

No. 34780-6-II

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

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

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

Appellants,

vs.

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

Respondents.

CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF

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ORIGINAL

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RULES

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I. NATURE OF THE CASE

This matter is an appeal of a decision by the Central Puget Sound Growth Management Hearings Board (“Board”) that upheld an Ordinance enacted by the City and approved by the Department of Ecology. The Ordinance amends the City’s Shoreline Master Program to include a provision designed to protect aesthetic qualities, navigation, and natural resources in Blakely Harbor, a “shoreline of statewide significance” under the Shoreline Management Act ("SMA").

The SMA requires that the City manage and plan for shoreline development. For shorelines of statewide significance, such as Blakely Harbor, the SMA contains an extremely strong policy in favor of protecting and preserving these shorelines for benefit of the public. The SMA requires that when the City adopts, and the Department approves, a master program relating to these shorelines, preference must be given to uses that recognize statewide over local interests, preserve the natural character of the shoreline, and result in long-term over short-term benefit. For shorelines of statewide significance, the public interest is paramount. *RCW 90.58.020*.

Blakely Harbor is a unique body of water. The Harbor is recognized as the least developed harbor in all of Central Puget Sound. Based on the Harbor’s relatively pristine state, its well-documented natural resources and beauty, its geography, and its history of use by vessels, as well as best available science and a study addressing impacts of docks on the Harbor, the City enacted and the Department approved Ordinance No. 2003-30. The Ordinance prohibits new single-use private docks in the Harbor, and allows

one public dock and two community docks. This limited Ordinance does not affect any other use of shoreline property.

On appeal, the Board upheld the City's enactment, and the Department's approval, of Ordinance No. 2003-30. The Superior Court affirmed the Board. In this appeal, Appellants have a heavy burden of proof. This Court must uphold the Board's Decision unless the Court determines the Board erred by ruling that Appellants failed to prove, by clear and convincing evidence, that the Ordinance is inconsistent with SMA policies and applicable regulations.

Appellants cannot meet this burden; the Ordinance is consistent with the SMA's policies, particularly those for shorelines of statewide significance, and all relevant regulations. The Board did not err by ruling that the Department properly determined that "new" regulations did not apply to the City's enactment of the Ordinance. Even if "new" regulations applied, the Ordinance is consistent with those regulations. Likewise, Appellants did not establish that the Ordinance is inconsistent with any Comprehensive Plan or Master Program provision. Finally, Appellants failed to establish that the Ordinance violates any constitutional provision. Accordingly, the Court should affirm the Department's action, the Board's Decision upholding that action, and the Superior Court Order affirming the Board's Decision.

II. STATEMENT OF ISSUES

1. Whether the Board properly determined that Appellants failed to establish by clear and convincing evidence that the Departments' decision approving Ordinance No. 2003-30 is inconsistent with the Shoreline Management Act policies in RCW 90.58.020, particularly the policies that govern shorelines of state-wide significance?

2. Whether the Board properly determined that Appellants failed to establish by clear and convincing evidence that the Departments' decision approving Ordinance No. 2003-30 is inconsistent with any applicable Shoreline Management Act guidelines, particularly the guidelines that govern shorelines of state-wide significance?
3. Whether the Board properly determined that Appellants failed to establish by clear and convincing evidence that the Department's application of the laws in effect when the City enacted Ordinance No. 2003-30, submitted the Ordinance to the Department, and during public comment and the majority of the Department's review, was improper?
4. Whether the Board properly determined that Appellants failed to establish that the City's enactment of Ordinance No. 2003-30 was clearly erroneous, based on alleged inconsistency with other City Comprehensive Plan or Master Program provisions?
5. Whether the Board's Decision affirming the City's enactment and the Department's approval of Ordinance No. 2003-30 is supported by substantial evidence?
6. Whether the Board's Decision affirming Ordinance No. 2003-30 (1) violates the public trust doctrine, (2) conflicts with the Shoreline Management Act in violation of Article XI, Section 11 of the state Constitution, or (3) violates constitutional substantive due process or equal protection requirements?

III. STATEMENT OF THE CASE

A. Blakely Harbor Is One of the Most Pristine Harbors Remaining in Puget Sound.

The City consists of the entire Bainbridge Island, located in Central Puget Sound between the City of Seattle and the Kitsap Peninsula. *Tab 30 (Ex. C-2.1, p. 5)*. The City has 45 miles of shoreline, with four major harbors, and several additional bays of varying size. *Tab 35 (SMP, p.6 (map), p. 7); Tab 36 (Ex. C-222, p. 4, Ex. C-223)*.

Blakely Harbor is on the Island's southeastern shore, between Jasmine Point to the north and Restoration Point to the south. Absent any docks or other obstructions, the Harbor would contain 279.1 acres of navigable water, with 288.4 acres navigable by handcraft. *Tab 30 (Ex. C-2.1, p. 5, 14)*. Water depths range from 150 feet in the outer Harbor to 60 feet in the inner Harbor. The Harbor is sheltered from all but easterly winds. *Tab 36 (Ex. C-222, p. 5, App. C p. 1)*.

Blakely Harbor has a rich and unique history. Around 1900, the Harbor hosted one of the largest timber mills in Puget Sound, with a booming ship building industry. The mill was located at the Harbor's head. A town existed around the mill. *Tab 30 (Ex. C-2.1, p. 5); Tab 36 (Ex. C-222, p. 5)*.

All that has changed, as over the last 90 years, the Harbor has reverted to a much more natural, pristine condition. *Tab 30 (Ex. C-2.1, p. 5)*. Much of the Harbor has returned to its pre-1900 condition. *Tab 36 (Ex. C-222, p. 5)*. Blakely Harbor is now recognized as the least developed, and perhaps the last undeveloped, harbor in all of Central Puget Sound. *Tab 30 (Ex. C-2.1, p. 5); Tab 36 (Ex. C-222, p. 28, App. C, p. 1)*. When compared to other harbors in the City, there is certainly no harbor as undeveloped as Blakely Harbor. *Tab 30 (Ex. C-2.1, p. 5); Tab 36 (Ex. C-222, p. 5)*.

Blakely Harbor is an important ecological resource, with habitats that include tidelands, wetlands, ravines, and succession forests, and also contains interesting geological features. It is a haven for shore birds and waterfowl,

animals, plants, trees and marine life.¹

Year-round, Blakely Harbor provides a special niche to vessels of all kinds as a mid-Puget Sound destination in close proximity to Seattle. *Tab 36 (Ex. C-222, p. 5)*. Although it is in sight of the Seattle skyline, the prevailing natural beauty gives the illusion of being far away, making it a favored destination for anchorage. *Tab 36 (Ex. C-222, App. C, p. 1, 5)*. As one of the last undeveloped anchorages in Puget Sound, Blakely Harbor is valued by boaters for its rustic integrity. *Id., App. C p. 23*. During the 1997 yachting season, an estimated 7,643 boats used the Harbor. *Tab 30 (Ex. C-2.1, p. 13)*.

Other recreational uses are also integral to Blakely Harbor. The Harbor is used by a multitude of kayakers and canoeists. People swim, picnic, enjoy the beaches, and fish. *Tab 36 (Ex. C-222, App. C. p. 5)*. Boaters come ashore to explore the estuary and view the mill's remnants. *Id.* The head of the Harbor has been acquired as a park, and the two Points are currently open space. *Tab 30 (Ex. C-2.1, p. 5)*. Blakely Rock, directly outside the mouth of the Harbor, is prized by scuba divers. *Tab 36 (Ex. C-222 App. C, p. 2)*.

Currently, some residential development exists along Blakely Harbor's

¹ The Harbor's water quality supports two oyster farms. *Tab 36 (Ex. C-222, p. 5)*. At the head of the Harbor, the mill pond is now an estuary providing wildlife habitat. *Tab 36 (Ex. C-222, App. C p. 1)*. The shoreline consists of bedrock, above which rise steep wooded slopes. A waterfall cascades to the shores below. Small caves and interesting rock formations are found in sandstone on the north shore near Jasmine Point. *Id.* At least 124 species of birds live in the habitat surrounding the Harbor, including blue heron, bald eagles, and red-tailed hawks, as do a wide variety of mammals. *Id., App. C, "Birds of Blakely Harbor Area," "Mammals in Port Blakely Area."* The Harbor contains water habitats that are very productive and heavily used, particularly by salmonids. *Id., "Aquatic Resources in Blakely Harbor."* Two federally listed species (bald eagle and chinook salmon) utilize the Harbor. *Tab 30 (Ex. C-2.1 p. 24)*.

northern and southern shores. As of February 2002, there were 35 residences on the Harbor's shores. *Tab 30 (Ex. C-2.1 p. 9)*.

One of Blakely Harbor's unique features is the scarcity of docks. *Tab 36 (Ex. C-222, App. C, p. 22)*. Before 2002, there were only four functioning docks, with six total docks. One dock is on the Harbor's southeast shore as part of the Seattle Country Club; three are on the north-central shore. *Id.*

Unfortunately, development pressure is increasing. The general City population is expected to increase by more than 2,500 residents from 2000 to 2010. *Tab 34 (Comp. Plan Intro. p. 7)*. Typically, the most densely developed areas are the City center and the shorelines. *Id. (Land Use Element, p. 35)*. Over 82 percent of the City's shoreline lots are developed, with the vast majority being private residences. *Tab 30 (Ex. C-14, Summary of BAS, p. VI-3)*. As of February 2000, there were several active applications for subdivisions, building permits, and dock development for Blakely Harbor shoreline property. *Tab 30 (Ex. C-2.1 p. 5); Tab 36 (Ex. C-220, 223)*. In 1999, the 1,100 acre Port Blakely Mill Company land was under redevelopment. *Tab 36 (Ex. C-222 App. C p. 2)*. Although for many years there were no applications to construct new docks, in 2001 there were two dock applications, and one was constructed in 2002. *Tab 30 (Ex. C-191, 210, p.7, 220)*. Other Harbor property owners were interested in installing docks. *Tab 30 (Ex. C-62, 164, 211 Findings p. 2); Tab 36 (Ex. C-74, 78, 168)*.

B. The City Becomes Interested in Limiting Docks in Blakely Harbor as Part of its Review of its Shoreline Master Program.

In Washington, the regulation of shoreline development and use is

three-tiered: (1) the Shoreline Management Act, Chapter 90.58 RCW; (2) regulations adopted and administered by the Department of Ecology to implement the SMA; and (3) "shoreline master programs" adopted by each local jurisdiction pursuant to the SMA and the implementing regulations. In 1996, the City adopted its Shoreline Master Program ("SMP"). For land on Blakely Harbor's shoreline, the City's SMP designates the areas landward of the ordinary high water mark as "semi-rural" or "rural" environment, and areas waterward of the ordinary high water mark as "aquatic" environment. *Tab 35 (SMP, p. 52).*

In 2000, the Department revised the shoreline regulations. In 2001 and 2002, the City was in the initial stages of reviewing its 1996 SMP for amendments, in response to the revised regulations. See *RCW 90.58.080 (version in effect until 2003)*(requiring comprehensive SMP updates within two years of revised regulations). Based in part on the unique and relatively pristine nature of Blakely Harbor, as well as the Harbor's configuration and history, the City began to consider limiting docks in the Harbor.² In fact, during this time, the City considered limits on docks on all City shorelines.

In 1999, the City had adopted a Harbor Management Plan. *Tab 30 (Ex.*

² In 1992, the Bainbridge Park and Recreation District adopted a Park Plan for Blakely Harbor, which the City adopted as part of its Comprehensive Plan. *Tab 30 (Ex. C-2.4); Tab 34 (Comp. Plan, Land Use Element, p. 99)*. The Park Plan identifies Blakely Harbor as "one of the most unique harbors in Puget Sound, a deep sheltered harbor, largely free from docks and pollution, in close proximity to the major metropolitan area of Seattle, plus Bremerton," and states the desire to preserve the "unique character of the inner harbor as a splendid example of the potential of natural recovery." *Tab 30 (Ex. C-2.4, p. 2, 3)*. The Plan details the Harbor's historical significance, describes the ecological recovery, and lists birds, mammals, and aquatic life using the Harbor. *Id. p. 8-17*.

C-2.3, 222). The Harbor Plan recognizes:

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. To the maximum extent possible, consistent with the general policies herein, its character should be maintained. . . .

Tab 30 (Ex. C-2.3, p. 28). The Plan establishes the Goal to “[m]anage the number, size and placement of structures built on the water to allow the greatest use and enjoyment of the Bainbridge Island waters,” and “[t]he City will determine the number, size and location of water-dependent structures that the city’s harbors can ecologically and environmentally support.” *Tab 36 (Ex. C-222, p. 22).*³

After adopting the Harbor Plan, the City began work on the Bainbridge Island Nearshore Assessment study. The Nearshore Assessment is a comprehensive summary and analysis of the best available science relating to the impacts of development on shorelines, including overwater structures such as docks. *Tab 36 (Ex. C-223).*

In 2002, the City completed the “Blakely Harbor Cumulative Impact Assessment.” The Cumulative Impact Assessment identifies Blakely Harbor as the “least and perhaps the last undeveloped harbor in all of Central Puget Sound.” *Tab 30 (Ex. C-2.1, p. 5).* The Assessment was prepared specifically to document impacts of overwater structures on Blakely Harbor, to provide

³ Further, “growth in numbers and size over the years of piers, docks and other water dependent structures without the benefit of a master plan has created the potential for unsafe navigation and degradation of the environment of City waters.” *Tab 36 (Ex. C-222, p. 21).*

information for a discussion regarding Blakely Harbor's future. *Id.*

The Assessment created three models for impact assessment: (1) existing development in the Harbor, based on the six existing docks; (2) predicted (likely) development based on current development patterns in Blakely Harbor and other City residential harbors; and (3) maximum allowable development under land use and environmental laws. *Tab 30 (Ex. C-2.1, p. 7, 8).* The predicted and maximum development scenarios were based on a number of assumptions regarding known land development restrictions, such as zoning density, critical areas, restrictive covenants, and other existing regulations. *Id. at p. 7-8.* The predicted scenario was also premised on other assumptions that affect development.⁴ Based on these assumptions, this scenario predicts that 45 docks will be built in Blakely Harbor. *Id. at 9.* The maximum scenario predicts 59 docks will be built. *Id.*⁵

While there is a substantial jump in residential development between the predicted and maximum build-out scenarios, the increase in dock development is much smaller, primarily because the City considered joint-use

⁴ The predicted development scenario assumptions include: (1) lot size, (2) Blakely Harbor Park would not have a dock, (3) some parcels are not likely to develop due to lot size and relationship to neighboring developed parcels under same ownership, (4) subdivisions must provide joint use dock facilities, (5) the Seattle Country Club will remain as open space, and (6) dock density will not exceed average dock development in other residential harbors in the City (in other residential harbors, 60% of developed lots have docks; this scenario predicts that 50% of developed parcels in Blakely Harbor will have docks due to large sections of the shoreline that are not likely or able to develop docks). *Id. at p. 8.*

⁵ The maximum build-out scenario was based on the assumptions that: (1) all subdivisions would be based on maximum zoning and minimum lot dimensions for shoreline lots, (2) subdivision of the Seattle Country Club property would provide joint use dock facilities, and (3) all parcels would develop docks, if possible. *Id., p. 8.*

docks that would be required due to the Harbor's challenging topography, critical areas, rights-of-way, and existing marina facilities. *Id.* p. 8. However, the increase in docks between the existing condition and the predicted development scenario is very significant. *Id.*

For each of the three scenarios, the Assessment analyzed the cumulative impacts of docks to views, navigation, and natural resources. *Tab 30 (Ex. C-2.1, at 10)*. The Assessment concludes: “The predicted build-out scenario, which is considered the most likely, presents a significant change to the character, navigational use, and natural resources of Blakely Harbor when considered cumulatively.” *Tab 30 (Ex. C-2.1, p. 8-9)*.

Regarding views, in Blakely Harbor, publicly available vistas include views from Blakely Harbor Park at the head of the Harbor, Seaborn Road along the north shore, and Country Club Road along the south shore. *Tab 30 (Ex. C-2.1, p. 11)*. The Assessment addressed view corridors and ambient views. *Id.* The predicted development scenario presents significant view corridor narrowing, including a 58% reduction in view from Blakely Harbor Park, a 27% reduction from the eastern Country Club Road vista, and view reductions in other areas ranging from 41 to 47 percent. *Id., p. 11-12; Tab 30 (Ex. C-2.2)*. The maximum build-out scenario presents an even greater narrowing of view corridors, with reductions up to 78 percent. *Tab 30 (Ex. C-2.1, p. 11-12)*. As to ambient views, “dock development within the Harbor will clearly impact ambient views from the shorelines and significantly affect ambient views from the water.” *Id. p. 12*. Ambient views from Blakely Harbor Park and Seaborn Road are significantly impacted under both build-

out scenarios, and ambient views from Country Club Road are either moderately or significantly impacted . *Id.* p. 12, 13.

The Assessment analyzed impacts to navigation of small handcraft (kayaks, dinghies, canoes) and vessels (motorboats and sailboats):

All types of residential docks will directly limit the passage of any sized vessel. Dock size, water depth, vessel draft, and the ability of the vessel to turn are all factors that determine the impact of a dock on vessel navigation. These factors limit the ability of any sized vessel to freely navigate within a certain vicinity of a particular dock, therefore **creating an indirect loss of navigable waters greater than the physical footprint of the structure.** Clusters of docks will cumulatively eliminate even larger areas of navigable waters because the open water between structures are no longer functional for navigation. **Continuous dock development along the shoreline will completely eliminate nearshore navigation within the harbor,** resulting in significant losses of navigable waters

Tab 30 (Ex. C-2.1 p. 13-4)(emph. added). The predicted and maximum build-out scenarios will eliminate 90 acres of navigable water and prevent almost all unencumbered nearshore vessel navigation. *Id.* p. 14. Reducing the operational surface area will adversely impact boater safety. *Id.*⁶

Regarding natural resources, the Assessment summarizes existing natural resources in Blakely Harbor and analyzes the impact of dock development based on best available science. *Tab 30 (Ex. C-2.1, p. 15-8, 26-7).* Based on the best available science, the Assessment summarizes direct

⁶ Regarding handcraft, the Assessment recognizes that dock design combines both pier and float structures, so an increase in docks will have limited impact on handcraft navigation. *Id.* at 14. However, the increase in Harbor use by vessels and handcraft will adversely impact safety of handcraft, and general safety and intensity of use in the Harbor may reduce handcraft use, and could likely result in a significant de facto loss of navigable water. *Id.*

and indirect impacts of dock development and associated activities.⁷

The Assessment discusses cumulative impacts of dock development. *Id. at 22-3.* The additive impact of each dock can lead to adverse non-linear impacts, including shifts in benthic and riparian habitats, species assemblage changes, alteration of habitat and ecological functions between docks and upland activities, migration disturbance, and increased risk of predation. *Id. at 23.* Overwater and upland activity can increase nutrient input, leading to algae blooms and reduced light and oxygen in the Harbor waters. *Id.*

C. Based on Information in the Record Regarding the Impacts of Dock Development on Blakely Harbor, Including the Cumulative Impact Assessment, the City Adopts Ordinance No. 2003-30.

As part of the City's review of its Shoreline Master Program as a whole, the City's Steering Committee considered limitations on docks. In its recommendations for potential SMP amendments, the Committee recommended prohibiting private docks on Blakely Harbor's south shore, and provided options on dock restrictions for the north shore. *Tab 36 (Ex. C-12).* In 2001, the City was preparing the Nearshore Assessment, but the study

⁷ Direct impacts include: (1) loss of benthic (bottom) habitat, (2) animal and plant injury/mortality, (3) increased turbidity, (4) reduction in available light, (5) alteration of ambient light patterns, (6) noise disturbance, (7) sediment impoundment, and (8) removal of riparian vegetation. *Tab 30 (Ex. C-2.1 p. 18).* For the predicted development scenario, benthic habitat loss is estimated at 565 square feet, with infauna habitat loss of 1,696 square feet. For the maximum build-out scenario, benthic habitat loss is estimated at 815 square feet, with infauna habitat loss of 2,446 square feet. *Id., p. 19.* Indirect impacts from docks and associated activities are summarized as: (1) altered wave energy patterns, (2) altered substrate characteristics and dynamics, (3) decreased primary production, (4) increased exotic species, toxics, nutrients, and bacterial introductions, (5) alteration of hydrology, (6) alteration of water quality, (7) alteration of microclimates, and (8) alteration of upland wildlife habitat and composition. *Id. at 19-22.*

would take time to complete. In August 2001, the City enacted a moratorium on applications for certain shoreline permits, including applications for new docks and piers. *Tab 30 (Ex. P-1)*.

The City's Planning Commission considered the Steering Committee's proposal. After the Cumulative Impact Assessment was complete, the Commission conducted a public hearing on the issue of dock limitations in September 2002, and a public workshop in December 2002. *Tab 30 (Ex. C-131 p. 2)*. The Commission submitted its recommendation in January 2003, which included prohibiting private docks in Blakely Harbor, but allowing one public dock. *Id. (Ex. C-131 p. 2, Ex. C-15)*. City staff then continued work on the SMP amendments, including the Blakely Harbor dock restrictions.

In 2003, the legislature extended the statutory timeframe for the City's completion of its SMP amendments to 2011. *RCW 90.58.080(2)(a)(iii)*. Given this legislative timeframe, the City determined that the comprehensive SMP updates would not be completed that year. But based on the unique characteristics of Blakely Harbor, the City determined to continue considering dock limitations in that Harbor. Most of the information on the impacts of dock development, in general and in the Harbor, had already been prepared or gathered by the City.⁸

Therefore, the City prepared an ordinance that related solely to dock limitations in Blakely Harbor, which was reviewed by the Land Use

⁸ As noted by Appellants, the City's moratorium on shoreline applications had been challenged in court. The Washington Supreme Court ultimately invalidated the moratorium. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007).

Committee, and forwarded to the City Council for review on July 9, 2003. *Tab 36 (Ex. C-24); Tab 30 (Ex. C-25)*. This draft proposed to prohibit all new docks in the Harbor, except for one public dock. *Tab 30 (Ex. C-25)*.

The Land Use Committee considered the ordinance at a July 16, 2003 meeting. The City solicited comments from citizens, and on July 31, conducted a public workshop on the ordinance at Blakely Harbor Park. *Tab 36 (Ex. C-33, 63, 120, 140)*. The Committee determined to present three options to the City Council: (1) allow one public dock, (2) allow two community docks, or (3) allow one public dock and two community docks. *Tab 36 (Ex. C-65, 140); Tab 30 (Ex. C-67)*. In August 2003, the City Council held two public hearings on the alternatives, and accepted written comments. *Tab 30 (Ex. C-114); Tab 36 (Ex. C-77, 140)*. The Department of Ecology indicated that the proposed ordinance appeared consistent with the SMA. *Tab 36 (Ex. C-68)*. On September 10, the Council passed Ordinance No. 2003-30, adopting the alternative that prohibits new single-use docks, and allows two community docks and one public dock. *Tab 30 (Ex. C-129, 131); Tab 36 (Ex. C-140)*.

D. The Department of Ecology Approves Ordinance No. 2003-30.

The SMA requires that Department of Ecology approve amendments to local shoreline master programs. *RCW 90.58.090*. Therefore, on September 25, 2003, the City forwarded the Ordinance to the Department for its review. *Tab 30 (Ex. C-144)*. Pursuant to its ordinary procedures, the Department solicited written public comments, which were submitted to the Department through November 30, 2003. *Tab 9 (City's Index, Ex. C-152 through 208);*

Tab 36 (Ex. C-140, p. 5; Ex. C-151). Ultimately, on February 6, 2004, the Department issued Findings of Fact and Conclusions of Law approving Ordinance No. 2003-30 as consistent with the SMA policies, particularly those for shorelines of statewide significance, and the implementing regulations. *Tab 30 (Ex. C-211).*

E. Statement of Procedure.

1. The Growth Management Hearings Board Affirms the City's and the Department's Actions.

Appellants appealed the City's enactment, and the Department's approval, of Ordinance No. 2003-30 to the Central Puget Sound Growth Management Hearings Board ("Board"). Following a hearing, the Board affirmed the City's enactment, and the Department's approval, of Ordinance No. 2003-30. *Tab 41 (Board Decision).*

2. The Superior Court Affirms the Board's Decision.

Appellants filed a petition in Thurston County Superior Court under the Administrative Procedures Act, appealing the Board's Decision, and alleging that the Ordinance violates constitutional provisions, including the public trust doctrine, Article XI, Section 11, substantive due process, and equal protection. The Superior Court affirmed the Board in all respects, and dismissed all the constitutional claims. *CP 176-81; RP 5-112.* The Superior Court also denied Appellants' Motion to Supplement the Board's administrative record, as Appellants did not prove they were entitled to supplement the record pursuant to RCW 34.05.562. *CP 182-4.*

IV. AUTHORITY AND ARGUMENT

A. Standard of Review.

1. Standard of Review under the Administrative Procedure Act.

The Administrative Procedure Act ("APA") governs judicial review of challenges to Board actions. *Quadrant Corp. v. Growth Man. Hgs. Bd.*, 154 Wn.2d 224, 233, 110 P.3d 1132 (2005). Under the APA, the "burden of demonstrating the invalidity of agency action is on the party asserting the invalidity." *RCW 34.05.570(1)(a)*.

The APA establishes standards for granting relief from agency action. *RCW 34.05.570(3)*. The APA standards are "applied to the agency's action at the time it was taken." *RCW 34.05.570(1)(b)*. Here, Appellants allege that the Board's decision violates eight APA standards. *App. Brief, p. 13*, citing *RCW 34.05.570(3)(a)-(f), (h), (i)*.

Under the APA, "judicial review of the Board's decision is based on the record made before the Board." *King County v. Growth Man. Hgs. Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *RCW 34.05.558*. The APA standards are applied directly to the record before the Board. *Id.* The Court grants relief **only** if a person was substantially prejudiced by the action challenged. *RCW 34.05.570(1)(d)*.

Under *RCW 34.05.570(3)(d)*("erroneous interpretation or application of law" standard), the Court reviews the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the statutes that it administers. *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 15, 57 P.3d 1156 (2002). Under *RCW 34.05.570(3)(e)*("substantial evidence"

standard), the test is whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County v. Growth Man. Hgs. Bd.*, 142 Wn.2d at 553.⁹ Under RCW 34.05.570(3)(i)("arbitrary and capricious" standard), the Board's decision is reversed only if it is willful, unreasoning, and issued without regard to or consideration of the surrounding facts and circumstances. *Manke Lumber Co. v. Growth Man. Hgs. Bd.*, 113 Wn.App. 615, 622, 53 P.3d 1011 (2002). A decision issued after due consideration is not arbitrary and capricious if there is room for two opinions, even if the reviewing court deems that the record would also support a different decision. *Manke Lumber*, at 622.

2. Standards for Review of Shoreline Master Program Amendment under the GMA and SMA.

This matter requires the Court to review the Board's Decision affirming the City's amendment to its Shoreline Master Program, and the Department of Ecology's approval of the amendment. In applying the APA standards to the Board's Decision, it is important to keep in mind the standards that governed the Board's review. These standards are set forth in the Growth Management Act ("GMA) and the SMA.¹⁰

⁹ Reviewing courts do not substitute their own judgment for that of the fact-finder; the review "necessarily entails acceptance of the fact-finder's view regarding credibility of witnesses and the weight to give reasonable but competing inferences." *State ex rel. Lige & Dickson Co. v. Pierce County*, 65 Wn.App. 614, 618, 829 P.2d 217 rev. denied 120 Wn.2d 1008, 841 P.2d 47 (1972); *Hilltop Terrace Assn. v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995). The Court views the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Boehm v. Vancouver*, 111 Wn.App. 711, 716, 47 P.2d 137 (2002).

¹⁰ Appellants make no mention of the GMA and SMA standards of review, which must be applied in this case and which are deferential to the City and the Department.

Under the GMA, the City's SMP policies are an element of its comprehensive plan, and the shoreline regulations in the SMP are part of its development regulations. *RCW 36.70A.480(1)*. The GMA instructs that the sole basis for determining whether a SMP complies with the GMA is (1) the policies, goals and provisions in the SMA and applicable guidelines, and (2) the GMA's internal consistency provisions. *RCW 36.70A.480(3)*. The Board is required to find compliance with the GMA, unless the Board determines that the City's actions **are clearly erroneous** in view of the entire record, and in light of the GMA's goals and requirements. *RCW 36.70A.320(3)(emph. added)*.¹¹ Further, the Board grants deference to the City in its land use planning, and recognizes that cities may exercise a broad range of discretion in planning, consistent with requirements of the GMA. *RCW 36.70A.3201*.

The SMA requires that Department of Ecology approve amendments to SMPs. *RCW 90.58.090*. Ordinance No. 2003-30 addressed Blakely Harbor, which Appellants agree is a "shoreline of statewide significance," as are all City shorelines. *RCW 90.58.030(2)(e)(iii)*. Thus, the Department could approve the Ordinance "only after determining the program provides the **optimum implementation of the policy** of [Chapter 90.58] **to satisfy the statewide interest.**" *RCW 90.58.090(5)(emph. added)*.

Consistent with the APA, the SMA provides that Appellants have the burden of proof in this appeal. *RCW 90.58.190(2)(d)*. Because this appeal

¹¹ Under the clearly erroneous standard, the City's action is upheld unless the Board is "left with a firm and definite conviction that a mistake has been made." *Dept. of Ecology v. PUD No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

involves a master program for a shoreline of statewide significance, the burden of proof is heavy. The Board must uphold the Department's decision unless the Board, "by clear and convincing evidence, determines that the decision is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines." *RCW 90.58.190(2)(c)(emph. added)*. Here, the Board properly held that Appellants did not establish by clear and convincing evidence that Ordinance No. 2003-30 is inconsistent with the policies in RCW 90.58.020 or the applicable guidelines relating to shorelines of statewide significance.

B. Ordinance No. 2003-30 is Consistent with the SMA Policies Relating to Shorelines of Statewide Significance.

1. The SMA Policies For Shorelines of Statewide Significance Require that the Master Program Protect Statewide over Local Interests, Preserve the Shoreline's Natural Character, and Result in Long-Term over Short-Term Benefit.

The Shoreline Management Act, enacted in 1971 by initiative of the citizens, is strong legislation designed to protect Washington's shorelines as fully as possible. The SMA's policy is based on recognition that shorelines are among the most valuable and fragile of the state's natural resources, there is great concern relating to shoreline use, protection, and preservation, and increasing pressure of additional uses being placed on them necessitates coordination and management to protect the resource. *RCW 90.58.020*; *Buechel v. Dep't. of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *Bellevue Farm Owners Assoc. v. Shorelines Hgs. Bd.*, 100 Wn.App. 341, 350. 997 P.2d 380 (2000). The SMA is broadly construed in order to protect the shorelines as fully as possible. *Buechel*, 125 Wn.2d at 203; *RCW 90.58.900*.

The SMA's primary purpose is "to protect the state shorelines as fully

as possible." *Lund v. Dept. of Ecology*, 93 Wn.App. 329, 337, 969 P.2d 1072 (1998).¹² RCW 90.58.020 states the SMA's general policy:

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.

Moreover, the SMA distinguishes shorelines of statewide significance from other shorelines, and states an even stronger policy in favor of protecting and preserving these shorelines for benefit of the public. The Act expressly requires that when a city adopts, and the Department approves, a master program for these shorelines, preference *must* be given to uses that recognize statewide over local interest, preserve the natural character of the shoreline, and result in long-term over short-term benefit. In fact, for shorelines of statewide significance, the public interest is "paramount":

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. ... [L]ocal government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference

¹² In the SMA, the legislature finds that much of the shorelines and adjacent uplands "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.." *RCW 90.58.020 (emph. added)*.

which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020 (emph. added). In implementing the SMA's policy, "the public's opportunity to enjoy the physical and aesthetic qualities of the natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the State and the people generally."

RCW 90.58.020; see RCW 90.58.090(5).

The SMA policies for shorelines of statewide significance are the key provisions that the City and Department were required to follow in enacting and approving Ordinance No. 2003-30. Yet Appellants' Brief makes no mention of these policies that **require** consideration of public interests as paramount and **require** preference of uses that recognize statewide over local interest, preserve the shoreline's natural character, and promote long-term benefit. This is a fundamental flaw in Appellants' position.

Ordinance 2003-30 is consistent with all of the SMA's policies, and in particular, the policies governing shorelines of statewide significance. The Ordinance promotes the public's opportunity to enjoy Blakely Harbor's unique physical and aesthetic qualities, protects the public interest in navigation, and fulfills the requirement that "the interest of all of the people

shall be paramount" when managing shorelines of statewide significance. *RCW 90.58.020*. The Ordinance gives the required preference to use of Blakely Harbor that: (1) recognize statewide over local interests; (2) preserve the natural character of the Harbor; (3) result in long-term over short-term benefit; (4) protect the Harbor's resources and ecology; (5) increase public access to publicly-owned areas (Blakely Harbor Park); and (6) increase recreational opportunities for the public. *See Tab 30 (Ex. C-211)*.

Thus, the Board correctly concluded that the Ordinance is consistent with SMA policies, particularly given Appellants' heavy burden to prove any inconsistency "by clear and convincing evidence."

2. In Ordinance No. 2003-30, the City Planned for Reasonable and Appropriate Use of Blakely Harbor Shorelines.

Appellants allege that Ordinance No. 2003-30 is inconsistent with language in *RCW 90.58.020* regarding "planning for and fostering all reasonable and appropriate uses," arguing the Ordinance does not strike the appropriate balance between shoreline use and protection. *App. Brief, p. 26-8*.

Ordinance No. 2003-30 is consistent with this provision. The statute does not require the City to permit every use, or even every "preferred use," on every shoreline in the City.¹³ For example, the City is not required to permit ports, water-related industry, or single-family residences (or any other use) on every shoreline. Rather, the City has authority to plan for shoreline uses on a coordinated, area-wide basis. The SMA contemplates that the City

¹³ Before the Superior Court, Appellants agreed that the City does not have to allow a preferred use, or docks, on every shoreline. *CP __ (Pet. Opening Brief, p. 29)*.

will plan in its SMP for various uses on different shorelines.

The City fulfilled this responsibility. The City permits private, single-use docks on other shorelines where single-family residences are permitted on uplands. However, based on the unique circumstances of Blakely Harbor, the City made a policy decision, consistent with best available science, evidence regarding the Harbor's specific situation, and SMA policies governing shorelines of state-wide significance, to restrict single-use private docks in that Harbor. The Ordinance does not prohibit all development in Blakely Harbor; residences and other development are permitted, including bulkheads, floats and mooring buoys. The Ordinance does not even prohibit all docks in the Harbor; it allows one new public dock and two new community docks. The City determined, and the Department approved, that this level of dock development is "reasonable and appropriate use" of the Blakely Harbor shoreline. To the extent that the SMA requires the City to determine the appropriate balance between shoreline use and protection, the City did so.¹⁴ *RP 5, 10; CP 178.*

Appellants' argument ignores the specific SMA policies that govern shorelines of state-wide significance, which **do** place greater emphasis on shoreline protection and the public interest, rather than on private property or

¹⁴ Appellants claim that Ordinance No. 2003-30 improperly "mandates preservation of the shorelines to the exclusion of all other policies." *App. Brief, p. 26.* Of course, Blakely Harbor's "shoreline of state-wide significance" designation does not mean that no development can occur on the Harbor's shorelines, and the City has never made that assertion. The Ordinance does not prohibit all development on Harbor shorelines; it only restricts single-use, private docks. It does not impact any other use or structure.

private recreational interests. *RCW 90.58.020*; *City's Response Brief, Section IV.B.1*. In fact, for shorelines of state-wide significance, it is appropriate to favor "the resources and ecology of the shoreline" over "recreational interests." *Weden v. San Juan County*, 135 Wn.2d 678, 697, 958 P.2d 273 (1998). Even considering the general policies, the SMA's **primary purpose** is "to protect the state shorelines as fully as possible;" SMA policies relating to private property rights are "secondary." *Lund*, 93 Wn.App. at 337.

Nothing in the SMA requires the City to allow private, single-use docks on all City shorelines, or even on every shoreline where the uplands are designated "residential." Ordinance No. 2003-30 only limits single-use, private docks, in one unique Harbor, consistent with SMA policies. While Appellants may not like the balance the City Council determined appropriate for Blakely Harbor (which the Department approved), Appellants' remedy is political, not judicial. The Board, and now the Court, is required to give deference to the Council's planning for uses in the City. *RCW 36.70A.3201*.¹⁵

The few cases cited by Appellants do not require a different conclusion. None involved a challenge to approval of a local SMP; most involved a site-specific permitting decision under existing regulations.¹⁶ In *Buechel*, the

¹⁵ The wisdom, necessity and expediency of a law are not for judicial determination; an enactment may not be struck down as beyond police power unless it "is shown to be clearly unreasonable, arbitrary or capricious." *Weden*, 135 Wn.2d at 700.

¹⁶ See *App. Brief*, p. 27, citing *Buechel v. Dep't. of Ecology, supra*; *Nisqually Delta Assn. v. City of DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985)(Court affirms conditional use permit for an overwater export facility, on a shoreline designated "urban," as consistent with SMA and local master program); *Dept. of Ecology v. Ballard Elks Lodge*, 84 Wn.2d 551, 527 P.2d 1121 (1974)(Based on existing commercial development regulations, "[g]iven the unique factual situation" of the case, the decision to allow a building partly overwater was

shorelines hearings board denied a shoreline variance for a residence on an undersized lot. The Court affirmed the denial of the variance, stating:

The SMA is to be broadly construed in order to protect the state shorelines as fully as possible. ... The SMA provides that it is the policy of the State to provide for the management of the shorelines by planning for and fostering all "reasonable and appropriate uses." 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 the public right of navigation and corollary rights incidental thereto.

Buechel, 125 Wn.2d at 203 (emph. added). The Court then held:

The landowner argues that recreational use is unreasonable because residential use must be given priority under the SMA. This is inaccurate. The landowner relies on the SMA which states that "[a]lterations of the natural condition of the shorelines of the state, *in those limited instances when authorized*, shall be given priority for single family residences and ... ports, shoreline recreational uses." (Italics ours.) RCW 90.58.020(7)(part). However, in this case the residential use was not "authorized;" in fact, it was prohibited by the regulations in existence at the time the landowner made his application for a variance and at the time he had purchased this property.

Id. at 209.

Thus, no case cited by Appellants requires the City 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. Likewise, no case

not clearly erroneous). Likewise, Chapter 321, Laws of 2003, cited at Appellants' Brief, p. 27, does not impact the City's authority to restrict docks in one unique Harbor. That Act confirmed the legislature's intent that (1) the SMA be read, interpreted, and implemented as a whole consistent with decisions of the shoreline hearings board and courts prior to *Everett Shorelines Coalition v. City of Everett*, and (2) the GMA goals, which include the SMA policies, are listed without an order of priority. *Chap. 321, Laws of 2003, Sec. 1.*

requires the City to allow the exact same uses on every shoreline with a "residential" designation. To the contrary, Courts and the shorelines hearings board routinely uphold denial a permit for a dock based on impacts to the environment, navigation or scenic views.¹⁷ If a city has authority to deny a dock permit based on environmental, aesthetic, or other concerns, then a city can take these same considerations into account on an area-wide basis when enacting a master program. Nothing in the SMA requires a city to mitigate impacts on a piecemeal, application-by-application basis. In fact, the SMA requires just the opposite: the SMA mandates "coordination in planning and development" in order "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." *RCW 90.58.020*.

3. The Board Did Not Err by Ruling that Private, Single-Use Docks Are Not a "Preferred Use" under the SMA.

A common theme throughout Appellants' Brief is that the SMA treats private, single-use docks as a "preferred use." *App. Brief, p. 28*. However, the basic premise that such docks are a preferred use under the SMA is incorrect. *RCW 90.58.020* states:

In the implementation of this policy the public's opportunity to

¹⁷ See e.g., *Bellevue Farm Owners*, 100 Wn.App. at 365 (Court upholds dock permit denial, in part based on aesthetic and scenic impacts, as the dock's "marginal increase in convenience did not outweigh the obstruction of public waters and tidelands, and private and public scenic views"); *Viafore v. Mason Cty.*, SHB No. 99-033, Final Order (1999)(Board upholds denial of permit for single-family residential dock, based on a master program policy that docks be located to minimize obstruction of views and on cumulative effect of future development); *Gennotti v. Mason Cty.*, SHB No.99-011, Final Order (1999)(Upholds denial of pier permit, based on finding that cumulative impacts of docks would have adverse effect on salmon habitat and views). *Holley v. San Juan Cty.*, SHB 00-001, Final Order (2000) (Upholds dock permit denial based on SMP provision that applicant show alternate moorage is not adequate or feasible); *Anderson v. San Juan Cty.*, SHB 94-13, Final Order (1995).

enjoy the physical and aesthetic qualities of the natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the State and the people generally.

To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, **in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state,** industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and **other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state. . . .**

(Emph. added).

Neither the SMA's reference to "single-family residences and their appurtenant structures," nor to "shoreline recreational uses including ... piers, and other improvements facilitating public access to the shorelines of the state," means that the SMA gives special preference to use of shorelines for private single-family residential docks. First, the regulations define an "appurtenance" to a single-family residence, and specifically exclude over-water structures, such as docks. *WAC 173-27-040(2)(g)*("An 'appurtenance' is necessarily connected to the use and enjoyment of a single-family residence and **is located landward of the ordinary high water mark**"); *Spencer v. Bainbridge Island*, SHB 97-43, Final Order, p. 11 (1998)("We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would

limit public access in, rather than promote public access to the waters of the state"); *Tab 41 (Decision, p. 11)*. Second, only recreational uses that facilitate "public access" to shorelines are priority uses. Private, single-use docks do not facilitate public access; they limit public access. Likewise, private single-use docks do not allow "substantial numbers of people" to enjoy the shoreline. Thus, a private, single-use dock is not a priority use under the SMA, particularly on shorelines of state-wide significance.

Appellants do not mention this language in RCW 90.58.020. Instead, Appellants cite to *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 689 (1987). However, *Caminiti* does not hold that single-use, private docks are a preferred or priority use under the SMA; that issue was not even before the Court.¹⁸ In holding that RCW 79.90.105 does not violate the public trust doctrine, the Court stated:

[RCW 79.90.105] also promotes the interests of the public in the *jus publicum*, albeit to a limited degree. . . . [RCW 79.90.105] is a practical recognition that one 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 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, at 673-4. Thus, *Caminiti* addressed the policy of RCW 79.90.105,

¹⁸ In *Caminiti*, the Court addressed the issue of whether "RCW 79.90.105, which allows owners of residential property abutting state-owned ... shorelands to install and maintain private recreational docks on such lands free of charge, violates article 17, section 1 of the Washington State Constitution or the public trust doctrine?" *Caminiti*, 107 Wn.2d at 665-6.

not the SMA. As noted above, the SMA differentiates between recreational uses that facilitate “public access” to shorelines, and those that do not.

Finally, Appellants contend that "new" regulations recognize docks as a “preferred use,” citing WAC 173-26-231(3)(b)(*emph. added*):

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.**

App. Brief, p. 28. Even if "new regulations" applied, this regulation does not grant docks preferred status. Rather, it restricts local jurisdictions from allowing docks at all, except for a water-dependent use or public access. While the regulation states that some docks associated with a single-family residence are a water-dependent use, it does not state that such docks must be allowed on every shoreline. WAC 173-26-231(3)(b) continues:

Where new piers or docks are allowed, master programs should contain provisions to **require new residential development of two or more dwellings to provide joint use or community dock facilities,** when feasible, **rather than allow individual docks for each residence.**

(*Emph. added*). The regulation does not grant private residential docks any preferred status; to the contrary, it contemplates that there will be situations where docks are not allowed, and directs cities to require community docks for development of two or more dwellings.

In fact, the preferred use theme is a red herring. Appellants can point to no statute or regulation requiring the City to allow a preferred use on every shoreline, or private, single-use docks on every shoreline where residences

are permitted on upland property. Appellants' argument ignores the SMA policies and regulations that specifically govern shorelines of statewide significance. The SMA must be read in its entirety. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992)(Statutes are read in their entirety, not piecemeal). Appellants' position violates this tenet: Appellants focus on the secondary policy supporting protection of private property rights, and ignore the key, primary policies that specifically govern shorelines of statewide significance such as Blakely Harbor. Reading and implementing the SMA as a whole, Ordinance No. 2003-30 is not inconsistent with the SMA.

The Court must uphold the Board's Decision affirming the Department's approval of the Ordinance, unless Appellants established by clear and convincing evidence that the Department's approval was inconsistent with the SMA's shorelines of statewide significance policies. The Board (and the Superior Court) properly determined that Appellants did not meet this burden.

C. Ordinance No. 2003-30 Is Consistent with the Applicable State Regulations Implementing the Shoreline Management Act.

1. The Board Did Not Err by Following the Department's Interpretation of its Own Regulations, and Holding that the "New" Regulations Did Not Apply to the City's Enactment of Ordinance No. 2003-30.

The Board properly ruled that Appellants did not meet their burden to prove that the Department erred in determining that the "new" regulations did not apply to Ordinance No. 2003-30. Contrary to Appellants' claim (*App. Brief* p. 16), the SMA does not "mandate" that the Department have applied the new regulations in this case.

The SMA requires the Department to make findings regarding consistency of the SMP amendment "with the policy of RCW 90.58.020 and the applicable guidelines." *RCW 90.58.090(2)(d)*. Here, the Department properly determined that the new regulations were not the "applicable guidelines." The new guidelines did not take effect until January 17, 2004, long after the City enacted Ordinance No. 2003-30, and after the Department substantially completed its review. The new guidelines were not in effect when the City (i) considered the Ordinance during summer of 2003 (and before), (ii) passed the Ordinance on September 10, 2003, and (iii) submitted the Ordinance to the Department on September 25. *Tab 30 (Ex. C-131; C-144)*. They were not in effect when the Department accepted public comment through November 30. They still were not in effect when the Department sent a December 11 letter, requesting that the City respond to the comments. *Tab 36 (Ex. C-141, p. 6, C-151)*.

The new guidelines contain no language indicating they should be applied to the amendments at issue here.¹⁹ The Department correctly interpreted the new guidelines as not applying to the City's amendments. The Department's interpretation of the applicability of its own regulations is

¹⁹ In fact, the guidelines state that they have three purposes: (1) to assist local government in developing master programs; (2) to serve as standards for regulation of shoreline development in absence of a master program; and (3) to be used with the policy of RCW 90.58.020 as criteria for state review of master programs. *WAC 173-26-171(2)*; see *WAC 173-26-176(1)*(The guidelines are designed to assist local governments in developing, adopting, and amending master programs that are consistent with the act). Here, the City had already completed its process to develop and enact its SMP amendment, and the Department had substantially completed its review, before the new regulations took effect. The Department's interpretation of its guidelines is consistent with their purpose.

entitled to deference. *Hama Hama Co. v. Shorelines Hgs. Bd.*, 85 Wn.2d 441, 449, 536 P.2d 157 (1975); *Port of Seattle v. Pol. Control Hgs. Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). An agency's interpretation of its own regulation is upheld if it is plausible and not contrary to legislative intent. *Pitts v. DSHS*, 129 Wn.App. 513, 523, 119 P.3d 896 (2005).

Any other interpretation would be illogical and unreasonable. *Roy v. Everett*, 118 Wn.2d 352, 357, 823 P.2d 1084 (1992)(courts avoid statutory interpretations that lead to illogical or unreasonable results). It would be unreasonable, and waste public resources, to apply a new set of regulations to approval of an SMP amendment, where the city had already completed its extensive legislative process, all public comment periods had occurred, and the Department substantially completed its review. The Department's interpretation is plausible, reasonable, and not contrary to legislative intent.

The Department's interpretation is consistent with the principle that statutes do not apply retroactively, unless they are merely procedural or remedial. *In re F.D. Processing*, 119 Wn.2d 452, 462-3, 832 P.2d 1303 (1992); *Johnston v. Ben. Man. Corp.*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975)(Statute operates prospectively unless it is remedial in nature or legislature indicates it is to operate retrospectively); *RP 6*. Here, the "new" regulations contain substantive requirements for local SMP amendments. The City fully completed its process to enact the Ordinance four months before the new regulations took effect. Appellants seek to have the Department apply the new regulations retroactively to the City's actions,

contrary to the general rule.²⁰

Appellants assert that the Department did not interpret its own regulations, and the Board erred by deferring to a decision "never made." *App. Brief*, p. 16-7. But it is readily apparent from the fact that the Department did not discuss the new regulations in its decision, that it interpreted the regulations as not applying.²¹ The Department did not "opt out" of any statutory obligation (*App. Brief*, p. 18); rather, the Department determined that the new regulations were not the "applicable guidelines."²²

Appellants assert that the City and the Department rushed to enact the

²⁰ The Department's interpretation is consistent with Washington's "vested rights doctrine," which refers to the principle that a land use application is considered only under laws in effect at the time of the application's submission. *Ass'n. of Rural Res. v. Kitsap County*, 141 Wn.2d 185, 193, 4 P.3d 115 (2000). The vesting rule provides a measure of certainty to landowners and protects their expectations against fluctuating land use policy. *Weyerhaeuser v. Pierce County*, 95 Wn.App. 883, 891, 976 P.2d 1279 (1999). While the "vested rights doctrine" does not apply directly to this case, the policy behind the doctrine is analogous. The City expended substantial public funds and resources over a number of years, developing the policies in Ordinance No. 2003-30. The City enacted the Ordinance and submitted it to the Department, and the public commented, based on the existing laws. The Department interpreted and applied the regulations in a reasonable manner that avoided waste of public resources.

²¹ The Department knew that it was in the process of adopting new regulations. Yet, in its December 11, 2003 letter, the Department did not require the City to revisit the Ordinance to address the new regulations. Likewise, in its February 6, 2004 decision, the Department did not apply the new regulations. Regardless of whether the Department specifically stated that it interpreted the new regulations not to apply, it obviously had taken that position.

²² Contrary to Appellants' allegation, it would be unfair to the public to apply the new regulations. The City completed its process on September 10, 2003, and the new regulations were not effective until January 17, 2004. The public was not "deprived" of any opportunity to comment on the Ordinance. *App. Brief*, p. 18. Both the City and the Department gave amply opportunity for public comment, and citizens commented both in favor of and against the Ordinance. But the fact that new regulations became effective during the process, after the amendment was submitted to the Department, does not mean that the City or the Department were required to "start over" with the process for approving the Ordinance.

Ordinance, implying that the City had an improper motive due to the judicial ruling on the shoreline moratorium, or was trying to avoid the new regulations. However, Appellants make no claim that the City or the Department failed to meet any procedural, notice, or public participation requirement for SMP amendments, under the SMA, new or old guidelines, or the City's own process for enacting ordinances. The record demonstrates that the City provided extensive opportunity for public participation. The City did not "rush" to enact the Ordinance; the record shows that the City had been considering dock restrictions for several years, since at least 2001.

Thus, the Board did not err in ruling that the Department appropriately determined that "new" regulations did not apply to Ordinance No. 2003-30. Once this conclusion is reached, Appellants' claims regarding the "new" regulations are rendered moot.

2. The Board Did Not Err By Determining that Even if the "New" Regulations Applied, Ordinance No. 2003-30 Is Consistent with the New Regulations.

Appellants assert that the Board erred by analyzing whether Ordinance No. 2003-30 is consistent with the new regulations, alleging that the doctrine of primary jurisdiction required the Board to remand the Ordinance to the Department to determine consistency. *App. Brief, p. 19*. Appellants did not assert the doctrine of primary jurisdiction before the Board, and therefore waived the argument. *Tab 30, 38; St. v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *St. v. Jackman*, 113 Wn.2d 772, 782, 783 P.2d 580 (1989).

Further, even if the new regulations applied to the City's enactment of the Ordinance, the Board was not required to remand the matter. The doctrine

of primary jurisdiction is "**not mandatory** in any given case, but rather is within the sound discretion of the court." *St. v. Coldwell Banker*, 95 Wn.2d 297, 306, 622 P.2d 1185 (1980)(*emph. added*). The doctrine functions "to guide the court in determining whether it should refrain from exercising its jurisdiction until an administrative agency with special competence has resolved an issue arising in the judicial proceeding." *Id.* at 301.

Thus, application of the doctrine is not mandatory, but is a matter of judicial discretion. Here, the doctrine has no application; nothing would be gained by a remand to the Department. The Department fully participated in the Board's proceedings, and thoroughly documented its position that the new regulations did not apply, but even if they did, the Ordinance was consistent. *Tab 32*. No case cited by Appellants involves a situation where the agency alleged to have "primary jurisdiction" was a full participant in the judicial proceedings. Remanding the matter to the Department would only waste public resources. The Board did not abuse its discretion by not remanding, as the Board was already fully informed of the Department's position.

Put another way, even if the doctrine of primary jurisdiction applied, the Court only grants relief under the APA if a person was substantially prejudiced by the challenged action. *RCW 34.05.570(1)(d)*. The Department fully participated before the Board, informing the Board of the Department's position. *Tab 32*. Because Appellants cannot demonstrate prejudice from the alleged failure to remand, the Court should not reverse the Board.

3. Even if the “New” Regulations Applied to the City’s Enactment of Ordinance No. 2003-30, the Ordinance Is Consistent with those Regulations.

a. Ordinance No. 2003-30 Is Consistent With the New Regulations Relating to Shorelines of State-Wide Significance.

Even if the new regulations applied to Ordinance No. 2003-30, the Ordinance is consistent with those regulations. The “new” regulations contain the same policy statements for shorelines of statewide significance as are found in the SMA. WAC 173-26-251, which applies to preparation of master programs for shorelines of state-wide significance, explains:

Chapter 90.58 RCW raises the status of shorelines of statewide significance in two ways. First, the Shoreline Management Act sets specific preferences for uses of shorelines of statewide significance. ... **[repeats verbatim shoreline of state-wide significance use preference language from RCW 90.58.020]** Second, the Shoreline Management Act calls for a higher level of effort in implementing its objectives on shorelines of statewide significance. RCW 90.58.090(5) states:

"The department shall approve those segments of the master program relating to shorelines of statewide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the statewide interest."

Optimum implementation involves special emphasis on statewide objectives and consultation with state agencies. The state's interests may vary, depending upon the geographic region, type of shoreline, and local conditions. ...

WAC 173-26-251(2):

The “new” regulation then directs that master programs for shorelines of state-wide significance must implement the state-wide interest, and:

(3) Master program provisions for shorelines of statewide significance. Because shorelines of statewide significance are major resources from which all people of the state derive

benefit, local governments that are preparing master program provisions for shorelines of statewide significance shall implement the following: ...

(b) **Preserving resources for future generations.** Prepare master program provisions on the basis of **preserving the shorelines for future generations. For example, actions that would convert resources into irreversible uses or detrimentally alter natural conditions characteristic of shorelines of statewide significance should be severely limited.** Where natural resources of statewide importance are being diminished over time, master programs shall include provisions to contribute to the restoration of those resources.

(c) **Priority uses.** Establish shoreline environment designation policies, boundaries, and **use provisions that give preference to those uses described in RCW 90.58.020(1) through (7).** More specifically:

(i) Identify the extent and importance of ecological resources of statewide importance and potential impacts to those resources, both inside and outside the local government's geographic jurisdiction. ...

(iii) **Base public access and recreation requirements on demand projections that take into account the activities of state agencies and the interests of the citizens of the state to visit public shorelines with special scenic qualities** or cultural or recreational opportunities.

(d) **Resources of statewide importance.** Establish development standards that:

(i) Ensure the long-term protection of ecological resources of statewide importance, ...

(ii) Provide for the shoreline needs of water-oriented uses and other shoreline economic resources of statewide importance.

(iii) Provide for the right of the public to use, access, and enjoy public shoreline resources of statewide importance. ...

WAC 173-26-251(3)(emph. added). For shorelines of statewide significance, the “new” regulation is virtually identical to the “old” regulation, and both regulations repeat the statutory policies for these shorelines. *WAC 173-26-251; compare WAC 173-26-250 (effective until AWB v. DOE, SHB No. 00-037, Order Granting/Denying Appeal, Aug. 27, 2001).*

Appellants do not claim that Ordinance No. 2003-30 violates this new regulation; in fact, Appellants do not even mention this controlling regulation. Just as Appellants ignore the key SMA policies governing shorelines of statewide significance, Appellants also ignore the key new regulation governing SMPs for shorelines of statewide significance. And just as the Ordinance is consistent with the SMA policies, it is consistent with "new" WAC 173-26-251. Appellants cannot demonstrate prejudice due to any alleged lack of consideration of "new" regulations. *RCW 34.05.570(3)*.

b. Ordinance No. 2003-30 Is Consistent With the New Regulations Relating to Cumulative Impacts.

Appellants allege that the City's assessment of cumulative impacts was not consistent with "new" WAC 173-26-186(8)(d). *App. Brief, p. 20-24*. WAC 173-26-186 states governing principles that underlie the guidelines, and WAC 173-26-186(8) states principles relating to protection of shoreline ecological systems:

(8) ... the act makes protection of the shoreline environment an essential statewide policy goal consistent with the other policy goals of the act. ...

(d) 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. 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 fairly allocate the burden of addressing cumulative impacts among development opportunities. Evaluation of such cumulative impacts should consider:

(i) Current circumstances affecting the shorelines and relevant natural processes;

(ii) **Reasonably foreseeable future development** and use of the shoreline; and

(iii) Beneficial effects of any established regulatory programs under other local, state, and federal laws.

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

WAC 173-26-186(8)(d)(emph. added). Appellants allege that the City's evaluation of cumulative impacts does not meet WAC 173-26-186(8)(d)(ii) because it was not based on "reasonably foreseeable future development and use of the shoreline," arguing that the Board's reliance on "the City's assumptions about predicted dock construction in Blakely Harbor" was arbitrary and capricious, and unlawful. *App. Brief, p. 20, 22*.

The Board's ruling that the City's Cumulative Impacts Assessment, and thus Ordinance No. 2003-30, is consistent with WAC 173-26-186(8)(d) is not arbitrary and capricious, or unlawful. *Tab 41 (Decision, p. 13-6)*. The City prepared the Assessment specifically to document and analyze the cumulative impacts of docks on Blakely Harbor's shoreline. *Tab 30 (Ex. C-2.1)*. The City's analysis was based on "reasonably foreseeable" dock development in Blakely Harbor. The Assessment addresses the impacts of dock development under both a "maximum build-out" scenario, based on maximum allowable development under existing land use and environmental laws, and a "predicted build-out" scenario, based on predicted (or likely) development based in part on current development patterns in Blakely Harbor and other City residential harbors. *Tab 30 (Ex. 2.1, p. 7)*. Each scenario is based on a

number of reasonable assumptions regarding dock development.²³

Under WAC 173-26-186(8)(d), the evaluation of cumulative impacts should consider "reasonably foreseeable" development. The regulation recognizes that methods to determine reasonably foreseeable development will "vary according to local circumstances." *WAC 173-26-186(8)(d)*. The City's predicted and maximum build-out scenarios provide a reasonable forecast of dock development. While Appellants make the bare allegation that the Assessment is not supported by a "probability analysis" (*App. Brief, p. 22*),²⁴ the Assessment plainly demonstrates that the scenarios take into account multiple factors relevant to whether dock development is reasonably foreseeable in Blakely Harbor. *Tab 30 (Ex. 2.1, p. 7-8)*. And while Appellants now object to the Assessment, **Appellants presented no contradictory evidence to the Department or the Board.**²⁵ The Board's ruling that the Assessment is consistent with WAC 173-26-186(8)(d) is not willful, unreasoning, or made without regard to facts and circumstances. The Board's ruling is supported by substantial evidence, and is not erroneous.²⁶

²³ See *supra*, p. 9, notes 4 and 5. Other evidence also supports the dock development scenarios. See this Response Brief, Section IV.D. Thus, the dock scenarios are **not** contrary to all the evidence in the record, as Appellants allege. *App. Brief*, p. 21.

²⁴ WAC 173-26-186(8)(d) does not require any "probability analysis."

²⁵ Courts do not substitute their judgment for that of the legislative body, even where there is competing expert evidence in the record. *Weden v. San Juan County*, 135 Wn.2d 678, 705, 958 P.2d 273 (1998). Here, Appellants presented no analysis of their own to contradict the Assessment.

²⁶ Appellants allege that the Assessment's author "admitted in deposition" that based on information available when the Assessment was done, the build-out scenarios in the Assessment are not reasonably foreseeable. *App. Brief, p. 21, n. 3*. First, the referenced

Appellants next allege that the City failed to consider beneficial effects of established regulatory programs. *App. Brief, p. 23*. Appellants are simply incorrect. *Tab 30 (Ex. C-2.1, at 7, 8)*. For example, the maximum build-out scenario was based on "existing land use and environmental laws." *Id.* All three scenarios included identification and evaluation of "dock development potential and design requirements." *Id. Table 1*. Potential dock construction was modeled on "standard design that reflects ... typical mitigation measures and regulatory requirements." *Id.* The predicted and maximum build-out scenarios considered parcel restrictions, including "zoning density," "critical area analysis" and "existing regulations." *Id. at 7-8*. Thus, the City did take existing regulatory programs into account.

While these programs address some impact to ecological functions, navigation and aesthetics are not adequately addressed by the programs.²⁷

deposition was not part of the record before the Board. The APA standards are applied directly to the record before the Board. *RCW 34.05.558*. Motions to supplement the record are only granted in very limited circumstances. *RCW 34.05.562*. Here, the Superior Court denied Appellants' motion to supplement the record. Any reference to this deposition must be stricken from Appellants' Brief. Second, this matter is an appeal of the City Council's enactment, and the Department's approval, of an ordinance. The City's and the Department's actions were based on information before them at the time, as was the Board's Decision. The APA standards are applied to the Board's action "at the time it was taken." *RCW 34.05.570(1)(b)*. Even if different information was available now, it would not be relevant to the issue before the Court, i.e., whether the Board's decision violated an APA standard, at the time it was made. Finally, Appellants' do not accurately describe the testimony. The Assessment's author did not "admit" that based on information available when the Assessment was done (or at any other time), the build-out scenarios in the Assessment were not reasonably foreseeable. See City's Response Brief, Section IV.G

²⁷ Appellants cite to the City's former Planning Director's deposition. *App. Brief, p. 23*. The director testified about ecological impacts, not navigation or view impacts. Moreover, the Assessment states that it modeled potential dock construction on a "standard design that reflects ... typical mitigation measures and regulatory requirements." *Tab 30 (Ex. C-2.1 at 7)*. At the very least, substantial evidence supports the Board's ruling.

The existence of these regulatory programs does not preclude the City from enacting the Ordinance. The City is not limited to mitigating impacts of specific applications or denying applications on a piecemeal basis, but may plan for appropriate shoreline use on an area-wide basis.

Appellants allege the City did not fairly allocate the burden of addressing cumulative impacts among development opportunities, arguing that the City should have addressed its regulation of Blakely Harbor in the City-wide SMP update. *App. Brief, p. 23*. Appellants cite no authority for this, and neither the SMA nor the regulations prohibit a city from amending its SMP to address one documented need.²⁸ In fact, the "new regulations" specifically contemplate and encourage local jurisdictions to address specific shoreline areas outside of the overall SMP development process, due to unique features or issues in that area. *WAC 173-26-201(3)(d)(ix)*.

The language regarding burden allocation cannot be read in isolation. The City did not restrict private single-use docks on all shorelines; the City only restricted private docks in Blakely Harbor, a unique shoreline based on its relatively pristine character, value for public recreation, and configuration for navigation. The City did not restrict other types of development in the Harbor. For example, owners can construct residences and bulkheads, and floats and mooring buoys for private recreation.

²⁸ Indeed, any such prohibition would be contrary to the SMA's primary policy, to protect the state's shorelines. If a city was required to complete the complicated, lengthy review process for the comprehensive master program update, then it could be "too late" to address needs that are already documented, as applications could be filed in the interim.

Finally, Appellants claim for the first time that Ordinance No. 2003-30 is inconsistent with *WAC 173-26-211*, the "new" regulation relating to shoreline "environment designations."²⁹ *App. Brief, p. 24-6*. Again, Appellants did not present this argument to either the Board or Superior Court; therefore, the argument is waived.³⁰

Moreover, Appellants' claim that *WAC 173-26-211* somehow precludes the Ordinance is meritless. Nothing in *WAC 173-26-211* prohibits the City from restricting docks in one harbor, based on circumstances specific to that harbor. Nothing in the regulation requires the City to allow single-use docks on all shorelines, or even on all shorelines where residences are allowed on the uplands. Appellants' argument contains a number of inaccuracies. A jurisdiction is not required to use the environment designations described in *WAC 173-26-211* without change for local circumstances.³¹ Appellants imply that management policies for the "aquatic designation" require the City to allow docks, but Appellants misquote the regulation by omitting the key word "only":

(A) Allow new over-water structures **only** for water-dependent uses, public access, or ecological restoration.

²⁹ "Environment designations" in SMPs are similar to "zoning districts" in traditional zoning regulations.

³⁰ *RAP 2.5(a)*; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *State v. Jackman*, 113 Wn.2d 772, 782, 783 P.2d 580 (1989).

³¹ "Local governments may establish a different designation system or may retain their current environment designations, if it is consistent with the purposes and policies of this section and *WAC 173-26-211(5)*." *WAC 173-26-211(4)(c)(i)*. The regulations specifically authorize two or more shoreline "residential environments." *WAC 173-26-211(5)(f)(ii)(A)*.

WAC 173-26-211(5)(c)(ii)(A)(emph. added); App. Brief, p. 25. This regulation does not require single-use docks in all aquatic environments; to the contrary, it plainly limits a city's ability to allow new over-water structures (including docks) **only** for water-dependent uses, public access, or ecological restoration.³² And, to the extent Appellants contend that single-use docks must be allowed in the Harbor because residential development is allowed on the uplands, under the SMA, docks are not an "appurtenance" to a single-family residence. *WAC 173-27-040(2)(g); Section IV.B.3 supra.*

Thus, Appellants did not establish by clear and convincing evidence that Ordinance No. 2003-30 is inconsistent with any SMA policy, or applicable guideline, even if "new" regulations are considered. The Board's Decision that the Ordinance is consistent with the SMA policies and applicable guidelines is supported by substantial evidence, and is not erroneous, or arbitrary or capricious.

D. The Board's Decision that Ordinance No. 2003-30 Is Consistent with the SMA and Applicable Regulations Is Supported by Substantial Evidence.

Appellants argue that the Board's decision that Ordinance No. 2003-30 is consistent with WAC 173-26-090 is not supported by substantial evidence. *App. Brief, p. 35-8.* Appellants assume that WAC 173-26-090 prohibits the City from amending its SMP unless the City establishes "changing local circumstances, new information or improved data." However, WAC 173-26-

³² Other aquatic designation management policies also clearly discourage multiple single-use docks. See *WAC 173-26-211(5)(c)(ii)(C), (D), (E).*

090 is not so prohibitive.³³ Given that the SMA and guidelines are liberally construed to protect shorelines as fully as possible, the first sentence cannot be interpreted to limit the City in enacting amendments. *RCW 90.58.900*. Rather, the City “should” make amendments to reflect changing local circumstances, new information or improved data, but the City is not prohibited from amending its SMP for other reasons, so long as the amendment is consistent with the SMA and the implementing regulations.³⁴

Further, as the Department and the Board found, the record plainly demonstrates that Ordinance No. 2003-30 is based on “changing local circumstances, new information or improved data.” The Cumulative Impact Assessment was prepared specifically to address impacts of docks on Blakely Harbor; no such study previously existed. *Tab 30 (Ex. C-2.1)*. The Assessment summarizes and is based on best available science and other information on environmental and other impacts of docks. *Tab 30 (Ex. 2.1, p. 26-7; Ex. C-211, p. 9)*. Many studies and reports that comprise the best

³³ WAC 173-26-090 states: "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. When the amendment is consistent with Chapter 90.58 RCW and its applicable guidelines, it may be approved by local government and the department or adopted by rule when appropriate by the department." To the extent that Appellants allege that the "new" regulations apply to this matter, WAC 173-26-090 is not part of the new regulations. See *Chapter 173-26 WAC (effective January 17, 2004)*.

³⁴ Under principles of statutory construction, a court cannot add words to an unambiguous statute when the legislature chose not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002). Appellants' interpretation of WAC 173-26-090 as prohibiting any amendment not based on changing local circumstances, new information or improved data requires the Court to add restrictive language.

available science were prepared after 1996, when the City enacted its SMP. *Id.*³⁵ In addition, the City's Harbor Management Plan was adopted in 1999, and a report on natural resource values and restoration opportunities at Blakely Harbor Park was prepared in 2001. *Tab 36 (Ex. C-222, C-221)*. It seems beyond dispute that the Ordinance is based on "changing circumstances" and "new information and improved data;" at a minimum, the Board's finding on this point is supported by substantial evidence.

Appellants argue that there are no "changing circumstances" because there is no "risk" of dock development in Blakely Harbor. *App. Brief, p. 35*. However, the City documented increased development activity on the Harbor's shorelines. *Tab 36 (Ex. C-220; 223)*.³⁶ The projected population increase will place residential development pressure on all City shorelines. A number of Blakely Harbor owners indicated they want to install a dock.

³⁵ For instance, (1) the Bainbridge Island Watershed Nonpoint Source Pollution Water Quality Assessment Project was published in 1997 (*Tab 36 (Ex. C-225)*), (2) the Salmonid Habitat Limiting Factors: Water Resource Inventory Area 15 was published in 2000 (*Tab 36 (Ex. C-226)*); (3) Overwater Structures: Marine Issues was published in 2001 (*Tab 36 (Ex. C-228)*); (4) the Cumulative Impact Consideration in Environmental Resource Permitting was published in 2001 (*Tab 30 (Ex. C-2.1, p. 26)*; *Tab 9 (City's Index at 229)*); (5) Treated Wood Issues Associated with Overwater Structures in Marine and Freshwater Environments was published in 2001 (*Tab 36 (Ex. 231)*); (6) the Washington State ShoreZone Inventory was prepared in 2001 (*See Tab 9 (City's Index at 235)*); (7) Marine and Estuarine Shoreline Modification Issues was published in 2001 (*Tab 36 (Ex. C-236)*); (8) the Reconnaissance Assessment of the State of the Nearshore Ecosystem: Eastern Shore of Central Puget Sound was prepared in 2001 (*Tab 30 (Ex. C-2.1, at p. 27)*); and (9) the Bainbridge Island Nearshore Assessment was published in 2003 (and in progress before that time)(*Tab 36 (Ex. C-223)*).

³⁶ To the extent Appellants claim that it is "speculation" to assume docks will be constructed if not limited by regulations, it is also "speculation" to assume that an owner will not install a dock if the SMP permits it. In reality, every comprehensive plan and zoning code is based on "speculation" that owners will use property as regulations permit.

Based in part on the ratio between residences and docks in other City harbors, the City made reasonable predictions of future dock development for Blakely Harbor (in other harbors, 60 percent of residential lots have docks). The City's dock development scenarios were based on actual conditions in the Harbor, such as the number of lots, existing open space and parks, critical areas, covenants preventing docks, the geography, and environmental factors, including regulatory requirements, and the fact that joint-use docks might be required in some cases.³⁷ *Tab 30 (Ex. C-2.1 p. 7-9)*. In addition to general increased development, there were two dock permit applications specifically for Blakely Harbor, after a long period with no applications. The City does not have to wait until a multitude of applications occurs to amend its SMP to protect the Harbor; if the City waits until after it receives applications, the amendment would be pointless, as the docks would already be permitted.³⁸

Appellants claim no evidence supports the Board's finding that land surrounding Blakely Harbor recently became available for development. *App. Brief, p. 36*. However, the record indicates that in 1999, the 1,100 acre Port Blakely Mill Company property was under redevelopment. *Tab 36 (Ex. C-222 App. C, p. 2)*. Further, regarding "changing local circumstances," the

³⁷ Appellants recognize that due to the Harbor's geography, property owners would need to construct docks in excess of 300 feet. The Cumulative Impact Report also notes this fact. *Tab 30 (Ex. C-2.1 p. 9)*. The fact that very long docks are required in Blakely Harbor is one factor that results in a relatively low number of docks having a great impact.

³⁸ Under Washington's "vested rights doctrine," an owner has the right to develop his property in accordance with the regulations in effect at the time a complete land use application is submitted. If the City had to wait until a "flood" of applications occurred, any new regulations would be moot, as the development would already have occurred.

Board also found:

Letters and testimony in the record indicate the interest of Blakely Harbor property owners in constructing private docks. [fn 24: 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 owners", C-198, C-202.] Under current zoning, the City projects 94 residences on Blakely Harbor waterfront at likely build-out. C-2.1, at 9. From the 34 homes around the Harbor at the time of the 1997 inventory, there were 20 resident boats, most moored at mooring buoys or anchored in the Harbor. C-222, at 23; C-2.1, at 8. The City's experience on its other shorelines is that 60% of waterfront residential properties build docks or piers. *Id.* The City contends that it "does not have to wait until after a flood of applications has occurred to amend its SMP to protect the Harbor." City Response, at 35. The Board agrees.

Tab 41, at 18-9 (Board's Decision). Appellants do not (and cannot) challenge these findings, which are supported by substantial evidence in the record.

Appellants assert that the documents in the record containing scientific and other information are not "new or improved information or data," because the Cumulative Impact Assessment is "merely a general literature survey" and the other documents only contain two references to Blakely Harbor. *App. Brief, p. 36-7.* First, the City, Department, and Board did not rely exclusively on the Assessment. The record contains many environmental studies and other information on which they relied. See *supra*, note 35. Second, as cited in the Assessment, a number of the documents reference Blakely Harbor. *Tab 30 (Ex. C-2.1, p. 16-22).* Third, this claim ignores that the build-out scenarios, as well as the navigation and view impact analysis, are all specifically tailored to Blakely Harbor. Fourth, Appellants provided no science whatsoever to dispute the documents on which the City and Department relied to approve the Ordinance. Appellants

had the burden to establish “by clear and convincing evidence” that the Department’s decision approving the Ordinance was erroneous, yet they provided no evidence that contradicts the Department’s decision.

Fifth, while Appellants complain that the Assessment is a general literature survey, not a “site-specific analysis” of impacts of dock construction, at the master program level there is no requirement that scientific information be site-specific. To be relevant, informative, and otherwise qualify as proper for use in amending a master program, the science does not have to specifically address the exact location to which a regulation will apply.³⁹

Appellants allege that the Assessment’s conclusions regarding view impacts do not support Ordinance 2003-30. *App. Brief, p. 38*. However, the SMA requires the City to give preference to uses that “preserve the natural character of the shoreline,” and “the public’s opportunity to enjoy the physical and aesthetic qualities of the natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state” *RCW 90.58.020; see RCW 90.58.100(2)(f)*. The City’s consideration of the fact that docks alter the shoreline’s natural

³⁹ *See WAC 173-26-201(2)(a)*. If that were the standard, then there would be no science (or “best available science” under the GMA) for most jurisdictions in the State. Clearly, that is not what either the GMA or the shoreline regulations intend by the requirement to base regulations on scientific information or best available science. By its very nature, relevant information (or best available science) often consists of general research and studies performed in one area of the State (or even outside the State). Local jurisdictions are required to use that science and apply it to their particular circumstances in enacting regulations. *See WAC 173-26-201(2)(a)*. To the extent that the new regulations are relevant, Ordinance No. 2003-30 is consistent with *WAC 173-26-201(2)(a)*.

character, impacting and altering views, is consistent with the SMA, regardless of whether persons can see "over and under a private dock."

Next, Appellants allege that the Assessment does not establish impacts to navigation by kayakers and canoeists, complaining that the Assessment did not consider low tides. However, docks will impact navigation by all watercraft during non-low tide periods. Appellants assert that the Assessment contains no statistics for Harbor use by kayakers or canoeists, but the Assessment notes that the Harbor is used by kayakers and canoeists, and 75 handcraft were recorded in the summer of 1997. *Tab 30 (Ex. C-2.1 p. 13)*. Even if the City did not have a count, it would not invalidate the Assessment's conclusions. For instance, Appellants do not assert that the Harbor is not used by kayakers and canoeists, nor can they; there is no evidence that docks do not affect the ability of small watercraft to navigate.

Finally, Appellants allege that the Assessment's conclusion regarding the direct and indirect impacts of dock development on natural resources is not supported. *App. Brief, p. 38*. However, the record contains numerous studies documenting adverse environmental impacts on marine habitat from over-water structures. These studies are uncontested. Appellants contend that existing policies and regulations adequately mitigate impacts to Blakely Harbor's shorelines, but cite no evidence other than the former Planning Director's deposition. Even if they had provided supporting evidence, the City is not required to mitigate impacts on a case-by-case basis; the City has authority to plan on an area-wide basis. The record contains ample evidence of the environmental impacts of overwater structures.

Thus, the Board's findings that Ordinance No. 2003-30 is based on “changing local circumstances, new information or improved data” are supported by substantial evidence. The Board did not err by concluding that the Ordinance is consistent with WAC 173-26-090.

E. Ordinance No. 2003-30 Is Not Inconsistent with the City’s Shoreline Master Program or Comprehensive Plan Policies.

Appellants allege that Ordinance No. 2003-30 violates RCW 36.70A.040(4) and 36.70A.070, which require that comprehensive plan provisions be internally consistent. *App. Brief*, p. 31-5. On this issue, the Board was required to find that Ordinance No. 2003-30 complies with the GMA, unless the Board determined that the City’s actions are **clearly erroneous in view of the entire record before the Board**, and in light of the applicable goals and requirements of the Act. *RCW 36.70A.320(3)(emph. added)*. As stated in RCW 36.70A.3201, the legislature intends that cities have a broad range of discretion in land use planning, and require the Board to grant deference to cities, consistent with the goals and requirements of the GMA. Thus, the GMA contains an over-riding principle that the Board (and hence the Court) should defer to a city's decision in how to best plan for development in that community.

Appellants state that no SMP policy supports the dock limitations on shorelines with the "semi-rural" designation, such as Blakely Harbor. *App. Brief*, p. 31. However, the very provision cited by Appellants supports Ordinance No. 2003-30. Appellants cite to the “Master Goal”:

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.

Tab 35 (SMP, Sec. I.A, p. 11)(emph. added). In addition, the Shoreline Use Element Goal states: "Identify and preserve shoreline and water areas with unique attributes for specific long term uses, including commercial, industrial, residential, recreational, and open space uses." *Id. (SMP, Sec. I.B, p. 11).* Ordinance No. 2003-30 is consistent with these goals. The Ordinance assists in preserving Blakely Harbor as a scarce natural resource, with unique attributes. The Ordinance promotes long-term recreational enjoyment of the Harbor, by protecting against adverse impacts to navigation and views. Recreational use by watercraft is a water-dependent use.

Appellants also cite to SMP dock policies, alleging that the City did not attempt to harmonize the existing policies with Ordinance No. 2003-30. However, the fact that the Ordinance adds a ninth policy that applies specifically to one Harbor, does not render the restriction on docks in that Harbor inconsistent with existing policies, or disregard those policies. In essence, Appellants are merely restating their earlier argument that the City is limited to restricting docks on a case-by-case basis, but no authority supports that proposition.

Many other SMP policies are consistent with the Ordinance. For example:

1. Multiple use and expansion of existing conforming piers, docks, and floats should be encouraged over the addition and/or proliferation of new facilities. Joint use facilities are preferred over new, single-use piers, docks, and floats.
2. The use of mooring buoys should be encouraged in preference to either piers or docks.
3. Piers, docks, and floats should be designed to cause minimum interference with navigable waters, the public's use of the shoreline, and views from adjoining properties.
4. Piers, floats, and docks should be sited and designed to minimize possible adverse environmental impacts, including potential impacts on littoral drift, sand movement, water circulation and quality, and fish and wildlife habitat. . . .
8. The proposed size of the structure and intensity of use or uses of any dock, pier, and/or float should be compatible with the surrounding environment and land and water uses.

Tab 35 (SMP Sec. I.H, p. 13). The Ordinance requires joint use dock facilities in Blakely Harbor, and use of mooring buoys rather than docks. It protects against interference with navigable waters, the public's use of the shoreline, and views from adjoining property, and it minimizes adverse environmental impacts. In the Ordinance, the City determined that multiple single-use docks simply are not compatible with Blakely Harbor.⁴⁰

Appellants also claim that Ordinance No. 2003-30 is inconsistent with Comprehensive Plan and SMP policies that designate the Blakely Harbor

⁴⁰ As recognized by the Board, Ordinance No. 2003-30 is supported by many other SMP provisions. See *Tab 35 (SMP, Sec.I.B., p. 11; Sec. III.H, p. 41*, relating to shorelines of state-wide significance; *Conservation Element Goal 1 (Sec. I.E.1, p. 12)*, *Public Access Element Goal 1 (Sec. I.F, p. 13)*; *Recreation Element Goals 1-4 (Sec. I.H, p. 13)*, *Harbor Use and Safety Element Goals 1, 2 (Sec. I.I, p. 14)*. Reading the SMP as a whole, the Ordinance is not inconsistent with existing SMP provisions.

shoreline for residential use. However, the dock restrictions are not inconsistent with residential use designation. Under the SMA, docks are not an “appurtenance” to a single-family residence. *WAC 173-27-040(2)(g)*; see *BIMC 16.12.030(11)*; *Tab 35 (SMP p. 15)*. Again, the fact that docks are permitted on some shorelines where residences are permitted on the uplands, does not mean that docks have to be permitted on every such shoreline.

Appellants claim that Ordinance No. 2003-30 is inconsistent with a GMA Goal and SMP policy to "ensure that proposed shoreline uses give consideration to the rights of private property ownership," and Comprehensive Plan goals regarding consideration of "costs" to property owners when making land use decisions. *App. Brief, p. 34*. Ordinance No. 2003-30 does not violate these policies. The Ordinance does not prevent all or even most uses of property; it simply limits one type of structure.⁴¹ Owners may still develop residences and other permitted uses on the property, including other recreational uses.⁴²

⁴¹ Appellants do not claim the Ordinance is a "taking," nor could they. See *Lund*, 93 Wn.App at 339-40 (Owner failed to meet heavy burden to establish an unconstitutional taking by regulation that prohibited construction of residence on shoreline lot, where owner could make recreational use of the land). If regulations that prevent construction of a residence but allow recreational use do not rise to the level of a “taking,” then a regulation that only prevents single-use docks, but allows all other residential development, and mooring buoys and recreational floats, is not a taking.

⁴² As recognized by the Board (*Tab 41, p. 22-3*), many other Comprehensive Plan policies support Ordinance No. 2003-30. See eg. *Tab 34 (Comp. Plan, Vision Statement; Land Use Element, five overriding principles, p. 1, 47; Land Use Env. Goal 1, p. 84; Land Use Env. Goal 3, p. 86; Land Use Aquatic Resources Goal 1, p. 87)*. The Ordinance is consistent with all these provisions. Appellants attempt to read the "cost to property owners" language in isolation, but when the Comprehensive Plan is read as a whole, the Ordinance is consistent with the Plan. In addition, the Bainbridge Island Parks and Recreation Plan, Appendix C, and the 1999 Harbor Management Plan support the Ordinance. Each document

Accordingly, the Board properly determined that Appellants did not establish that Ordinance No. 2003-30 was inconsistent with Comprehensive Plan or master program provisions.

F. The Board's Decision Does Not Violate Any Constitutional Provision.

Appellants allege that the Board's Decision upholding Ordinance No. 2003-30 violates constitutional provisions, as applied, including the public trust doctrine, Article XI, Section 11, substantive due process, and equal protection. Appellants' constitutional claims have no merit.

Ordinances are presumed constitutional. The burden of showing otherwise rests heavily on the party challenging the ordinance. *Brown v. Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); *Louthan v. King County*, 94 Wn.2d 442, 428, 617 P.2d 977 (1980).

Municipal ordinances are presumed to be validly enacted. ... The entity challenging the ordinance has the burden to show by clear, cogent and convincing evidence that the ordinance was not validly enacted. ... Moreover, an ordinance is presumed constitutional; the party asserting otherwise has the burden of proof.

Housing Authority v. City of Pasco, 120 Wn.App. 839, 843, 86 P.3d 1217 (2004)(*cites omitted*).

1. Ordinance No. 2003-30 Does Not Violate the Public Trust Doctrine.

The public trust doctrine stems from the state Constitution, Art. XVII, Section 1, under which "[t]he state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the

provides relevant factual information, and the Harbor Management Plan establishes goals for docks in general and for Blakely Harbor. *Tab 36 (Ex. C-222)*.

line of ordinary high tide, in waters where the tide ebbs and flows" Under Art. XVII, Section 1, the State has authority to transfer ownership of shorelands, subject to the paramount public right in the shorelands. *Caminiti v. Boyle*, 107 Wn.2d 662, 667, 732 P.2d 989 (1987).⁴³ The paramount public interest (the "jus publicum") includes the right:

of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.

Caminiti, 107 Wn.2d at 669; *Weden v. San Juan County*, 135 Wn.2d 678, 698, 958 P.2d 273 (1998).

The public trust doctrine emanates from this public authority interest ("jus publicum") in the shorelands. *Orion v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987). As explained in *Caminiti*:

The state can no more convey or give away this jus publicum interest than it can "abdicate its police powers in the administration of government and the preservation of the peace." Thus it is that the sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the "public trust doctrine."

⁴³ The State's ownership of shorelands is comprised of two distinct aspects. The first is referred to as the "jus privatum" or private property interest, under which the state holds proprietary rights in tidelands and shorelands, and can convey title in any manner and for any purpose not forbidden by the state or federal constitutions. The second aspect "is historically referred to as the jus publicum or public authority interest. The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in Rome in the fifth century A.D." *Caminiti*, at 668-9.

Caminiti, at 669-70 (citations omitted); *Weden*, 135 Wn.2d at 698.⁴⁴

In determining whether legislation violates the public trust doctrine, courts apply a two-part test:

(1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.

Caminiti, at 670.⁴⁵ In *Caminiti*, the plaintiff claimed that former RCW 79.90.105 violated the public trust doctrine.⁴⁶ The Court held that the statute did not violate even the first prong of the test, as "the Legislature [gave] up relatively little right of control over the jus publicum, and has not conveyed title to any state-owned ... shorelands." *Id.* at 672.⁴⁷ Thus, *Caminiti* does not hold or even imply that private docks must be allowed on all shorelines, or that an ordinance restricting private docks violates the public trust doctrine.

⁴⁴ The "public trust" principles are reflected in the SMA's underlying policy, which 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." *Orion*, 109 Wn.2d at 641, n. 11. In effect, the "public trust doctrine" resembles a covenant running with the land (or water) for benefit of the public and land's dependent wildlife. *Id.* at 640.

⁴⁵ Appellants make no mention of the test for determining whether legislation violates the public trust doctrine, perhaps because their claim clearly fails the test.

⁴⁶ RCW 79.90.105 allows owners of residential property abutting state-owned tidelands to install private recreational docks without charge, subject to applicable local, state, and federal rules and regulations governing location, design, construction, size and length of the dock. *Caminiti*, 107 Wn.2d at 672-3; *RCW 79.90.105(1)*, recodified at *RCW 79.105.430(1)*.

⁴⁷ The statute only granted a revocable license to owners of land abutting state-owned land, subject to many state and local controls. *Caminiti*, 107 Wn.2d at 672. The Court noted: "The construction of private recreational docks is also regulated by the [SMA] which requires that a dock be constructed in a manner that is consistent with the policy of the act and the local guidelines, regulations or master programs promulgated under the act and the planning enabling act which authorizes local zoning controls." *Id.*

In *Weden v. San Juan County*, the plaintiff claimed that the County's ordinance prohibiting "jet skis" from all marine waters and one lake violated the public trust doctrine. The Court disagreed:

[W]e agree with the County that the Ordinance does not violate the public trust doctrine because the County has not given up its right of control over its waters. **Although the Ordinance prohibits a particular form of recreation, the waters are open to access by the entire public, including owners of [jet skis] who utilize some other method of recreation.**

Weden, 135 Wn.2d at 699 (*emph. added*).

Under *Caminiti* and *Weden*, Ordinance No. 2003-30 does not violate the public trust doctrine. The Ordinance does not give up any control over the public's interest in state waters. To the contrary, consistent with the SMA's policies, the Ordinance **protects** the public interest in Blakely Harbor. In fact, Appellants purchased their property subject to the public trust doctrine, which acts similar to a covenant running with the shorelands for benefit of the public and dependent wildlife.

2. Ordinance No. 2003-30 Does Not Violate Article XI, Section 11 of the State Constitution.

Appellants claim that Ordinance No. 2003-30 violates Article XI, Section 11 of the state Constitution, alleging that the Ordinance conflicts with the SMA, citing *Weden*. But *Weden* does not support Appellants' claim. Under Article XI, Section 11, a city may enact "all such local police, sanitary and other regulations as are not in conflict with general laws."⁴⁸

⁴⁸ Under Art. 11, §11, local regulation yields to a statute only "if a conflict exists such that the two cannot be harmonized." *Weden*, at 693. The test is "whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Id.*

[M]unicipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws. ... The scope of police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.

Weden, 135 Wn.2d at 692. The Court held that the County's jet ski ban did not conflict with the SMA, focusing on whether the ordinance was inconsistent with the SMA's purpose: "The ban of a certain type of activity is consistent with the 'limited reduction of rights' allowed by the statute." *Weden*, at 696.⁴⁹ Based on SMA policies for shorelines of state-wide significance, the Court held that "the Ordinance appropriately favors 'the resources and ecology of the shorelines' over recreational interests." *Id.* Likewise, restriction of one type of structure (docks) is not inconsistent with the "limited reduction of property rights" recognized in the SMA.

Appellants claim that Ordinance No. 2003-30 conflicts with the SMA, alleging (1) single-family residential private docks are a "priority," water dependent use under WAC 173-26-231(3)(b), (2) a permit "shall be granted" for such a dock if the application is consistent with "the applicable master program and [the SMA]," citing RCW 90.58.140(2)(b), and (3) the SMA exempts single-family residences and related appurtenances and private docks costing \$2500 or less from permit requirements. *App. Brief*, p. 40-1.

⁴⁹ An ordinance is a reasonable exercise of police power if: (1) the ordinance promotes the health, safety, peace, education, or welfare of the people; and (2) the ordinance's requirements bear some reasonable relationship to accomplishing the purpose of the ordinance. *Weden*, 135 Wn.2d at 700. Appellants do not argue that Ordinance No. 2003-30 fails this test. The Ordinance clearly meets this test under *Weden*.

First, while a dock may be a "water-dependent" use under WAC 173-26-231(3)(b), that regulation does not grant such docks any "preferred" status. *Supra*, Section IV.B.3. At a minimum, the regulation does not state that docks **must** be allowed on every shoreline where residences are allowed on uplands. Second, RCW 90.58.140(2)(b) specifically states that a shoreline development permit shall be granted "only when the development proposed is consistent with the applicable master program and [the SMA]." Here, the "applicable master program" includes Ordinance No. 2003-30, limiting the siting of docks in Blakely Harbor. Third, the permit exemption for "single-family residences and their appurtenant structures" does not apply to docks;. *WAC 173-27-040(2)(g)*. Fourth, even if a development is exempt from permit requirements, the development must still meet all SMP provisions, including those that restrict the development's location. *RCW 90.58.140(1)*; *WAC 173-27-040(1)(b)*(exemption from permit process "is not an exemption from compliance with the act or the local master program").⁵⁰

Biggers v. Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007) does not require the conclusion that Ordinance No. 2003-30 conflicts with the SMA. In *Biggers*, four justices determined that the City's moratoria on shoreline applications, which included bulkheads, was invalid because the SMA does not grant local moratoria authority and the City had not complied with the SMA's process for amending its SMP. *Biggers*, 162 Wn.2d at 698-9

⁵⁰ Appellants cite to the definition of substantial development, which excludes certain saltwater docks with a fair market value of less than \$2,500. Most docks exceed this value.

("Without amending the 1996 SMP, which received the required approval from the Department of Ecology, the City imposed moratoria blocking developments which the SMP approved").⁵¹ Here, unlike *Biggers*, the Department approved the Ordinance, which amended the SMP.

Thus, Ordinance No. 2003-30 does not conflict with any provision of the SMA. To the contrary, *Weden* actually holds that a complete ban on one type of recreational activity was consistent with the SMA, and for shorelines of state-wide significance, it is appropriate to favor "resources and ecology of the shoreline" over "recreational interests."

3. Ordinance No. 2003-30 Does Not Violate Equal Protection or Substantive Due Process.

Appellants allege that the Ordinance violates equal protection, but provide scant analysis. *App. Brief*, p. 42. Regarding equal protection, when no suspect class is involved, a law must meet the following three-part test:

- (1) whether the legislation applies alike to all members within a designated class;
- (2) whether there are reasonable grounds to distinguish between those within and those without the class; and
- (3) whether the classification has a rational relationship to the purpose of the legislation.

Haberman v. WPPSS, 109 Wn.2d 107, 139, 744 P.2d 1032 (1987).

Appellants bear the heavy burden to establish that a regulation results in a

⁵¹ Five justices opined that the City had authority to enact shoreline moratoria, but one determined the City's moratorium was unreasonable in length, and so the City's was invalidated. *Id.* at 703-6 (conurrence), 709-12 (dissent). Importantly, some justices criticized the moratoria with respect to bulkheads, which protect private property, but did not make similar comments about docks. Here, the Ordinance limits docks only, and does not affect bulkheads. And, the SMA does contemplate that SMPs will regulate use location, provide for public recreation opportunities, and preserve natural resources, including scenic vistas and aesthetics. See e.g. *RCW 90.58.100(1), (2)(c), (2)(e), (2)(f)*.

constitutional violation; a party cannot rely on conclusory statements regarding alleged constitutional infirmities. *Lund*, 93 Wn.App. at 339. Appellants devote a single sentence to arguing that Ordinance No. 2003-30 violates this test. *App. Brief*, p. 43. By failing to present meaningful argument, they waive this claim.

But even if this Court addresses the equal protection claim, the Ordinance easily satisfies the test. First, the Ordinance applies alike to all Blakely Harbor property. Second, reasonable grounds exist to distinguish between Blakely Harbor and other shoreline property, due to the Harbor's unique attributes detailed in the record. Third, the Blakely Harbor class has a rational relationship to the Ordinance's purpose: protection of the Harbor.

Appellants' equal protection claim appears to center on the second prong. However, the Ordinance does not violate equal protection simply because it applies only to Blakely Harbor.⁵² The City properly determined that based on the Harbor's uniquely undeveloped state, natural scenic value, recognized status as a favored recreational site for watercraft, geography and topography, and other factors, the Harbor warrants the dock restriction. The record is replete with evidence supporting this finding. Thus, there are "reasonable grounds" to distinguish Blakely Harbor from other shorelines.

Appellants describe the Ordinance as "draconian" because it applies to one shoreline area, but not others with the same designation. However, the City determined that the dock limitations were only appropriate in Blakely

⁵² If true, every zoning ordinance would be subject to an equal protection challenge.

Harbor, due to that Harbor's unique circumstances. The SMA contemplates that regulations will apply to discrete sections of the shoreline. See *WAC 173-26-201(3)(d)(ix)*(special area planning). The Board properly analogized the Ordinance to a sub-area plan. *Tab 41, p. 22-23*. The Superior Court properly dismissed Appellants' equal protection claim.

Likewise, Appellants' substantive due process claim has no merit. The test for whether a regulation violates substantive due process involves:

- (1) Whether the regulation is aimed at achieving a legitimate public purpose;
- (2) whether it uses means that are reasonably necessary to achieve that purpose; and
- (3) whether it is unduly oppressive on the landowner.

Sintra, Inc. v. Seattle, 119 Wn.2d 1, 21, 829 P.2d 765 (1992). Several nonexclusive factors are used to determine whether a regulation is unduly oppressive, such as nature of the harm, availability and effectiveness of less drastic measures, and economic loss suffered by the owner. *Id.* at 22.

Appellants made no argument to the Superior Court that the first two prongs were violated. *CP __ (Pet.'s Opening Brief, p. 40-1; Pet.'s Reply, p. 35-6)*. At the very least, Appellants waived any argument that the first two prongs were violated.

Similarly, Appellants presented no evidence whatsoever that the Ordinance is unduly oppressive. Appellants simply allege that the Ordinance treats Blakely Harbor owners differently from other owners of property with the same shoreline designation. However, the record is replete with evidence indicating the City's reasons for limiting docks on Blakely Harbor.

Moreover, an ordinance that only regulates an activity or use that causes

harm is not "unduly oppressive." In *Weden*, jet ski users similarly alleged that the jet ski ban violated substantive due process. The Court disagreed, holding that the unduly oppressive test "simply does not apply," stating:

[T]he jet ski] owners are directly responsible for the problems created by the use of their machines. It defies logic to suggest an ordinance is unduly oppressive when it regulates only the activity which is directly responsible for the harm.

Weden, 135 Wn.2d at 707. Here, Ordinance No. 2003-30 does nothing more than regulate a use (docks) that is directly responsible for a particular harm (impacts on environment, navigation, views and aesthetics). Appellants cannot establish that the Ordinance violates substantive due process.

In this appeal, Appellants argue that the Ordinance is contrary to the SMA policy of planning for reasonable and appropriate uses. *App. Brief*, p. 45. However, the Ordinance is fully consistent with the SMA policies. *Supra*, Section IV.B. Appellants allege that the Ordinance fails the second substantive due process test because it "effectively bans" construction of all new single-use docks in Blakely Harbor, and the City and the Department "cannot explain" why a ban is needed in that Harbor to protect aquatic environment. However, the Ordinance was enacted to address impacts on navigation and views, as well as the environment. The record amply documents the impacts of docks on all three in Blakely Harbor, given the unique circumstances of Blakely Harbor. The SMA does not require that docks be allowed on all shorelines, or all shorelines where residences are allowed on uplands. And the Ordinance does not restrict floats or mooring buoys for private recreation.

Finally, Appellants claim that the Ordinance is unduly oppressive, because anyone who frequents the shoreline will impact the environment, not just the Blakely Harbor owners, and the City has a permitting system to address environmental impacts. *App. Brief*, p. 45-6. Again, Appellants ignore that the Ordinance was enacted to protect navigation and scenic view concerns, as well as environmental impacts. Visitors will not impact navigation, views, or even the environment in the same manner as docks. Nothing in the SMA requires the City to address dock impacts on a case-by-case basis. Here, the City Council properly exercised legislative discretion, consistent with the SMA policies, and determined the level of dock development appropriate for the Harbor, which the Department approved.

While Appellants claim that the amount and percentage of value loss is significant (*App. Brief*, p. 46), Appellants presented **no evidence** to the Superior Court of the amount or percentage of alleged value loss. Any reference to "value loss" is completely unsupported, and must be disregarded.

Appellants purchased their shoreland property subject to the public trust doctrine. *Caminiti*, 107 Wn.2d at 669; *Weden*, at 698. Ordinance No. 2003-30 is fully consistent with that doctrine, and is not "unduly" oppressive. The Superior Court properly dismissed the substantive due process claim.

G. The Superior Court Properly Denied Appellants' Motions to Supplement the Record.

Under the APA, the Court's review of the Board's decision is based solely on the Board's record, with very limited exceptions. *RCW 34.05.558, 34.05.562*. Appellants filed two motions under *RCW 34.05.562* seeking to

supplement the Board's record, or remand the matter to the Board, to add (1) deposition testimony of Peter Best, taken in a separate case filed in federal court, and (2) Mr. Best's Declaration, filed in that same federal action.⁵³ The Superior Court properly exercised its discretion and denied both motions.

First, Mr. Best's deposition and Declaration are irrelevant to this appeal. Appellants claim that they are evidence of "validity of agency action with regard to consideration and application of the DOE Guidelines," referring to "new" WAC 173-26-186. But as discussed above, WAC 173-26-186 did not govern the City's enactment of the Ordinance.

Second, Appellants cannot meet any APA standard for supplementing the Board's record. Under the APA, judicial review is limited to the agency's record. *RCW 34.05.558; Wash. Ind. Tel. Ass'n. v. Util. & Transp. Comm.*, 110 Wn.App. 498, 518, 41 P.3d 1212 (2002). The Court may only supplement the agency's record in very limited circumstances:

(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.

⁵³ Appellants, and others, filed damage claims against the City in federal court, based on the shoreline moratoria enacted before the passage of Ordinance No. 2003-30. In the federal action, Appellants deposed Peter Best, a City Planner with expertise in shoreline issues, on January 19, 2006 regarding the moratoria. In Superior Court, Appellants moved to supplement the Board's record with this deposition. Also in the federal case, Mr. Best submitted a Declaration on February 27, 2006, opposing class certification. Appellants then filed a second motion to supplement the Board's record with this Declaration.

RCW 34.05.562(1)(emph. added). New evidence is admitted only in "highly limited circumstances;" to be admitted, it must fall "squarely within" an exception in RCW 34.05.562(1). *Motley-Motley, Inc. v. State*, 127 Wn.App. 62, 76, 110 P.3d 812 (2005)(Trial court abused its discretion by admitting new evidence that essentially allowed party to "retry its case"). Denial of a motion to supplement is not reversed unless manifest abuse of discretion is shown. *Okamoto v. Emp. Sec.*, 107 Wn.App. 490, 494, 27 P.3d 1203 (2001).

Here, although Appellants assert that the deposition and Declaration fall within RCW 34.05.562(1), they do not even attempt to explain which of the three exceptions for adding evidence apply (and none apply). They allege the documents relate to "validity of the agency action," but even if accurate, that alone is not grounds to supplement the record. Appellants had to establish that RCW 34.05.562(1)(a), (b), or (c) were met.

Likewise, Appellants fail to meet RCW 34.05.562(2), which allows the Court to remand a case to the Board with direction to conduct fact-finding if:

(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....

RCW 34.05.562(2)(b)(emph. added). Appellants claimed the deposition and Declaration are relevant to their analysis under new WAC 173-26-186(8)(d), relating to evaluating cumulative impacts of reasonably foreseeable future development and "established regulatory programs," alleging they contain statements that "directly contradict" the Cumulative Impact Assessment.

The Superior Court properly denied Appellants' remand request under RCW 34.05.562(2). First, Appellants mischaracterize the substance, and take out of context, Mr. Best's deposition testimony and Declaration, which do not contradict the Assessment. CP 94 (*Pet's. Brief in Supp. of Mot. p. 5*).⁵⁴

Second, the statements cited by Appellants are not “new” evidence that Appellants “did not know and [were] under no duty to discover or could not have reasonably been discovered until after the [Board] action.” Appellants argued that the City, Department, and Board did not consider that eelgrass and other environmental factors could limit dock construction. However, the record contains ample evidence that eelgrass and other resources exist in Blakely Harbor. Tab 36 (*Ex. C222, App. C, p. 24; Ex. C223, p. IV-3, IV-5, VI-17, and Maps at App. X-4 (bathymetry), X-10 (algae), X-11 (eelgrass and kelp)*). The Assessment itself states that eelgrass and other resources are present in the Harbor, and states the build-out scenario assumptions. Tab 30 (*Ex. 2.1, p. 7-9, 16-7*). The City Council specifically discussed the Harbor's bathymetry. Tab 30 (*Ex. C129, Minutes p. 6*). The SMP contains provisions

⁵⁴ Mr. Best did not, as Appellants claim, contradict the validity of the Assessment. At deposition, Appellants' counsel questioned Mr. Best extensively about assumptions in the Assessment that resulted in the build-out scenarios, and attempted multiple times to get Mr. Best to alter the Assessment's conclusion on the number of docks under the "predicted build-out" scenario. CP 156-9 (*Maduell Dec. Ex. C, Best Dep., p. 170-84*). Mr. Best indicated several times that without site-specific data, as in a dock application, it is not possible to know whether environmental factors, such as continuous eelgrass, kelp, or macroalgae, preclude dock construction on a particular property. *Best Dep. p. 173-4, 182-83, 238*. Read in context, Mr. Best's point was simply that predictions regarding impacts depend on the underlying assumptions. Any assumption about whether environmental resources exist on a particular property to a degree precluding dock construction is speculative until such time as a dive survey and other studies are performed on the property in connection with a dock application. See CP __ (*City's Response to Mot. to Supp., p. 8-11*).

that regulate dock construction based on environmental factors, as do state and federal regulations. *Tab 35 (SMP p. 106-7)*. The record contains evidence that there are federal, state and local statutes that govern dock development, none of which guarantee the right to build a dock. *Tab 30 (Ex. C46, FAQ's p. 1)*.⁵⁵ Thus, even if Appellants accurately characterized the testimony, it does not provide "new" information; rather, the information is merely cumulative to that already in the record, and does not warrant remand. *Keenan v. Emp. Sec. Dept.*, 81 Wn.App. 391, 396, 914 P.2d 1191 (1996).

Further, the documents do not contain information that Appellants did not know or could not discover before the Board's Decision. As noted by Appellants, the City recommended denial of the Hackers' dock application. Appellants were well aware that environmental factors can lead to denial of individual applications after site-specific review. Although Appellants claim they did not have the exact statements until Mr. Best was deposed, the test is not whether Appellants had a specific quote, but whether the underlying information was available. Here, the information was available and known to Appellants. Appellants had the opportunity and duty to challenge the

⁵⁵ The record also indicates that the City calculated that 26 docks could occur (*Tab 30 (Ex. C155, 164)*), and whether the "reasonably foreseeable" number of docks was 45 or not, "a limited number of new docks in key locations in the Harbor could have profound effects" (*Tab 30 (Ex. C100)*), "even with a five-fold reduction in docks (by requiring 5 owners to have a common dock), impacts to views, scenic corridors, and the environment would not be significantly less than unrestricted dock development," and "allowing five community docks would not greatly reduce impacts to view corridors, navigation and habitat that would occur from private docks." *Tab 36 (Ex. C63, C65)*.

Assessment before the Board.⁵⁶ If they believed it was necessary to question Mr. Best, they could have done so, either by requesting leave to depose him, or calling him as a witness.⁵⁷ Appellants had the obligation to present any evidence they had to the Board to rebut the Assessment. They did not do so.

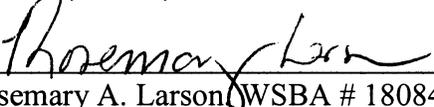
Finally, the interests of justice do not support remanding this matter for additional consideration by the Board. *RCW 34.05.562(2)(b)(ii)*. Remand is unlikely to result in a different Board decision, because the same information was already in the record, and would only result in needless delay and expense for all parties. The Superior Court did not abuse its discretion by denying Appellants' motions to supplement or remand to the Board.

V. CONCLUSION

The City respectfully requests that the Court deny Appellants' appeal, and affirm the Decisions of the Board and the Superior Court which, in turn, affirmed the decisions of the Department of Ecology and the City.

DATED this 24th day of March, 2008.

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

By 
Rosemary A. Larson, WSBA # 18084
Attorneys for City of Bainbridge Island

⁵⁶ Appellants did just that on other issues. Appellants moved to supplement the record with the deposition of the former Planning Director, and other documents. *Tab 31*. The Board granted this motion. *Tab 41, p. 5*.

⁵⁷ *WAC 242-02-410* (authorizing discovery); *WAC 242-02-420* (authorizing subpoenas); *WAC 242-02-610* (relating to testimony considered by the board). Mr. Best was present at the Board's hearing. *Tab 41, p. 3*.

CERTIFICATE OF SERVICE

I, Carol Cotto, hereby certify that on this 24th day of March, 2008, I caused to be served a true and correct copy of CITY OF BAINBRIDGE ISLAND'S RESPONSE BRIEF on the individual(s) named below in the specific manner indicated:

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FILED
COURT OF APPEALS
DIVISION II
08 MAR 24 PM 3:39
STATE OF WASHINGTON
BY _____ DEPUTY

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

DATED: March 24th, 2008, at Bellevue, Washington.

Carol Cotto
Carol Cotto

APPENDIX

**CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD
FINAL DECISION AND ORDER** **A**

**ORDER AND JUDGMENT DISMISSING
PETITION FOR JUDICIAL REVIEW OF
ADMINISTRATIVE DECISION** **B**

RCW 90.58.020 **C**

WAC 173-26-251 **D**

WAC 173-26-250 **E**

APPENDIX A

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
 STATE OF WASHINGTON

KELLY AND SALLY SAMSON and)
 ROBERT AND JO ANNE HACKER)

Case No. 04-3-0013

Petitioners,)
 and)

FINAL DECISION AND ORDER

BAINBRIDGE CITIZENS UNITED)

(*Samson*)

Intervenor,)

v.)

CITY OF BAINBRIDGE ISLAND and)

STATE OF WASHINGTON)

DEPARTMENT OF ECOLOGY)

Respondents)

SYNOPSIS

The City of Bainbridge Island amended its Shoreline Management Master program with respect to Blakely Harbor. The amendment limits dock and pier development in Blakely Harbor by prohibiting construction of new single-use private docks and allowing two joint-use docks for up to five vessels each and a community dock for public use. Use of mooring buoys by resident vessels is continued. The amendment was supported by a Harbor Management Plan that inventoried the natural resources and patterns of use of the city's four harbors, by the Blakely Harbor Cumulative Impacts Assessment which projected dock build-out and assessed impacts on navigation, scenic views, aquatic resources and recreational use, and by an extensive record.

The Washington State Department of Ecology approved the Amendment.

Petitioners are Blakely Harbor property owners who assert that the City and Ecology violated the Growth Management Act and the Shoreline Management Act by using a shoreline master plan amendment to deny the right to build new single-use private docks in Blakely Harbor rather than addressing impacts of proposed new private docks and piers on a case-by-case basis through the permitting process.

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
7 The Board found that Petitioners failed to present "clear and convincing evidence of
8 error" in Ecology's approval of the Amendment. Ecology's approval is supportable
9 when tested against either the goals, policies and provisions of chapter 90.58 RCW or the
10 new guidelines cited by Petitioners and adopted by Ecology when its consideration of this
11 Amendment was pending.
12

13 I. BACKGROUND¹

14
15 On September 10, 2003, the Council of the City of Bainbridge Island (the City) adopted
16 Ordinance No. 2003-30 (the Amendment) "...limiting dock and pier development within
17 Blakely Harbor and amending the Shoreline Management Master Program...". On
18 February 13, 2004, the Washington State Department of Ecology (DOE or Ecology)
19 approved the amendment to the Bainbridge Island Shoreline Management Master
20 Program (Bainbridge SMP). On April 23, 2004, the Central Puget Sound Growth
21 Management Hearings Board (the Board) received a Petition for Review (PFR) from
22 Kelly and Sally Samson and Robert and Jo Anne Hacker (Petitioners or Samson). The
23 matter was assigned Case No. 04-3-0013. Petitioners challenge the City's adoption of the
24 Amendment to the Bainbridge SMP. Petitioners also challenge DOE's approval of the
25 City's Amendment to the Bainbridge SMP. The bases for the challenges are
26 noncompliance with the Growth Management Act (GMA) and the State Shoreline
27 Management Act (SMA). The PFR set forth 19 Issues to be resolved.
28
29

30 During May and June, 2004, the Board issued a notice of hearing, conducted a prehearing
31 conference and issued its Prehearing Order and Order on Intervention (PHO). The PHO
32 set a schedule, established fifteen legal issues to be decided by the Board² and granted
33 Bainbridge Citizens United (Intervenor) status to intervene on behalf of the Petitioners.
34 The Board's Order on Motions of July 6, 2004, dismissed ten issues and restated three of
35 the issues to be decided by the Board.³ In October and November the Board received
36 prehearing briefing and briefing on Petitioners' Motion to Correct and/or Supplement the
37 Record. The prehearing briefing received by the Board is referenced in this Final
38 Decision and Order (FDO) as: Petitioners' Prehearing Brief (Samson PHB), City of
39 Bainbridge Island's Prehearing Brief (City Response), Department of Ecology
40 Prehearing Brief (DOE Response), Petitioners' Reply Brief (Samson Reply). Intervenor
41 Bainbridge Citizens United did not submit any briefing.
42
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47 ¹ For more complete details, see Appendix – A, Chronological Procedural History, *infra*, at 25.

48 ² Appendix – C, Legal Issues as Stated in the Prehearing Order, *infra*, at 30.

49 ³ Appendix – B, Legal Issues Restated and Retained for Prehearing Briefing, *infra*, at 28.
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
15 Both Bainbridge Island's and Ecology's actions must be consistent with the goals and
16 requirements of the Shoreline Management Act. However, because Ecology must
17 approve a local government action in order for it to take effect, the Board here focuses on
18 the applicable standard of review for Ecology's actions. The Board's review of
19 Ecology's action here is governed by RCW 90.58.190(2) because the shorelines at issue
20 here are "shorelines of state-wide significance."
21

22 RCW 90.58.190(2) provides in part:

23
24
25 (c) If the appeal to the growth management hearings board concerns a
26 shoreline of state-wide significance, the board shall uphold the decision by
27 the department unless the board, by clear and convincing evidence,
28 determines that the decision of the department is inconsistent with the
29 policy of RCW 90.58.020 and the applicable guidelines.
30

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

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

39 III. BOARD JURISDICTION, PRELIMINARY ITEMS, ABANDONED ISSUE

40 41 A. BOARD JURISDICTION

42
43 The Board finds that the Samson PFR was timely filed, pursuant to RCW 36.70A.290(2);
44 Petitioners participated in the City's public process and have participation standing to
45 appear before the Board, pursuant to RCW 36.70A.280(2) and RCW 90.58.190; and
46 pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the
47 challenged action (Bainbridge Island Ordinance No. 2003-30) which amends the City's
48 Shoreline Management Master Program and, *de jure*, Comprehensive Plan and
49 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-196⁴ 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).⁵

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.⁶

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*

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

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

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

1 *abandonment of the unbriefed issue.* Briefs shall enumerate and set forth
2 the legal issue(s) as specified in the prehearing order if one has been
3 entered.
4

5 WAC 242-02-570(1), (emphasis supplied).
6

7 Additionally, the Board's June 3, 2004, PHO in this matter states: "Legal issues, or
8 portions of legal issues, not briefed in the Prehearing Brief will be deemed to have
9 been abandoned and cannot be resurrected in Reply Briefs or in oral argument at
10 the Hearing on the Merits." PHO, at 7 (emphasis in original). *See, City of Bremerton, et*
11 *al., v. Kitsap County (Bremerton II)*, CPSGMHB Consolidated Case No. 04-3-0009c,
12 Final Decision and Order (Aug. 9, 2004), at 5; *Tulalip Tribes of Washington v.*
13 *Snohomish County (Tulalip)*, CPSGMHB Case No. 96-3-0029, Final Decision and Order
14 (Jan. 8, 1997), at 7.
15

16 Also, the Board has stated, "Inadequately briefed issues would be considered in a manner
17 similar to consideration of unbriefed issues and, therefore, should be deemed
18 abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c,
19 Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3; *see also Bremerton II*,
20 at 5.
21

22 In review of the Samson PHB, the Board found only a few conclusory restatements of
23 Legal Issue No. 5⁷ in the context of discussion of Legal Issues No. 1 and 2 but without
24 any legal analysis or citation to authority.⁸ It is not sufficient to brief an issue for the first
25 time in a reply brief. *Tulalip*, at 7. Therefore the Board deems Legal Issue No. 5
26 abandoned.
27

28 VI. CHALLENGED ACTION AND POSITION OF THE PARTIES

29 The City's Action

30 This matter involves the City's enactment and Ecology's approval of Ordinance 2003-30
31 amending the City's Shoreline Master Program to include a provision limiting
32 development of docks in Blakely Harbor. C-131.⁹ The City adopted its first Shoreline
33

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39 ⁷ Legal Issue No. 5: Is the Ordinance noncompliant with GMA requirements mandating consistency and
40 predictability in the land-use decision-making process, including internal consistency among development
41 regulations, by imposing different requirements for siting and constructing private residential docks on
42 parcels with the same zoning and shoreline land use designations?

43 ⁸ "[P]rivate docks and piers are allowed ... in all other shoreline designations, including the Semi-rural
44 designation along the Blakely Harbor shoreline. No SMP policies suggest or support adoption of a ban in
45 other shoreline designations...." Samson PHB, at 35. "Banning docks and piers from all shoreline areas
46 within Blakely Harbor, regardless of a property's shoreline designation ... is inconsistent...." *Id.* "The
47 Comprehensive Plan has designated Blakely Harbor shoreline area for residential uses. A ban on private
48 docks is inconsistent with such land use policies." *Id.*, at 37.

49 ⁹ In the remainder of this FDO, exhibits, whether submitted by Petitioners or Respondents, will be
50 referenced by their numbers in the City's Index, i.e., "C-131".

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.¹⁰
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.¹¹
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
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43
44 ¹⁰ "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 ¹¹ 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 The City adopted the Amendment on September 10, 2003 and forwarded it to Ecology on
14 September 25, 2003. Ecology's comment period closed on November 30, 2003, and
15 Ecology issued its decision approving the Amendment on February 13, 2004. C-211.
16

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

26 Petitioners' Case

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

38 Petitioners argue that the Amendment is inconsistent with the goals and policies of SMA
39 which identify residential docks and piers as a preferred use, requiring that their impacts
40 be assessed and mitigated on a case-by-case basis through the permitting process, not
41 through planned restrictions or use regulations. (Legal Issue 2) Further, Petitioners state,
42 the Amendment is not consistent with the SMA because Ecology failed to test it against
43 its new guidelines. In particular, Petitioners assert, the City's Blakely Harbor Cumulative
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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,¹² conditionally dismissed¹³
17 or are deemed abandoned.¹⁴ Petitioners' Legal Issue No. 15 asks for a determination of
18 invalidity.
19

20
21 The Board analyzes the Petitioners' issues in the order above - Legal Issues 2, 9, 1 and
22 15. The Board finds and concludes that the City's Amendment to its SMP and Ecology's
23 approval of the Amendment **comply** with the GMA and the SMA.
24

25 V. LEGAL ISSUES AND DISCUSSION¹⁵

26 27 **A. Legal Issue 2 – Consistency with SMA and Applicable Regulations**

28
29 The Board's Prehearing Order states Legal Issue No. 2 as follows:
30

31
32 Does the Ordinance violate the GMA, RCW 36.70A.480(2) and (3),
33 because it is inconsistent with and fails to implement the goals and
34 policies of the Shoreline Management Act (the SMA) and the Bainbridge
35 Island Shoreline Master Program?
36

37 *Applicable Law*

38
39 RCW 36.70A.480(2) and (3) state, in pertinent part:
40

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

45
46 ¹² See *infra*, fn. 35.

47 ¹³ See *infra*, fn. 19, 20, 34.

48 ¹⁴ *Supra*, at 5-6.

49 ¹⁵ 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

13 Relevant portions of the Shoreline Management Act, chapter 90.58 RCW, are set out in
14 Appendix – D, *infra*, at 33-35.
15

16
17 *Discussion – Goals and Policies of the Shoreline Management Act*
18

19 Petitioners assert that the Amendment is inconsistent with the goals and policies of the
20 Shoreline Management Act because the SMA requires Ecology and local jurisdictions to
21 balance shoreline development and shoreline preservation. That balance must be
22 achieved, according to Petitioners, by allowing preferred water-dependent uses such as
23 private residential docks in the shoreline plan and then denying them or conditioning
24 them on a case-by-case basis through the permit process to address specific impacts.
25 Petitioners allege that the City's ban on private docks in Blakely Harbor violates the
26 statutory priority for residential docks and piers. The City may deny a permit for a
27 particular dock, they argue, but may not do so in its master program. "Absent evidence
28 that existing procedural safeguards in the SMP policies and regulations are not adequate
29 to mitigate and protect Blakely Harbor from adverse environmental impacts, and none
30 exists in the record, the ban on docks and piers is inconsistent with SMA policies and
31 applicable guidelines." Sampson PHB, at 34.
32
33

34 It is well-settled that a jurisdiction may limit or even prohibit construction of a single-use
35 private recreational dock in a permit proceeding. Petitioners agree. But Petitioners argue
36 that a jurisdiction may not take the same action prospectively as it fine-tunes its SMP for
37 a particular area of shoreline within the purview of its plan; rather, each permit
38 application must be decided on its own discrete facts.
39
40

41 Ecology responds that the SMA recognizes "the inherent harm in an uncoordinated and
42 piecemeal development of the state's shorelines." RCW 90.58.020. "If a local
43 government can conclude at a particular site that a dock may not be allowed because it
44 will interfere with navigation, or aesthetics, or other shoreline uses or functions, the local
45 government can, on proper evidence, reach the same conclusion with regard to a class of
46 sites or section of shoreline." DOE Response, at 7. There is no requirement in the SMA
47 that local governments proceed on a permit-by-permit basis; to the contrary, the SMA
48
49
50

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).¹⁶ 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 ¹⁶ 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
0 every shoreline, or even on every shoreline otherwise designated for residential use. In
1 *Beuchel v. Department of Ecology*, 125 Wn.2d 196, 209, 884 P.2d 910 (1994), the Court
2 underscored the key phrase in the statutory preference language:
3

4 The landowner argues that...residential use must be given priority under
5 the SMA. This is inaccurate. The landowner relies on the SMA which
6 states that "alterations of the natural condition of the shorelines of the
7 state, *in those limited instances when authorized*, shall be given priority
8 for single family residences and ... shoreline recreational uses." RCW
9 90.58.020(7). However, in this case the residential use was not
10 "authorized"; in fact, it was prohibited by the regulations....
11

12
13 (Emphasis added); *see also Lund v. Department of Ecology*, 93 Wn.App. 329, 337, 969
14 P.2d 1072 (1998) (denying residential construction in a shoreline residential zone).
15

16 It is within the authority of the local government, in developing and amending its master
17 program, to determine *where* various priority uses may be located. *See e.g.*, WAC 173-
18 26-231(3)(b) ("*where* new piers or docks are allowed..."); RCW 79.90.105 (construction
19 of dock on state tidelands "is subject to applicable local, state, and federal rules and
20 regulations governing *location* ...").¹⁷ The City of Bainbridge Island does not allow
21 docks within the natural and aquatic conservancy environments, allows them only as
22 conditional uses in the conservancy environment, and now has amended its SMP to
23 prohibit new single-use private docks in Blakely Harbor. This is well within the City's
24 authority given the record and consistent with the goals and policies of the SMA – RCW
25 90.58.020.
26

27
28 The Board finds that the City's adoption of the Amendment and Ecology's approval is
29 consistent with the goals and policies of the SMA as set forth in RCW 90.58.020.
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45 ¹⁷ 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.

Yes Key!

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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.¹⁸ 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

¹⁸ *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
34 (Emphasis and numeration supplied.)

35
36 1. Other Shoreline Functions.¹⁹ 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.
44

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46
47 ¹⁹ 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 The Board notes that Blakely Harbor boat owners may use mooring buoys, develop a
20 joint use dock on each shore or work toward the development of a community dock.
21 Given the special character of Blakely Harbor as demonstrated in the record, the
22 restrictions on single-use private dock construction are not an unfair burden to shoreline
23 property owners who will continue to enjoy the harbor’s “unique recreational, aesthetic,
24 and natural resource values.” *Id.*
25
26

27 3. Reasonably Foreseeable Development.²⁰ 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 The City responds that its predicted build-out scenario was based on “known parcel
34 restrictions that affect development, such as zoning density, critical areas, restrictive
35 covenants, and other existing regulations.” City Response, at 28; C-2.1, at 7-8. The City
36 also accounted for park and country club property, adjacent lots in single ownership,
37 subdivisions required to provide joint-use dock facilities, and the average density of dock
38 development in other Bainbridge Island residential harbors. *Id.*
39
40

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

46 ²⁰ 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),²¹ 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
36 *Conclusion*
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 ²¹ "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 173-26-090²² (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.

²² 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 guideline²³ but is the
18 requirement of RCW 90.58.100(1). Ecology makes this clear:
19

20
21 Under RCW 90.58.100, local governments in developing master programs
22 must utilize “all available information regarding hydrology, geography,
23 topography, ecology, economics, and other pertinent data,” to “employ,
24 when feasible, all appropriate, modern scientific data processing and
25 computer techniques” and “to conduct or support such further research,
26 studies, surveys and interviews that are deemed necessary.” The Blakely
27 Harbor Cumulative Impact Assessment meets this standard because it uses
28 “all available information” and “modern computer techniques” to assess
29 the cumulative impacts of dock construction in the harbor.
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
35 Changing Local Circumstances. Petitioners assert that the City’s Cumulative Impact
36 Assessment is pure speculation because, with only six functional docks in Blakely Harbor
37 and one recently built, there is “no reason to believe that this ‘relatively low level of dock
38 development’ will not continue into the foreseeable future.” Samson PHB, at 17.
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.²⁴ 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 ²³ See discussion *supra*, at 13.

48 ²⁴ 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
9 New Information. Petitioners contend that the Blakely Harbor Cumulative Impact
10 Assessment and other materials relied on are not "new information" but are mere
11 "literature surveys," containing virtually no substance specific to Blakely Harbor.
12 Samson PHB, at 18. In response, the City asserts that since adopting its 1996 Shoreline
13 Master Program, and particularly since Puget Sound Chinook were listed under the
14 Endangered Species Act in 1999, new understandings have emerged in the scientific
15 literature concerning the value of nearshore marine environments and the ecological
16 impacts of overwater structures. City Response, at 33-34.
17

18 The City notes that most of the studies and reports on which the Assessment was based
19 were prepared after 1996. *Id.*²⁵ 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.²⁶ *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.²⁷
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 ²⁵ 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 ²⁶ 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 ²⁷ 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.²⁸ City Response, at 10-11. Scenic view corridors and
14 "ambient views" would be significantly reduced.²⁹ *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
22 Petitioners contend that the City's inventories and modeling are not "improved" data
23 because the predicted build-out is unrealistic. The Board disagrees with Petitioners and
24 finds that the City's recent inventories and modeling provide improved data that is
25 responsive to the requirements of RCW 90.58.100.
26

27 *Conclusion*

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

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

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

5 *Applicable Law*

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*³⁰

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.³¹
42

43
44 ³⁰ 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 ³¹ 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
9 The City points to the same policies identified by Petitioners and finds support for
10 limiting new single-use private docks in Blakely Harbor. The City's comments on the
11 cited Bainbridge SMP and Comprehensive Plan policies are quoted in Appendix E. For
12 example, the SMP Recreational Element Goals call for "optimizing" opportunities for
13 passive and active water-oriented recreation, including "those that can reasonably tolerate
14 peak use." SMP, at 13. Given the inventoried peak use of Blakely Harbor by 7,643
15 vessels during the 1997 yachting season (112 vessels on the busiest night), limiting new
16 single-use docks is appropriate. C2.1, at 13. Similarly, the Bainbridge SMP policies for
17 piers and docks express a preference for mooring buoys and for multiple-use docks,
18 consistent with the Amendment. SMP, at 13.
19

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

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

37
38 *Carlson v. San Juan County*, WWGMHB Case No. 00-2-0016 (Final Decision and Order,
39 September 15, 2000) is instructive. San Juan County adopted a subarea plan for Waldron
40 Island that prohibited new private docks. Several Waldron owners appealed, contending
41 that the dock prohibition, which was unique to Waldron Island, was inconsistent with the
42 county's comprehensive plan. The County's findings included:
43

- 44 • "Unlike most other areas in the County, for many years Waldron Island has had
45 only one County dock and one private dock. There is no existing pattern of
46 moorage development on the Island.
- 47 • The Island's shoreline is highly exposed to wind and wave action, and there are
48 few, if any, locations where docks of small or moderate scale could withstand
49 these conditions on a year-round basis.
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.³² 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.³³ 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 policies³⁴ 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

³² C-222, Appendix C, Blakely Harbor Inventory, at 23-24; C-2.1; C-2.2; Samson PHB, at 18.

³³ *See* fn. 24, *supra*, at 18.

³⁴ 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

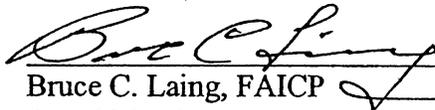
9
10 VI. ORDER
11

12 Based upon review of the Petition for Review, the briefs and exhibits submitted by the
13 parties, having considered the arguments of the parties, and having deliberated on the
14 matter, the Board ORDERS:
15

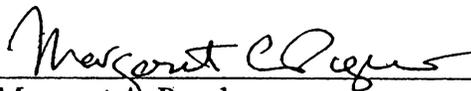
16 The City of Bainbridge Island's adoption of Ordinance No. 2003-30,
17 amending its shoreline master program, and the Department of Ecology's
18 approval of the City's action, **comply** with the goals, policies and
19 provisions of the SMA (RCW 90.58.020 and .100) and **comply** with the
20 relevant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

22 So ORDERED this 19th day of January, 2005.
23

24
25 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
26
27
28

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

33
34 
35 Edward G. McGuire, AICP
36 Board Member
37

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

46
47 Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a
48 party files a motion for reconsideration pursuant to WAC 242-02-832.
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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 4th 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 15³⁵ 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
39 On July 22, 2004 the Board issued its "Order Granting Settlement Extension and
40 Amending Case Schedule."
41

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

45
46 ³⁵ 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.
04-3-0013³⁶

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?³⁷

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?

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

³⁷ 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 General³⁸ to ensure the Ordinance does not result in an unconstitutional taking of private property?

³⁸ 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

12 Are perceived navigation and visual impacts valid elements to take into consideration in a
13 cumulative impacts analysis prepared to justify a prohibition of use of the shorelines?
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 Legal Issue No. 12
31

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

36 Legal Issue No. 13
37

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

41 Legal Issue No. 14
42

43 Has the City of Bainbridge Island in adopting the Ordinance complied with its procedures
44 for amendment of its Comprehensive Land Use Plan and development regulations
45 specified in its Plan and public participation program, as required by RCW
46 36.70A.130(1)(2)(b)?
47
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Legal Issue No. 15

If the Board finds the City has not complied with the goals or requirements of the GMA when addressing Issues 1-14, supra, does such noncompliance substantially interfere with 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
44 (iii) Those areas of Puget Sound and the Strait of Juan de Fuca and
45 adjacent salt waters north to the Canadian line and lying seaward from the
46 line of extreme low tide;
47

48
49 RCW 90.58.090(4) provides:
50

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

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

11
12 3. Piers, docks, and floats should be designed to cause minimum possible
13 adverse environmental impacts, including potential impacts on littoral
14 drift, sand movement, water circulation and quality, and fish and wildlife
15 habitat. . . .
16

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

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

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

- 35 a. Recognize and protect the state-wide interest over local area and
36 individual interest.
- 37 b. Preserve the natural character of the shoreline.
- 38 c. Produce long-term benefits over short-term benefits.
- 39 d. Protect the resources and ecology of the shorelines.
- 40 e. Increase public access to publicly-owned areas of the shorelines.
- 41 f. Increase public recreational opportunities on the shoreline.
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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
20 The City emphasizes the commitment to protect the public's *visual* access to shorelines.
21 City Response at 46.
22

23 *Harbor Use and Safety Element, SMP Sec. I.I, p. 14.*
24

25 1. Ensure the safe and environmentally sound use of Island harbors and
26 bays in a manner that protects and enhances harbor and shoreline use
27 consistent with the goals of the other elements.
28

29 2. Provide, protect, and control public use of harbor and bay waters in a
30 manner that is in the best interest of the public.
31

32 *Comprehensive Plan Land Use Element – "Overriding Principles." Comp Plan, p. 47.*
33

34 1. Preserve the special character of the Island which includes forested
35 areas, meadows, marine views, and winding roads bordered by dense
36 vegetation.
37

38 2. Protect the water resources of the Island.
39

40 3. Foster diversity of the residents of the Island, its most precious
41 resource.
42

43 4. The costs and benefits to property owners should be considered in
44 making land use decisions.
45

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

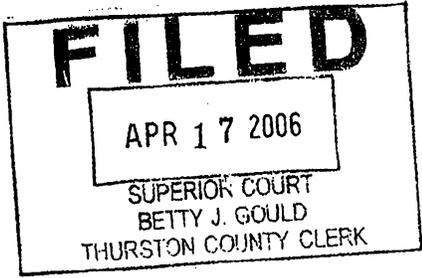
25 Goal 1. Preserve and enhance Bainbridge Island’s natural systems, natural
26 beauty, and environmental quality.
27

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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APPENDIX B



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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:

ORDER AND JUDGMENT DISMISSNG
PETITION FOR JUDICIAL REVIEW OF
STATE AGENCY ADMINISTRATIVE DECISION - 1
094700|0235|337008.01

INSLEE, BEST, DOEZIE & RYDER, P.S.
ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
(425) 455-1234

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

APPENDIX C

- 90.58.210 Court actions to insure against conflicting uses and to enforce—Civil penalty—Review.
- 90.58.220 General penalty.
- 90.58.230 Violators liable for damages resulting from violation—Attorney's fees and costs.
- 90.58.240 Additional authority granted department and local governments.
- 90.58.250 Intent—Department to cooperate with local governments—Grants for development of master programs.
- 90.58.260 State to represent its interest before federal agencies, interstate agencies and courts.
- 90.58.270 Nonapplication to certain structures, docks, developments, etc., placed in navigable waters—Nonapplication to certain rights of action, authority.
- 90.58.280 Application to all state agencies, counties, public and municipal corporations.
- 90.58.290 Restrictions as affecting fair market value of property.
- 90.58.300 Department as regulating state agency—Special authority.
- 90.58.310 Designation of shorelines of statewide significance by legislature—Recommendation by director, procedure.
- 90.58.320 Height limitation respecting permits.
- 90.58.340 Use policies for land adjacent to shorelines, development of.
- 90.58.350 Nonapplication to treaty rights.
- 90.58.355 Hazardous substance remedial actions—Procedural requirements not applicable.
- 90.58.360 Existing requirements for permits, certificates, etc., not obviated.
- 90.58.370 Processing of permits or authorizations for emergency water withdrawal and facilities to be expedited.
- 90.58.380 Adoption of wetland manual.
- 90.58.390 Certain secure community transition facilities not subject to chapter.
- 90.58.515 Watershed restoration projects—Exemption.
- 90.58.550 Oil or natural gas exploration in marine waters—Definitions—Application for permit—Requirements—Review—Enforcement.
- 90.58.560 Oil or natural gas exploration—Violations of RCW 90.58.550—Penalty—Appeal.
- 90.58.570 Consultation before responding to federal coastal zone management certificates.
- 90.58.600 Conformance with chapter 43.97 RCW required.
- 90.58.900 Liberal construction—1971 ex.s. c 286.
- 90.58.910 Severability—1971 ex.s. c 286.
- 90.58.911 Severability—1983 c 138.
- 90.58.920 Effective date—1971 ex.s. c 286.

Marine oil pollution—Baseline study program: RCW 43.21A.405 through 43.21A.420.

90.58.010 Short title. This chapter shall be known and may be cited as the "Shoreline Management Act of 1971". [1971 ex.s. c 286 § 1.]

90.58.020 Legislative findings—State policy enunciated—Use preference. 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.

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 statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

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

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. [1995 c 347 § 301; 1992 c 105 § 1; 1982 1st ex.s. c 13 § 1; 1971 ex.s. c 286 § 2.]

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW 36.70A.470.

90.58.030 Definitions and concepts. As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

(1) Administration:
 (a) "Department" means the department of ecology;
 (b) "Director" means the director of the department of ecology;

(c) "Local government" means any county, incorporated city, or town which contains within its boundaries any lands or waters subject to this chapter;

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

(e) "Hearing board" means the shoreline hearings board established by this chapter.

(2) Geographical:

(a) "Extreme low tide" means the lowest line on the land reached by a receding tide;

(b) "Ordinary high water mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: PROVIDED, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water;

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of statewide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;

(e) "Shorelines of statewide significance" means the following shorelines of the state:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

(A) Nisqually Delta—from DeWolf Bight to Tatsolo Point,

(B) Birch Bay—from Point Whitehorn to Birch Point,

(C) Hood Canal—from Tala Point to Foulweather Bluff,

(D) Skagit Bay and adjacent area—from Brown Point to Yokeko Point, and

(E) Padilla Bay—from March Point to William Point;

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

(iv) Those lakes, whether natural, artificial, or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;

(v) Those natural rivers or segments thereof as follows:

(A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,

(B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;

(vi) Those shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);

(f) "Shorelands" or "shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.

(i) Any county or city may determine that portion of a one-hundred-year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.

(ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provisions of this subsection (2)(f)(ii) are not subject to additional regulations under this chapter;

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

(h) "Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circum-

APPENDIX D

When permitted, provisions shall assure that the facilities do not result in a net loss of shoreline ecological functions or significant impacts to other shoreline resources and values.

[Statutory Authority: RCW 90.58.060 and 90.58.200. 04-01-117 (Order 03-02), § 173-26-241, filed 12/17/03, effective 1/17/04.]

WAC 173-26-251 Shorelines of statewide significance. (1) **Applicability.** The following section applies to local governments preparing master programs that include shorelines of statewide significance as defined in RCW 90.58.030.

(2) **Principles.** Chapter 90.58 RCW raises the status of shorelines of statewide significance in two ways. First, the Shoreline Management Act sets specific preferences for uses of shorelines of statewide significance. RCW 90.58.020 states:

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

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

(2) *Preserve the natural character of the shoreline;*

(3) *Result in long term over short term benefit;*

(4) *Protect the resources and ecology of the shoreline;*

(5) *Increase public access to publicly owned areas of the shorelines;*

(6) *Increase recreational opportunities for the public in the shoreline;*

(7) *Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary."*

Second, the Shoreline Management Act calls for a higher level of effort in implementing its objectives on shorelines of statewide significance. RCW 90.58.090(5) states:

"The department shall approve those segments of the master program relating to shorelines of statewide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the statewide interest."

Optimum implementation involves special emphasis on statewide objectives and consultation with state agencies. The state's interests may vary, depending upon the geographic region, type of shoreline, and local conditions. Optimum implementation may involve ensuring that other comprehensive planning policies and regulations support Shoreline Management Act objectives.

Because shoreline ecological resources are linked to other environments, implementation of ecological objectives requires effective management of whole ecosystems. Optimum implementation places a greater imperative on identifying, understanding, and managing ecosystem-wide processes and ecological functions that sustain resources of statewide importance.

(3) **Master program provisions for shorelines of statewide significance.** Because shorelines of statewide significance are major resources from which all people of the state derive benefit, local governments that are preparing master

program provisions for shorelines of statewide significance shall implement the following:

(a) **Statewide interest.** To recognize and protect statewide interest over local interest, consult with applicable state agencies, affected Indian tribes, and statewide interest groups and consider their recommendations in preparing shoreline master program provisions. Recognize and take into account state agencies' policies, programs, and recommendations in developing use regulations. For example, if an anadromous fish species is affected, the Washington state departments of fish and wildlife and ecology and the governor's salmon recovery office, as well as affected Indian tribes, should, at a minimum, be consulted.

(b) **Preserving resources for future generations.** Prepare master program provisions on the basis of preserving the shorelines for future generations. For example, actions that would convert resources into irreversible uses or detrimentally alter natural conditions characteristic of shorelines of statewide significance should be severely limited. Where natural resources of statewide importance are being diminished over time, master programs shall include provisions to contribute to the restoration of those resources.

(c) **Priority uses.** Establish shoreline environment designation policies, boundaries, and use provisions that give preference to those uses described in RCW 90.58.020 (1) through (7). More specifically:

(i) Identify the extent and importance of ecological resources of statewide importance and potential impacts to those resources, both inside and outside the local government's geographic jurisdiction.

(ii) Preserve sufficient shorelands and submerged lands to accommodate current and projected demand for economic resources of statewide importance, such as commercial shellfish beds and navigable harbors. Base projections on statewide or regional analyses, requirements for essential public facilities, and comment from related industry associations, affected Indian tribes, and state agencies.

(iii) Base public access and recreation requirements on demand projections that take into account the activities of state agencies and the interests of the citizens of the state to visit public shorelines with special scenic qualities or cultural or recreational opportunities.

(d) **Resources of statewide importance.** Establish development standards that:

(i) Ensure the long-term protection of ecological resources of statewide importance, such as anadromous fish habitats, forage fish spawning and rearing areas, shellfish beds, and unique environments. Standards shall consider incremental and cumulative impacts of permitted development and include provisions to insure no net loss of shoreline ecosystems and ecosystem-wide processes.

(ii) Provide for the shoreline needs of water-oriented uses and other shoreline economic resources of statewide importance.

(iii) Provide for the right of the public to use, access, and enjoy public shoreline resources of statewide importance.

(e) **Comprehensive plan consistency.** Assure that other local comprehensive plan provisions are consistent with and support as a high priority the policies for shorelines of statewide significance. Specifically, shoreline master programs should include policies that incorporate the priorities and

optimum implementation directives of chapter 90.58 RCW into comprehensive plan provisions and implementing development regulations.

[Statutory Authority: RCW 90.58.060 and 90.58.200. 04-01-117 (Order 03-02), § 173-26-251, filed 12/17/03, effective 1/17/04.]

PART IV OCEAN MANAGEMENT

WAC 173-26-360 Ocean management. (1) Purpose and intent. This section implements the Ocean Resources Management Act, (RCW 43.143.005 through 43.143.030) enacted in 1989 by the Washington state legislature. The law requires the department of ecology to develop guidelines and policies for the management of ocean uses and to serve as the basis for evaluation and modification of local shoreline management master programs of coastal local governments in Jefferson, Clallam, Grays Harbor, and Pacific counties. The guidelines are intended to clarify state shoreline management policy regarding use of coastal resources, address evolving interest in ocean development and prepare state and local agencies for new ocean developments and activities.

(2) Geographical application. The guidelines apply to Washington's coastal waters from Cape Disappointment at the mouth of the Columbia River north one hundred sixty miles to Cape Flattery at the entrance to the Strait of Juan De Fuca including the offshore ocean area, the near shore area under state ownership, shorelines of the state, and their adjacent uplands. Their broadest application would include an area seaward two hundred miles (RCW 43.143.020) and landward to include those uplands immediately adjacent to land under permit jurisdiction for which consistent planning is required under RCW 90.58.340. The guidelines address uses occurring in Washington's coastal waters, but not impacts generated from activities offshore of Oregon, Alaska, California, or British Columbia or impacts from Washington's offshore on the Strait of Juan de Fuca or other inland marine waters.

(3) Ocean uses defined. Ocean uses are activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters and includes their associated off shore, near shore, inland marine, shoreland, and upland facilities and the supply, service, and distribution activities, such as crew ships, circulating to and between the activities and developments. Ocean uses involving nonrenewable resources include such activities as extraction of oil, gas and minerals, energy production, disposal of waste products, and salvage. Ocean uses which generally involve sustainable use of renewable resources include commercial, recreational, and tribal fishing, aquaculture, recreation, shellfish harvesting, and pleasure craft activity.

(4) Relationship to existing management programs. These guidelines augment existing requirements of the Shoreline Management Act, chapter 90.58 RCW, and those chapters in Title 173 of the Washington Administrative Code that implement the act. They are not intended to modify current resource allocation procedures or regulations administered by other agencies, such as the Washington department of fisheries management of commercial, recreational, and tribal fisheries. They are not intended to regulate recreational uses or currently existing commercial uses involving fishing

or other renewable marine or ocean resources. Every effort will be made to take into account tribal interests and programs in the guidelines and master program amendment processes. After inclusion in the state coastal zone management program, these guidelines and resultant master programs will be used for federal consistency purposes in evaluating federal permits and activities in Washington's coastal waters. Participation in the development of these guidelines and subsequent amendments to master programs will not preclude state and local government from opposing the introduction of new uses, such as oil and gas development.

These and other statutes, documents, and regulations referred to or cited in these rules may be reviewed at the department of ecology, headquarters in Lacey, Washington, for which the mailing address is Mailstop PV-11, Olympia, WA 98504.

(5) Regional approach. The guidelines are intended to foster a regional perspective and consistent approach for the management of ocean uses. While local governments may have need to vary their programs to accommodate local circumstances, local government should attempt and the department will review local programs for compliance with these guidelines and chapter 173-16 WAC: Shoreline Management Act guidelines for development of master programs. It is recognized that further amendments to the master programs may be required to address new information on critical and sensitive habitats and environmental impacts of ocean uses or to address future activities, such as oil development. In addition to the criteria in RCW 43.143.030, these guidelines apply to ocean uses until local master program amendments are adopted. The amended master program shall be the basis for review of an action that is either located exclusively in, or its environmental impacts confined to, one county. Where a proposal clearly involves more than one local jurisdiction, the guidelines shall be applied and remain in effect in addition to the provisions of the local master programs.

(6) Permit criteria: Local government and the department may permit ocean or coastal uses and activities as a substantial development, variance or conditional use only if the criteria of RCW 43.143.030(2) listed below are met or exceeded:

(a) There is a demonstrated significant local, state, or national need for the proposed use or activity;

(b) There is no reasonable alternative to meet the public need for the proposed use or activity;

(c) There will be no likely long-term significant adverse impacts to coastal or marine resources or uses;

(d) All reasonable steps are taken to avoid and minimize adverse environmental impacts, with special protection provided for the marine life and resources of the Columbia River, Willapa Bay and Grays Harbor estuaries, and Olympic National Park;

(e) All reasonable steps are taken to avoid and minimize adverse social and economic impacts, including impacts on aquaculture, recreation, tourism, navigation, air quality, and recreational, commercial, and tribal fishing;

(f) Compensation is provided to mitigate adverse impacts to coastal resources or uses;

(g) Plans and sufficient performance bonding are provided to ensure that the site will be rehabilitated after the use or activity is completed; and

APPENDIX E

Establish and implement master program policies and regulations to provide safe, reasonable, and adequate circulation systems to shorelines.

Transportation and parking plans and projects shall be consistent with the master program public access policies, public access plan, and environmental protection provisions.

Circulation system planning to and on shorelands shall include systems for pedestrian, bicycle, and public transportation where appropriate. Circulation planning and projects should support existing and proposed shoreline uses that are consistent with the master program.

Plan, locate, and design proposed transportation and parking facilities where routes will have the least possible adverse effect on unique or fragile shoreline features and existing ecological functions or on existing or future water-dependent uses. Where other options are available and feasible, new roads or road expansions should not be built within shoreline jurisdiction.

Parking facilities in shorelines are not a preferred use and shall be allowed only as necessary to support a preferred use. Shoreline master programs shall include policies and regulations to minimize the environmental and visual impacts of parking facilities.

Restoration of shoreline ecological functions should be a condition of new and expanded nonwater-dependent transportation and parking facilities.

(1) Utilities.

These provisions apply to services and facilities that produce, convey, store, or process power, gas, sewage, communications, oil, waste, and the like. On-site utility features serving a primary use, such as a water line to a residence, are "accessory utilities" and shall be considered a part of the allowed use.

All utility facilities shall be designed and located to minimize harm to shoreline functions, preserve the natural landscape, and minimize conflicts with present and planned land and shoreline uses while meeting the needs of future populations in areas planned to accommodate growth.

Utility production and processing facilities, such as power plants and sewage treatment plants, or parts of those facilities, that are nonwater-oriented shall not be allowed in shoreline areas unless it can be demonstrated that no other feasible option is available.

Transmission facilities for the conveyance of services, such as power lines, cables, and pipelines, shall be located to cause minimum harm to the shoreline and shall be located outside of the shoreline area where feasible. Utilities should be located in existing rights of way and corridors whenever possible.

Development of pipelines and cables on tidelands, particularly those running roughly parallel to the shoreline, and development of facilities that may require periodic maintenance or that cause significant ecological impacts should be discouraged except where no other feasible alternative exists. When permitted, those facilities should include adequate provisions to protect against significant ecological impacts.

[Statutory Authority: RCW 90.58.060 and 90.58.200. 00-24-031 (Order 95-17a), § 173-26-240, filed 11/29/00, effective 12/30/00.]

[Title 173 WAC—p. 166]

WAC 173-26-250 Shorelines of statewide significance. (1) Applicability.

The following section applies to local governments preparing master programs that include shorelines of statewide significance as defined in RCW 90.58.030.

(2) Principles.

Chapter 90.58 RCW raises the status of shorelines of statewide significance in two ways. First, the Shoreline Management Act sets specific preferences for uses of shorelines of statewide significance. RCW 90.58.020 states:

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

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

Second, the Shoreline Management Act calls for a higher level of effort in implementing its objectives on shorelines of statewide significance. RCW 90.58.090(4) states:

The department shall approve those segments of the master program relating to shorelines of statewide significance only after determining the program provides the optimum implementation of the policy of this chapter to satisfy the statewide interest.

Optimum implementation involves special emphasis on statewide objectives and consultation with state agencies. The state's interests may vary, depending upon the geographic region, type of shoreline, and local conditions. Optimum implementation may involve ensuring that other comprehensive planning policies and regulations support Shoreline Management Act objectives.

Because shoreline ecological resources are linked to other environments, implementation of ecological objectives requires effective management of whole ecosystems. Optimum implementation places a greater imperative on identifying, understanding, and managing ecosystem-wide processes and ecological functions that sustain resources of statewide importance.

(3) Master program provisions for shorelines of statewide significance.

Because shorelines of statewide significance are major resources from which all people of the state derive benefit, local governments that are preparing master program provisions for shorelines of statewide significance shall implement the following:

(a) Statewide interest.

To recognize and protect statewide interest over local interest, consult with applicable state agencies, affected Indian tribes, and statewide interest groups and consider their recommendations in preparing shoreline master program provisions. Recognize and take into account state agencies' policies, programs, and recommendations in developing use regulations. For example, if an anadromous fish species is affected, the Washington state departments of fish and wildlife and ecology and the governor's salmon recovery office, as well as affected Indian tribes, should, at a minimum, be consulted.

(b) Preserving resources for future generations.

Prepare master program provisions on the basis of preserving the shorelines for future generations. For example, actions that would convert resources into irreversible uses or detrimentally alter natural conditions characteristic of shorelines of statewide significance should be severely limited. Where natural resources of statewide importance are being diminished over time, master programs shall include provisions to contribute to the restoration of those resources.

(c) Priority uses.

Establish shoreline environment designation policies, boundaries, and use provisions that give preference to those uses described in RCW 90.58.020 (1) through (7). More specifically:

(i) Identify the extent and importance of ecological resources of statewide importance and potential impacts to those resources, both inside and outside the local government's geographic jurisdiction.

(ii) Preserve sufficient shorelands and submerged lands to accommodate current and projected demand for economic resources of statewide importance, such as commercial shellfish beds and navigable harbors. Base projections on statewide or regional analyses, requirements for essential public facilities, and comment from related industry associations, affected Indian tribes, and state agencies.

(iii) Base public access and recreation requirements on demand projections that take into account the activities of state agencies and the interests of the citizens of the state to visit public shorelines with special scenic qualities or cultural or recreational opportunities.

(d) Resources of statewide importance.

Establish development standards that:

(i) Ensure the long-term protection and restoration of ecological resources of statewide importance, such as anadromous fish habitats, forage fish spawning and rearing areas, shellfish beds, and unique environments. Standards shall consider incremental and cumulative impacts of permitted development and include provisions to improve the functions of shoreline ecosystems as a whole.

(ii) Provide for the shoreline needs of water-oriented uses and other shoreline economic resources of statewide importance.

(iii) Provide for the right of the public to use, access, and enjoy public shoreline resources of statewide importance.

(e) Comprehensive plan consistency.

Assure that other local comprehensive plan provisions are consistent with and support as a high priority the policies for shorelines of statewide significance. Specifically, shoreline master programs should include policies that incorporate

the priorities and optimum implementation directives of chapter 90.58 RCW into comprehensive plan provisions and implementing development regulations.

[Statutory Authority: RCW 90.58.060 and 90.58.200. 00-24-031 (Order 95-17a), § 173-26-250, filed 11/29/00, effective 12/30/00.]

**PART IV
GUIDELINES—OPTIONAL APPROACH**

WAC 173-26-270 Purpose of Part IV. (1) Objectives.

WAC 173-26-270 through 173-26-350 are adopted pursuant to chapter 90.58 RCW, the Shoreline Management Act of 1971, to serve as standards for implementation of the policy of the act for regulation of uses of the shorelines; and provide criteria to local governments and the department in developing and amending master programs. The purposes of Part IV are to: (Text in quotations is excerpted from RCW 90.58.020.)

(a) Protect against adverse impacts.

"Protect against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life..."

Provide measures for the utilization, protection, restoration, and preservation of the state shorelines, which are "among the state's most valuable and fragile of its natural resources."

Prepare standards governing the protection of single-family residences and appurtenant structures from shoreline erosion, giving preference to measures to protect single-family residences occupied before January 1, 1992, where the proposed measure is designed to minimize harm to the shoreline natural environment. (See RCW 90.58.100(6).)

Undertake 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."

(b) Protect the public's right to use and access the surface waters of the state.

"Insure the development of shorelines of the state in a manner which, while allowing limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest."

"Protect generally public rights of navigation and corollary rights incidental thereto."

Preserve "the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state to the greatest extent feasible consistent with the overall best interest of the state and the people generally."

Regulate the design, construction, and operation of "permitted uses in the shorelines of the state to minimize, insofar as practical, any interference with the public's use of the water."

(c) Foster reasonable and appropriate uses that are in the public's best interest.

Give preference to uses "which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline." Alterations to the natural conditions of the shore-