

No. 78462-1  
C/A 54277-0-1

THE SUPREME COURT OF WASHINGTON

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TWIN BRIDGE MARINE PARK, L.L.C., AND KEN YOUNGSMAN,  
(KEN YOUNGSMAN AND ASSOCIATES),

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Petitioner.

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RESPONDENT'S ANSWER AND OPPOSITION TO PETITION  
FOR REVIEW

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Craig D. Magnusson, WSBA #12733  
MAGNUSSON LAW OFFICE, P.S.  
800 Bellevue Way NE, Suite 400  
Bellevue, WA 98004  
Phone: (425) 462-4037  
Fax: (425) 462-5638

J. Todd Henry, WSBA #32219  
OLES MORRISON RINKER & BAKER LLP  
701 Pike Street, Suite 1700  
Seattle, WA 98101-3930  
Phone: (206) 623-3427  
Fax: (206) 682-6234

Attorneys for Respondents

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## I. INTRODUCTION

This Petition for Review, brought by the Washington State Department of Ecology ("Ecology"), challenges a published Court of Appeals Decision affirming a judgment entered by Skagit County Superior Court, which was sitting in its appellate capacity in regard to a decision of the Shoreline Hearings Board ("SHB"). The Superior Court's decision, which reversed the SHB, concerned shoreline development permits, the Land Use Petition Act, and the scope of independent authority by Ecology over County-approved shoreline permits.

A full year has now passed since Division I of the Court of Appeals published its decision in this matter. That decision is being relied upon by local permitting jurisdictions in regard to their issuance of shoreline development permits and the scope of authority between those local jurisdictions and Ecology.

By Order dated December 6, 2006, the Supreme Court gave notice that consideration of the Petition for Review would be continued to the Court's January 4, 2007 En Banc Conference.

In consideration of the scheduled En Banc review, Respondent Twin Bridge hereby Answers and opposes the Petition

for Review and requests that this Answer be considered by the Court in response to Ecology's Petition.

## **II. STANDARD OF REVIEW**

In order to convince this Court that the issues raised in its Petition for Review warrant this Court's attention, Ecology must show that one or more of the criteria upon which a Petition for Review is accepted are present in this matter. RAP 13.4(b)(1)-(4) provides in pertinent part:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1)-(4).

Respondent Twin Bridge asserts that none of those criteria are met in Ecology's Petition, because among other points:  
a) Ecology's Petition is impermissibly based on issues it did not

raise before the SHB, and therefore is precluded from raising at any level of appellate review; and b) the law of this case has been well settled by this Court, with no conflict involving that law existing between appellate divisions, no Constitutional issues at stake and no substantial public interest issues left to be decided.

Ecology's failure to meet any of the criteria under which this Court can accept a Petition for Review requires this Court to reject it, which Respondents respectfully urge this Court to do.

### III. AUTHORITY

#### A. ECOLOGY'S PETITION FOR REVIEW SHOULD BE DENIED BECAUSE IT IS IMPERMISSIBLY BASED UPON ARGUMENTS NOT RAISED BELOW.

Ecology argues that this Court should reverse the Appellate Court's Decision because the Twin Bridge development "violated the terms of a conditional use permit approved by Ecology," and asserts that "[Twin Bridge] began use of the shoreline in violation of the conditions and limits in SMA conditional use permits." (Petition for Review, p. 2).

However, these alleged "issues" are not before this Court. Twin Bridge does not, and has never argued that Ecology does not have concurrent jurisdiction with local permitting jurisdictions with respect to shoreline conditional use permits. Ecology misleads this

Court (as it attempted to do with the two appellate levels below) by asserting that the SHB decision, attached to its Petition, “found that Twin Bridge engaged in construction and development contrary to the limits of, and not authorized by, the Shoreline Conditional Use Permits.” See, Petition, p. 6. That assertion is not true.

In fact, the SHB made no finding whatever that there was any violation of any existing permit, whether a substantial development permit (“SDP”) or conditional use permit (“CUP”), but instead concluded as follows:

The Board has concluded a shoreline substantial development permit was necessary before constructing the improvements on this site. The Board is not ruling on whether a conditional use permit is required to run a marina under the Skagit County Master Program since it is not necessary to reach that issue to resolve the case and the record does not contain the local government’s analysis of this question. (SHB Order July 17, 2002, COL IV, p. 18); (CP 24) (emphasis added).

Stated succinctly, Ecology has unsuccessfully attempted at every appellate level to argue that which it *did not* before the SHB: that this matter is somehow an enforcement action for the violation of existing shoreline conditional use permits. The above finding by the SHB was persuasive to both the Superior and Appellate Courts, each of which determined that this matter was an impermissible

attempt by Ecology to collaterally attack a local authority's final land use decision without having filed a timely Land Use Petition Act ("LUPA") appeal.

RAP 2.5(a) provides, in pertinent part:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

The decisions of this state's courts are replete with admonitions to would-be appellants who would seek review of trial court's decision on issues not raised with that tribunal. "An issue not briefed or argued in the trial court will not be considered on appeal." *Brower v. Ackerley*, 88 Wn. App. 87, 96, 943 P.2d 1141 (1997), *citing*, *State v. Riley*, 121 Wn.2d 22, 30, 846 P.2d 1365 (1993). The "issues" upon which Ecology bases this Petition for Review were not raised at the SHB, and therefore are not subject to consideration on appeal.

Twin Bridge did not challenge the SHB's findings at the Superior Court, and there was no need to do so. This because there was no finding either that Twin Bridge violated an existing shoreline conditional use permit, or that a "new" shoreline conditional use permit was required before the disputed construction could resume, or the finished marina be placed in use.

Though the SHB was silent on the matter of any requirement for a new shoreline conditional use permit, the Superior Court was not. The Superior Court relied upon additional evidence submitted to and accepted by it, the entry of which was stipulated to by Ecology, and stated in its Finding No. 18:

The April 10, 2002 hearing examiner approval of the requested Shoreline Substantial Development Permit does not include nor require a Shoreline Conditional Use Permit for the marina and associated uses. (SCFOF No. 18).

In other words, one of the very “issues” upon which Ecology bases this Petition for Review was mooted by its ultimate determination (made after its attempts to halt Twin Bridge’s construction and the SHB’s decision) that the Twin Bridge project did not, in fact, require a new shoreline conditional use permit.

The Appellate Court recognized this fact, and the majority referred to that finding in its summary of the matter’s facts:

In finding of fact 18, the court found that the County’s approval of the requested Shoreline Substantial Development Permit does not include nor require a Shoreline Conditional Use Permit for the marina and associated uses.

*Twin Bridge Marine Park, LLC v. Dep’t of Ecology*, 130 Wn. App. 730, 737, 125 P.3d 155 (2005).

The record on this matter cannot be more clear. There is no reading of: a) the original Ecology Order and Notice; b) the SHB's July 17, 2002 Findings of Fact, Conclusions of Law and Order; c) the Superior Court's April 22, 2004 Findings of Fact, Conclusions of Law and Order; or d) the Appellate Court's December 12, 2005 Opinion that supports any violation of any existing "shoreline conditional use permit approved by Ecology" or that any "new" shoreline conditional use permit was required for the disputed Twin Bridge development.

Ecology goes on to argue that this Petition should be accepted because the decision of the Court of Appeals is in conflict with this Court's decision in *Samuel's Furniture v. Department of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). Ecology asserts that the decision below in this matter prevents Ecology from enforcing shoreline conditional use permit "violations" or permitting requirements, which *Samuel's Furniture* provides it is entitled to do. As set forth above, that argument is without factual basis or merit.

Essentially, through either incomplete or misstated references to the record, Ecology attempts to create an inference with this Court (just as it unsuccessfully attempted below) that the *Twin Bridge v. Ecology* dispute is about conditional use permits,

and not about Ecology's original Notice and Order appealed to the SHB that the project was proceeding without necessary shoreline substantial development permits.

**B. ECOLOGY'S PETITION FOR REVIEW SHOULD ALSO BE DENIED BECAUSE THE LAW OF THE CASE IS ESTABLISHED AND WARRANTS NO REVIEW BY THIS COURT.**

As the trial court declared and the Court of Appeals reiterated, the facts of this matter are factually indistinguishable from those in *Samuel's Furniture v. Ecology, supra*. Therefore, the result must also be the same: Ecology was precluded by LUPA from its collateral attack on the building permits issued by Skagit County to Twin Bridge. Consequently, there is no reason under RAP 13.4(b)(1)-(4) for this Court to accept review of a case in which the facts dictate that the analysis and applicable law would be no different than as established by this Court in previous decisions.

Now more than three years old, *Samuel's Furniture* closes the loop on a series of four decisions issued by this Court, the gravamen of each being: failure to timely appeal a final land use decision bars further attack on that decision. Despite the fact that each of this Court's decisions in *Wenatchee Sportsmen v. Chelan*

*County*<sup>1</sup>, *Skamania County v. Columbia River Gorge Comm'n*<sup>2</sup> and *Chelan County v. Nykreim*<sup>3</sup> holds that timely appeal of a local authority's final land use decision is required, Ecology has continued to maintain that its actions against Twin Bridge were somehow exempted from LUPA under its "independent enforcement" powers over the SMA, something this Court's decision in *Samuel's Furniture* clearly ruled is not so.

Ecology has nothing new to offer the Court in its Petition for Review, and this Court's holdings in *Wenatchee Sportsmen*, *Nykreim* and *Samuel's Furniture* are controlling in this matter. While attempting to dress this matter up as an "enforcement" issue, the central fact at issue here is one this Court has seen repeatedly and ruled on consistently: a governmental agency attempting to attack a local authority's final land use decision without having made a timely LUPA appeal must fail in that attempt.

Ecology's real dispute throughout this matter appears to have been with the actions of Skagit County rather than with those of Twin Bridge – something it repeats in this Petition. However, even if Skagit County's decision not to require additional shoreline

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<sup>1</sup> 141 Wn.2d 169, 4 P.3d 123 (2000).

<sup>2</sup> 144 Wn.2d 30, 26 P.3d 241 (2001).

<sup>3</sup> 146 Wn.2d 904, 52 P.3d 1 (2002).

permits for the Twin Bridge project violated the SMA, Ecology was still bound to have made a timely appeal of the issuance of those permits. Even arguably illegal final land use decisions made by a governmental agency must be challenged under LUPA. This Court held as much in *Wenatchee Sportsmen and Nykreim*, and recently repeated that holding in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 406-07, 120 P.3d 56 (2005).

The last part of Judge Coleman's majority opinion below summarizes the law applicable in this matter very clearly. That analysis reveals precisely why this Court reversed the Court of Appeals in *Samuel's Furniture*,<sup>4</sup> an opinion Judge Coleman also authored:

*Samuel's Furniture* limits Ecology's oversight and independent enforcement role when a local government has determined that a development is consistent with the SMA. Under the analysis of *Samuel's Furniture*, Ecology must invoke LUPA to challenge a permit that it believes is inconsistent with the SMA, or it must enlist the aid of the local government. An inferential decision by the local government that an additional shoreline permit is not required must be appealed through LUPA to the Superior Court. Directly imposing a penalty through RCW 90.58.210 would constitute a collateral attack on a local government decision at odds with the policy of cooperation contemplated in RCW 90.58.050.

130 Wn. App. 730, 742-43.

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<sup>4</sup> 105 Wn. App. 278, 19 P.3d 474 (2001).

No attempt to paint the facts of *Samuel's Furniture* as a mere "jurisdictional dispute," or to impermissibly assert this matter involves violations of existing CUPs can change the fact that Ecology's actions in this matter were collateral attacks on final land use decisions made by Skagit County without benefit of a timely LUPA appeal. This Court has repeatedly held that LUPA plainly bars such attacks, including by Ecology under the SMA.

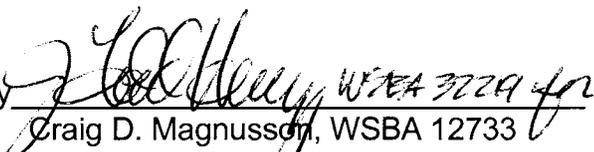
Ultimately, Ecology wholly fails to provide this Court with bases that the issues in this Petition meet any of the RAP 13.4(b) criteria, and therefore there is no reason for this Court to accept review of this matter.

#### IV. CONCLUSION

For the foregoing reasons, Respondent Twin Bridge respectfully requests that the Court deny Ecology's Petition for Review.

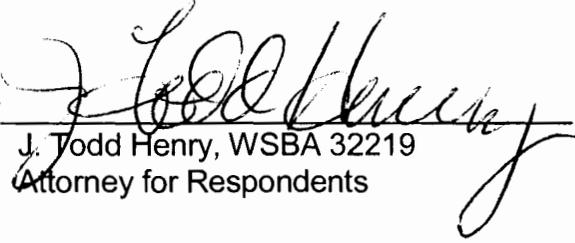
DATED this 28th day of December, 2006.

MAGNUSSON LAW OFFICES, P.S.

By  WSEA 32294  
Craig D. Magnusson, WSBA 12733  
Attorney for Respondents

OLES MORRISON RINKER & BAKER, LLP

By

A handwritten signature in black ink, appearing to read "J. Todd Henry", written over a horizontal line.

J. Todd Henry, WSBA 32219  
Attorney for Respondents

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