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**COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON**

THE PUYALLUP TRIBE OF INDIANS,

Petitioner,

vs.

THE WASHINGTON STATE SHORELINES HEARINGS
BOARD, THE CITY OF TACOMA, PUGET SOUND ENERGY,
PORT OF TACOMA, and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Respondents.

**RESPONDENT CITY OF TACOMA'S
RESPONSE BRIEF**

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ORIGINAL

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I. INTRODUCTION

The Washington State Shoreline Management Act¹ is an interesting aggregation of competing interests, where “the shorelines of the state are [declared to be] among the most valuable and fragile of its natural resources,”² and their “protection, restoration, and preservation”³ “is [of] great concern.”⁴ Yet at the same time, the legislature places importance on the “utilization” and productive “development” of the State’s shorelines.⁵ “Alterations of the natural condition of the shorelines of the state”⁶ are not favored necessarily, but when they are allowed, “priority [shall be given] for [among others] *industrial and commercial developments* which are particularly dependent on their location on or use of the shorelines of the state...”⁷ [Emphasis added]

The shoreline substantial development permit (“SSDP”) on appeal here, as applied for jointly by the Port of Tacoma (“Port) and Puget Sound Energy (“PSE”), and as approved by the City of Tacoma (“City”) and then upheld by the Shorelines Hearings Board (“SHB” or “Board”), is just such a development—an industrial/commercial development which is

¹ Revised Code of Washington (“RCW”) 90.58, referred to herein as the “SMA.”

² RCW 90.58.020.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

particularly dependent on its location on or use of the shorelines of the state.

The primary purpose of the PSE project (the “Project”), of which the SSDP is a starting point, is for PSE to supply cleaner burning liquefied natural gas (“LNG”) to Totem Ocean Express Trailer (“TOTE”) ships that travel from Commencement Bay to Alaska and back on a weekly basis.⁸ Supplying LNG in this manner to TOTE requires, at a minimum, a fueling arm/facility, and docking facility.⁹

The Puyallup Tribe of Indians (“Tribe”) appealed the City’s issuance of the SSDP to the Board. Its main claims were that the approval of the SSDP failed to comply with the SMA and the City’s Shoreline Master Plan (“SMP”)¹⁰ because the City did not require PSE to do sediment sampling in the Blair Waterway as part of the SSDP approval process, and because, in the Tribe’s view, Project mitigation did not comply with the “no net loss” rule.¹¹

After a week-long hearing before the Board, the Board upheld the SSDP primarily finding that the Tribe did not meet its

⁸ See e.g. Finding 2 of “Original SSDP Decision” at AR 700; and FF 1 at AR 612 as well as RP v.4 at 69.

⁹ AR at 701.

¹⁰ Tacoma’s Shoreline Master Plan is codified at Tacoma Municipal Code 13.10 which can be found here: <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title13-LandUseRegulatoryCode.PDF>.

¹¹ The “no net loss” rule is found at TMC 13.10, 1.1, 1.2 5, 1.4 6.b., 5.5.5 D.3, 6.2, 6.4 among others, and will be discussed in more detail below.

burden¹² to show that the SSDP does not comply with the SMA and the City's Shoreline Master Plan ("SMP").¹³ The City's purpose in appearing before this Court is essentially to show that the Board was correct in its determination that the SSDP complies with the SMA and the SMP, and that there are no grounds for this Court to reverse or remand the SSDP.

Although the Tribe raises a multitude of issues on appeal, the City has never viewed this particular permit (the SSDP) as especially complex or difficult. The City views the appeal in the same light as the permit itself. It really is not as complicated as it is made out to be. The City performed its regulatory role correctly. The Board recognized that to be the case after its *de novo* review and made the correct call in upholding the SSDP.

II. ISSUES PRESENTED

From the City's perspective, and in perhaps over simplified form, the sole issue on appeal is "whether the Board's Order should be upheld as correctly decided?" The City makes no Assignments of Error because the City agrees with the Board's Findings of Fact, Conclusions of Law and Order dated July 18, 2016 (the "Board Order"). That notwithstanding, given that the Tribe has set forth a list of ten "Assignments of Error,"

¹² See e.g. FF 40 at AR 634; CL 20 at AR 655.

¹³ Tacoma's Shoreline Master Plan is codified at Tacoma Municipal Code 13.10 which can be found here: <http://cms.cityoftacoma.org/cityclerk/Files/MunicipalCode/Title13-LandUseRegulatoryCode.PDF>.

and eight distinct issues in its Opening Brief, for purposes of responding, the City will organize around the Tribe's stated issues and respond to each in turn. Those issues, as framed up by the Tribe, together with brief City responses, are as follows:¹⁴

1. May an adequate determination of the "no net loss of shoreline ecological functions" standard be made when there is no knowledge or understanding of sediment conditions that will be disturbed during construction of the Project?

Short Response: Implying that the City and other regulators had "no knowledge or understanding of sediment conditions" is not completely accurate, but under the conditions present, for the part of the Project that falls under SMA jurisdiction, the answer here is that an adequate determination of "no net loss" was indeed made.

2. May an adequate determination of mitigation necessary to address in-water impacts caused by the Project be made when there is no knowledge or understanding of sediment conditions that will be disturbed during construction of the Project and no steps have been required to prevent contamination from occurring?

Short Response: Again, the implication that the City and other regulators had "no knowledge or understanding of sediment conditions" is not accurate, nor is the Tribe's characterization that "no steps have been required to prevent contamination from occurring." Adequate mitigation requirements have been imposed, and

¹⁴ The City does not relist the Tribe's ten Assignments of Error here. Needless to say, the City disagrees with the Tribe's Assignments of Error, and contrarily submits that the Board found correctly on each point. The City will address the Assignments of Error in the context of responding to the Tribe's eight listed issues.

can be reexamined prior to actual, in-water construction.

3. May an adequate determination of the "no net loss of shoreline ecological functions" standard be made, an SSDP issued, and appeal of the SSDP be conducted and concluded when the Project scope, mitigation plans and remedies, and other key parameters are not established?

Short Response: *The entire basis of this issue is inaccurate. The "Project scope" here is known. Claims to the contrary are unsupported in the record. The same is true for "mitigation plans and remedies, and other key parameters" of the Project. Again, the City adequately determined the "no net loss" requirement for the Project.*

4. Does Tacoma have the authority to require and obtain sufficient information of sediment conditions at a project site before granting an SSDP for that project?

Short Response: *The Tribe's Issue 4 largely misses the point. The City may be able to find cover in its SMP for requiring sediment testing on the way to issuing an SSDP, but in order to carry such testing out, the other government agencies upon whom the City relies would have to be involved in any event. The City and the Board's reliance on these other agencies to address sediment issues was not misplaced.*

5. Did the Board improperly shift the burden to prove sediment contamination to the Tribe?

Short Response: *No. The burden of proving issues on appeal is properly on the appellant. To the extent that the Tribe's issues relied on alleged sediment contamination, proof of the allegation was properly assigned to the Tribe.*

6. May the Board rely in its Final Order upon a document it excluded from evidence?

Short Response: To the extent this occurred, it was harmless error.

7. May the Board usurp the City's exclusive role to administer the SMA and TSMP permitting during its *de novo* review when the Project has changed substantially from the original application considered by the City?

Short Response: Again, this issue relies on a false premise—that of stating that the “Project has changed substantially.” The Project scope has been reduced by eliminating the in-water work in the Hylebos waterway, but not in any way that triggers the requirements of WAC 173-27-100. In any event, the Board acted well within its authority.

8. Does the Board's quasi-judicial role and status in considering the appeal of the Project SSDP qualify the Board to perform scientific and other factual analysis of the Project that was not initially performed by the City?

Short Response: The Board's review is de novo. The Board acted well within its authority on all fronts.

III. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the City does not offer its own Statement of the Case separate from what the Tribe has set forth in its Opening Brief. Instead, the City offers only the following points of distinction and clarification (A through E below) regarding the facts of this appeal.

A. At footnote 6 of its brief, the Tribe states, “The Project still includes the original eight million gallon LNG storage tank.” While it is true that PSE overall Project includes the LNG storage tank, the City would point out that the storage tank is not within the SMA shoreline jurisdiction zone, and therefore is not subject to the SSDP or this appeal. In fact, the majority of the Project is outside the SMA zone.¹⁵

B. At page 9 of its brief, the Tribe contends that “a number of regulatory agencies raised issues regarding the Project's in-water construction work.” The City would point out that these issues mainly regarded in-water work in the Hylebos Waterway.¹⁶ The Tribe correctly notes previously in its brief (at page 8) that “The Blair Waterway is a former Superfund site, but was removed from the National Priorities List.”

C. Similarly, the Tribe’s reference to the State Department of Ecology’s (“Ecology”) EIS comment, at page 9 of its brief,¹⁷ appears to be a concern for Ecology only as it related to work in the Hylebos Waterway.

D. At the top of page 13 of its brief, after mentioning EPA and Ecology concerns about sediment contamination in the Hylebos Waterway, the Tribe concludes its Section D by stating “Significantly to the Tribe's issues in this appeal, the *City*

¹⁵ RP v.4 at 208.

¹⁶ RP v.4 at 9-10, 39 and 180.

¹⁷ Citing to AR 1842.

required no such testing in the Blair Waterway.” As testimony throughout the SHB Hearing showed, EPA and Ecology did not have the same concerns about sediments in the Blair.¹⁸ The two waterways are simply not on the same footing as will be discussed further below.

E. Further down on page 13 of its brief, after introducing PSE’s Stipulation¹⁹ to remove in-water work in the Hylebos Waterway from the Project, the Tribe states, “The City never formally reevaluated the SSDP in light of the changes [to the Project from the Stipulation].” While it is true that no *formal* reevaluation was made at the time of the SHB Hearing, the City did determine that simply removing aspects of the Project, thereby significantly reducing its scope did not require much in the way of reevaluation. The Board correctly identified that the stipulated reductions did not trigger WAC 173-27-100 requirements regarding permit revision.²⁰

IV. ARGUMENT

A. The Standard of Review on Appeal.

The Washington Administrative Procedure Act²¹ governs judicial review of a SHB decision.²² “Appellate review is of the

¹⁸ See e.g. RP v.4, pp. 9-10, 39 and 180.

¹⁹ Which begins at AR 13.

²⁰ Board Order at 48.

²¹ Chapter 34.05 RCW.

²² *de Tienne v. Shorelines Hr'gs Bd.*, 197 Wn. App. 248, 276, 391 P.3d 458, 461 (2016) *citing* *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910 (1994).

SHB decision [Board Order], not the decision of the local government or the superior court, and judicial review is limited to the record before the SHB.”²³ The party appealing the Board Order, in this case the Tribe, bears the burden of demonstrating the invalidity of the Board's actions.²⁴

While the Tribe is technically correct that “The Court...is not bound by the Board's interpretation of the SMA or the TSMP”,²⁵ this Court has recognized that “The SHB is a quasi-judicial administrative body ‘with specialized skills in hearing shoreline cases,’ and this court is obligated to give due deference to the SHB's ‘specialized knowledge and expertise.’”²⁶ In addition to the foregoing, this Court “[does] not substitute [its] judgment for that of the SHB regarding credibility of witnesses or the weight of conflicting evidence [on review].”²⁷ This standard is of particular significance to the Tribe’s Issues 1 through 4 because those issues rely almost entirely on the “credibility of witnesses or the weight of conflicting evidence.”

As stated in the Tribe’s brief at page 16: “Under the APA, the Court may grant relief if, *inter alia*, (1) the Final Order

²³ *Id.*

²⁴ RCW 34.05.570(1)(a). *See also* Robertson v. May, 153 Wn. App. 57, 72-73, 218 P.3d 211, 219 (2009) *citing* Preserve Our Islands v. Shoreline Hearings Bd., 133 Wn. App. 503, 515, 137 P.3d 31 (2006), *review denied*, 162 Wn.2d 1008 (2008); de Tienne, 197 Wn. App. at 276.

²⁵ Tribe’s *Opening Brief* at 16.

²⁶ de Tienne, 197 Wn. App. at 276, *citing* Buechel, 125 Wn.2d at 204, 202-03.

²⁷ de Tienne, 197 Wn. App. at 276-277, *citing* Beatty v. Fish & Wildlife Comm'n., 185 Wn. App. 426, 449, 341 P.3d 291, *review denied*, 183 Wn.2d 1004 (2015).

is contrary to law; (2) the Final Order is not supported by substantial evidence; or (3) the Final Order is arbitrary and capricious.”²⁸ It would appear that the Tribe referenced these three standards as particularly applicable to its issues.

In de Tienne, the Court provided a very complete review of the standards and definitions applicable to review of a SHB decision. The court listed these as follows:²⁹

A decision is arbitrary and capricious if it is willful and unreasoning action in disregard of facts and circumstances. Where there is room for two opinions, an action is not arbitrary and capricious so long as it is undertaken honestly and upon due consideration, even if the reviewing court disagrees with the conclusion. An appellate court may reverse only if the SHB order is a willful, unreasoning action in disregard of facts and circumstances or if firmly convinced a mistake has been committed in light of the policy of the SMA.

We review the SHB conclusions of law de novo and the SHB interpretation of the SMA and local government shoreline regulations de novo. We give the SHB interpretation of the SMA and SMP great weight. If the SHB interpretation is consistent with the language of the [SMA], and clearly serves to further its goals, we affirm the SHB decision.

The Board Order was neither arbitrary and capricious, nor was it contrary to law. The record contains substantial evidence to support the Board’s action on every level. The City understands that the Tribe disagrees with the evidence that

²⁸ RCW 34.05.570(3).

²⁹ de Tienne, 197 Wn. App. at 277, internal cites omitted.

supports the Board Decision, but that disagreement alone is not enough to reverse the Board's validly made, and well-supported Order.

B. The Tribe's Issues do not Warrant Reversal of the Board Order and the SSDP.

The City is reasonably certain that the Court does not need a play-by-play recounting of the evidence in this appeal as it relates to the Tribe's issues. The record here speaks for itself and is replete with credible testimony and evidence that supports the Board Decision. Nevertheless, the City does intend to address briefly the Tribe's issues below in order to address why the Board Order was not in error and should be upheld from the City's standpoint. Subsections 1 through 8 that follow correspond to the Tribe's eight issues as restated and briefly answered above.

1. Sediment testing is not necessary to make an adequate determination of "no net loss of shoreline ecological functions." The Tribe's contention that "no net loss" cannot be adequately determined without sediment testing is without support in controlling law, statewide practice, or in any testimony from the hearing outside of the Tribe's own witnesses. Tribe witnesses more or less uniformly faulted the City (and the Board Decision) for not requiring sediment testing in the face of testimony from City witnesses that, not only has the City of

Tacoma never required sediment testing as part of a SSDP review, but neither has any other jurisdiction to their knowledge.³⁰ The Tribe presented no evidence of sediment testing being required or conducted as part of a SSDP at any place or any time in Washington State.³¹

The Tribe's primary stated concern has been that in-water work—the removal and installation of piles—would disturb contaminated sediments causing deleterious environmental effects. That notwithstanding, and in spite of the City conceding that sediments in the Blair³² may very well have some level of contamination,³³ the Tribe did not show what types and levels of contamination exist in sediments at the Project in-water work location. The Tribe might say that this failure begs its biggest question—whether the City should have required the sediment testing. The answer is still “no.”

Multiple City witnesses testified that the City's requirement that PSE follow all state and federal Best Management Practices (“BMPs”) should take care of any sediment concerns.³⁴ Testimony showed that, in general, pile removal does not release significant amounts of contamination,

³⁰ See e.g. RP v.4 at 111-112.

³¹ See e.g. RP v.3 at 61-62.

³² The City focuses on the Project elements in the Blair Waterway because the in-water work previously proposed in the Hylebos Waterway has been removed from the Project and is effectively no longer part of the SSDP as a result of the Stipulation.

³³ See e.g. RP v.4 at 180.

³⁴ See e.g. RP v.3 at 132-133.; RP v.4 at 117-122.

and that BMPs do work in keeping anything that is released contained.³⁵

The Tribe's own expert witnesses conceded that BMPs are the published "consensus on the best way to mitigate, to manage, to minimize,... the risk to the environment associated with your proposed activities."³⁶ Nevertheless, the Tribe argues that, even though state and federal BMPs are the "best" approach available, because BMPs cannot "guarantee no impact," the City and the Board should have required even better than the best.³⁷

As the City's Environmental Specialist, Shannon Brenner, testified, "no net loss" analysis and compliance with the SMA and the TSMP does not require a determination of no impacts in the absolute.³⁸ Compliance does require that unavoidable impacts be sufficiently mitigated, however, and that type of mitigation is exactly what the City analyzed and approved. Even Tribe witnesses conceded that the applicant (and the City in its review) followed the appropriate mitigation sequencing in its permit.³⁹

As a result, the City's contention that "Sediment testing is not necessary to make an adequate determination of 'no net loss' of shoreline ecological functions" is correct and has been

³⁵ See e.g. RP v.4 at 121.

³⁶ RP v.3 at 51.

³⁷ RP v.3 at 53.

³⁸ RP v.3 at 126-128.

³⁹ RP v.3 at 53.

correct for every compliant SSDP in the state of Washington since the inception of the SMA until the present as far as anyone involved in this appeal knows or can show.

2. For purposes of issuing the SSDP, an adequate determination of mitigation necessary to address in-water impacts was made and adequate steps are in place and will continue to be reviewed until, and even during, actual construction.

In its second issue, the Tribe contends that, the mitigation required under the SSDP was inadequate because (1) “there is no knowledge or understanding of sediment conditions that will be disturbed during construction of the Project,” and (2) no steps have been required to prevent contamination from occurring. Neither of these contentions is accurate or supported by the record.

As mentioned above, although no sediment testing was performed or required in the Blair Waterway, that lack of a requirement does not equal a complete dearth of information regarding conditions in the Blair. As Shirley Schultz stated during her testimony at the hearing, “there's always potential [to find contaminated sediments] anywhere in Commencement Bay.”⁴⁰

⁴⁰ RP v.4 at 180.

As a result of that presumption, the City made it a condition of the SSDP that all work on the Project within the shoreline comply with all applicable State and Federal BMPs during construction and with all state and federal permitting requirements.⁴¹ This requirement brings the SSDP full circle with the Tribe's first issue. Either BMPs work or they do not. The Tribe's witnesses testified that BMPs are the "consensus...best way to mitigate,...the risk to the environment associated with your proposed activities,"⁴² but that still more should have been done here—more even than any other project any of the witnesses knew of at the time of the hearing.

The Tribe offered no meaningful evidence on how the approach to the in-water work on the Blair would be different, even if additional information were known from having performed sediment testing. This is the biggest hole in the Tribe's contentions that left the Board to conclude that the Tribe had not met its burden of proof that the SSDP was non-compliant.

City staff went by "line by line [] through every applicable section of that code [TMC 13.10, the TSMP] and measure[d] it up against the application" in order to make sure that it complies with the TSMP.⁴³ Shannon Brenner performed a

⁴¹ AR at 675.

⁴² RP v.3 at 51.

⁴³ RP v.4 at 160-161.

meticulous analysis of the mitigation necessary to meet the “no net loss” standard, and for compliance with the TSMP generally. This analysis included scrutinizing the Project both with and without the in-water work in the Hylebos Waterway, because as Ms. Brenner testified, “We reviewed the project under both scenarios knowing that it [in-water work on the Hylebos] could be possibly removed from the project.”⁴⁴ The City’s analysis differentiated between work in the Hylebos and Blair Waterways in order to account for the different possible mitigation scenarios and requirements for meeting “no net loss.”⁴⁵

The Tribe’s witnesses, particularly Tad Deschler, opined that the proposed mitigation was insufficient to meet the “no net loss” standard. Mr. Deschler conducted his own analysis without ever contacting anyone at the City, entirely from documents given to him from the Tribe, and with only having partially read the TSMP.⁴⁶

In addition, Mr. Deschler used what is referred to in the record as the “HEA analysis” or “HEA approach” to assess the adequacy of mitigation. Mr. Deschler’s testimony admitted that the HEA approach comes from a different context than the Project at hand.⁴⁷ The HEA approach is almost exclusively used to determine compensatory restoration or damages for which a

⁴⁴ RP v.3 at 124.

⁴⁵ RP v.3 at 125.

⁴⁶ RP v.2 at 211-215.

⁴⁷ RP v.2 at 217.

polluter would be liable as part of a “Natural Resource Damage Assessment (“NRDA”).⁴⁸ Mr. Deschler further admitted that he modified the HEA approach in an attempt to make it work for this kind of an application and for this location.⁴⁹ He was entirely unaware that the City had rejected the HEA approach for another project in the Blair Waterway because the result there had been that no mitigation was necessary whatsoever.⁵⁰

Lastly, Mr. Deschler was entirely unaware that significant shoreline revegetation was part of the mitigation plan for the SSDP after he agreed that shoreline revegetation, “if done in sufficient quantity” could be considered mitigation.⁵¹

Ms. Brenner testified at length as to why the HEA approach was inapplicable here, even if Mr. Deschler had taken into account all the mitigation measures proposed.⁵² Along the way she provided the City’s definitive statement for how it determined the adequacy of mitigation, both with and without the Hylebos in-water work, including explanation as to why shoreline revegetation can be, and in this case is, a very important mitigation measure. The Tribe’s contentions of inadequacy at the hearing ignored this altogether.

⁴⁸ *Id.*

⁴⁹ RP v.2 at 217-220.

⁵⁰ *Id.*

⁵¹ *Id.*, at 220-221.

⁵² RP v.4 at 219-227.

An adequate review of mitigation measures was made. Adequate mitigation measures are part of the SSDP. The adequacy of these measures will continue to be assessed up to and including during building permit review as was testified to by City witnesses.⁵³

3. For purposes of issuing the SSDP and determining “no net loss”, “the Project scope, mitigation plans and remedies, and other key parameters” are, in fact, established more than adequately. In its third issue the Tribe contends that Project scope, Project mitigation and other key parameters are not known well enough to be able to determine SMA and TSMP compliance for the present SSDP. The only support the Tribe offers for this argument is (1) the fact that there have been a number of revisions to the proposed mitigation, and (2) the removal of the Hylebos in-water work through the Stipulation.

For its part, the City did not find any of this to be particularly problematic, and apparently neither did the Board. The Stipulation does not trigger any of the requirements of WAC 173-27-100 such that a formal permit revision is necessary.⁵⁴

As for the proposed mitigation, the City has a hard time faulting PSE for revising and refining its proposed mitigation in an effort to find something that would address the Tribe’s

⁵³ See e.g. RP v.4 at 184-185.

⁵⁴ See RP v.4 at 192-194 which includes a detailed walk-through of the WAC 173-27-100 triggers.

concerns. The City is used to this kind of back and forth in the permitting context.⁵⁵

The Tribe's reliance on Hayes v. Yount, 87 Wn.2d 280, 295, 552 P.2d 1038, 1047 (1976) on this issue is misplaced. In Hayes, the State Supreme Court found that the project proposed under the SSDP in question was so vague as to not be reviewable under the SMA. Vagueness is not a problem here. The aspects of the Project that fall under SMA jurisdiction are very well spelled out down to each component, including the number of piles and the square footage of over water coverage. Lack of information is not the issue here.

4. Regardless of whether Tacoma could require sediment testing as part of the review and approval process for an SSDP, the state and federal agencies already involved in Project review would have to be involved in order for the sediment testing to have any recognized validity and the City and the Board were justified in relying on their role in the review process. The Tribe has offered a fair amount of argument and evidence that the City could require sediment testing of its own accord on the way to issuing (or denying) a SSPD. The City's position is that it cannot and has not, of its own volition required sediment testing in the SSDP process, and that such

⁵⁵ RP v.4 at 192-194.

would have no meaning without the participation of other agencies.

City witness Jim Thornton summed up why the City does not require sediment testing at the SSDP level in this exchange:

Q. Earlier, I don't know if you were here for this testimony, but earlier one of the Tribe's experts, Jan[et] Knox, testified that a local property owner could do its own sediment testing and characterization on its own. Do you agree with that statement?

A. They could, but it would have no regulatory meaning.

Q. Why not?

A. Because there's a number of protocols we have to go through and get approval from the Department of Ecology, but if you're going to take the sediment samples to be then used in a regulatory setting in terms of permitting, you would have to go through the Department of Ecology and Corps of Engineers to do it correctly and get the right testing done, et cetera.⁵⁶

The Tribe's own expert witness, Shane Cherry had this to offer regarding undertaking sediment testing:

Q. You testified earlier, correct me if I'm wrong, that owners have the option to require sediment characterization; do you recall that?

A. Yes.

Q. Who were you referring to?...You testified and, again, correct me if I heard this and wrote it down wrong, that owners have the option to require sediment characterization? Do you recall that testimony earlier in response to questioning from Mr. Missall?

A. Yes, yes.

⁵⁶ RP v.4 at 113.

Q. Who did you mean when you said "owners"?

A. The owner is the applicant. In this case, it would be PSE. They could, at their discretion, go out and collect sediment samples to characterize the sediment in the vicinity of the work area.

Q. So is it your testimony that they could do that without any oversight from the State Department of Ecology, Environmental Protection Agency, and the Corps of Engineers?

A. No. As the letter stated in its language, the letter – I forget the reference, but it was the EPA language, they would have to submit and get approved a sampling and analysis plan and a quality assurance plan.

Q. Do you know of anything that would allow the City of Tacoma to oversee that in lieu of Department of Ecology, EPA, and the Army Corps of Engineers? A. I don't know of anything that the City would -- how do I phrase it? No. No, I don't know of anything that would require the City to oversee that.

Q. In your review of the shoreline substantial development permit, do you recall reading a requirement in there that required the applicant to comply with the requirements and review of all other jurisdictions with authority over the project?

A. I do.

Q. Do you find that to be in error in any way?

A. No. That's a good line to include.⁵⁷

Just prior to this exchange, Mr. Cherry testified that all state and federal agencies involved in reviewing the project were “competent in the work that [they] do[] in reviewing shoreline projects.”⁵⁸ As part of this exchange, the City asked some follow up on whether the BMPs required through the SSDP at all levels had any utility or whether anything was missing from them. Mr.

⁵⁷ RP v.3 at 66-67.

⁵⁸ RP v.3 at 64-65.

Cherry answered “The BMPs, if applied as specified, will do their job. And so, no [nothing is missing from them].”⁵⁹

The City’s witnesses also agreed on this point. The multi-layered review process is thorough and competent and it works.⁶⁰ That said, a court ruling requiring the City to take over an area of review (sediments) from these other jurisdictions, as the Tribe advocates, makes no sense and the Board Order was correct in not requiring it.

5. The Board did not improperly shift the burden of proving the need for sediment testing or the presence of sediment contamination to the Tribe. “The party seeking review of the local government's decision to issue a permit bears the burden of proof before the SHB.”⁶¹ The majority of the Tribe’s argument that the SSDP was inadequate and fails to comply with the SMA and the TSMP rests on the Tribe’s contention that sediment testing was necessary. As already recounted herein, the City’s witnesses agreed uniformly that sediment testing was not necessary to determine “no net loss” or for compliance with the SMA and the TSMP.⁶² The Board weighed the evidence and found that sediment testing was not necessary for the SSDP to comply with the SMA and the TSMP.

⁵⁹ *Id.*

⁶⁰ *See e.g.* RP at 136, and 179-180.

⁶¹ *de Tienne*, 197 Wn. App. at 284 *citing* RCW 90.58.140(7); *Buechel*, 125 Wn.2d at 205.

⁶² *See e.g.* RP v.4 at 134-135.

On this point, the Board Order could hardly be found to be arbitrary and capricious, or “willful and unreasoning action in disregard of facts and circumstances.”⁶³

6. Any reliance the Board placed on a document not formally admitted into evidence was harmless error. The City views this issue as primarily one for PSE to argue since the City did not offer the exhibit in question. That said, the information in the exhibit was referenced at various times in the hearing and it seems like the controversy over any reliance on it falls into the category of harmless error. To the extent that RCW 34.05.461(4) requires that, “Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding,” the information relied on by the Board was part of the record whether through the contested exhibit or otherwise.

7. The Board did not “usurp” City authority in any way in deciding the Board Order, if for no other reason than that the revisions to the Project do not require a revised permit under WAC 173-27-100. The City is hardly the exclusive administrator of the TSMP as the Tribe claims.⁶⁴ The TSMP is merely one segment of the State’s overall Shoreline Master Program and only becomes effective after approval by Ecology.⁶⁵ While the State defers to local jurisdictions to

⁶³ de Tienne, 197 Wn. App. at 277.

⁶⁴ Tribe’s Opening Brief, at 38.

⁶⁵ RCW 90.58.080(1), .090; Citizens for Rational Shoreline Planning v. Whatcom County, 172 Wn.2d 384, 392, 258 P.3d 36 (2011).

formulate their piece of the State program, final approval of the local Master Program rests with the State.⁶⁶ The State Supreme Court has gone so far as to state that, “The involvement of local jurisdictions in the SMP process is a benevolent gesture by the state.”⁶⁷

The same is true in permitting under the TSMP. As this Court has explained previously:

Ecology also plays a part in enforcing an SMP after final approval. A party seeking to develop shoreline areas may apply for one of three types of permits: a conditional use permit, a variance, or a substantial development permit. Ecology retains authority to issue final approval for conditional use permits and variances. *See RCW 90.58.140(10)*. The third type of permit—substantial development permits—must be forwarded to Ecology, which then may appeal the issuance of the permit. *See RCW 90.58.140(6)*.⁶⁸

Although Ecology did not appeal this SSDP, the foregoing statement by our State Supreme Court poignantly illustrates the inaccuracy of the Tribe’s claims of local supremacy when it comes to shoreline permitting.

The testimony of Jim Thornton during the hearing further bears this out.⁶⁹ Mr. Thornton testified that Ecology essentially

⁶⁶ *Id.*; *see also Olympic Stewardship Found. v. State Env'tl. & Land Use Hr'gs Office*, No. 47641-0-II, 2017 Wash. App. LEXIS 1475, at *1 (Ct. App. June 20, 2017, published in part); *and RCW 90.58.090(7)*.

⁶⁷ *Citizens for Rational Shoreline Planning*, 172 Wn.2d at 392.

⁶⁸ *Id.*, at fn. 7.

⁶⁹ Mr. Thornton has worked in the environmental field since 1975 and was with Ecology from 1975 until approximately 15 years. RP v.4 at 75-77.

requires the local agency to complete its entire review before Ecology will take up its review of a shoreline permit.⁷⁰

Moving outside the strict parameters of the TSMP, all evidence from the hearing clearly showed that SSDP review, and overall Project review would include scrutiny from multiple agencies at the state and federal level. The FEIS for the Project actually makes reference to all the agencies that will be involved before review is complete.⁷¹

Insofar as the Board's authority is concerned, the Tribe's argument of usurpation has even less legitimacy. As already acknowledged above, the review conducted here is of the SHB decision, not the City's decision.⁷² If all the SHB were empowered to do in its review was simply affirm or reverse the City's decision further appellate review of an SHB decision would be in name only. The Board conducts its review of local SSDP issuance *de novo* for a reason: so that it can bring to bear its "specialized skills in hearing shoreline cases,"⁷³ to insure that development conforms with the ultimately state-administered goals and policies of the SMA. The Board did just that here.

⁷⁰ RP v.4 at 92 and 100.

⁷¹ AR at 1468-1470.

⁷² de Tienne, 197 Wn. App. at 276; Buechel, 125 Wn.2d at 202.

⁷³ de Tienne, 197 Wn. App. at 275.

8. The Tribe is incorrect that the City did not perform a complete SSDP review and analysis. The Tribe's suggestion that permits cannot be revised during the review process does not comport with actual practice. The Tribe's eighth issue implies again that the City's review was incomplete. The evidence clearly shows that it was not. As already set forth in depth above, the weight of testimony showed that sediment testing was not necessary to determine "no net loss," and as a result it was not necessary to determine adequate mitigation for the SSDP. These two go hand in hand. Evidence and testimony also shows that City review was thorough and meticulous.⁷⁴

In any event, given the Board's statutorily granted authority,⁷⁵ and the *de novo* nature of proceedings before the Board, nothing the Board did during the hearing or in issuing the Board Order can be considered *ultra vires*. The Board simply did its job, weighed the evidence and testimony before it, and made a sound decision.

The Tribe's suggestion that any change along the way, such as PSE filing the Stipulation, requires remand to the local jurisdiction is without support. Examples of the Board modifying a local jurisdiction's SSDP at the conclusion of the Board's

⁷⁴ See e.g. RP v.4 at 160-161.

⁷⁵ RCW 90.58.170-180.

review are numerous.⁷⁶ The Board’s authority to do so is at least implicit in statute.⁷⁷ The controlling authority for whether a permit needs to be formally revised is WAC 173-27-100. The City offered detailed testimony that none of the WAC 173-27-100(2)(a)-(f) factors were triggered by the Stipulation.⁷⁸ The Board rightly agreed.⁷⁹

V. CONCLUSION

The Tribe’s contention that the Shoreline Substantial Development Permit (“SSDP”) in question here does not comport with the Shoreline Management Act (“SMA”) and Tacoma Shoreline Master Program (“TSMP”) simply does not stand up to scrutiny. The Tribe argues that more should have been done, but does so without providing anything as to how that more—in this case sediment testing—would have enhanced the process, especially in light of the SSDP’s requirements that Best Management Practices (“BMPs”) at all jurisdictional levels be followed, and that all other levels (state and federal) of permitting be obtained. The foregoing requirement subjects the

⁷⁶ See e.g. Moses v. Skagit County, 1991 WA ENV LEXIS 107 (1991); and Dukich, et al v. Pend Oreille County et al. 1997 WA ENV LEXIS 196, SHB NO. 97-12 & 13.

⁷⁷ See e.g. RCW 90.58.140(5)(d), which allows the Board to approve a local SSDP in whole or in part.

⁷⁸ RP v.4 at 192-194.

⁷⁹ Board Order at 48.

parts of the Project covered by the SSDP to significant levels of additional scrutiny and that scrutiny is by design under the SMA in order to insure “coordinated development of our shorelines.”⁸⁰

The Board Order was correctly decided after weighing all the evidence and testimony and should be upheld.

DATED this 23rd day of June, 2017, at Tacoma, Washington.

WILLIAM FOSBRE, City
Attorney

By: 
JEFF H. CAPELL WSBA
#25207, Deputy City Attorney
of Attorneys for City Tacoma

⁸⁰ de Tienne., 197 Wn. App. at 275; RCW 90.58.050.

FILED
COURT OF APPEALS
DIVISION II

2017 JUN 23 PM 3:45

NO. 46803-4 STATE OF WASHINGTON

BY _____
DEPUTY

**COURT OF APPEALS FOR DIVISION TWO
STATE OF WASHINGTON**

TT PROPERTIES, LLC,

Appellant,

vs.

THE CITY OF TACOMA,
a Washington municipal corporation,

Respondent.

**CERTIFICATE OF SERVICE RESPONDENT
CITY OF TACOMA'S RESPONSE BRIEF**

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Deputy City Attorney
Attorneys for Respondent

THIS IS TO CERTIFY that on this 23th day of June, 2017, I did
serve via email and U.S. Postal Service, a true and correct copy of City of
Tacoma's Response Brief, by addressing for delivery to the following:

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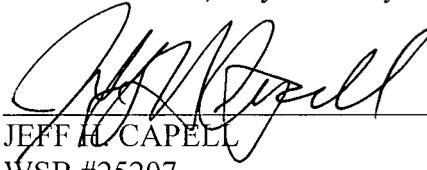
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A handwritten signature in black ink, appearing to read "Jeff H. Capell", written over a horizontal line.

JEFF H. CAPELL

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