the “natural” environment. WAC 173-26-211(5)(a)(ii)(C).

The next most restrictive designation is the “aquatic environment,” which has as its purpose “to protect, restore, and manage the unique characteristics and resources of the areas waterward of the ordinary high-water mark.” WAC 173-26-211(5)(c)(i). However, the DOE Guidelines set forth the following, as the first “management policy” for “aquatic” environments:

Allow new over-water structures for water-dependent uses, public access, or ecological functions.

WAC 173-26-211(5)(c)(ii)(A). Thus, docks are allowed even in the very restrictive “aquatic” designation.

The City’s “semi-rural” classification for Blakely Harbor is not one of the six basic “environments” recognized in the DOE Guidelines. Appellants would assign it a position comparable to the “shoreline residential” designation in the array of allowed shoreline classifications in the DOE Guidelines, a classification which also contains no prohibition against over-water structures for water-dependent uses. *See* WAC 197-26-211(5)(f)(iii).

There is thus no “dock-prohibitive” designation in the DOE Guidelines that the City and DOE can apply to Blakely Harbor. The

Board and trial court's decision upholding such a prohibition is contrary to the DOE Guidelines.

**D. The Ban on Docks Is Not Consistent With SMA Policies.**

The SMA requires that amendments to a shoreline master program be consistent “with the policy of RCW 90.58.020 and applicable guidelines,” RCW 90.58.090(2)(d), but the SMP Amendment is not.

**a. City Must Plan for and Foster All Reasonable and Appropriate Uses.**

The trial court and the Board erred by failing to consider all of the policies in the SMA. Specifically, the dock ban impermissibly mandates preservation of shorelines to the exclusion of all other policies of the SMA.

The SMA declares that 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. According to this State's highest court,

*[t]he SMA does not prohibit development of the state's shorelines, but calls instead for “coordinated planning . . . recognizing and protecting private property rights consistent with the public interest.”*

*Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 727, 696 P.2d 1222 (1985) (emphasis added).

The courts of this state have recognized that if the sole purpose of the SMA were to preserve shorelines in their natural state to the exclusion of all development and modification, there would be no purpose in having the extensive permitting scheme that is embedded in the SMA. *See* RCW 90.58.140; *State Dep't of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974). *See also* Laws of 2003, Ch. 321 § 1. Instead, the policies of the SMA, as set forth in RCW 90.58.020, strike a balance between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shoreline. *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). This balance is explicitly acknowledged in the DOE Guidelines. *See* WAC 173-26-176(2).

The balance envisioned by the SMA anticipates that there will be some impact to shoreline areas by development, because alterations of the natural conditions of the shorelines must be recognized by Ecology. RCW 90.58.020. *See Biggers*, 169 P.3d at 22 (“The SMA embodies a legislatively determined and voter-approved balance between protection of state shorelines and development . . . . As part of our careful management of shorelines, property owners are also allowed to construct water-dependent facilities such as single-family residences, bulkheads, and docks”).

In this case, the City's SMP Amendment banning docks within Blakely Harbor fails the SMA requirement of balance. Rather, the City's SMP Amendment completely eliminates private docks – the most fundamental water-dependent use – from an entire harbor of the City under the guise of preserving the aquatic environment.

**b. SMA Treats Docks as a Preferred, Water-Dependent Use.**

In order to uphold the dock ban, the Board had to first erroneously conclude that private residential docks are not a preferred use under the SMA. However, the SMA, the DOE Guidelines and Washington case law all establish private recreational docks as preferred, water-dependent uses. RCW 90.58.020, so the Board erred.<sup>4</sup>

The Supreme Court long ago declared the construction of private docks under the SMA to be a beneficial public use of the state's shorelines:

*[O]ne of the many beneficial uses of public tidelands and shorelands abutting private homes is the placement of private docks on such lands so homeowners and their guests may obtain recreational access to navigable*

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<sup>4</sup> The DOE Guidelines similarly recognize docks and piers as preferred uses. New piers and docks shall be allowed only for water dependent uses or public access. As used here, *a dock associated with a single family residence is a water dependent use* provided that it is designed and intended as a facility for access to watercraft and otherwise complies with the provisions of this section. WAC 173-26-231(3)(b) (emphasis added).

*waters*. No expression of public policy has been directed to our attention which would encourage water uses originating on public docks, as they do, while at the same time discouraging any private investment in docks to help promote the use of public waters.

*Caminiti v. Boyle*, 107 Wn.2d 662, 673-74, 732 P.2d 989 (1987)

(emphasis added).

Of course, this does not mean that local jurisdictions cannot regulate the construction of new private recreational docks on shorelines. To the contrary, their construction “is subject to substantial regulation and control.” *See Caminiti*, 107 Wn.2d at 671. There are numerous cases in Washington where the denial of dock applications have been upheld for failure to meet the rigorous standards for such uses. *See, e.g., Skagit County v. Dep’t of Ecology*, 93 Wn.2d 742, 750, 613 P.2d 115 (1980); *Genotti v. Mason County*, SHB No. 99-011, Final Order (1999); *Viafore v. Mason County*, SHB No. 99-033, Final Order (2000); *Holley v. San Juan County*, SHB No. 00-0001, Final Order (2000); *Bellevue Farm Owners Assoc. v. Shoreline Hearings Bd.*, 100 Wn. App. 341, 997 P.2d 380 (2000).

As the case law demonstrates, the SMA permit system is working. It separates the wheat from the chaff. There is no demonstrated need for an outright ban against all private docks in Blakely Harbor.

**c. Shorelines of Statewide Significance.**

Designation of Blakely Harbor as a “shoreline of statewide significance” pursuant to RCW 90.58.030(1)(e) does not justify a dock ban. If it did, thousands of miles of Washington’s marine and freshwater shorelines would be eligible for a Bainbridge Island type dock ban.

Shorelines of statewide significance are not intended as areas prohibiting development, particularly water-dependent uses:

Designation of a shoreline as of “state-wide significance” does not prevent all development. That designation . . . but permits limited alteration of the natural shorelines, with priority given to “residences, ports, *shoreline recreational uses*” . . . which are particularly dependent on their location on or use of the shorelines of the state . . . .

*Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985) (emphasis supplied). Designation of a shoreline as one of state-wide significance “provides greater procedural safeguards;” it does not prohibit “limited alteration of the natural shorelines” for reasonable and appropriate shoreline uses, especially preferred water-dependent uses such as private residential docks and piers. *Id.* at 726. These safeguards are commonly applied during the permitting process established by the SMA.

**E. The Ban on Docks Is Inconsistent With the City's Shoreline Master Program and Comprehensive Plan Policies.**

In addition to complying with the policies, goals and provisions of the SMA and applicable guidelines, a shoreline master program is also required to comply with the internal consistency provisions of RCW 36.70A.070 and .040(4), the Growth Management Act ("GMA"). In this case, the SMP Amendment is not consistent with the City's SMP and Comprehensive Plan policies.

Under the 1996 SMP, private docks are allowed except in the most protective shoreline designation, i.e., the "aquatic" and "natural conservancy" shoreline designations, where they are prohibited. They are otherwise permitted or conditionally permitted in all other shoreline designations, including the "semi-rural" shoreline designation in Blakely Harbor.

No SMP policies suggest or support adoption of a ban in the semi-rural shoreline designation accorded Blakely Harbor and other residentially developed shorelines on Bainbridge Island. Instead, these use policies are in keeping with SMP goals and policies that give preference to water dependent and water-related uses, including recreational docks. This intent is emphasized as a "Master Goal" of the City's SMP:

*It is the intent of this program to manage the shorelines of Bainbridge Island, giving preference to water-dependent and water-related uses, . . . .*

Tab 35 (SMP at 11) (emphasis added).

It is unlikely that even a small percentage of the City's predicted number of private docks could be constructed in Blakely Harbor under its current SMP policies (excluding consideration of the dock ban). In order to be permitted, a private dock applicant must satisfy the following City policies (paraphrased):

- Joint use facilities are preferred over new, single-use piers, docks and floats.
- Mooring buoys should be encouraged in preference to either piers or docks.
- Piers, docks, and floats should cause minimum interference with navigable waters, the public's use of the shoreline, and views from adjoining properties.
- Piers, floats, and docks should minimize possible adverse environmental impacts, including potential impacts on littoral drift, sand movement, water circulation and quality, and fish and wildlife habitat.
- The proposed size of the structure should be compatible with the surrounding environment and land and water uses.
- Piers, floats, buoys, and docks may be limited in length or prohibited to protect navigation, public use, or habitat values.

Tab 35 (SMP, pp. 106-07).

The City made no attempt to harmonize its existing dock policies with its SMP Amendment; instead, the City simply added a ninth policy (without altering the eight existing policies) to ban docks in Blakely Harbor.

The Comprehensive Plan has designated the Blakely Harbor shoreline area for residential uses. The land along Blakely Harbor is currently zoned two dwelling units per acre (OSR-2). The shoreline designation – semi-rural environment – reflects this level and intensity of residential development and associated uses. Under the SMP, it “accommodates low to medium density residential development, low to medium density recreational development, passive recreation, and open space consistent with the Bainbridge Island Comprehensive Plan.” Tab 35 (SMP, p. 48). Consequently, “[i]t” includes shoreline areas that presently support medium to low density residential development. . . .” *Id.*

One of the Shoreline Use Element goals in the SMP has as its purpose preserving shoreline and water areas “with unique attributes for specific long-term uses,” in order to allow “residential [and] recreational” uses. *Id.* The ban on docks and piers in Blakely Harbor is inconsistent with these SMP goals and policies because it eliminates recreational

opportunities and uses associated with residential use of shorelines regardless of impacts to the integrity or character of the shoreline.

The City's ban on docks improperly burdens a discrete number of waterfront property owners merely because they happen to own property in Blakely Harbor. This is inconsistent with the State GMA and the City's SMP policy to "[e]nsure that proposed shoreline uses give consideration to the rights of private property ownership and rights of others." Tab 35 (SMP, p. 48); RCW 36.70A.020(6). It is also inconsistent with other Comprehensive Plan goals and policies intended to protect private property rights, e.g., Comprehensive Plan Land Use Element Goal No. 5, requiring consideration of "costs" to property owners when making land use decisions. *Id.*

Instead of addressing these inconsistencies, the Board simply cited SMP and Comprehensive Plan policies favoring "marine views," "marine safety," "joint use docks," and a "focus on 'unique attributes' and 'distinctive qualities of harbors.'" Tab 41 (Decision at 22). How these policies justify the ban on docks in Blakely Harbor but not other bays or harbors on Bainbridge Island is never explained, except to state that "[p]art of the distinctive quality and unique attribute of Blakely Harbor is its relative lack of docks." *Id.*

What is clear from the record is that the City's real purpose in adopting the SMP Amendment was to replace its illegal moratorium on docks in Blakely Harbor, while hurrying through adoption of a permanent ban on docks. The City did so in advance of and independent of its citywide SMP update. It is thus no surprise that the SMP Amendment is internally inconsistent with the City's SMP and Comprehensive Plan, since little if no thought was given to the requirement.

**F. The Board's Decision That the Dock Ban Is Consistent With the DOE Guidelines Is Not Supported by Evidence That Is Substantial When Viewed in Light of the Whole Record.**

Pursuant to WAC 173-26-090, local governments can make amendments to their shoreline master programs when "deemed necessary to reflect changing local circumstances, new information or improved data." The City's amendments to its SMP to ban private docks and piers within Blakely Harbor cannot be justified because no substantial evidence demonstrates compliance with the criteria.

While both the City and DOE sought to justify the need for the amendment because of the adverse cumulative impacts "likely to be caused by the proliferation of private dock and pier development within Blakely Harbor" and the "risk of experiencing irreversible development that would adversely impact the public interest in the shorelines of the

state.” In fact, there is no evidence of proliferation or risk. Tab 30 (Ex. 131, p. 1-2; Ex. C-211, p. 2). If anything, both DOE and the City appear to agree that there has been a “relatively low level of dock development.” Tab 30 (Ex. C-211, p. 2).

Recognizing this reality, the Board *sua sponte* made a finding of fact that the land surrounding Blakely Harbor has only recently become available for development, thereby implying a change in the status quo was imminent. Tab 41 (Decision, at 18). No evidence supports this finding, only subjective speculation. Instead, as the record demonstrates, the land surrounding Blakely Harbor has been used and available for residential development during the last 25-year period in which only two docks and few new homes have been built. Tab 30 (Ex. C-2.2; Ex. C-222, App. C, p. 4; Ex. C-2-1).

Nor is there evidence of “new information or improved data” bearing on the proposed amendments. According to DOE, the “continuing research indicating that cumulative impacts of shoreline development reduce aquatic ecosystem functions led to the City’s decision to adopt [its] proposed SMP amendment.” Tab 30 (Ex. C-211, p. 2). In fact, both DOE and the City relied exclusively on the Blakely Harbor Cumulative Impact Assessment as justification for the SMP Amendment adoption and approval. The Assessment, however, is not “new information or improved

data” or even “research.” Instead, it is merely a general literature survey of the effects of historic dock construction, or other waterfront developments, such as a large seawall constructed at Lincoln Park, Seattle. *See* Tab 30 (Ex. C-2.1). The literature surveyed is not new nor the conclusions reported therein “new data” as to Blakely Harbor. In fact, the literature surveyed contains only two references to Blakely Harbor, one dated 1992 and the other 2001. The 2001 study is specific to a small municipal park located within Blakely Harbor and addresses site restoration possibilities. *Id.*

There is thus no evidence that there were “changed circumstances, new information or improved data” that created the need for an amendment to the SMP in advance of the comprehensive SMP amendment process currently underway. Instead, the basis for the SMP amendment is as stated by DOE in its approval: “The City is . . . anxious to lift its temporary island-wide moratorium on permitting of docks and piers.” Tab 30 (Ex. C-211, p. 2).

According to the Assessment, the “cumulative impact” predication is a harbor where nearly every waterfront lot is developed with a very long private dock intruding into the bay. *See* Tab 30 (Ex. C-2.2). Based on this theoretical scenario, significant impacts to navigation and aesthetics were

presumed to occur. Tab 30 (Ex. C-2.1). Speculation is not evidence, let alone substantial evidence. *See Little v. King, supra.*

Regarding view impacts, the Assessment ultimately concluded that, “while debatable”, a dock is a “visual blight.” Tab 30 (Ex. C-2.1, p. 24). The Assessment ignored the fact that boaters can see through, under and over a private dock in favor of subjective conclusions by its author. As to impacts to navigation, the Assessment opined that there would be “significant impacts” to nearshore navigation associated with use of the Harbor by kayakers and canoeists, but did not take into account the impact of natural events, such as the two daily low tides. The Assessment contains no use statistics related to actual use of the Harbor by kayakers or canoeists.

Turning to perceived impacts on aquatic life and aquatic habitat as a justification, solely based upon a review of the literature, without site-specific analysis, the Assessment “finds” that there are direct, indirect and cumulative impacts from construction of docks and piers through application of the assumed scenarios. Tab 30 (Ex. C-2-1, p. 24).

Not only is the Assessment’s conclusion regarding significant impacts to natural resources unsupportable, other evidence in the record supports the opposite conclusion: that existing policies and regulations adequately mitigate and protect shorelines from adverse impacts from

construction of private docks and piers. *See* Warren Dep., Tab 30 (Ex. C-196). *See also* Best Dep., CP 96-174.

**G. The Board’s Decision Is in Violation of the State and Federal Constitution.**

The Board’s Final Decision and Order upholding the ban on private docks in Blakely Harbor is in violation of state and federal constitutional provisions. The trial court erred by upholding the SMA Amendment on constitutional grounds, as applied to Appellants, justifies relief under RCW 34.04.570(3)(a).

**1. The Ban Violates the Public Trust Doctrine.**

The ban on private docks in Blakely Harbor cannot be reconciled with the state’s public trust doctrine, a doctrine that is of constitutional dimension. In *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), the Washington State Supreme Court held that “the requirements of the public trust doctrine are fully met by legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58.” 107 Wn.2d at 670. In that case, the court refused to declare unconstitutional a state statute, RCW 79.90.105, that allows owners of residential property abutting state owned tidelands and shorelands to install and maintain private recreational docks without charge or payment to the state.

Here, the City and DOE have decided to prohibit what the very statute upheld in *Caminiti* allows: public access to the waters of the state through construction of private recreational docks by abutting waterfront property owners. The ban cannot be reconciled with the public trust doctrine.<sup>5</sup> In this regard, the SMA embodies the public trust doctrine, so to the extent the ban is inconsistent with the SMA and SMP as argued herein, Appellants submit it also violates the doctrine.

**2. The Ban Conflicts With the General Laws of the State.**

If an ordinance prohibits that which a statute expressly authorizes, or if the ordinance allows that which a statute prohibits, then the local ordinance conflicts with general laws and violates Article XI, Section 11. *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998). Private docks in connection with single-family residences are priority, water-dependent uses under the SMA. WAC 173-26-231(3)(b). The SMA and DOE's regulations promulgated thereunder require that local shoreline master programs authorize property owners to obtain "development permits" for such uses and the regulations provide that such

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<sup>5</sup> The Supreme Court recently made the same observation in condemning the City of Bainbridge Island's moratorium against the permitting of docks in Blakely Harbor: The limitation on local police power over shoreline use and development is reinforced by the public trust doctrine. *Biggers*, \_\_\_ Wn.2d at \_\_\_, 169 P.3d at 22.

permits “shall be granted” if the application is consistent with “the applicable master program and the provisions of Chapter 90.58 RCW.” RCW 90.58.140(2)(b). The SMA and its implementing regulations also contain exemptions from the permitting requirements for certain shoreline developments, including docks that cost \$2,500 or less. RCW 90.58.030(3)(e)(vii); WAC 173-27-040(2)(g); WAC 173-27-040(2)(h). By banning all private docks in Blakely Harbor, including those that are exempt under the SMA, the City has prohibited activities that the State has permitted, thereby violating Article XI, Section 11. *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 103 P.3d 244 (2004).

When the trial court invalidated the City’s moratorium against docks in Blakely Harbor in the summer of 2003 (Tab 31), the City hurriedly drafted and passed an amendment to its SMP to ban private docks in Blakely Harbor (Tab 30, Ex. C-25 and C-210). Unfortunately, the City’s dock ban has the same constitutional flaws as the moratorium - both are inconsistent with the general laws of the state. *Biggers*, 169 P.3d 17 (“The City is not authorized to adopt moratoria on shoreline development arising out of its police powers under Article XI, Section 11 of the Washington Constitution, which limits local government to regulation ‘not in conflict with general laws’”).

### **3. The Ban Violates Due Process and Equal Protection.**

The most draconian aspect of the ban is that it applies only to a discrete number of property owners in one location, while other bays or harbors on Bainbridge Island with the same shoreline environmental designation are unaffected.

SMPs start with the assignment of shoreline designations that are based upon the “physical conditions and development settings” along shoreline areas. WAC 173-26-191(a). The allowable use provisions that spring from each of these shoreline designations are expected to be comparable. *Id.* In this case, the City has classified Blakely Harbor as “semi-rural.” In all other areas of the City, the “semi-rural” shoreline designation allows private docks. Such treatment violates Appellants’ rights to equal protection.

The City’s ad hoc dock ban does not pass the test for determining whether an ordinance violates equal protection:

- (1) all members of the class created within the statute are treated alike;
- (2) reasonable grounds exist to justify the exclusion of parties who are not within the class; and
- (3) the classification created by the statute bears a rational relationship to a legitimate purpose of the statute.

*1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 577, 29 P.3d 1249 (2001). Even under a minimal scrutiny test, there is no rational basis for treating waterfront property owners in Blakely Harbor with a “semi-rural” designation differently than waterfront property owners in other areas of the City with a “semi rural” designation.

In addition to violating equal protection, the ban violates substantive due process. Washington courts use a three-prong test to determine whether a land use regulation violates due process: (1) the regulation must be aimed at achieving a legitimate purpose; (2) it must use means that are reasonably necessary to achieve the purpose; and (3) it must not be “unduly oppressive” upon the person regulated. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). Failure to meet any of these prongs violates due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article XI, Section 3 of the Washington State Constitution. *Id.*

Under Washington case law, the “unduly oppressive” prong, is the most determinative one: It involves balancing the public’s interest against those of the regulated landowner. *Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (violation of due process found); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) (taking claim remanded; violation of due process found); *Robinson v. Seattle*, 119 Wn.2d 34, 830

P.2d 318 (1992) (violation of due process found). In assessing this prong, courts consider “(a) nature of the harm to be avoided; (b) the availability and effectiveness of less drastic measures; and (c) the economic loss suffered by the property owner.” *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 768, 49 P.3d 867 (2002). The non-exclusive factors that guide the inquiry are:

On the public’s side, the seriousness of the public problem, the extent to which the owner’s land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner’s side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

*Presbytery*, 114 Wn.2d at 331.

The SMA Amendment fails all three prongs. The City and DOE assert that the purpose of the SMA Amendments is to prevent the construction of new docks, ostensibly to preserve the aquatic environment by prohibiting development on privately owned second class tidelands with no compensation. However, as discussed previously, a complete ban

is contrary to the SMA by preventing “planning for and fostering all reasonable and appropriate uses.” RCW 90.58.020.

Second, the SMA Amendment is grossly excessive for the very reason that it effectively bans the construction of all new piers in Blakely Harbor.<sup>6</sup> The City and DOE cannot explain why a ban on new docks in Blakely Harbor – and no other location – is needed to protect the aquatic environment. Thus, the Amendment fails the second prong.

With respect to the third prong, the factors favor Appellants. On the public’s side, Appellants’ property did not, alone, contribute to whatever environmental ills the City and DOE are seeking to avoid through the dock ban. Anyone who owns or controls shoreline property, or who frequents the shorelines for recreational or other reasons, will have an impact on the shoreline environment. Thus, it is unfair to expect Appellants and the property owners within Blakely Harbor to shoulder the entire burden. *See Sintra*, 119 Wn.2d at 22; *Guimont*, 121 Wn.2d at 610-

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<sup>6</sup> Although the SMA Amendments purport to “limit” piers and docks in Blakely Harbor, it is in fact a total ban on new piers and docks for parcels in single-family ownership. As for the public dock, the City has indicated that there are no plans for such a dock. And while two private “community docks” are allowed by the Ordinance, the concept as approved is unworkable. Tab 30 (Ex. C-159). First, there would be a need to purchase additional land by property owners on which to site community docks, which is unavailable without a willing seller. Second, a community dock would need parking, bathroom, sewage treatment, water, power and security which adds significant costs to the facilities. Third, a community dock is limited by the terms of the Ordinance to no more than six slips. Fourth, the total of twelve slips is not sufficient to meet demand for slips when compared to the City’s assessment of the need. Tab 30 (Ex. C-159, p. 5-6). From a practical standpoint, the City’s ban is all inclusive as to private docks within Blakely Harbor and is equivalent to the City’s moratorium on docks it was intended to and did in fact replace.

11; *Robinson*, 119 Wn.2d at 55. Moreover, a complete ban on docks in Blakely Harbor – and only Blakely Harbor – is unlikely to have a significant impact on Bainbridge Island’s shoreline environment. Perhaps most importantly, there are reasonable, less drastic alternatives to a complete ban: The City’s existing permit system is a proper and adequate means to address potential impacts of private docks. The City can also utilize its design standards, e.g. length requirements or mandatory joint dock use or even a cap. The City ignored these options in favor of its restrictive dock ban. *Robinson*, 119 Wn.2d at 55.

On the owner’s side, the amount and percentage of value loss is significant. Washington courts have long recognized that “[a]lthough less than a fee interest, development rights are beyond question a valuable right in property.” *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986) (quoting *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980) (relying on *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *reh’g denied*, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978)). *See also* C. Siemon, W. Larsen & D. Porter, *Vested Rights* 61-68 (1982).

Second, the dock ban is permanent and perpetual. Finally, there is no reason that Appellants or other Blakely Harbor owners could have or should have predicted an outright ban, especially a ban that is inconsistent

with state policy that encourages “planning for and fostering all reasonable and appropriate uses.” RCW 90.58.020.

Thus, the City’s infringement upon and deprivation of Appellants’ right to construct docks over the second class tidelands they own is an infringement of their property rights and a violation of their equal protection and substantive due process rights.

**H. The Superior Court Erred in Denying Appellant’s Motion to Supplement the Record With Newly Discovered Evidence Directly Relevant to the City’s Cumulative Impact Analysis, the Key Document Relied Upon by DOE to Approve the Dock Ban.**

After filing their appeal of the Board’s decision on the SMP Amendment, Appellants filed motions in superior court to supplement the administrative record with a deposition and affidavit of Peter Best, the City planner who prepared the Assessment that the City and DOE relied upon as sole justification for the Blakely Harbor dock ban. The trial court’s denial of these motions was clear error.

While under the APA judicial review is limited to the agency record, RCW 34.05.566(1), *Wash. Indep. Tel. Ass’n v. Wash. Util. & Transp. Comm’n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002), *aff’d*, 149 Wn.2d 17, 65 P.3d 319 (2003), “[a] court may take evidence in addition to the agency record only if it relates to the validity of the agency action and is needed to decide disputed issues regarding improper agency action,

unlawfulness of procedure, or material facts not required to be determined on the agency record.” *Id.* (citing RCW 34.05.562(1)). If it falls squarely within the statutory language of RCW 34.05.562(1), then it is admissible. *Motley-Motley, Inc. v. PCHB*, 127 Wn. App. 62, 110 P.3d 812 (2005). If it is also newly discovered evidence, a remand for consideration of the additional evidence is permitted “if the new evidence is available which relates to the validity of the agency action and could not reasonably have been discovered until after the agency action, and remand will serve the interest of justice.” *Keenan v. State Employment Sec. Dep’t*, 81 Wn. App. 391, 395-96, 914 P.2d 1191 (1996) (citing RCW 34.05.562(2)).

In holding that the SMP amendments are consistent with the DOE Guidelines, the Board relied exclusively on the Assessment that evaluated cumulative impacts from dock construction based upon predicted and maximum build-out scenarios set out in the Assessment of between 45 and 59 new docks in Blakely Harbor. The City and DOE argued, and the Board agreed, that such level of development was “reasonably foreseeable” and thus the cumulative impacts evaluation was consistent with the new Guidelines. The City and DOE also argued, and the Board agreed, that the predicted dock development scenarios in the Assessment took into account existing local, state and federal regulatory programs applicable to dock permits.

The deposition and declaration testimony of Peter Best, who was the author of the Assessment, directly contradicts these conclusions, for it provides testimony that demonstrates that the application of existing regulatory programs would make it difficult if not impossible to obtain permit approvals for construction of a significant number of new docks in Blakely Harbor, including the City's own shoreline policies and standards as applied to dock applications in Blakely Harbor, and that the projected dock build out in the Assessment is not likely or reasonably foreseeable.<sup>7</sup>

Mr. Best's testimony is based on information and evidence that was known to the City prior to its adoption and DOE's approval of the SMP Amendment. In fact, one of the examples mentioned by Mr. Best in his Declaration to show the difficulty of obtaining approval for construction of new private docks in Blakely Harbor is a dock application filed by one of the Appellants, Mr. and Mrs. Hacker, that City staff recommended for denial based on application of existing City SMP policies and standards in 2002, all of which occurred prior to adoption of the SMP Amendment.

Thus, the deposition and declaration testimony of Peter Best provides direct and probative evidence of the validity of agency action with regard to consideration and application of the DOE Guidelines to the

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<sup>7</sup> See footnote 3, *supra*.

SMP Amendment at issue and is necessary to resolve disputed issues regarding the consistency of the amendments with the Guidelines. It falls squarely within the statutory criteria for admission of new evidence into the record on appeal. It also is newly discovered evidence that could not have been produced earlier, either at the time of adoption and approval of the amendments or at the appeal hearing before the Board. The trial court erred in denying Appellants' motions to supplement the record under RCW 34.05.562(1) and/or remand to the Board for consideration of new evidence under RCW 34.05.562(2).

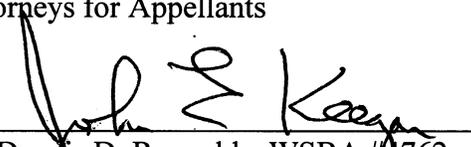
## VI. CONCLUSION

The Court should reverse the trial court and invalidate the City's dock ban in Blakely Harbor.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of January, 2008.

Davis Wright Tremaine LLP  
Attorneys for Appellants

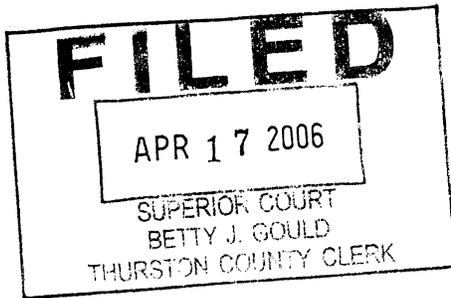
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## APPENDIX

ORDER AND JUDGMENT DISMISSING PETITION FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION	A-1
ORDER DENYING (1) PETITIONERS' MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD OR FOR REMAND and (2) PETITIONERS' SECOND MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD OR FOR REMAND	A-2
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD FINAL DECISION AND ORDER	A-3
RCW 34.05.562	A-4
RCW 34.05.570	A-5

**A-1**



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IN THE SUPERIOR COURT OF THURSTON COUNTY  
STATE OF WASHINGTON

KELLY and SALLY SAMSON, husband  
and wife, and ROBERT and JO ANNE  
HACKER, husband and wife,

Petitioners,

v.

THE CITY OF BAINBRIDGE ISLAND,  
STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY, and  
CENTRAL PUGET SOUND GROWTH  
MANAGEMENT HEARINGS BOARD,

Respondents.

NO. 05-2-00331-3

ORDER AND JUDGMENT  
DISMISSING PETITION FOR  
JUDICIAL REVIEW OF  
ADMINISTRATIVE DECISION

This matter came on for hearing on March 10, 2006 before the undersigned Court on Petitioners' Petition for Judicial Review of State Agency Administrative Decision. Petitioners were represented by Davis Wright Tremaine LLP and Charles E. Maduell. Respondent City of Bainbridge Island was represented by Inslee, Best, Doezie and Ryder, P.S. and Rosemary A. Larson. The Department of Ecology was represented by the Office of the Attorney General for the State of Washington and Thomas Young. The Central Puget Sound Growth Management Hearings Board was represented by the Office of the Attorney General for the State of Washington and Martha Lantz. The Court considered:

1. Petitioners' Petition for Judicial Review of State Agency Administrative Decision;
2. The Index and Certification of Record filed by the Central Puget Sound Growth Management Hearings Board, with the accompanying four binders of documents and eleven oversized documents that comprise the administrative record prepared by the Board in this matter;
3. Petitioners' Opening Brief;
4. City's Response Brief;
5. Respondent Department of Ecology's Response Brief;
6. Petitioners' Reply Brief;

and the files and records herein, and heard argument of counsel.

Petitioners claimed that Final Decision and Order of the Central Puget Sound Growth Management Hearings Board, dated January 19, 2005 ("Board Decision"), violated the standards stated in the Administrative Procedure Act, RCW 34.05.570(3) (a), (b), (c), (d), (e), (f), (h), and (i). Petitioners alleged that the Board Decision (1) violated constitutional provisions; (2) is outside the statutory authority or jurisdiction of the Board; (3) is the result of an unlawful procedure or decision-making process; (4) is an erroneous interpretation or application of the law; (5) is not supported by substantial evidence; (6) did not decide all issues requiring resolution by the Board; (7) is inconsistent with a rule of the agency; and (8) is arbitrary or capricious.

Being fully advised in the premises, and finding good cause for the entry of this Order; now, therefore

The Court ORDERS, ADJUDGES and DECREES as follows:

1. The City's enactment of Ordinance No. 2003-30, the Department of Ecology's approval of Ordinance No. 2003-30, and the Board Decision approving the City's enactment and the Department of Ecology's approval of the Ordinance, were all

1 consistent with the Shoreline Management Act ("SMA"), Chapter 90.58 RCW and with  
2 the policy of the SMA.

3  
4 2. In enacting Ordinance No. 2003-30, the City was planning in the manner  
5 intended by the SMA, which is to plan in a way to protect shorelines, in this case  
6 shorelines of state-wide significance, but still allow reasonable use of private property. In  
7 enacting the Ordinance, the City struck this balance in protecting the shoreline and in  
8 allowing reasonable use of private property for a part of Bainbridge Island that has unique  
9 and unusual characteristics and that has importance for the citizens of the City and of the  
10 state of Washington.

11 3. Regarding the issue of whether the Department of Ecology should have  
12 applied the "new" state guidelines to Ordinance No. 2003-30 that were issued on  
13 December 17, 2003 and took effect on January 17, 2004, the Department of Ecology  
14 correctly determined that the "new" guidelines were not applicable to Ordinance No.  
15 2003-30. In this regard, the Department followed the well-settled rule that statutes and  
16 regulations are not applied retroactively unless they are remedial or procedural. It would  
17 have been error for the Department of Ecology to have applied the new regulations when  
18 they had not been adopted at the time the City adopted Ordinance No. 2003-30. Because  
19 the new regulations were not in place at that time, the Department was correct to apply the  
20 Shoreline Management Act to Ordinance No. 2003-30 in making its decision to approve  
21 the Ordinance.

22 4. In addition, there was a sufficient record developed before the Board to  
23 support the Board's conclusion that Ordinance No. 2003-30 is consistent with the new  
24 guidelines. The Board's conclusion in this regard is not clearly erroneous.

25 5. The Court finds that there is no error of law in the Board's Decision  
26 approving Ordinance No. 2003-30 and the Department of Ecology's approval of  
27

1 Ordinance No. 2003-30 either under the "new" guidelines or under the SMA framework in  
2 the absence of those guidelines.

3  
4 6. The Court determines that there was substantial evidence to support the  
5 Cumulative Impact Assessment that the City adopted or that the City found or the Board  
6 found provided a legal basis to support the restriction on docks in Blakely Harbor. The  
7 Board's Decision is supported by substantial evidence. The City's method of estimating  
8 cumulative impact was reasonable given the evidence it had, including the percentage of  
9 dock development along other shorelines, and understanding that there may be physical  
10 limitations to dock development in Blakely Harbor that do not exist elsewhere.

11 7. The Board Decision that Ordinance No. 2003-30 is consistent with WAC  
12 173-26-090, relating to changing local circumstances, new information or improved data,  
13 is supported by substantial evidence, is not error of law or clearly erroneous, and is not  
14 arbitrary or capricious.

15 8. The Board Decision that Ordinance No. 2003-30 complies with the internal  
16 consistency requirements of RCW 36.70A.040 and 36.70A.070 is supported by substantial  
17 evidence, is not error of law or clearly erroneous, and is not arbitrary or capricious.

18 9. Petitioners failed to meet their burden to establish that Ordinance No. 2003-  
19 30 or the Board Decision approving the City's enactment and the Department of Ecology's  
20 approval of the Ordinance violates the Public Trust Doctrine.

21 10. Petitioners failed to meet their burden to establish that Ordinance No. 2003-  
22 30 or the Board Decision approving the Ordinance violate Article 11, Section 11 of the  
23 Washington Constitution.

24 11. Petitioners failed to meet their burden of proving a violation of substantive  
25 due process. The test for determining whether a regulation results in a violation of  
26 substantive due process involves three inquiries:  
27

- (1) Whether the regulation is aimed at achieving a legitimate public

1 purpose; (2) whether it uses means that are reasonably necessary to  
2 achieve that purpose; and (3) whether it is unduly oppressive on the  
3 landowner.

4 *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 21, 829 P.2d 765 (1992). Petitioners failed to meet  
5 their burden to establish that Ordinance No. 2003-30 or the Board Decision approving the  
6 Ordinance violate constitutional substantive due process requirements. Ordinance No.  
7 2003-30 is aimed at achieving a legitimate public purpose, which is to protect a shoreline  
8 of state-wide significance; the means used are reasonably necessary to achieve that  
9 purpose; and Ordinance No. 2003-30 is not unduly oppressive on landowners.  
10 Landowners are given other opportunities for using boats on Blakely Harbor through  
11 mooring buoys or community dock opportunities.

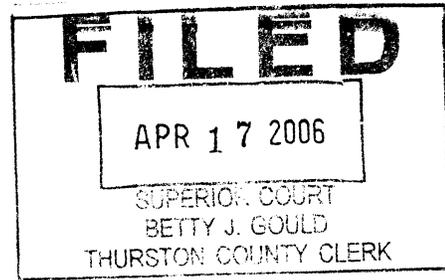
12 12. Petitioners failed to meet their burden to establish that Ordinance No. 2003-  
13 30 or the Board Decision approving the Ordinance violate constitutional equal protection  
14 requirements. The Ordinance applies to all property owners on the Blakely Harbor  
15 shoreline. There are reasonable grounds to distinguish between property owners on the  
16 Blakely Harbor shoreline and owners of property outside of Blakely Harbor, based on the  
17 ecological, recreational, and historical characteristics of Blakely Harbor. The separation  
18 of treatment for property owners within Blakely Harbor and outside of Blakely Harbor has  
19 a rational relationship to the purpose of Ordinance No. 2003-30.

20 13. Petitioners did not meet their burden to prove that the Board Decision was  
21 error or in violation of any standard stated in the Administrative Procedure Act, RCW  
22 34.05.570.

23 14. Regarding Petitioners' Reply Brief, Attachments A and B to the Reply Brief  
24 are stricken from and not considered part of the record although the Court did consider  
25 them in terms of understanding the points made by Petitioners. Attachments A and B do  
26 not meet the criteria of RCW 34.05.562 for supplementation of the administrative record.  
27



**A-2**



IN THE SUPERIOR COURT OF THURSTON COUNTY  
STATE OF WASHINGTON

KELLY and SALLY SAMSON, husband  
and wife, and ROBERT and JO ANNE  
HACKER, husband and wife,

NO. 05-2-00331-3

Petitioners,

ORDER DENYING (1)  
PETITIONERS' MOTION TO  
SUPPLEMENT THE  
ADMINISTRATIVE RECORD OR  
FOR REMAND and (2)  
PETITIONERS' SECOND MOTION  
TO SUPPLEMENT THE  
ADMINISTRATIVE RECORD OR  
FOR REMAND

v.

THE CITY OF BAINBRIDGE ISLAND,  
STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY, and  
CENTRAL PUGET SOUND GROWTH  
MANAGEMENT HEARINGS BOARD,

Respondents.

This matter came on for hearing on March 10, 2006 before the undersigned Court on (1) Petitioners' Motion to Supplement the Administrative Record or for Remand, and (2) Petitioners' Second Motion to Supplement the Administrative Record or for Remand. Petitioners were represented by Davis Wright Tremaine LLP and Charles E. Maduell. Respondent City of Bainbridge Island was represented by Inslee, Best, Doezie and Ryder, P.S. and Rosemary A. Larson. The Department of Ecology was represented by the Office of the Attorney General for the State of Washington and Thomas Young. The Central Puget Sound Growth Management Hearings Board was represented by the Office of the Attorney General for the State of Washington and Martha Lantz. The Court considered:

ORDER DENYING PETITIONERS' MOTIONS TO  
SUPPLEMENT THE ADMINISTRATIVE RECORD OR  
FOR REMAND - 1

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INSLEE, BEST, DOEZIE & RYDER, P.S.

ATTORNEYS AT LAW  
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Suite 1900  
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Bellevue, Washington 98009-9016  
(425) 455-1234

1. Petitioners' Motion to Supplement the Administrative Record or for Remand;
  2. Petitioners' Brief in Support of Motion to Supplement the Administrative Record or for Remand;
  3. Declaration of Charles E. Maduell in Support of Motion to Supplement the Administrative Record or for Remand, with Attachments;
  4. Petitioners' Second Motion to Supplement the Administrative Record or for Remand;
  5. Petitioners' Brief in Support of Second Motion to Supplement the Administrative Record or for Remand;
  6. Supplemental Declaration of Charles E. Maduell in Support of Second Motion to Supplement the Administrative Record or for Remand, with Attachment;
  7. City's Response to Petitioners' (1) Motion to Supplement Administrative Record or for Remand; and (2) Second Motion to Supplement Administrative Record or Remand; and
  8. Department of Ecology's Response to Petitioners' Motions;
- and the files and records herein, and heard argument of counsel.

Being fully advised in the premises, and finding good cause for the entry of this Order; now, therefore

The Court ORDERS as follows:

1. Petitioners' Motion to Supplement the Administrative Record or for Remand is DENIED.
2. Petitioners' Second Motion to Supplement the Administrative Record or for Remand is DENIED.
3. All references to the Best Deposition in Petitioners' Opening Brief and Reply Brief are stricken.

**ORDER DENYING PETITIONERS' MOTIONS TO  
SUPPLEMENT THE ADMINISTRATIVE RECORD OR  
FOR REMAND - 2**

094700|0235|335257.01

**INSLEE, BEST, DOEZIE & RYDER, P.S.**

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1 Dated this 17th day of April, 2006.

2  
3 **CHRIS WICKHAM,**

4 JUDGE

5 Presented by:

6 INSLEE, BEST, DOEZIE & RYDER, P.S.

**EX PARTE**

7  
8 By Rosemary Larson  
9 Rosemary A. Larson, WSBA #18084  
10 Attorneys for City of Bainbridge Island

11 Copy received; Notice of presentation waived:

12 DAVIS WRIGHT TREMAINE LLP

13 By Rosemary Larson for  
14 Charles E. Maquell, WSBA # 15491  
15 Attorneys for Petitioners

Per email authorization April 12, 2006

16 ROB McKENNA, Attorney General

17 By Rosemary Larson for  
18 Thomas Young, WSBA # 17366  
19 Assistant Attorney General  
20 Attorneys for Department of Ecology

Per email authorization  
4/13/06

21 ROB McKENNA, Attorney General

22 By Rosemary Larson for  
23 Martha Lantz, WSBA #21290  
24 Assistant Attorney General  
25 Attorneys for Central Puget Sound Growth Management Hearings Board

Per email authorization 4/11/06

26  
27 ORDER DENYING PETITIONERS' MOTIONS TO  
SUPPLEMENT THE ADMINISTRATIVE RECORD OR  
FOR REMAND - 3

094700|0235|335257.01

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**A-3**



1 The Board found that the Petitioners failed to meet their burden of demonstrating that the  
2 City's action was clearly erroneous. The City's adopted Comprehensive Plan and  
3 Shoreline Master Plan goals and policies support the dock restrictions in light of the  
4 City's detailed record of the distinctive qualities and unique attributes of Blakely Harbor.  
5

6 The Board found that Petitioners failed to present "clear and convincing evidence of  
7 error" in Ecology's approval of the Amendment. Ecology's approval is supportable  
8 when tested against either the goals, policies and provisions of chapter 90.58 RCW or the  
9 new guidelines cited by Petitioners and adopted by Ecology when its consideration of this  
10 Amendment was pending.  
11

## 12 I. BACKGROUND<sup>1</sup>

13 On September 10, 2003, the Council of the City of Bainbridge Island (the **City**) adopted  
14 Ordinance No. 2003-30 (the **Amendment**) "...limiting dock and pier development within  
15 Blakely Harbor and amending the Shoreline Management Master Program...". On  
16 February 13, 2004, the Washington State Department of Ecology (**DOE** or **Ecology**)  
17 approved the amendment to the Bainbridge Island Shoreline Management Master  
18 Program (**Bainbridge SMP**). On April 23, 2004, the Central Puget Sound Growth  
19 Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from  
20 Kelly and Sally Samson and Robert and Jo Anne Hacker (**Petitioners** or **Samson**). The  
21 matter was assigned Case No. 04-3-0013. Petitioners challenge the City's adoption of the  
22 Amendment to the Bainbridge SMP. Petitioners also challenge DOE's approval of the  
23 City's Amendment to the Bainbridge SMP. The bases for the challenges are  
24 noncompliance with the Growth Management Act (**GMA**) and the State Shoreline  
25 Management Act (**SMA**). The PFR set forth 19 Issues to be resolved.  
26  
27  
28

29 During May and June, 2004, the Board issued a notice of hearing, conducted a prehearing  
30 conference and issued its Prehearing Order and Order on Intervention (**PHO**). The PHO  
31 set a schedule, established fifteen legal issues to be decided by the Board<sup>2</sup> and granted  
32 Bainbridge Citizens United (**Intervenor**) status to intervene on behalf of the Petitioners.  
33 The Board's Order on Motions of July 6, 2004, dismissed ten issues and restated three of  
34 the issues to be decided by the Board.<sup>3</sup> In October and November the Board received  
35 prehearing briefing and briefing on Petitioners' Motion to Correct and/or Supplement the  
36 Record. The prehearing briefing received by the Board is referenced in this Final  
37 Decision and Order (**FDO**) as: Petitioners' Prehearing Brief (**Samson PHB**), City of  
38 Bainbridge Island's Prehearing Brief (**City Response**), Department of Ecology  
39 Prehearing Brief (**DOE Response**), Petitioners' Reply Brief (**Samson Reply**). Intervenor  
40 Bainbridge Citizens United did not submit any briefing.  
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42  
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46 <sup>1</sup> For more complete details, see Appendix – A, Chronological Procedural History, *infra*, at 25.

47 <sup>2</sup> Appendix – C, Legal Issues as Stated in the Prehearing Order, *infra*, at 30.

48 <sup>3</sup> Appendix – B, Legal Issues Restated and Retained for Prehearing Briefing, *infra*, at 28.  
49  
50

1 On November 22, 2004, the Board conducted a Hearing on the Merits (**HOM**) in Suite  
2 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington.  
3 Board members present were Margaret Pageler, Edward McGuire and Bruce Laing,  
4 Presiding Officer. Chuck Maduell represented the Petitioners. Rosemary Larson  
5 represented the City of Bainbridge Island. Present with Ms. Larson was Peter Namtvedt  
6 Best, Planner for the City. Thomas Young, Assistant Attorney General, represented the  
7 Department of Ecology. Gary Tripp attended as a member of Intervenor Bainbridge  
8 Citizens United. Also present was Julie Taylor, extern with the Board. The Court  
9 Reporter was Karmen Fox, Byers & Anderson, Inc. The hearing was opened at 10:00  
10 a.m. and adjourned at 12:28 p.m.  
11

## 12 II. STANDARD OF REVIEW AND BURDEN OF PROOF

13  
14  
15 Due to the nature of the challenged action as both a local action under the GMA (*i.e.*,  
16 Bainbridge Island's adoption of its SMP Amendment) and a state action under the SMA  
17 (*i.e.*, Ecology's approval of the SMP Amendment), the Board must employ two different  
18 standards of review to reach a final decision.  
19

### 20 **A. GMA**

21  
22 The City of Bainbridge Island is subject to the goals and requirements of the GMA,  
23 therefore the Board's review of the City's action is governed by RCW 36.70A.320.  
24 Pursuant to that standard, comprehensive plans and development regulations, and  
25 amendments thereto, adopted pursuant to the Act, are presumed valid upon adoption. The  
26 burden is on the Petitioners to demonstrate that the City's action adopting the  
27 Amendment is not in compliance with the Growth Management Act.  
28

29  
30 The Board "shall find compliance with the [Growth Management] Act, unless it  
31 determines that the [City's] action[s are] clearly erroneous in view of the entire record  
32 before the Board and in light of the goals and requirements of the [GMA]." RCW  
33 36.70A.320 (3). For the Board to find the City's actions clearly erroneous, the Board  
34 must be "left with the firm and definite conviction that a mistake has been made." *Dep't*  
35 *of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646, 658 (1993).  
36

37  
38 Pursuant to RCW 36.70A.3201 the Board will grant deference to Bainbridge Island in  
39 how it plans for growth, provided that its policy choices are consistent with the goals and  
40 requirements of the GMA. As the State Supreme Court has stated, "Local discretion is  
41 bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget*  
42 *Sound Growth Management Hearings Board (King County)*, 142 Wn.2d 543, 561, 14  
43 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, "Consistent  
44 with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201,  
45 the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent  
46 with the requirements and goals of the GMA.'" *Cooper Point Association v. Thurston*  
47 *County*, 108 Wn.App. 429, 444, 31 P.3d 28 (2001).  
48  
49  
50

1 In affirming the *Cooper Point* court, the Supreme Court recently stated:  
2

3 Although we review questions of law *de novo*, we give substantial weight  
4 to the Board's interpretation of the statute it administers. See *Redmond*,  
5 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board]  
6 is appropriate where an administrative agency's construction of statutes is  
7 within the agency's field of expertise . . ."  
8

9  
10 *Thurston County v. Western Washington Growth Management Hearings Board*, 148  
11 Wn.2d 1, 15, 57 P3d 1156 (2002).  
12

### 13 B. SMA

14 Both Bainbridge Island's and Ecology's actions must be consistent with the goals and  
15 requirements of the Shoreline Management Act. However, because Ecology must  
16 approve a local government action in order for it to take effect, the Board here focuses on  
17 the applicable standard of review for Ecology's actions. The Board's review of  
18 Ecology's action here is governed by RCW 90.58.190(2) because the shorelines at issue  
19 here are "shorelines of state-wide significance."  
20  
21

22 RCW 90.58.190(2) provides in part:  
23

24 (c) If the appeal to the growth management hearings board concerns a  
25 shoreline of state-wide significance, the board shall uphold the decision by  
26 the department unless the board, by clear and convincing evidence,  
27 determines that the decision of the department is inconsistent with the  
28 policy of RCW 90.58.020 and the applicable guidelines.  
29

30 (d) The appellant has the burden of proof in all appeals to the growth  
31 management hearings board under this subsection.  
32  
33

34 The Board must test the Amendment against the policy of RCW 90.58.020 and the  
35 applicable SMA guidelines, upholding Ecology's decision to approve the Amendment  
36 unless the appellants present "clear and convincing evidence" of error. *Id.*  
37  
38

## 39 III. BOARD JURISDICTION, PRELIMINARY ITEMS, ABANDONED ISSUE

### 40 A. BOARD JURISDICTION

41 The Board finds that the Samson PFR was timely filed, pursuant to RCW 36.70A.290(2);  
42 Petitioners participated in the City's public process and have participation standing to  
43 appear before the Board, pursuant to RCW 36.70A.280(2) and RCW 90.58.190; and  
44 pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the  
45 challenged action (Bainbridge Island Ordinance No. 2003-30) which amends the City's  
46 Shoreline Management Master Program and, *de jure*, Comprehensive Plan and  
47 development regulations. RCW 36.70A.480(1).  
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## B. PRELIMINARY ITEMS

During the Hearing on the Merits, the Board made the following rulings:

1. On or before December 2, 2004, the City will file with the Board, and transmit to Petitioners, colored copies of the maps identified in the record as Exhibit C-2.2 "Blakely Harbor Existing Dock Development & Dock Buildability".

2. The following exhibits were admitted during the hearing:

a. **HOM Exhibit No. 1.** Three items identified in Exhibit C-196<sup>4</sup> as attachments to that document: the Judgment in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (4 pages); Memorandum on Decision on Motions for Summary Judgment in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (7 pages); and a transcript of the Deposition Upon Oral Examination of Stephanie Warren in *Biggers et al v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 01-2-03282-0, dated August 6, 2003 (25 pages).<sup>5</sup>

b. **HOM Exhibit No. 2.** Two Agreements between the South Bainbridge Community Association and two property owners and a Declaration of Covenants, Restrictions and Easements.<sup>6</sup>

c. **Core Document No. 1.** City of Bainbridge Island Comprehensive Plan, September 1, 1994.

d. **Core Document No. 2.** City of Bainbridge Island Shoreline Management Master Program, November 26, 1996, Corrected January 1998; including Ordinances 2003-025, 2003-30.

On December 2, 2004, the Board received colored copies of Exhibit C-2.2, which will be labeled **HOM Exhibit No. 3** and a colored copy of the map of shoreline environmental designations attached to the Shoreline Master Program, Core Document 2, which will be labeled **HOM Exhibit No. 4**.

## C. ABANDONED ISSUE

The Board's Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute*

<sup>4</sup> Listed in City's Index as C-196 and in DOE Index as 1297-1300.

<sup>5</sup> Attachment A to Petitioners' Motion to Correct and/or Supplement Record, received October 25, 2004.

<sup>6</sup> Attachment B to Petitioners' Motion to Correct and/or Supplement Record, received October 25, 2004.



1 Master Program in 1996. Subsequently, the City studied its four major harbors and  
2 adopted a Harbor Management Plan in January, 1999. C-222.  
3

4 Blakely Harbor, one of the City's four harbor areas, is a coastal inlet on the southeast  
5 shore of Bainbridge Island. Because the land was primarily owned by a timber company  
6 for over a century, Blakely Harbor is less developed than most of the City's shorelands.<sup>10</sup>  
7 Blakely Harbor has only recently been made available for subdivision and residential  
8 development. C-222, Appendix C, Blakely Harbor Inventory and Report, 1997, at 3. With  
9 just 6 docks or piers, it is "the last harbor within Central Puget Sound that remains largely  
10 undeveloped ... with docks or piers, and is a popular anchorage for vessels because of its  
11 undeveloped character, natural beauty, and scenic views." Amendment, C-131, at 1.  
12

13  
14 Blakeley Harbor's scenic beauty, unobstructed waters, birds and sealife, even the  
15 darkness of the nights with little artificial light, distinguish Blakely from the City's other  
16 harbor areas. C-222, Appendix C, at 2, 5. Blakely Harbor is uniquely attractive for  
17 transient moorage, for kayaks and other handcraft, for diving, swimming, fishing and  
18 passive public enjoyment. *Id.*, at 22-25. The community has supported several voluntary  
19 efforts to preserve the harbor's distinct character. The Bainbridge Island Land Trust  
20 secured donations to acquire nearly 40 acres of land for a park. C-27, at 2. Some Blakely  
21 Harbor residents and the South Bainbridge Community Association have entered into  
22 restrictive covenants to limit private dock construction on some parcels. *See e.g.*, HOM  
23 Ex. 2; C-27, at 1, 3.  
24

25  
26 The City prepared the Blakely Harbor Cumulative Impact Assessment (*Assessment*),  
27 dated February 22, 2002, to gauge the impact of the likely build-out of piers in the harbor  
28 under various scenarios. C-2.1. The Assessment concluded that predicted build-out of 45  
29 docks would significantly impact navigability of the harbor, reduce scenic vistas, and  
30 create risk to natural resources. City Response, at 8-12.  
31

32  
33 At the same time, the City was developing a Nearshore Assessment for all of the City's  
34 marine shorelines in response to the listing of Puget Sound Chinook salmon under the  
35 Endangered Species Act. C-223. The City also convened a Shoreline Master Program  
36 Steering Committee to guide its review and update of its Shoreline Master Program.<sup>11</sup>  
37 Limitations on private docks in Blakely Harbor were discussed and recommended by the  
38 Steering Committee in 2001, then by the City's Planning Commission in 2002 and finally  
39 by the City Council in 2003. City Response, at 12-13. A variety of restrictions and  
40 allowances were considered, with public comment and debate at each level.  
41

42  
43  
44 <sup>10</sup> "Blakely Harbor is surrounded by 1,153 acres of undeveloped land owned by the Port Blakely Mill  
45 Company.... The land is now for sale in 20 acre parcels.... [T]he waterfront ... can be developed into 80  
46 foot lots." C-222, Appendix C, Blakely Harbor Inventory (1997), at 2.

47 <sup>11</sup> The City adopted a moratorium on overwater structures and bulkheads on all its shorelines while this  
48 review was pending. In December, 2004, the moratorium was struck down by the Court of Appeals on the  
49 grounds that development moratoria are only authorized under the GMA, not under the SMA. *Biggers et al.*  
50 *v. City of Bainbridge Island*, \_\_ Wn.App. \_\_, \_\_ P.3d \_\_ (No. 30752-9-II, December 21, 2004).

1 The Amendment as adopted prohibits new single-use docks or piers in Blakely Harbor,  
2 continues to allow use of mooring buoys and floating platforms, and allows development  
3 of two joint-use docks for up to five boats each and one community dock. The City based  
4 its action on two justifications: (1) "to preserve the unique character, navigable waters,  
5 natural resources, and scenic beauty of the harbor and promote compatible recreational  
6 use of the harbor for the residents of Bainbridge Island and the State;" and (2) because of  
7 the "significant cumulative loss of scenic view sheds, navigable waters, and adverse  
8 cumulative effects to water and environmental quality likely to be caused by the  
9 proliferation of private dock and pier development within Blakely Harbor." Amendment,  
10 C-131, at 2.  
11

### 12 Ecology's Action

13  
14  
15 The City adopted the Amendment on September 10, 2003 and forwarded it to Ecology on  
16 September 25, 2003. Ecology's comment period closed on November 30, 2003, and  
17 Ecology issued its decision approving the Amendment on February 13, 2004. C-211.  
18

19  
20 By statute, Ecology's review must be based on the Shoreline Management Act and  
21 "applicable guidelines." Ecology's previous guidelines for master program approval  
22 were ruled invalid by the Shorelines Hearings Board in 2001. New guidelines were  
23 developed by Ecology and filed December 17, 2003, effective January 17, 2004. Thus,  
24 when the City submitted its Amendment to Ecology, the prior guidelines were invalid and  
25 not in effect, but the new guidelines were not yet effective. In the absence of applicable  
26 guidelines, Ecology reviewed the Amendment under the policy of RCW 90.58.020 and  
27 the requirements of RCW 90.58.100. DOE Response, at 3, 12; C-211, at 7-11.  
28

### 29 Petitioners' Case

30  
31 Petitioners contend that banning development of new private single-use recreational  
32 docks is contrary to the SMA and inconsistent with Bainbridge Island's Comprehensive  
33 Plan and Shoreline Master Program. Petitioners argue that the only lawful limitation  
34 under the circumstances is "allowance of a discrete number of new docks within Blakely  
35 Harbor on a case-by-case basis, as conditioned through compliance with the existing  
36 regulatory system." Samson PHB, at 35. "Absent evidence that existing procedural  
37 safeguards in the SMP policies and regulations are not adequate to mitigate and protect  
38 Blakely Harbor from adverse environmental impacts, and none exists in the record, the  
39 ban on docks and piers is inconsistent with SMA policies and applicable guidelines." *Id.*,  
40 at 34.  
41

42  
43 Petitioners argue that the Amendment is inconsistent with the goals and policies of SMA  
44 which identify residential docks and piers as a preferred use, requiring that their impacts  
45 be assessed and mitigated on a case-by-case basis through the permitting process, not  
46 through planned restrictions or use regulations. (Legal Issue 2) Further, Petitioners state,  
47 the Amendment is not consistent with the SMA because Ecology failed to test it against  
48 its new guidelines. In particular, Petitioners assert, the City's Blakely Harbor Cumulative  
49  
50

1 Impact Assessment does not meet the standards in the new guidelines at WAC 173-26-  
2 186(8)(d).  
3

4 Petitioners assert that the City has failed to show the changed circumstances which  
5 Petitioners contend are required by Ecology's guidelines as a threshold matter in order to  
6 trigger the local SMP amendment process, *citing* WAC 173-26-090. (Legal Issue 9)  
7 Ecology should therefore have rejected the Amendment.  
8

9  
10 Petitioners contend that the Amendment is noncompliant with the GMA because it is  
11 inconsistent with the policies of the Bainbridge Island Comprehensive Plan, including the  
12 Bainbridge SMP policies. (Legal Issue 1) Petitioners point out that the 1996 Bainbridge  
13 SMP favors residential and recreational uses, allowing private docks and piers in all but  
14 two shoreline designations.  
15

16 Petitioners raise other issues that were previously dismissed,<sup>12</sup> conditionally dismissed<sup>13</sup>  
17 or are deemed abandoned.<sup>14</sup> Petitioners' Legal Issue No. 15 asks for a determination of  
18 invalidity.  
19

20 The Board analyzes the Petitioners' issues in the order above - Legal Issues 2, 9, 1 and  
21 15. The Board finds and concludes that the City's Amendment to its SMP and Ecology's  
22 approval of the Amendment **comply** with the GMA and the SMA.  
23

## 24 V. LEGAL ISSUES AND DISCUSSION<sup>15</sup>

### 25 **A. Legal Issue 2 – Consistency with SMA and Applicable Regulations**

26  
27 The Board's Prehearing Order states Legal Issue No. 2 as follows:  
28

29  
30 Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3),  
31 because it is inconsistent with and fails to implement the goals and  
32 policies of the Shoreline Management Act (the SMA) and the Bainbridge  
33 Island Shoreline Master Program?  
34  
35

#### 36 *Applicable Law*

37  
38 RCW 36.70A.480(2) and (3) state, in pertinent part:  
39

40  
41 (2) The shoreline master program shall be adopted pursuant to the  
42 procedures of chapter 90.58 RCW rather than the goals, policies and  
43  
44

45  
46 <sup>12</sup> See *infra*, fn. 35.

47 <sup>13</sup> See *infra*, fn. 19, 20, 34.

48 <sup>14</sup> *Supra*, at 5-6.

49 <sup>15</sup> See Appendix – B, Legal Issues Restated and Retained for Prehearing Briefing, *infra*, at 28.  
50

1 procedures set forth in this chapter for the adoption of a comprehensive  
2 plan or development regulations.  
3

4 (3) The *policies, goals and provisions of chapter 90.58 RCW and*  
5 *applicable guidelines* shall be the sole basis for determining compliance of  
6 a shoreline master program with this chapter except as the shoreline  
7 master program is required to comply with the internal consistency  
8 provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and  
9 35A.63.105.  
10

11 (Emphasis supplied.)

12 Relevant portions of the Shoreline Management Act, chapter 90.58 RCW, are set out in  
13 Appendix – D, *infra*, at 33-35.  
14

### 15 *Discussion – Goals and Policies of the Shoreline Management Act*

16

17 Petitioners assert that the Amendment is inconsistent with the goals and policies of the  
18 Shoreline Management Act because the SMA requires Ecology and local jurisdictions to  
19 balance shoreline development and shoreline preservation. That balance must be  
20 achieved, according to Petitioners, by allowing preferred water-dependent uses such as  
21 private residential docks in the shoreline plan and then denying them or conditioning  
22 them on a case-by-case basis through the permit process to address specific impacts.  
23 Petitioners allege that the City's ban on private docks in Blakely Harbor violates the  
24 statutory priority for residential docks and piers. The City may deny a permit for a  
25 particular dock, they argue, but may not do so in its master program. "Absent evidence  
26 that existing procedural safeguards in the SMP policies and regulations are not adequate  
27 to mitigate and protect Blakely Harbor from adverse environmental impacts, and none  
28 exists in the record, the ban on docks and piers is inconsistent with SMA policies and  
29 applicable guidelines." Sampson PHB, at 34.  
30

31 It is well-settled that a jurisdiction may limit or even prohibit construction of a single-use  
32 private recreational dock in a permit proceeding. Petitioners agree. But Petitioners argue  
33 that a jurisdiction may not take the same action prospectively as it fine-tunes its SMP for  
34 a particular area of shoreline within the purview of its plan; rather, each permit  
35 application must be decided on its own discrete facts.  
36

37 Ecology responds that the SMA recognizes "the inherent harm in an uncoordinated and  
38 piecemeal development of the state's shorelines." RCW 90.58.020. "If a local  
39 government can conclude at a particular site that a dock may not be allowed because it  
40 will interfere with navigation, or aesthetics, or other shoreline uses or functions, the local  
41 government can, on proper evidence, reach the same conclusion with regard to a class of  
42 sites or section of shoreline." DOE Response, at 7. There is no requirement in the SMA  
43 that local governments proceed on a permit-by-permit basis; to the contrary, the SMA  
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1 requires master programs in order to “prevent the inherent harm in uncoordinated and  
2 piecemeal development.” *Id.*, at 11.  
3

4 Ecology argues that the limitation on private docks and piers in Blakely Harbor is not  
5 inconsistent with SMA preference for public access or water dependent use. Indeed  
6 private piers are not a preferred use under SMA. DOE Response, at 8, 9, *citing Spencer v.*  
7 *Bainbridge Island (Spencer)*, SHB 97-43, Final Order (1998).<sup>16</sup> The Amendment  
8 balances the SMA values of navigation, public access, need for recreational (joint use)  
9 piers, and protection of the unique harbor for public enjoyment. DOE Response, at 10.  
10

11  
12 The City focuses on the emphasis on public rather than private values in the goals of  
13 SMA, particularly in shorelines of statewide significance. *Citing* RCW 90.58.020. The  
14 Blakely Harbor amendment promotes “the public’s opportunity to enjoy the physical and  
15 aesthetic qualities of the natural shorelines of the state.” *Id.*; City Response, at 16. The  
16 Amendment protects the shores of Blakely Harbor for use by the public and protects the  
17 public’s interest in navigation. *Id.*, at 19. Indeed, the City argues, private docks are not a  
18 preferred use; public recreational piers are preferred. *Id.*, at 24. No case cited by  
19 Petitioners requires the City to allow single-use private docks on *all* shorelines of the City  
20 or even to allow them subject to a case-by-case permit review. *Id.*, at 19.  
21

22  
23 The Board looks to the SMA preference policy articulated in RCW 90.58.020:  
24

25       Alterations of the natural conditions of the shorelines of the state, *in those*  
26 *limited instances when authorized*, shall be given priority for [1] single  
27 family residences and their appurtenant structures, [2] ports, [3] shoreline  
28 recreational uses including but not limited to parks, marinas, piers, and  
29 other improvements facilitating public access to the shorelines of the state,  
30 [4] industrial and commercial developments which are particularly  
31 dependent on their location on or use of the shorelines of the state and [5]  
32 other development that will provide an opportunity for substantial  
33 numbers of the people to enjoy the shorelines of the state.  
34

35  
36 (Numeration and emphasis added.)  
37

38 The Board notes that in this set of priorities, “piers” (i.e., docks) are listed in the context  
39 of [3] “shoreline recreational uses ... facilitating public access to shorelines of the state,”  
40 not in the context of [1] single-family residences. In *Spencer, supra*, at 11, the Shorelines  
41 Hearings Board stated:  
42

43       The reference in RCW 90.58.020, to single-family residential uses and  
44 their appurtenant structures, does not specifically list docks or piers. Piers  
45 are listed, however, as a preferred use, under improvements which  
46  
47

48  
49 <sup>16</sup> In EHSB 1933, the Legislature directed that the SMA “be read, interpreted, applied and implemented as a  
50 whole consistent with decisions of the Shoreline Hearings Board and Washington courts.”

1 facilitate public access to the state's shorelines. We conclude that the  
2 Legislature purposefully distinguished between public and private piers  
3 and did not apply any particular preference to the latter, which would limit  
4 public access in, rather than promote public access to the water of the  
5 state.  
6

7  
8 Petitioners are incorrect in contending that private docks, because of a statutory  
9 preference for single family residences and water-dependent uses, must be allowed on  
10 every shoreline, or even on every shoreline otherwise designated for residential use. In  
11 *Beuchel v. Department of Ecology*, 125 Wn.2d 196, 209, 884 P.2d 910 (1994), the Court  
12 underscored the key phrase in the statutory preference language:  
13

14 The landowner argues that...residential use must be given priority under  
15 the SMA. This is inaccurate. The landowner relies on the SMA which  
16 states that "alterations of the natural condition of the shorelines of the  
17 state, *in those limited instances when authorized*, shall be given priority  
18 for single family residences and ... shoreline recreational uses." RCW  
19 90.58.020(7). However, in this case the residential use was not  
20 "authorized"; in fact, it was prohibited by the regulations....  
21

22  
23 (Emphasis added); *see also Lund v. Department of Ecology*, 93 Wn.App. 329, 337, 969  
24 P.2d 1072 (1998) (denying residential construction in a shoreline residential zone).  
25

26 It is within the authority of the local government, in developing and amending its master  
27 program, to determine *where* various priority uses may be located. *See e.g.*, WAC 173-  
28 26-231(3)(b) ("*where* new piers or docks are allowed..."); RCW 79.90.105 (construction  
29 of dock on state tidelands "is subject to applicable local, state, and federal rules and  
30 regulations governing *location* ...").<sup>17</sup> The City of Bainbridge Island does not allow  
31 docks within the natural and aquatic conservancy environments, allows them only as  
32 conditional uses in the conservancy environment, and now has amended its SMP to  
33 prohibit new single-use private docks in Blakely Harbor. This is well within the City's  
34 authority given the record and consistent with the goals and policies of the SMA – RCW  
35 90.58.020.  
36

37  
38 The Board finds that the City's adoption of the Amendment and Ecology's approval is  
39 **consistent with the goals and policies of the SMA** as set forth in RCW 90.58.020.  
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45 <sup>17</sup> Construction of a dock on saltwater is exempt from obtaining a shoreline substantial development permit  
46 if it has a fair market value of less than \$2500. RCW 90.58.030(3)(e)(vii)(A); WAC 173-27-040(2)(h)(i).  
47 The development must still comply with master program locational regulations. WAC 173-27-040(1)(b).  
48 The parties acknowledge that due to Blakely Harbor's geography, docks of 300-400 feet are generally  
49 required. Samson PHB, at 25; City Response, at 25 fn. 6, 35 fn. 8. However, the dock constructed in 2002  
50 has a length of just 98 feet. Samson Reply, at 7.

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**Discussion – “Applicable Guidelines”**

Petitioners also contend that Ecology failed to consider applicable guidelines and that, if the guidelines at WAC 173-26-186(8)(d) and WAC 173-26-231(3)(b) were applied, the Amendment could not be approved.

The parties dispute whether there are “applicable guidelines.” Petitioners contend that Ecology was required to apply its new guidelines and that doing so would have required invalidation of the Amendment. Sampson PHB, at 15-16. The City submitted its Amendment to Ecology on September 25, 2003. At that time, a draft of proposed new DOE guidelines had been published for public review. Ecology adopted its new guidelines December 17, 2003, and they became effective January 17, 2004. Ecology completed its review and issued its approval of the City’s Amendment on February 13, 2004.

Ecology states: “It would have been unfair for Ecology to apply the new guidelines to the City’s amendment because the City had in good faith adopted the amendment and submitted it during the time period when there were no guidelines in effect.” DOE Response, at 3. Ecology chose to apply the “law which was in effect at the time of the submittal,” *i.e.*, the SMA. *Id.*

None of the parties cites any authority for or against Ecology’s position here. Nothing in the guidelines themselves expressly decides this question. Without more, the Board will defer to Ecology’s interpretation of its own regulations and governing statute.<sup>18</sup> The Board concludes that Ecology’s review of the Amendment in the context of the policies of the SMA (RCW 90.58.020) was the correct and appropriate basis for review.

Even if the new guidelines relied upon by Petitioners are applied, *arguendo*, the Board must conclude that the cited provisions support the Blakely Harbor Cumulative Impact Assessment relied on by the City and Ecology.

WAC 173-26-186(8)(d) states:

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and [1] *other shoreline functions* fostered by the policy goals of the act. To ensure no net loss of ecological functions and protection of *other shoreline functions* and/or uses, master programs shall contain policies, programs, and regulations that address adverse cumulative impacts and [2] *fairly allocate the burden* of addressing cumulative

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<sup>18</sup> *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn.2d 441, 449, 536 P. 2d 157 (1975); *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (“deference to an agency’s interpretation of its own regulations is also appropriate”).

1 impacts among development opportunities. Evaluation of such cumulative  
2 impacts should consider:

3  
4 (i) Current circumstances affecting the shorelines and relevant natural  
5 processes:

6  
7 (ii) [3] *Reasonably foreseeable future development* and use of the  
8 shoreline; and

9  
10 (iii)[4] *Beneficial effects of any established regulatory programs* under  
11 other local, state, and federal laws.

12  
13  
14 It is recognized that methods of determining reasonably foreseeable future  
15 development may vary according to local circumstances, including  
16 demographic and economic characteristics and the nature and extent of  
17 local shorelines.

18  
19 WAC 173-26-231(3)(b) states:

20  
21 New piers and docks shall be allowed only for water-dependent uses or  
22 public access. As used here, a dock associated with a single-family  
23 residence is a water-dependent use provided that it is designed and  
24 intended as a facility for access to watercraft and otherwise complies with  
25 the provisions of this section. ...

26  
27  
28 [5] *Where new piers or docks are allowed*, master programs should  
29 contain provisions to require new residential development of two or more  
30 dwellings to provide for joint use or community dock facilities, where  
31 feasible, rather than allow individual docks for each residence.

32  
33 (Emphasis and numeration supplied.)

34  
35  
36 1. Other Shoreline Functions.<sup>19</sup> Petitioners argue that the cumulative impacts analysis  
37 required by the guidelines is limited to “shoreline ecological functions” and that impacts  
38 on aesthetics and navigation “cannot be taken into account or used to justify a use  
39 regulation.” Samson PHB, at 21. Ecology counters that the guidelines themselves require  
40 local governments to conduct cumulative impacts analysis on other shoreline functions  
41 and uses: “For example, a cumulative impact of allowing development of docks or piers  
42 could be interference with navigation on a water body.” WAC 173-26-210(3)(d)(iii).  
43 DOE Response, at 4.

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47 <sup>19</sup> Legal Issue No. 8 stated: “*Are perceived navigational and visual impacts valid elements to take into*  
48 *consideration in a cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?*”  
49 This issue was dismissed on motions, subject to permission to argue the matter “if Petitioner can  
50 demonstrate... a statutory duty ...related to the assertions.” See Appendix - B, *infra*, at 29.

1 The Board notes that the plain language of the guideline includes “other shoreline  
2 functions fostered by the policy goals of the act” and “protection of other shoreline  
3 functions and/or uses.” Without question, the SMA fosters such shoreline functions as  
4 navigation, public recreation and scenic views. RCW 90.58.020; *see, e.g., Bellevue Farm*  
5 *Owners Ass’n v. Shorelines Hearings Board*, 100 Wn.App. 341, 356, 997 P.2d 380  
6 (2000) (upholding denial of dock permit in Westcott Bay because of impact on scenic  
7 views). Petitioners’ objection to consideration of view impacts and navigational  
8 obstruction in the Blakely Harbor Cumulative Impact Assessment is without merit.  
9

10  
11 2. Fair Allocation of Burden. Petitioners argue that by not allowing single-use private  
12 docks in Blakely Harbor, the City unfairly burdens residential property owners with  
13 protection of the harbor. Samson PHB, at 21. Ecology explains that the regulation  
14 requires “that no one type of use, area or property owner bear a disproportionate share of  
15 the requirement to protect the shoreline environment.... In this case, myriad uses and  
16 development opportunities remain under the amended master program.” DOE Response,  
17 at 4-5.  
18

19  
20 The Board notes that Blakely Harbor boat owners may use mooring buoys, develop a  
21 joint use dock on each shore or work toward the development of a community dock.  
22 Given the special character of Blakely Harbor as demonstrated in the record, the  
23 restrictions on single-use private dock construction are not an unfair burden to shoreline  
24 property owners who will continue to enjoy the harbor’s “unique recreational, aesthetic,  
25 and natural resource values.” *Id.*  
26

27 3. Reasonably Foreseeable Development.<sup>20</sup> Petitioners argue that the predicted build-out  
28 scenario in the Assessment is unrealistic. They allege that the City failed to take into  
29 consideration the acquisition of property for a park, the restrictive covenants on some  
30 Blakely Harbor waterfront lots, and the practical difficulties and costs of building docks  
31 because of the topography of the harbor. Sampson PHB, at 17.  
32

33  
34 The City responds that its predicted build-out scenario was based on “known parcel  
35 restrictions that affect development, such as zoning density, critical areas, restrictive  
36 covenants, and other existing regulations.” City Response, at 28; C-2.1, at 7-8. The City  
37 also accounted for park and country club property, adjacent lots in single ownership,  
38 subdivisions required to provide joint-use dock facilities, and the average density of dock  
39 development in other Bainbridge Island residential harbors. *Id.*  
40

41  
42 The Board notes that a maximum waterfront lot build-out for Blakely Harbor could  
43 theoretically produce 307 homes. C-2.1, at 9. The City’s Assessment did not assume  
44 maximum build-out; applying the discount factors listed above, likely build-out was  
45

46 <sup>20</sup> Legal Issue No. 7 stated: “May a local jurisdiction and/or the Department of Ecology presume maximum  
47 build-out of all waterfront properties unrelated to actual experience or reasonable probabilities as to  
48 project development, when enacting use regulations intended to preserve and protect the shorelines?” This  
49 issue was dismissed on motions subject to permission to argue the matter “if Petitioner can demonstrate ...  
50 a statutory duty ... related to the assertions.” See Appendix - B, *infra*, at 29.

1 calculated at 94 homes of which, again discounting as indicated, only 50% would build  
2 docks. Consistent with WAC 173-26-186(8)(d),<sup>21</sup> the City also applied its local  
3 experience of its own residents' expectations and economic capability, based in part on  
4 the pier and dock build-out on other Bainbridge residential shorelines. Petitioners'  
5 objections on this point are unfounded.  
6

7  
8 4. Beneficial Effects of Regulatory Programs. Petitioners contend that the shorelines  
9 permitting process will reduce the number of docks that can be developed so that adverse  
10 impacts will be minimized. Sampson PHB, at 21. The City responds that environmental  
11 regulations were considered in its cumulative analysis, but "navigational and visual or  
12 aesthetic impacts would not be adequately addressed by these [regulatory] programs."  
13 City Response, at 29.  
14

15 In fact, the Board notes that the Assessment modeled all docks on a "standard design that  
16 reflects ... typical mitigation measures and regulatory requirements." C-2.1, at 7. The  
17 beneficial effects of regulatory programs were clearly incorporated in the Assessment.  
18

19  
20 5. Where New Piers and Docks are Allowed. Petitioners read the new guideline  
21 concerning piers and docks - WAC 173-26-231(3)(b) - as *requiring* local governments to  
22 allow waterfront homeowners to build docks. Sampson PHB, at 25.  
23

24 Ecology points out that the regulation recognizes residential docks and piers as water-  
25 dependent uses and provides standards for their development "where they are allowed."  
26 DOE Response, at 8. The City reads the whole rule and notes that "where new piers are  
27 allowed," master programs should "require ... joint use or community dock facilities"  
28 rather than allow single-use docks. City Response, at 31. The Board concurs - the  
29 guideline by its terms appears to recognize that there will be areas where private docks  
30 are not allowed.  
31

32 In sum, the Board finds no merit in Petitioners' challenge pertaining to compliance with  
33 the new Ecology guidelines, even if they were "applicable."  
34

### 35 *Conclusion*

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37  
38 The Board finds and concludes that the City's adoption of the Amendment **was**  
39 **consistent** with the goals and policies of the SMA. The Board finds and concludes that  
40 Ecology's approval of the Amendment **complied** with the SMA goals and policies and  
41 the applicable guidelines, if any.  
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49 <sup>21</sup> "It is recognized that methods of determining reasonably foreseeable future development may vary  
50 according to local circumstances, including demographic and economic characteristics..." *Id.*

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**B. Legal Issue 9 – WAC 173-26-090**

The Board's Prehearing Order states Legal Issue No. 9 as follows:

Does the Administrative record demonstrate sufficient "changing local circumstances, new information or improved data" pursuant to WAC 173-26-090 to justify an amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?

*Applicable Law*

RCW 90.58.100 provides, in pertinent part:

1) . . . In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts; (b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact; (c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state; (d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary; (e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data; (f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

*Discussion*

The Board notes that WAC 173-26-090<sup>22</sup> (i.e., the *new* shoreline guideline) was not in effect when the City adopted the Amendment and submitted it to Ecology for approval. Nonetheless, the Board will discuss compliance in the context of RCW 90.58.100 which sets a clear standard for local governments in preparing master program amendments.

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<sup>22</sup> WAC 173-26-090 states as follows: "Each local government *should* periodically review a shoreline master program under its jurisdiction and make amendments to the master program deemed necessary to reflect changing local circumstances, new information or improved data. Each local government *shall* also review any master program under its jurisdiction and make amendments to the master program necessary to comply with the requirements of RCW 90.58.080 and any applicable guidelines issued by the department." (Emphasis supplied.)

1 Petitioners assert the Amendment should not have been approved by Ecology because the  
2 Blakely Harbor Cumulative Impact Assessment is flawed; therefore the City cannot  
3 justify that the Amendment was “necessary to reflect changing local circumstances, new  
4 information or improved data,” as Petitioners contend is required by WAC 173-26-090.  
5 Sampson PHB, at 16-19; Samson Reply, at 20. In particular, Petitioners assert that there  
6 is no proliferation of new dock development in Blakely Harbor and no new scientific  
7 information to support a master program amendment.  
8

9  
10 In approving the Amendment, Ecology cited WAC 173-26-090, finding “increasing  
11 interest in developing new docks and piers” in Blakely Harbor and “continuing scientific  
12 research indicating that cumulative impacts of shoreline development reduce aquatic  
13 ecosystem functions.” C-211, at 2. WAC 173-26-090, however, is not by its terms a  
14 limitation on the authority of local governments to amend their master programs. DOE  
15 Response, at 13; City Response, at 32-33. The Board concurs.  
16

17 The relevant standard, however, is not the new shoreline guideline<sup>23</sup> but is the  
18 requirement of RCW 90.58.100(1). Ecology makes this clear:  
19

20 Under RCW 90.58.100, local governments in developing master programs  
21 must utilize “all available information regarding hydrology, geography,  
22 topography, ecology, economics, and other pertinent data,” to “employ,  
23 when feasible, all appropriate, modern scientific data processing and  
24 computer techniques” and “to conduct or support such further research,  
25 studies, surveys and interviews that are deemed necessary.” The Blakely  
26 Harbor Cumulative Impact Assessment meets this standard because it uses  
27 “all available information” and “modern computer techniques” to assess  
28 the cumulative impacts of dock construction in the harbor.  
29  
30

31 DOE Response, at 12. As detailed below, the Board finds that the record before the City  
32 and Ecology meets the statutory standard.  
33

34 Changing Local Circumstances. Petitioners assert that the City’s Cumulative Impact  
35 Assessment is pure speculation because, with only six functional docks in Blakely Harbor  
36 and one recently built, there is “no reason to believe that this ‘relatively low level of dock  
37 development’ will not continue into the foreseeable future.” Samson PHB, at 17.  
38  
39

40 The Board finds that the fact that the land surrounding Blakely Harbor has only recently  
41 become available for development is sufficient “changed circumstance” to merit the  
42 City’s action. Letters and testimony in the record indicate the interest of Blakely Harbor  
43 property owners in constructing private docks.<sup>24</sup> Under current zoning, the City projects  
44 94 residences on Blakely Harbor waterfront at likely build-out. C-2.1, at 9. From the 34  
45

46  
47 <sup>23</sup> See discussion *supra*, at 13.

48 <sup>24</sup> See, e.g., C-62, C-74, C-78 at 5, C-164, C-167, C-183, C-196 “on behalf of a number of property  
49 owners”, C-198, C-202.  
50

1 homes around the Harbor at the time of the 1997 inventory, there were 20 resident boats,  
2 most moored at mooring buoys or anchored in the Harbor. C-222, at 23; C-2.1, at 8. The  
3 City's experience on its other shorelines is that 60% of waterfront residential properties  
4 build docks or piers. *Id.* The City contends that it "does not have to wait until after a  
5 flood of applications has occurred to amend its SMP to protect the Harbor." City  
6 Response, at 35. The Board agrees.  
7

8 New Information. Petitioners contend that the Blakely Harbor Cumulative Impact  
9 Assessment and other materials relied on are not "new information" but are mere  
10 "literature surveys," containing virtually no substance specific to Blakely Harbor.  
11 Samson PHB, at 18. In response, the City asserts that since adopting its 1996 Shoreline  
12 Master Program, and particularly since Puget Sound Chinook were listed under the  
13 Endangered Species Act in 1999, new understandings have emerged in the scientific  
14 literature concerning the value of nearshore marine environments and the ecological  
15 impacts of overwater structures. City Response, at 33-34.  
16  
17

18 The City notes that most of the studies and reports on which the Assessment was based  
19 were prepared after 1996. *Id.*<sup>25</sup> While some of these studies are not specific to Blakely  
20 Harbor, the City applied the relevant scientific principles in its assessment of the  
21 cumulative impact of potential dock and pier development on the aquatic resources of  
22 Blakely Harbor.<sup>26</sup> *Id.*, at 35. The City also commissioned inventories of birds, wildlife  
23 and other natural resources in Blakely Harbor and was developing a Nearshore  
24 Assessment specific to City shorelines, drafts of which were available and considered in  
25 the Blakely Harbor Amendment process. C-223.  
26  
27

28 The Petitioners argue that newly-understood ecological impacts of dock and pier  
29 development should be addressed through the permit process on a case-by-case basis, but  
30 they present no science to dispute the research on which the City and Ecology relied.<sup>27</sup>  
31 The Board finds that since the 1999 listing of Puget Sound Chinook, there has been  
32 ample new information reported in the scientific literature pertaining to the impacts of  
33  
34

35 <sup>25</sup> For example, Bainbridge Island Watershed Nonpoint Source Pollution Water Quality Assessment  
36 Project, 1997 (C-225); Salmonid Habitat Limiting Factors: Water Resource Inventory Area 15, 2000 (C-  
37 226); Overwater Structures: Marine Issues, 2001 (C-228); Cumulative Impact Consideration in  
38 Environmental Resource Permitting, 2001 (C-2.1, at 26; City's Index, at 229); Treated Wood Issues  
39 Associated with Overwater Structures in Marine and Freshwater Environments, 2001 (C-231); Washington  
40 State ShoreZone Inventory, 2001 (City's Index, at 235); Marine and Estuarine Shoreline Modification  
41 Issues, 2001 (C-236); Reconnaissance Assessment of the State of the Nearshore Ecosystem; Eastern Shore  
42 of Central Puget Sound, 2001 (C-2.1 at 27); Bainbridge Island Nearshore Assessment, 2003 (available in  
43 draft form, see C-2.1, at 26; C-2.2; C-2.5; C-223); A Review of Natural Resource Values and Restoration  
44 Opportunities at Blakely Harbor Park, 2001 [where 12 of 19 studies relied on are subsequent to Bainbridge  
45 Island SMP adoption, at 10-11] (C-221).

46 <sup>26</sup> The City notes that local governments are not expected to conduct site-specific research in order to  
47 comply with GMA or SMA requirements. *Id.* Ecology agrees: "[T]he Assessment documents the resources  
48 found in Blakely Harbor and reasonably infers that the impacts known to occur from docks elsewhere in  
49 Puget Sound will likely occur in Blakely Harbor also." DOE Response, at 12.

50 <sup>27</sup> Petitioners rely on the deposition of a former city planning director. Samson PHB at 32-33; HOM Ex. 1.

1 overwater structures on the shoreline ecosystem to merit the City's Amendment  
2 applicable to all of Blakely Harbor, rather than reliance on case-by-case analysis and  
3 mitigations.  
4

5 Improved Data. Since 1996, the City has inventoried its four harbors and developed a  
6 Harbor Management Plan focusing on shoreline development patterns, water-dependent  
7 uses, navigation, and natural resources. C-222. The City applied this "improved data"  
8 concerning harbor use to its Cumulative Impact Assessment of new docks and piers in  
9 Blakely Harbor. A computer model of three development scenarios was used to project  
10 impacts on navigation and vistas. HOM Ex. 3. The City concluded that continuing to  
11 allow development of single-use private docks and piers in Blakely Harbor would  
12 interfere with navigational access and recreational anchorage for the scores of boats that  
13 now enjoy the scenic harbor.<sup>28</sup> City Response, at 10-11. Scenic view corridors and  
14 "ambient views" would be significantly reduced.<sup>29</sup> *Id.*, at 9-10.  
15  
16

17 Ecology found this modeling to be consistent with the SMA requirement that local  
18 jurisdictions use "modern computer techniques" in developing master program  
19 amendments. DOE Response, at 12.  
20

21 Petitioners contend that the City's inventories and modeling are not "improved" data  
22 because the predicted build-out is unrealistic. The Board disagrees with Petitioners and  
23 finds that the City's recent inventories and modeling provide improved data that is  
24 responsive to the requirements of RCW 90.58.100.  
25

### 26 **Conclusion**

27  
28  
29 The Board finds and concludes that the City's action, and Ecology's approval, are  
30 consistent and **comply** with the standards of RCW 90.58.100 (and, by implication, of  
31 WAC 173-26-090) for development of master program amendments.  
32

### 33 **C. Legal Issue 1 – Consistency with Bainbridge Island Comprehensive Plan and** 34 **Shoreline Master Program**

35  
36  
37 The Board's Prehearing Order states Legal Issue No. 1 as follows:  
38

39 Does the Ordinance violate the Growth Management Act (the "GMA"),  
40 specifically RCW 36.70A.040 and RCW 36.70C.070 because it is not  
41 consistent with and fails to implement the City's Land Use  
42

43  
44  
45 <sup>28</sup> The Assessment finds that the predicted build-out scenario will eliminate nearly 90 acres of navigable  
46 water, prevent almost all unencumbered nearshore navigation, and adversely impact boater safety for both  
47 vessels and handcraft. C-2.1, at 10-13; HOM Ex. 3.

48 <sup>29</sup> The Assessment concludes that the predicted build-out scenario narrows scenic vistas in a range of 27%  
49 to 58% reduction. C-2.1, at 13-14; HOM Ex. 3.  
50

1 Comprehensive Plan goals and policies, including its Shoreline Master  
2 Program policies which are a part of the Plan per RCW 36.70A.480(1)?  
3

4 *Applicable Law*  
5

6 RCW 36.70A.480(1) integrates shoreline management programs into comprehensive  
7 plans as follows:  
8

9  
10 For shorelines of the state, the goals and policies of the shoreline  
11 management act as set forth in RCW 90.58.020 are added as one of the  
12 goals of this chapter as set forth in RCW 36.70A.020 without creating an  
13 order of priority among the fourteen goals. The goals and policies of a  
14 shoreline master program for a county or city approved under chapter  
15 90.58 RCW shall be considered an element of the county or city's  
16 comprehensive plan. All other portions of the shoreline master program  
17 for a county or city adopted under chapter 90.58 RCW, including use  
18 regulations, shall be considered a part of the county or city's development  
19 regulations.  
20

21 *Discussion*<sup>30</sup>  
22

23  
24 Petitioners state: "Banning docks and piers from all shoreline areas within Blakely  
25 Harbor...is inconsistent with the intent, goals and policies of the SMP that strongly  
26 support allowance of a discrete number of new docks within Blakely Harbor on a case-  
27 by-case basis, as conditioned through compliance with the existing regulatory system."  
28 Samson PHB, at 35. Petitioners argue that the Amendment is inconsistent with the City's  
29 SMP and Comprehensive Plan policies which allow private docks and piers in all  
30 shoreline designations except the most protective – Aquatic and Natural Conservancy  
31 designations.  
32

33  
34 Petitioners cite provisions of the Bainbridge SMP that support residential use and  
35 recreational enjoyment (SMP, at 11), give preference to water dependent uses (*Id.*) and  
36 support residential recreational use of the shoreline. SMP, at 13. They assert that the  
37 policies regarding Piers, Docks, Recreational Floats, and Mooring Buoys (SMP, at 13)  
38 "establish performance standards for construction and use of over-water structures, not a  
39 prohibition." Samson PHB, at 37. The policy to "ensure that proposed shoreline uses give  
40 consideration to the rights of private property ownership" (SMP, at 11) is violated by  
41 imposing a ban on dock development in Blakely Harbor, Petitioners allege.<sup>31</sup>  
42

43  
44 <sup>30</sup> Appendix – E, Bainbridge Island Shoreline Master Program and Comprehensive Plan Goals and Policies,  
45 *infra*, at 36-39, provides the text of the SMP and Comprehensive Plan provisions cited by the parties, with  
46 some of the City's explanatory comments.

47 <sup>31</sup> Petitioners' briefs incorporate arguments concerning private property rights and the public trust doctrine.  
48 These issues (Legal Issues No. 4, 6, and 10) were dismissed on motion as beyond the jurisdiction of this  
49 Board and will not be discussed here. *See* Appendix – B, at 29, and Appendix C, at 30-31. *See also* fn. 35,  
50 *infra*, at 26, acknowledging that constitutional claims in the PFR are outside the Board's jurisdiction.

1 Petitioners cite the "Overriding Principles" and Goal 5 of the Comprehensive Plan Land  
2 Use Element (*infra*, at 38-39) and contend that the Blakely Harbor restrictions fail to  
3 allow recreational use of waters consistent with the "special character of the Island," fail  
4 to consider the "costs and benefits to property owners," and fail to "recognize the rights  
5 of individuals to use and develop private property in a manner that is consistent with City  
6 regulations." Samson PHB, at 38.  
7

8 The City points to the same policies identified by Petitioners and finds support for  
9 limiting new single-use private docks in Blakely Harbor. The City's comments on the  
10 cited Bainbridge SMP and Comprehensive Plan policies are quoted in Appendix E. For  
11 example, the SMP Recreational Element Goals call for "optimizing" opportunities for  
12 passive and active water-oriented recreation, including "those that can reasonably tolerate  
13 peak use." SMP, at 13. Given the inventoried peak use of Blakely Harbor by 7,643  
14 vessels during the 1997 yachting season (112 vessels on the busiest night), limiting new  
15 single-use docks is appropriate. C2.1, at 13. Similarly, the Bainbridge SMP policies for  
16 piers and docks express a preference for mooring buoys and for multiple-use docks,  
17 consistent with the Amendment. SMP, at 13.  
18  
19

20 The Board finds that the Amendment is consistent with and supported by the goals and  
21 policies cited by the parties and set out in Appendix E. The Board notes, for example,  
22 policies favoring marine views (SMP, at 12; Comp Plan, at 47), marine safety (SMP, at  
23 11, 14), joint-use docks (SMP, at 11, 13) and a focus on "unique attributes" and  
24 "distinctive qualities of harbors" (SMP, at 11; Comp Plan Vision Statement). Part of the  
25 distinctive quality and unique attribute of Blakely Harbor is its relative lack of docks.  
26  
27

28 Petitioners cite no authority, nor has the Board found any, for their contention that the  
29 Comprehensive Plan and Bainbridge SMP policies prohibit the City from adopting  
30 particularized regulations for residential shoreline areas with distinctive features.  
31 Comprehensive plans have long used overlay zones, subarea plans, and similar  
32 mechanisms to tailor regulations to particular situations, even where the underlying  
33 zoning or classification may remain the same. *See* R. Settle, *Washington Land Use and*  
34 *Environmental Law and Practice*, Section 2.12(F), "Overlay," at 71 (1983).  
35  
36

37 *Carlson v. San Juan County*, WWGMHB Case No. 00-2-0016 (Final Decision and Order,  
38 September 15, 2000) is instructive. San Juan County adopted a subarea plan for Waldron  
39 Island that prohibited new private docks. Several Waldron owners appealed, contending  
40 that the dock prohibition, which was unique to Waldron Island, was inconsistent with the  
41 county's comprehensive plan. The County's findings included:  
42

- 43 • "Unlike most other areas in the County, for many years Waldron Island has had  
44 only one County dock and one private dock. There is no existing pattern of  
45 moorage development on the Island.
- 46 • The Island's shoreline is highly exposed to wind and wave action, and there are  
47 few, if any, locations where docks of small or moderate scale could withstand  
48 these conditions on a year-round basis.  
49  
50

- Use of the County dock by Island residents in lieu of having private docks is common and accepted practice of long standing. Mooring buoys may also be, and have been permitted in some locations.
- Generally, once a dock is approved in a given area, it is difficult to avoid further dock approvals and proliferation of the facilities in the same area over time.
- The marine and intertidal conditions on the shore of the island are almost completely unaffected by the physical and biological impacts of moorage development. Eelgrass is abundant along much of the island's shorelines, and marine habitat quality is high."

Because the County's record revealed extensive support for these findings, the Western Board found the unique dock prohibition for Waldron Island consistent with the Comprehensive Plan. *See also* San Juan County Uniform Development Code 18.50.190(K)(9) (prohibiting boating facilities in East Sound on Orcas Island, in conservancy, protected and residential designations).

The record before the Board in the present case supports analogous findings. Blakely Harbor has a low level of dock development, so that marine habitat quality is high. There are eelgrass beds along the southern shore.<sup>32</sup> Use of mooring buoys in lieu of private docks is a long-standing practice. Approval of one new private dock is likely to be followed by many others.<sup>33</sup> On this record, the Board finds that different and more restrictive dock regulations for Blakely Harbor are consistent with the Comprehensive Plan and Bainbridge SMP policies<sup>34</sup> and compliant with the consistency requirements of RCW 36.70A.070 and .040.

#### *Conclusion*

The Board finds and concludes that the City's Amendment **complies** with the consistency requirement of RCW 36.70A.070 and .040.

#### **D. Legal Issue No. 15 – Invalidity**

The Board's Prehearing Order states Legal Issue No. 15 as follows:

If the Board finds that the City has not complied with the goals or requirements of the GMA when addressing issues 1, 2, 5, or 9, does such

<sup>32</sup> C-222, Appendix C, Blakely Harbor Inventory, at 23-24; C-2.1; C-2.2; Sampson PHB, at 18.

<sup>33</sup> *See* fn. 24, *supra*, at 18.

<sup>34</sup> Petitioners also argue that the City erred in relying on policies outside of its adopted Comprehensive Plan and SMP. Sampson PHB, at 38. The documents referred to are the Bainbridge Island Parks and Recreation Plan, Appendix C, and the 1999 Harbor Management Plan. Petitioners' argument addresses Legal Issue No. 11: "Did the City impermissibly rely upon policies not part of its Comprehensive Plan and Shoreline Master Program when enacting the Ordinance?" This issue was **dismissed** on motions, subject to permission to argue the matter "if Petitioners can demonstrate ... a statutory duty ... related to the assertions." *See* Appendix - B, *infra*, at 29. Petitioners have not identified any statutory duty supporting their argument, and the issue must be disregarded.

1 noncompliance substantially interfere with the fulfillment of the goals of  
2 the Act, such as to merit a determination of invalidity?  
3

4 *Conclusion*  
5

6 The Board has not found noncompliance with the goals or requirements of the GMA;  
7 therefore the Board need not and will not address the request for invalidity.  
8

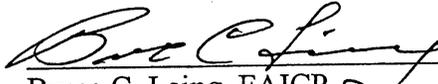
9 VI. ORDER  
10

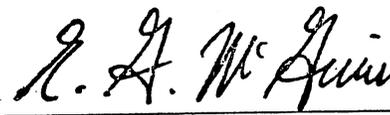
11 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
12 parties, having considered the arguments of the parties, and having deliberated on the  
13 matter, the Board ORDERS:  
14

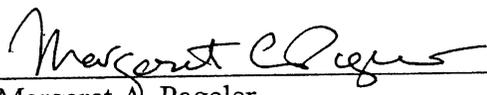
15  
16 The City of Bainbridge Island's adoption of Ordinance No. 2003-30,  
17 amending its shoreline master program, and the Department of Ecology's  
18 approval of the City's action, **comply** with the goals, policies and  
19 provisions of the SMA (RCW 90.58.020 and .100) and **comply** with the  
20 relevant requirements of the GMA (RCW 36.70A.040, .070 and .480).  
21

22 So ORDERED this 19<sup>th</sup> day of January, 2005.  
23

24 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD  
25

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27  
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29   
30 Bruce C. Laing, FAICP  
31 Board Member

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34  
35 Edward G. McGuire, AICP  
36 Board Member

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39   
40 Margaret A. Pageler  
41 Board Member  
42  
43  
44  
45

46 Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a  
47 party files a motion for reconsideration pursuant to WAC 242-02-832.  
48  
49  
50

APPENDIX - A

Chronological Procedural History of CPSGMHB Case No. 04-3-0013

On April 23, 2004 the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kelly and Sally Samson and Robert and Jo Anne Hacker (**Petitioners** or **Samson**). The matter was assigned Case No. 04-3-0013. Petitioners challenge the City of Bainbridge Island's (the **City**) adoption of Ordinance No. 2003-30 (the **Ordinance**), amending the City's Shoreline Master Program. Petitioners also challenge the Department of Ecology's (the **DOE** or **Ecology**) approval of the City's amendments to the Shoreline Master Program. The bases for the challenges are noncompliance with the Growth Management Act (**GMA**) and the State Shoreline Management Act (**SMA**). Petitioners request the Board find the Ordinance noncompliant under the GMA and SMA. Petitioners also request that the Board enter a determination of invalidity. The PFR set forth 19 Issues to be resolved.

On May 3, 2004 the Board received a Notice of Appearance from legal counsel for the City and a Notice of Appearance from legal counsel for Ecology.

On May 4, 2004 the Board issued a "Notice of Hearing" in the above-captioned case. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On May 7, 2004 the Board issued a "Corrected Notice of Hearing".

On May 24, 2004 the Board received "City's Motion to Extend Time for Filing Index".

On May 25, 2004 the board received "Department of Ecology's Joinder in City's Motion to Extend Time for Filing Index".

On May 27, 2004, the Board conducted the prehearing conference in this matter in Suite 2430, Union Bank of California Building, 900 4<sup>th</sup> Avenue, Seattle. Present for the Board were Edward G. McGuire and Bruce C. Laing, presiding officer. Dennis D. Reynolds represented the Petitioners. Present with Mr. Reynolds was Petitioner Kelly Samson. Rosemary A. Larson represented the City. Present with Ms. Larson was Peter Namtvedt Best, Planner for the City. Thomas J. Young, Assistant Attorney General, represented the Department. Also present at the prehearing conference was Gary W. Tripp who presented to the Board and participants "Bainbridge Citizen United's Motion to Intervene".

On May 27, 2004 the Board received "City's Index" (**City's Index**).

On May 27, 2004 the Board received "Respondent Department of Ecology's Submittal of Index of Record" (**Ecology's Index**).

On June 2, 2004 the Board received a letter from counsel for the City advising that the City will not file a response to Bainbridge Citizen United's Motion to Intervene.

1  
2 On June 3, 2004 the Board issued its "Prehearing Order and Order on Intervention"  
3 (PHO) in this matter. The PHO set forth the schedule and listed 15<sup>35</sup> Legal Issues to be  
4 resolved by the Board. The Board granted intervention to Bainbridge Citizens United.  
5 The Board received several timely motions from the parties: 1) Petitioners' Motion to  
6 Clarify; and 2) Motions to Dismiss certain issues filed by the City and Ecology.  
7

8  
9 On June 10, 2004 the Board received: 1) Petitioners' "Motion for Order Clarifying Issues  
10 on Appeal"; 2) "Dep't of Ecology's Motion to Dismiss" with an attached "Declaration of  
11 Thomas J. Young in Support of Ecology's Motion to Dismiss;" 3) "City's Motion to  
12 Dismiss Issues" with an attached "Declaration of Rosemary Larson in Support of City's  
13 Motion to Dismiss Issues."  
14

15 On June 24, 2004 the Board received: 1) "City's Response to Petitioners' Motion for  
16 Order Clarifying Issues on Appeal"; 2) "Ecology's Objection to Petitioners' Motion for  
17 Order Clarifying Issues on Appeal"; and 3) Petitioners' Response to Respondent's  
18 Motions to Dismiss".  
19

20  
21 On July 1, 2004 the Board received: 1) "Petitioners' Reply to Respondents' Response to  
22 Petitioners' Motion for Order Clarifying Issues on Appeal"; 2) "Dep't of Ecology's  
23 Reply to Petitioners' Response to Ecology's Motion to Dismiss"; and 3) "City's Reply to  
24 Petitioners' Response to Respondents' Motions to Dismiss."  
25

26 On July 6, 2004 the Board issued its "Order on Motions" in this matter. The Order  
27 dismissed several issues and restated three of the issues to be decided by the Board. Order  
28 on Motions at 5-6.  
29

30 On July 16, 2004 the Board received a "Motion to Correct and/or Reconsider Order on  
31 Motions" from Petitioners.  
32

33 On July 19, 2004 the Board issued its "Order Correcting Legal Issue No. 2" as stated in  
34 the July 6, 2004 Order on Motions.  
35

36 On July 21, 2004 the Board received "Stipulation and Joint Request to Extend Time".  
37

38 On July 22, 2004 the Board issued its "Order Granting Settlement Extension and  
39 Amending Case Schedule."  
40

41  
42 On October 11, 2004 the Board received "Stipulation to Amend Index" (**City's**  
43 **Amended Index**).  
44

45  
46 <sup>35</sup> The PFR acknowledged that Issues 16 through 19 therein "are constitutional issues beyond Board  
47 purview but stated herein to preserve them for appeal." PFR, at 5. At the prehearing conference, the  
48 parties and the Board agreed that they would not be included in the PHO, since they were issues outside the  
49 Board's subject matter jurisdiction. For all intents and purposes they were dismissed for lack of  
50 jurisdiction.

1  
2 On October 20, 2004 the Board received a "Stipulated Motion to Amend Briefing  
3 Schedule" signed by all parties to this case.  
4

5 On October 22, 2004 the Board issued its "Order Amending Briefing Schedule."  
6

7 On October 25, 2004 the Board received "Petitioner's Opening Brief" (**Samson PHB**).  
8

9 On October 25, 2004 the Board received Petitioner's "Motion to Correct and /or  
10 Supplement the Record."  
11

12 On November 9, 2004 the Board received "Ecology's Response Brief" (**DOE Response**).  
13

14 On November 9, 2004 the Board received "City's Response Brief" (**City's Response**).  
15

16 On November 9, 2004 the Board received "City's Response to Motion to Supplement  
17 Record".  
18

19 On November 16, 2004 the Board received "Petitioners' Reply Brief" (**Samson Reply**).  
20

21 On November 16, 2004 the Board received Petitioners' "Reply Regarding Motion to  
22 Correct and/or Supplement Record."  
23

24 No briefing was received from Intervenor Bainbridge Citizens United on motions or on  
25 the merits.  
26

27 On November 22, 2004 the Board conducted a Hearing on the Merits (**HOM**) in Suite  
28 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington.  
29 Board members present were Margaret Pageler, Edward McGuire and Bruce Laing,  
30 Presiding Officer. Chuck Maduell represented the Petitioners. Rosemary Larson  
31 represented the City of Bainbridge Island. Present with Ms. Larson was Peter Namtvedt  
32 Best, Planner for the City. Thomas Young, Assistant Attorney General, represented the  
33 Department of Ecology. Gary Tripp attended as a member of Intervenor Bainbridge  
34 Citizens United. Also present was Julie Taylor, extern with the Board. The Court  
35 Reporter was Karmen Fox, Byers & Anderson, Inc. The hearing was opened at 10:00  
36 a.m. and adjourned at 12:28 p.m.  
37

38 On December 2, 2004 the Board received a letter from Rosemary Larson attaching color  
39 versions of certain exhibits as requested by the Board at the HOM.  
40

41 On December 23, 2004 the Board received Petitioners' "Citation of Additional  
42 Authority" with attached opinion from Division II Court of Appeals in *Biggers et. al. v.*  
43 *City of Bainbridge Island* (December 21, 2004.)  
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APPENDIX – B

Legal Issues Restated and Retained for Prehearing Briefing in CPSGMHB Case No.  
04-3-0013<sup>36</sup>

Legal Issue No. 1

Does Ordinance No 2003-02 (the **Ordinance**) violate the Growth Management Act (**GMA**), specifically, RCW 36.70A.040 and RCW 36.70A.070, because it is not consistent with and fails to implement the City’s Comprehensive Land Use Plan (**Plan**) goals and policies, including its shoreline Master Program polices which are part of the Plan per RCW 36.70A.480(1)? [*Restated per Petitioner*].

Legal Issue No. 2

Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3), because it is inconsistent with and fails to implement the goals and policies of the Shoreline Management Act (SMA) and Bainbridge Island Shoreline Master Program?<sup>37</sup>

Legal Issue No. 5

Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land use decision-making process, including internal consistency among development regulations, by imposing different requirements for siting and construction of private residential docks on parcels with the same zoning and shoreline land use designations? [*Restated per Petitioner*].

Legal Issue No. 9

Does the administrative record demonstrate sufficient “changing local circumstances, new information or improved data” pursuant to WAC 173-26-090 to justify an amendment to the City’s Shoreline Master Program banning docks in Blakely Harbor?

Legal Issue No. 15

If the Board finds the City has not complied with the goals or requirements of the GMA when addressing issues [remaining Legal Issues 1, 2, 5 or 9] does such noncompliance substantially interfere with the fulfillment of the goals of the Act, such as to merit a determination of invalidity?

---

<sup>36</sup> Order on Motions. 7/16/04 Order, at 5-6.

<sup>37</sup> Order Correcting Issue No. 2, at 1-2.

1 Legal Issues No. 3, 4, 6, 7, 8, 10, 11, 12, 13, and 14 were dismissed by the Board's Order  
2 on Motions. The Order on Motions includes the following proviso regarding the  
3 dismissal of Issues No. 7, 8 and 11: "However, as the City suggests, these issues may be  
4 duplicative of *arguments* that fall within the parameters of Legal Issues 1, 2 or 5.  
5 Consequently, if Petitioner can demonstrate that either the City or DOE had a statutory  
6 duty [as framed in Legal Issues 1, 2 or 5] to do something related to the assertions in  
7 Legal Issue 7, 8 or 11, that the City or DOE failed to comply with, they may be argued in  
8 the context of those Legal Issues (*i.e.*, Legal Issues 1, 2 or 5)."  
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**APPENDIX – C**

**Legal Issues as Stated in the Prehearing Order in CPSGMHB Case No. 04-3-0013**

Legal Issue No. 1

Does the Ordinance violate the Growth Management Act (the “GMA”), specifically RCW 36.70A.040, RCW 36.70A.070, RCW 36.70A.120, and RCW 36.70A.130, because it is not consistent with and fails to implement the City’s Comprehensive Land Use Plan goals and policies? (Comprehensive Plan, Land Use Elements.)

Legal Issue No. 2

Does the Ordinance violate the GMA because it is inconsistent with and fails to implement the goals and policies of the Shoreline Management Act (the “SMA”) and the Bainbridge Island Shoreline Master Program? (Master Program Goals.)

Legal Issue No. 3

Does the Ordinance violate GMA Goal 9 (Enhancement of Recreational Opportunities), RCW 36.70A.020(9)?

Legal Issue No. 4

Has the City of Bainbridge Island, in adopting the Ordinance, and the Department, in approving the Blakely Harbor Shoreline Amendments, acted in an arbitrary, capricious and discriminating manner in violation of GMA Goal 6 (Property Rights), RCW 36.70.A.020(6)?

Legal Issue No. 5

Is the Ordinance noncompliant with GMA requirements mandating consistency and predictability in the land use decision-making process, including internal consistency among development regulations, by imposing different requirements for siting and constructing private residential docks on parcels with the same Zoning and Shoreline and Land Use designations?

Legal Issue No. 6

Did the City and the Department adequately comply with the requirements of RCW 36.70A.370 to utilize the process established by the Office of the Washington State Attorney General<sup>38</sup> to ensure the Ordinance does not result in an unconstitutional taking of private property?

---

<sup>38</sup> The guidelines are entitled “State of Washington, Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Taking of Private Property,” first published in February, 1992.

1  
2 Legal Issue No. 7  
3

4 May a local jurisdiction and/or the Department of Ecology, presume maximum build out  
5 of all waterfront properties unrelated to actual experience or reasonable probabilities as to  
6 project development, when enacting use regulations intended to preserve and protect the  
7 shorelines?  
8

9  
10 Legal Issue No. 8

11 Are perceived navigation and visual impacts valid elements to take into consideration in a  
12 cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?  
13

14  
15 Legal Issue No. 9  
16

17 Does the administrative record demonstrate sufficient "changing local circumstances,  
18 new information or improved data" pursuant to WAC 173-26-090 to justify an  
19 amendment to the City's Shoreline Master Program banning docks in Blakely Harbor?  
20

21 Legal Issue No. 10  
22

23 Does the Ordinance violate the public trust doctrine?  
24

25 Legal Issue No. 11  
26

27 Did the City impermissibly rely upon policies not part of its Comprehensive Plan and  
28 Shoreline Master Program when enacting the Ordinance?  
29

30  
31 Legal Issue No. 12  
32

33 Do the notices issued by the City regarding possible adoption of the Ordinance comply  
34 with GMA, Comprehensive Plan, and procedural due process requirements for adequate  
35 notice to the public of proposed City Council actions?  
36

37 Legal Issue No. 13  
38

39 Has the City of Bainbridge Island complied with the public participation requirements of  
40 the GMA (RCW 36.70A.140; .035) in adopting the Ordinance?  
41

42 Legal Issue No. 14  
43

44 Has the City of Bainbridge Island in adopting the Ordinance complied with its procedures  
45 for amendment of its Comprehensive Land Use Plan and development regulations  
46 specified in its Plan and public participation program, as required by RCW  
47 36.70A.130(1)(2)(b)?  
48  
49  
50

1     Legal Issue No. 15

2  
3     If the Board finds the City has not complied with the goals or requirements of the GMA  
4     when addressing Issues 1-14, supra, does such noncompliance substantially interfere with  
5     the fulfillment of the goals of the Act, such as to merit a determination of invalidity?  
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**APPENDIX - D**

**Shoreline Management Act Provisions**

RCW 90.58.020 provides:

[FINDINGS PORTION]

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever-increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, 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, 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.

[POLICY PORTION]

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. This policy is designed to insure the development of these shorelines in a manner, which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife; and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

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

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term

1 benefit; (4) Protect the resources and ecology of the shoreline; (5) Increase  
2 public access to publicly owned areas of the shorelines; (6) Increase recreational  
3 opportunities for the public in the shoreline; (7) Provide for any other element as  
4 defined in RCW 90.58.100 deemed appropriate or necessary.  
5

6 [IMPLEMENTATION PORTION]  
7

8  
9 In the implementation of this policy the public's opportunity to enjoy the physical  
10 and aesthetic qualities of natural shorelines of the state shall be preserved to the  
11 greatest extent feasible consistent with the overall best interest of the state and the  
12 people generally. To this end uses shall be preferred which are consistent with  
13 control of pollution and prevention of damage to the natural environment, or are  
14 unique to or dependent upon use of the state's shoreline. Alterations of the natural  
15 condition of the shorelines of the state, in those limited instances when  
16 authorized, shall be given priority for single family residences and their  
17 appurtenant structures, ports, shoreline recreational uses including but not limited  
18 to parks, marinas, piers, and other improvements facilitating public access to  
19 shorelines of the state, industrial and commercial developments which are  
20 particularly dependent on their location on or use of the shorelines of the state and  
21 other development that will provide an opportunity for substantial numbers of the  
22 people to enjoy the shorelines of the state. Alterations of the natural condition of  
23 the shorelines and shorelands of the state shall be recognized by the department.  
24 Shorelines and shorelands of the state shall be appropriately classified and these  
25 classifications shall be revised when circumstances warrant regardless of whether  
26 the change in circumstances occurs through man-made causes or natural causes.  
27 Any areas resulting from alterations of the natural condition of the shorelines and  
28 shorelands of the state no longer meeting the definition of "shorelines of the state"  
29 shall not be subject to the provisions of chapter 90.58 RCW.  
30  
31

32  
33 Permitted uses in the shorelines of the state shall be designed and conducted in a  
34 manner to minimize, insofar as practical, any resultant damage to the ecology and  
35 environment of the shoreline area and any interference with the public's use of the  
36 water.  
37

38 RCW 90.58.030 provides in pertinent part:

39 (e) "Shorelines of state-wide significance" means the following  
40 shorelines of the state:  
41

42 ....

43 (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and  
44 adjacent salt waters north to the Canadian line and lying seaward from the  
45 line of extreme low tide;  
46  
47

48 RCW 90.58.090(4) provides:  
49  
50

1  
2 The department shall approve those segments of the master program  
3 relating to shorelines of state-wide significance only after determining the  
4 program provides the optimum implementation of the policy of this  
5 chapter to satisfy the state-wide interest. If the department does not  
6 approve a segment of a local government master program relating to a  
7 shoreline of state-wide significance, the department may develop and by  
8 rule adopt an alternative to the local government's proposal.  
9

10  
11 RCW 90.58.100 provides:

12  
13 1) The master programs provided for in this chapter, when adopted or  
14 approved by the department shall constitute use regulations for the various  
15 shorelines of the state. In preparing the master programs, and any  
16 amendments thereto, the department and local governments shall to the  
17 extent feasible:

18 (a) Utilize a systematic interdisciplinary approach which will insure the  
19 integrated use of the natural and social sciences and the environmental  
20 design arts; (b) Consult with and obtain the comments of any federal,  
21 state, regional, or local agency having any special expertise with respect to  
22 any environmental impact; (c) Consider all plans, studies, surveys,  
23 inventories, and systems of classification made or being made by federal,  
24 state, regional, or local agencies, by private individuals, or by  
25 organizations dealing with pertinent shorelines of the state; (d) Conduct or  
26 support such further research, studies, surveys, and interviews as are  
27 deemed necessary; (e) Utilize all available information regarding  
28 hydrology, geography, topography, ecology, economics, and other  
29 pertinent data; (f) Employ, when feasible, all appropriate, modern  
30 scientific data processing and computer techniques to store, index,  
31 analyze, and manage the information gathered.  
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APPENDIX - E

Bainbridge Island Shoreline Master Program and Comprehensive Plan

Goals and Policies

*Shoreline Master Plan Master Goal*, SMP, Sec. I.A, p. 11.

The City's shorelines are among the most valuable, scarce, and fragile of our natural resources that provide a significant part of our way of life as a place of residence, recreational enjoyment, and occupation. It is the intent of this program to manage the shorelines of Bainbridge Island, giving preference to water-dependent and water-related uses, and to encourage development and other activities to co-exist in harmony with the natural conditions. Uses that result in long-term over short-term benefits are preferred, as are uses which promote sustainable development.

*Shoreline Use Element Goal*, SMP, Sec. I.B, p. 11.

Identify and preserve shoreline and water areas with unique attributes for specific long term uses, including commercial, industrial, residential, recreational, and open space uses.

"The Ordinance assists in preserving Blakely Harbor as a scarce natural resource, with unique attributes. The Ordinance promotes recreational enjoyment of the harbor by watercraft, by protecting against adverse impacts to navigation." City Response at 43-44.

*Recreation Element Goals*, SMP, Sec. I.H, p. 13.

1. Ensure optimal recreational opportunities that can reasonably tolerate peak use periods as well as active, passive, competitive, or contemplative recreational uses without destroying integrity and character of the shoreline.
2. Optimize opportunities for both passive and active water-oriented recreation.
3. Integrate shoreline recreational elements into public access and conservation planning.
4. Encourage State and local government to acquire additional shoreline properties for public recreational uses.

The City states that the Ordinance supports the first two goals and does not conflict with Goals 3 and 4. City Response at 44.

1 *Piers, Docks, Recreational Floats and Mooring Buoys*, SMP Sec. I.H, p. 13.

2  
3 1. Multiple use and expansion of existing conforming piers, docks and  
4 floats should be encouraged over the addition and/or proliferation of new  
5 facilities. Joint use facilities are preferred over new, single-use piers,  
6 docks and floats.

7  
8 2. The use of mooring buoys should be encouraged in preference to either  
9 piers or docks.

10  
11 3. Piers, docks, and floats should be designed to cause minimum possible  
12 adverse environmental impacts, including potential impacts on littoral  
13 drift, sand movement, water circulation and quality, and fish and wildlife  
14 habitat. . . .

15  
16 8. The proposed size of the structure and intensity of use or uses of any  
17 dock, pier, and/or float should be compatible with the surrounding  
18 environment and land and water uses.

19  
20  
21 “The fact that some policies encourage or require mitigation of adverse impacts of docks  
22 does not preclude the City from restricting dock development in Blakely Harbor, based  
23 on the unique circumstances applicable to that Harbor. . . . Ordinance No. 2003-30  
24 requires joint use dock facilities in Blakely Harbor. The Ordinance encourages use of  
25 mooring buoys, rather than docks. It protects against interference with navigable waters,  
26 the public’s use of the shoreline, and views from adjoining property.” City Response at  
27 45.  
28

29 *Shoreline Use Element Goals*, SMP, Sec. I.B, p. 11.

30  
31 3. Designated shorelines of statewide significance are of value to the entire  
32 state and should be protected and managed. In order of preference, the  
33 priorities are to:

34 a. Recognize and protect the state-wide interest over local area and  
35 individual interest.

36 b. Preserve the natural character of the shoreline.

37 c. Produce long-term benefits over short-term benefits.

38 d. Protect the resources and ecology of the shorelines.

39 e. Increase public access to publicly-owned areas of the shorelines.

40 f. Increase public recreational opportunities on the shoreline.

1 4. Ensure that proposed shoreline uses are distributed, located, and  
2 developed in a manner that will maintain or improve the health, safety,  
3 and welfare of the public. . . .  
4

5 8. Encourage joint-use activities in proposed shoreline developments.  
6

7 *Conservation Element Goals*, SMP Sec. I.E, p. 12.  
8

9 1. Acknowledge natural shoreline processes and seek alternatives to  
10 structures that adversely affect the shoreline.  
11

12 *Public Access Element Goals*, SMP Sec. I.F, p. 12.  
13

14 1. Provide, protect and enhance a public access system that is both  
15 physical and visual and which utilizes public and appropriate private lands  
16 and increases the amount and diversity of public access to the State's  
17 shorelines.  
18

19 The City emphasizes the commitment to protect the public's *visual* access to shorelines.  
20 City Response at 46.  
21

22 *Harbor Use and Safety Element*, SMP Sec. I.I, p. 14.  
23

24 1. Ensure the safe and environmentally sound use of Island harbors and  
25 bays in a manner that protects and enhances harbor and shoreline use  
26 consistent with the goals of the other elements.  
27

28 2. Provide, protect, and control public use of harbor and bay waters in a  
29 manner that is in the best interest of the public.  
30

31 *Comprehensive Plan Land Use Element – "Overriding Principles."* Comp Plan, p. 47.  
32

33 1. Preserve the special character of the Island which includes forested  
34 areas, meadows, marine views, and winding roads bordered by dense  
35 vegetation.  
36

37 2. Protect the water resources of the Island.  
38

39 3. Foster diversity of the residents of the Island, its most precious  
40 resource.  
41

42 4. The costs and benefits to property owners should be considered in  
43 making land use decisions.  
44

45 5. Development should be based on the principle that the Island  
46 environmental resources are finite and must be maintained at a sustainable  
47 level.  
48  
49  
50

1 The Ordinance “furthers these principles . . . with the exception of Principle 3, which  
2 does not apply. . . . Even with respect to Principle 4, . . . the City balanced the relatively  
3 small cost to property owners resulting from dock restrictions against the benefit to  
4 owners (protected views of the pristine Harbor), and more importantly, the benefit to the  
5 public from the protection of Blakely Harbor.” City Response at 47.  
6

7 *Land Use Element Goal 5, Comp. Plan, p. 51.*  
8

9 Strive to ensure that basic community values and aspirations are reflected  
10 in the City’s planning program while recognizing the rights of individuals  
11 to use and develop private property in a manner that is consistent with  
12 City regulations. Private property shall not be taken for public use without  
13 just compensation having been made. The property rights of landowners  
14 shall be protected from arbitrary and discriminatory actions.  
15

16  
17 *Comprehensive Plan Vision Statement.*  
18

19 The City should “preserve its pastoral heritage” and should “preserve the distinctive  
20 qualities of its harbors and small communities. New development should be compatible  
21 with the natural landscape.” City Response at 49.  
22

23 *Comprehensive Plan Land Use Element, Environment, Comp. Plan, p. 84-86.*  
24

25 Goal 1. Preserve and enhance Bainbridge Island’s natural systems, natural  
26 beauty, and environmental quality.  
27

28 Goal 3. Protect and enhance wildlife and natural ecosystems on  
29 Bainbridge Island.  
30

31 *Comprehensive Plan Land Use Element, Aquatic Resources, Comp. Plan, p. 87.*  
32

33 Goal 1. Preserve and protect the Island’s remaining aquatic resources’  
34 functions and values.  
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**A-4**

Court of Appeals reviews agency decision based on record of agency, rather than that of trial court. *Jefferson County v. Seattle Yacht Club* (1994) 73 Wash.App. 576, 870 P.2d 987, review denied 124 Wash.2d 1029, 883 P.2d 326. Administrative Law And Procedure ⇨ 676

Appellate court reviews adjudicative administrative actions on administrative, not superior court, record; if, however, superior court takes additional evidence or examines issue not raised before agency, appellate court may look to superior court record for information needed for review. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n* (1994) 123 Wash.2d 621, 869 P.2d 1034, reconsideration denied. Administrative Law And Procedure ⇨ 676

Proper judicial review in a zoning adjustment case is possible only where the reviewing court can consider the full and complete record of the administrative tribunal. *Murphy v. City of Seattle* (1982) 32 Wash.App. 386, 647 P.2d 540. Zoning And Planning ⇨ 574

Judicial review of an administrative decision revoking a nursing home license and medicare certification is to be confined to the record unless there are allegations of irregularities in the procedure before the agency. *Valley View Convalescent Home v. Department of Social & Health Services* (1979) 24 Wash.App. 192, 599 P.2d 1313, review denied. Health ⇨ 276; Health ⇨ 507; Health ⇨ 566

#### 2. Issues not addressed below

Reviewing court cannot pass upon issues not actually decided by administrative agency. *Chaussee v. Snohomish County Council* (1984) 38 Wash.App. 630, 689 P.2d 1084. Administrative Law And Procedure ⇨ 669.1

Generally, administrative law judge's decision on an issue will not be upheld on review if issue was not raised in the amended complaint, in briefs, or in oral argument, and no evidence was presented concerning such issue. *International Ass'n of Firefighters, Local No. 469 v. Public Employment Relations Com'n of State of Wash.* (1984) 38 Wash.App.

## ADMINISTRATIVE LAW

572, 686 P.2d 1122, review denied. Administrative Law And Procedure ⇨ 751

#### 3. Agency's record

On appeal involving determination by State Board of Pharmacy, appellate court reviews findings of Board, not findings of trial court. *In re Farina* (1999) 94 Wash.App. 441, 972 P.2d 531, amended on reconsideration. Health ⇨ 158

Trial court did not abuse its discretion in admitting evidence not presented to homeowners' association's board in reviewing board's decision rejecting lot owners' plan to construct new dwelling, particularly as homeowners were not government and, thus, proceedings before board did not constitute administrative record and provision of Administrative Procedure Act (APA) restricting review of agency decisions to agency record did not apply. *Riss v. Angel* (1996) 80 Wash.App. 553, 912 P.2d 1028, amended, review granted 129 Wash.2d 1019, 919 P.2d 599, affirmed and remanded 131 Wash.2d 612, 934 P.2d 669. Administrative Law And Procedure ⇨ 5; Associations ⇨ 20(5)

Judicial review of agency's decision involves review of the record of the agency, not the trial court record. *Batchilder v. City of Seattle* (1995) 77 Wash.App. 154, 890 P.2d 25, reconsideration denied, review denied 127 Wash.2d 1022, 904 P.2d 1157. Administrative Law And Procedure ⇨ 683

#### 4. Evidence

Substantial evidence supported finding by Department of Labor and Industries that employer's president maintained records on personal calendar of hours worked and identity of job for time spent performing roofing and that he generally left calendar blank with respect to time spent performing administrative duties, for purpose of assessment of industrial insurance premiums against employer; calendar contained entries for individual roofing jobs and hours spent on job but was largely devoid of reference to office hours and contained numerous blank pages, and president admitted that he entered only billable

## ADMINISTRATIVE PROCEDURE ACT

hours in calendar. *Maplewood Esstate, Inc. v. Department of Labor and Industries* (2000) 104 Wash.App. 299,

### 34.05.562. New evidence taken by court or agency

(1) The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
  - (b) Unlawfulness of procedure or of decision-making process; or
  - (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.
- (2) The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, if:

(a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;

(b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;

(c) The agency improperly excluded or omitted evidence from the record; or

(d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

[1988 c 288 § 514.]

### Historical and Statutory Notes

#### Uniform Law:

This section is similar to § 5-114 of the Model State Administrative Procedure Act (1981). See 15 Uniform Laws Annotated, Master Edition, or ULA Database on Westlaw.

## Library References

Administrative Law and Procedure  
 676, 746.  
 Westlaw Topic No. 15A.  
 C.J.S. Public Administrative Law And  
 Procedure §§ 197, 198, 218, 219.

## Notes of Decisions

- In general** 1  
**Discretion of court** 5  
**Incomplete record** 2  
**Newly discovered evidence** 3  
**Supplementation of record** 4

## 1. In general

The validity of a rule is determined as of the time the agency took the action adopting the rule. *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n* (2003) 64 P.3d 606.

Unless superior court takes new evidence on judicial review of agency decision, its findings are not relevant on further appellate review. *Postema v. Pollution Control Hearings Bd.* (2000) 142 Wash.2d 68, 11 P.3d 726. *Administrative Law And Procedure* 683

Court of Appeals would review, on superior court record, Department of Fish and Wildlife's decision not to open nontreaty spawn-on-kelp herring fisheries for the season, as there was no Department record, the matter was tried on affidavits in superior court, and superior court took additional evidence and/or examined an issued not raised before the Department. *Purse Seine Vessel Owners Ass'n v. State* (1998) 92 Wash.App. 381, 966 P.2d 928, review denied 137 Wash.2d 1030, 980 P.2d 1284. *Fish* 12

Generally, trial court's findings are not relevant in appellate review of agency action; however, where trial court takes additional evidence appellate court will look to trial court record. *Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council* (1996) 129 Wash.2d 787, 920 P.2d 581, reconsideration denied, certiorari denied 117 S.Ct. 1693, 520 U.S. 1210, 137 L.Ed.2d 820. *Administrative Law And Procedure* 682

## 2. Incomplete record

Presentation of additional evidence at court level is not permitted in judicial review of agency decision where it is only asserted that record is incomplete. *Lewis County v. Public Employment Relations Commission* (1982) 31 Wash.App. 853, 644 P.2d 1231, review denied. *Administrative Law And Procedure* 746

Presentation of additional evidence is not permitted in judicial review of highway commission's findings and order establishing highway plan for state route where aggrieved party asserts only that record is "incomplete" rather than alleging procedural irregularities not shown in record. *Ault v. Washington State Highway Commission* (1969) 77 Wash.2d 376, 462 P.2d 546.

## 3. Newly discovered evidence

Neither opinion of prosecutor who concluded that unemployment compensation claimant could not be successfully prosecuted for criminal assault that caused her discharge nor report of Judicial Conduct Commission which concluded that her employer had shown lack of impartiality regarding personnel and made derogatory remarks about them was not newly discovered evidence to require remand of decision denying benefits, where there was no showing that prosecutor's opinion was based on any evidentiary facts which were not presented to administrative law judge (ALJ), and commission report would be cumulative to evidence of deteriorating relationship that ALJ considered. *Keenan v. State Employment Sec. Dept.* (1996) 81 Wash.App. 391, 914 P.2d 1191. *Social Security And Public Welfare* 682

Remand for consideration of additional evidence is permitted if new evidence is available which relates to validity of agency action and could not reasonably have been discovered until

after agency action, and remand will serve interest of justice. *Keenan v. State Employment Sec. Dept.* (1996) 81 Wash.App. 391, 914 P.2d 1191. *Administrative Law And Procedure* 817.1

## 4. Supplementation of record

In unemployment compensation appeal, claimant was not entitled to supplement agency record with transcripts of two prior administrative hearings; proceeding involved whether claimant purged disqualification to receive unemployment compensation benefits, and two prior hearings involved entirely separate claims for benefits. *Okamoto v. State of Washington Employment Sec. Dept.* (2001) 107 Wash.App. 490, 27 P.3d 1203, review denied 145 Wash.2d 1022, 41 P.3d 482. *Social Security And Public Welfare* 650

Court of Appeals would strike affidavit submitted by law student to supplement record of his appeal from dismissal of his action for judicial review of state university administrative policy, where contents of affidavit reiterated those of agency record. *Hunter v. University of Washington* (2000) 101 Wash.App. 283, 2 P.3d 1022, review denied 142 Wash.2d 1021, 16 P.3d 1263. *Colleges And Universities* 10

Court of Appeals would accept affidavit submitted by state university to sup-

plement record of law student's appeal from dismissal of his action for judicial review of university administrative policy, where affidavit was offered to establish university official's authority to take challenged action. *Hunter v. University of Washington* (2000) 101 Wash.App. 283, 2 P.3d 1022, review denied 142 Wash.2d 1021, 16 P.3d 1263. *Colleges And Universities* 10

## 5. Discretion of court

The trial court did not abuse its discretion in refusing to allow additional discovery and quashing subpoena of independent telephone association that was challenging utilities and transportation commission decision designating wireless carrier as an additional "eligible telecommunications carrier" in rural service areas previously served exclusively by association members, where actions by commission were discretionary and court acted to limit evidence to agency record as provided by the Administrative Procedure Act (APA). *Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n* (2002) 110 Wash.App. 498, 41 P.3d 1212, review granted 147 Wash.2d 1008, 56 P.3d 566, affirmed 65 P.3d 319. *Telecommunications* 461.5

## 34.05.566. Agency record for review—Costs

(1) Within thirty days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action. The record shall consist of any agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material described in this chapter as the agency record for the type of agency action at issue, subject to the provisions of this section.

(2) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (4) of this section.

**34.05.550. Stay and other temporary remedies****Research References****Treatises and Practice Aids**

24 Wash. Prac. Series § 25.27, The Petition for Review.

**34.05.554. Limitation on new issues****Research References****ALR Library**

132 ALR 738, Assumption of Jurisdiction by Court Before Completion of Administrative Procedure as Ground of Prohibition.  
62 ALR 1011, Facts Warranting Extension or Reduction of Municipal Boundaries.

**Treatises and Practice Aids**

24 Wash. Prac. Series § 25.28, The Record on Review.  
26 Wash. Prac. Series § 7.72, Initial Administrative Hearing.

**Notes of Decisions**

**1. In general**  
Judicial review of a final decision of an administrative agency is limited by the provisions of the Administrative Procedure Act (APA). *Lang v. Washington State Dept. of Health* (2007) 138 Wash. App. 235, 156 P.3d 919. Administrative Law And Procedure ⇨ 751

The Administrative Procedure Act allows new issues during the review of an order if (1) the person did not know, and was under no duty to discover, facts giving rise to the issue, or (2) the person was not notified of the administrative proceeding. *Motley-Motley, Inc. v. State* (2005) 127 Wash. App. 62, 110 P.3d 812, review denied 156 Wash.2d 1004, 128 P.3d 1239. Administrative Law And Procedure ⇨ 669.1

Therapist who provided counseling services under Crime Victims Compensation Act to sister of homicide victim for immediate, near-term consequences of the homicide, could not raise, for the first time on appeal, the argument that Department of Labor and Industries engaged in unlawful rulemaking when it established policy defining "immediate" as within one year, raising new issues for the first time on appeal was proscribed by statute. Department of Labor and Industries of State of Wash. v. Gongyin (2008) 119 Wash. App. 188, 79 P.3d 488, review granted 151 Wash.2d 1082, 95 P.3d 351, reversed 154 Wash.2d 38, 109 P.3d 816. Criminal Law ⇨ 1220

**3. Preservation of error**  
When reviewing an administrative decision, the trial court acts in a limited, appellate capacity. *Mader v. Health Care*

ignations for first time on judicial review of Western Washington Growth Management Hearings Board's decision regarding challenge, by advocacy group for responsible growth management, to county's periodic review under Growth Management Act (GMA) of county's comprehensive land use plan, and thus, Administrative Procedure Act (APA) did not preclude judicial consideration of those issues; while landowner, as intervenor on side of county in Board proceedings, had not raised the issues before the Board and while county was not seeking judicial review of Board's decision, the issues were developed by county's briefing and arguments in Board proceedings, which had been formally and explicitly adopted by landowner in the

Board proceedings. *Gold Star Resorts, Inc. v. Futurewise* (2007) 2007 WL 2412217.

On appeal from decision of growth management hearings board, invalidating portions of county's comprehensive plan and development regulations, county failed to preserve for appellate review its contention that the board erred by using land figures from the year 2000 to calculate projected growth over period from 2005 to 2025, where county failed to raise the issue before the board. *Thurston County v. Western Washington Growth Management Hearings Bd.* (2007) 137 Wash. App. 781, 154 P.3d 959. Zoning And Planning ⇨ 572

**34.05.558. Judicial review of facts confined to record****Research References**

26 Wash. Prac. Series § 7.72, Initial Administrative Hearing.

**Treatises and Practice Aids**

24 Wash. Prac. Series § 25.28, The Record on Review.

**Notes of Decisions****1. In general**

An appellate court reviews decisions of the growth management hearings board under the Administrative Procedure Act (APA), which calls for a review of the record created before the board, not the decision of the superior court. *Low Income Housing Institute v. City of Lakewood* (2008) 119 Wash. App. 110, 77 P.3d 653. Zoning And Planning ⇨ 745.1

**3. Agency's record**

On review of an administrative decision, the trial court has the discretion to limit its review to the administrative record before it. *Gasper v. Department of Social and Health Services* (2006) 132 Wash. App. 42, 129 P.3d 849, review granted 157 Wash.2d 1017, 143 P.3d 598, affirmed in

part, reversed in part 160 Wash.2d 287, 157 P.3d 388. Administrative Law And Procedure ⇨ 676

The party challenging an agency's action must prove the decision's invalidity, and review by Court of Appeals is limited to the agency record, but it could consider evidence before the superior court, if the superior court reviewed additional evidence outside the administrative record. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council* (2006) 131 Wash. App. 862, 129 P.3d 838, as amended. Administrative Law And Procedure ⇨ 676; Administrative Law And Procedure ⇨ 682; Administrative Law And Procedure ⇨ 750

**34.05.562. New evidence taken by court or agency****Research References**

24 Wash. Prac. Series § 25.28, The Record on Review.

**Treatises and Practice Aids**

Administrative Law and Practice § 8.27, Record for Review.

**Notes of Decisions****1. In general**

Superior Court abused its discretion by admitting new evidence regarding relinquishment of property owner's water

right, after Pollution Control Hearings Board (PCHB) had issued final order affirming Department of Ecology's tentative

order that the water right had been relinquished; new evidence was not admissible under the Administrative Procedure Act, inasmuch as new evidence was available at time of PCHB hearing, and allowing evidence essentially permitted property owner to retry its case, and superior court had no authority to admit new evidence under theory of equitable estoppel. *Motley-Motley, Inc. v. State* (2005) 127 Wash.App. 62, 110 P.3d 812, review denied 156 Wash.2d 1004, 128 P.3d 1239. *Waters And Water Courses* ⇨ 151

In appealing to superior court, advocates of affordable housing were not entitled to supplement the administrative record in regard to approval of city's comprehensive plan with determination of nonsignificance (DNS); DNS would be created during development regulations process, and thus, was irrelevant to ruling on comprehensive plan. *Low Income Housing Institute v. City of Lakewood* (2008) 119 Wash.App. 110, 77 P.3d 653. *Zoning And Planning* ⇨ 574

Generally, trial court's findings are not relevant in appellate review of agency action; however, where trial court takes additional evidence appellate court will look to trial court record. *Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council* (1996) 129 Wash.2d 787, 920 P.2d 581, reconsideration denied, certiorari denied 117 S.Ct. 1698, 520 U.S. 1210, 137 L.Ed.2d 820. *Administrative Law And Procedure* ⇨ 682

### 34.05.566. Agency record for review—Costs

#### Research References

#### Treatises and Practice Aids

24 Wash. Prac. Series § 25.28, *The Record on Review*.

#### Notes of Decisions

**1. In general**  
Trial court that reviewed decision by regional educational service district committee approving a transfer of territory from one school district to another, and decision by Board of Education approving committee's decision, did not abuse its discretion by denying request by school district that was losing territory for discovery as to alleged violations of the Open Public Meetings Law, and racial and socioeconomic isolation of the district; dis-

### 2. Incomplete record

Trial court properly refused to consider additional declarations, which were not part of administrative record, in judicial challenge to decision of Utilities and Transportation Commission (UTC) allowing utilities which were operating on reservation to pass on cost of fee exacted by Tribal Council to all ratepayers within the reservation, as new evidence was material to determination whether fee was valid, and UTC lacked authority to make such determination. *Willman v. Washington Utilities and Transp. Com'n* (2004) 122 Wash.App. 194, 93 P.3d 909, review granted 153 Wash.2d 1031, 110 P.3d 757, affirmed 154 Wash.2d 801, 117 P.3d 343. *Public Utilities* ⇨ 193

### 5. Discretion of court

Superior Court abused its discretion by admitting new evidence regarding relinquishment of property owner's water right, after Pollution Control Hearings Board (PCHB) had issued final order affirming Department of Ecology's tentative order that the water right had been relinquished; new evidence was not admissible under the Administrative Procedure Act, inasmuch as new evidence was available at time of PCHB hearing, and allowing evidence essentially permitted property owner to retry its case, and superior court had no authority to admit new evidence under theory of equitable estoppel. *Motley-Motley, Inc. v. State* (2005) 127 Wash.App. 62, 110 P.3d 812, review denied 156 Wash.2d 1004, 128 P.3d 1239. *Waters And Water Courses* ⇨ 151

tribut made no offer of proof as to what information it hoped to add to the record, and provided no reason for trial court to depart from the standard practice of reviewing only the administrative record. *Clover Park School Dist. No. 400 v. Washington State Bd. of Educ.* (2006) 131 Wash.App. 1046, Unreported, review denied 158 Wash.2d 1016, 149 P.3d 377, certiorari denied 127 S.Ct. 2255, 167 L.Ed.2d 1091. *Schools* ⇨ 39

### 34.05.570. Judicial review

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record

**A-5**

order that the water right had been relinquished; new evidence was not admissible under the Administrative Procedure Act, inasmuch as new evidence was available at time of PCHB hearing, and allowing evidence essentially permitted property owner to retry its case, and superior court had no authority to admit new evidence under theory of equitable estoppel. *Motley-Motley, Inc. v. State* (2005) 127 Wash.App. 62, 110 P.3d 812, review denied 156 Wash.2d 1004, 128 P.3d 1239. *Waters And Water Courses* ⇨ 151

In appealing to superior court, advocates of affordable housing were not entitled to supplement the administrative record in regard to approval of city's comprehensive plan with determination of nonsignificance (DNS); DNS would be created during development regulations process, and thus, was irrelevant to ruling on comprehensive plan. *Low Income Housing Institute v. City of Lakewood* (2003) 119 Wash.App. 110, 77 P.3d 653. *Zoning And Planning* ⇨ 574

Generally, trial court's findings are not relevant in appellate review of agency action; however, where trial court takes additional evidence appellate court will look to trial court record. *Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council* (1996) 129 Wash.2d 787, 920 P.2d 581, reconsideration denied, certiorari denied 117 S.Ct. 1693, 520 U.S. 1210, 137 L.Ed.2d 820. *Administrative Law And Procedure* ⇨ 682

### 34.05.566. Agency record for review—Costs

#### Research References

#### Treatises and Practice Aids

24 Wash. Prac. Series § 25.28, *The Record on Review*.

#### Notes of Decisions

**1. In general**  
Trial court that reviewed decision by regional educational service district committee approving a transfer of territory from one school district to another, and decision by Board of Education approving committee's decision, did not abuse its discretion by denying request by school district that was losing territory for discovery as to alleged violations of the Open Public Meetings Law, and racial and socioeconomic isolation of the district; dis-

### 2. Incomplete record

Trial court properly refused to consider additional declarations, which were not part of administrative record, in judicial challenge to decision of Utilities and Transportation Commission (UTC) allowing utilities which were operating on reservation to pass on cost of fee exacted by Tribal Council to all ratepayers within the reservation, as new evidence was material to determination whether fee was valid, and UTC lacked authority to make such determination. *Willman v. Washington Utilities and Transp. Com'n* (2004) 122 Wash.App. 194, 93 P.3d 909, review granted 153 Wash.2d 1031, 110 P.3d 757, affirmed 154 Wash.2d 801, 117 P.3d 343. *Public Utilities* ⇨ 193

### 5. Discretion of court

Superior Court abused its discretion by admitting new evidence regarding relinquishment of property owner's water right, after Pollution Control Hearings Board (PCHB) had issued final order affirming Department of Ecology's tentative order that the water right had been relinquished; new evidence was not admissible under the Administrative Procedure Act, inasmuch as new evidence was available at time of PCHB hearing, and allowing evidence essentially permitted property owner to retry its case, and superior court had no authority to admit new evidence under theory of equitable estoppel. *Motley-Motley, Inc. v. State* (2005) 127 Wash.App. 62, 110 P.3d 812, review denied 156 Wash.2d 1004, 128 P.3d 1239. *Waters And Water Courses* ⇨ 151

### 34.05.570. Judicial review

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record

for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency; (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1, eff. June 10, 2004; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

### Historical and Statutory Notes

the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner.

The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question."

### 2004 Legislation

Laws 2004, ch. 30, § 1 rewrote subsec.

(2)(b), which formerly read:

"(b) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that

### Research References

**ALR Library**  
132 ALR 738, Assumption of Jurisdiction by Court Before Completion of Administrative Procedure as Ground of Prohibition.  
17 ALR 523, Validity and Effect of Statute or Ordinance Relating to Location of Hospital, Sanitarium, or the Like.

1C Wash. Prac. Series § 91.75, Pollution Control Hearings Board—Appeal from Decisions.

14 Wash. Prac. Series § 6.14, Other Special Actions or Proceedings.

15 Wash. Prac. Series § 42.10, Availability of Other Remedies, Effect—Review of Administrative Agencies.

2A Wash. Prac. Series RAP 2.5, Circumstances Which May Affect Scope of Review.

23 Wash. Prac. Series § 7.45, The Variability Issue/The Upset Defense.

24 Wash. Prac. Series § 18.42, Appeals to Growth Management Hearings Boards.

24 Wash. Prac. Series § 25.25, Post-Hearing Procedures.

24 Wash. Prac. Series § 25.27, The Petition for Review.

24 Wash. Prac. Series § 25.28, The Record on Review.

24 Wash. Prac. Series § 25.31, The Standard of Review.

24 Wash. Prac. Series § 25.32, Relief from Agency Action.

15A Wash. Prac. Series § 13.13, Other Special Actions or Proceedings.

### Notes of Decisions

or has failed to follow a prescribed procedure. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council* (2006) 131 Wash.App. 862, 129 P.3d 838, as amended. Administrative Law And Procedure ¶ 799

Under statute governing judicial review of an agency order, Court of Appeals may grant relief only if the party challenging the agency order shows that the order is invalid for one of the reasons specifically set forth in the statute. *Blueshield v. State Office of Ins. Com'r* (2006) 131 Wash.App. 639, 128 P.3d 640. Administrative Law And Procedure ¶ 741

The Administrative Procedure Act (APA) governs judicial review of challenges to actions of growth management hearings board. *Quadrant Corp. v. State Growth Management Hearings Bd.* (2005) 154 Wash.2d 224, 110 P.3d 1132. Zoning And Planning ¶ 561

A petitioner may challenge an agency's decision only if such a decision is (1) unconstitutional; (2) outside the statutory or legal authority of the agency, (3) arbitrary or capricious, or (4) taken by persons not authorized to take the action. *Willman v. Washington Utilities and Transp. Com'n* (2005) 154 Wash.2d 801, 117 P.3d 843.

### Reasons for decision 50.5

#### I. Construction and application

The Administrative Procedure Act (APA) standards apply in reviewing an administrative board decision. *Kitsap County v. Central Puget Sound Growth Management Hearings Bd.* (2007) 158 P.3d 638, clarified on denial of reconsideration. Administrative Law And Procedure ¶ 657.1

On judicial review of Pollution Control Hearings Board (PCHB) orders, the Court of Appeals sits in the same position as the superior court and reviews the Board's decision by applying the applicable standards of review directly to the agency record. *Fort v. State, Dept. of Ecology* (2006) 133 Wash.App. 90, 135 P.3d 515. Environmental Law ¶ 708

When the agency gives the person disciplined ample opportunity to be heard, exercised honestly and upon due consideration, it has not acted arbitrarily or capriciously. *Johnson v. Washington State Dept. of Health* (2006) 133 Wash.App. 403, 136 P.3d 760. Licenses ¶ 38

Court of Appeals may grant judicial relief when an agency has engaged in unlawful procedure or decision-making process.

Administrative Law And Procedure ⇨ 741

Task of Supreme Court is the same as a superior court's task when reviewing an agency decision under the Administrative Procedure Act. *Schrom v. Board For Volunteer Fire Fighters* (2004) 153 Wash.2d 19, 100 P.3d 814. Administrative Law And Procedure ⇨ 683

On review of administrative decision, the Court of Appeals applies the standards of the Administrative Procedures Act (APA) directly to the agency record, sitting in the same position as the superior court. *Timberlane Mobile Home Park v. Washington State Human Rights Com'n* (2004) 122 Wash.App. 896, 95 P.3d 1288. Administrative Law And Procedure ⇨ 683

An appellate court reviewing an action of an administrative agency sits in the same position as the superior court, applying the standards of the Administrative Procedure Act (APA) directly to the record before the agency. *Willman v. Washington Utilities and Transp. Com'n* (2004) 122 Wash.App. 194, 93 P.3d 909, review granted 153 Wash.2d 1031, 110 P.3d 757, affirmed 154 Wash.2d 801, 117 P.3d 343. Administrative Law And Procedure ⇨ 683

On appeal from superior court review of a decision by the growth management hearings board, the Court of Appeals bases its review on the record before the board, and sits in the same position as the superior court. *Whidbey Environmental Action Network v. Island County* (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ⇨ 745.1

Under administrative preclusion doctrine, final unreviewed administrative decision of the Washington State Department of Agriculture (WSDA) rejecting plaintiffs' claims precluded plaintiffs' separate suit against the WSDA seeking damages and declaratory relief for constitutional violations; plaintiffs had a full and fair opportunity to litigate constitutional claims within the administrative process or upon judicial review to Washington state courts. *Brody v. Washington State Dept. of Agriculture, C.A.9* (Wash.) 2005, 127 Fed.Appx. 928, 2005 WL 767454, Unreported. Administrative Law And Procedure ⇨ 501; Agriculture ⇨ 2

## 5. Jurisdiction

Forest Practices Appeals Board (FPAB) did not have jurisdiction to hear claim by conservation groups that state Department of Natural Resources (DNR) failed to comply with federal and state clean water acts when approving timber company's watershed analysis (WSA) for timber harvesting plan; challenge to validity of Forest Practice Rules determining water quality standards must be brought as petition for declaratory judgment in Thurston County Superior Court. *Kettle Range Conservation Group v. Washington Dept. of Natural Resources* (2003) 120 Wash.App. 434, 85 P.3d 894, amended on reconsideration, review denied 152 Wash.2d 1026, 101 P.3d 421. Declaratory Judgment ⇨ 204; Environmental Law ⇨ 222

## 6. Rules—In general

In a proceeding involving review of an administrative rule, the court shall declare the rule invalid only if it finds that the rule violates constitutional provisions, the agency, the rule was adopted without compliance with statutory rule-making procedures, or the rule is arbitrary and capricious. *Gasper v. Department of Social and Health Services* (2006) 132 Wash.App. 42, 129 P.3d 849, review granted 157 Wash.2d 1017, 143 P.3d 598, affirmed in part, reversed in part 160 Wash.2d 287, 157 P.3d 388. Administrative Law And Procedure ⇨ 390.1

## 7. — Constitutionality, rules

In reviewing an agency rule, the appellate court will hold the rule invalid only if: (1) the rule violates constitutional provisions; (2) the rule exceeds the agency's statutory authority; (3) the agency adopted the rule without compliance with statutory rule-making procedures; or (4) the rule is arbitrary and capricious. *Tesoro Refining and Marketing Co. v. State, Dept. of Revenue* (2006) 135 Wash.App. 411, 144 P.3d 368. Administrative Law And Procedure ⇨ 741

## 8. — Authority of agency, rules

An agency's rule that conflicts with a statute is beyond that agency's authority and requires invalidation of the rule. *Edelman v. State ex. rel. Public Disclosure Com'n* (2003) 116 Wash.App. 876, 68 P.3d 296, review granted 150 Wash.2d 1025, 82 P.3d 242, affirmed 152 Wash.2d 584, 99 P.3d 386. Administrative Law And Procedure ⇨ 390.1

## 11. — Standard of review, orders

In reviewing final administrative order, when facts are undisputed, Court of Appeals reviews conclusions of law *de novo*; however, Court accords substantial weight to legal interpretation of agency acting within realm of its expertise. *Vance v. Department of Retirement Systems* (2002) 114 Wash.App. 572, 59 P.3d 130, review denied 149 Wash.2d 1028, 78 P.3d 657. Administrative Law And Procedure ⇨ 796

In reviewing the administrative order, the Court of Appeals is in the same position as the superior court, applying the Administrative Procedure Act (APA) standards to the administrative record before the agency. *Herbert v. Washington State Public Disclosure Com'n* (2006) 136 Wash.App. 249, 148 P.3d 1102. Administrative Law And Procedure ⇨ 683

The appellate court reviews final agency orders under the Administrative Procedure Act (APA), standing in the shoes of the superior court and applying the APA's standards governing judicial review directly to the agency record. *Musselman v. Department of Social and Health Services* (2006) 132 Wash.App. 841, 134 P.3d 248. Administrative Law And Procedure ⇨ 683

## 12. — Authority of agency, orders

Appellate court can reverse an arbitrary or capricious agency order, which is a willful and unreasoning action, taken without consideration and in disregard of facts and circumstances. *Johnson v. Washington State Dept. of Health* (2006) 133 Wash.App. 403, 136 P.3d 760. Administrative Law And Procedure ⇨ 763

## 15. — Arbitrary or capricious action, orders

The Washington State Apprenticeship and Training Council's order limiting a union affiliated apprenticeship sponsors' discovery of, and cross-examination on, competing non-union Construction Industry Training Council's (CITC) information demonstrating need for a program to expand the geographic area in which it provides plumber apprenticeship training, was arbitrary and capricious and denied the sponsors a fair and full hearing on the proposed amendments to the existing standards; it did not allow the sponsors to argue that geographic expansion necessarily triggers consideration of demonstrated need within the expanded area and, as such, an expansion constitutes an amendment to program standards that the sponsors

sors should have been allowed to address. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council* (2006) 131 Wash.App. 862, 129 P.3d 838, as amended. Labor And Employment ⇨ 925

Court can reverse agency order if order is arbitrary or capricious; harshness is not test for arbitrary and capricious action. *Heimiller v. Department of Health* (1995) 127 Wash.2d 595, 903 P.2d 433, reconsideration denied, amended 909 P.2d 1294, certiorari denied 116 S.Ct. 2526, 518 U.S. 1006, 135 L.Ed.2d 1051. Administrative Law And Procedure ⇨ 763

## 16. Other actions—In general

Water diverter who was authorized to divert water from creek for class 1, 8, and 9 water rights was not entitled to withdraw class 8 and 9 water after State Department of Ecology ordered all rights junior to class 5 to be shut off based on insufficient water; although water diverter asserted that, based on his position on the creek, he could withdraw class 8 and 9 water without interfering with the rights of superior classes, diverters were enjoined from interfering with other diverters in the order of their respective priorities. *Fort v. State, Dept. of Ecology* (2006) 133 Wash.App. 90, 135 P.3d 515. Waters And Water Courses ⇨ 140

## 19. — Environmental impact statements, other actions

Threshold determinations and decisions regarding whether a supplemental environmental impact statement (EIS) is required under State Environmental Policy Act (SEPA) involve the application of law to facts and are reviewed under the "clearly erroneous" standard. *Glasser v. City of Seattle* (2007) 162 P.3d 1134. Environmental Law ⇨ 689

## 24. — Licenses, other actions

Presiding officer of Dental Quality Assurance Commission and Medical Quality Assurance Commission did not violate dentists' due process rights when he evaluated evidence against them in disciplinary proceedings under both clear and convincing and preponderance of evidence standards; presiding officer ultimately found the violations were supported by clear and convincing evidence, and dentists failed to show how they were prejudiced, given that they admitted employing unlicensed surgical assistant who started intravenous (IV) lines and administered general anesthetic. *Lang v. Washington*

State Dept. of Health (2007) 138 Wash. App. 235, 156 P.3d 919. Health  $\Rightarrow$  218

30. — Unemployment compensation, other actions

The appellate court determines whether challenged findings of fact by the commissioner of the Employment Security Department (ESD) are supported by substantial evidence, i.e., evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises, applying a presumption that the findings are prima facie correct, which presumption must be rebutted by the challenger; findings that are not properly challenged are treated as verities. *Dela-grave v. Employment Sec. Dept. of State of Wash.* (2005) 127 Wash.App. 596, 111 P.3d 879, reconsideration denied. Unemployment Compensation  $\Rightarrow$  456; Unemployment Compensation  $\Rightarrow$  478; Unemployment Compensation  $\Rightarrow$  486

Court of Appeals would decline to consider whether commercial truck driver, who was terminated after he lost his commercial driver's license following his commission of two serious traffic offenses, engaged in misconduct which precluded him from obtaining unemployment benefits; issue was not the basis for lower court decision affirming the denial of benefits, and scope of review was governed by the Administrative Procedure Act (APA), which did not allow a court sitting in review to affirm on any ground. *Bauer v. State Employment Sec. Dept.* (2005) 126 Wash.App. 468, 108 P.3d 1240, reconsideration denied. Unemployment Compensation  $\Rightarrow$  456

### 32. — Zoning and planning, other actions

On appeal to the Court of Appeals from a decision of the Superior Court reviewing a decision by the Growth Management Hearings Board under the Growth Management Act (GMA), the Court of Appeals applies the standards of the Administrative Procedure Act (APA) directly to the record before the Board, sitting in the same position as the Superior Court. *Gold Star Resorts, Inc. v. Futurewise* (2007) 2007 WL 2412217. Zoning And Planning  $\Rightarrow$  745.1

Under the Growth Management Act (GMA), the test for existence of a variety of rural densities and uses is whether county's rural element provided for such densities and uses; county's proposed "significant blocks" test was not consistent with this approach. *Whidbey Environ-*

## ADMINISTRATIVE LAW

mental Action Network v. Island County (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning  $\Rightarrow$  76

Although the Administrative Procedure Act (APA) requires the Court of Appeals to give substantial weight to an agency's interpretation, the Growth Management Act (GMA) requires that it give even greater deference to county planning actions that are consistent with the GMA's goals and requirements; thus, under the APA the Court need not give deference to a board's ruling that fails to apply the more deferential standard of review to county actions. *Kitsap County v. Central Puget Sound Growth Management Hearings Bd.* (2007) 158 P.3d 638, clarified on denial of reconsideration. Zoning And Planning  $\Rightarrow$  605

Property owner whose rezone request was denied by county could argue on appeal that county's comprehensive land use plans and development regulations constituted a regulatory taking and violated its substantive due process rights, notwithstanding that owner failed to raise such claims before the county board of commissioners; owner was expressly allowed by statute to bring constitutional takings and substantive due process claims in its Land Use Petition Act (LUPA) petition, and reviewing courts may grant relief from an adjudicative agency ruling if it determines that the statute or rule on which the decision was based is in violation of constitutional provisions either on its face or as applied. *Peste v. Mason County* (2006) 133 Wash.App. 456, 136 P.3d 140, review denied 159 Wash.2d 1013, 154 P.3d 919. Zoning And Planning  $\Rightarrow$  572

Environmental action network failed to make a showing of prejudice, and was therefore not entitled to reversal of a decision by growth management hearings board as to whether county complied with Growth Management Act, with regard to network's claim that superior court failed to review the whole record before rendering its decision, where the Court of Appeals reviewed the entire record of the board. *Whidbey Environmental Action Network v. Island County* (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning  $\Rightarrow$  748

## ADMINISTRATIVE LAW

Environmental action network failed to make a showing of prejudice, and was therefore not entitled to reversal on appeal from superior court review of a decision by growth management hearings board as to whether county complied with Growth Management Act, with regard to network's claim that superior court exceeded the proper scope of review under the Administrative Procedure Act by finding compliance on matters solely within board's discretion, where superior court remanded the case to the board for further proceedings. *Whidbey Environmental Action Network v. Island County* (2004) 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning  $\Rightarrow$  748

### 33. Scope of review

On review of an agency order, the Court of Appeals stands in the shoes of the superior court and applies the statutory standards for judicial review directly to the agency record. *Hahn v. Department of Retirement Systems of State of Washington* (2007) 137 Wash.App. 933, 155 P.3d 177. Administrative Law And Procedure  $\Rightarrow$  683

When reviewing an administrative decision, courts act in a limited appellate capacity and will reverse an administrative decision only if it (1) was based on an error of law, (2) is not supported by substantial evidence, or (3) is arbitrary or capricious. *Netversant Wireless Systems v. Washington State Dept. of Labor & Industries* (2006) 133 Wash.App. 813, 138 P.3d 161. Administrative Law And Procedure  $\Rightarrow$  763; Administrative Law And Procedure  $\Rightarrow$  791; Administrative Law And Procedure  $\Rightarrow$  796

The party challenging an agency's action must prove the decision's invalidity, and review by Court of Appeals is limited to the agency record, but it could consider evidence before the superior court, if the superior court reviewed additional evidence outside the administrative record. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council* (2006) 131 Wash.App. 862, 129 P.3d 838, as amended. Administrative Law And Procedure  $\Rightarrow$  676; Administrative Law And Procedure  $\Rightarrow$  682; Administrative Law And Procedure  $\Rightarrow$  750

In reviewing an administrative action, Court of Appeals sits in the same position as the trial court and applies the Administrative Procedure Act (APA) standards directly to the agency's administrative rec-

ord, and reviews findings of fact for substantial evidence in light of the whole record, and reviews questions of law de novo. *Satterlee v. State, Dept. of Social and Health Services* (2006) 131 Wash.App. 97, 125 P.3d 1003. Administrative Law And Procedure  $\Rightarrow$  683

The party challenging an agency's action must prove the decision's invalidity and judicial review is limited to the record before the agency, and court may grant relief to the petitioner if an agency erroneously interpreted the law or if an agency's decision is arbitrary or capricious. *Western Washington Operating Engineers Apprenticeship Committee v. Washington State Apprenticeship and Training Council* (2005) 130 Wash.App. 510, 123 P.3d 533. Administrative Law And Procedure  $\Rightarrow$  676; Administrative Law And Procedure  $\Rightarrow$  750; Administrative Law And Procedure  $\Rightarrow$  763; Administrative Law And Procedure  $\Rightarrow$  796

Relief from an agency decision will be granted when the agency has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or the order is arbitrary or capricious. *Barker v. Employment Sec. Dept. of State of Wash.* (2005) 127 Wash.App. 588, 112 P.3d 536. Administrative Law And Procedure  $\Rightarrow$  763; Administrative Law And Procedure  $\Rightarrow$  791; Administrative Law And Procedure  $\Rightarrow$  796

Assuming that the whole record of the proceeding before the growth management hearing board was not before the trial court at the time of its ruling, organization that challenged county's comprehensive plan failed to establish that it was prejudiced as a result, as was required to warrant relief. *Whidbey Environmental Action Network v. Island County* (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning  $\Rightarrow$  625

The Supreme Court may grant relief from an order of the Pollution Control Hearings Board (PCHB) if the PCHB order is inconsistent with an applicable rule, unless the PCHB has provided a rational basis for the inconsistency. Port of Seattle v. Pollution Control Hearings Bd. (2004) 151 Wash.2d 568, 90 P.3d 659. Environmental Law  $\Rightarrow$  678

On review of an administrative agency's ruling, where there is room for two opinions and the agency acted honestly upon due consideration, the Supreme Court should not find that an action was

light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *Ongom v. State, Dept. of Health, Office of Professional Standards* (2005) 124 Wash. App. 935, 104 P.3d 29, review granted 155 Wash.2d 1001, 122 P.3d 185, reversed 159 Wash.2d 132, 148 P.3d 1029, certiorari denied 127 S.Ct. 2115, 167 L.Ed.2d 815. Administrative Law And Procedure  $\Rightarrow$  749; Administrative Law And Procedure  $\Rightarrow$  787; Administrative Law And Procedure  $\Rightarrow$  789

An agency's findings of fact are reviewed under the substantial evidence standard. *Ongom v. State, Dept. of Health, Office of Professional Standards* (2005) 124 Wash. App. 935, 104 P.3d 29, review granted 155 Wash.2d 1001, 122 P.3d 185, reversed 159 Wash.2d 132, 148 P.3d 1029, certiorari denied 127 S.Ct. 2115, 167 L.Ed.2d 815. Administrative Law And Procedure  $\Rightarrow$  791

Court of Appeals reviews an agency's findings of fact for substantial supporting evidence in the record. *Stephens v. Employment Sec. Dept. of State of Wash.* (2004) 123 Wash. App. 894, 98 P.3d 1284. Administrative Law And Procedure  $\Rightarrow$  791

The Court of Appeals reviews an agency's factual findings under the "substantial evidence" standard. *Broschart v. Employment Sec. Dept. of State* (2004) 123 Wash. App. 257, 95 P.3d 356, review denied 153 Wash.2d 1024, 110 P.3d 755. Administrative Law And Procedure  $\Rightarrow$  791

Substantial evidence supported conclusion that state Department of Natural Resources (DNR) sufficiently considered effects of future forest practices when it approved timber company's watershed analysis (WSA) and issued a related modified determination of nonsignificance (MDNS) as part of the timber company's harvesting plan; DNR assumed that timber company would eventually log all of its land, thus reducing need to list, map, and discuss every pending harvest plan individually, and related land-specific Conservation Agreement and environmental impact statement (EIS), to which timber company was party, sufficiently addressed future forest practices in affected area and was before Forest Practices Appeals Board (FPAB) when it approved WSA. *Kettle Range Conservation Group v.*

*Washington Dept. of Natural Resources* (2008) 120 Wash. App. 434, 85 P.3d 894, amended on reconsideration, review denied 152 Wash.2d 1026, 101 P.3d 421. Environmental Law  $\Rightarrow$  595(2); Environmental Law  $\Rightarrow$  595(3)

### 37. — Sufficient amount of evidence to convince fair-minded person, substantial evidence standard

"Substantial evidence" to support decision by administrative agency is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Ferry County v. Concerned Friends of Ferry County* (2005) 155 Wash.2d 824, 123 P.3d 102. Administrative Law And Procedure  $\Rightarrow$  791

The "substantial evidence" standard, as used in administrative proceedings, is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises. *Ongom v. State, Dept. of Health, Office of Professional Standards* (2005) 124 Wash. App. 935, 104 P.3d 29, review granted 155 Wash.2d 1001, 122 P.3d 185, reversed 159 Wash.2d 132, 148 P.3d 1029, certiorari denied 127 S.Ct. 2115, 167 L.Ed.2d 815. Administrative Law And Procedure  $\Rightarrow$  791

"Substantial evidence" upholding administrative findings is evidence of sufficient quantity to persuade a fair-minded person of the truth or correctness of the agency order. *Affordable Cabs, Inc. v. Department of Employment Sec.* (2004) 124 Wash. App. 361, 101 P.3d 440. Administrative Law And Procedure  $\Rightarrow$  791

Appellate court reviews administrative agency's factual findings under "substantial evidence" test; evidence is substantial when there is sufficient quantity of evidence to persuade fair-minded person of truth or correctness of order. *Kettle Range Conservation Group v. Washington Dept. of Natural Resources* (2003) 120 Wash. App. 434, 85 P.3d 894, amended on reconsideration, review denied 152 Wash.2d 1026, 101 P.3d 421. Administrative Law And Procedure  $\Rightarrow$  791

"Substantial evidence" to support order of administrative agency, for purposes of Administrative Procedure Act (APA), is that which is sufficient to persuade a fair-minded person of the truth of the factual finding. *Nguyen v. State, Dept. of Health, Medical Quality Assur. Com'n* (1999) 99 Wash. App. 96, 994 P.2d 216, review granted 141 Wash.2d 1001, 10 P.3d 404, vacated and remanded 144 Wash.2d 516, 29 P.3d 689, certiorari denied 122

S.Ct. 1208, 535 U.S. 904, 152 L.Ed.2d 141. Administrative Law And Procedure  $\Rightarrow$  791

### 38. Clearly erroneous standard

When reviewing approval by Forest Practices Appeals Board (FPAB) of threshold determination of factual finding by state Department of Natural Resources (DNR) under State Environmental Protection Act (SEPA), appellate court applies "clearly erroneous" standard to FPAB's final order upholding DNR's threshold determination; "clearly erroneous" standard does not allow appellate court to reverse DNR's threshold determination unless court is left with definite and firm conviction that mistake has been committed. *Kettle Range Conservation Group v. Washington Dept. of Natural Resources* (2003) 120 Wash. App. 434, 85 P.3d 894, amended on reconsideration, review denied 152 Wash.2d 1026, 101 P.3d 421. Environmental Law  $\Rightarrow$  689

When reviewing threshold determination of factual findings by state Department of Natural Resources (DNR) under State Environmental Protection Act (SEPA), Forest Practices Appeals Board (FPAB) must affirm determination unless it finds determination to be "clearly erroneous." *Kettle Range Conservation Group v. Washington Dept. of Natural Resources* (2003) 120 Wash. App. 434, 85 P.3d 894, amended on reconsideration, review denied 152 Wash.2d 1026, 101 P.3d 421. Environmental Law  $\Rightarrow$  596

### 39. Error of law standard—In general

In reviewing conclusions of law in administrative hearings, the appellate court applies the error of law standard, under which the court gives substantial weight to the agency's interpretation of the law, but is not bound by the agency's interpretation. *Ongom v. State, Dept. of Health, Office of Professional Standards* (2005) 124 Wash. App. 935, 104 P.3d 29, review granted 155 Wash.2d 1001, 122 P.3d 185, reversed 159 Wash.2d 132, 148 P.3d 1029, certiorari denied 127 S.Ct. 2115, 167 L.Ed.2d 815. Administrative Law And Procedure  $\Rightarrow$  796

When only legal issues are germane in an appeal from an agency decision, the Supreme Court reviews the decision under the error of law standard. *Schrom v. Board For Volunteer Fire-Fighters* (2004) 153 Wash.2d 19, 100 P.3d 814. Administrative Law And Procedure  $\Rightarrow$  796

In reviewing an administrative agency's decision, the Court of Appeals reviews

issues of law under the error of law standard, giving substantial weight to the agency's view of the law. *Department of Labor and Industries of State of Wash. v. Gongyin* (2003) 119 Wash. App. 188, 79 P.3d 488, review granted 151 Wash.2d 1032, 95 P.3d 351, reversed 154 Wash.2d 38, 109 P.3d 816. Administrative Law And Procedure  $\Rightarrow$  796

### 40. — De novo review, error of law standard

The Supreme Court would review administrative decision to suspend license of Registered nursing assistant pursuant to the Administrative Procedure Act and would apply the Act's "error of law" standard to the agency's legal conclusions. *Ongom v. State, Dept. of Health, Office of Professional Standards* (2006) 159 Wash.2d 132, 148 P.3d 1029, certiorari denied 127 S.Ct. 2115, 167 L.Ed.2d 815. Health  $\Rightarrow$  223(1); Health  $\Rightarrow$  223(2)

When reviewing a challenge to an administrative action based on the argument that the agency erroneously interpreted or applied the law, the Supreme Court reviews the issue of law de novo. *Quadrant Corp. v. State Growth Management Hearings Bd.* (2005) 154 Wash.2d 224, 110 P.3d 1132. Administrative Law And Procedure  $\Rightarrow$  796

With respect to issues of law in a review of an administrative decision, the Court of Appeals applies a de novo standard, giving substantial weight to the agency's interpretation of the statute it administers. *Quadrant Corp. v. State Growth Management Hearings Bd.* (2003) 119 Wash. App. 562, 81 P.3d 918, review granted 152 Wash.2d 1012, 99 P.3d 895, affirmed in part, reversed in part 154 Wash.2d 224, 110 P.3d 1132. Administrative Law And Procedure  $\Rightarrow$  796; Statutes  $\Rightarrow$  219(1)

### 41. — Substitution of court's judgment for of law standard

Under the Administrative Procedure Act (APA), the Court of Appeals reviews the record before the Growth Management Hearing Board, sitting in the same position as the trial court, and gives substantial weight to the agency's interpretation of the statute it administers. *Kitsap County v. Central Puget Sound Growth Management Hearings Bd.* (2007) 158 P.3d 638, clarified on denial of reconsideration. *Zoning And Planning*  $\Rightarrow$  231; *Zoning And Planning*  $\Rightarrow$  745.1

On review of administrative findings of fact, the court will not substitute its interpretation of the law.

ment for that of the agency regarding witness credibility or the weight of evidence. *Affordable Cabs, Inc. v. Department of Employment Sec.* (2004) 124 Wash.App. 361, 101 P.3d 440. *Administrative Law And Procedure*  $\Leftrightarrow$  787; *Administrative Law And Procedure*  $\Leftrightarrow$  793

#### 42. — Agency's interpretation of statute, error of law standard

Court of Appeals reviews an agency's interpretation of statutes under an error of law standard, which allows an appellate court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council* (2006) 131 Wash. App. 862, 129 P.3d 838, as amended. *Administrative Law And Procedure*  $\Leftrightarrow$  413; *Statutes*  $\Leftrightarrow$  219(4)

#### 44. Arbitrary or capricious action—In general

An arbitrary or capricious action, for purposes of Uniform Disciplinary Act (UDA) provision authorizing a court to reverse an arbitrary or capricious order of an agency, is a willful and unreasonable action made without consideration and without regard to the facts and circumstances. *Lang v. Washington State Dept. of Health* (2007) 138 Wash.App. 235, 156 P.3d 919. *Health*  $\Leftrightarrow$  223(2)

The fact that certain Department of Natural Resources' (DNR) employees expressed divergent views concerning the issuance of a permit to convert forest land in a special management area into agricultural land did not render the decision arbitrary and capricious, but rather indicated that the DNR gave the matter due consideration. *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.* (2005) 129 Wash. App. 35, 118 P.3d 354. *Woods And Forests*  $\Leftrightarrow$  8

An agency's action is arbitrary or capricious if it is a willful and unreasonable action, without consideration and regard for facts or circumstances. *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.* (2005) 129 Wash.App. 35, 118 P.3d 354. *Administrative Law And Procedure*  $\Leftrightarrow$  763

Under Administrative Procedure Act (APA), action of administrative agency is arbitrary and capricious only if it is willful and unreasonable and taken without regard to the attending facts or circumstances. *Willman v. Washington Utilities and Transn. Com'n* (2004) 122 Wash. Ann. 194.

93 P.3d 909, review granted 153 Wash.2d 1031, 110 P.3d 757, affirmed 154 Wash.2d 801, 117 P.3d 343. *Administrative Law And Procedure*  $\Leftrightarrow$  763

When reviewing agency's decision under administrative procedure act, the Court of Appeals reviews issues of law de novo. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd., State of Wash.* (2003) 116 Wash.App. 48, 65 P.3d 337, review denied 150 Wash.2d 1007, 77 P.3d 651. *Administrative Law And Procedure*  $\Leftrightarrow$  796

"Substantial evidence" necessary for court to uphold administrative agency decision is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd., State of Wash.* (2003) 116 Wash.App. 48, 65 P.3d 337, review denied 150 Wash.2d 1007, 77 P.3d 651. *Administrative Law And Procedure*  $\Leftrightarrow$  791

An "arbitrary and capricious" administrative agency decision, from which a court shall grant relief, means willful and unreasonable action, taken without regard to or consideration of the facts and circumstances surrounding the action; where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd., State of Wash.* (2003) 116 Wash.App. 48, 65 P.3d 337, review denied 150 Wash.2d 1007, 77 P.3d 651. *Administrative Law And Procedure*  $\Leftrightarrow$  763

For purposes of Administrative Procedure Act (APA), "arbitrary and capricious" agency action is willful and unreasonable action, taken without regard to or consideration of the facts and circumstances surrounding the action. *Nguyen v. State, Dept. of Health, Medical Quality Assur. Com'n* (1999) 99 Wash.App. 96, 994 P.2d 216, review granted 141 Wash.2d 1001, 10 P.3d 404, vacated and remanded 144 Wash.2d 516, 29 P.3d 689, certiorari denied 122 S.Ct. 1203, 535 U.S. 904, 152 L.Ed.2d 141. *Administrative Law And Procedure*  $\Leftrightarrow$  763

#### 45. — Room for two opinions, arbitrary or capricious action

Where there is room for two opinions, an action taken after due consideration is not "arbitrary and capricious" for purposes of the Administrative Procedure

Act, even though a reviewing court may believe it to be erroneous. *Whidbey Environmental Action Network v. Island County* (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 93 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. *Administrative Law And Procedure*  $\Leftrightarrow$  763

Where there is room for two opinions, an agency's action is not arbitrary or capricious when exercised honestly and upon due consideration. *Friends of Columbia Gorge, Inc. v. Washington State Forest Practices Appeals Bd.* (2005) 129 Wash. App. 35, 118 P.3d 354. *Administrative Law And Procedure*  $\Leftrightarrow$  763

If there are two plausible opinions, administrative agency action is not "arbitrary and capricious." *Nguyen v. State, Dept. of Health, Medical Quality Assur. Com'n* (1999) 99 Wash.App. 96, 994 P.2d 216, review granted 141 Wash.2d 1001, 10 P.3d 404, vacated and remanded 144 Wash.2d 516, 29 P.3d 689, certiorari denied 122 S.Ct. 1203, 535 U.S. 904, 152 L.Ed.2d 141. *Administrative Law And Procedure*  $\Leftrightarrow$  763

#### 47. Record on appeal

Trial court properly refused to consider additional declarations, which were not part of administrative record, in judicial challenge to decision of Utilities and Transportation Commission (UTC) allowing utilities which were operating on reservation to pass on cost of fee exacted by Tribal Council to all ratepayers within the reservation, as new evidence was material to determination whether fee was valid, and UTC lacked authority to make such determination. *Willman v. Washington Utilities and Transp. Com'n* (2004) 122 Wash.App. 194, 93 P.3d 909, review granted 153 Wash.2d 1031, 110 P.3d 757, affirmed 154 Wash.2d 801, 117 P.3d 343. *Public Utilities*  $\Leftrightarrow$  193

Appellate court's review of determination made by Medical Quality Assurance Commission in licensing or disciplinary proceeding regarding health profession which is held pursuant to Uniform Disciplinary Act (UDA) is based on the administrative record before the Commission, not the superior court's record. *Nguyen v. State, Dept. of Health, Medical Quality Assur. Com'n* (1999) 99 Wash.App. 96, 994 P.2d 216, review granted 141 Wash.2d 1001, 10 P.3d 404, vacated and remanded 144 Wash.2d 516, 29 P.3d 689, certiorari denied 122 S.Ct. 1203, 535 U.S. 904, 152 L.Ed.2d 141. *Health*  $\Leftrightarrow$  993(2)

Generally, trial court's findings are not relevant in appellate review of agency action; however, where trial court takes additional evidence appellate court will look to trial court record. *Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council* (1996) 129 Wash.2d 787, 920 P.2d 581, reconsideration denied, certiorari denied 117 S.Ct. 1693, 520 U.S. 1210, 137 L.Ed.2d 820. *Administrative Law And Procedure*  $\Leftrightarrow$  682

#### 48. Presumptions and burden of proof

Surgeon, as party appealing to trial court, had burden of proving invalid agency action concerning decisions of state Medical Quality Assurance Commission to dismiss without prejudice statement of charges against surgeon in disciplinary proceeding and to refuse to accord surgeon public exoneration. *Lawrence v. Department of Health* (2006) 132 Wash.App. 1042, Unreported, published at 133 Wash. App. 665, 138 P.3d 124. *Health*  $\Leftrightarrow$  223(1)

The party asserting the invalidity of an administrative agency action has the burden to demonstrate it. *DeLacey v. Clover Park School Dist.* (2003) 117 Wash.App. 291, 69 P.3d 877, review denied 150 Wash.2d 1023, 81 P.3d 120. *Administrative Law And Procedure*  $\Leftrightarrow$  750

The burden is on the party challenging the Commissioner's ruling on an unemployment compensation claim to show erroneous interpretation of law and substantial prejudice. *Starr v. Washington State Dept. of Employment Sec.* (2005) 130 Wash.App. 541, 123 P.3d 513, review denied 157 Wash.2d 1019, 142 P.3d 607. *Unemployment Compensation*  $\Leftrightarrow$  457

The burden of proving that an administrative agency action was invalid, because agency erroneously interpreted or applied the law, there is not substantial evidence to support the decision, or the decision was arbitrary or capricious, lies with the party challenging the action. *Mader v. Health Care Authority* (2002) 109 Wash. App. 904, 37 P.3d 1244, review granted 146 Wash.2d 1021, 52 P.3d 520, reversed in part 149 Wash.2d 458, 70 P.3d 931, corrected on denial of reconsideration. *Administrative Law And Procedure*  $\Leftrightarrow$  750

Party challenging determination by Medical Quality Assurance Commission in licensing or disciplinary proceeding regarding health profession bears the burden of showing that the Commission's action was not valid. *Nguyen v. State, Dept. of Health, Medical Quality Assur.*

**34.05.570**  
**Note 48**

Com'n (1999) 99 Wash.App. 96, 994 P.2d 216, review granted 141 Wash.2d 1001, 10 P.3d 404, vacated and remanded 144 Wash.2d 516, 29 P.3d 689, certiorari denied 122 S.Ct. 1203, 535 U.S. 904, 152 L.Ed.2d 141. Health ☞ 223(1)

**50. Findings of fact**

In an appeal under the Washington Industrial Safety and Health Act (WISHA), the findings of fact of the Board of Industrial Insurance Appeals (BIIA) are conclusive if supported by substantial evidence; the court then reviews the findings to

**34.05.574. Type of relief**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.28, The Record on Review.

**Notes of Decisions**

**4. Modification of agency decision**  
Organization that challenged county's comprehensive plan was not entitled to relief based on trial court arguably exceeding its authority under the Administrative Procedure Act (APA), by finding compliance on matters solely within discretion of growth management hearing

**34.05.588. Enforcement of agency subpoena**

**Research References**

**Treatises and Practice Aids**  
15 Wash. Prac. Series § 43.2, Who Has Contempt Powers.

**34.05.598. Frivolous petitions**

**Research References**

**Treatises and Practice Aids**  
15 Wash. Prac. Series § 42.10, Availability of Other Remedies, Effect—Review of Administrative Agencies.  
22 Wash. Prac. Series § 26.23.110, Procedures When Amount of Support

**PART VI—LEGISLATIVE REVIEW**

**34.05.610. Joint administrative rules review committee—Members—Appointment—Terms—Vacancies**

determine if they support the conclusions of law. Prezant Associates, Inc. v. Washington State Dept. of Labor & Industries (2007) 165 P.3d 12. Labor And Employment ☞ 2612

**50.5. Reasons for decision**

In ruling on approval of city's comprehensive plan, growth management hearings board was required to articulate reasons for its decision. Low Income Housing Institute v. City of Lakewood (2003) 119 Wash.App. 110, 77 P.3d 653. Zoning And Planning ☞ 361

**Research References**

24 Wash. Prac. Series § 25.32, Relief from Agency Action.

board, where organization failed to establish that it was prejudiced by the full scope of court's action. Whidbey Environmental Action Network v. Island County (2004) 2004 WL 1153309, superseded 122 Wash.App. 156, 98 P.3d 885, reconsideration denied, review denied 153 Wash.2d 1025, 110 P.3d 756. Zoning And Planning ☞ 625

**34.05.588. Enforcement of agency subpoena**

**Research References**

15 Wash. Prac. Series § 43.7, Remedial Sanctions—Procedure.  
21 Wash. Prac. Series § 56.3, Remedial Sanctions.

**Research References**  
Obligation Needs to be Determined—Notice—Adjudicative Proceeding.  
24 Wash. Prac. Series § 19.51, Enforcement of the Forest Practices Act and Remedies for Violations.

**ADMINISTRATIVE LAW**

**34.08.020**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.16, The Promulgation of a Final Rule.

**34.05.620. Review of proposed rules—Notice**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.15, Public Participation in Rulemaking Process.  
24 Wash. Prac. Series § 25.16, The Promulgation of a Final Rule.

**34.05.630. Review of existing rules—Policy and interpretive statements, etc.—Notice—Hearing**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.16, The Promulgation of a Final Rule.

**34.05.640. Committee objections to agency intended action—Statement in register and WAC—Suspension of rule**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.16, The Promulgation of a Final Rule.

**34.05.650. Recommendations by committee to legislature**

**Research References**

**Treatises and Practice Aids**  
24 Wash. Prac. Series § 25.16, The Promulgation of a Final Rule.

**CHAPTER 34.08**

**WASHINGTON STATE REGISTER ACT OF 1977**

**34.08.020. Washington State Register—Created—Publication period—Contents**

**Research References**

**Treatises and Practice Aids**  
1B Wash. Prac. Series § 66.81, Effect of Dissolution.

FILED  
 COURT OF APPEALS  
 DIVISION II  
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 STATE OF WASHINGTON  
 BY DEPUTY

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

KELLY and SALLY SAMSON, )  
 husband and wife; and ROBERT and )  
 JOANNE HACKER, husband and )  
 wife, )

No. 34780-6-II

Appellants, )

**CERTIFICATE OF  
 SERVICE**

v. )

CITY OF BAINBRIDGE ISLAND; )  
 STATE OF WASHINGTON )  
 DEPARTMENT OF ECOLOGY; )  
 and CENTRAL PUGET SOUND )  
 GROWTH MANAGEMENT )  
 HEARINGS BOARD, )

Respondents. )

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of

ORIGINAL

Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of this Certificate and the document entitled: **BRIEF OF APPELLANTS** on the following:

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DATED this 22nd day of January, 2008.

  
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Karen Hall