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NO. 542770

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

TWIN BRIDGE MARINE PARK, ET AL.,

Respondents,

v.

DEPARTMENT OF ECOLOGY, a department of
the State of Washington,

Appellant.

DEPARTMENT OF ECOLOGY'S REPLY BRIEF

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I. INTRODUCTION

Twin Bridge Marine Park does not dispute the material facts. It built a marina on state shorelands without a shoreline permit to do so and in direct violation of the express conditions of shoreline permits Ecology previously had approved. Pursuant to RCW 90.58.210(2), Ecology took enforcement action against Twin Bridge for “undertak[ing] development on the shorelines of the state without first obtaining [a] permit required by this chapter” and for “fail[ure] to conform to the terms of a permit issued under this chapter.” On administrative appeal, the Shorelines Hearings Board (SHB) entered Findings of Fact and Conclusions of Law upholding the violations and the reasonableness of the penalty. *See* Ecology’s Opening Brief, Appendix 1.

In its Brief, Twin Bridge argues that Ecology’s enforcement action was a “collateral attack” on the building permits issued by Skagit County. However, Ecology’s enforcement action was not taken against the County and did not collaterally attack any County decision. Ecology took enforcement action against Twin Bridge for its “intentional and knowing” violations of the Shoreline Management Act (SMA). *See* Shorelines Hearings Board Findings of Fact, Conclusions of Law, and Order at 18. Ecology was simply enforcing conditions of the shoreline permits it previously approved for the site. It also was enforcing the requirement to

obtain shoreline permits on a site where SMA jurisdiction was undisputed. Twin Bridge did not act within the terms of the SMA and the county building permits do not shield it from the consequences of its knowing violations.

Ecology's action was consistent with *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002) and the other cases cited by Twin Bridge. Under *Samuel's Furniture*, 147 Wn.2d at 456, Ecology is "not . . . prevented from taking action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate the conditions of the permit." Because that is precisely what Twin Bridge did in this case, and what the Shorelines Hearings Board found, Ecology's penalties should be affirmed.

II. AUTHORITY AND ARGUMENT

A. **The Decision on Review is the Findings of Fact, Conclusions of Law and Order of the Shorelines Hearings Board, not the Decision of the Superior Court**

As explained in Ecology's Opening Brief at 18, under the Administrative Procedures Act, the court reviews the decision of the SHB, not the decision of the superior court. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *Bellevue Farm Owners Ass'n. v. Shorelines Hearings Board*, 100 Wn. App. 341, 362, 997 P.2d 380 (2000). The findings of fact and conclusions of law entered by the

superior court are superfluous. *Valentine v. Department of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352 (1995).

Notwithstanding the wealth of authority on this point, Twin Bridge maintains that the superior court's findings should be reviewed, not those of the SHB. Twin Bridge relies on the fact that "additional evidence" was admitted by the superior court. As explained in Ecology's Answer to Twin Bridge's Motion on the Merits at 5-8, this so-called additional evidence was nothing more than the shoreline permit that Twin Bridge belatedly received for the project in 2002, two years after it was built.

Twin Bridge's argument lacks merit for several reasons. First, the belated permit was not "new evidence" because the SHB previously was aware of it. SHB Order Denying Motion to Vacate at 11; Ecology's Opening Brief, Appendix 2. Second, it was not relied on by the superior court in its decision in any way. Finally, it is irrelevant to the issues here because this case concerns violations that Twin Bridge committed before Twin Bridge obtained the permit.

Twin Bridge contends that this belated permit allowed the superior court to conclude that this case concerned only "substantial development permits" instead of "conditional use permits" and that this alleged conclusion eliminates the need for review of the Findings and Conclusions of the Shorelines Hearings Board. Twin Bridge Brief at 3. This

contention is contrary to the record and legally erroneous. The superior court made no mention of the belated permit in its letter decision in this case and plainly did not rely on it in any way. CP at 424–426. Moreover, the record is clear that the permits Twin Bridge violated in this case were conditional use permits over which Ecology had final review and approval authority under RCW 90.58.140(10). SHB Finding of Fact V.

Twin Bridge’s obligation under the APA is to demonstrate how the Board’s Findings and Conclusions are in error. The Board found that Twin Bridge built many structures and engaged in uses not authorized in the original conditional use permits and in violation of those permits. SHB Conclusion of Law IV; Order Denying Motion to Vacate at 4 n.1. Twin Bridge therefore was subject to penalties under the SMA regardless of whether it later obtained a permit and regardless of whether that later permit was a substantial development permit or a conditional use permit. *See* RCW 90.58.210(2); RCW 90.58.140(2) (permit must be obtained *before* undertaking development on state shorelines).

In short, contrary to Twin Bridge’s arguments, the “agency action” on judicial review here is the decision of the SHB, not the decision of the superior court. Under the APA, the SHB decision should be affirmed unless the Board’s Findings of Fact are not supported by substantial evidence or the Board’s Conclusions are contrary to law. RCW

34.05.570(3). As shown in the next section, Twin Bridge fails to demonstrate either and therefore the SHB decision should be affirmed.

B. The SMA Grants Ecology Broad Authority To Enforce Permit Conditions. It Does Not Require Ecology to Pursue a LUPA Appeal Before Exercising that Authority.

Twin Bridge does not dispute the Findings of Fact entered by the SHB, and those therefore are verities on this appeal. *Patterson v. Superintendent of Public Instruction*, 76 Wn. App. 666, 674, 887 P.2d 411 (1994). Twin Bridge does not deny that it engaged in numerous developments and uses within shoreline jurisdiction that were not authorized by the conditional use permits (CUPs) issued years earlier in the 1980s. *See* SHB Findings of Fact III, XVI, XVII, XVIII; Conclusions of Law IV, V. Nor does Twin Bridge even attempt to show that those old permits, which approved only the construction of a headquarters for Mr. Youngsman's marine construction and dredging business, somehow authorized construction of the large "backshore" marina Twin Bridge actually built.

Instead, Twin Bridge relies entirely on the legal argument that Ecology was precluded from pursuing enforcement for this admitted violation of the SMA because the local government, in settlement of other litigation with the City of Anacortes, reissued building permits for the marina buildings. *See* Ex. A-2; SHB Finding of Fact XIII at 9. According

to Twin Bridge, Ecology was required to appeal these reissued building permits under the Land Use Petition Act (LUPA) before pursuing enforcement under the SMA. In effect, Twin Bridge asks this court to conclude that the local government's action of issuing the building permits either *sub silentio* amended the SMA permits or *sub silentio* amended Ecology's power to enforce the express conditions of the SMA permits and express requirements of the SMA. Twin Bridge's legal argument is without merit.

1. The Statutory Scheme is Contrary to Twin Bridge's Argument

As explained in Ecology's Opening Brief at 22-30, the SMA does not require Ecology to file a LUPA appeal before taking enforcement action. The RCW 90.58.210(2) states:

“Any person who shall fail to conform to the terms of a permit issued under this chapter or who shall undertake development on the shorelines of the state without first obtaining any permit required under this chapter shall also be subject to a civil penalty”

The RCW 90.58.210(3) further states:

“The penalty provided for in this section shall be imposed by a notice in writing . . . to the person incurring the same from the department or local government”

Nothing in this statute states or even suggests that Ecology is required to pursue an appeal under LUPA before taking enforcement

action. There is simply no statutory basis on which to require a LUPA appeal where Ecology's SMA jurisdiction is established. As explained in Ecology's Opening Brief, LUPA should not be read as impliedly amending these express provisions of the SMA. Implied amendments are strongly disfavored in the law. *In re Detention of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972 (1994). LUPA actually preserves SMA authority because it exempts from its coverage "land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board" RCW 39.70C.030(1)(a)(ii). This exemption establishes that the legislature did not intend, contrary to Twin Bridge's arguments, for LUPA to replace or impliedly repeal the express provisions of the SMA. Instead, the Legislature plainly intended for the specific regulatory regime established in the SMA to continue.

An essential part of that regulatory scheme within shoreline jurisdiction is Ecology's authority to enforce permit conditions and its authority to enforce the requirement to obtain a permit. The SMA specifically says that Ecology "or" the local government may take such enforcement. The SMA in no way makes Ecology's enforcement power subordinate to or dependent on the local government, and Twin Bridge can point to nothing in LUPA that creates such subordination. Twin Bridge

does not respond to the point made in Ecology's Opening Brief that LUPA can be harmonized with the SMA. Under LUPA, Ecology may have been time barred from challenging the building permits, but under the SMA Ecology was not barred from exercising its authority to enforce compliance with the separately issued SMA permits.

In support of its arguments, Twin Bridge cites the language in RCW 90.58.140(3) that the permit system established by the SMA shall be administered "exclusively" by the local government. This language, however, is not material here because the local government did not issue a new shoreline permit before Twin Bridge built the marina, it issued only building permits. Also, this language does not mean what Twin Bridge claims. The permit system established by the SMA is *not* exclusively administered by the local government. The statute expressly grants to Ecology review and approval authority over shoreline variances and conditional use permits: "[a]ny permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval." RCW 90.58.140(10). The court in *Samuel's Furniture* recognized that Ecology retained this power. *Samuel's Furniture*, 147 Wn.2d at 455 n.13. Because the permits Twin Bridge violated here were conditional use permits, the local government did not have "exclusive" authority to administer them.

2. **Compliance with SMA Permit Conditions Is Essential to Protect the Public Policy Expressed in the SMA**

The statutory enforcement scheme is important here because the old shoreline permits upon which Twin Bridge relied to authorize construction of the marina were shoreline conditional use permits that had been subject to public review and were approved by Ecology with specific limitations on what they authorized. Exs. R-3, R-6. For example, in its letter approving CUP 7-82, Ecology stated: “. . . this permit only authorizes 90,000 cubic yards of fill to be placed onsite and subsequent use of the site for the operation of a marine construction and dredging business to include storage of materials and equipment. Any other substantial development on the site such as buildings, shore structures, hard surfacing and drainage improvements will be submitted as a new permit or a revision to this permit” Ex. R-4; *see also* Exs. R-9, R-12, R-16, R-17, R-19, R-23, R-39.

In approving those permits, Ecology authorized construction of a specific project – development of a marine construction and dredging business – as consistent with the SMA. *See Hayes v. Yount*, 87 Wn. 2d 280, 295, 552 P. 2d 1038 (1976). The public reviewed and commented on that specific project. Ecology did not approve, and the interested public

had no notice of or opportunity to comment on, the indoor marina that Twin Bridge ultimately built.

By penalizing Twin Bridge, Ecology was protecting the public's interest in ensuring that the state's "valuable" and "fragile" shorelines are developed only in accordance with permits issued under and consistent with the SMA. RCW 90.58.020. The Legislature declared in the SMA that the state's shorelines are a unique resource and it set up a specific regulatory and permitting regime to manage them. The specific policies and procedures of the SMA are not followed when a local government issues a building permit and it is totally inconsistent with the statutory scheme to hold that a building permit may *sub silentio* amend SMA permits. *See* SHB Order Denying Motion to Vacate at 7-8.

Twin Bridge offers no good reason to avoid the SMA's express statutory scheme. Nor does Twin Bridge offer a good reason for holding that conditions in SMA permits become unenforceable by virtue of a later building permit. Twin Bridge's sole reasoning is by analogy to the recent ruling in *Samuel's Furniture* but, as shown in the next section, the *Samuel's Furniture* opinion does not provide a defense to development on state shorelines without a required permit or in violation of express permit conditions. The superior court judgment should be reversed and the SHB decisions affirmed.

C. *Samuel's Furniture* Is Distinguishable From This Case Because This Case Involves Enforcement of Permit Conditions And it is Not Disputed that this Project is Located in Shoreline Jurisdiction

In Ecology's Opening Brief, Ecology pointed out that Twin Bridge's reliance on the *Samuel's Furniture* case was misplaced because that case applies only when the local government makes a determination that a project is not located in shoreline jurisdiction. Ecology's Opening Brief at 30-35. Here, the local government made no determination that the project is located outside shoreline jurisdiction. Indeed, the Board specifically found as fact that numerous developments and uses engaged in by Twin Bridge were within shoreline jurisdiction. SHB Finding of Fact XVI at 10.

Samuel's Furniture is therefore distinguishable from this case. The *Samuel's Furniture* court required a LUPA appeal because it concluded that, before Ecology could take enforcement action, "its jurisdiction must first be established." *Samuel's Furniture*, 147 Wn.2d at 457. The court expressly acknowledged that Ecology has enforcement authority in cases where there is development on state shorelines without a permit, or in violation of permit conditions. *Id.* The court, however, said LUPA applied in that case because the jurisdictional question must be answered first before Ecology's enforcement authority may be exercised. The court

reasoned that, where the local government has properly decided that a project is not within shoreline jurisdiction, Ecology must appeal that decision under LUPA and get it finally resolved before it can take enforcement. *Id.*

Here, there was no question of jurisdiction. Therefore, there is no basis upon which to conclude that Ecology's enforcement powers are inapplicable. As the SHB stated in its Order Denying Twin Bridge's Motion to Vacate at 9: "Expanding the mandatory filing of a LUPA appeal to projects clearly located within the shoreline would be inconsistent with the protections of the Act and the defined role of the Department of Ecology."

Twin Bridge's argument is not that the SMA is inapplicable, but rather it is that the local government, by issuing the building permits, thereby silently or implicitly authorized the development *under the SMA*, and that Ecology should have appealed that silent determination under LUPA before exercising its enforcement powers. This argument, however, is inconsistent with both the SMA and LUPA. It is inconsistent with the SMA because a local government cannot authorize a substantial development such as the Twin Bridge marina on state shorelines without issuing an SMA permit for that development. RCW 90.58.140(1). It is also inconsistent with LUPA because LUPA allows appeal only of

explicit, final decisions that the local government is authorized to make, not silent or implicit determinations on the scope of SMA permits that are beyond the local government's authority. *See* RCW 36.70C.020(1).

The determination of whether the Twin Bridge project was authorized by the existing SMA conditional use permits was not within the authority of the local government to make because the SMA grants final approval authority over such permits to Ecology. RCW 90.58.140(10) ("any permit for a variance or conditional use . . . must be submitted to the department for its approval or disapproval"). The Supreme Court noted in *Samuel's Furniture* that where Ecology has specific review authority, local decisions are not "final" for LUPA purposes. *Samuel's Furniture*, 147 Wn.2d at 453 n.2. Local government is not the "body or officer with the highest level of authority to make the determination" on a conditional use permit. RCW 36.70C.020(1). That body or officer is Ecology and those permits are subject to appeal to the Shorelines Hearings Board.¹

¹ The County decision was, in any event, unclear. The Hearing Examiner determined that a new shoreline permit was needed. *See* Ex. R-52. Twin Bridge appealed that determination to the County Commissioners, but the County reached a settlement before the appeal was heard. The County issued the building permits as a result of the settlement. *See* Ex. A-2.

D. Enforcement of Express Shoreline Management Act Permit Conditions Does Not Harm the Public Interest In Achieving Finality

Twin Bridge does not directly respond to Ecology's argument that *Samuel's Furniture* applies only when the local government makes a jurisdictional determination. Twin Bridge simply cites language from *Samuel's* regarding finality that it claims applies here. Twin Bridge Brief at 18–19. However, the record shows that Ecology several times over the years informed Twin Bridge that new developments and uses not specifically authorized in the shoreline permits of record would require either a new shoreline permit or a revision of the existing permits. Ex. R-16 (“Your present proposal may be significantly changed from that authorized by the above-referenced permits Revisions to the permits may be required”); R-17 (“the present marine park proposal is substantively different from the originally permitted moorage basin proposal such substantive differences require either permit revision or new permits”); R-19 (“if the revised proposal were to constitute a change of use, new shoreline permits would be required”).

Under these facts, Twin Bridge knew exactly what the law required in order to obtain development permission. The SHB, in an unchallenged conclusion of law, stated that “Twin Bridge was fully aware of Ecology's position at the time it constructed the improvements within

the shoreline . . . Twin Bridge chose to ignore and/or reject Ecology’s role in enforcing the shoreline act.” SHB Conclusion of Law X at 18. Thus, the equities of this case weigh heavily against Twin Bridge. Not only did Twin Bridge know of Ecology’s position and proceed in flagrant disregard of it, Twin Bridge even agreed to get a new shoreline permit for the project, applied for that permit, and then proceeded to build the structure without waiting for the permit to be issued. This case does not involve a situation where government seeks to alter a project years after permits are final. This case involves a developer who was fully informed of the need for state SMA permits but who instead sought to use a local government approval to shield himself from the application of state law.

As the SHB noted, these facts also distinguish this case from *Wenatchee Sportsman v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000); *Skamania County v. Columbia River Gorge Comm’n.*, 144 Wn.2d 30, 26 P.3d 241 (2001), and *Chelan County v. Nykriem*, 146 Wn.2d 904, 52 P.3d 1 (2002), relied on by Twin Bridge. SHB Order Denying Motion to Vacate at 9–10. Those cases involved equitable concerns of undue delay that are not present here. Moreover, those cases did not involve the particularized regulatory regime and express enforcement authority set out in the SMA. The court should reject Twin Bridge’s claims that finality

concerns justify a bar on enforcement of the state Shoreline Management Act under the facts found by the Board.

E. Twin Bridge Waived any Claim that LUPA Applies Here Because it Agreed to Get a New Shoreline Permit

Twin Bridge has no response at all in its Brief to the argument that it waived application of LUPA in this case by agreeing to get a new shoreline permit in a written settlement agreement with Ecology. *See* Ecology's Opening Brief at 41–43. The settlement agreement signed by Twin Bridge required Twin Bridge to submit an application for a new shoreline permit for the marina and it required Twin Bridge to stop work on the project “until all required federal, state, and local permits have been obtained.” Ex. R-80. Twin Bridge submitted an application for a new shoreline permit to the county, as well as numerous supporting documents, but it did not wait until the permit was issued before resuming construction. *See* Exs. R-53, R-61, R-62, R-63, R-81. Twin Bridge completed construction and opened the marina for business well before the county issued the new permit. *See* Exs. R-92; R-103.

The Board found that Twin Bridge breached the settlement agreement by resuming construction before obtaining the new shoreline permit. SHB Conclusion of Law VII at 16. Twin Bridge's breach authorized Ecology to reinstate the original penalty and issue new

penalties regardless of whether LUPA applies. The SHB decision distinguishing *Samuel's Furniture* on this basis, as well as the other bases set forth in its Order Denying Motion to Vacate, should be affirmed.

III. CONCLUSION

For the reasons stated above, the decisions of the Shorelines Hearings Board upholding Ecology's penalties and orders should be affirmed and the superior court reversed.

Respectfully submitted this 22 day of April, 2005.


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CERTIFICATE
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Pursuant to RCW 9A.72.085, I certify that on the 25th day of April 2005, I caused to be served Department of Ecology's Reply Brief, and this Certificate of Service in the above-captioned matter, upon the parties herein, as indicated below:

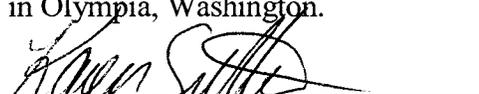
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of April 2005, in Olympia, Washington.


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