

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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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

In 2003, the Central Puget Sound Growth Management Hearings Board ruled in Case No. 02-3-0009c that “the primary and paramount policy mandate that the board gleans from a complete reading of RCW 90.58.020, particularly within the context of the goals and overall growth management structure Chapter 36.70A RCW, is one of **shoreline preservation, protection, enhancement and restoration.**” *Shorelines Coalition et. al v. City of Everett et. al*, CPSGHMB Case No. 02-3-0009C, (January 9, 2003), p. 15. (Emphasis in original).

After issuance of the Board’s decision in the City of Everett case, the Washington Legislature intervened, enacting Chapter 321 of the Laws of 2003. This law clarifies how the Shoreline Management Act (“the SMA”) is to be applied and interpreted by the Growth Management Hearings Boards in conjunction with the Growth Management Act (“the GMA”) and the new authority delegated to the Boards by RCW 36.70C.480(3) to hear appeals of amendments to shoreline master programs. Therein, the Legislature stated the SMA shall be:

. . . read, interpreted, applied, and implemented as a whole consistent with decisions of the shoreline hearings board and Washington courts **prior to** the decision of the central Puget Sound growth management hearings board in *Everett*

*Shorelines Coalition v. City of Everett and  
Washington State Department of Ecology;*

Washington Laws of 2003, ch. 320, § 1. (Emphasis supplied).

The Central Board continued down the same road rejected by the 2003 Washington Legislature in upholding the Blakely Harbor private dock ban, stating its decision preserved existing conditions.

In addition to misconstruing and misapplying the SMA to the facts, there was no basis for Ecology to fail to follow the process mandated by the Washington Legislature for review and approval of amendments to a shoreline master program by using guidelines enacted specifically for this purpose. When the Blakely Harbor Amendment was approved, the new guidelines were in effect, and Ecology was required to use them. *See* RCW 90.58.090.

If left in place, the Board's decision imposes an impermissible element of uncertainty in the review and approval process, since it allows Ecology to ignore its guidelines and SMA dictates if it unilaterally decides they are "not applicable." *See* City Response, p. 33. The legislature has provided one process, not two, for review and approval of master program amendments and the established process does not allow any leeway to ignore the Guidelines.

## II. ARGUMENT

### A. Ecology Had a Nondiscretionary Duty to Comply With the New Guidelines for Amendment of Shoreline Master Programs.

The matter before this Court presents an important question relating to the proper process for amendment of shoreline master programs. There is no discretion for Ecology to ignore legislative directives and its own guidelines when approving master programs. Thus, the Board erred in excusing Ecology's illegal action.

This oversight is not about deferring to or according deference to Ecology's interpretation of its own regulations. For one, under the guise of interpretation of agency regulations, Ecology cannot ignore a clear legislative directive. *See*, Opening Brief, pp. 15-16. Two, Ecology's action is sui generis and simply a position taken to defend litigation. There is no deference given to legal arguments of counsel labeled as "administrative determinations."<sup>1</sup> *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P. 2d 990 (2007). Three, the Guidelines themselves are non-discretionary.<sup>2</sup>

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<sup>1</sup> The first time the "interpretation" allegedly made by Ecology is even mentioned is in Ecology's briefing before the Board. To the extent there is discretion, there is a "compelling indication" that Ecology's interpretation conflicts with legislative intent and is outside of its authority.

<sup>2</sup> Contrary to the City's assertion, Resp. Br., p.1, the Guidelines unequivocally state that they apply to "approval" of revisions to Shoreline Master Programs. WAC 173-26-173(3).

There is no provision in the SMA allowing Ecology to “opt out” of its obligations, as in this case, the Department’s efforts to help the City of Bainbridge Island get around its illegal shoreline moratorium. Ecology’s stated basis for acting on the SMP Amendment without consideration of the Guidelines was that the City is “. . . anxious to lift its temporary Islandwide moratorium on permitting of docks and piers.”<sup>3</sup> Tab 3 (Ex. C-211, p. 2.). This is an impermissible reason, Bainbridge Island’s illegal shoreline moratorium was not part of the “applicable guidelines.”

The requirement that Ecology 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 the DOE is central to the implementation of the SMA and cannot be ignored. *See* RCW 90.58.060(1); RCW 90.58.080(1).

So integral is the role of the adopted Guidelines in the development and amendment of local master programs that the first implementing action required by the SMA, when originally enacted by the Legislature in 1971 and approved by the people of Washington in 1972, was for Ecology to adopt guidelines for development of master programs “[f]or regulation of the uses of shorelines of statewide significance” under

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<sup>3</sup> The City’s stated reason for proposing to enact the Blakely Harbor dock ban before completing the more extensive SMP update required by law was “to protect Blakely Harbor in case the moratorium is ultimately invalidated.” Tab 30 (Ex. C 53).

a timetable set forth in the Act. Laws of 1971, Exs., ch. 286, § 6. Local governments then had 24 months *after* the guidelines were adopted to develop local master programs consistent with such guidelines. *Id.*

That sequence for development and amendment of local master programs has remained constant throughout subsequent amendments to the SMA. For example, in 1995, the Legislature amended the SMA to authorize Ecology to review and adopt amendments to its guidelines for SMP adoption or revision and then provided local governments 24 months *after* the guidelines were adopted to develop or amend their local master programs consistent with the new guidelines. Laws of 1995, ch. 347, §§304, 305. And in 2003, after the SMA Guidelines adopted by Ecology in 2000 were invalidated by the Shoreline Hearings Board, the Legislature amended the SMA to provide a new, longer timetable for local governments to develop or amend their local master programs consistent with the guidelines that DOE developed to replace the invalidated ones. Laws of 2003, ch. 262, §§ 1, 2, codified in RCW 90.58.060, .080.

The substance of the proposed Guidelines was known by Ecology as far back as December 20, 2002, when Ecology agreed to adopt new guidelines substantially to resolve litigation regarding the validity of the old guidelines. Ecology did so, issuing its pre-proposal statement of inquiry on January 8, 2003, issuing its notice of proposed rulemaking on

June 17, 2003, and adopting the guidelines on December 17, 2003.

Further, during this time, Ecology even went to the Legislature to request SMA amendments that would give local governments additional time and state grants to comply with the new guidelines, which the Legislature adopted in 2003 and which became effective in July, 2003, *before* the City issued a public notice of intent to adopt its proposed dock ban. Tab 30 (Ex. C-25).

This history was well known to Ecology and the City in 2003, and except for actual adoption of the new Guidelines on December 17, 2003, by that time a mere formality, all of these rulemaking and legislative actions had occurred before the City completed its review and adoption of the SMP Amendment. *See* City Resp. Br., p.33, n.21. In fact, the City delayed the comprehensive update of its SMP because the Legislature had extended the deadline for the City to update its SMP to 2011. Laws of 2003, c. 262, § 2, effective July 27, 2003, codified in RCW 90.58.080. Instead of also delaying consideration of any amendments to its dock regulations, however, the City pushed forward the proposed ban on docks in Blakely Harbor as a stand-alone SMP amendment.

Considering the timing of its new Guidelines, Ecology should have exercised its discretion to delay its review of the Amendment, either by extending the comment period or by sending the proposal back to the City

for consideration under the new Guidelines.<sup>4</sup> *See, e.g.*, RCW 90.58.090 (“the comment period shall be at least 30 days”). To do so would not have been unfair to the City, assuming that this is even a relevant consideration given the mandatory statutory obligation governing Ecology’s review and approval of SMP amendments. After all, the SMP Amendment had been under review by the City Council for only a few months before it was adopted on September 10, 2003, which was less than three months before the new Guidelines were scheduled to be adopted by Ecology.

Instead of focusing on the unfairness to the City, Ecology should have considered the unfairness to the public by not applying guidelines that it had taken Ecology years to develop and adopt with much fanfare. *See* Opening Brief, pp.17-18. As to shorelines of state-wide significance, Ecology is required to determine “the state-wide interest” as set forth in the “applicable guidelines.” WAC 173-26-120, City Resp. Br., p. 21, p. 24. Because shorelines of state-wide significance are involved, it is remarkable the involved agencies and the Board so easily discounted the key tool used for preparation and review of shoreline master program amendments. How can citizens effectively and meaningfully comment on proposed SMP amendments if they do not know the criteria under which

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<sup>4</sup> Ecology under its regulations had discretion to declare Bainbridge Island’s submittal “incomplete,” since it knew the guidelines would be adopted in a few months, as conceded by the City in its Response Brief, n.21, p. 33. WAC 173-26-120(1).

the proposals will be reviewed to determine compliance with the SMA?<sup>5</sup>

For the SMP amendment at issue, 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 regulations and mitigation standards for docks. WAC 173-26-186(8); WAC 173-26-241(3)(b).

Without consideration of the Guidelines, those most affected by the agency's failure to comply with its statutory and regulatory mandate – waterfront property owners like Appellants – were substantially prejudiced because deprived of the ability to provide effective and meaningful comment on the SMP Amendment at issue.

It is of no import that the Guidelines were not in effect when the Amendment was submitted. The operative section of the SMA applies to Ecology's "approval" of SMA amendments. RCW 90.58.090; WAC 173-26-173(3). The regulatory touchstone thus is the decision made by Ecology, not when the municipality acts or when a proposed amendment is received by the Department. There is no retroactive application here, since at the time of approval of the Amendment the Guidelines were in effect.

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<sup>5</sup> 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).

The Board's legal analysis and legal conclusions are reviewed *de novo* under the Administrative Procedures Act ("APA") error of law standard. *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 746, 954 P.2d 304 (1998). This APA standard permits a reviewing court to substitute its interpretation of the law for that of the agency, in this case, the Board. *Overlake Fund., supra*. It is particularly appropriate to do so here, since the Board is not charged to administer the SMA. The Guidelines were required to be applied, and it was clearly erroneous not to do so and an error of law to interpret the SMA as excusing their use under the circumstances. Because of these legal errors, Appellants need not meet their burden to show inconsistency of the amendment "... with SMA policies and applicable guidelines," as alleged by the City. *See City Resp.*, p. 2. Since the Guidelines were not employed, it is premature to reach questions of consistency until Ecology and the City remedy their illegal actions.

**B. Ecology and the City Misconstrue Petitioners' Arguments as Contending There Is a "Right" for an Individual Property Owner to Construct a Private Dock. When Petitioners' Contentions are Correctly Construed and Applied to the Actual Facts and Circumstances, the Port Blakely Harbor Amendment Offends Several Important SMA Policies, Including Mandates for "Coordinated Planning and Development and Balanced Use and Development."**

The Department of Ecology and City of Bainbridge Island submit 107 pages of briefing urging this court to interpret the SMA and its provisions for regulating development and use of waters of state-wide significance as imposing a prime directive to "preserve" existing conditions in Blakely Harbor. The approach of the City and Ecology is fatally flawed and rejected by the 2003 Washington Legislature and the courts. *See* Opening Brief, pp. 26-27. The views of the courts and the legislature control over those of a quasi-judicial tribunal or highly interested City Council whose membership for the most part is composed of non-lawyers and, in all cases, no judges.

**1. SMA Policies for Shorelines of State-wide Significance Do Not Support a Total Ban.**

Appellants' differences with the Department and the City are not so much with the policies cited in the Response Briefs, but their implementation in the context of the regulatory tool employed. Where, as here, the City and Ecology attempt to rely upon the language from SMA

permitting cases to postulate that the SMA is “all about preservation,” especially when shorelines of state-wide significance are involved, some balance and perspective is in order. It begins with a firm understanding of the intent and consequences of the regulatory action before the court.

The City refers to its “limited ordinance” as if to suggest little of import is before the Court. *See, e.g.*, City Response, pp. 1-2. In fact, much is at stake. While Ecology and the City are careful to avoid use of the term “ban” when referring to the Blakely Harbor Amendment, the prohibition on private docks in the amendment in Ordinance No. 2003-30 is for all intents and purposes a total ban on private residential docks in Blakely Harbor. While one public dock and two community docks are allowed, the record indicates that there are no plans for such docks. As one City Council member pointedly stated: “Allowing a public dock doesn’t mean the City will build one.” Tab 30, Ex. C-65 (August, 2003 Minutes of Land Use Committee, p. 2). Similarly, the record indicates the two “community docks” provided for in the Ordinance are not feasible, and thus unlikely to be constructed. Tab 30, Ex. C-155, p. 5-6.

What Ecology approved and the Board affirmed is a total, permanent ban on construction of new private docks in Blakely Harbor, even shared docks or private community docks, forever, in order to create an “aquatic preserve” without using those words. No consideration was

given to a cap on docks or to amendment of locational or design standards which would control future dock development and use.<sup>6</sup>

The SMA states that “unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest.” RCW 90.58.020. *See City Resp.*, n.12, p. 20. All of the SMA policies cited by the City and Ecology assume such development is or will likely occur in Blakely Harbor. The City chides Appellants for ignoring SMA policies, *Resp. Br.* p. 21, but it is the City that errs by imposing policies without the predicate of “unrestricted development.”

The record does not show that allowance of a “discrete number” of new docks would cause any measurable harm to important shoreline functions or values. In fact, the evidence in the record is to the contrary.<sup>7</sup> Further, as Ecology conceded in its Response, p. 22, no assessment of impacts (if any) to natural resources in the Harbor caused by new dock

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<sup>6</sup> The Blakely Harbor Cumulative Impact Assessment concludes that “[t]here are no conclusions in this assessment as to how many docks are too many or perhaps how far apart they should be spaced.” *Id.* at 25.

<sup>7</sup> The record contains no information showing undue impacts to any state-wide interests associated with the current dock development and use in Blakely Harbor. In a deposition of the City’s former Director of Planning taken in connection with the challenge to the City’s moratorium on private docks and piers, the Director testified about the substantial regulatory system in place to prevent undue impacts on the aquatic environment as a result of construction of private docks. Tab 30 (Ex. C-196). The Director acknowledged the substantial state regulatory system for approval of private docks through the State Hydraulic Code. *Id.* Additionally, the Director acknowledged that the Army Corps of Engineers must approve dock facilities, including review under the Federal Clean Water Act. Ecology ignored this evidence, falsely contending “other agencies” cannot deny docks, so no discount in the prediction that 45 new docks will be constructed was required. *Ecology Resp.*, p.24.

development was made. The supposed analysis of impacts alluded to by the City in its response, pp. 11-12, p. 50, in fact are literature surveys of generalized impacts observed in other areas, and associated with large industrial or commercial piers.

As set out in Appellants' Opening Brief, pp. 47-50, the City and Ecology have impermissibly created the illusion of out-of-control development in order to fall within the SMA policies. In fact, the Assessment's prediction of 45 new private docks is unlikely to happen if the site-specific information is considered in the context of what is "reasonably foreseeable." This is what the author of the Assessment admitted in his deposition when asked the critical question ignored by the City and Ecology: what is reasonably foreseeable under the circumstances? See Petitioners' Motion to Supplement the Administrative Record, Ex. C, CP 96-174. According to Mr. Best, based on information available when the City adopted the SMP amendment, the predicted dock buildout number should have been closer to ten docks. *Id.*, lines 14-16 ("Fewer than ten docks"..."may be in the ballpark under a certain set of circumstances."). The distinction between what is reasonably possible and theoretically possible is crucial, but was ignored by the Board.

After allowing the City to presume an absurdly fanciful level of development in the Harbor, Ecology continues with its Alice in

Wonderland approach when responding to Appellants' arguments. For example, according to Ecology, Appellants "claim a right to build an individual dock on their property". Resp. Br., p. 18. That is not correct. Appellants' objectives in this appeal relate to process and fair interpretation and administration of the SMA. Their goal is to make governments (1) rely upon the actual circumstances, (2) apply all SMA policies and (3) consider regulatory tools short of an outright ban, as they believe this approach is faithful to SMA policies to balance use of the shoreline for recreational and other uses with their protection.

The Board relied upon *Spencer v. Bainbridge Island*, SHB No. 97-43, for the proposition that private docks are not preferred. This case involves a boathouse, not a private pier. The Board found no preference for such a facility. The courts have ruled that private facilities which provide access for private individuals meet SMA priorities for public access to the waters of the state, since private property owners "are part of the public." See *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 589-90, 870 P. 2d. 987 (1994). The Shorelines Hearings Board noted in a case involving approval of construction of a dock on Bainbridge Island that:

Here we are concerned with the building of docks, a generally favored type of shoreline development, and the impact of allowing

this on public access, another priority item. Of course, these private docks in a limited way improve access—the Hammer dock in particular, since it is to be a joint use facility [shared by two property owners].<sup>8</sup>

*Hammer v. Kitsap County*, SHB No. 85-18 (July 11, 1986), p. 8.

While it is true that the Blakely Harbor shoreline is a shoreline of statewide significance, a fact noted in Appellants’ Opening Brief (despite what the City says in its response, p. 21), that designation does not support a ban on dock development in Blakely Harbor under the circumstances. This is especially so for a preferred, water-dependent shoreline use such as private residential docks associated with single family residences. If it did, under the Respondents’ logic, private docks could be banned on all shorelines of Bainbridge Island where there is a scarcity of private dock development, as in Blakely Harbor, and along all shorelines of Puget Sound, since all Puget Sound shorelines are designated as shorelines of state-wide significance. *See* RCW 90.58.030(2)(e).

The SMA does not elevate the preservation of undeveloped shorelines above all other SMA goals and policies without adequate justification or basis, even on shorelines of state-wide significance. This point was emphasized by the Supreme Court in *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985). Under the

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<sup>8</sup> The City’s use regulations strongly favor joint use docks in the semi-rural environment.

SMA and cases construing its policies, designating a shoreline as being of state-wide significance only “provides greater procedural safeguards;” it does not prohibit “limited alteration of the natural shorelines” for reasonable and appropriate shoreline uses, especially the preferred water-dependent uses such as private residential docks and piers. *Nisqually Delta Ass’n v. City of DuPont*, *supra*, at 726.

While the Court in *Nisqually* was referring to a different preferred shoreline use, the quoted language emphasizes that the designation of a shoreline as one of state-wide significance does not eliminate the balance that inheres in the policy of the SMA between protection of the shoreline environment and reasonable and appropriate use of the waters of the state and their associated shorelines. RCW 90.58.020; *see also* WAC 173-26-176(2); *Buechel v. State Department of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974). That balance is struck by the City’s existing policies and standards for regulation of docks in its SMP, which provides “greater procedural safeguards” for dock construction on the island’s shorelines of statewide significance. The internal inconsistency between these SMP policies and the SMP Amendment created by Ecology’s and the City’s much-too-narrow view of the SMA is left unresolved by them in their responsive briefs.

The SMA policies cited over and over by Respondents come into play only by **assuming an elevenfold increase in new dock development in the Harbor over that which occurred in the last century**. Thus, the Board's affirmance of the ban is clearly erroneous. While Ecology and the City cite to the SMA policies, they may not presume facts in contradiction to the actual circumstances to force their decision-making into the policies they favor. The City argues that Appellants' appeal fails because they cite no case which requires it "to enact a master program that allows all uses on every shoreline, every priority or preferred use on every shoreline, or docks on every shoreline." Resp. Brief, p. 25. Since no case construing the SMA stands for such an absurd proposition, none is cited.

The SMA is a worthy law which must be properly implemented. The public is entitled to that. The City and Ecology want to wear the mantle of representing the "public interest," but with that comes responsibility for ensuring the integrity of the process. In this instance, the SMP Amendment was implemented in an unfair, illegal and discriminatory way by assuming impacts and ignoring the actual facts and circumstances. Such an approach should not be countenanced by this Court or the public. The City is wrong when it says the remedy is

“political, not judicial.” Resp. Br., p. 24. It is the role of the courts to require agencies to abide by the law.

## **2. The Dock Ban Is Uncoordinated Planning.**

Ad hoc decision making without regard to actual circumstances is the antithesis of coordinated planning and by definition does not comply with the “internal consistency” requirement of the GMA required by RCW 36.70A.480(3) for a master program amendment.

Addressing first conditions in Blakely Harbor before enactment of the law, while both the City and DOE sought to justify the need for the Amendment as required to preserve the existing environment, Blakely Harbor already is significantly developed and not a good candidate for an aquatic preserve. Except for a park at one end and open space at the harbor points, the Blakely Harbor shoreline is and has been largely developed with single family residences or platted for such uses at the low to medium residential densities for which it is currently zoned (OSR-2, two dwelling units per acre). The applicable 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. . . .” Tab 35 (SMP, p. 48).

Thus, Blakely Harbor is neither pristine nor undeveloped. Its alleged “natural character” is low to medium single family residential development along its shorelines. Its alleged “unique quality” is its “scarcity of docks,” Tab 30 (Ex. C-222, App. C, p. 22). However, there is no evidence that the dock ban is needed to preserve this “natural character” or “unique quality” of Blakely Harbor from the “cumulative impacts” of new private dock development. The City’s prediction of unfettered new dock development is off-base. True “coordinated planning” uses actual conditions, not speculation based upon generalized fears.

Ecology next urges that the ban is a logical extension of the SMA permitting system, but better, because more predictable. Specifically, the Department states in its Response Brief, pp. 11-16, that the Shorelines Hearings Board’s denial of permits submitted by individual property owners for private docks justifies the Blakely Harbor ban as being sound action in accord with the SMA as interpreted and applied. Appellants caution against the use of language not in the context of review and approval of a shoreline amendment. For instance, no Board case is cited

by Respondents which allows a municipality within the same shoreline designation to enact use regulations which preclude private docks in one bay and not another.

Contrary to Ecology's assertion in its Response Brief, the fact that a local government can deny one dock permit because of undue impacts to shorelines, including cumulative impacts, does not mean that it can ban all docks through generic enactments. Instead, it means that the SMA is working as intended to protect shoreline values and functions, individually or cumulatively. Indeed, Appellants do not contend the law mandates allowance of "a preferred use on every shoreline, or private, single-use docks on every shoreline where residences are permitted on upland property," as suggested by Bainbridge Island. City Resp. pp. 29-30. The SMA permitting would not allow such result.

Ecology disparages regulation of docks through the permit review process as "piecemeal" and "uncoordinated" planning. This approach reflects Ecology's selective view and even hostility toward the SMA and its permit system. However, as the cases cited in the City's and Ecology's Response Briefs make clear, local jurisdictions have considerable discretion to regulate and even deny dock permits although authorized by the local master program. This power should have been factored in when considering if a total ban was necessary but was not. As the courts have

recognized, if the sole purpose of the SMA was to preserve shorelines in their natural state to the exclusion of all further development and modification, the unique permitting scheme set up under the SMA would be superfluous. *See* RCW 90.58.140; *see also State Dept. of Ecology v. Ballard Elks Lodge No. 827*, 84 Wn.2d 551, 557, 527 P.2d 1121 (1974).

The SMA accomplishes “coordinated planning” through adoption and approval of shoreline master programs that, together with the SMA policies, provide the criteria for decisions on permits for development within distinct shoreline designations. Then, permit applications are judged against site-specific environmental conditions to make a final decision on a proposed shoreline development within each shoreline designation. Under the guise of accomplishing “coordinated planning,” Ecology reads out of the law the SMA shoreline designation and permit system and elevates one policy, preservation, over all others. Such an outcome is not and never was the intent of the SMA, as confirmed by promulgation of the 2003 law referenced above that legislatively overturned a decision by the Central Puget Sound Growth Management Hearings Board that, like the instant one before the court, sought to elevate preservation of shorelines over all other goals and policies of the SMA. *See* Chapter 321, Laws of 2003.

Ecology asserts that all a local government must do is make “reasonable allowances” for uses within the full geographic extent of its jurisdiction and that a local government can prohibit or restrict certain uses in certain locations. Resp. Br., p. 17. The City says the same thing. Resp. Br., pp. 29-30. From there, Ecology then asserts that the Blakely Harbor ban is an enactment promulgated on an “area-wide basis” and thus consistent with the proposition it sets out as sound SMA planning. Resp. Br., p. 16.

The problem with Respondents’ contentions is that the geographic area for comparison is more than Blakely Harbor: it is all portions of Bainbridge Island which are accorded the “semi-rural” shoreline designation. All of the shorelines designated “semi-rural” by the City constitute the area for comparison to determine compliance with the GMA’s requirement for internal consistency. In fact, the City in its argument acknowledges as much, stating that shoreline use designations are “similar to ‘zoning districts’ in traditional zoning regulations.” City Resp., p.43, n.25. *See also* Ecology Resp., p. 4. No case is cited by Respondents which stands for the proposition that within the same zoning district, a discrete classified use can be treated differently, allowed in one neighborhood but denied outright in another. Yet, that is precisely what occurred in the Blakely Harbor Amendment. The City’s outright ban

offends SMA planning policies and it was clearly erroneous for the Board to affirm the Amendment.

If the City wants to preclude docks in Blakely Harbor, it could consider changing the shoreline designation, perhaps, to fit within a category in the 1996 Master Program which severely curtails such facilities, such as Natural or Conservancy. This would at least be a coordinated approach and one not based on political whim as to which harbor should bear the major burden of no private dock development. *See* Opening Brief, p. 31. Ecology concedes the option of redesignating Blakely Harbor to a more restrictive shoreline designation. Ecology Resp., p. 25.

The Board's misconstruction of the SMA is an error of law within the meaning of RCW 34.04.570(3)(d). The Board's affirmance of the dock ban also is clearly erroneous in light of the entire record and the policies, goals and provisions in the SMA when properly construed and applied to the actual facts and circumstances. *See* RCW 36.70C.330(3). The only way to correct these errors is to invalidate the Blakely Harbor amendment and let the City of Bainbridge Island start over if it desires.

**C. The Blakely Harbor Cumulative Impact Assessment Does Not Support The Ban.**

According to the agencies, a total ban is necessary because otherwise many shoreline functions and values will be lost in Blakely Harbor, such as aesthetics, views and unimpeded navigation for non-motorized vessels or other near shore uses as a result of “unrestricted development. These impacts, Respondents say, are 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 such “proliferation” nor risk of “irreversible development” therefrom. Tab 30 (Ex. 131, p. 1-2; Ex. C-211, p. 2).

Before setting out the actual circumstances in the context of foreseeable development, however, Appellants first address two procedural contentions raised in the response briefs. According to Ecology and the City, because the Samsons and the Hackers did not urge a remand below before the Board, they cannot object to the Board engaging in its own review of the Amendment against the new guidelines. Appellants, Ecology contends, “invited” the Board’s error. Ecology Resp., p. 19. The City argues Appellants failed to assert the doctrine of

primary jurisdiction before the Board and therefore waived the argument. City Resp., p.34.

The Appellants are gratified that the Department concedes it was error for the Board to assume the role of the administrative agency delegated responsibility to approve shoreline master programs amendments. However, no error was invited nor contentions waived.

Appellants' position has always been that the Amendment is invalid because when approved by Ecology, the agency unlawfully failed to consider and apply its new guidelines. The Board should have invalidated the Amendment, since it is illegal, remanded and reached no other issues on appeal. There was no need to ask for a remand or raise primary jurisdiction because the GMA automatically provides for a remand. *See* RCW 36.70A.302(3)(b) (order on remand upon finding of non-compliance). Respondents misconstrue Appellants' actions when they urge waiver or invited error, and their contentions should be rejected.<sup>9</sup>

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<sup>9</sup> As they did before the Board, Appellants in their Opening Brief discuss the new guidelines to support contentions that the failure to utilize them was materially prejudicial. *See* Opening Brief, pp. 20-25. By suggesting prejudice occurred, Appellants do not invite this Court to excuse Ecology's illegal action by evaluating for itself the consistency of the Amendment against the new guidelines. Appellants believe this Court understands that such a role is not appropriate for a judicial body any more than it was for the Board to assume authority delegated exclusively to the Department, since only Ecology can make the requisite findings required by RCW 90.58.090(2)(d).

Turning to substance, the “cumulative impacts” guideline set out in WAC 173-26-186(8)(d) is helpful to assess the type of approach that would demonstrate substantial evidence of cumulative impacts such to invoke the SMA policy set out in RCW 90.58.020 requiring control of “unrestricted construction” on private or public shorelines. Ecology acknowledges that the operative concept for prediction of cumulative impacts is whether future development is “reasonably foreseeable,” as set out in WAC 123-36-186(8)(d).<sup>10</sup> Ecology Response, p. 20.

However, nowhere in the record is there any finding, conclusion or even determination by the City or Ecology that the Assessment’s “predicted build-out” of between 45 and 59 docks upon which the City’s assertion of cumulative impacts is based is “reasonably foreseeable.” There is instead only a conclusionary statement found in the Assessment relating to a “proliferation of docks” in Blakely Harbor. In fact, the regulatory term “reasonably foreseeable” is not even mentioned by the City in adopting the SMP Amendment or by Ecology in approving it. This essential inquiry was ignored in favor of theoretical calculations.<sup>11</sup>

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<sup>10</sup> Contrary to Ecology’s assertion, Resp. Br., p.20, cumulative impacts are meaningfully addressed only on an area-wide basis. WAC 173-26-186(8)(d) relates to “policies, programs and regulations” that address cumulative impacts. Since the City’s Blakely Harbor Amendment is discrete, this requirement is not truly in play until Bainbridge Island undertakes a comprehensive update of its Master Program.

<sup>11</sup> In this deposition, Mr. Best was asked the following question: “Using that refinement, did you come up with a number of docks that you thought were reasonably foreseeable given the conditions as you knew them?” Mr. Best replied: “I did not generate a number

The “predicted” dock build-out in the Assessment is premised on the “predicted” build-out of 94 homes on waterfront properties along Blakely Harbor, supposedly taking into account parcel restrictions, including zoning density, critical areas, known restrictive covenants and easements, and existing regulations. Tab 30, Ex. C-2.1, at 7-8. The Assessment then assumes that approximately 50% of the developed parcels in Blakely Harbor will have docks, a percentage based primarily on the average dock development for other residential harbors on Bainbridge Island, to arrive at the predicted dock buildout of between 45 and 59 docks. In and of itself, this evidence does not support the Board’s finding of consistency with the cumulative impact requirements of WAC 173-26-186(d). And it constitutes the totality of the evidence in the record that the Board and Ecology relied on to support the City’s cumulative impact analysis.

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). Currently, there are only six docks in all of Blakely Harbor, of which only four are functional and only one, a small

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to that effect.” Petitioners’ Motion to Supplement the Administrative Record, Ex. C, p. 182, lines 15-18.

private floating dock less than 100 feet long, has been approved and constructed since 1977. Thus, even though Blakely Harbor has been developed with single family residential development for many years, only two docks have been constructed in Blakely Harbor since enactment of the SMA more than a quarter of a century ago. Nothing comes close to the assumed “50%” development rate used in the Assessment.

Ecology then states that “past development” as a predictor of future development “makes little sense in the context of planning for growth.” Response Br., p. 22. The GMA, however, requires municipalities take into account “local circumstances.” RCW 36.70C.3201; WAC 173-26-186(8)(d). Appellants submit that the rate of growth to date in Blakely Harbor for private docks is such a local circumstance which bears heavily on whether there is a factual basis to enact an outright ban. Ecology concedes in its Response, p. 24, that “Blakely Harbor differed from other harbors on the Island which are mostly already developed with docks,” yet the Assessment relied on dock build-out rates in other harbors to justify the ban.

The Assessment presumes that 45 lots on the Harbor would be developed with very long docks protruding out into the bay more than 325 feet. *See* Tab 30 (Ex. C-2.2). But such development is not reasonably foreseeable, taking into account all the local circumstances, including the

City's existing regulations. *See* Opening Br., pp. 35-39. How is it that between 45 and 59 new docks at an average length of 325 feet can or will be approved and constructed in Blakely Harbor at a 50% rate of homes to new dock development? Respondents provide no answer based upon fact.

To maintain the integrity of the decision-making process, what was required was a probability analysis to support the predicted 50% growth rate. This is what the Guidelines require. Yet the City did not perform such analysis. It simply assumed development rates in other areas on the Island would occur in Blakely Harbor at the approximate same rate and ignored the "reasonably foreseeable" standard. Ecology Response, p. 21. This assumption is not backed by any analysis showing (1) that the circumstances in other bays are comparable to Blakely Harbor or (2) how the historic low rate of development in the Harbor is not expected to continue. Without adequate analysis, there is no substantial evidence which supports the Amendment under SMA policies relating to unrestricted development and protection of the aquatic environment from such activity.

A shoreline master program amendment requires a showing of "changing local circumstances, new information or improved data," justifying a change. WAC 173-26-060; Opening Br., pp. 35-37. Ecology does not address this standard at all in its response, which is telling. The

City alludes to WAC 173-26-060 but says it can amend its SMP “for other reasons.” City Response, p. 45. No citation of authority is provided by the City for this proposition, but the concession is remarkable, showing promulgation of the Amendment was tied into the City’s problems with its illegal moratorium instead of sound SMA planning.

The Blakely Harbor Cumulative Impact Assessment, when all is said and done, is not a document which demonstrates changing local circumstances, new information or improved data. Adoption of the Amendment is thus well outside the framework and is unsupported by substantial evidence. It was thus clearly erroneous for the Board to affirm its validity.

**D. The Dock Ban Is Internally Inconsistent Because in Conflict with the City’s Shoreline Master Program and Comprehensive Plan Policies.**

The GMA requires that Comprehensive Plan policies and regulations be “internally consistent,” which includes SMP policies. *See* RCW 36.70A.070 and .040(4). In this case, the SMP Amendment is not consistent with the City’s SMP and Comprehensive Plan policies. Under the 1996 SMP, private docks and piers are allowed except in the most protective shoreline designations, 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 along the Blakely Harbor shoreline.

No SMP policies suggest or support adoption of a ban in the semi-rural shoreline designation to Blakely Harbor and other residentially developed shorelines on Bainbridge Island in that designation. Instead, the City's SMP use policies are in keeping with SMP goals and policies that give preference to water dependent and water-related uses, including recreational docks and piers. This intent is emphasized as a "Master Goal" of the SMP. *See* Opening Brief, pp 31-32; Tab 35 (SMP at 11):

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. *See* Opening Brief, p. 33. The ban on docks and piers in Blakely Harbor is inconsistent with these SMP goals and policies regarding residential recreational uses 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 ban also disregards SMP policies relating to piers and docks that ensure that impacts therefrom are minimized or avoided. Tab 35 (SMP, pp. 106-07). These policies establish performance standards for construction and use of over water structures, not a prohibition.

The City's SMP allows exempt structures, including private docks. BIMC § 16.12.030(70); BIMC § 16.12.340(A); (C)(1). Dock exemptions are allowed for property owners within the semi-rural designation but not in Blakely Harbor, even though the bay is in the same designation. Nowhere in its response does the City explain away this inconsistency.

The City's ban on docks and piers in Blakely Harbor not only disregards its existing SMP goals, policies and regulations pertaining to docks and piers, but it also improperly burdens a discrete number of waterfront property owners merely because they happen to own waterfront property in Blakely Harbor without an existing dock or pier. For this reason, Ordinance No. 2003-30 is also inconsistent with SMP goals and policies to "[e]nsure that proposed shoreline uses give consideration to the rights of private property ownership and rights of others." RCW 36.70A.020. It is also inconsistent with similar Comprehensive Plan goals and policies intended to protect private property rights, such as Comprehensive Plan Land Use Element Goal No. 5.

In response, the City contends only "one type of structure is limited." Rep. Br., p. 54. What the City ignores is that a dock is a key amenity for a valuable waterfront parcel. There is a significant difference between the right to build a private dock and a right limited to using a commercial marina or busy public dock or public access. In this regard,

the City's existing SMP regulations already require that "[p]iers, floats, buoys, and docks shall not interfere with the use of navigable waters."

Tab 36 (SMP, p. 107).

Ordinance No. 2003-30 is also inconsistent with other Comprehensive Plan goals and policies, none of which even remotely suggest a dock ban even be studied or considered, let alone implemented. Instead, the Comprehensive Plan has designated the Blakely Harbor shoreline area for residential uses. A ban on private docks is inconsistent with such land use policies, as well as policies that ensure that the "costs and benefits to property owners should be considered in making land use decisions." Tab 34 (Comprehensive Plan (Goal 5)). The Ordinance fails to consider the attendant costs and benefits to property owners by making a few waterfront property owners bear the entire cost of preserving Blakely Harbor shorelines for the public.

Appellants do not contend the City is limited to denying docks "on a case-by-case basis." *See City Resp. Br.*, p. 52. Their contention is that a ban is the wrong tool, as it creates internal inconsistencies. Because the SMP Amendment bans private docks only in one area of Bainbridge Island with a semi-rural environment designation, Blakely Harbor, the SMP Amendment is inconsistent with the policies of the SMA and the SMP as well as the DOE Guidelines governing shoreline master program

amendments. The correct approach is to change the environment designation, which Ecology states the new guidelines allow. Ecology Resp., p. 25-26. See also City Resp., p. 42, citing WAC 173-26-201(3)(d)(ix) (Special Area Planning).<sup>12</sup> Ecology states the new guidelines show that the City had “discretion” to determine where piers and docks shall be located. The problem of course is that Ecology also states that the new guidelines do not apply and were ignored.

Appellants ask: which is it?

**E. The Board’s Final Decision and Order is in Violation of Constitutional Standards.**

Respondents assert that the burden of demonstrating that Ordinance No. 2003-30 violates constitutional provisions is on Appellants. City Response Br. at 55. Even though regularly enacted ordinances are presumed to be constitutional, that presumption ends where “the statute involves a fundamental right or a suspect class, in which case the presumption is reversed.” *Weden v. San Juan County*, 135 Wn.2d 678, 690, 958 P.2d 273 (1998). Fundamental attributes of ownership include “the right to possess, to exclude others, to dispose of property, or to make

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<sup>12</sup> The City in its response, p. 43, incorrectly claims Appellants contend the ban is illegal because inconsistent with WAC 173-26-211. This is not correct. The cited regulation shows how Appellants were prejudiced by Ecology ignoring the guidelines, which if employed could be used to create new shoreline designations. The internal conflict is the failure of the City to change the designation, treating two bays designated “semi-rural” differently.

some economically viable use of property.” *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993). Appellants have met their burden, and in the alternative, where the constitutional issues involve Appellants’ fundamental property rights, Respondents have failed their burden.

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

Relying on *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987), and *Weden*,<sup>13</sup> Respondents argue that Ordinance No. 2003-30 does not violate the public trust doctrine because it does not give up any control over the public’s interest in state waters and that it is consistent with the public trust doctrine. City Response Br. at 58, DOE Response Br. at 27. On the contrary, the public’s interest in shorelands recognizes an interest in fostering reasonable and appropriate uses, which includes a balance of public and private uses. RCW 90.58.020; *Caminiti*, 107 Wn. 2d at 670-71. The dock ban essentially gives up the ability to control that balance of public and private uses, by favoring public uses and excluding private uses.<sup>14</sup> Giving up such control is against the public’s interest, which favors a balance of both uses. RCW 90.58.020. Perhaps more

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<sup>13</sup> Respondents’ reliance on *Weden* is misplaced. There, the respondents attempted to argue that a right existed when it was never expressly stated. *Weden*, 135 Wn.2d at 695. Here, the rights of property owners are clearly expressed in the Shoreline Management Act. See *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 695-696, 169 P.3d 14 (2007) holding a moratorium on docks violates the public trust doctrine.

<sup>14</sup> Appellants are not, as the DOE claims, advocating in favor of unregulated docks. DOE Response Br. at 27.

importantly, the City is attempting to prohibit that which was allowed in *Caminiti* – public access to the waters of the state through construction of private recreational docks. Consequently, Ordinance No. 2003-30 violates the public trust doctrine.

## **2. The Ban Conflicts with General Laws**

The City contends that there is no conflict between the SMA and the dock ban by arguing that docks are not preferred uses; that a permit shall be granted only if consistent with the applicable master program; that the permit exemption does not apply to docks; and that even if a development is exempt, it must still meet all SMP provisions. Only a brief response is warranted. As discussed above and in the Opening Brief, the SMA does treat docks as a preferred, water-dependent use. Respondents' argument that a permit shall be granted only if consistent with the applicable master program is circular because, as the City notes, the applicable master program includes the very ordinance in dispute. Furthermore, the City improperly claims there are no express exemptions for docks by citing to WAC 173-27-040(2)(g) and ignoring the clear language in WAC 173-27-040(2)(h).

DOE argues that the dock ban is consistent with Ecology's guidelines and the SMA by misconstruing Appellant's arguments as an

unlimited right to construct a dock. DOE Response Br. at 29-30. As discussed previously, Appellants have never taken this position.

Respondents' arguments miss the bigger picture: 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. *Biggers* is directly on point: the Court of Appeals affirmed the trial court's holding that the City lacked authority to impose a moratorium and that the moratorium conflicted with the state's general laws in violation of our state constitution. *Biggers*, 124 Wn. App. at 865, *aff'd on appeal*, 162 Wn.2d 683.

### **3. The Ban Violates Equal Protection**

In all areas of the City, the City's "semi-rural" shoreline designation allows private docks. Only in Blakely Harbor are property owners treated differently. The City and Ecology justify the different treatment based on Blakely Harbor's "unique attributes detailed in the record." City Response Br. at 62; DOE Response Br. at 35. As discussed previously, when the City passed the ban, it did so by relying on the Assessment, but the Assessment is merely a general literature survey that does not correlate general observations from other areas to Blakely Harbor. Tab 30 (Ex. C-21, p. 24). Thus, the City lacked support for its position that Blakely Harbor should be treated differently when it passed

Ordinance 2003-30. Moreover, it was the *City* that classified Blakely Harbor as “semi-rural.” If Blakely Harbor is not semi-rural or if it requires a different classification because of its “unique attributes,” the City should not have designated it as such. Simply put, the City lacked reasonable grounds to justify excluding non-Blakely Harbor property owners within the class of owners who are completely banned from building docks.

#### 4. The Ban Violates Substantive Due Process

Respondents argue that the dock ban has a legitimate purpose, e.g. preservation of the environment and preventing negative impacts on views and navigation.<sup>15</sup> Appellants strongly contest, as set out above, that the ban is needed because impacts are assumed, not documented. However, assuming for the sake of argument that this is a legitimate purpose, Appellants still have provided no explanation as to why a *complete ban of all docks of every type* is needed to protect the environment, views and navigation, especially where any application would be screened rigorously by the City’s application process.<sup>16</sup> This type of response is not, as the

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<sup>15</sup> Appellants did not waive argument regarding the first two prongs, and, in fact, the trial court addressed all three prongs in its holding. Order, at 5, ¶ 11. CP 182-184.

<sup>16</sup> Whether any application would be harmful to the environment, views or navigation is speculation in light of the fact that the City’s moratorium, followed by the dock ban, prevented Appellants from filing an application.

DOE claims, a “measured and reasonable means” of advancing the City’s purposes. Ecology Resp. Br. at 32, but unduly onerous.

The City and Ecology contend that docks will have a greater impact than the many visitors who frequent the shorelines for recreational or other reasons. Noticeably missing is any argument that these other users of Blakely Harbor are shouldering any of the burden for protecting these waters. Instead, Respondents take the position that the Blakely Harbor waterfront property owners should bear the entire burden; this position violates Appellants’ substantive due process, requiring them to provide a public benefit without compensation. *E.g. Guimont v. Clarke*, 121 Wn.2d 586, 610-11, 854 P.2d 1(1993); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 22, 829 P.2d 765 (1992). When a regulation “fails to meet any of the three prongs of the substantive due process analysis, then it is subject to invalidation.” *Robinson v. City of Seattle*, 119 Wn.2d 34, 52, 830 P.2d 318 (1992). Because the ordinance fails all three prongs, it must be invalidated.

**F. The Superior Court Erred in Denying Appellant’s Motion to Supplement the Record**

The Superior Court’s refusal to allow Appellants to supplement the record with Mr. Best’s deposition and affidavit was clear error.

Supplementing the record was warranted because the evidence was needed

to decide disputed issues regarding the validity and lawfulness of the decision-making process. RCW34.05.562(1)(b). Peter Best's deposition and affidavit directly contradicts the City's, Board's and DOE's conclusions regarding the Assessment and "reasonably foreseeable" development. Although the City had the necessary information to make a foreseeability determination, it had not fully prepared its analysis until Mr. Best's affidavit and deposition were prepared. The analysis – which should have been done as part of the decision making process and not after the fact – contradicts the conclusions about predicted development. Consequently, the integrity of the decision-making process was compromised.

Moreover, the information was not cumulative, as the City contends. City Response Br. at 69. Although the City had the basic information needed to conduct its analysis, the City did not actually perform and complete the required analysis until after Ecology's approval of the SMP Amendment.<sup>17</sup> Thus, it is not cumulative, but rather contradictory. To the extent that the City argues that the information was not contradictory, City Response Br. at 68, it would be up to the decision-maker, not the City, to determine the significance and probative value of the new information.

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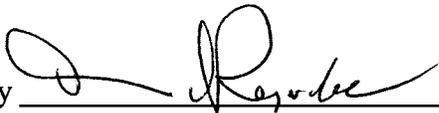
<sup>17</sup> It is absurd for the City to suggest that a citizen must depose City officials during the legislative process as part of a public process. City Response Br. at 70.

### III. CONCLUSION

For the reasons stated, the Board Decision should be reversed and the Blakely Harbor Amendment declared unlawful and invalid.

RESPECTFULLY SUBMITTED this 23 day of May, 2008.

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Attorneys for Appellants

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**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 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 the document entitled

**APPELLANTS' REPLY BRIEF, APPELLANTS' MOTION FOR LEAVE TO FILE OVER-LENGTH BRIEF and DECLARATION OF DENNIS D. REYNOLDS**

on the following:

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APPELLANTS' MOTION FOR LEAVE TO FILE OVER-LENGTH BRIEF - 5

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DATED this 23d day of May, 2008.

  
\_\_\_\_\_  
Karen Hall

APPELLANTS' MOTION FOR LEAVE  
TO FILE OVER-LENGTH BRIEF - 6

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