

No. 49329-2-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

TAZMINA VERJEE-VAN and BRIAN VAN,

Appellants,

vs.

PIERCE COUNTY, acting through its Department of
Planning and Land Services and Office of Pierce County Hearing Examiner,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 16-2-04323-8

AMENDED BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The Superior Court erred when it affirmed the Hearing Examiner's decision that the doctrine of finality precludes review of the Borgert pier construction.

2. The Superior Court erred when it affirmed the Hearing Examiner's decision that the County is not required to apply shoreline regulations to an illegal shoreline structure.

3. The Superior Court erred when it held that the Hearing Examiner's decision did not constitute an unconstitutional taking of appellants' private property.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court erred when it affirmed the Hearing Examiner's decision that the County issued a final decision for the Borgert pier when the structure never obtained appropriate permits in order for the structure to be lawfully constructed. (Assignments of Error #1, 2)

2. Whether the Superior Court erred when it affirmed the Hearing Examiner's decision that the doctrine of finality precluded review of the Borgert pier's construction when no final decision had been made for the pier as the permitting requirements for the structure were never completed. (Assignments of Error #1, 2)

3. Whether the Superior Court erred when it affirmed the Hearing Examiner's decision that the County is not required to follow shoreline regulations when the clear language of said regulations is mandatory and not permissive? (Assignments of Error #1, 2)

4. Whether the Superior Court erred when it held that the Hearing Examiner's decision was not an unconstitutional taking of private property when the appellants' lawful water access was encroached upon by the neighbor's unlawful pier? (Assignment of Error #3)

III. INTRODUCTION

The Shoreline Master Program (SMP) for Pierce County, dated March 4, 1974, governs shoreline management within Pierce County. The SMP applies to all shoreline development on Lake Tapps, a shoreline of state-wide significance. The Shoreline Management regulations are codified at Pierce County Code (PCC), Title 20.

PCC 20.02.030 states as follows:

Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits.

Appellants appeal the imposition of two conditions imposed by Pierce County Planning and Land Services (PALS) on their request for a shoreline exemption, which the Hearing Examiner and Superior Court affirmed. The Hearing Examiner arbitrarily imposed conditions already satisfied by appellants from an earlier appeal, and an illegal pier impedes appellants' ability to enjoy and use their waterfront access on Lake Tapps. The Hearing Examiner's decision involves an erroneous interpretation of the law, the decision is not supported by substantial evidence, the decision is a clearly erroneous application of the law to the facts, and the decision violates the constitutional rights of the appellants. See RCW 36.70C.130(1)(b)(c)(d) and (f).

This appeal raises issues regarding the validity of a land use decision under the Land Use Petition Act (LUPA). In a separate but related appeal, Tazmina Verjee-Van v. Pierce County, Case No. 48947-3-II, this Court is reviewing a Superior Court decision denying appellant's petition for a writ of mandamus wherein appellants seek court assistance to require Pierce County to uniformly apply the Shoreline Management regulations to all structures subject to the

Shoreline Management Act, including the Borgert pier. Final briefing on that appeal was filed on January 6, 2017, and the parties are awaiting oral argument. Issues raised in the afore-mentioned appeal include issues related to this LUPA appeal.

By separate motion, the appellants seek to stay responsive briefing on this LUPA appeal until a final decision has been rendered in the appeal under 48947-3-II. Such stay is necessary in the interests of judicial economy because a primary issue related to both appeals is whether the Borgert pier is a legal, permitted structure and whether a final land use decision has been rendered that would preclude appellants' challenge to the legality of the Borgert pier. If this Court determines that a final land use decision was rendered and such final decision was not timely appealed, this current appeal is moot. If, however, this Court determines that the Borgert pier is unlawful, then the underlying Hearing Examiner's decision is clearly erroneous and the LUPA case would be remanded for further hearings.

Appellants urge this Court to reverse the trial court's decision, which affirmed the Hearing Examiner's decision, and remand this matter with instructions to either enter an order granting appellants' appeal or to remand for further hearings related to appellants' exemption application.

IV. STATEMENT OF THE CASE

A. Procedural History and Background

1. Administrative Appeal AA7-14

On September 18, 2014, appellants appealed a PALS' denial of their shoreline exemption application related to the construction of a pier on Lake Tapps in their waterfront access. The appeal contested PALS' determination that appellants' proposed pier did not satisfy the 10 foot side yard setback requirements. CP 370. On April 7, 2015, the Hearing Examiner granted

appellants' appeal holding that appellants' proposal satisfied the side yard setback requirements in compliance with Pierce County Code (PCC) Ch. 20.56. CP 254-66. The only issue appellants appealed was the side yard setback as that was the only issue PALS stated was lacking for appellants' exemption to be issued. CP 264. Pierce County did not appeal this administrative decision in favor of appellants.

Relying upon the Hearing Officer's decision under AA7-14 that appellants' proposed pier was exempt from a shoreline development permit, and based upon the PALS' staff report and testimony of Mike Erkinen, appellants constructed a pier in their legally designated water access to Lake Tapps.

2. *Administrative Appeal AA9-15*

On June 30, 2015, PALS issued a new decision regarding appellants' pier and stated that in order to obtain an exemption to construct a pier, appellants' pier must have a minimum separation of 20 feet from a pier associated with the adjacent property owner. CP 267-70. The only pier referenced in this exemption letter is the Borgert pier, which violates the ten foot side yard setback requirement and encroaches into appellants' water ingress and egress. *Id.* On July 13, 2015, appellants appealed the PALS' decision. CP 242-51.

On November 18, 2015, a public hearing was held before the Honorable Stephen K. Causseaux, Jr., Hearing Examiner, regarding appellant's appeal of the following conditions imposed by PALS:

Appeal of two conditions imposed by a Pierce County Planning and Land Services Department (PALS) Administrative Official on a shoreline exemption. The conditions require: 1) that the pier length be shortened from the proposed 30 feet to a length that provides a minimum separation of 20 feet from piers associated with adjacent waterfront properties; and 2) that all portions of the recently constructed pier that are less than 20 feet from an adjacent pier or more than 30 feet in length be removed no later than 30 days of the effective date of the Exemption. The subject site is located adjacent to 4225

Lakeridge Drive East, within the SE ¼ of Section 17, T20N, R5E, W.M., in Council District #1.

CP 209.

On December 14, 2015, the Hearing Examiner denied the Vans' appeal. CP 208-606. The Vans appealed the administrative decision to the Superior Court pursuant to Chapter 36.70C RCW. CP 881-932. On June 24, 2016, the Superior Court heard argument on the LUPA appeal. See RP 1-46. On August 1, 2016, the Superior Court issued a decision denying the LUPA petition for review. CP 861-66, 867-68. This appeal follows. CP 869-877.

B. Facts

The appellants have a possessory ownership interest in property located at 4225 Lakeridge Drive East, Lake Tapps, Washington. CP 258. Appellants received a license from Cascade Water Alliance (CWA) to construct the pier that is the subject of this case. CP 259.

After appellants received a favorable decision from the Hearing Examiner in Administrative Appeal, AA7-14, related to an exemption for their proposed pier, appellants constructed a five foot wide, 26 foot long pier. CP 216. The appellants' pier is located within the lateral lines established by a survey of their parcel. Id. Appellants' pier does not exceed the length, width and setback guidelines set forth in the Shoreline Use Regulations (SUR) that would prohibit an exemption and is consistent with the pier exemption previously ruled upon in AA7-14. CP 216-217.

In the pier appeal, appellant Brian Van was advised by Mike Erkinen, from Pierce County Planning and Land Services (PALS), that the only issue appellants needed to resolve was the encroachment of their dock into the side yard setbacks. CP 62:11-63:3. Before building the dock, Mr. Van obtained all necessary permits for the entire project. CP 60:9-14. All of the shoreline work on appellants' property has been permitted. CP 63:4-8.

Mr. Van, as a general contractor who builds homes on waterfront property, is familiar with the Shoreline Management provisions as well as the Pierce County Code. CP 65:14-66:12. Mr. Van is familiar with the mandatory requirements that exist with respect to the Pierce County Code that address building structures on shorelines. CP 66:23-67:3.

Mr. Van researched to determine whether the Borgert pier had obtained the proper permitting before it was constructed, and he learned that no record exists that such permitting occurred nor was appropriate notice provided. CP 66:23-75:24.

Mr. Erkinen of PALS also acknowledged that no records of the Borgert pier exemption were sent to any of the required entities entitled to have notice of the construction. CP 28:21-29:23. Further, he acknowledged that the Borgert pier was constructed without first obtaining any necessary permits or associated environmental and Mr. Erkinen acknowledged that the Borgert pier was not constructed or permitted appropriately. CP 30:21-34:12. Mr. Erkinen also acknowledged that the Borgert pier extended into appellants' lateral lines. CP 22:14-23, 38:16-20.

Respectfully, Pierce County's application of the Pierce County Code and the Shoreline Management Act is arbitrary and capricious. Accordingly, this Court should reverse the Superior Court's decision affirming the Hearing Examiner's decision in administrative appeal AA9-15.

V. ARGUMENT

A. OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Appellants object to the following Findings of Fact:

Finding of Fact No. 8. Finding of Fact No. 8 asserts that based upon the exemption granted to the Vans in decision AA7-14, their proposal must also meet the requirements of the

Shoreline Management Act (SMA), the Shoreline Master Plan (SMP) and the Shoreline Use Regulations (SUR). CP 208-227.

Respectfully, the only issue in AA7-14 before the Hearing Examiner at that time was whether appellants' exemption request satisfied a ten foot side yard setback. CP 254-66. The Hearing Examiner resolved that matter in favor of the appellants. The requirements of the SMA, SMP and SUR were satisfied as noted by the Staff report generated by Mr. Erkkinen related to the appeal in AA7-14. As such, Finding of Fact No. 8 is in error as the only appeal issue was the side yard setbacks. CP 208-227.

Finding of Fact No. 10. The Hearing Examiner determined in decision AA7-14, that appellants' property rights are marked by lateral lines that extend into the water of Lake Tapps. The Borgert pier encroaches into the area marked by appellants' lateral lines. Appellants' pier does not interfere with the ingress and egress into appellants' water access. Rather, it is the Borgert's unlawful pier that obstructs the appellants' access to their pier as the Borgert pier unlawfully encroaches into the appellants' water access. CP 38:16-20, 208-227, 466.

Finding of Fact No. 13. Although the Hearing Examiner properly lists the chronology surrounding the Borgert pier's construction, subsection G of paragraph 13 states "no appeals of the Shoreline Exemption, building permit or SEPA DNS for the Helmke dock were filed." CP 220. Respectfully, no appeals were filed as no final decision has been rendered that would start the timeline for when to file an appeal as none of the requirements related to the shoreline construction were undertaken by Helmke and/or Borgert. Although, this Finding of Fact is correct with respect to some of the chronology surrounding the attempts to permit the Borgert pier, the Finding of Fact is inaccurate as it relates to issues regarding an appeal. No final decision has been made that would authorize an appeal to be filed. CP 208-227.

Finding of Fact No. 14. Appellants object to the Finding that they cannot now challenge the legality of the Borgert pier, and further object to the finding that the Borgert pier was permitted. Although the Borgert pier was, indeed, built, it was never lawfully permitted or approved as the required permitting requirements were never followed. As such, the structure is illegal and no final decision has been made. Once a final decision is made, an appeal of that decision may be filed. CP 208-227.

Finding of Fact No. 15. Appellants object insofar as this Finding suggests their exemption does not comply with the policies and criteria of the SMA, SMP, SUR and WAC. The pier exemption sought and reviewed in decision AA7-14 is the same pier exemption sought in the current matter although this pier is four feet shorter. All policies and criteria of the SMA, SMP, SUR and WAC were complied with in the application set forth in decision AA7-14, and are consistent with the current exemption application. CP 208-227.

Appellants object to the following Conclusions of Law:

Conclusion of Law No. 4. Appellants' pier satisfies all criteria of the shoreline regulations as appellants' pier is properly confined within the 10 foot side setback from the lateral lines that the Hearing Examiner determined in the decision in AA7-14. The only reason that a restriction exists with neighboring properties is because of the encroaching and unlawful Borgert pier. CP 208-227.

Conclusion of Law No. 6. Appellants' pier does not violate any shoreline code as appellants' pier does not prohibit reasonable use of the shoreline by adjoining property owners. Rather, the unlawful Borgert pier encroaches upon appellants' water access creating an ingress/egress access issues. CP 208-227.

Conclusion of law No. 8. Appellants consistently maintained that no section of the SMP or SUR authorizes measuring setbacks from adjacent piers. In compliance with the Pierce County legislative authority, which imposed a 10 foot side yard setback for piers and docks, the appellants' pier satisfies the 10 foot side yard setback. The Borgert pier does not satisfy the 10 foot side yard setback as it encroaches over the appellants' lateral lines determined by the Hearing Examiner in decision AA7-14. Further, the State Shoreline Hearings Board decision in Gig Harbor Fishing Co. LLC v. Gig Harbor Marina, Inc., SHB No. 15-008¹, does not support the conclusion that a 20 foot wide separation between docks is an appropriate manner in which to measure a setback when one of the docks is illegal, unpermitted, and encroaches upon adjoining property. Further, and contrary to the Conclusion of Law, the Staff Report's conditions are not consistent with such determination. CP 208-227, 231-234.

Conclusion of Law No. 9. Contrary to this conclusion, appellants' actions comply with the Hearing Examiner's decision in AA7-14. Appellants' pier satisfies all applicable criteria and policies set forth in the SMA, SMP, SUR and WAC and further, no lawful authority authorizes the Hearing Examiner to grant appellants' exemption as related to setbacks and lateral lines in one hearing (AA7-14) and then to ignore those unchallenged findings in a subsequent hearing (AA9-15). Appellants' lateral lines and setbacks were lawfully established in AA7-14. The County did not appeal this decision. By not following that precedent, the Hearing Examiner's decision denying the appellants' appeal violates the decision in AA7-14. Such conclusion constitutes an unconstitutional and unlawful taking of private property without due process. CP 208-227.

¹ All SHB cases referenced herein are provided in the appendix to this brief.

B. REVIEW UNDER LUPA

RCW 36.70C.130 sets forth the standards for granting relief for land use decisions. Here, appellants challenge the Hearing Examiner's findings and conclusions pursuant to RCW 36.70C.130(1)(b), (c), (d), and (f).

Under LUPA, the superior court may grant relief from a land use decision if the petitioning party can show, among other bases, that "[t]he land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130(1)(f). "A decision to grant, deny or impose conditions upon a proposed plat is administrative or quasi judicial in nature." Snider v. Board of County Comm'rs, 85 Wn.App. 371, 375, 932 P.2d 704 (1997) (quoting Miller v. City of Port Angeles, 38 Wn.App. 904, 908, 691 P.2d 229 (1984)). In reviewing an administrative decision, the appellate court stands in the same position as the superior court. Biermann v. City of Spokane, 90 Wn.App. 816, 821, 960 P.2d 434 (1998), review denied, 137 Wn.2d 1004, 972 P.2d 466 (1999); Wilson v. Employment Sec. Dep't, 87 Wn.App. 197, 201, 940 P.2d 269 (1997). We base our review on the administrative record. Biermann, 90 Wn.App. at 821, 960 P.2d 434; Snohomish County v. State, 69 Wn.App. 655, 664, 850 P.2d 546 (1993).

We review factual findings under the substantial evidence standard and conclusions of law de novo. Biermann, 90 Wn.App. at 821, 960 P.2d 434; Wilson, 87 Wn.App. at 201-02, 940 P.2d 269. Substantial evidence exists when the evidence in the record is of sufficient quantity to persuade a fair-minded rational person of the truth of the finding. Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 34, 891 P.2d 29 (1995).

Under the substantial evidence standard, we will not substitute our judgment for that of the factfinder. Hilltop Terrace, 126 Wn.2d at 34, 891 P.2d 29. Instead, we accept the factfinder's views regarding the credibility of witnesses and the weight accorded to reasonable but competing inferences. Hilltop Terrace, 126 Wn.2d at 34, 891 P.2d 29; State ex ref. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn.App. 614, 618, 829 P.2d 217 (1992).

When reviewing a superior court's LUPA decision, "[o]ur review is deferential." Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999). "We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority." Schofield, 96 Wn.App. at 586-87, 980 P.2d 277 (citing Davidson v. Kitsap County, 86 Wn.App. 673, 680, 937 P.2d 1309 (1997)).

Isla Verde International Holdings, Inc. v. City of Camas, 99 Wn.App. 127, 133-34, 990 P.2d 429 (1999).

C. SHORELINE DEVELOPMENT MUST FOLLOW ALL REQUIREMENTS OF THE SHORELINE MANAGEMENT ACT.

The Shoreline Master Program (SMP) for Pierce County, dated March 4, 1974, governs shoreline management within Pierce County. The SMP applies to Lake Tapps, which is a shoreline of state-wide significance. The Shoreline Management Act is codified at RCW Chapter 90.58. Pursuant to RCW 90.58.210(1), the Pierce County Prosecutor is responsible for enforcement of the Shoreline Management Act (SMA). RCW 90.58.210(1) states as follows:

Except as provided in RCW 43.05.060 through 43.05.080 and 43.05.150, the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to ensure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

The local Shoreline Management regulations are codified at Pierce County Code (PCC), Title 20.

Pierce County Code § 20.02.030 states as follows:

Hereafter no construction or exterior alteration of structures, dredging, drilling, dumping, filling, removal of any sand, gravel or minerals, bulkheading, driving of piling, placing of obstructions, or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Shoreline Management Act of 1971 shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits. (Emphasis added)

Pierce County Code § 18.25.030 defines a "structure" as follows:

"Structure" means anything that is constructed in or on the ground or over water, including any edifice, gas or liquid storage tank, and any piece of work artificially built up or composed of parts and joined together. For the purposes of this regulation, structure does not include paved areas, fill, or any vehicle.

Based on the foregoing definition, the Borgert pier is a "structure."

The following sections of Pierce County Code § 20.62.040 entitled "Environmental Regulations - Uses Permitted" apply to the Borgert pier since the Verjee-Van property is situated in a Rural Residential zone classification:

20.62.040 Environment Regulations- Uses Permitted.

NOTE: The Pierce County Zoning Code and other County regulations also contain density, setback, and lot width requirements which are applicable in shoreline areas. These regulations must also be consulted, when appropriate, when developing on the shoreline. In case of a discrepancy between the requirements of this Code and the Zoning Code, or other regulations, the most restrictive regulation shall prevail.

A. Urban, Rural-Residential and Rural Environments. The following specific regulations are applicable to the Urban, Rural-Residential and Rural Environments.

1. The following uses are permitted outright in the Urban, Rural Residential, and Rural Environments. The issuance of a building permit may be required:
 - a. Construction, within the prescribed setback, bulk and height limitations of a single family residence by an owner, lessee or contract purchaser for his own or the use of his family.
 - b. The construction of single family residences within a subdivision for the purpose of sale where the construction of said residences and the subdivision meet all applicable Master Program requirements.
 - c. The following uses commonly accessory to single family residences constructed within the prescribed setback and height limitations:
 - (1) Garages;
 - (2) Sheds and storage facilities;
 - (3) Bulkheads (see Chapter 20.28);
 - (4) Piers, docks, buoys and floats (see Chapter 20.56).
 - d. Residential subdivisions, determined not to be substantial developments.
2. The following uses are permitted upon the issuance of a Substantial Development Permit and building permit, if appropriate:
 - a. The construction of single family residences for the purpose of sale which are not within a subdivision which has received prior approval of a Substantial Development Permit.
 - b. Two family detached dwellings (duplexes).
 - c. Residential subdivisions determined to be substantial developments.
 - d. Structures commonly accessory to dwellings other than those listed in subsection A.I.c.

According to the foregoing, various permits are required before constructing a pier within the shoreline jurisdiction.

Pierce County Code § 20.62.050 entitled "Bulk Regulations" establishes "Special Setbacks for Shoreline Sites" as follows:

20.62.050 Bulk Regulations.

The following lot coverage, setback and height limitations shall be applicable to residential development in all shoreline environments. Exceptions may be made to the lot

coverage and setback requirements if a project is developed pursuant to the Planned Development Ordinance.

- A. **Lot Coverage.** Not more than 33-1/3 percent of the gross lot area shall be covered by impervious material including parking areas but excluding driveways.
- B. **Setbacks.** All setbacks, with the exception of the setbacks from the ordinary high water line or lawfully established bulkhead, shall be as required by the Pierce County Zoning Code or other County regulations.
- C. **Special Setbacks for Shoreline Sites.** The required setback for buildings and structures from any lot line or lines abutting the ordinary high water line or lawfully constructed bulkhead shall be 50 feet except that the special shoreline setback shall not apply to docks, floats, buoys, bulkheads, launching ramps, jetties and groins.

Any shoreline development in this area must comply with the Pierce County Code and the Shoreline Management Act, and any development must be appropriately permitted, at a minimum, through Pierce County and the Department of Ecology before any construction may begin.

D. THE HEARING EXAMINER'S CONCLUSION THAT THE BORGERT PIER IS A LEGAL STRUCTURE IS CLEARLY ERRONEOUS.

The Borgert pier was constructed before properly applying for any permits, and the pier construction did not follow the mandatory submittal standards per State and County regulations.

1. THE BORGERT PIER WAS BUILT BEFORE ANY PERMITS WERE OBTAINED AND THE REQUIREMENTS FOR CONSTRUCTION HAVE NEVER BEEN COMPLETED.

Title 18 of the Pierce County Code sets forth the general provisions for development within Pierce County. PCC § 18.20.010. Pursuant to Pierce County Code § 18.30.020, “[t]he property owner or authorized agent shall obtain applicable permits and approvals prior to commencing development.” (Emphasis added). Pierce County Code § 18.140.030 addresses permits, approvals, and uses. In part it states as follows:

Pierce County regulations require acquisition of permits or approvals before certain activity may be performed. It shall be unlawful to conduct these regulated activities without first obtaining a written permit or approval.

PCC §18.140.030(A) (emphasis added).

The Borgert pier, built by the former owner, Julie Helmka Winne, was constructed without a shoreline exemption letter from Pierce County. CP 219. Significantly, the pier was constructed before submitting an appropriate application, without any required review, and without notice to adjacent property owners. Although the County suggests that Ms. Winne subsequently obtained a shoreline exemption and building permit for an “as built” dock, no Pierce County Code authorizes, much less recognizes, such a structure. Further, PCC § 18D.20.020(C)(1)(a) states that the County cannot give authorization for any non-exempt action. Here, the County seeks to make something exempt in which it has no lawful authority to do so.

The Hearing Examiner’s decision sets forth the chronology of the Borgert pier, built by the former owner, Julie Winne, and acknowledges that it was constructed without permits or an exemption. CP 219-220. What the Hearing Examiner failed to acknowledge is that the pier was constructed before submitting any appropriate application, without any required review, and without proper notice to adjacent property owners, which is critical to its legality. See Save Flounder Bay v. Mousel and City of Anacortes, SHB No. 81-15 (failure of city to give mandatory notice requires granting of substantial development permit to be reversed).

Under WAC 173-27-040 (1) (b):

To be authorized, all uses and developments must be consistent with the policies and provisions of the applicable master program and the Shoreline Management Act. A development or use that is listed as a conditional use pursuant to the local master program *or is an unlisted use*, [As-Built Dock] must obtain a conditional use permit even though the development or use does not require a substantial development permit. When a development or use is proposed that *does not comply* with the bulk, dimensional and performance standards of the master program, such development or use can only be authorized by approval of a variance. (Emphasis added)

No variance was either sought or obtained for the Borgert pier.

Had the Borgert pier been lawfully applied for and authorized, numerous documents would exist in the Pierce County file establishing that all shoreline standards had been complied with and that all state and federal jurisdictions (Ecology, DNR, Army Corps of Engineers, etc.) as well as all affected Indian tribes, had received notice of the application, environmental review, SEPA, any DNS, or any exemption. None of these documents exist in the Borgert pier file because the requirements were never met. CP 30:21-31:23, 64:23-75:24. No application was submitted pursuant to Pierce County Code § 18.140.030 before the Borgert pier was constructed (1998).

Although the County asserts that the Borgert pier was authorized pursuant to an exemption, no code provision in the Pierce County Code authorizes the granting of a shoreline exemption without first following the permitting process, nor is such authority granted pursuant to the Shoreline Master Plan or the Shoreline Management Act. RCW 90.58.140.

In conjunction with the SMA, PCC § 20.02.030 states “no construction . . . shall be undertaken except in compliance with the provisions of this Title and then only after securing all required permits.” (Emphasis added) Even though this Code provision applies to the Borgert pier, the County, without lawful authority, ignored the regulation, and the County has consistently failed to enforce the laws it is required to enforce pursuant to RCW 90.58.210(c).

The Hearing Examiner noted that a determination of nonsignificance (DNS) was issued for the Borgert pier. CP 220. The DNS requirements are set forth in WAC 197-11-340. The County, however, did not require the Borgert pier to follow the code provision requirements that the County is required to enforce. Pursuant to the DNS related to the Borgert pier, the following language is included:

NOTE : Pursuant to RCW 43.21C.075 and Pierce County Environmental Regulations Chapter 18D.10.080 and Chapter 1.22 Pierce County Code, decisions of the Responsible

Official may be appealed. Appeals are filed with appropriate fees at the Planning and Land Services Department, located at the Development Center in the Public Services Building. Appeals must be filed within 14 days of the date of publication of the Notice of Determination of Nonsignificance.

NOTE : The issuance of this Determination of Nonsignificance does not constitute project approval . The applicant must comply with all other applicable requirements of Pierce County Departments and other agencies with jurisdiction prior to receiving construction permits.

CP 276-77.

This DNS, by its terms, sets forth mandatory requirements that must be satisfied before any proactive action can be taken. Further, the “note” states that issuance of this Determination of Nonsignificance does not constitute project approval. CP 277. Even though the County, in the DNS, sets forth what must be completed before the project is approved, the County failed to adhere to its own requirements as no evidence exists that any of the above requirements were met.

Although the Hearing Examiner ruled in Finding of Fact No. 14 that a final decision was made, such finding is not supported by the evidence because none of the requirements set forth in the Pierce County Code were followed with respect to constructing the pier. PCC § 20.76.060, sets forth compliance regulations and references Chapter 18.140. Noncompliance with the Code causes a project to be null and void. Pierce County Code § 18.140.030(C). Clearly, the Borgert pier is unlawful as the code requirements were never followed, and the County adamantly refuses to require the Borgert pier be brought into compliance even though the County is mandated to enforce shoreline development pursuant to RCW 90.58.210(1).

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E. THE DOCTRINE OF FINALITY DOES NOT APPLY AS NO FINAL DECISION HAS BEEN MADE.

Although the Hearing Examiner and Superior Court held that the doctrine of finality precludes review, no final decision has been made for the Borgert pier. RCW 36.70C.020 defines a “land use decision” as follows:

[A] final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An application for a project permit . . .

RCW 36.70C.020(2). As set forth above, no final decision has occurred for the Borgert pier as all requirements have not been satisfied. During the appellants’ appeal to the Superior Court, the Court noted the significance of the issue surrounding the legality of the Borgert pier: “The legality of the Borgert pier, as being built without valid permits, is central to the Vans’ argument. If the Borgert’s pier is illegal, then all decisions from the examiner must fail as to the Vans’ pier.” CP 863. The Superior Court then noted the ruling it made on the writ of mandamus, wherein the Superior Court denied the writ, and noted that even though that decision is under appeal, until an appellate court rules, the Superior Court’s prior decision still stands. CP 863-64.

Although appellants have appealed the Superior Court’s denial of the writ of mandamus decision under cause no. 48947-3-II, a review of the pertinent documents in this case also clearly establish a final decision has not been made. The DNS written by Adonais Clark, states as follows: “[a]ppeals must be filed within 14 days of the date of publication of the notice of determination of nonsignificance.” CP 277. No proper publication or notice to adjoining property owners and other jurisdictions ever occurred so the appeal period never started pursuant to PCC § 18.80.020. Respectfully, nothing occurred before or after the DNS was written on June

20, 2001. As such, there has been no final decision on the Borgert pier that would trigger the timeline in which to appeal.

With respect to the issuance of a DNS, WAC 197-11-340(2)(d) states as follows: “The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available.”

No evidence exists that the DNS for the Borgert pier was ever sent to the Department of Ecology or any other agency for review. Rather, the last date noted is June 20, 2001, when the County not only wrote, but finalized the DNS. CP 278. This is a legal impossibility. No evidence exists that the County followed WAC 197-11-340(2)(d).

Although it is clear that the Borgert pier was constructed, what is also clear is that it was not constructed lawfully nor was a “final decision” ever rendered that would necessitate the starting of the timeline in which to appeal. Pursuant to PCC § 18.140.030(c) noncompliance with the code causes a project to be null and void.

Here, because of the noncompliance by the predecessors to Mr. Borgert, the project is null and void. A permit issued without consideration of environmental factors and therefore being in violation of SEPA is null and void. Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107. Compliance with SEPA is required prior to permit issuance.

Brachbogel, et al. v. Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45.

After the DNS was written, no further action was taken and the County presented no evidence to establish a final decision was ever rendered. Significantly, a County determination of nonsignificance (DNS) under SEPA must be sent to affected Indian Tribes. An approval of a shoreline substantial development permit where this is not done must be reversed. See Southpoint Coalition v. Jefferson County, SHB No. 86-47. Here, clearly the Borgert pier is

issued in violation of the Shoreline Management Act, PCC, pertinent WACs, and it is illegal. Further, no final decision has ever been rendered, and, as such, petitioners have not missed the appeal timeline.

Additionally, the cases on which the Hearing Examiner relies are clearly distinguishable as permitting occurred and final decisions were issued. But even more importantly, none of these cases dealt with the mandatory Shoreline regulations. See Durland v. San Juan County, 182 Wn.2d 55, 340 P.2d 192 (2014); Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (2002) and Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000).

In Durland, San Juan County issued a building permit and the appellant skipped the administrative appeal process and filed a land use petition directly in the Superior Court to challenge the issuance of the building permit. The court dismissed the petition finding there was no land use decision under LUPA. The Court of Appeals and the Supreme Court affirmed. The court held that the petitioners were required to exhaust available administrative remedies in order to obtain a land use decision, which then could be appealed. The issue was not whether the building permit was appropriate, but whether notice had been given of the permit application and the granting of the permit. Because a lawful permit had been issued, a final decision occurred, and the LUPA timelines applied.

In Chelan County, an administrative decision had been made regarding a boundary line dispute and the question was whether LUPA applies to quasi-judicial land use decisions and not to ministerial decisions such as boundary line adjustments. The Supreme Court determined that LUPA pertains to judicial review of all land use decisions and, therefore, was the appropriate appellate vehicle to use. Because the petitioners did not timely file a petition for review within 21 days under the LUPA provisions even though they had knowledge of its own

decision fourteen months before filing of the declaratory judgment action, a final decision had been issued, from which the appellant failed to appeal. See also Wenatchee Sportsman Assoc. v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (2000)(failure to timely file LUPA challenge bars from collaterally challenging validity at a later time).

Here, although the Hearing Examiner ruled that a final decision was made, no evidence supports such finding that any final decision has ever been made with respect to the Borgert pier. Not until a final decision is made can the doctrine of finality apply. Because no final decision has been made, the doctrine of finality does not apply to this case.

F. THE HEARING EXAMINER’S DECISION CONSTITUTES AN UNCONSTITUTIONAL TAKING OF APPELLANT’S PROPERTY RIGHTS.

Washington State Constitution, Article I, Section 16 states that “No private property shall be taken or damaged for public or private use without just compensation having been first made”. Further, “the takings clause of the Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation.” Isla Verde International Holdings, Inc. v. City of Camas, 99 Wn.App. 127, 990 P.2d 429 (1999), Burton v. Clark County, 91 Wn.App. 505, 514, 958 P.2d 343 (1998). “The purpose of the takings clause is to ‘bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” Id.

In Isla Verde, the City of Camas required Isla Verde, a development company, to set aside 30% of its property for purposes of protecting wildlife. The appellate court found that the required set aside was an unconstitutional taking under the Fifth Amendment.

Here, the County argues, and the Hearing Examiner held, that a 20 foot setback between piers is required for navigational purposes, i.e., public use. CP 224. Respectfully, however, the

reason a navigation problem exists is because the Borgert pier encroaches upon the appellants' ingress and egress water access. Thus, a constitutional taking sanctioned by the County, approved by the Hearing Examiner, and affirmed by the Superior Court, deprives appellants of their rights to enjoy their property. This amounts to an unconstitutional taking under the guise of a public use navigational purpose.

Under such circumstances, appellants are harmed because the value of their property is less than the value of their neighbors, Neil Borgert, who is provided full access to his water ingress and egress even though the Borgert pier encroaches upon appellants' property interests. Respectfully, and based upon the evidence presented, the Hearing Examiner's decision is clearly erroneous, arbitrary and capricious, and constitutes an unconstitutional act.

VI. CONCLUSION

The Hearing Examiner's decision involves an erroneous interpretation of the law, the decision is not supported by substantial evidence, the decision is a clearly erroneous application of the law to the facts, and the decision violates the constitutional rights of the appellants. See RCW 36.70C.130(1)(b)(c)(d) and (f).

As such, this Court should reverse both the Hearing Examiner's and Superior Court's decision.

VII. APPENDIX

- A-001 Ball v. City of Port Angeles and Port of Port Angeles, SHB No. 107
- A-005 Brachbogel, et al. v. Mason County & Tawanah Falls Beach Club, Inc., SHB No. 45
- A-022 Gig Harbor Fishing Co. LLC v. Gig Harbor Marina, Inc., SHB No. 15-008

A-042 Save Flounder Bay v. Mousel and City of Anacortes, SHB No. 81-15

A-072 Southpoint Coalition v. Jefferson County, SHB No. 86-47

DATED THIS 21st day of March, 2017.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellants

By: 

Brett A. Purtzer
WSB# 27813

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this brief to be served on the following in the manner indicated below:

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Signed at Tacoma, Washington this 28th day of February, 2017.



Kathy A. Herbstler

*Case Number
Kulen
v. City of Port Angeles
f. The
Hearings B.*

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT ISSUED BY)
THE CITY OF PORT ANGELES TO)
THE PORT OF PORT ANGELES)
ALICE P. BALL,)
Appellant,)
vs.)
CITY OF PORT ANGELES and)
THE PORT OF PORT ANGELES,)
Respondents.)

SHB No. 107

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of a substantial development permit issued by the City of Port Angeles to the Port of Port Angeles, came before the Shorelines Hearings Board (Walt Woodward, presiding officer) in the Commissioners' Meeting Room, Clallam County Courthouse, Port Angeles, Washington, at 10:00 a.m., March 1, 1974.

Appellant appeared pro se; Port of Port Angeles through Tyler Moffett, and the City of Port Angeles made no appearance. Richard

Reinertsen, Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted.
Appellant and counsel made closing arguments.

From testimony heard, exhibits examined, arguments considered,
transcript reviewed and exceptions denied, the Shorelines Hearings
Board makes these

FINDINGS OF FACT

I.

On July 30, 1973, the Port of Port Angeles applied for a substantial
development permit under chapter 90.58 RCW, from the City of Port
Angeles for dredging, bulkheading and filling for ship moorage at the
Port's Terminal No. 1, in Port Angeles Bay, Washington. After due public
notice and at a public hearing, the City Council of the City of Port
Angeles approved the permit on September 18, 1973. On October 15, 1973,
appellant filed a request for review of the permit with the Board and on
November 9, 1973, both the Attorney General and the Department of
Ecology certified the request for review as reasonable.

II.

By stipulation of appellant and the Port of Port Angeles, the
shorelines of Port Angeles Harbor are of state-wide significance.

III.

Appellant failed to prove that the permit is inconsistent with
chapter 90.58 RCW or WAC 173-16. As of September 18, 1973, there was
not in existence any discernible or ascertainable master program of the
City of Port Angeles.

IV.

The City Council of the City of Port Angeles, in granting the

1 permit failed to consider environmental factors of the proposed project
2 as required by chapter 43.21C RCW, did not submit a finding of no
3 significant environmental impact and did not prepare or consider an
4 environmental impact statement.

5 V.

6 An Conclusion of Law hereinafter recited which should be deemed a
7 Finding of Fact is hereby adopted as such.

8 From these Findings, the Shorelines Hearings Board comes to these

9 CONCLUSIONS OF LAW

10 I.

11 The Shorelines Hearings Board has jurisdiction under chapter
12 90.58 RCW to review the permit and asserts jurisdiction to consider
13 environmental aspects as specified in chapter 43.21C RCW.

14 II.

15 Uncontroverted testimony convinces this Board that the City Council
16 of the City of Port Angeles granted the permit with total disregard for
17 environmental factors and that this disregard is a violation of chapter
18 43.21C RCW, thus making the permit null and void.

19 III.

20 Any Finding of Fact which should be deemed a Conclusion of Law is
21 hereby adopted as such.

22 Therefore, the Shorelines Hearings Board issues this

23 ORDER

24 The substantial development permit issued by the City of Port
25 Angeles on September 18, 1973 to the Port of Port Angeles is hereby
26 vacated without prejudice.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

DONE at Lacey, Washington this 28th day of May, 1974.

SHORELINES HEARINGS BOARD

Walt Woodward

WALT WOODWARD, Chairman

W. A. Gissberg

W. A. GISSBERG, Member

Mary Ellen McCaffree

MARY ELLEN McCAFFREE, Member

Robert F. Hintz

ROBERT F. HINTZ, Member

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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

*Hand Carol
per/loc - PS.*

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT ISSUED BY)
MASON COUNTY TO TWANOH FALLS)
BEACH CLUB, INC.)

M. W. BRACHVOGEL, et al.)
and RANDY E. AND CAROL)
R. McILRAITH, et al.,)

Appellants,)

vs.)

MASON COUNTY and TWANOH FALLS)
BEACH CLUB, INC.,)

Respondents,)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and)
SLADE GORTON, ATTORNEY GENERAL,)

Amici Curiae,)

SHE Nos. 45 and 45-A
FINDINGS OF FACT,
CONCLUSIONS AND ORDER

This matter, a request for a reversal of a substantial development
permit granted by Mason County to Twanoh Falls Beach Club, Inc., came
before members of the Shorelines Hearings Board at a formal hearing in

1 Olympia, Washington conducted at 10:00 a.m. on March 12, 1973. Board
2 members present were: Walt Woodward, Chairman, W. A. Gissberg, presiding
3 officer, James T. Sheehy and Robert F. Hintz.

4 The appellants, M. W. Brachvogel, et al., were represented by John
5 Petrich, and Phillip M. Best represented Randy E. and Carol R. McIlraith,
6 et al. Twanoh Falls Beach Club, Inc. was represented by Mary Ellen
7 Hanley. Mason County was not represented. Robert V. Jensen appeared as
8 amicus curiae. The proceedings were recorded by Richard Reinertsen, an
9 Olympia court reporter.

10 The Board entered its Proposed Findings, Conclusions and Order on
11 June 11, 1973, which Proposed Order conditionally approved the substantial
12 development permit issued by Mason County to respondent, Twanoh Falls
13 Beach Club, Inc. Exceptions were duly filed with the Board by appellant,
14 M. W. Brachvogel, et al. The Board asked for further oral argument or
15 written statements of the parties on appellants' numbered Exception VII
16 relating to the Board's proposed Conclusion II. That proposed Conclusion
17 was that the granting of the permit was not a major action requiring an
18 environmental impact statement under the State Environmental Policy Act
19 (SEPA). Briefs were submitted by the parties on that question and
20 supplemented by oral argument before certain Board members on July 25,
21 1973.

22 Having carefully considered all of the Exceptions and the contentions
23 of the parties, the Board concludes that appellant Brachvogel's
24 Exception VII is well taken and should be and therefore is granted. We
25 believe the recent case of Juanita Bay Valley Community Association vs.
26 City of Kirkland, 9 Wn. App. 59 (June 4, 1973) to be controlling and

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 that it prevents this Board, as a matter of law, from making the initial
2 determination that the issuance of the permit was not a major action
3 under SEPA. We are unable to ascertain, from an examination of the
4 record, whether that determination was made by Mason County. The mere
5 fact that no environmental impact statement was prepared is not in
6 itself proof that the County made a determination that none was
7 required, nor can we indulge in such a presumption. Further, the record
8 does not affirmatively show (and we believe that it must) that the
9 County considered the environmental factors in the project before
10 determining whether or not an environmental impact statement must be
11 prepared. The record reveals that some factors affecting the
12 environment were before the County, in written form and we are asked
13 by respondents to presume that the County Commissioners did not neglect
14 their duty of considering them. We express no opinion whether the
15 factors before them were comprehensive and sufficient. See Hanly vs.
16 Mitchell, 460 F.2d 640 (2d Cir. 1972). We are unable to ascertain
17 what they did consider or whether they gave any consideration.

18 Here too we cannot presume that the County considered environmental
19 factors. We cannot do so because of the strong, directive language of
20 SEPA found in RCW 43.21C.030.

21 In remanding this matter to Mason County, we adhere to those
22 Proposed Findings and Order which relate to and are relevant to the
23 Shoreline Management Act. However, we, as stated in Hanly vs.
24 Mitchell, supra, do not "regard the remand as pure ritual."

25 We direct that the determination to be made under SEPA be made in
26 good faith after full consideration. We suggest that the County

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 Commissioners address themselves to a consideration of the environmental
2 factors mentioned in the dissent of Mr. Sheehy to the Proposed Findings,
3 Conclusions and Order heretofore provided to the parties to this
4 request for review.

5 If the County determines that no environmental impact statement
6 is required because the quality of the environment will not be
7 significantly affected, this Board can review that question again.

8 Accordingly, from the evidence presented (testimony and exhibits)
9 and assisted by arguments by counsel and from a review of the transcript
10 of the hearing, the Shorelines Hearings Board makes the following:

11 FINDINGS OF FACT

12 I.

3 On November 13, 1972, the Mason County Board of County Commissioners,
14 after public hearings conducted on four separate dates, granted
15 Shorelines Management Substantial Development Permit No. 24 to Twanoh
16 Falls Beach Club, Inc. for a development on the shoreline of Hood Canal
17 located on a site seven and eight-tenths miles southwest of Belfair,
18 Washington. In authorizing the permit, the Board was acting as the
19 "local governmental agency" under the Shoreline Management Act of 1971
20 and followed procedures established pursuant to the requirements of
21 that Act. Development authorized by the permit was to "repair and
22 replace piling, float, etc. destroyed by ice and construct a new float,
23 provided property line of Twanoh Falls development be adequately posted,
24 the current county boating ordinance posted conspicuously on dock, along
25 with 'no skiing from west side of pier' signs to be posted". In addition,
26 the following standard conditions were imposed:

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

- 1 1. This permit is granted pursuant to the Shoreline Management Act
2 of 1971 and nothing in this permit shall excuse the applicant
3 from compliance with any other Federal, State or local statutes,
4 ordinances or regulations applicable to this project.
- 5 2. This permit may be rescinded pursuant to Section 14(7) of the
6 Shoreline Management Act of 1971, in the event the permittee
7 fails to comply with any condition hereof.
- 8 3. Construction pursuant to this permit will not begin or is not
9 authorized until forty-five (45) days from the date of filing
10 of the final order of the local government with the Department
11 of Ecology or Attorney General, whichever comes first; or until
12 all review proceedings initiated within forty-five (45) days
13 from the date of filing of the final order of the local govern-
14 ment with the Department of Ecology or Attorney General,
15 whichever comes first; or until all review proceedings
16 initiated within forty-five (45) days from the day of such
17 filing have been terminated.

18 II.

19 The site consists of 372 lineal feet of waterfront on Hood Canal
20 containing approximately 56,000 square feet between the bulkheaded
21 shoreline and the State highway. The site is jointly owned by members
22 of the Twanoh Falls Beach Club, Inc. who are eligible for membership by
23 reason of ownership of one or more lots in a 397 lot subdivision on the
24 hillside lying south of the State highway abutting the beachfront
25 property. About 150 of these lots are improved and capable of occupancy.
26 Improvements now existing on the beachfront property consist of a

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 bulkhead, cabana dressing rooms, playground equipment and a line of piles
2 extending approximately 434 feet northward into Hood Canal near the
3 southwestern edge of the property. The piles have been used to anchor a
4 floating walkway and a 120 foot floating dock with a capacity to moor
5 18 to 20 small craft.

6 III.

7 The hearings before the Mason County Board of County Commissioners
8 revealed opposition to the proposed development by owners of adjacent
9 property and by others. Opposition was based upon hazards to swimmers
10 caused by overconcentration of small boat movements, water skiing
11 activity and contamination of the water, and by the creation of excessive
12 noise and by motor oils.

3 IV.

14 The record is silent as to whether the County Commissioners
15 considered environmental factors in the project and whether they
16 determined that it is or is not a major action significantly affecting
17 the quality of the environment. The County did not require the
18 preparation of an environmental impact statement.

19 V.

20 The Hood Canal Advisory Commission is a citizens group which consists
21 of three members from each of three counties: Mason, Kitsap and
22 Jefferson. Members from each of the counties are appointed by the
23 respective County Boards. The Advisory Commission meets monthly
24 concerning environmental matters and problems in areas bordering Hood
25 Canal. From time to time its advice is sought by the County Boards of
6 its three constituent counties. In response to a request by Mason County

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 Board of County Commissioners, the Hood Canal Advisory Commission
2 reviewed Application No. 24 by Twanoh Falls Beach Club, Inc., viewed
3 the site and subsequently recommended that the application for a
4 substantial development permit as proposed by the applicant be denied.

5 VI.

6 The existing development, including the floating walkway extending
7 442 feet into Hood Canal and the 120 foot mooring float at right angles
8 thereto were installed in 1965 without a U. S. Army Corps of Engineers'
9 permit or a State Hydraulic Permit. Facilities have been in continuous
10 use since that date and no notice of violation has been made by the
11 U. S. Army Corps of Engineers or the State of Washington.

12 VII.

13 Hood Canal shorelines are shorelines of state-wide significance
14 having high aesthetic, recreational and ecological values. The shoreline
15 in the vicinity of this application is intensively developed with
16 residential structures occupied year round or seasonally by summer
17 residents.

18 VIII.

19 Mason County has completed its shoreline inventory as required by
20 the Shoreline Management Act of 1971; development of its master program
21 is in process. Evaluation of Application No. 24 by the County Board
22 was based upon the policies set forth in Section 2 of the Act and the
23 guidelines issued by the Department of Ecology on June 20, 1972.

24 IX.

25 The Twanoh Falls Beach Club, Inc. has made the application to the
26 Department of the Army, Seattle Corps of Engineers for the work

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 contemplated in its Application No. 24 to Mason County for a substantial
2 development permit.

3 X.

4 The plan for the project as set forth in the Corps of Engineers
5 application was utilized in the Application for Substantial Development
6 No. 24. That plan calls for repair and preservation of existing bulkhead
7 and pier and the driving of additional piles in Hood Canal. Under the
8 plan, the existing 24 piles would be supplemented by 39 additional
9 piles and the conversion of the floating walkway to a rigid pier or
10 walkway extending 434 feet into Hood Canal. The surface of the walkway
11 would be 15.8 feet above mean lower low water. The walkway would be
12 protected on both sides by three foot high handrails. The plan includes
13 the existing float 120 feet long reached by a thirty foot ramp,
14 extending eastward from the walkway at a point 370 feet out from the
15 existing rock bulkhead. A new finger float 120 feet long reached by a
16 thirty foot ramp would extend eastward from the end of the walkway at a
17 point approximately 430 feet out from the existing bulkhead.

18 From these Findings of Fact, the Shorelines Hearings Board
19 comes to these

20 CONCLUSIONS

21 I.

22 Appellants contend that in granting a conditional substantial
23 development permit to Twanoh Falls Beach Club, Inc., the Mason County
24 Board of Commissioners should have complied with the Administrative
25 Procedures Act because in granting said permit it was acting as an
26 agency of the State. Such contention is without merit; County

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 Commissioners need not comply with the Administrative Procedures Act.

2 II.

3 Mason County did not comply with SEPA and is required to do so
4 prior to the issuance of any substantial development permit.

5 III.

6 The conditional permit granted by the Mason County Board of
7 Commissioners and the application by the Twanoh Falls Beach Club, Inc.
8 for a U. S. Army Corps of Engineers' permit was for a total development
9 incorporating previous improvements installed with or without a permit.
10 Hood Canal and its bordering lands constitute shorelines of state-wide
11 significance. The area involved here possesses high scenic and
12 recreational values, generally recognized and appreciated as a finite
13 and precious resource by residents and visitors alike.

14 This is a dispute between homeowners of individual properties
15 utilized for dwelling and recreational purposes on the one hand and
16 joint or corporate owners of adjacent property utilized exclusively for
17 recreational purposes. The focus of water-oriented activities by the
18 owners and guests of 150 improved nearby properties on 372 lineal feet
19 of commonly owned waterfront has produced a sharp contrast with the
20 density of persons and their recreational pursuits on the adjoining and
21 nearby properties which generally support lower concentrations of persons
22 and activities on a front foot basis. It must be recognized that superb
23 recreational environments will have peak periods of attraction and use.
24 In these circumstances the rate of use can be self-regulating: over-
25 crowding discourages more activity unless the capacity of the facility
26 is expanded.

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 IV.

2 The potential demand for use of the Twanoh Falls Beach Club, Inc.
3 facilities could be more than double the current rate of use since less
4 than half of the lots of the potentially participating members are
5 developed for occupancy. Some reasonable control of use and activities
6 should be established.

7 V.

8 The limited shoreline resource can provide a direct recreation
9 opportunity to people in each of three ways, each of which must be
10 considered as a legitimate opportunity to enjoy this finite resource:
11 (1) through private ownership; (2) through joint or community ownership,
12 and (3) through public ownership. Public ownership of waterfront
13 recreational facilities offers the highest benefit cost ratio, yet the
14 amount of public ownership must necessarily remain quite limited.
15 Joint or community ownership of waterfront presents the next highest
16 benefit cost ratio, providing an effective means for multiple use and
17 enjoyment of the shoreline resources.

18 VI.

19 The development as modified by this order is consistent with the
20 policy of the Shoreline Management Act and the guidelines of the
21 Department of Ecology. Therefore, the Shorelines Hearings Board makes this

22 ORDER

23 1. The permit is remanded to the Mason County Commissioners to
24 consider the environmental factors in the project and to make a
25 determination, based on such consideration, as to: (a) whether the
26 project is or is not a major action significantly affecting the quality

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 of the environment; (b) whether or not to require the preparation of an
2 environmental impact statement, and (c) to reconsider the issuance of
3 the substantial development permit in light of such determinations.

4 2. Upon reconsideration of the issuance of the permit, as above
5 provided, and if the same shall be granted, this Board requires the
6 following additional conditions thereto:

- 7 (a) That the rigid piers supporting the walkway extend no
8 farther than 430 feet from the existing rock bulkhead;
9 (b) That only one 120 foot finger float be installed extending
10 eastward from the end of the pier, and
11 (c) That use of the pier and beach facilities be limited to the
12 owners and guests of the existing 397 platted lots.

13 DONE at Lacey, Washington this 10th day of August, 1973.

14 SHORELINES HEARINGS BOARD

15 Walt Woodward
16 WALT WOODWARD, Chairman

17 Ralph A. Rowick
18 RALPH A. ROWICK, Member

19 W. A. Gissberg
20 W. A. GISSBERG, Member

21 Robert F. Hintz
22 ROBERT F. HINTZ, Member

23 Tracey J. Owen
24 TRACEY J. OWEN, Member

25 James T. Sheehy
26 JAMES T. SHEEHY, Member

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

DISSENT

I dissent from the Conclusions of Law and Order which the majority of this Board have entered. Both the applicant, Twanoh Falls Beach Club, Inc., and the Board of commissioners of Mason County have failed to comply with the purpose and spirit of the Shoreline Management Act of 1971 (SMA) and the State Environmental Policy Act of 1971 (SEPA). A substantial development permit as granted by the Mason County Commissioners should either be reversed and denied altogether, or remanded to the Board of Mason County Commissioners for substantial compliance with both Acts.

I agree with the majority that the permit must be remanded for compliance by the Commissioners with SEPA, but I dissent from the majority's Conclusion No. VI that the development as modified by its order is consistent with the policy of the SMA and the guidelines of the Department of Ecology.

Before approving this or any other pier application for Hood Canal we should know how the plan would fit in with a master program for the Canal. Another way of stating this is that a type of zoning should be promulgated by the Mason County Commissioners which would deal with location, spacing, length, buffer zones and density of use. No master program for the portion of Hood Canal lying within Mason County has been developed. The SMA provides that in preparing such a master program, local government shall give preference to uses in the following order of preference as stated in RCW 90.58.020:

"1. Recognize and protect the statewide interests over local interests;

"2. Preserve the natural character of the shoreline;

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

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

9 The majority appears to approve of this type of development in its

10 Conclusion No. V because it provides access to the beach with a higher

11 "benefit cost ratio" than individual private ownership of the shoreline.

12 It is questionable whether this particular use comes within any of the

13 preferred uses under the SMA and this argument standing alone provides

14 no justification for approval under the SMA.

15 RCW 90.58.140 provides that until such time as an applicable master

16 program has become effective, a permit shall be granted only when the

17 development proposed is consistent with the guidelines and regulations

18 of the Department of Ecology. The proposed development is inconsistent

19 with those guidelines. For instance, the guidelines relating to piers

20 (WAC 173-16-060(19)), provides in part as follows: (1) That the use of

21 floating docks should be encouraged in those areas where scenic values

22 are high; (2) That those agencies faced with the granting of pier

23 applications should establish criteria for their location, spacing and

24 length with regard to the geographical characteristics of the particular

25 area; (3) That the capacity of the shorelines sites to absorb the

26 impact of waste discharges from boats, including gas and oil spillage,

27 FINDINGS OF FACT,
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1 should be considered.

2 The evidence before this Board does not convince me that the
3 existing floating dock needs to be converted to a permanent pier and
4 it appears that the Mason County Commissioners have developed no set
5 of standards of criteria for the location, spacing and length of piers
6 on Hood Canal. Neither does there seem to be any evidence that the
7 impact of waste discharges has been investigated in any meaningful way,
8 either by the applicant or the County Commissioners.

9 As measured by the guidelines of the Department of Ecology
10 promulgated in December, 1972, for use with SEPA determinations, the
11 project will also significantly affect the quality of the environment.
12 The Board has taken the position that the permit application is for
13 a total development incorporating previous improvements installed
14 with or without a permit. The evidence before the Board indicated that
15 the floating dock that now exists has had a great impact on the mouth
16 of the creek on which it was built. Where once there was an abundant
17 oyster bed, now there is none; where once the fish population in the
18 creek was plentiful, now it is very small, if in fact it does exist;
19 where once a significant smelt fishery was found on this shore, now
20 there is none; where once the view of the tidelands and the waters of
21 Hood Canal were unobstructed, now it is framed by unsightly piling.
22 The additional construction would only increase these detrimental
23 effects. These effects are irreversible for at least as long as the
24 pier exists in its present location.

25 It appears that the only systematic evaluation for this pier
26 application was made by the Hood Canal Advisory Commission and this

27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 official citizens' group concluded and recommended to the Mason County
2 Commissioners that the application for permit be denied on the basis
3 that a float pier was preferable in an area of such scenic beauty as
4 Hood Canal; that the pier was located at one edge of the property
5 rather than the center, causing a significant interference in the use of
6 the adjoining property; and finally, that the pier was too long in
7 relation to the size of the beach it served.

8 There has been little or no systematic evaluation by the Board of
9 Commissioners of Mason County nor this Board as to how this particular
10 pier will actually benefit the people it is intended to benefit or how
11 it will relate to a total picture of development of this type for
12 Hood Canal. There is a question whether this project is needed at all
13 for adequate recreational use of the area by the members of the Beach
14 Club. The boat moorage facilities themselves will not change. Most of
15 the individual beachowners adjacent to or near the project in this
16 matter use the buoy method of mooring their boats which has no
17 appreciable effect on the environment. Since a public launch facility
18 is available nearby at Twanoh State Park, I see no reason why this
19 method could not be used by members of the Beach Club. At the very
20 least, I see no reason why the Club cannot continue with the existing
21 floating dock. Although there was a claim made that the existing
22 dock has a somewhat higher maintenance cost than a permanent pier, the
23 testimony was vague on this particular issue and it did not appear that
24 the cost was excessive when considered on a per-lot basis.

25 There has been an inadequate evaluation of the effects on the
26 shoreline by reason of the upland use and the large numbers of people
27 FINDINGS OF FACT,
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1 | which would be using the relatively small stretch of beach. In the
2 | recent decision of the Court of Appeals in the case of Merkel v. Port
3 | of Brownsville, 8 Wn. App. 844 (Div. II 1973), the Court held that a
4 | single improvement or project having an interrelated effect on both
5 | uplands and shorelines cannot be divided into segments for purposes of
6 | complying with the provisions of SEPA and SMA. This case applies to
7 | the Twanoh Falls Beach Club, Inc. improvement as the application for
8 | a pier is an integral part of the total recreational home development.
9 | In considering the numbers of people which would be entitled to use
10 | the relatively small area of beach, there could well be a density of
11 | use on this particular segment of shoreline which would greatly exceed
12 | the density of use on many, if not all, of our State parks. In fact,
13 | when all lots in the platted upland are sold and occupied and all
14 | owners and their families have joined in membership in the Beach Club,
15 | the density of use in the shoreline involved in this matter could
16 | eventually reach a figure which would constitute an inescapable,
17 | intolerable and unjust nuisance to the property owners adjacent to and
18 | in close proximity to the Twanoh Falls Beach Club.

19 | Until we are provided with some kind of data or criteria, such
20 | as has not been provided in this case, this Board will be unable to
21 | make an intelligent and informed decision concerning pier applications.
22 | Private beach clubs should not be automatically allowed to construct
23 | environmentally damaging structures merely because they claim to give
24 | more people access to a limited area of beach. The project should be
25 | evaluated to determine whether or not it is really needed and how
26 | many people would really benefit by the construction. This should be

27 | FINDINGS OF FACT,
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1 compared with how many people would be directly and detrimentally
2 affected. It appears that the plan as approved will provide for
3 moorage for only fifteen (15) boats, but more than fifteen (15)
4 adjoining owners would be detrimentally affected by this project.
5 There is no buffer zone between this pier and adjoining property such
6 as we require for State parks and industries. No less should be
7 required in this type of project.

8 For all of the foregoing reasons it is my belief that the permit
9 should be either denied or remanded to the Board of Commissioners of
10 Mason County for proceedings in conformity with both SEPA and SMA.

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13 JAMES T. SHEEHY, Member
14 SHORELINES HEARINGS BOARD
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27 FINDINGS OF FACT,
CONCLUSIONS AND ORDER

1 **FINDINGS OF FACT**

2 1.

3 In June 2014, the Marina submitted to the City an application for an SSDP, site plan
4 review approval, design review approval, and State Environmental Policy Act (SEPA) checklist
5 to restore a marine, fuel service facility (fuel dock). The fuel dock was proposed to be located on
6 a new float connected to an existing dock at 3313 and 3323 Harborview Drive in Gig Harbor.
7 Katich Testimony, Exs. R-7, R-24, R-25.

8 2.

9 The proposed fuel dock is located on a parcel owned by the Marina that slopes down
10 easterly from Harborview Drive to the tidelands on Gig Harbor Bay, which are owned by the
11 Department of Natural Resources (DNR). Exs. R-1, R-2, p. 2. The Marina's upland parcel,
12 referred to as Arabella's South Dock, contains parking lots, buildings, two buried fuel tanks, and
13 a partially overwater restaurant on a fixed timber wharf. The fuel dock will be connected to the
14 existing Bayview Marina located east and waterward of Arabella's South Dock. Bayview Marina
15 is an existing private marina that provides permanent moorage for about 20 boats on a 325-foot-
16 long floating pier. Moist Testimony. Finger piers extending from the north side of the pier
17 provide moorage slips, and the pier's south side provides side tie moorage. A fixed timber pier
18 and aluminum gangway connects Bayview Marina's floating pier to the upland Arabella's South
19 Dock. Exs. R-3, p. 4; R-10; P-1.

20 3.

21 The portion of the Bayview Marina pier where the fuel dock will be located is mostly

1 surrounded by other docks. To the northwest is Arabella's Landing Marina, also owned by the
2 Marina. To the east are the open waters of Gig Harbor Bay, and to the west is the upland
3 property comprised of Arabella's South Dock. To the south and southeast is petitioner GHFC's
4 dock, which is connected to upland property to the southwest improved with a single family
5 home and a historic net shed. GHFC's dock was referred to as the Whittier dock during the
6 hearing because De Whittier is the owner of the dock and upland property. Exs. R-3, p. 3-4; P-1.
7 Both the Whittier dock and the Bayview Marina dock are located on leased DNR aquatic lands.
8 Exs. R-2, p. 6; R-34.

9 4.

10 The fuel dock is to be located within a commercial waterfront area improved with water-
11 dependent uses. The project site is in the Waterfront Millville zoning classification with a
12 Historic District Overlay under the Gig Harbor Municipal Code (GHMC). That zoning allows for
13 medium intensity, mixed uses, including marine dependent ones. *See* GHMC 17.14, Ex. R-9, p.
14 3, 7. The Gig Harbor Shoreline Master Plan (GHSMP) designates the site as "City Waterfront"
15 Shoreline Environment, which allows for waterfront, residential, and commercial uses. *See*
16 GHSMP 5.2.5. The goal of the City Waterfront designation is to preserve water-dependent uses
17 such as boatyards and marinas, allow for a continued mix of uses, enhance public access to the
18 shoreline, and protect existing shoreline ecological functions. *Id.* A marine fuel facility is a
19 permitted use under the City's GHSMP. *See* GHSMP 7.11.10.

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5.

The fuel dock will consist of an existing concrete float six feet wide and 110 feet long, and a new two-foot-wide, 74-foot-long concrete float added to the north side of the existing float. Three new diesel only fuel dispensers will be installed on the new concrete float: a low flow dispenser, a high flow dispenser, and a high flow satellite dispenser. The landward end of the existing concrete float will have a fuel service attendant's booth. Exs. R-9, R-10. The fuel dock will mostly serve boats larger than 35 feet long because that is the typical size of diesel powered boats. The fuel dock will not sell gasoline. Layton Testimony; Moist Testimony. The project will also remove and replace damaged piling cross supports under the pier, and also remove an existing finger pier that extends perpendicularly from the existing concrete float towards the Whittier dock. The underground fuel tanks on the Marina's uplands will be recommissioned, and a new double wall fuel service pipe will be installed from the tanks to the fuel dock. Exs. R-3, R-25.

6.

The fuel dock and the adjacent Whittier dock are separated by a waterway measuring 56.39 feet at its narrowest point. From that point, the width of the waterway increases both landward to over 70 feet and waterward to over 100 feet. The GHSMP requires a minimum setback of 24 feet between boating facilities. The City planner, Mr. Peter Katich, testified that the fuel dock complies with the GHSMP's setback requirement. The Whittier dock is approximately 17 feet from the property line, and the existing concrete float that will become part of the fuel dock is approximately 40 feet from the property line. Thus, the Marina provided

1 substantially more setback than did GHFC. Exs. P-4; R-32, R-35; Katich Testimony; Layton
2 Testimony; Moist Testimony; Moore Testimony.

3 7.

4 The proposed fuel dock's Ingress/Egress Signage and Operation Plan calls for a 70 feet
5 long fueling waiting area at the waterward end of the fuel dock on the south side of the Bayview
6 pier. Ex. R-11, Attachment 1. Boats can leave the fuel dock by backing all the way to the bay in
7 the waterway between the fuel dock and the Whittier dock. After clearing the end of the Whittier
8 dock, boats can continue to back out in the wider channel between the Bayview pier and the
9 covered Harborview Marina to the south. An alternative egress route would be for boats to back
10 out until the end of the Whittier dock and turn around bow facing out toward the bay. The choice
11 between these alternatives depends on the boat size and the skills of its operator. Babich
12 Testimony; Layton Testimony; Moore Testimony.

13 8.

14 The former owner of the subject property operated a fuel dock known as the old Philpot
15 fuel dock. Philpot's fuel dispensing service was located near the waterward end of the current
16 Bayview Marina pier. After the property was sold, the Philpot fuel dock was removed and the
17 upland fuel tanks and fuel conveyance system were decommissioned. Ex. R-9, p. 1; Moist
18 Testimony; Katich Testimony. In the past Gig Harbor had four marine fueling facilities, but it
19 has none presently. Under the City's prior GHSMP, marine fueling facilities required a shoreline
20 conditional use permit. In order to encourage restoration of marine fueling facilities, the City
21 Council eliminated the conditional use permit requirement for such facilities when it adopted its

1 current GHSMP. The current GHSMP, which became effective on December 27, 2013, is
2 applicable here. Katich Testimony; Ex. R-2, p. 7.

3 9.

4 The City reviewed the application under SEPA, the Shoreline Management Act (SMA),
5 and the GHSMP. It posted and published notice of the proposed project, and mailed notice to
6 property owners within 300 feet of the site. The City issued a mitigated determination of non-
7 significance (MDNS) for the proposed action. No appeals of the MDNS were filed. Katich
8 Testimony; Exs. R-2, R-6, R-7, R-11, R-13. The City received one written comment expressing
9 concerns about operation of the fuel delivery to the upland underground storage tanks. Katich
10 Testimony; Ex. R-2, p. 5.

11 10.

12 City planner Peter Katich submitted a staff report to the City hearing examiner
13 recommending approval of the SSDP conditioned upon compliance with the SEPA mitigation
14 measures, including compliance with the Marina's Best Management Practices Plan, Habitat
15 Management Plan and Informal ESA Report, and restrictions on fuel truck delivery times. Exs.
16 R-9, p. 11, attachment G, R-15, R-21; Katich Testimony. The City hearing examiner reviewed
17 the staff report and conducted a public hearing on the Marina's application on February 5, 2015.
18 Ex. R-2, p. 3, 12; Katich Testimony.

19 11.

20 On February 25, 2015, the City hearing examiner issued a decision granting the Marina's
21 request for an SSDP, site plan review approval, and design review approval for the fuel dock,

1 subject to conditions. On April 1, 2015, GHFC filed a petition for review of the hearing
2 examiner's decision.

3 12.

4 The Board heard extensive testimony regarding the issue of ingress and egress by boats to
5 the proposed fuel dock. GHFC presented the testimony of Vernon Moore, an experienced
6 commercial and private vessel operator, in support of its position that the fuel dock will be
7 difficult to safely access. Mr. Moore is familiar with the proposed fuel dock and Whittier dock,
8 having brought in vessels to both docks many times. He currently moors a research boat (the
9 "Sea 3") at the Whittier dock. In reviewing the proposed fuel dock, Mr. Moore looked at the site
10 plan drawings and brought in several boats in late 2014 to moor at the Whittier dock. The diesel
11 powered boats ranged in size from 39 to 78 feet long (11 to 14.5 foot beam), and were not
12 equipped with bow or stern thrusters. Mr. Moore explained thrusters as mounted propeller
13 systems that help boats steer side to side. He also testified that boats built after 2000 will
14 typically have thrusters, but that commercial fishing boats and older boats typically will not. Mr.
15 Moore took photographs from the boats as he entered and exited the Whittier dock and passed
16 another boat docked at the location of the proposed fuel dock. Ex. P-3a through p. Mr. Moore is
17 aware of the 56.39 feet separation between the two docks at the narrowest point, but pointed out
18 that the distance would be reduced by the width of boats moored on either dock. Depending on
19 wind and current conditions, Mr. Moore stated he would either not feel comfortable steering his
20 boat, or would not attempt it, if there was a 24 to 28 feet separation between his boat and another
21 boat moored at the fuel dock. Finally, Mr. Moore generally testified as to his concerns with the

1 steering difficulties of boats with no thrusters backing out of the fuel dock, the increased number
2 of kayakers in Gig Harbor, and the tendency of ubiquitous single propeller boats without
3 thrusters to veer toward port side, or toward the Whittier dock, when backing out of the fuel
4 dock. Moore Testimony.

5 13.

6 GHFC also presented the testimony of Kae Paterson, a boater for nearly 50 years who is
7 familiar with the proposed fuel dock and Whittier dock, having moored boats in Gig Harbor for
8 nearly as long. She is concerned about the tight space between the fuel dock and Whittier dock,
9 and that boaters backing out of the fuel dock would not be able to see kayakers. She believes that
10 locating the fuel dock at the end of the Bayview pier parallel to shore would be better. Paterson
11 Testimony.

12 14.

13 A different perspective regarding the potential difficulties posed by fuel dock ingress and
14 egress was presented by the Marina's witnesses. Mr. Randy Babich, a commercial fisherman
15 familiar with Gig Harbor Bay and fuel docks in general, operates vessels 55-58 feet long
16 (average 15 foot beam). Mr. Babich does not have vessels moored at the Whittier dock or any of
17 the Marina's docks. Mr. Babich testified that he is not concerned with ingress and egress to and
18 from the fuel dock because most boaters have maneuvered in much narrower waterways with
19 only 25-30 feet separation between docks, and because it was not uncommon for boats to back
20 out for much longer distances. Mr. Babich also testified that he would exit out of the fuel dock

1 by backing out, turn around in the wider area past the Whittier dock, and head towards the bay
2 bow out. Babich Testimony.

3 15.

4 Mr. Jeffrey Layton, a licensed civil engineer specializing in coastal engineering whose
5 firm was retained by the Marina to design and obtain the permits necessary for the fuel dock,
6 also testified regarding ingress and egress. Mr. Layton testified that navigating in and out of the
7 fuel dock was not much different than entering into a double-loaded slip, or a finger pier with
8 boats moored on both sides. Mr. Layton also demonstrated and testified to the distance between
9 boats of different sizes moored at the Whittier dock and boats entering and exiting the fuel dock.
10 Ex. R-35. Mr. Layton prepared exhibit R-35, which depicts a shaded gray area between the two
11 docks extending roughly from the landward end of both docks, past their waterward end, and
12 into the outer harbor line. The shaded grey area represents unobstructed navigable waters, taking
13 into account a 15-foot moorage zone along the fuel dock and the Bayview pier. As to the
14 narrowest 56.39 feet width of the waterway between the Whittier and fuel docks, the exhibit
15 shows that the width expands landward to over 70 feet and more than 100 feet waterward. Exs.
16 R-2, p. 11, R-25, P-4. Depending on the size of boats moored at the Whittier dock and boats
17 coming to fuel, Mr. Layton testified that a fueled boat would back out approximately 110 to 150
18 feet from the fuel dock (depending on which fuel pump it used) to clear the end of the Whittier
19 dock and turn bow out per Mr. Babich's testimony as to how fueled boats would exit. GHFC's
20 expert, Mr. Moore, also testified that boats 40 to 50 feet long could similarly exit. Larger boats
21 with lengths of 60 feet or more and 17-foot beams would most likely exit by backing all the way

1 out to the bay rather than turning around. Layton testimony. But the same larger boats would
2 have less distance to back out because they would be fueling from the high flow fuel dispenser
3 located toward the seaward end of the fuel dock. Layton Testimony. Moreover, boats longer than
4 60 feet long would not be common— the typical length of diesel boats at the fuel dock would be
5 in the 35 to 60 feet range. Moist Testimony.

6 16.

7 The Marina's general manager, John Moist, also testified that the available navigable
8 waters between the two docks provides a workable area for boats to enter and exit the fuel dock.
9 Mr. Moist stated that the Marina has trained dock hands adept at helping large boats 50 to 60 feet
10 long get into their moorage space safely. Mr. Moist is familiar with the fuel dock's Best
11 Management Practices (BMPs) and the Fuel Dock Ingress/Egress Signage and Operation Plan
12 attached to the BMPs. Ex. R-15. The BMPs sets forth standards for fueling practices, oil spill
13 prevention and response, and management of chemicals and waste.

14 17.

15 Mr. Moist testified that the Marina will ensure safe ingress and egress and fueling
16 practices by affixing signage of fuel dock rules on the dock and posting its ingress/egress plan
17 and map on its website. The Marina's BMPs calls for an attendant to be at the fuel dock during
18 all fueling operations. Signage will inform boaters whether the fuel dock is open or closed,
19 advise boaters to wait for the attendant's directions, and inform them that boats cannot turn
20 around or raft at the fuel dock or waiting area. The operation plan allows two boats to fuel stern
21 to bow, depending on the boat lengths involved. As to the exit plan for two fueling boats, Mr.

1 Moist testified that the boat closest to shore will wait until the boat behind it finishes fueling and
2 exits, unless the shoreward boat operator feels it is safe to back out with a fueling boat
3 immediately behind. Mr. Moist stressed that captains are ultimately in charge of their boats, and
4 that attendants cannot control a boat's path or always ensure that boats will abide by the signage
5 rules. He also acknowledged that there are many kayakers in the area, and that it was incumbent
6 upon boat operators to be aware of surroundings in the congested inner harbor. Finally, Mr.
7 Moist testified that in his 14 years managing three marinas in Gig Harbor, there were only four
8 or five accidents, only one of which required a minor repair. Moist Testimony.

9 18.

10 Mr. Katich, the City planner that recommended approval of the SSDP, testified that the
11 City relied on DNR's determination that the proposed fuel dock location and the fuel dock's
12 Ingress/Egress Signage and Operation Plan provided adequate space for safe ingress and egress.
13 Ex. R-2, p. 6; Katich Testimony. Specifically, DNR approved the fuel dock location and
14 considered access to both the fuel dock and Whittier dock. Ex. R-2, p. 6. DNR's requirements for
15 its approval were incorporated into the Marina's BMPs. *Id.*

16 19.

17 The Board finds that the fuel dock, as approved and conditioned in the SSDP, provides
18 sufficient space for safe ingress to and egress from the fuel dock. The Board was persuaded by
19 the testimony of the Marina's witnesses, especially that of Mr. Layton who testified that access
20 to the proposed fuel dock will not be more difficult than typically faced by boaters in marinas.
21

1 The Board finds that the BMPs and the Dock Fuel Ingress/Egress Signage and Operation Plan
2 further enhance safe ingress and egress.

3 20.

4 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

5 **CONCLUSIONS OF LAW**

6 1.

7 The Board has jurisdiction over this matter under RCW 90.58.180. GHFC has the burden
8 of proving that approval of the SSDP is inconsistent with the requirements of the SMA and/or
9 the City's GHSMP. RCW 90.58.140(7). The scope and standard of review for this matter is *de*
10 *novo*. WAC 461-08-500(1).

11 2.

12 The pre-hearing order entered in this case identified four issues agreed to by the parties:

13 1. Does the proposal meet the requirements for an SSDP under the SMA, the City's
14 GHSMP, and applicable land use regulations?

15 2. Does the proposal comply with the policies and requirements regarding public
16 navigation rights under the SMA and GHSMP?

17 3. Does the proposal unreasonably restrict GHFC's use of its aquatic leasehold
18 and/or the safety and movement of the boats moored in its leasehold?

1 prohibit development. Rather, in assessing impacts to navigation, this Board must balance all
2 reasonable uses of the water in allowing a limited reduction of the public's right to navigation.
3 *Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d
4 151 (1979); *Mukai v. City of Seattle*, SHB Nos. 00-029 and 00-032, COL 12 (2001).

5 5.

6 The GHSMP requires a minimum 24 feet separation between adjoining boating facilities
7 in saltwater bodies unless the moorage structure is built pursuant to an agreement between
8 adjoining owners. GHSMP 7.11.4(2) (boating facilities shall be located no closer than 12 feet
9 from the property or lease line). The Board concludes that the fuel dock location complies with
10 this separation requirement. The uncontroverted evidence showed that the fuel dock will be
11 56.39 feet from the Whittier dock at the narrowest point between the two docks. Moreover, the
12 City recently amended its GHSMP to list marine fuel facilities as a permitted shoreline use in
13 order to promote development of such facilities within the city and achieve the GHSMP goal of
14 encouraging a variety of water-dependent activities, including commercial fishing and
15 recreational boats. *See* GHSMP 7.1.1 (Permitted Use Table); GHSMP 7.11; SMP 7.11.10. 7.11;
16 Ex. R-2, p. 3. Therefore, the remaining question is whether approval of the fuel dock complies
17 with provisions in the GHSMP and the SMA that relate to public navigation hazards. Section
18 7.11.7 (7) of the GHSMP states in part that “[c]ommercial, industrial or public recreational
19 docks, piers . . . shall be spaced and oriented to the shoreline in a manner that avoids or
20 minimizes . . . [h]azards and obstructions to navigation, fishing, swimming and pleasure
21 boating.” GHSMP 7.11.7(7)(a).

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6.

GHFC primarily argues that the fuel dock location poses a hazard to public navigation because boaters must back out from the fuel dock in a busy, narrow channel, often with boats moored on both sides and many kayakers paddling in the area. GHFC particularly focuses on the hazards that the proposed location will present to inexperienced boaters. The focus on novice boaters is not well taken since boaters have varying degree of skills, and the location and design of the fuel dock is neither inherently dangerous nor poses an unreasonable risk of collision for the general population of boaters. Similarly, the Board is not persuaded that the fuel dock unduly impacts the safety of kayakers since the testimony demonstrated that kayakers are present all over the bay, thus suggesting that kayaker safety is an issue that the whole harbor faces, not just the fuel dock site. Gig Harbor is a busy waterfront, and it is incumbent upon *all* boaters and kayakers to exercise due caution and to make prudent maneuvering choices.

7.

The narrowest 56.39 feet separation between the fuel dock and the Whittier dock, referred to by Mr. Moore as the “choke point,” is indeed a point or a small area of constriction. From that narrowest point, the width of the waterway between the two docks expands both landward and waterward. The 56.39 feet separation complies with the GHSMP’s setback requirements between boating facilities. Lack of visibility for boats backing out and concerns over maneuvering difficulties will be alleviated by the Marina’s Ingress/Egress Signage and Operation Plan, and the harbor’s no wake zone and speed limit of 3 miles per hour. The presence of the fuel dock attendant ready to direct boats and the fuel dock information posted on the

1 Marina's website will also help boaters moor safely, especially those who are not as experienced
2 or familiar with the harbor. Finally, DNR approved the proposed fuel dock and the Ingress/
3 Egress Signage and Operation Plan.

4 8.

5 GHFC cited *Mukai* and *Harborview Marina* to support its claim that the location of the
6 fuel dock creates a navigational hazard for fueling boats and boats entering and exiting the
7 Whittier dock. But those cases are distinguishable. In *Mukai*, the navigational conflict was
8 between Spinnaker's 52-slip moorage and Parkshore's 42-slip marina located in Lake
9 Washington. The waterway distance between the Spinnaker fixed pier and the tips of Parkshore
10 finger piers was only 36 feet, and Parkshore boaters had to make an "L" turn into the narrow
11 waterway to enter or exit their finger pier slips. The difficulty in entering and exiting their slips
12 caused Parkshore boaters to not leave their slips as often as they would like. *Mukai*, SHB Nos.
13 00-029 and 00-032 at FF 5, 11; COL 13. The Board in *Mukai* concluded that both Parkshore's
14 and Spinnaker's navigation rights were affected, and that on balance, modifying Spinnaker's 93-
15 foot fixed pier was necessary since it unreasonably interfered with navigation given the narrow
16 waterway between the two moorage facilities. *Id.* at COL 13. In contrast, the distance between
17 the fuel dock and the Whittier dock is 56.39 feet at its narrowest, and boats entering and exiting
18 either dock would not be required to turn since they can also back straight out. If boats chose to
19 turn, the configuration of the two docks would not require a ninety degree "L" turn within that
20 narrowest point of the channel.

1 In *Harborview Marina v. City of Gig Harbor*, SHB No. 99-013 (2000), a condominium
2 owner's association (Harborview) appealed a shoreline substantial development permit
3 authorizing a 110-foot-extension of an existing fishing dock further into Gig Harbor Bay.
4 *Harborview Marina*, SHB No. 99-013 at FF II, III. Harborview's private covered marina and the
5 Philpot gas fuel dock were located adjacent to the fishing dock, whose extension would have
6 come within 13 to 22 feet of the Philpot fuel dock. The Board ultimately concluded that the
7 proposed dock extension should be shortened and narrowed because it interfered with safe public
8 navigation around the fuel dock, not because it impeded navigation of boaters moored in the
9 Harborview marina slips. *Id.* at COL VIII, IX. The Board specifically concluded that although
10 extending the fishing dock would complicate access to the Harborview slips and require careful
11 maneuvering, "other slips with a similar challenge have found the access tight, but workable,"
12 and that that Harborview was "not entitled to favored treatment simply because it exists." *Id.* at
13 COL VI. Unlike the facts in *Harborview Marina*, the proposed fuel dock will not add any
14 structures extending into the waterway between the fuel dock and Whittier dock, but will remove
15 the existing finger pier that extends into the waterway, creating more room to maneuver.
16 Moreover, the narrowest 56.39 feet separation between the fuel dock and the Whittier dock
17 complies with the GHSMP's setback requirements between boating facilities, and is over 30 feet
18 longer than the distance between the Philpot gas dock and the proposed fishing dock in
19 *Harborview Marina*.

20 9.

21 GHFC also argues that the Marina should have considered other sites for the proposed

1 fuel dock that would not have required fueling boats to back out in a confined water channel.
2 GHFC presented testimony that the location perpendicular to the end of the Bayview pier was a
3 preferable or safer alternative site under certain wind and current conditions due to better
4 visibility and more maneuvering space. Paterson Testimony; Moore Testimony. But GHFC
5 provides no legal authority for the Board to require the Marina to consider alternative sites in an
6 application for an SSDP. So long as public right to navigation is not impaired and the fuel dock
7 complies with other policies of the SMA and GHSMMP, the Marina need not consider alternative
8 sites.

9 10.

10 Even if consideration of alternative sites was required, the Marina presented evidence at
11 the hearing that it had discussed with the City the end of the Bayview pier as an alternative site
12 for the fuel dock. That location, however, would require further extension of the fuel line, and in
13 the event of an oil spill or fire, one occurring in the outer harbor would be more difficult to
14 contain than one closer to shore. Stronger winds and currents in the outer harbor also create
15 navigability challenges with the end of the pier location, and weigh against siting the fuel there.
16 Moist Testimony; Layton Testimony.

17 11.

18 GHFC also asserts that the fuel dock will unreasonably restrict the movement of boats
19 seeking to enter and exit the Whittier dock. In support of this claim, GHFC relies on Vern
20 Moore's and Kae Peterson's testimony that entering and exiting the Whittier dock will be more
21 difficult with large boats fueling adjacent to the dock. But Mr. Moore testified that the narrower

1 waterway between the two docks still provided sufficient room to maneuver despite his
2 discomfort in operating in the tight space. He also specifically testified that 40-to 50- foot long
3 boats could exit the waterway by backing out past the end of the Whittier dock and turn bow
4 facing out. This is consistent with Mr. Layton's and Mr. Babich's testimony that boats could exit
5 the fuel dock and Whittier dock in a number of ways depending on the size of the boat and the
6 operator's skill. Although careful maneuvering is required, the situation is not unworkable
7 because the turning and backing movement required is similar to coming in and out of double
8 loaded slip configurations that is the norm in Pacific Northwest marinas. Layton Testimony.

9 12.

10 Even if GHFC satisfied its burden of proving that the fuel dock unreasonably restricted
11 movement of its boats, the competing interests in this context would be those between two
12 adjacent private pier owners. Consistent with its prior decisions, the Board concludes that to the
13 extent the SMA requires any balancing of ingress and egress issues between neighboring piers,
14 the City performed that balancing through the requirement of a 12-foot setback from any
15 adjacent property or lease line in its GHSMP. *See Foreman v. City of Bellevue*, SHB No. 14-023,
16 COL 27 (2015); *Yousefian v. City of Mercer Island*, SHB No. 12-010, COL 10 (2013). That
17 setback requirement provides a 24 feet separation between adjacent boating facilities. As
18 discussed, the location of the fuel dock complies with this setback.

19 13.

20 In sum, GHFC did not present sufficient evidence to meet its burden of proving that the
21 Marina's fuel dock will impair safe navigation or unreasonably restrict movement of boats

1 moored at the Whittier dock. GHFC did not demonstrate that the fuel dock is inconsistent with
2 the GHSMMP or the SMA's policies and implementing regulations.

3 14.

4 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based
5 on the foregoing findings and conclusions, the Board enters the following:

6 **ORDER**

7 The Shoreline Substantial Development Permit to restore the Marina's diesel fuel dock as
8 granted and conditioned by the City of Gig Harbor Hearing Examiner is AFFIRMED.

9 SO ORDERED this 28th day of September, 2015.

10 **SHORELINES HEARINGS BOARD**

11 KAY BROWN, Member

12 ROB GELDER, Member

13 LILY SMITH, Member

14
15
16
17
18 Carolina Sun-Widrow, Presiding
19 Administrative Appeals Judge

20
21

RECEIVED

MAY 28 1982

SHORELINES
HEARINGS BOARD

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

1
2
3 IN THE MATTER OF A)
SUBSTANTIAL DEVELOPMENT PERMIT)
4 ISSUED BY THE CITY OF ANACORTES)
TO HAROLD W. MOUSEL,)
5)
SAVE FLOUNDER BAY, AN)
6 UNINCORPORATED ASSOCIATION,)
SHELDON ROTCHEL and ROBERT)
7 WARFIELD,)
8 Appellants,)
9 v.)
10 HAROLD W. MOUSEL and THE)
CITY OF ANACORTES,)
11 Respondents.)
12

SHB No. 81-15

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

13 This matter, the request for review of a substantial development
14 permit issued by the City of Anacortes to Harold W. Mousel came before
15 the Shorelines Hearings Board, Nat W. Washington, Chairman, presiding,
16 Gayle Rothrock, David Akana, Richard A. O'Neal, Frank Hansen, and
17 Robert Landles, at a hearing in Anacortes on July 27 and 28, 1981.

18 Appellants were represented by their attorney J. Richard Aramburu;

1 respondent Harold W. Mousel was represented by his attorney James E.
2 Anderson; respondent City of Anacortes was represented by Stephen
3 Mansfield, City Attorney. Court Reporter Lois Fairfield reported the
4 proceedings.

5 Having heard the testimony, having examined the exhibits, having
6 viewed the site of the proposed development, and being fully advised,
7 the Shorelines Hearings Board makes the following

8 INTRODUCTION

9 Although we have concluded that the subject substantial
10 development permit is invalid due to inadequate public notice, we
11 recognize that the issue is one of first impression which is not
12 finally settled by our decision.

13 A full hearing has been held. In an effort to avoid the necessity
14 of a second hearing on the merits, in the event our decision on notice
15 is not upheld, we are making Findings of Fact and Conclusions on all
16 the issues presented to us.

17 FINDINGS OF FACT

18 I

19 Respondent Harold W. Mousel on April 8, 1981, was granted a
20 shoreline substantial development permit (No. 85) by the City of
21 Anacortes, through its Planning Commission, to develop a marina within
22 the confines of Flounder Bay. The permit is for the construction of
23 54 private, open-mooring berths and 52 automobile parking spaces. The
24 mooring berths will be located on waters of the state, but the
25 underlying land is the property of respondent. The parking spaces

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 | will be on property of the respondent located on the artificial spit
2 | jetty which extends in a westerly direction from the mouth of the
3 | harbor and separates Flounder Bay from the open water of Burrows Bay.
4 | The location and nature of the proposed development is more
5 | particularly set forth in attachment "A" hereto.

6 | II

7 | Flounder Bay was at one time a natural bay protected by a natural
8 | spit running in an easterly-westerly direction with a harbor entrance
9 | at each end of the spit. To assist in understanding the situation
10 | there is appended as Attachment "B" an aerial photograph of Flounder
11 | Bay and its environs, which is appellant's exhibit 11(a) in reduced
12 | size.

13 | Before the advent of the Shoreline Management Act, the natural bay
14 | was remodeled into an artificial harbor with a shape approximating a
15 | right triangle in which the hypotenuse is not straight but is deeply
16 | undulating.

17 | The whole configuration of the shoreline presents an unnatural
18 | picture of geometrically precise curves and straight lines. The
19 | entire shoreline, except for a small portion which is bulkheaded, is
20 | protected by unsightly but highly practical rock riprap.

21 | The northerly shore along the undulating hypotenuse of the
22 | triangle consists of four artificially constructed peninsulas called
23 | cays which provide waterfront residential sites and four artificially
24 | developed narrow embayments, called lobes, which provide water
25 | frontage, boating access, and moorage for the residential sites.

26 | FINAL FINDINGS OF FACT,
27 | CONCLUSIONS OF LAW & ORDER

1 The natural sand spit which once formed the southerly margin of
2 the bay has been heightened and widened by fill material and is
3 protected on both sides by rock riprap. The natural entrance at the
4 westerly end of the spit has been completely filled. Thus, the
5 southerly leg of the triangle which separates Flounder and Burrows
6 Bays is now an artificially constructed jetty which protects the
7 harbor. It also provides access and automobile parking to serve many
8 of the existing boat mooring berths and has sufficient space to
9 provide access and parking for the proposed marina development.

10 The entire westerly shore of the triangular bay supports an
11 assortment of boat mooring facilities including two large, covered
12 moorages.

13 The moorage facilities now in Flounder Bay are capable of mooring
14 about 500 boats. In addition to the development being proposed by
15 respondent Mousel, there is a pending proposal by Skyline Marina for
16 an additional 108 moorage berths, as shown by Figure 2-2 of
17 Exhibit A-3.

18 III

19 The City of Anacortes has established a fairway 130 feet in width
20 for passage of boats in and out of the harbor. The entrance to the
21 harbor is only about 85 feet in width. The marina, as authorized by
22 the substantial development permit issued by the city, will not
23 encroach upon the fairway.

24 IV

25 Appellants contend the proposal will increase traffic and make
26 navigation in the bay more difficult and more dangerous and in
27

1 addition will (1) cause a substantial deterioration of water quality,
2 (2) increase noise levels, (3) increase air pollution, (4) cause
3 substantial aesthetic deterioration, (5) limit recreational use of the
4 bay and cause a reduction of open water for boats seeking refuge from
5 storms. However, appellants' chief contention and the contention to
6 which the bulk of appellants' evidence was directed is that
7 respondents' proposed marina development will result in congestion of
8 boat traffic such that navigation in the bay will be made difficult
9 and dangerous.

10 v

11 Under the Anacortes Shoreline Master Program (ASMP), the area in
12 which the proposed development will be located has been designated as
13 Urban II (map between pages 16 and 17). At page 11 the ASMP provides
14 that it is the intent to "encourage the location of water dependent or
15 water related uses attractive to the public in Urban II." Marinas are
16 specifically identified as a permitted use. It has also been zoned to
17 provide for marinas.

18 VI

19 The proposed development will result in a deterioration of water
20 quality, an increase in noise levels, and an increase in the levels of
21 air pollution. The additional mooring floats will cause some
22 reduction of surface water circulation which will result in an
23 increase in the accumulation of unsightly floatable waste material.
24 However, the deterioration in the quality of the environment resulting
25 from these adverse impacts will not be substantial and will be more

1 than offset by the benefits to navigation which will result from the
2 increased availability of moorage.

3 VII

4 Whether the increases in the ratio of moored boats to open water
5 in Flounder Bay will result in increasing or decreasing the quality of
6 the view from the adjacent residential area and from the immediate
7 perimeter of the bay depends on the preference of the individual
8 observer. To some, the sight of closely moored boats of many sizes,
9 shapes, and colors adds an interesting nautical dimension to a view,
10 particularly when there is a vista of open water, islands and
11 mountains in the background. To others, the sight of closely moored
12 boats is a clutter and an intrusion on an otherwise natural scene.
13 The later point of view is most apt to prevail when a pristine natural
14 bay or harbor is involved, and such is not the case here. The
15 impairment of view, if any, will be minimal.

16 VIII

17 The proposed development will lessen the area of open water in the
18 bay and might tend to adversely affect somewhat the small boat
19 recreational use of the bay itself for recreational boating. However,
20 the evidence presented at the hearing did not establish that the small
21 bay itself is used to any substantial degree for recreational boating.

22 IX

23 The proposed marina extension will reduce the amount of open water
24 available in the bay for use as a refuge for boats and seaplanes
25 during storms, but it was not established that there would not be
26 ample, open water remaining to adequately accommodate this use.

X

1
2 Flounder Bay, with its largely man-made protective spit and narrow
3 85 foot entrance, was obviously designed and constructed to reduce
4 wave action and to produce a safe moorage for boats. It is now being
5 successfully used for this purpose.

6 As a general rule, the expansion of an existing marina rather than
7 the construction of a new facility results in less total adverse
8 impact on the environment. Unless there are compelling
9 non-environmental reasons against it, protection of the environment
10 would be furthered by utilizing Flounder Bay to the maximum practical
11 extent for boat moorage. The City of Anacortes has opened the door to
12 such use by allowing all of the bay south of the south boundary of the
13 130 foot fairway to be utilized for moorage and moorage access.

XI

14
15 The proposed marina development will narrow the navigation channel
16 bayward from the narrow entrance to the bay. It will, to some extent,
17 restrict the freedom of movement of boats in the channel and will
18 cause some reduction in the safe speed of boats operating within the
19 narrowed channel. During heavy boating activity on holidays and
20 weekends in July and August, the result will be some increase in
21 traffic congestion within the bay. The evidence did not establish
22 that the lowered speed and resulting increase in traffic congestion
23 would result in an unreasonable threat to navigational safety.

XII

24
25 Boats moored in the segment of the proposed marina development
26 located between the turn in the channel and the entrance to the bay
27

1 will partially obscure the view from boats approaching the turn from
2 both directions. Boats approaching the turn while traveling near the
3 center of the channel (the deepest part) will, because of the wide
4 angle of the turn (about 120°) have a line of sight which is long
5 enough to allow ample time and distance for evasive action.

6 The soundings and measurements taken by appellants' witness
7 Richard Threet (exhibit A-7) indicates that the fairway (channel)
8 adjacent to the proposed marina is about 12 to 13 feet deep at the
9 center, becoming somewhat more shallow at the outer margins. The
10 depths at the outer margins varies between 9 and 11 feet.

11 XIII

12 The only element of the proposed marina which might pose an
13 unacceptable navigational risk is the placement of 14 berths in such a
14 way that boats leaving them must back into the fairway. This is not
15 desirable and should be avoided, if possible.

16 The question to be determined is whether the increased risk of
17 collisions or groundings will be offset by the benefits to navigation
18 which will result from the increased availability of moorage.

19 The Port of Bellingham which has about 1,000 berths with some
20 boats as long as 80 feet has a section of 40 berths opening directly
21 into the main channel. It is the only marina in the area which has
22 such an arrangement. No safety or congestion problems have resulted
23 from this arrangement at the Bellingham facility. Some witnesses
24 expressed fears regarding the 14 berths opening directly into the
25 fairway, but it was not shown that this berthing arrangement poses any

1 more than a minimal safety risk. In all probability there are ways
2 this minimal risk could be lessened; such as by instituting traffic
3 control measures. Safety measures might well be instituted by the
4 cooperative efforts of the owners and lessees of moorage space, or in
5 the alternative, they could be instituted by the City of Anacortes.

6 The minimal safety risk, although requiring attention, is offset
7 by positive factors of public benefit. The Anacortes area is an area
8 of high boating use where there is a high, unmet demand for moorage.
9 Environmentally acceptable areas available for moorage are limited,
10 making it environmentally preferable to add additional berths to
11 existing moorage facilities rather than developing new areas.

12 XIV

13 The subject development as applied for did not include dredging.
14 It appears, however, that some additional dredging will be necessary
15 if all of the proposed mooring berths are to be made usable for other
16 than shallow draft boats. An already-existing substantial development
17 permit (No. 56) issued by the City of Anacortes on April 26, 1978,
18 will allow the necessary additional dredging to take place. The
19 environmental impact statement mistakenly stated that no additional
20 dredging would be required. This mistake is of minimal environmental
21 importance, since by issuing the existing shoreline development
22 permit, the City of Anacortes indicated that it had already been
23 determined that the dredging was compatible with ASMP and chapter
24 90.58 RCW. WAC 173-14-060 provides that a substantial development
25 permit once issued is operative for five years from the date of

1 issuance, unless the permit itself specifies an earlier termination
2 date. Substantial development permit No. 56 (exhibit A9(b)) does not
3 provide for an earlier termination date.

4 XV

5 In addition to the substantive issues heretofore discussed, the
6 appellants raised a basic procedural issue by contending that the city
7 did not give any notice of the filing of the application for the
8 substantial development permit as required by RCW 90.58.140(4)(b). It
9 was admitted by the environmental hearings officer of the city of
10 Anacortes that notice of filing was not given by the city as required
11 by RCW 90.58.140(4)(b) and section 11(b) of the ASMP. In fact the
12 city completely failed to follow the notice requirement of
13 RCW 90.58.140(4)(b) and its own posting requirements set forth in
14 section 11(b) of ASMP. No notices were posted on the subject property
15 or anywhere in the vicinity of the proposed development, and no
16 notices were mailed to owners of record within 300 feet of the subject
17 property.

18 Two notices were posted in the central business district at the
19 post office and the City Hall, both of which are much further than 300
20 feet from the subject property. No claim was made by appellants that
21 the notice of filing was not properly published in a newspaper of
22 general circulation in the City of Anacortes.

23 Sheldon Kotchel, president of Save Flounder Bay, an unincorporated
24 association consisting of some of the residents of the Skyline
25 Community and some of the owners and renters of moorage space in the

1 existing marinas, responded on March 20, 1981, to the EIS of the
2 proposed marina on behalf of the association's members. He is also an
3 individual appellant in this matter.

4 R. L. Carlson, president of the Board of Trustees of Skyline Beach
5 Club on March 12, 1981, responded to the EIS on behalf of the members
6 of the club and spoke in opposition to the development at the hearing
7 before the planning commissioners. The owners of lots in the Skyline
8 residential development are automatically members of the club. In
9 speaking at the planning commission hearing, Mr. Carlson stated that
10 each of the approximately 1000 members had been polled regarding their
11 views on the subject of additional commercial moorage in Flounder
12 Bay. The notice however did not specifically mention the proposed
13 Mousel development. He stated that about 528 ballots were returned.
14 There were 332 votes against additional moorage and 196 votes for.
15 The trustees of the club voted to actively oppose the proposed marina.

16 Mr. and Mrs. Robert Griesel, residents of Skyline, and owners of a
17 condominium moorage responded to the EIS on expressing opposition to
18 the Mousel Marina. (They indicated in their letter that as of March,
19 1981, many other people were aware of the proposed marina and would
20 attend the planning commission meeting to express opposition.)

21 Opposition to the proposed development was expressed both by
22 responses to the EIS and by statements at the public hearing before
23 the planning commission. Five written citizen responses were made to
24 the EIS, four being opposed and one being in support of the project.
25 Six citizens expressed opinions at the public hearing on April 8,

1 1981, three expressing opposition and three expressing support. A
2 broad segment of the residents in the immediate area and the owners
3 and lessors of moorage space in the bay had by February and March of
4 1981 gained actual notice of the application and the hearing.

5 The application for the permit was filed on May 24, 1979, but
6 broad public awareness does not appear to have been generated until
7 February and March of 1981. It was during this period between May,
8 1979, and March, 1981, that the city made one of its most important
9 decisions relating to the project. This was the decision to establish
10 the width of the fairway channel at 130 feet.

11 XV

12 CONCLUSIONS OF LAW

13 NOTICE ISSUE

14 I

15 As discussed in Finding of Fact XV the environmental officer of
16 the City did not give notice of the filing of the permit application
17 as required by RCW 90.58.140(4)(b), WAC 173-14-070 and Section 11 of
18 ASMP.¹ Section 11 of ASMP provides in part as follows:

19 (b) Upon receipt of the application, the
20 Environmental Officer shall instruct the applicant to
21 publish notices of the application once a week for
two consecutive weeks in a newspaper of general

22
23 1. The issue of notice arose late in the hearing during the
24 cross-examination of the environmental officer of the city.
25 The issue had not been set forth in the pre-hearing order.
26 Respondent Mousel, however had already opened up the issues of
hearings and notice by moving to dismiss appellants' case on
the ground that they had failed to exhaust their
administrative remedy before the planning commission. This
issue likewise had not been set forth in the pre-hearing order.

1 circulation in the City of Anacortes. In addition,
2 the Environmental Officer shall post at least four
3 copies of the notice prominently on the subject
4 property or in conspicuous public places within 300
5 feet thereof. Within thirty days of the final
6 publication of notice, any interested person may
7 submit his views upon the application, in writing, to
8 the Environmental Officer. All persons submitting
9 views or requesting notice shall be entitled to
10 receive a copy of the action taken on the
11 application. (Emphasis added.)

(c) As a part of the substantial development permit
12 review process, the Planning Commission may, at their
13 discretion, provide for a public hearing on the
14 application, particularly when: (Emphasis added.)

(i) the proposed development has broad public
15 interest.

(ii) the proposed development will require a
16 shoreline conditional use or a variance from the
17 provisions of this Master Program.

(A hearing shall not be more than 15 days after the
18 initial 30 day review period.)

(d) Not more than 5 working days after the 30 day
19 review period, or following a hearing, if necessary,
20 the Environmental Officer shall recommend approval or
21 denial of the permit to the Planning Commission who
22 shall approve or deny the permit at their next
23 meeting. If the Planning Commission does not act on
24 the permit the decision of the Environmental Officer
25 shall stand. (Emphasis added.)

26 RCW 90.58.140(4) provides in part as follows:

(4) Local government shall require notification of
27 the public of all applications for permits governed
28 by any permit system established pursuant to
29 subsection (3) of this section by ensuring that:

(a) A notice of such an application is published
30 at least once a week on the same day of the week for
31 two consecutive weeks in a legal newspaper of general
32 circulation within the area in which the development
33 is proposed; and

(b) Additional notice of such an application is
34 given by at least one of the following methods:

(i) Mailing of the notice to the latest recorded
35 real property owners as shown by the records of the
36 county assessor within at least three hundred feet of
37 the boundary of the property upon which the
38 substantial development is proposed;

1 (ii) Posting of the notice in a conspicuous
2 manner on the property upon which the project is to
be constructed; or

3 (iii) Any other manner deemed appropriate by
4 local authorities to accomplish the objectives of
5 reasonable notice to adjacent landowners and the
6 public. (Emphasis added.)

7 Such notices shall include a statement that any
8 person desiring to submit written comments concerning
9 an application, or desiring to receive a copy of the
10 final order concerning an application as
11 expeditiously as possible after the issuance of the
12 order, may submit such comments or such requests for
13 orders to the local government within thirty days of
14 the last date the notice is to be published pursuant
15 to subsection (a) of this subsection. Local
16 government shall forward, in a timely manner
17 following the issuance of an order, a copy of the
18 order to each person who submits a request for such
19 order.

20 If a hearing is to be held on an application,
21 notices of such a hearing shall include a statement
22 that any person may submit oral or written comments
23 on an application at such hearing.

24 WAC 173-14-070 provides as follows:

25 NOTICE REQUIRED. Upon receipt of a proper
26 application for a shoreline management substantial
27 development, conditional use, or variance permit,
28 local government shall insure that notices thereof
29 are published at least once a week on the same day of
30 the week for two consecutive weeks in a newspaper of
31 general circulation within the area in which the
32 development is proposed. In addition, local
33 government shall insure that additional notice of
34 such application is given by at least one of the
35 following methods:

36 (1) Mailing of the notice to the latest recorded
37 real peroperty owners as shown by the records of the
38 county assessor within at least three hundred feet of
39 the boundary of the property upon which the
40 substantial development is proposed.

41 (2) Posting of the notice in a conspicuous
42 manner on the property upon which the project is to
43 be constructed or;

44 (3) Any other manner deemed appropriate by local
45 authorities to accomplish the objectives of
46 reasonable notice to adjacent landowners and the
47 public. (Emphasis added.)

1 An affidavit that the notice has been properly
2 published, and/or as applicable, posted or deposited
3 in the U.S. mail pursuant to this section shall be
4 affixed to the application. All such notices shall
5 include a statement that within thirty days of the
6 final newspaper publication, any interested person
7 may submit his written views upon the application to
8 the appropriate local government or notify the local
9 government of his desire to receive a copy of the
10 action taken upon the application. All persons who
11 notify the appropriate local government of their
12 desire to receive a copy of the final order shall be
13 notified in a timely manner of the action taken upon
14 the application. If a hearing is to be held on an
15 application, notices of such a hearing shall include
16 a statement that any person may submit oral or
17 written comments on an application at such hearing.
18 (Emphasis added.)

19 II

20 The effect of failing to follow the notice procedures set out in
21 RCW 90.58.140(4) or the failure to follow the notice procedure set out
22 by a shoreline master program, as far as can be determined, has not
23 been directly ruled upon by the Shorelines Hearings Board or by the
24 Courts.

25 In the recent shoreline case of Whittle v. City of Westport, SHB
26 No. 81-10 (1981), the issuance of a substantial development permit was
27 reversed on a number of grounds including the failure of the City to
give notice as required by its own regulations. Whether the failure
to substantially comply with 4(b) notice requirement would alone have
been enough to bring about a reversal was not before the Board and was
not decided in that case. In this case, however, this issue is
squarely before us.

1 III

2 It is clear that RCW 90.58.140(4) requires the giving of two
3 separate and distinct kinds of notice when an application for a
4 substantial development permit is filed. One type of notice is
5 prescribed in subsection (4)(a). It serves primarily to give notice
6 to the general public of the area. It consists of the publication of
7 a notice in a newspaper of general circulation in the area (hereinafter
8 referred to as "4a notice"). The other distinct type of notice is set
9 forth under subsection (4)(b). It primarily serves to notify adjacent
10 property owners and those members of the public who use the shoreline
11 for recreation and commercial purposes (hereinafter referred to as "4b
12 notice").

13 Local agencies are given three optional methods for giving 4b
14 notice, (1) mailing to adjacent property owners; (2) posting in a
15 conspicuous manner on the property on which the substantial
16 development is proposed; or (3) any other manner deemed appropriate by
17 local authorities to accomplish the objectives of reasonable notice to
18 adjacent landowners and the public.

19 The local authorities of Anacortes (City Council and Mayor)
20 elected to give the required 4b notice by utilizing the third option
21 set forth in (4)(b)(iii). They deemed that it would be appropriate to
22 give notice to the adjacent landowners and the public by posting at
23 least ~~four~~ copies of the notice prominently on the subject property or
24 in conspicuous public places within 300 feet thereof.

IV

1
2 Public hearings in the permit process are encouraged by
3 RCW 90.58.140, WAC 173-14-080, and section 11(c) of ASMP, but are not
4 mandatory. The shorelines act appears to recognize that public input
5 is more effective if it comes early in the process before the minds of
6 those who influence decisions have become set. This means that public
7 input to be truly effective at this stage needs to be directed
8 initially at the staff personnel who will study the proposal and make
9 the highly important recommendation to the final local decision maker
10 or makers. It is apparently for this reason that public notice is
11 required to be given at the very beginning of the process, when the
12 permit application is first received, rather than waiting for notice
13 to first be given for a public hearing which, if held, usually takes
14 place near the end of the permit granting process.

15 It is particularly important in Anacortes that public input reach
16 the environmental officer before he determines what his recommendation
17 to the planning commission will be. This is true not only because it
18 is broadly recognized by observers of the administrative process that
19 staff recommendations have an excellent chance of being accepted, but
20 for the additional specific reason that section 11(d) of ASMP provides
21 that the recommendation of the environmental officer will stand if the
22 planning commission fails to expeditiously act on the permit.

V

23
24 The requirement that 4b notice be given is a substantial and
25 mandatory provision. It is not a mere technicality which can be
26

1 avoided by waiver or estoppel. It clearly appears to have been
2 brought about by a strong recognition on the part of the legislature
3 that notice published in a newspaper may give constructive notice but
4 that in actual practice it seldom gives real notice to the people who
5 are most directly concerned.² Those most directly concerned are the
6 property owners adjacent to a proposed shoreline development and the
7 members of the public who utilize the immediate area for recreational
8 or commercial purposes.

9 VI

10 The Shoreline Management Act originally provided for notice only by
11 publication in a newspaper (4a notice), but the legislature in 1976
12 amended RCW 90.58.140(4) by specifically requiring that additional
13 notice directed primarily at adjacent landowners and members of the
14 public utilizing the shoreline for recreational and commercial
15 purposes be given. This amendment, which established the 4b notice
16 requirement, was a part of substitute House Bill 676 which passed
17 unanimously in both the House and the Senate.

18 The history of the notice provision in State Environmental Policy
19 Act (SEPA), Chapter 43.21C RCW, further indicates the concern the
20 legislature had for giving adequate notice on matters relating to the
21 environment and further indicates legislative distrust of relying
22 mainly on published notice.

23
24 2. The Kitsap County Superior Court case of Trask v. City of Winslow,
25 No. 69405 (1976) was a shoreline case involving WAC 173-14-070 and a
26 notice of application given only by publication. The Judge in his
27 memorandum decision commented on the published notice stating, "It is
common knowledge that few people read such newspaper notices..."

1 In 1973 the legislature established a limitation period for
2 commencing action based on a violation of SEPA. For the purpose of
3 stating the limitation period, it was required only that notice be
4 published in a newspaper of general circulation in the area. However,
5 in 1974 the legislature added a requirement that notice also be mailed
6 to abutting property owners. (Section 2 Chapter 179, Laws of 1974 1st
7 Ex. Sess.) In 1977 the legislature strengthened the mailing provision
8 and in addition provided for posting notice on the property in a
9 conspicuous manner as an alternative to mailing. (Section 1 Chapter
10 278 Laws of 1977, 1st Ex. Sess.)

11 VII

12 Proper 4b notice makes it probable that neighboring property
13 owners and those members of the public who use the shoreline area for
4 recreation and commercial purposes will receive actual notice of the
5 proposed development at an early stage in the proceedings. Early
6 notice will afford them the opportunity of making a meaningful input
7 at an early stage. Since a public hearing is optional under the
8 Shoreline Management Act, a written statement, which the statutory
9 notice invites, may be the only way members of the public will have of
0 expressing a viewpoint.

1 Only by actually receiving early notice as provided by section 4b
2 can neighboring property owners and users of the subject shoreline be
3 assured of an opportunity to provide input into the SEPA process which
4 in some way is usually involved in processing a shoreline substantial
5 development permit. SEPA encourages and provides for notice and
6 public hearings, but notice and hearings are not mandatory.

1 VIII

2 We conclude that it was intended by the legislature that
3 substantial compliance with RCW 90.58.140(4)(b) be mandatory and not
4 discretionary, and that unless substantially complied with, would
5 deprive any local quasi-judicial officer or body of jurisdiction to
6 issue a permit.

7 IX

8 Although not required by the Shorelines Management Act to do so,
9 the planning commission exercised its option of holding a public
10 hearing on the permit application as provided by WAC 173-14-080 and
11 section 11(c) of ASMP. The hearing was held on April 8, 1981.
12 Appellants Kotel and Warfield attended the hearing, but did not
13 participate. The environmental officer of the city gave his report
14 which was favorable to the project and a few people spoke for and
15 against it. After adjourning the hearing, the commission went into
16 session. After some discussion the commission voted to approve the
17 permit with conditions as appealed. The minutes indicate that the
18 permit and conditions were adopted, without amendment, as presented.

19 A hearing at this late stage was of limited value for providing
20 meaningful public input. From the minutes of the hearing and meeting
21 (exhibit R-9) it appears that the environmental officer had already
22 determined to recommend issuance of the permit, and that the permit in
23 final form with conditions had already been prepared for submission to
24 the commission. It was to prevent meaningful public input from being
25 limited to a presentation at a late-stage public hearing, such as this
26

1 one, that notice inviting public participation is required by statute
2 and regulation to be given when a permit application is first filed.
3 In a very practical way, RCW 90.58.140(4)(b) further encourages
4 meaningful participation by requiring more than just the traditional
5 notice by publication. The City Council of Anacortes in a very
6 practical way also did its part to encourage meaningful public input
7 at an early stage in the permit process. By the enactment of section
8 11b of ASMP the council required conspicuous visual notice to be
9 posted where it would most likely attract the attention of nearby
10 property owners and members of the public utilizing the shoreline and
11 water area for recreational and commercial purposes.

12 X

13 The attendance of appellants Kotchel and Warfield at the
14 non-mandatory hearing held on April 8, 1981, did not amount to a
15 waiver and does not estop them from raising the issue that the city
16 completely failed to give the mandatory 4b notice which should have
17 been given in May of 1979, when the permit application was filed.
18 Neither did the submission by appellant Kotchel on March 21, 1981, of
19 a letter of response to the Draft EIS amount to a waiver or estoppel
20 of his right to object to the failure of the city to give the
21 mandatory notice.

22 The fact that broad public awareness of the project had been
23 gained by February and March of 1981 does not excuse the failure to
24 give the mandatory 4b notice, particularly since consideration of the
25 decision regarding the permit began when the permit was filed in May
26 of 1979.

XI

On the strongly contested issue of navigation safety the evidence was conflicting and almost evenly balanced. The issue was close but it was determined that on the basis of the evidence presented the appellants had not sustained their burden of proof.

It was a close question before the Board and may well have been a close question as far as the city decision makers were concerned. It was a close issue which might possibly have been decided the other way by the environmental officer and the planning commission had other interested persons been alerted to the pendency of the permit application by notice posted according to the law.

Had the planning commission concluded that the marina would pose an unacceptable hazard to navigation, the position of the parties might well have been reversed, with the city and Mr. Mousel being appellants with the burden of proof on this close issue.

XII

The giving of a notice in substantial compliance with RCW 90.58.140(4), WAC 173-14-070 and section 11 of ASMP is mandatory and jurisdictional. The failure of the city to substantially comply with the 4b notice requirement was fatal to the jurisdiction of the planning commission. Consequently, the substantial development permit issued by the commission is invalid.

XIII

It appears that there has been no case which has determined the legal consequences of failing to substantially comply with the notice

1 provisions of RCW 90.58.140(4), so it has been necessary for us to
2 base our decision largely on our own interpretation of legislative
3 intent. We note, however, that our decision is consistent with a
4 respectable body of law developed in the field of zoning which is
5 closely related to shoreline management.

6 The general rule regarding notice provisions relating to hearings
7 on variances or special exceptions (conditional use) in connection
8 with municipal zoning is that statutory notice requirements are
9 mandatory and jurisdictional, and that a failure to substantially
10 comply will invalidate the granting or denying of the requested
11 permit. This general rule is well set forth in Anderson, American Law
12 of Zoning; second edition and annot., 38 ALR 3d 167.

13 Anderson section 20.17, p 491 states:

14 The tolerance of informality which is reflected in
15 the judicial decisions which relate to pleadings,
16 rules of evidence, and other aspects of board
17 procedure, are less evident where notice and
18 hearing are involved. These are regarded as
19 essential ingredients of administrative justice,
20 and substantial or even literal compliance with
21 requirements as required. Statutory notice and
22 hearing requirements are regarded as mandatory.

23 The following is set forth in annot., 38 ALR 3d 167, 174:

24 Requirements respecting notice of hearing on an
25 application to a zoning body or board for a
26 variance or special exception are commonly set
27 forth in zoning enabling statutes and/or in the
local ordinances adopted pursuant thereto, and in
construing such requirements, the courts have
generally adopted the view that they are mandatory
and jurisdictional. Thus, in a number of cases it
has been held or recognized that failure to comply
with the requirements of a statute or ordinance
respecting notice of hearing on an application for
a variance or special exception is fatal to the

1 jurisdiction of a zoning body or board, and that
2 such failure to comply will invalidate the granting
or denial of the requested variance or exception by
3 such body or board.²

4 The Washington Supreme Court in Glaspey and Sons, Inc., 83 Wn. 2d
5 707,521 p.2d 1173 (1974) gave a strict interpretation to notice
6 provisions for zoning hearings, which indicates that Washington should
7 be considered among the states following the general rule which
8 regards statutory notice requirements as being mandatory. The case
9 involved the adoption of amendments to a proposed zoning ordinance in
10 Yakima County, and the question was whether the notice adequately set

11
12 2. See Also: Hart v. Bayless (Ariz. 1959) 346 P. 2d 1101, 1108,
where it is stated:

13 (9) This court has held that, where a jurisdictional
14 notice is required to be given in a certain manner, any
15 means other than that prescribed is ineffective. See
16 Yuma County v. Arizona Edison Co., 65 Ariz. 332, 180
17 P.2d 868. This is so even though the intended
18 recipient of that notice does in fact acquire the
19 knowledge contemplated by the law. Such a rule is no
mere "legal technicality"; rather it is a fundamental
safeguard assuring each citizen that he will be
afforded due process of law. Nor may the requirement
be relaxed merely because of a showing that certain
complaining parties did have actual notice of the
proceeding.

20 Gallagher v. Board of Appeals (Mass 1966) 221 N.E. 2d 756,
21 758, where it is stated:

22 A defect in the general notice to the public cannot be
23 overcome by the appearance of some citizens and the
24 absence of objection to the notice. All citizens are
entitled to the statutory notice and the opportunity to
be heard after it is given.

1 forth the purpose of the hearing. The court held that the notice was
2 not adequate, that consequently procedural due process had not been
3 accorded, and that the resulting amendment was invalid in its inception.

4 The court at page 712 stated the basic reason for giving adequate
5 notice:

6 ...adequate notice of a public hearing has another,
7 more subtle, reason that goes beyond merely
8 enabling the opposition to give vent to its
9 feelings. (1) It is important that a board have
10 an opportunity to reach an "informed" decision.

11 (2) That reason is thwarted if interested parties
12 are prevented from presenting their view because of
13 a board's failure to adequately disclose the true
14 "purpose of the hearing." (3) In short, failure
15 properly to disclose the purpose of a hearing will
16 create a potential information vacuum.

17 (4) Unfortunately, the interested parties as well
18 as the public at large will be deprived on an
19 "informed" resolution of problems that are the
20 subject of the hearing. (Numbering supplied.)

21 The above statement makes four key points relating to an inadequate
22 statement of purpose, but the basic principles set forth could apply
23 with equal force to a potential information vacuum caused by
24 inadequate notice.

25 Courts which give a strict interpretation to notice provisions for
26 the adoption of zoning ordinances generally give the same strict
27 interpretation to notice provisions relating to variances and
28 conditional use. For this reason zoning notice decisions, whether
29 involving the adoption of zoning ordinances or the granting of
30 variances or conditional uses may be considered for guidance in
31 interpreting the notice provisions of the Shoreline Management Act.
32 The Glaspey case may thus be looked to for guidance in interpreting
33 the notice provisions of . RCW 90.58.140(4)(b).

1 The approval of the expansion of the marina, taking
2 into consideration that the result of approval would
3 have less adverse impact on nature than the creation
4 of an additional totally new marina, was a proper
5 action.

6 The Shorelines Hearings Board when the Eickhoff case, SHB No. 104
7 (1975) was before it stated the policy as follows:

8 Such representatives of the public interest have
9 concluded that the proposed expansion of Zittel's
10 Marina is in the best interests of the people of
11 Thurston County in that additional marina facilities
12 are undeniably needed and that such expansion will
13 have a lesser adverse effect on the overall
14 shorelines of Thurston County than the establishment
15 of new and/or other independent facilities.

16 XIV

17 Flounder Bay is located in a high boating use area, and is a
18 non-natural shoreline area. Its designation, therefore, in the ASMP
19 as Urban II which specifically encourages and provides for marinas was
20 in keeping with the policy act set forth in WAC 173-16-060(5)(c) which
21 provides:

22 (c) Master programs should identify locations that
23 are near high--use or potentially high--use areas
24 for proposed marina sites. Local as well as
25 regional 'need' data should be considered as input
26 in location selection.

27 The issuance of the subject substantial development permit for an
28 expansion of marina facilities in Flounder Bay was likewise in keeping
29 with the policy of WAC 173-16-060(5)(c).

30 XV

31 RCW 90.58.020 provides in part as follows:

32 In the implementation of this policy the public's
33 opportunity to enjoy the physical and aesthetic

34 FINAL FINDINGS OF FACT,
35 CONCLUSIONS OF LAW & ORDER

1 qualities of natural shorelines of the state shall
2 be preserved to the greatest extent feasible
3 consistent with the overall best interest of the
4 state and the people generally. To this end uses
5 shall be preferred which are consistent with control
6 of pollution and prevention of damage to the natural
7 environment, or are unique to or dependent upon use
8 of the state's shoreline. Alterations of the
9 natural condition of the shorelines of the state, in
10 those limited instances when authorized, shall be
11 given priority for single family residences, ports,
12 shoreline recreational uses including but not
13 limited to parks, marinas, piers, and other
14 improvements facilitating public access to
15 shorelines of the state, industrial and commercial
16 developments which are particularly dependent on
17 their location on or use of the shorelines of the
18 state and other development that will provide an
19 opportunity for substantial numbers of the people to
20 enjoy the shorelines of the state. (Emphasis added.)

21 Flounder Bay is not a natural shoreline area within the meaning of RCW
22 90.58.020, but even where it is necessary to alter natural conditions,
23 marinas are among the uses to be given priority. Consequently, the
24 issuance of the subject substantial development permit is in accord
25 with above set forth policy of RCW 90.58.020.

26
27
XVI

Under the circumstances set forth in Finding of Fact XIV, the
likelihood that further dredging may become necessary does not
constitute piecemeal development as envisaged by RCW 90.58.020.

XVII

Based on the evidence presented to it at the hearing, although the
issue was close, the Board has concluded that the issuance of the
substantial development permit No. 85 was consistent with Chapter
90.58 RCW and the ASMP, but due to failure of the City to give the

1 mandatory 4b notice, the granting of the substantial development
2 permit should be reversed.

3
4 XVIII

5 Any Finding of Fact which should be deemed a Conclusion of Law is
6 hereby adopted as such.

7 From these Conclusions the Board enters this
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27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

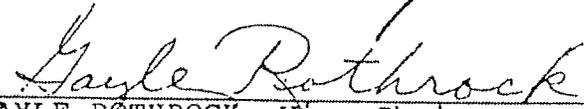
ORDER

The action of the City of Anacortes in granting the Shoreline Substantial Development Permit No. 85 is reversed and remanded to the City for further consideration.

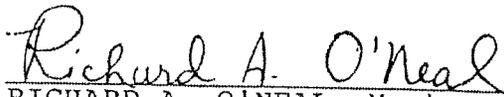
DONE this 23rd day of October, 1981.

SHORELINES HEARINGS BOARD


NAT W. WASHINGTON, Chairman


GAYLE ROTHROCK, Vice Chairman

(See Dissenting Opinion)
DAVID AKANA, Member


RICHARD A. O'NEAL, Member


ROBERT LANDLES, Member

(See Dissenting Opinion)
FRANK HANSEN, Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

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IN THE MATTER OF A SUBSTANTIAL)
DEVELOPMENT PERMIT GRANTED BY)
JEFFERSON COUNTY TO OLYMPIC SEA)
FARMS, INC.,)
SOUTH POINT COALITION,)
Appellant,)
State of Washington DEPARTMENT)
OF ECOLOGY and DEPARTMENT)
OF FISHERIES,)
Appellant-Intervenors)
v.)
JEFFERSON COUNTY and OLYMPIC)
FARMS, INC.,)
Respondents,)
and)
State of Washington DEPARTMENT)
OF NATURAL RESOURCES,)
Respondent-Intervenor)

SHB NO. 86-47

ORDER GRANTING
SUMMARY JUDGMENT

1 This matter, having come before the Board by Motion for Summary
2 Judgment filed by Appellant South Point Coalition ("South Point"), and
3 the Board having considered the following:

4 1. South Point's Motion for Summary Judgment filed March 16,
5 1987, together with Memorandum in Support and Exhibits A, B, C, D, E,
6 F (affidavit of S. Ralph), and affidavit of R. Meinig and its Exhibits
7 1, 2, 3, 4; and

8 2. Respondents Jefferson County, Olympic Sea Farms, Inc., and
9 Washington State Department of Natural Resources' Memorandum in
10 Opposition filed March 31, 1987, and Exhibits A (affidavit of K.
11 Perjanic) and B (minutes of Jefferson County Board of Commissioners'
12 meeting September 8, 1986);

13 And being fully advised, the Board finds it to be uncontested that
14 the affected Tribes, the Clallam and Skokomish Tribes represented by
15 the Point No Point Treaty Council, were not sent the County's
16 Determination of Non-significance ("DNS") and the environmental
17 checklist. Pursuant to WAC 371-08-031(2) of the Board's procedural
18 rules, and Civil Rule 56 of Superior Court, judgment as a matter of
19 law should be granted, based on that finding alone. See Moe v. DOE,
20 SHB No. 78-15 (1978). The undisputed facts are:

21 I

22 FINDINGS OF FACT

23 1. On June 16, 1987, Olympic Sea Farms, Inc. ("Olympic") filed
24 with Jefferson County an application for a shoreline substantial

25
26 ORDER GRANTING SUMMARY
27 JUDGMENT
SHB NO. 86-47

(2)

1 development permit. Olympic sought a permit to place 22 salmon net
2 pens at South Point in the Hood Canal, approximately five miles south
3 of the Hood Canal Bridge at the site of the former ferry terminal.

4 2. A Notice of Application was published in the Port Townsend
5 Leader starting June 18, 1986 and for two weeks thereafter. Notices
6 were sent to adjoining property owners and a notice was posted.

7 3. On July 21, 1986, the Jefferson County Board of Commissioners,
8 after review of the environmental checklist and other materials,
9 determined it was the lead agency for the project under SEPA, issued a
10 DNS for the project, determining that an environmental impact
11 statement was not required, and provided a comment period until August
12 6, 1987.

13 4. Neither the DNS nor the environmental checklist were sent to
14 the affected tribes, the Clallam and Skokomish Tribes represented by
15 the Point No Point Treaty Council.

16 5. The proposed project involves other agencies with jurisdiction
17 to approve or deny its placement or operation, in addition to
18 Jefferson County.

19 6. On September 22, 1987, after proceedings on September 8 and
20 15, 1987, the Jefferson County Board of County Commissioners issued a
21 conditioned Shoreline substantial development permit to Olympic Sea
22 Farms, Inc. A hearing had been held before the Jefferson-Port
23 Townsend Shoreline Management Advisory Commission on August 6, 1986 on
24
25

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27 JUDGMENT
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(3)

1 the application, with additional Shoreline Commission proceedings that
2 same month.

3 7. On October 27, 1986, appellant South Point Coalition filed a
4 timely appeal with the Board.

5 8. A pre-hearing conference was held on December 16, 1986, before
6 Judith A. Bendor, member and presiding, with all parties represented.
7 As a result of the conference and written materials received and
8 considered, pre-hearing orders were issued. A formal hearing was
9 scheduled for May 18-27, 1987 and June 1-5, 1987.

10 9. On March 16, 1987, Appellant's Motion for Summary Judgment was
11 filed. The Memorandum in Opposition was filed on March 31, 1987.

12 10. The Board reviewed the file herein, deliberated, and
13 authorized that the presiding member deliver an oral opinion to the
14 parties for their convenience. This was done by telephone conference
15 on April 17, 1987; all parties were represented.

16 From the facts, the Board reaches the following legal conclusions:

17 II

18 CONCLUSIONS OF LAW

19 1. Jefferson County is the lead agency which issued the DNS,
20 determined that an EIS should not be prepared, and provided a comment
21 period on that decision. The County failed to notify affected Clallam
22 and Skokomish Tribes of this decision, thereby violating the mandatory
23 requirements of WAC 197-11-340(2)(b) which states:
24
25

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(4)

1 The responsible official shall send the DNS and
2 environmental checklist to agencies with jurisdiction, the
3 department of ecology, and affected tribes, and each local
4 agency or political subdivision whose public services
5 would be changed as a result of implementation of the
6 proposal, and shall give notice under 197-11-510.
7 (Emphasis added)

8 2. A key goal of the State Environmental Policy Act
9 ("SEPA") is to ensure that governments plan, decide, and
10 implement the substantive provisions of the Act after being
11 informed of environmental concerns. RCW 43.21C.020(2),
12 43.21C.110(1)(e) and (1); See Settle The Washington State
13 Environmental Policy Act (1987) section 5(d) p. 33.

14 3. SEPA is a statute which places a heightened emphasis
15 on clear procedures geared to informed governmental
16 decision-making. Providing notice of a proposed action is
17 central to ensuring participation, such that governments have
18 the opportunity to engage in an informed process. See Glaspey
19 & Sons v. Conrad, 83 Wn.2d 707, 521 P.2d 1173 (1974).

20 4. An informed process is vitally important to the
21 integrity of SEPA, and therefore important for all
22 Washingtonians, not just for those who may not have received
23 notice and might thus be individually prejudiced. See Norway
24 Hill Preservation & Protection Association v. King County
25 Council, 87 Wn.2d 267, 552 P.2d 674 (1976). This Board's
26 Order, founded on SEPA, therefore does not and need not

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(5)

1 address whether prejudice to a particular party may have
2 occurred in this instance, despite respondents' contentions to
3 this effect, e.g., Strand v. Snohomish, SHB No. 85-4 (1985).

4 5. In shorelines matters, the evidence considered by this
5 Board may differ from that considered by the local permitting
6 entity. New or additional information may be introduced. San
7 Juan County v. Department of Natural Resources, 28 Wn.App. 796
8 626 P.2d 995 (1981). However, our review function cannot
9 perform mandated procedural requirements assigned to local
10 government. This has led us, in certain cases, to invalidate
11 local decisions where notice requirements were not met, e.g.,
12 Save Flounder Bay, et al. v. City of Anacortes and Mausel, SHB
13 81-15 (1982); Schwinge v. Town of Friday Harbor, SHB 84-31
14 (1985).

15 6. The soundness of such an approach is even clearer when
16 SEPA compliance issues are part of shorelines cases. A
17 consistent theme when reviewing for SEPA compliance is an
18 insistence on procedural regularity. The emphasis is on
19 informed choice. For threshold decisions, this means that
20 prima facie compliance with the procedural requirements of
21 SEPA must occur before the deciding agency reaches its
22 ultimate decision. Sisley v. San Juan County, 89 Wn.2d 78,
23 569 P.2d 712 (1977); Norway Hill, supra; Juanita Bay Valley
24

25
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(6)

1 Community Association v. Kirkland, 9 Wn.App. 59, 510 P.2d 1140
2 (1973).

3 We conclude, therefore, that the information gathering
4 function essential to an informed threshold decision cannot be
5 performed at a later date by this Board. Strict compliance
6 with the consultation requirements of WAC 197-11-340(2)(b) is
7 necessary to the validity of a threshold decision. ¹

8 7. Respondents' claims that constructive notice has
9 occurred and therefore compliance has resulted, is ultimately
10 legally unpersuasive. The requirement to send the notice is
11 clear and unambiguous, and has not been fulfilled. The
12 unambiguous language of the regulation leaves no room for
13 construction; its plain meaning is to be given effect. See,
14 King County v. The Taxpayers of King County, 104 Wn.2d 1, 700
15 P.2d 1143 (1985); Bavarian Properties, Ltd. v. Ross, 104 Wn.2d
16 73, 700 P.2d 1161 (1985).

17
18
19
20 1. Where, as here, there is more than one agency with
21 jurisdiction the responsible official's initial DNS
22 determination is merely tentative. WAC 197-11-340.
23 Other entities must be notified, provided the DNS
24 and environmental checklist, and their responses
25 considered. WAC 197-11-340(2)(b). If, after this
26 comment cycle, "significant adverse impacts are
27 likely", the DNS must be withdrawn.
WAC 197-11-340(2)(f). WAC 197-11-340(3)(a)(11).

26 ORDER GRANTING SUMMARY
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(7)

1 8. Respondents' contention that affected Tribes' concerns
2 are the same as those of non-tribal gill netters is
3 speculative, unsupported by the record before the Board, and
4 ultimately legally irrelevant. The regulation requires that
5 notice to the Tribes shall be given.

6 9. Respondents' contention that newspaper articles
7 notifying the public about the permit application somehow
8 supplant WAC 197-11-340(2)(b) SEPA notice requirements for the
9 Tribes is misplaced. The WAC mandatory language requires
10 specific notice to the Tribes and to agencies, political
11 subdivisions, as well as notice under 197-11-510. In
12 addition, many of the newspaper articles cited by respondents
13 occurred on dates after the County's July 21, 1986 threshold
14 decision and DNS issuance, and even after the DNS comment
15 closure date of August 6, 1986.

16 10. Even if the Tribes might have been afforded notice
17 through the United States Army Corps of Engineers Section 10
18 Permit process, as respondents contend, such procedure in no
19 way abrogates Washington residents' rights to an informed
20 threshold decision by State or local government through State
21 Environmental Policy Act procedures.

22 11. We hold the County's failure to comply with WAC
23 197-11-340(2)(b), by failing to notify the affected Tribes
24
25

26 ORDER GRANTING SUMMARY
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(8)

1 about the DNS and to notify them about the opportunity to
2 comment on it, as a matter of law deprives the County of an
3 informed decision under SEPA. Therefore, the DNS shall be
4 vacated and the substantial development permit reversed and
5 remanded.

6 III

7 The Board further finds that there remain genuine issues
8 of material fact regarding the following legal issues:

9 1. Was the content of the notices of the shoreline
10 substantial development permit application, as required by
11 WAC 173-14-070, so inaccurate or otherwise defective as to
12 merit reversal? (Appellant's Issue II A.)

13 2. Did the shoreline permit application process fail to
14 provide affected Tribes notice and the opportunity to
15 comment, so as to contravene the Shoreline Management Act
16 ("SMA") or the implementing regulations, so as to merit
17 reversal under Chapter 197-11 WAC? (Appellant's Issue II
18 B.)

19 3. Did the Jefferson County Board of Commissioners fail
20 to consider the impact of the proposed net pens on
21 existing commercial fishing operations, or on navigation,
22 so as to contravene the SMA or SEPA, and thereby merit
23 reversal? (Appellant's Issue II E.)

24
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(9)

1 4. Has the proposed project changed so substantially
2 since DNS issuance, so as to require under SEPA or WAC
3 197-11-340(3)(a) or (c) the vacating of the DNS, and a
4 remand to the County for a new threshold determination?
5 (Appellant's Issue II F.)

6 5. If errors were committed regarding notice of the
7 shoreline permit application (Appellant's Issues II A. and
8 B.), were the cumulative effects sufficient to merit
9 reversal? (Appellant's Issue II D.)

10 The Board, therefore, declines to issue Summary Judgment
11 on the above five issues.

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ORDER

Appellant's Motion for Summary Judgment is GRANTED in part, and DENIED in part.

Jefferson County's approval of the Shoreline Substantial Development Permit is hereby reversed and remanded for proceedings consistent with this Order.

DONE this 26th day of May, 1987.

SHORELINES HEARINGS BOARD

Judith A. Bendor, Presiding
JUDITH A. BENDOR, Presiding

Lawrence J. Faulk 5/20/87
LAWRENCE J. FAULK, Chairman

Wick Dufford
WICK DUFFORD, Member

Nancy Burnett
NANCY BURNETT, Member

Les Eldridge
LES ELDRIDGE, Member

Dennis McLerran
DENNIS MCLERRAN, Member

ORDER GRANTING SUMMARY
JUDGMENT
SHE NO. 86-47

HESTER LAW GROUP, INC., P.S.
March 21, 2017 - 11:04 AM
Transmittal Letter

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Case Name: Verjee-Van v. Pierce County

Court of Appeals Case Number: 49329-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Motion: ____

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Brief: Amended Appellants'

Statement of Additional Authorities

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Brief corrected as follows: pg 6:15, 30 changed to 26, pg 15:6 pier changed to dock, pg 18:19 issued changed to written, pg 18:23 "before or" inserted before "after", pg 19:8, issued changed to wrote, pg 19:19, issued change to written. No changes to appendix.

Sender Name: Kathy Herbstler - Email: kathy@hesterlawgroup.com

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