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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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RESPONDENTS' SUPPLEMENTAL BRIEFING  
PURSUANT TO RAP 13.7(d)

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## I. INTRODUCTION

Respondent Twin Bridge Marine Park, LLC (“Twin Bridge”), submits the following supplemental briefing for the Court’s consideration, pursuant to RAP 13.7(d). This in response to the supplemental briefing apparently to be submitted by Appellant Department of Ecology (“Ecology”).

Twin Bridge draws the Court’s attention to three points, each of which are of central import to the Court’s consideration of this matter, and each of which warrant the Court upholding the decision of the Court of Appeals:

1. The dispute in this matter does not involve the alleged violation of existing Shoreline Conditional Use Permits.
2. The record before the Court in this matter is that established by the Skagit County Superior Court, and not of the Shoreline Hearings Board.
3. Though this Court’s decision in *Samuel’s Furniture v. Department of Ecology* is instructive and important to the Court’s consideration of this matter, unlike that case, the undisputed facts of this matter are not a “close call,” and line up more directly with this Court’s unanimous decisions in *Wenatchee Sportsmen v. Chelan County*, *Skamania County v. Columbia River Gorge Commission* and *Chelan County v. Nykreim*.

## II. AUTHORITY

- A. Ecology Never Asserted This Action Arose From a Violation of Conditional Use Permits Until After This**

**Court Issued its Decision in *Samuel's Furniture*, and is Therefore Precluded From Doing So Now.**

Though its original Order and Notice of Penalty Incurred (Ex. R-50<sup>1</sup>) includes a reference to “conditional use permits” in its introductory paragraph, that Order and Notice made no “Allegations of Fact” or “Allegations of Law” that Twin Bridge had “violated” existing Conditional Use Permits.

Though not properly before this Court for reasons outlined below, in its decision in this matter the Shoreline Hearings Board (“SHB”) specifically declined to make a finding of whether or not Twin Bridge was required to obtain a new CUP in order to construct its marina. See, SHB COL IX, CP 23. Axiomatically, if no new conditional use permit was required, the existing CUPs must have been adequate for the new work contemplated.

In fact, until this Court issued its ruling in *Samuel's Furniture v. Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), amended upon denial of reconsideration, this matter was characterized by Ecology as a “breach of contract,” and not as a CUP

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<sup>1</sup> The citations to the record used in this brief reflect those used by Ecology in its Opening Brief before the Court of Appeals. “R” designations refer to Ecology’s (the “Respondent’s”) exhibit number used before the Shoreline Hearings Board. “A” designations refer to Twin Bridge’s (the “Appellant’s”) exhibit numbers used before the Shoreline Hearings Board. “Tr.” designations refer to the specified portion of the Verbatim Report of Proceedings from the Shoreline Hearings Board proceedings.

enforcement action. Before the SHB, Ecology did not claim that Twin Bridge had violated CUPs, but rather had violated the settlement agreement entered into between Twin Bridge, Anacortes, Skagit County and Ecology, by resuming construction upon the reinstatement of its building permits by Skagit County. Ecology asserted that its Order and Notices were appropriate to halt construction based on the failure of Twin Bridge to have obtained the “new shoreline substantial development permit” Twin Bridge had applied for under the terms of the settlement agreement, and which Ecology asserted was “necessary” in order for the Twin Bridge project to resume.

However, under the Shoreline Management Act (“SMA”) Skagit County and not Ecology makes the threshold determination of what shoreline substantial development permits (“SDP”) are required under its Shoreline Management Plan (“SMP”). In keeping with that authority, Skagit County determined that Twin Bridge required no new SDP for its project, and with notice to Ecology, reinstated the suspended building permits.

At the SHB, Ecology relied on the Court of Appeals' decision in *Samuel's Furniture*<sup>2</sup> for its contention that it was entitled to "independent enforcement" over the SMA, regardless of whether or not it had adhered to the provisions of the Land Use Petition Act ("LUPA"), RCW 36.70C.<sup>3</sup> The SHB wholly adopted Ecology's position, and relied solely on the then-existing decision in *Samuel's Furniture* in its decision. Hence, the SHB made no determination regarding "violations of existing CUPs," because Ecology's position included no such accusations.

However, when this Court overturned *Samuel's Furniture*, and declared that its decision "present[ed] the intersection of the SMA and LUPA," (147 Wn.2d at 448), Ecology could no longer correctly assert that its "independent enforcement" authority over the SMA afforded it the ability to ignore LUPA. This especially in light of the following finding included by the SHB:

Skagit County apparently concluded that the existing CUP 7-82 covered the shoreline aspects of the project since Mr. Youngsman was not required to obtain a revision or seek a new shoreline substantial development permit or conditional use permit. Skagit County issued building permits 99-1065 and 99-1226 for the project on March 7, 2000. Ecology did not

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<sup>2</sup> 105 Wn. App. 278, 19 P.3d 474 (2001), *pet. rev. granted*, 145 Wn.2d 1001 (2001).

<sup>3</sup> See, generally, CP 117-398.

appeal issuance of the building permits under the  
Land Use Petition Act.

FOF IX, CP 23 (emphasis added).

Therefore, when Twin Bridge's appeal was heard by the Skagit County Superior Court, Ecology adopted the "CUP violation" position it has thus far unsuccessfully trumpeted before two successive appellate tribunals. RAP 2.5(a) generally precludes a party from arguing on appeal that which it failed to raise below. See, e.g., *In re Audett*, 158 Wn.2d 712, 725 n. 9, 147 P.3d 792 (2006). Ecology's "CUP violation" argument has only been adopted in order to disguise its action from what it truly was and remains – an impermissible collateral attack on a final land use decision, of the kind this Court has repeatedly (and unanimously) held<sup>4</sup> are void without a proper and timely LUPA appeal.

**B. Given the Superior Court's Acceptance of New Evidence, and its Proper Issuance of Findings and Conclusions, the Record Before This Court is the Superior Court Record.**

Where a superior court takes additional evidence under RCW 34.05.562, as it is authorized to do under RCW 34.05.570(4)(b), the appellate court will look to the superior court record.

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<sup>4</sup> See, generally, *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000); *Chelan County v. Nykreim*, 146 Wn.2d 904, 53 P.3d 1 (2002).

*Seattle Bldg. and Constr. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 799, 920 P.2d 581 (1996), *reconsideration denied, certiorari denied*, 117 S. Ct. 1693, 520 U.S. 1210, 137 L.Ed.2d 820 (1997) (emphasis added); *accord, Aviation West Corp. v. Dep't. of Labor and Industries*, 138 Wn.2d 413, 422 980 P.2d 701 (1999).

Though seeking reversal of the Court of Appeals, Ecology has appealed this matter from the decision of the Skagit County Superior Court sitting in its appellate capacity, which the Court of Appeals affirmed. And because the Superior Court took additional evidence in this matter pursuant to RCW 34.05.562(1), it is the findings of fact and conclusions of law of the Superior Court that were properly before both the Court of Appeals and this Court.

Ecology, however, has simply ignored the Superior Court record, and erroneously continues to treat this matter as if this Court can simply affirm the decision reached in this matter by the SHB. The Appellant's Brief submitted by Ecology to the Court of Appeals and relied upon here is peppered with improper "factual" references to CUPs. As outlined above, there was no finding made, either by the SHB or the Superior Court, that Twin Bridge was required to obtain a "new" CUP, and Ecology made no

assignment of error to the Court of Appeals regarding the Superior Court not having done so. Therefore, each reference in Ecology's brief to requirements for CUPs fails to comport to RAP 10.3(5), which requires a citation to the record for such references "of fact."

A court does review challenged agency action to determine compliance with legal precedent, and is not precluded from entering findings of fact and conclusions of law, as long as the trial court utilized proper standards of review to resolve the legal challenge.

*Spokane County Fire Dist. No. 8 v. Boundary Review Board*, 27 Wn. App. 491, 493, 618 P.2d 1326 (1980), *citing*, *Sisley v. San Juan County*, 89 Wn.2d 78, 82, 569 P.2d 712 (1977).

In turn, the standard for review of an administrative agency or Board's ruling is the "error of law" standard:

Legal determinations of administrative agencies are reviewed under an error of law standard which permits a reviewing court to substitute its interpretation of the law for that of the agency.

*Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 754, 954 P.2d 304 (1998), *citing*, *Haley v. Medical Disciplinary Board*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

In this matter, the Superior Court sat in review of the SHB decision under an error of law standard. The Superior Court determined that the SHB's decision failed to comport with authority

(*Nykreim* and *Samuel's Furniture*, among others) in upholding the Notices and Orders Ecology issued. Ecology made no assignment of error to the Court of Appeals asserting that the Superior Court's entry of new evidence did not "utilize the proper standards of review."

The Superior Court acted correctly when it substituted its own judgment in regard to the applicable law for that of the SHB, and was acting within its discretion under RCW 34.05.562(1)(b) when it: a) accepted new evidence based on the parties' stipulation to such entry; and then b) entered its own findings of fact and conclusions of law. Since the Superior Court made findings of fact and conclusions of law under RCW 34.05.562(1)(b), under *Seattle Bldg. and Constr. Trades Council, supra*, those findings and conclusions, and not those made by the SHB, are before this Court.

**C. The Factual Issues of Concern to This Court in *Samuel's Furniture* Are Not At Issue in This Matter.**

This Court's decisions in *Wenatchee Sportsmen*, *Nykreim* and *Samuel's Furniture* all stand for the proposition that government, like any "aggrieved person" is not exempt from the requirements of LUPA. Both *Wenatchee Sportsmen* and *Nykreim* were unanimous decisions, both of which indicate that even

erroneous final land use decisions must be timely appealed under LUPA.

*Samuel's Furniture*, in contrast was a 5-4 decision of this Court. In it, the dissent expressed concern regarding: a) the unwritten determination of the City of Ferndale that the project was not within shoreline jurisdiction (see, 147 Wn.2d at 469-70); and b) certain decisions of local authorities made such that Ecology had inadequate notice to exercise its statutory "review capacity" of threshold shoreline permitting decisions made by local authorities having jurisdiction (see, *id.* at 475).

*Samuel's Furniture* is enormously helpful in this Court's consideration of *Twin Bridge*, as it was to both the Superior Court and Court of Appeals. However, it must be pointed out that the facts of *Twin Bridge* are less ambiguous than were those of *Samuel's Furniture*, and therefore they align readily with this Court's unanimous decisions regarding the impermissibility of governmental collateral attacks on final land use decisions included in *Wenatchee Sportsmen* and *Nykreim*.

First, unlike *Samuel's Furniture*, there was no factual dispute between the permitting and reviewing governmental agencies that portions of the proposed Twin Bridge marina development was

within shoreline jurisdiction. Clearly, not only did Skagit County know and understand that development would be taking place within shoreline jurisdiction, both the City of Anacortes and Ecology knew it as well.

Second, there was no factual dispute in this matter that the issuance of building permits by Skagit County constituted a "final land use decision." In *Samuel's Furniture*, the dissent expressed concern regarding the majority's acceptance of Ferndale's "unwritten" decision not to require a new shoreline SDP as being a "final land use decision" that required a LUPA appeal. In contrast, the issuance by Skagit County of the Twin Bridge building permits was: a) unquestionably a "final land use decision" made by a local authority with jurisdiction; and b) made in writing, with copies provided to Ecology. Having received copies of the permits, Ecology had timely notice of their issuance.

It is of central import that unlike *Samuel's Furniture*, in this matter there is no issue with regard to "notice" to Ecology of the circumstances that should have triggered a timely LUPA appeal. Ecology was fully aware of Anacortes' appeal of the initial issuance of the building permits to Twin Bridge. Ecology was even asked by

Anacortes to participate in its appeal of those permits' issuance, but declined to do so. See, generally, Tr., at pp. 106-07, 111, 122-23.

Finally and significantly, when Skagit County reinstated the building permits, Ecology received a carbon copy of the notice of reinstatement (Ex. A-2), and therefore was fully aware that Twin Bridge had the permission it needed from Skagit County to resume construction on the project.

*Samuel's Furniture* clearly addresses a most salient question in this matter: is Ecology exempted from LUPA? And though this Court's unequivocal answer is "no," the problematic facts that apparently made *Samuel's Furniture* a "close call" for this Court are absent from this matter.

Rather, the facts of this matter align best with *Nykreim* and *Wenatchee Sportsmen*, cases in which this Court unanimously held that errors made by the sovereign in making a final land use decision could not be undone by way of collateral attack on the decision, even if the attack is made by the erring sovereign. Rather, this Court held that the government, like any other "aggrieved person," was bound to appeal any final land use decision under LUPA – even if erroneous – otherwise that decision becomes vested and unassailable.

Twin Bridge's matter is in many ways more factually similar to *Nykreim* than to *Samuel's Furniture*, and therefore it asserts the *Nykreim* outcome is appropriate. Like Ecology in this matter, in *Nykreim* Chelan County was aware of the existence of the final land use decision. Chelan County could or should have known that the decision failed to comport with its own zoning, just as Ecology either could or should have asserted the issuance of the building permits was error without a new shoreline permit. Finally, like Chelan County, Ecology failed to timely appeal under LUPA, and allowed the (arguably erroneous) land use decision to vest. And like Ecology, after failing to timely appeal, Chelan County attempted to collaterally attack the boundary line adjustment by rescinding it after expiration of the appeal period.

Ecology's actions in issuing its Order and Notice was no different – and no more permissible – than this Court found Chelan County's actions to have been in *Nykreim*. The Order and Notice Ecology issued to Twin Bridge sought to undermine valid and vested building permits issued by Skagit County, and to do so without first having timely filed a LUPA appeal. This Court determined unanimously that Chelan County was wrong to have done what it attempted in *Nykreim*, and under the strikingly similar

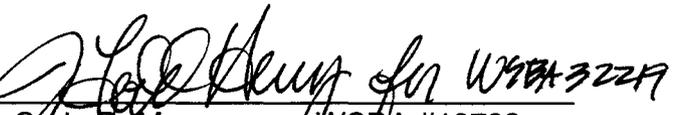
facts of this matter – when coupled with the determination in *Samuel's Furniture* that Ecology is not exempted from LUPA – should reach no different result here.

### III. CONCLUSION

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

DATED this 15<sup>th</sup> day of February, 2007.

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