

Jan 09, 2017, 2:59 pm

RECEIVED ELECTRONICALLY

Supreme Court No. No. 93381-2
Court of Appeals Nos. 33196-2-III
(consolidated with Nos. 332381-III and 332390-III)

**SUPREME COURT
OF THE STATE OF WASHINGTON**

CHELAN BASIN CONSERVANCY,

Petitioner,

v.

GBI HOLDING CO., STATE OF WASHINGTON, and
CITY OF CHELAN,

Respondents.

**SUPPLEMENTAL BRIEF
OF CITY OF CHELAN**

Davis, Arneil Law Firm, LLP
Nicholas J. Lofing, WSBA No. 43938
617 Washington St.
Wenatchee, WA 98801
(509) 662-3551

Attorneys for City of Chelan

TABLE OF CONTENTS

I. Introduction.....1

II. Assignment of Error.....2

II. Statement of the Case.....2

IV. Argument

A. The State and GBI should bear the burden of persuading the Court that RCW 90.58.270(1) promotes and protects the public’s interest in the navigable waters of Lake Chelan.....3

B. The Court should avoid the issue of whether RCW 90.58.270(1) is valid on this record by giving meaning to the plain language of the statute, which only applies to the “retention and maintenance” of fills, not their subsequent development.....5

C. The Court of Appeals’ interpretation of RCW 90.58.270(1) cannot stand under Washington’s Public Trust Doctrine.....7

V. Conclusion.....11

Appendix: City’s Administrative Decision (July 25, 2011)

TABLE OF AUTHORITIES

Cases

<i>Caminiti v. Boyle</i> , 107 Wn.2d 662, 732 P.2d 662 (1987).....	<i>passim</i>
<i>Chelan Basin Conservancy v. GBI Holding Co.</i> , 194 Wn.App. 478, 378 P.3d 222 (Div. 3 2015)	3-4, 6, 8-9
<i>Eggers v. City of Seattle</i> , 81 Wn.2d 840, 842-48, 505 P.2d 801 (1973).....	4
<i>Macias v. Dept. of Labor and Industries</i> , 100 Wn.2d 263, 271-75, 668 P.2d 1278 (1983).....	4
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	6
<i>Utter v. Building Industry Ass'n of Wn.</i> , 182 Wn.2d 398, 341 P.3d 953 (2015).....	5-6
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	3-4
<i>Wilbour v. Gallagher</i> , 77 Wn.2d 306, 452 P.2d 232 (1969).....	2, 7

Statutes and Rules

RCW 90.58.020.....	9-10
RCW 90.58.270.....	<i>passim</i>
Shoreline Management Act, RCW 90.58.....	<i>passim</i>
WAC 173-20-030(2).....	10

WAC 173-20-110(5).....10

Constitutional Provisions

Washington State Constitution, Article 17, Section 1.....7-8

I. INTRODUCTION

The City of Chelan maintains its neutral position regarding whether the Three Fingers Fills should be removed or retained. The City participates in this lawsuit because it originated in a land use action taken by the City, which is the subject of a current Land Use Petition Act (“LUPA”) lawsuit by GBI Holdings against the City. The two lawsuits overlap on the critical interpretation of RCW 90.58.270. The City opposes GBI’s far-reaching position that RCW 90.58.270 shields its Three Fingers Fills from all assessment under the Public Trust Doctrine.

The City assessed the Three Fingers Fills’ impact on the public’s right to navigation and access when the City issued its administrative decision on GBI’s application to develop the fills. See Appendix. GBI has appealed the City’s decision in a presently stayed LUPA appeal in Chelan County Superior Court Cause No. 14-2-00664-5. That lawsuit will resume pending resolution of this appeal. The City consistently has defended its assessment and decision throughout these Superior Court and Court of Appeals proceedings.

The City requests this Court consider the substantial administrative process and analysis it undertook in reconciling the disparate interests of the public and the property owner when GBI decided to proceed with development of the fills, which had been maintained as undeveloped, open

space for over 50 years. This lawsuit does not exist in a vacuum. The City requests this Court interpret RCW 90.58.270 in a way that gives effect to its plain language, limiting the statute's scope, as expressly provided in the statute, to "retention and maintenance" of the fills. GBI's interpretation that the statute's immunization goes further contradicts the statute's plain language and renders the statute invalid.

II. ASSIGNMENT OF ERROR

CBC raised two issues in its Petition for Review. The City addresses, as it did in its motion for summary judgment in the Superior Court and cross-appeal in the Court of Appeals, only the first issue. CBC has presented that issue as follows:

1. Can the Legislature abdicate complete control over the "paramount" and "inalienable" public rights of navigation?

III. STATEMENT OF THE CASE

The Three Fingers Fills have a fascinating history, both factually and legally. It should not be surprising to local citizens or scholars of Washington history that GBI left the Fingers undeveloped for over 50 years or that public opposition and lawsuits followed when GBI moved forward with development. The Three Fingers Fills have near factual identity with those fills ordered removed in the watershed case of *Wilbour v. Gallagher*, 77 Wn.2d 361, 163 P.3d 806 (1969). The critical difference

these many years later is legal, including passage of the Shoreline Management Act of 1971, this Court's development of Washington's Public Trust Doctrine, and laws and regulations for land use planning.

The factual specifics related to the Three Fingers Fills, their proposed development, and the public's opposition is summarized in the City's Administrative Decision. See Appendix.

V. ARGUMENT

A. **The State and GBI should bear the burden of persuading the Court that RCW 90.58.270(1) promotes and protects the public's interest in the navigable waters of Lake Chelan.**

The parties agree that the Court's standard of review is *de novo*. *Weden v. San Juan Co.*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). However, disagreement has arisen as to who bears the burden of persuasion. The Court of Appeals allocated the burden of proof to CBC, reasoning that "[p]ublic trust claims are merely quasi-constitutional" and "the challengers have waited over 40 years to bring suit." *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn.App. 478, 494, 378 P.3d 222 (Div. 3 2015). However, this lawsuit's long dormancy can be equally credited to GBI's long vacancy of the fills. More importantly, this Court has already concluded that Public Trust Doctrine cases merit heightened scrutiny: "courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, 'as if they were measuring that

legislation against constitutional protections.” *Weden*, 135 Wn.2d at 689, 958 P.2d 273.

The Court of Appeals incorrectly concluded that the lowest level of review – essentially rational basis review – should apply, thus allocating the burden of proof to CBC and ultimately resolving the issue on a burden of proof determination. *Chelan Basin*, 194 Wn.App. at 494-95, 378 P.3d 222. Rather, Washington Court’s should apply heightened scrutiny – similar to intermediate or strict scrutiny – that takes a critical eye toward protecting the public’s interest in navigable waters. Under such heightened scrutiny, the proponent of the legislation would bear the burden of proof. By way of analogy, the Court has applied strict review in cases involving the fundamental right to travel, which have similarities to the “paramount” and “inalienable” rights of navigation. See, e.g., *Eggers v. City of Seattle*, 81 Wn.2d 840, 842-48, 505 P.2d 801 (1973); *Macias v. Dept. of Labor and Industries*, 100 Wn.2d 263, 271-75, 668 P.2d 1278 (1983).

Such allocation is rooted in the *Caminiti* test itself: if challenged legislation abdicates the State’s control of the *jus publicum*, then the State or other proponent must demonstrate under heightened scrutiny that the legislation either promotes, or at least does not impair, the public interest in the State’s navigable waters. Assigning such burden to the State or proponent aligns with the plain language of the second prong of the

Caminiti test, requiring a showing that: “the state (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.” *Caminiti*, 107 Wn.2d at 670, 732 P.2d 662 (underlining added).

B. The Court should avoid the issue of whether RCW 90.58.270(1) is valid on this record by giving meaning to the plain language of the statute, which only applies to the “retention and maintenance” of fills, not their subsequent development.

RCW 90.58.270(1) need not be tested on the facts and proceedings in this lawsuit. The Court construes statutes to avoid constitutional doubt. *Utter v. Building Industry Ass’n of Wash.*, 182 Wn.2d 398, 434-35, 341 P.3d 953 (2015). Here, the Court need not reach the validity issue because RCW 90.58.270(1) only applies to “retention and maintenance” of fills, not GBI’s efforts to expand, develop, or construct upon the fills.

RCW 90.58.270(1) provides:

[...] the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, **caused by the retention and maintenance** of said structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes. (Emphasis added).

The City consistently advocated that RCW 90.58.270(1)’s application is limited to the “retention and maintenance” of the fills. CP

236:15-17; 442-47. This case began with efforts by GBI toward development of the Three Fingers Fills, not as a matter of their “retention and maintenance.” In fact, the genesis of this case was CBC’s objection to GBI’s initial application for a 40-unit planned development district. CP 272. CBC administratively appealed the initial related decision, then dismissed its appeal and filed this lawsuit. CP 317-323.

In this lawsuit, the City sought summary judgment and argued that the words "retention and maintenance" limit the scope of RCW 90.58.270(1). CP 236:15-17; 442-47. The Court of Appeals recognized that “the savings clause applies only to the retention and maintenance of preexisting fills.” *Chelan Basin*, 194 Wn.App. at fn. 5, 378 P.3d 222. However, the Court of Appeals did not apply the statute’s plain language, viewing the lawsuits as separate. *Id.*

Regardless of which lawsuit presents the statute for review, a plain language interpretation of RCW 90.58.270(1) avoids the unconstitutional and invalid interpretations. Principles of constitutional avoidance “mandate” choosing the interpretation that avoids constitutional doubt. *Utter*, 182 Wn.2d at 434-35, 341 P.3d 953. This plain language interpretation also gives meaning to the phrase “retention and maintenance.” *See e.g. State v. Roggenkamp*, 153 Wn.2d 614, 624-25, 106 P.3d 196 (2005) (reciting the “well-settled principle of statutory

construction” that “each word of a statute is to be accorded meaning”). Specifically, the statute’s words “retention and maintenance” render it inapplicable to the current situation whereby GBI endeavors to develop, plat, sub-divide, or expand the use and structure of the fills. In other words, GBI cannot develop the fills and simultaneously avail itself of the protections of a statute that, by its plain language, applies only to “retention and maintenance”.

This plain language interpretation also promotes the perceived intention of alleviating concerns of water-fronting landowners in the wake of *Wilbour*. Such landowners could rest in the authorization for their then-existing, lawful structures, but only insofar as the landowners retained and maintained them as existing on the date of the *Wilbour* decision.

Based on its plain language, history, and perceived intent, RCW 90.58.270(1) does not apply to GBI’s endeavors to enhance, expand, or develop the uses or structure of the Three Fingers Fills.

C. The Court of Appeals’ interpretation of RCW 90.58.270(1) cannot stand under Washington’s Public Trust Doctrine.

Though a common law doctrine with ancient origins, the Public Trust Doctrine also overlaps Article 17, Section 1 of the Washington Constitution. *Caminiti*, 107 Wn.2d at 669, 732 P.2d 989. The state cannot “convey or give away” the *jus publicum* interest. *Id.* at 669-670, 732 P.2d

989. In the event the state abdicates its control over the *jus publicum*, the abdication is invalid unless it (a) promotes the public's interest in the *jus publicum*, or (b) has not substantially impaired it. *Id.* at 670, 732 P.2d 989.

Applying *Caminiti* to GBI's interpretation that RCW 90.58.270(1) provides a blanket grandfathering for its fills can be viewed only as total abdication of control over the *jus publicum*. The Superior Court provided the most concise recognition of this absolute abdication:

[T]he inescapable conclusion that must be reached is the first part of the *Caminiti* test is met: that is, by granting a blanket authorization to any fills or other improvements existing as of December 4, 1969, the state has surrendered its right of control over the *jus publicum*. RCW 90.58.270(1) makes no effort of any kind at qualitative analysis as to the effect these fills and other improvements might have on the public's rights in the state's navigable waters; rather, the statute simply accepts impairment of the public's right, no matter the magnitude. The legislature simply waved the white flag and conveyed away the public's interest in contravention of the public rights doctrine. CP 836.

The second prong under the *Caminiti* test is to review whether the abdication of control, here, the indiscriminate and blanket grandfathering, promotes the public interest or does not substantially impair the public's interest. The State and GBI have provided no evidence in any of the administrative or judicial proceedings that the fills have promoted, or have left substantially unimpaired, the public's interest in the waters of Lake Chelan displaced by the fills. *Chelan Basin*, 194 Wn.App. at 495, 378 P.3d

222 (finding that there were “no facts to verify” or “refute” the possible claim that fills afforded access to deep waters).

The State did argue to the Court of Appeals that RCW 90.58.270(1) creates the following benefits: (1) certifying that then-existing structures are exempt from the Shoreline Management Act, (2) eliminating a cloud over historic development, and (3) promoting investment in historic fills. State’s Reply Br. 20-22 (Sept. 23, 2015). These “three benefits” are one in the same: a wholesale exemption for those who artificially filled the lake. Such a blanket exemption does not benefit the public or the public’s interest in navigating and accessing navigable waters. Such a blanket exemption benefits only those private landowners who filled navigable waters before 1969, the date the Court concluded that such filling violated the Public Trust Doctrine.

The public’s interests in the State’s navigable waters is reflected, in part, in the Shoreline Management Act’s policy, RCW 90.58.020:

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore,

coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance.¹

The blanket consent of RCW 90.58.270(1) for any fills existing on December 4, 1969 does not “promote[] and enhance[] the public’s interest” or provide for “coordinated planning” that is a “rational and concerted” effort to protect the public’s interest in the navigable waters. *Id.* The blanket consent does nothing to recognize the paramount public interests in Lake Chelan’s shorelines of statewide significance. *Id.* Rather, the grant of a blanket consent would exemplify the “unrestricted

¹ Lake Chelan’s shorelines are statutorily and administratively classified as “shorelines of statewide significance.” RCW 90.58.030(2)(f)(iv); WAC 173-20-030(2); see specific classification at WAC 173-20-110(5).

construction on shorelines” that the Court and the Legislature have recognized not to be in the public’s interest.

The Superior Court considered these interests when it concluded that “any benefit inures only to” GBI, stating as follows:

[T]he second part of the [*Caminiti*] test is also met. Specifically, there is no evidence whatsoever that the surrender of *jus publicum* to a private party vis-à-vis the Three Fingers Fill in any way promotes the public interest. As persuasively noted by plaintiff, this fill area does not preserve the natural character of shoreline, does not protect the resources or ecology of the shoreline and does not enhance or increase public access to the shoreline or navigable waters of Lake Chelan. To the contrary, it is undisputed that public access to the lake is impaired and the existence of the fill wholly obliterates the ability to utilize that portion of the lake for navigation and recreation. The impairment can only be characterized as substantial and any benefit inures only to defendant’s private interest. CP 836.

If the Court must reach the issue of RCW 90.58.270’s validity as it applies to these fills, then the statute violates the Washington Public Trust Doctrine and is invalid. A blanket immunity for all preexisting fills wholly abdicates the state’s control over the *jus publicum* in the displaced waters and provides no promotion or benefit for the public’s paramount and inalienable interest in the State’s navigable waters.

VI. CONCLUSION

The Court should avoid ruling on RCW 90.58.270(1)’s validity on this record. The statutory provision, RCW 90.58.270(1), does not apply by

its plain terms: “retention and maintenance.” The statute, case law, and public policy cannot support GBI’s far-reaching position that development of its fills is wholly immune from assessment of its infringement of the public’s right of navigation and access in Lake Chelan’s waters.

Respectfully submitted this 9th day of January, 2017.

Davis, Arneil Law Firm, LLP



Nicholas J. Lofing, WSBA No. 43938
Attorney for City of Chelan

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I served the *Supplemental Brief of City of Chelan*, in the manner noted on the following person(s):

<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	J. Kirk Bromiley Jeffers, Danielson, Sonn & Aylward, 2600 Chester Kimm Road Wenatchee WA 98801 kirkb@jdsa.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Kenneth Harper Menke Jackson Beyer, LLP 807 North 39th Avenue Yakima, WA 98902 kharper@mjbe.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Alexander W. "Sandy" Mackie Attorney at Law P.O. Box 607 Winthrop WA 98862-0607 Amackie6404@gmail.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Terence A. Pruitt Washington State Attorney General Natural Resources Division P.O. Box 40100 Olympia, WA 98504-0100 terryp@atg.wa.gov
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Russ Speidel David Bentsen Speidel Law Firm 7 N. Wenatchee, Ste. 600 Wenatchee WA 98801 russ.speidel@speidellaw.com david.bentsen@speidellaw.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Michael Gendler Gendler Law PLLC 5006 Greenwood North Seattle WA 98103 Gendler@MickeyGendler.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Erik Wahlquist Chelan County PUD P.O. Box 1231 Wenatchee WA 98807-1231 erik.wahlquist@chelanpud.org

<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Erik Wahlquist Chelan County PUD P.O. Box 1231 Wenatchee WA 98807-1231 erik.wahlquist@chelanpud.org
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	David Steele Katherine Galipeau Markham Quehrn Perkins Coie LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099 DSteele@perkinscoie.com kgalipeau@perkinscoie.com mquehrn@perkinscoie.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Allan Galbraith Allan Galbraith, PLLC 949 Wheeler Hill Road Wenatchee WA 98801 allan@hillatty.com
<input type="checkbox"/> First Class U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Email	Brendan Donckers Breskin Johnson & Townsend PLLC 1000 Second Avenue, Suite 3670 Seattle WA 98104 bdonckers@bjtlegal.com

DATED this 9th day of January, 2017 at Wenatchee, Washington.



Nick Lofing

City of Chelan, Washington
Community Development Department
Decision of the Planning Director

July 25 2011

Short Subdivision – Goodfellow Fingers)	File No. SUB2010-01, SEPA2010-15
)	
)	
Block 9, Town of Lake Park)	Craig Gildroy, Planning Director
tax parcel no. 272214662228)	Phone: (509) 682-8017
Submitted by GBI Holding, Inc.)	
)	

Findings of Fact

THE PROPOSED PROJECT AND PROJECT PROPERTY

1. This application is for “Goodfellow Fingers”, a short subdivision consisting of 6 lots (the “Proposed Project”).
2. The Applicant is GBI Holding, Inc., a Washington Corporation.
3. The Proposed Project is and legally described as follows (the “Project Property”):

All of Block 9, Plat of the Town of Lake Park, Chelan County, Washington, according to the Plat thereof recorded in Volume 1 of Plats, page 27,

Together with that portion of vacated Boulevard Avenue adjoining which, upon vacation, attached to said property by operation of law,

Except that portion, if any, lying adjacent to Lots 1 through 11, Block 2, said recorded Plat, as conveyed by deed recorded April 18, 1961, under recording no. 578247

Also except the right of way for SR 97 A.

The tax parcel number assigned by Chelan County to the Project Property is 272214662228. The map of the Project Property filed with the Application is attached as *Exhibit “A”*.

SUB 2010-01
Goodfellow Fingers
Page 1 of 32

4. The Applicant advises it has no specific plans for the construction of improvements on the Project Property.
5. This Application follows the withdrawal of an application by the Applicant for approval of a planned development district for the Project Property.
6. The Project Property primarily consists of fill (the "Fill"), to the level of 1,102 feet above sea level, which allows the Project Property to be above all levels of Lake Chelan. Without the Fill, the natural level of the Project Property is approximately 1,090 feet, and would be inundated by the waters of Lake Chelan during certain periods of the year, as set out in more detail in section 46. The Fill has existed for at least 50 years. The Project Property has been vacant for several years.
7. The Comprehensive Plan designation and Zoning for the Project Property is Waterfront Commercial (C-W).
8. As indicated in Exhibit "A", SR 97A or West Woodin Avenue, abuts the Project Property to the south, and the properties abutting the Project Property to the west, north and east are vacant properties which are regularly inundated by the waters of Lake Chelan due to the operations of the Lake Chelan Hydroelectric Project operated by the Chelan County Public Utility District.
9. The zoning of neighboring parcels is to the north, Lake Chelan; south of Woodin Avenue, Tourist Accommodation (T-A); west, Single Family Residential (R-L); and east, Waterfront Commercial(C-W).

PROCESSING OF THE APPLICATION

10. On December 15, 2010, the City of Chelan Department of Planning and Community Development (the "Planning Department") received the preliminary plat application and environmental checklist. The Planning Department issued a letter of incomplete application on January 11, 2011. On January 25, 2011, the Applicant submitted the following: owner authorization form, an updated SEPA checklist and associated fee, an updated Geotechnical Report, an updated Critical Area Study, new drawings illustrating vacated roads and survey data, and a Traffic Access Analysis. The application was deemed technically complete for processing on February 7, 2011.
11. The Planning Department requested a Subdivision Guarantee and the property to be staked to identify the location of vacated Boulevard Avenue from the Applicant on February 17, 2011. On March 31, 2011 the Applicant provided a subdivision guarantee for the Project Property and placed stakes on the Project Property to identify certain landmarks in compliance with requests therefore by the Planning Department.

12. The Preliminary Subsurface Exploration, Geologic Hazards, and Geotechnical Engineering Report, prepared by Battermann Geotechnical Consulting PLLC, dated January 20, 2011 stated that the topography of the site consists of three rectangular “fingers” that extend between 250 to 300 feet out into Lake Chelan. All of the fingers were at the approximate same elevation and were level on the surface. The perimeter borders with Lake Chelan were armored with large diameter boulders sloping down into the lake. Vegetation on the property consisted of scrub grass and weeds with a few bushes along the highway.
13. Pursuant to Chelan Municipal Code Title 19 and Title 16, an application for a short subdivision is a Type IIB project permit application, where the Planning Director issues an administrative decision, without a public hearing.
14. In order to approve an application for a short subdivision, the Planning Director must find that it complies with all adopted plans, policies and ordinances of the City (CMC 16.04.040), and must make findings identified in CMC 16.04.120, which incorporates the findings that are required by RCW 58.17.110.
 - A. The public use and interest will be served by the approval of the proposed land division, and associated dedications and impact fees, if any.
 - B. Appropriate provisions are made for, but not limited to, conditions due to flooding, bad drainage, topography, critical areas, rock formations, or other physical characteristics of the land and other matters affecting the public health, safety and general welfare; for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school.
 - C. Any land division for land situated in a flood control zone shall satisfy the requirements of Title 14, Environmental Regulations, and must have written approval from the Department of Ecology as provided in Chapter 86.16 RCW.
 - D. No locally adopted level of service standard for public facilities and services will fall below the standards as set forth in the comprehensive plan as a result of the land division being approved.
 - E. The public facilities and services necessary to support the land division shall be adequate and available concurrently with the demand for such services.
 - F. The capacities and dimensions of water, sewerage, drainage and street facilities shall be adequate to provide for future needs of other undeveloped properties in the general vicinity, with the subdivider bearing a roughly proportionate portion of the cost that is the result of the relative impact of the

land division, and the balance to be borne in a manner appropriate for the situation, either through a latecomer's agreement, development agreement, or by contribution by the city.

- G. No dedication, impact fee, condition or requirement shall be imposed upon the approval of a land division that constitutes an unconstitutional taking of private property.
15. Upon a determination that a short subdivision satisfies the requirements of the Land Division Code, the Planning Director shall approve, conditionally approve or disapprove the proposed short subdivision in accordance with the procedures set forth in the development regulations. CMC 16.12.030.

LAND USE ANALYSIS

16. Comprehensive Plan goals and policies generally support the Proposed Project as conditioned including:

Land Use Element

Commercial:

Policy 7: Consider design and redevelopment of private and public waterfront areas for mixed-use development projects that include retail shops, living spaces, overnight lodging, boardwalks, and water-related commercial activities.

Policy 18: Plans for development or redevelopment along Lake Chelan and other public open space should be oriented to tourist commercial, recreational services, activities, and residential.

Policy 21: Encourage relocation of the heavy commercial uses out of the South Shore waterfront area and promote a mixed-use development which includes water related/dependent tourist commercial activities, and residential.

- **Waterfront Commercial (C-W)-** This designation is intended to be applied to provide areas on lakefront property for heavy waterfront commercial uses, such as boat fueling and servicing, industrial docks, and other uses incidental to commercial water transportation. Commercial activities on the ground floors with office or residential spaces above could create unique waterfront focal points for the community.

Transportation Element

Continue efforts to develop trails and pathways that would provide connection among recreation sites and community features.

Specifically, pursue development of the Lakeside Trail and Northshore Pathway.

Comprehensive Parks & Recreation Plan 1.8

Provide parks and recreation facilities that are inclusive and accessible to all of the population regardless of age or physical ability

Comprehensive Parks & Recreation Plan 2.3

Require on-site (or nearby off-site) development of recreation facilities or appropriate and usable park land in conjunction with the approval of any development project

Comprehensive Parks & Recreation Plan 2.4

Require development projects along designated trail routes to be designed to incorporate the trail as part of the project

Shoreline Public Access Plan

Encourage shoreline uses and activities to provide their own shoreline public access or to contribute to the implementation of the City of Chelan Shoreline Public Access Plan

17. The Waterfront Commercial zoning district (CMC 17.40.040) dimensional standards are as follows
 - A. Minimum lot area: five thousand square feet
 - B. Minimum width of lot at building line: Fifty feet
 - C. Minimum lot depth: One hundred feet
 - D. Maximum lot coverage: Sixty –five percent
 - E. Maximum height of buildings : Thirty-five feet
 - F. Minimum setback distances:
 - a. Front yard: Twenty-five feet
 - b. Rear yard: Zero feet
 - c. Side yard: Five feet
18. The proposed lots range in width from 88 to 149 feet and depth of 364 to 434 feet.
19. The proposed lots range in size from approximately 55,000 square feet (plus or minus) to 73,000 square feet (plus or minus).
20. All commercial and residential (including multi-family) development, subdivisions, short subdivisions and binding site plans shall install street frontage improvements at the time of construction as required by the Public Works Department. Lakeside Trail is a frontage improvement as anticipated by the City’s Development Standards. City of Chelan Development Standard 5C.040 Street Frontage Improvements.

21. All lots within the Proposed Project will be served by domestic water with adequate fire flow, and sanitary sewer.
22. Additional information was requested for identification of Fish and Wildlife Habitat areas of local importance specifically the function of riparian areas in relation to and of the Project Property as allowed by CMC 14.10. The Critical Area Study and Mitigation Plan dated January 2011 prepared by Grette Associates indicate no critical areas on the site including fish and wildlife. It recognized riparian areas provide a number of benefits but are not defined by CMC 14.10 as a critical area. The report identifies impact avoidance and minimization measures.
23. A Preliminary Subsurface Exploration, Geologic Hazards and Geotechnical Engineering Report dated January 20, 2011 prepared by Battermann Geotechnical Consulting concludes that the site appears to be suitable for short platting to 6 building lots. It recommends that for specific development plans additional study for foundation requirements may be necessary along with recommendations regarding site preparation, structural fill, foundations and floor support and drainage considerations
24. The Proposed Project required environmental review pursuant to CMC 14.10, under the State Environmental Policy Act (SEPA) (RCW 43.21C) and the SEPA Rules (WAC 197-11). A Determination of Nonsignificance (DNS), with conditions, was issued contemporaneously with this Decision.

THE PUBLIC RIGHT OF ACCESS
OVER VACATED BOULEVARD AVENUE

25. The Project Property includes a portion of Boulevard Avenue, which was vacated by the Town of Lakeside on May 2, 1927, pursuant to Ordinance No. 24, the result of which vested Boulevard Avenue as part of the Project Property, subject to the Public Right of Access described in the next section.
26. In conjunction with the vacation of Boulevard Avenue, by virtue of an instrument dated May 2, 1927, the then owner of the Project Property, Chelan Electric Company, granted an easement to the Town of Lakeside, the predecessor of the City with regard to the Project Property for the right of access for the Town of Lakeside and the public over the vacated Boulevard Avenue to the waters of Lake Chelan. This right of access shall be referred to in this Decision as the "Public Right of Access", which is different from the "Public Right of Navigation", described in sections 29-32, and "Public Access", described in section 37.
27. The City, through its Resolution 534, adopted May 23, 1977, resolved, as follows regarding the vacated streets and alleys, or which vacated Boulevard Avenue is one:

That in accordance with the clear language of *Wilbour vs. Gallagher*, no use, development, or occupancy of . . . [Boulevard Avenue] . . . will be permitted which will in any way interfere with the free and unrestricted access by the public to lake Chelan. "Use", "development" or "occupancy" shall be so defined to include, but not be limited to, the filling of any portion by any material whatsoever, the construction of any manner or kind of structure including fences; and use or occupancy of any nature, which either directly or by implication limits the actual use of the lands by the public. In furtherance of this policy, no permits of any kind shall be issued by the city of Chelan or its officials, employees or agents and the City shall endeavor to prevent the issuance of a permit by any other governmental agency.

28. The Chelan County Superior Court, in the case of *Bardin-Leduc v. City of Chelan*, Cause No. 99-2-00429-3, considered and delineated certain elements of the extent of the Public Right of Access, which decision governs the rights of the Applicant and their successors in interest, the City and the public, and the Project Property, with regard to the rights and restrictions associated with the Public Right of Access. The Memorandum Decision of the Chelan County Superior Court dated November 10, 1999 is incorporated into these Findings:
 - 28.1. The Public Right of Access as being a walking easement, and does not include the right to erect a dock, pier, marina, boat ramp or other similar structure.
 - 28.2. Resolution 534 was at odds with the right of a servient owner under Washington law to use encumbered property in any manner that does not unreasonably burden the dominant easement holder's use of the property, and further recognized that because the Public Right of Access was a walking type of access, there would be many uses to which a servient owner could make of their property which would not unreasonably interfere with the Public Right of Access.

THE PUBLIC RIGHT OF NAVIGATION / PUBLIC TRUST DOCTRINE

29. As recognized by the Washington Supreme Court in *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232, 40 ALR.3d 760 (1969), Lake Chelan is a body of navigable water. The Supreme Court's decision emphasized that the character of Lake Chelan as a body of navigable water is not affected by the fluctuations in its level. A more specific description of the fluctuations in the water level of Lake Chelan is set out in section 46.1.
30. Based on the Supreme Court's decision in *Wilbour*, due to its character as navigable water, the waters of Lake Chelan are subject to the public's right of navigation, which applies to the waters of Lake Chelan at all levels, and has the following legal characteristics: The public right of navigation has also been referred to as the "Public

Trust Doctrine”, and for purposes of this Decision these two principals will be referred to as the “Public Right of Navigation”. As used in this Decision, the Public Right of Navigation is different than the “Public Right of Access”, described in sections 25-28.

- 30.1. The Public Right of Navigation associated with navigable waters historically encompassed the right of navigation and fisheries. The Public right of Navigation was not from a limitation, but resulted from a recognition of where the public need lay, and the doctrine has extended beyond its navigational aspects and includes the right to navigate on the water, but also includes the incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes. *See also Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987).
- 30.2. Title to riparian lands that are periodically submerged by navigable waters (referred to in this Decision as “Periodically Inundated Riparian Lands”) – as is the Project Property -- is qualified by the Public Right of Navigation, and the appropriate governmental jurisdiction may prevent any use of Periodically Inundated Riparian Lands that interferes with the Public Right of Navigation. The public trust doctrine (which is referenced to the Public Right of Navigation in this Decision) resembles a covenant running with the land with regard to Periodically Inundated Riparian Lands for the benefit of the public. *See also Orion Corp.*
- 30.3. The respective rights of the public in the Public Right of Navigation and of the owners Periodically Inundated Riparian Lands are dependent upon the level of the navigable water.
- 30.4. As the level of navigable water rises, the Public Right of Navigation follows the level of the navigable water; correspondingly, the rights of the owners of Periodically Inundated Riparian Lands decrease since they cannot use the Periodically Inundated riparian Lands in a manner which interferes with the Public Right of Navigation.
- 30.5. As the level of the navigable water lowers, and the area of inundation over Periodically Inundated Riparian Lands decreases, the rights of the owners of Periodically Inundated Riparian Lands increase as the navigable waters drain off the Periodically Inundated Riparian Land, again giving the owners of Periodically Inundated Riparian Lands the right to exclusive possession of the Periodically Inundated Riparian Lands until the Periodically Inundated Riparian Lands are again submerged by navigable water.
- 30.6. Owners of Periodically Inundated Riparian Lands have the right to prevent any trespass on the Periodically Inundated Riparian Lands between the high

and low elevations of navigable water when the Periodically Inundated Riparian Lands are not submerged by navigable water.

31. The Supreme Court in *Wilbour v. Gallaher*, ordered the removal of a fill similar to the Fills, due to its impairment of the Public Right of Navigation.
32. In ordering the removal of fill, the Supreme Court in *Wilbour v. Gallaher* indicated that its decision was influenced by the lack of evidence from public bodies with regard to the desirability of fills and structures under certain circumstances, and recognized that there are places on Lake Chelan where fills or structures may be desirable and appropriate after appropriate consideration and the establishment of development regulations which would intelligently resolve disparate interests in shoreline uses. See *Wilbour*, 77 Wn.2d at 316, note 13; see also, for example, *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 513 P.2d 36 (1973)
33. The Washington Legislature adopted the Shoreline Management Act in 1971, which has been codified as RCW 90.58, partly based on the Supreme Court's decision in *Wilbour*.
 - 33.1. Section 27 of the Shoreline Management Act, codified as RCW 90.58.270, applies to the Fills on the Project Property, such that fills such as the Fills are not required to be removed by virtue of the Shoreline Management Act:

**90.58.270. Nonapplication to certain structures, docks, developments, etc., placed in navigable waters--
Nonapplication to certain rights of action, authority**

- (1) Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969, and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.
- 33.2. The Washington Supreme Court has held that the Public Right of Navigation existing at the time *Wilbour* was decided has been modified by the Shoreline

Management Act, and contemplates development along the shorelines in the state, including over-the-water construction, and does not purport to totally prohibit such development. The policy of the Shoreline Management Act is to ensure future development on the shorelines of the State is carefully planned, managed, and coordinated in keeping with the public interest. Portage Bay-Roanoke Park Community Council v. Shoreline Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979); and State Dept. of Ecology v. Ballard Elks Lodge No. 827, 84 Wn.2d 551, 527 1121 (1974).

- 33.3. In coordinating development on the shorelines of the state in consideration of the Public Right of Navigation, the Shoreline Management Act does not mandate a calculation of equal public benefits to be offset against private benefits. Instead, the Shoreline Management Act declares the public policy is to plan for and foster all reasonable and appropriate uses, which all for a limited reduction of rights of the public in navigable waters and generally protect public rights of navigation and corollary rights incidental thereto. Portage Bay-Roanoke Park Community Council.
34. The impairment of the Public Right of Navigation and the Public Right of Access can be viewed as a trespass of those rights.
35. Neither the Public Right of Navigation nor the Public Right of Access can be eliminated through the passage of time by the principle of adverse possession.
36. To implement the Shoreline Management Act, the Department of Ecology has adopted, among other regulations, "Shoreline Management Permit and Enforcement Procedures", codified at WAC 173-27, which specifically provides at WAC 173-27-140 that any use or development on Lake Chelan can only occur after review and determination by the City that the use or development is consistent with the policy and provisions of the Shoreline Management Act and the City's Shoreline Management Program.
37. The Shoreline Management Act favors "Public Access", which refers to the ability of the general public "to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations" is a preferred use under the Shoreline Management Act. Public Access can be a physical access such as via a trail or park and/or visual such as a view corridor from a road. The principal of Public Access as a preferred use under the Shoreline Management Act in this Decision is different than the "Public Right of Access" referred to in sections 25-28.
38. The Shoreline Master Program identifies the shoreline environment as urban.
39. Washington Administrative Code for the Shoreline Management Act, WAC 173.27.030 (6) states that "Development" means a use consisting of the construction

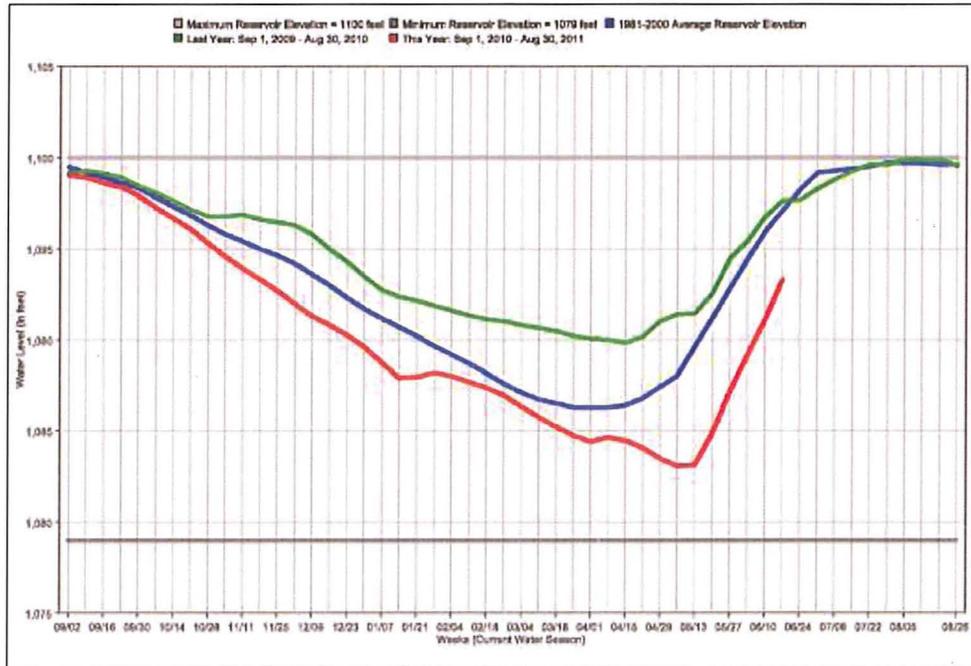
or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the act at any stage of water level. The City's Shoreline Master Program has the same definition for "Development".

40. The subdivision of land does not constitute a "development" as defined by WAC 173.27.030(6).
41. The City of Chelan's Shoreline Public Access Plan implements the Comprehensive Plan and Shoreline Management Act (WAC 173-26-221 (4)(c)). As stated within section 8 of the City's Shoreline Public Access Plan, the City shall apply its adopted policies to developments within shoreline jurisdiction to implement adopted park plans and identified gap areas to ensure sufficient parks and recreation. Developments shall provide shoreline public access or contribute to offsite improvements through the application of Title 16 Land Divisions, Chapter 17.56 Conditional Uses and Chapter 14.06 Environmental Procedures and Policies.
42. The City's Shoreline Public Access Plan identifies the property adjacent and west of the Project Property that is currently owned by Chelan County P.U.D. as a "Lakeside Water Street Neighborhood Access Plan". Improvements recommended by the Shoreline Public Access Plan include, but are not limited to, addition of docks, swim platforms, Buoy Signage and additional improvements that preserve the area as a swim area. New private docks are prohibited.
43. The City adopted its Shoreline Master Program as a development regulation relating to uses of lands along Lake Chelan within the City in April, 1972.
44. The City adopted its Shoreline Public Access Plan as a development regulation relating to access of the waters of Lake Chelan on August 26, 2010.
45. The City adopted its Lakeside Trail Feasibility Study on November 12, 2000, which was incorporated into the City's Comprehensive Plan during the annual comprehensive plan review process in 2006. The Lakeside Trail Feasibility Study identifies the Lakeside Trail and divides it into sections A through J. A portion of Section I of the Lakeside Trail crosses the Project Property.

ASSESSMENT OF THE EXTENT OF THE PUBLIC RIGHT OF NAVIGATION OVER THE PROJECT PROPERTY

46. The water level of Lake Chelan varies during the course of a year, due to the license requirement imposed on the Chelan County PUD in operating the Lake Chelan Hydroelectric Project. The maximum elevation of Lake Chelan is 1,100 feet above sea level and the minimum elevation of Lake Chelan is 1,079 feet above sea level.

46.1. The following graph from the Chelan County PUD website, sets out the levels of Lake Chelan for 2010, 2011 year-to-date, and the average levels for the past 20 years:



46.2. Based on the historical levels of Lake Chelan for the past 20 years, the following are the characteristics of the levels of water in Lake Chelan:

- High Level: The high level of water in Lake Chelan occurs on or about June 10;
- Low Level: The low level of water in Lake Chelan occurs on or about April 1;
- Various Levels: The following table illustrates the historical dates and times of the levels of Lake Chelan:

Elevation	Dates	Days	Pct
1090 ft	May 15 Jan 28	258	70.7%
1091 ft	May 18 Jan 15	247	66.3%
1092 ft	May 20 Dec 30	224	61.4%
1093 ft	May 27 Dec 9	196	53.7%
1094 ft	June 1 Dec 1	183	50.1%
1095 ft	June 6 Nov 18	165	45.2%

47. The actual use of Lake Chelan by the public for navigation purposes fluctuates according to the seasons, simply by virtue of the climate. There are several statistics indicating the relative activity of the public in the Lake Chelan area, which indirectly indicate the relative use of the waters of Lake Chelan by the public for navigation purposes, as follows:

47.1. Retail Sales Tax. The Finance Director for the City provided the amounts of the month by month collections of retail sales taxes for the years 2005 through 2010. A relative percentage of the monthly retail sales activity for the years 2005 through 2010 indicates the following activity levels corresponding to the various levels of Lake Chelan:

Lake Level	Pct of Lake Level	Pct of Retail Sales
1090	70.7%	78.3%
1091	66.3%	76.0%
1092	61.4%	72.2%
1093	53.7%	64.7%
1094	50.1%	69.5%
1095	45.2%	55.6%

47.2. Hotel-Motel Tax. The Finance Director for the city provided the amounts of month by month collections of the '2%' and '3%' stadium taxes, identified in the month of the revenue generating the tax for the years 2006 through 2010. The stadium taxes are based on revenues for transient lodging of 30 days or less, such as hotels, motels, the City's RV Park. A relative percentage of the monthly transient lodging activity for the years 2006 through 2010 indicates the following activity levels corresponding to the various levels of lake Chelan:

Lake Level	Pct of Lake Level	Pct of Hotel-Motel Tax Retail Sales
1090	70.7%	87.7%
1091	66.3%	86.9%
1092	61.4%	84.7%
1093	53.7%	80.5%
1094	50.1%	81.8%
1095	45.2%	74.4%

47.3. Wastewater flows. The City's Public Works Department operates a wastewater treatment facility which accepts wastewater from the City, the

Lake Chelan Sewer District, which is the south shore of lower Lake Chelan, and the Lake Chelan Reclamation District, which is the unincorporated Manson area and north shore of lower Lake Chelan. The City's Public Works Director provided the monthly wastewater flows for the City's wastewater treatment facility for the years 1990 through 2010. The relative flows of wastewater from the Lake Chelan Reclamation District and the City of Chelan are very similar to the relative flows of wastewater from the City's wastewater treatment facility, but the relative flows of wastewater from the Lake Chelan Reclamation District are significantly different. Relative percentages of the wastewater flows for the City's wastewater facility, in total, and Lake Chelan Sewer District, corresponding to the various levels of Lake Chelan are illustrated below:

Lake Level	Pct of Lake Level	Pct of wastewater flows	
		City wastewater treatment facility	Lake Chelan Sewer District
1090	70.7%	76.2%	85.2%
1091	66.3%	72.8%	82.7%
1092	61.4%	68.0%	79.2%
1093	53.7%	61.4%	74.1%
1094	50.1%	58.5%	71.8%
1095	45.2%	52.6%	66.3%

- 47.4. Calls for Service – Chelan County Sheriff. Chelan County Sheriff provided the number of calls for service and calls generated by Deputies within the City of Chelan for the years 2009 and 2009, a summary of which is set out below. The relative percentages of law enforcement calls within the City for 2009 and 2010 indicates the following activity levels corresponding to the various levels of Lake Chelan:

Lake Level	Pct of Lake Level	Pct of law enforcement activity
1090	70.7%	76.2%
1091	66.3%	73.3%
1092	61.4%	68.2%
1093	53.7%	61.6%
1094	50.1%	63.8%
1095	45.2%	53.4%

- 47.5. Boat Launch Activity – Don Morse Park. The City’s Park and Recreation Department provided the monthly revenue for boat launches at Don Morse park for the years 2002 through 2011, to date. The relative percentages of boat launches at Don Morse Park for these years indicates the following activity levels corresponding to the various levels of Lake Chelan:

Lake Level	Pct of Lake Level	Pct of Boat Launch activity
1090	70.7%	95.4%
1091	66.3%	95.4%
1092	61.4%	94.1%
1093	53.7%	92.3%
1094	50.1%	91.5%
1095	45.2%	88.6%

- 47.6. The foregoing activity levels deductively illustrate that the level of public activity in the Lake Chelan area is more intense during the periods where the Project Property would have been inundated by the waters of Lake Chelan, but for the existence of the Fills. It is reasonable to conclude that the level of the public’s use of the waters of Lake Chelan are more intense during the period where the Project Property would have been inundated by the waters of Lake Chelan, but for the existence of the Fills.

AGENCY COMMENTS

48. The application was referred to the City Public Works Department, City Building Department, Administration, Mayor, Chelan County Fire District #7, Chelan County PUD, Colville Confederated Tribes, WA Dept. of Transportation (WSDOT), Dept of Natural Resources, US Army Corps of Engineers, Dept. of Ecology and State Dept of Fish and Wildlife on February 8, 2011, with the following comments being made to the City.
49. Chelan County PUD NO. 1, Power Department advised on February 17, 2011 that primary underground line extension will be required. Construction will require tapping the feeder pole line Southwest of the Project, on the South side of the highway, running North/Northeast along easement driveway and requiring underground road crossing to the North side of SR 97A. Underground will continue East (along the North side) with cabinets and pad-mount transformers – all to be set within 150’ of building sites. The above requirements are good for up to six (6) lots.
50. Chelan County Fire District 7 commented on February 17, 2011 that because no construction was being proposed as part of the application, it was unable to provide

any review to ensure the 2009 IFC requirements are taken into account in the future planning and development of the projects being proposed.

51. The City of Chelan Building Department advised on March 14, 2011 that its primary concern was the build-ability of the proposed lots. It noted that the geotechnical report indicates acceptable conditions for the construction of 1- and 2- story single family and multi-family structures. Otherwise, until any plans for construction for structures on the Project Property, the Building Department, reserved comment.
52. The Washington State Department of Transportation made the following comments on February 22, 2011:
 - a single access point to US 97A should serve all properties, with an internal access road to serve the individual parcels.
 - The pedestrian element will need to be designed in accordance with the City's "Lakeside Trail" plan.
 - The final plat map should show highway right of way dimensions.
53. The Washington Department of Fish and Wildlife submitted the following comments on March 17, 2011:
 - The environmental implications of dividing the Project Property into multiple lots are not considered by evaluating only the short plat itself. WAC 197-11-060(5)(d) states that phased review is not appropriate when (i) it would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or (ii) it would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060 (3)(b) which states that proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document, as in those that are interdependent parts of a larger proposal and depend on the larger proposal as their justification.
 - Evaluating only a portion of a larger project is in violation of the State Environmental Policy Act (SEPA). Once the scope and extent of the plans for the Project Property are known, the environmental impacts can be adequately assessed and any necessary mitigation proposed and evaluated.
 - Because of the location of the Subject Property within Lake Chelan, of particular concern to WDFW are any proposed in-water structures, bank or bank stabilization work, work in the shallow water areas between the fill structures, storm and surface water management techniques, and impacts to water quality and the stability of the fill from additional water infiltration from watering ornamental plants and lawns. All of these aspects would require permitting under the hydraulic code by WDFW.

- When an application is in place that includes the proposed build-out for the Project Property, including the subdivision into multiple lots, the environmental impacts can be assessed and the review of the determination of the significance of the impacts can continue.
54. Chelan PUD No. 1 commented on the previous application in a letter dated September 16, 2010, and similarly in a letter dated February 15, 2011, advising that the PUD owns flowage easements around the Lake Chelan Reservoir, and has a license issued by the Federal Energy Regulatory Commission to operate the Lake Chelan Hydroelectric Project lying waterward of the 1,100 foot Easement Elevation Line, and authorizes the PUD to lower the water level to the 1,079 Easement Elevation Line. While the comments of the PUD were addressed to the proposed use of the withdrawn application, the PUD did advise that the PUD's prior written approval is required before any proposed land uses, improvements and/or alterations, including changes in soil or vegetation, or any contouring or filling at or below the 1,100 foot Easement Elevation Line is started. The PUD does not appear to contend the Fills violate the PUD's flowage easement.
55. Washington State Department of Ecology made the following comments on March 9, 2011:
- Shorelands/Environmental Assistance
 1. The SEPA calls for a geotechnical evaluation of the Project Property, but did not include anything other than a soils survey. The soil survey holds little value as the property areas were created by fill deposited waterward of the OHWM. The geotechnical evaluation is a critical piece of documentation that should have accompanied the SEPA documentation in order for Ecology to perform a more complete evaluation of the proposal at hand.
 2. Ecology would like to have the opportunity to review and evaluate the geotechnical evaluation (Batterman 2010), and provide comprehensive comment as it is an important component of a project that proposes to develop such a large fill area.
 3. because final build out is not defined it is difficult to evaluate the potential impacts, or potential cumulative impacts with the SEPA submittal.
 4. Toxics Clean up. Based upon the historical agricultural use of this land, there is a possibility the soil contains residual concentrations of pesticides. Ecology recommends that the soils be sampled and analyzed for lead and arsenic and for organochlorine pesticides. If these contaminants are found at concentrations above the MTCA clean-up levels Ecology recommends that potential buyers be notified of their occurrence.
56. The Colville Confederated Tribes commented on the previous application in a response dated September 17, 2010 that they are generally concerned with dock

overcrowding, and that they like the idea of more public docks and accesses versus private uses. The Confederated Tribes also recommended consultation with the Tribe's Historic Preservation officers prior to any ground disturbing activities.

57. The US Army Corps of Engineers provided no comment on the proposal.

PUBLIC COMMENT

58. Public notice of the Proposed Project was provided for in accordance with the applicable ordinance requirement of Title 19 of the City of Chelan Municipal Code for the notice of application by posting on February 11, 2011 and publishing on February 16, 2011.

59. In a letter dated February 17, 2011, attorney Russell Speidel requested the following comments, which were submitted in response to the PDD Application, be considered:

59.1. Attorney Russell Speidel commented on September 17, 2010 (focusing on the withdrawn application for a Planned Development District) that:

- Viewshed. The Development will detract from the natural beauty of Lake Chelan; the Development does not preserve or enhance the natural character of the shoreline; alleges the Development will restrict public viewing of the waterfront.
- Wilbour v. Gallagher. Development should be denied pursuant to Wilbour.
- Wildlife. Alleges the Development contemplates construction of an impervious sound barrier wall which will prevent wildlife from accessing Lake Chelan; Applicant is making no effort to preserve or enhance wildlife, or mitigation to reduce impacts on fish populations.
- Parking. The comments regarding parking are specific to the PDD Application and are not being considered.
- Public Water Access. Alleges the Development decreases public access to publicly owned shoreline by preventing access to otherwise navigable areas of Lake Chelan.
- SEPA/EIS. The comments regarding SEPA/EIS are specific to the PDD Application and are not being considered.
- Water Pollution. The Development does not protect the resources and ecology of the shoreline in that the storing of storm water on site will result in a gathering of pollutants in areas adjacent to Lake Chelan; the fills are not conducive to maintaining the City sewer systems; failure of the sewer system could result in decreased water quality and pollution in Lake Chelan.
- Chelan County Shoreline Master Program. The Development does not protect the rights of navigation, maintain or create a high quality of environment along the shorelines of Chelan County, preserve and protect

fragile natural resources and culturally significant features, or protect public and private properties from adverse effects of improper development of shoreline.

- Open Space. The Development decreases the availability of open space by developing private homes on artificial fills
- Chelan County Shoreline Master Program – Land Use Activities. The comments regarding parking are specific to the PDD Application and are not being considered.
- Chelan County Shoreline Master Program – Shoreline Modification Activities. The Development consists of landfills that may alter drainage patterns, the natural character of the land and create unnaturally heavy erosion and silting problems; the Development does not contemplate retaining walls or other means of preventing erosion and does not provide for compliance with State water quality standards; the landfills are not served by a public sewer system; there is no suitable area for an on-site sewage disposal system.
- Non-Conforming Use. The artificial fills are a pre-existing non-conforming use since they were constructed prior to adoption of the Shoreline Master Program in 1975; permitting the construction of residential duplexes, street parking spaces, community docks and other improvements changes the use of the artificial fills; the proposed changes are therefore subject to the Chelan County Shoreline Master Program.

59.2. Don Webb advised via an email of September 17, 2010 of the following concerns:

- Viewshed: He recommends the view of the Lake be maintained, and that the construction of view obscuring condominiums be denied;
- Commercial Development: He would like to see a public marina and a restaurant;
- Parks/Beaches: He believes the City needs more beaches and parks for the summertime.

59.3. Steve Cannon's letter received on September 16, 2010 that he did not want a big development, and the Fills should be removed.

59.4. Lyle & Cynthia Mettler commented on September 14, 2010 that:

- Viewshed. The landfill was a visual blight when it was created and development would block views
- Wilbour v. Gallagher. Fingers were illegal when they became a landfill and are illegal now. The fill ruined the bay that was previously the best area for recreation; Development will set a precedent for the City that allows "fill" projects
- Road Traffic. The project will pose a traffic nightmare
- Parking. There is no parking for boats/trailers

- 59.5. Dennis and Susan Garrood commented on September 15, 2010 that:
- Wilbour v. Gallagher. The landfill was illegally created and development should be denied on this ground;
 - Type of Development/Overdevelopment. Any residential or commercial development on the property should be stopped;
 - Road Traffic. Development will create traffic congestion with vehicles leaving and entering the project;
 - Public Water Access. This project would limit the public's recreational use of this part of the lake.
- 59.6. Steve Cannon's letter received on September 16, 2010 that he did not want a big development, and the Fills should be removed.
- 59.7. Oro Starcher commented on September 12, 2010 that:
- Viewshed. Community would lose a wonderful view of the lake if buildings are constructed on the Fingers;
 - Wildlife. Allowing development on the Fingers would cause certain types of wildlife to cease.
- 59.8. Gene Starcher commented on September 15, 2010 regarding the viewshed: State law prohibits the blocking of views and vistas from public rights of way; commercial development should be encouraged to move upland and leave the views to the people.
- 59.9. Steven S. Milner commented on September 6, 2010 that:
- Viewshed. Objects to adverse impact sites have on aesthetic amenity otherwise afforded the public;
 - Wilbour v. Gallagher. Objects in concert with court's findings that former fourth landfill created a wrongful interference with public access/navigation; asks how the City would respond if the project required filling of the Wapato Basin;
- 59.10. Ron Gibbs commented on September 8, 2010 that he is concerned with overdevelopment of the area represented by this project; other condominium developments in the City give Chelan a resort feeling rather than a small town feeling; recognizes City cannot tell developers what to build but would like to see a waterfront restaurant.
- 59.11. Randy Brooks commented on September 14, 2010 with regard to the viewshed: buildings should be limited to one story to protect views.
- 59.12. Tricia Page commented on September 14, 2010 that:

- Wilbour v. Gallagher. She finds it incredulous the City would consider the development in light of Supreme Court findings and wants landfills removed.
- Public Water Access. She fears the negative impact on maintaining public waterfront access.

59.13. Beverly Law commented on September 15, 2010 that:

- Viewshed. The development will be an eyesore
- Type of Development/Overdevelopment. The area is over-saturated with unsold homes and condos and the area does not need more unoccupied buildings; the Fingers should be designated as an off-leash dog park with an upscale restaurant on one finger and a casual restaurant on another
- Boat Traffic. Development will result in increased boat traffic which will increase noise and accidents; the lake is already crowded with jet skis and motorboats

59.14. David Law commented on September 15, 2010 that:

- Type of Development/Overdevelopment. The area is already overcrowded
- Road Traffic. The Development would contribute to overcrowding on the highway
- Boat Traffic. The Development would contribute to overcrowding of boat traffic

59.15. The Green family commented on September 16, 2010 that:

- Viewshed. The lake fronts that are available need to be preserved.
- Wilbour v. Gallagher. The fills are illegal and the public has a right to navigable waters
- Wildlife. The development will push wildlife out of its natural habitat
- Road Traffic. Congestion from the Development will be overwhelming
- Boat Traffic. If docks are built they will create an even greater loss of navigable waters
- Trails. It is detrimental to surrender 50 feet of right of way. This could make a wonderful addition to the trail
- Vacated Streets. Development is not to occur on vacated streets. The Fingers are located on at least 3 vacated streets
- Stability. The fills are not stable and should not be built on
- Noise. Sound carries well on the water and the sounds of over 50 groups of vacationers will ruin the peace and beauty of this area for residents on both sides of the lake

59.16. Susan Lester commented on September 16, 2010 that:

- Wilbour v. Gallagher. This sets a dangerous precedent to allow fill in the lake to be developed.
- Boat Traffic. Infringement on navigable waters.

59.17. d'Lynn Morrison commented on September 16, 2010 that the development is a resort, and that development should cease until there is community consensus on what is wanted on the lake front.

59.18. Bee Murphy commented on September 17, 2010 that:

- Viewshed. Agrees with comments made by Steve Milner that these sites have an adverse impact on the aesthetic amenity the viewshed otherwise provides to the public
- Wilbour v. Gallagher. Agrees with Steve Milner - Objects in concert with court's findings that former fourth landfill created a wrongful interference with public access/navigation; asks how the City would respond if the project required filling of the Wapato Basin;

59.19. Real Estate Broker Cathy Bisset commented on behalf of her client, Christopher Stansfield on September 16, 2010 that she represents that in creating the Fill, some of it was placed on a portion of her client's property that is known as portions of Block 3, plat of Lakepark, based upon the vacation of Boulevard Ave with title passed to adjacent landowners; claimant intends to vigorously defend their legal holding of the property.

59.20. Stan Morse commented on September 14, 2010 that the holding of Wilbour provides that the proper remedy is to remove the fill, and believes that if the City grants right to further develop the Fingers it places the purchasing public in peril of losing their investment in any structures built upon the properties. Asks that an experienced land use attorney render a legal opinion with substantial malpractice policy to guarantee the project

59.21. Pat and Ruth Manners commented on September 3, 2010 that:

- Viewshed. All utilities in the development should be placed underground to preserve the view
- Type of Development/Overdevelopment. The comments regarding the type of development were limited to the PDD, so are not being considered.
- Road Traffic. Ensure Dept of Transportation addresses the issue of turn lanes and traffic
- Encroached Traffic. Own 7 lots adjoining the project; want clarification of ownership of the vacated properties and claim full ownership of vacated properties adjoining their lots barring a court ruling to the contrary; claim interest in portion of land on the Fingers, want a permanent access easement to their property; want berm removed to allow access to their property

59.22. Tammy Hauge commented on September 17, 2010 that:

- Wilbour v. Gallagher. The City should reject the proposal and act on the public's behalf with regard to public access and require owners to remove the fill to the 1100 high water mark
- SEPA/EIS. Objects to use of WAC 197-11-355 and the Determination of Non-significance which shortens public comment process. The 8.2 acres of land is of itself an environmental impact and impedes the natural course of Lake Chelan
- Resolution 534. The clear language of Resolution 534 and Wilbour require no use, development or occupancy of the affected lands which interfere in any way with free and unrestricted access by the public to Lake Chelan, including fill

59.23. Attorney Peter Fraley, on behalf of the Twitchell Trust, commented on September 17, 2010, but his comments were limited to characteristics associated with the previous application and do not apply to the present application for a short subdivision.

60. Stan Morse provided comments in a letter dated December 30, 2010, concluding that the argument of the Applicant that RCW 90.58.270, quoted above at section 33.1 does not authorize fills which constitute a trespass, and that the portion of the Fill which covers vacated Boulevard Avenue constitutes a trespass.
61. Ed Isenhart filed his letter of February 24, 2011 opposing any private development of the Fingers, especially development that excluded any public use of the Fills or the waterways between them, because the Fills were created from a public highway right-of-way with publically funded crews, trucks and personnel being paid with public funds to improve the highway.
62. In a letter dated February 25, 2011, attorney Mickey Gendler advised that he represented the Chelan Basin Conservancy, and made the following comments:
- Right of Public Access. The portion of the Fill on vacated Boulevard Avenue impairs the Right of Public Access, constitutes a trespass on the City's and the Public's right of access, and is a public nuisance, and should be abated.
 - Resolution 534. Any development would violate the City's Resolution No. 534.
 - Required Findings in the State Subdivision Statute and the Chelan Municipal Code. Findings that the Proposed Project is essentially for the public interest cannot be made, and therefore the Proposed Project should be denied.
 - Public Trust Doctrine. The Fills violate the Public Trust Doctrine.
 - SEPA. The Applicant should file a new SEPA Checklist to take into account the survey and appraisal that has been requested by the City.

SUB 2010-01

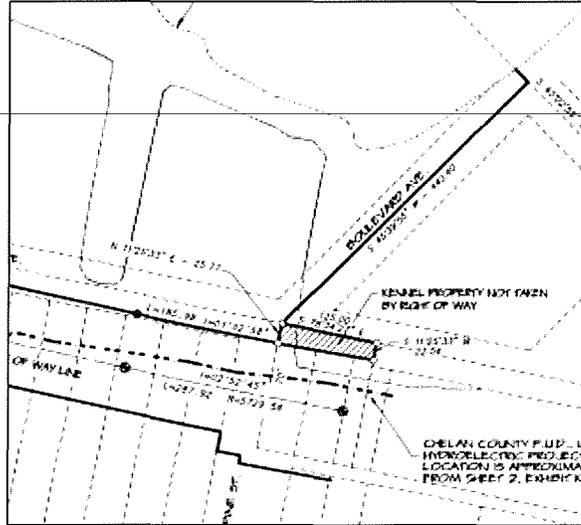
Goodfellow Fingers

Page 23 of 32

The new SEPA Checklist should address the impacts that could be associated with any development that could occur on the Subject Property.

63. On June 8, 2011 the City requested additional comment from all members of the public who have filed comments to date, on the limited issue whether condition(s) should be imposed as mitigation for the impairment of the Public Right of Access over the Project Property by the Fills, and if so, what the condition(s) should be, and received the following comments:
- 63.1. Steve Milner filed his comment dated June 14, 2011, stating that the condition should be a removal of the Fill, and restore the Project Property to its original state.
- 63.2. David Law filed an email on June 21, 2011 that the area of the Project Property was a peaceful and secluded bay, and it was a favorite swimming and water skiing area. The Fingers have taken this use away, and the Fills prevent any through traffic or access to the shoreline, and are unnatural and take away from the natural beauty of the area.
- 63.3. Pat Manners, on behalf of PR Properties, proposed the public have access at each end of the canals, but limit entry to canoes and kayaks that have been walked in. Mr. Manners also suggested a transaction be made between PR Properties, the City and the Applicant where PR Properties would exchange certain lots for two units on the finger facing the Lake Chelan Boat Company. This property would be adjacent to the Applicant's property south of SR 97A, and would allow the Applicant to use an existing road.
- 63.4. Lyle and Cynthia Mettler filed a letter dated June 16, 2011, wherein they recommended the mitigation for the impairment of the public right of access over Block 9 to be the complete removal of the fill material and the restoration of the bay, as was the result in *Wilbour v. Gallaher*. The restoration would re-create use of the bay out of the wind.
- 63.5. Mickey Gendler filed a letter on June 21, 2011 on behalf of the Chelan Basin Conservancy, restating his comments of February 25, 2011, specifically that a short plat application which does not include a specific proposed use does not vest any development rights, citing *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1348 (1977).
- 63.6. Cathy L. Bissett, a realtor on behalf of Christopher Stansfield, who owns property known as TPN 272214662078, located immediately adjacent to the southeast corner of the Project Property, advises that this property has been covered by the Fill. An excerpt of a record of survey filed July 18, 1995

under Chelan County Auditor's file no. 9507180085 illustrates the relationship of these properties:



- 63.6.1. Ms. Bissett advises that Mr. Stansfield recognizes the fill over his property was inadvertent, and he has elected to allow the property to remain undisturbed. Mr. Stansfield owns additional lands abutting the Project Property. Mr. Stansfield is supportive of the Proposed Project recognizes a need to remedy the denial of public access. Mr. Stansfield proposes to allow a public dock be placed on his property to enable access to and from the water from and to the Lakeside Trail.
- 63.7. The Applicant, through its attorney, Kirk Bromiley, filed a letter dated June 21, 2011, reminding the City of its proposal as mitigation to pay for the construction of a length of the Lakeside Trail that was equal in length to the portion of the Lakeside Trail that fronts the Project Property. This proposal was in addition to completing the construction of the Lakeside Trail fronting the Project Property.
- 63.8. Gene Starcher filed his comment with the Planning Department on June 23, 2011, contending the appropriate mitigation would be to remove the Fills, since they initially should not have been placed.
64. A draft of this Decision was provided to the Applicant on July 7, 2011 for comment. The Applicant made no comments on the Findings of Fact or Conclusions of Law, and made several comments on the Conditions of Approval, which comments have been addressed in this Decision.

65. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. CONCLUSIONS OF LAW

1. The Planning Director has jurisdiction to issue a final decision on Type IIB project permit applications in accordance with CMC 19.18.010.
2. The Planning Director's authority to issue a decision approving, conditionally approving or disapproving a short subdivision in accordance with the procedures set forth in the development regulations does not include the authority to completely remove the Fills.
3. An owner of property has the right to develop their property according to the statutes and ordinances in effect at the time a completed application for development has been filed. *Noble Manor v. Pierce County*, 133 Wn.2d 269, 275 (1997); RCW 58.17.033.
4. The completion of development on fills which obstruct the submergence of the land by navigable waters at or below the 1,100 foot level do not, per se, impair the Public Right of Navigation, so long as such development on such fills are accomplished pursuant to carefully planned zoning by appropriate governmental agencies. RCW 90.58.280; *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987); *Caminiti v. Boyle*, 107 Wn.2d 662, 668, 732 P.2d 989 (1987); *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 92 Wash.2d 1, 4, 593 P.2d 151 (1979); *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 513 P.2d 36 (1973); and *Wilbour v. Gallagher*, 77 Wn.2d 306, 462, 232, 40 ALR3d 760 (1960).
5. The Shoreline Management Act, RCW 90.58, the provisions of the Revised Code of Washington pertaining to the subdivision of land, Title 16 of the Chelan Municipal Code, the City's Shoreline Master Program, the City's Shoreline Access Plan, and the City's Development Standards, provide the procedural and substantive guidelines to reconcile the disparate interests of property owners and the public in development on the shorelines.
6. Considering the application as a short subdivision does not constitute inappropriate piecemeal development under either the Shoreline Management Act or the State Environmental Policy Act. There is no evidence that the Proposed Project is an 'artificial division' of a larger plan, and the intent of this Decision is to ensure that the Decision does not compromise full environmental review of future development proposals regarding the Project Property and will not operate to coerce the issuance of a permit for a future development proposal. See, e.g., *Nicholson v. City of Renton*, SHB No. 10-016 (Order on Summary Judgment, December 22, 2010) and *West v. Port of Olympia*, SHB No. 08-013 (Order of Dismissal, November 17, 2008).

7. The portion of the Fills covering vacated Boulevard Avenue do not create a per se trespass of the Public Right of Access. As conditioned, the Fills covering vacated Boulevard Avenue do not unreasonably interfere with the Public Right of Access associated with vacated Boulevard Avenue.
8. Because the Proposal does not constitute “Development” under the Shoreline Management Act and the City’s Shoreline Master Program, a Shoreline Substantial Development Permit for the Proposal is not required.
9. As conditioned, the approval will not limit the Public Right of Access to Lake Chelan, as required by Resolution #534.
10. As conditioned, the public use and interest will be served by the approval of the application. CMC 16.04.120(A).
11. As conditioned, appropriate provisions are either unnecessary or are made for conditions due to flooding, bad drainage, topography, critical areas, rock formations, or other physical characteristics of the land and other matters affecting the public health, safety and general welfare; for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school. CMC 16.04.120(B), and page 5-11 of the Chelan Development Standards (frontage improvements).
12. As conditioned, the Proposed Project will not cause level of service standards for public facilities and services to fall below the standards as set forth in the City’s comprehensive plan. CMC 16.04.120(D).
13. As conditioned, the public facilities and services necessary to support the Proposed Project are adequate and will be available concurrently with the demand for such services. CMC 16.04.120(E).
14. The capacities and dimensions of water, sewerage, drainage and street facilities shall be adequate to provide for future needs of other undeveloped properties in the general vicinity. CMC 16.04.120(F).
15. Generally, the conditions imposed on the Proposed Project are based on the direct impact of the Proposed Project, and the placement of the Fill on the Project Property. Specifically, the conditions imposed on the Proposed Project directly address the impairment by the Fill on the Public Right of Navigation, and directly address the impairment by the Fill on the Public Right of Access.
16. The conditions imposed to address the impairment of the Public Right of Navigation and the Public Right of Access , directly address the Fills and the impact of the

Proposed Project, and therefore do not constitute an unconstitutional taking of private property. CMC 16.04.120(G).

17. The requirements for public notice of the hearing, notice of application and environmental review have been accomplished in accordance with the requirements of Title 19 of the Chelan Municipal Code.
18. The Proposed Project as conditioned substantially complies with the City of Chelan Comprehensive Plan, Shoreline Public Access Plan, Zoning Code, Land Division Code, and Development Standards.
19. Consideration was given to comments received during the public comment period.
20. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. DECISION

Based on the above Findings of Fact and Conclusions of Law, the Short Subdivision known as the Goodfellow Fingers is APPROVED, subject to the following Conditions.

VI. CONDITIONS OF APPROVAL

All Conditions of Approval shall apply to the Applicant, and the Applicant's successors in interest and assigns.

1. All public improvements shall be designed by a licensed civil engineer and approved by the Director of Public Works. All public improvements shall be designed in accordance with the City of Chelan Development Standards.
2. Water rights shall be transferred to the City, or the Applicant provide alternative means for water rights to the satisfaction of the City, in accordance with CMC 13.40 Water Rights Transfer, prior to recording the final short plat.
3. The Applicant shall design and construct domestic water infrastructure for all lots consistent with the City's Development Standards and the Department of Health Water System Design Manual prior to approval of the final short subdivision.
4. The Applicant shall design and construct sanitary sewer infrastructure for all lots consistent with the City's Development Standards and Department of Ecology "Orange Book" Standards prior to approval of the final short subdivision.

5. The Applicant shall reimburse the City for all costs incurred by it associated with review, design and approval of all elements of the Proposed Project, and the Applicant shall enter into a reimbursement agreement with the City.
6. A cultural resource survey, as requested by the Colville Confederated Tribes shall be submitted to the Colville Confederated Tribes, and their acceptance and approval thereof shall be submitted to the Planning Department prior to the commencement of any earthwork or construction activities, and a note shall be placed on the face of the final short plat of this condition.
7. Access to SR 97A from all lots shall be via one access point, which shall be located with regard to sight distance requirements required by WSDOT, and shall otherwise be designed and constructed to WSDOT Standards for commercial development prior to the filing of the final short plat.
8. The Applicant shall construct frontage improvements, including that portion of the Lakeside Trail that crosses the Project Property, pursuant to the specifications established by the Lakeside Trail Plan and the Director of Public Works.
9. All signage prohibiting access by the public to the portion of the Fills covering the vacated Boulevard Avenue shall be removed, subject to the modification of the Fills set out in Condition No. 11.
10. To accommodate the Public Right of Access, the Applicant shall erect signage advising of the Public Right of Access, as set out by the Shoreline Public Access Sign Manual, and as approved by the Planning Director.
11. To accommodate the Public Right of Access, and prior to the approval of the short subdivision, the following portions of the Fill over vacated Boulevard Avenue shall be modified to provide a less severe slope from the top of the Fill to 1090 feet, to facilitate the Public Right of Access. Such modifications shall be pursuant to a design by a landscape architect experienced in the design of lake /water pedestrian access, with plans to be approved by the Planning Director and the Public Works Director:
 - 11.1. The Fill covering the western end of vacated Boulevard Avenue;
 - 11.2. The Fill covering the eastern end of vacated Boulevard Avenue and vacated Main Street;
 - 11.3. The Fill covering the vacated Boulevard Avenue and between the individual fingers;
 - 11.4. All portions of the Fill, as modified above, shall be covered by material allowing barefoot pedestrian access.
12. To accommodate the Public Right of Navigation, and prior to the approval of the short subdivision, the Fill constituting Lots 1 and 2 shall be improved as a park, available for the Public at all levels of Lake Chelan. In making said improvements,

the Fill should be modified to provide a less severe slope from the top of the Fill to 1090 feet, similar to the sloping identified in Condition No. 12, and shall also be covered by materials allowing barefoot pedestrian access. The park shall be made pursuant to a design by a landscape architect experienced in the design of lake/water pedestrian access, with the design and construction to be reviewed and approved by the Planning Director and the Public Works Director. Upon completion of the improvements, Lots 1 and 2 shall be dedicated to the City.

To further accommodate the Public Right of Navigation, and as a condition of the DNS, the Applicant shall construct a public dock designed for non-motorized vessels as specified in the Lakeside Water Street Neighborhood Access Plan in consultation and approval by the City and Chelan County P.U.D. parks departments.

13. As specified in the conditions of the DNS, all structures on the Project Property shall be setback from the level of Lake Chelan at 1100 feet of elevation a distance of twenty-five feet to maintain visual views from SR97A. Setback from the north OHWM shall be in accordance with the Shoreline Master Program.
14. A note shall be placed on the face of the final short plat which states there is a question as to the legality of the Fills, and that the issuance of this Decision does not address the legality of the Fills, which can only be addressed by a decision of a court of competent jurisdiction.
15. Domestic water, sanitary sewer and storm drainage facilities not lying within the right-of-way shall be within utility easements which grant the City of Chelan access for operation and maintenance.
16. Fire flow shall be provided in accordance with the International Fire Code, existing at the time of the construction of improvements on the lots.
17. All storm water improvements will be in accordance with the City of Chelan Development Standards, and the Department of Ecology's Eastern Washington Stormwater Regulations, existing at the time of the construction of improvements on the lots.
18. Location and layout of utilities, driveways or access roads and parking areas shall be designed to the greatest distance or extent from the OHWM as possible in accordance with the Critical Areas Study dated January 2011 by Grette Associates. A note on the face of the final land division map shall state the same.
19. A geotechnical report shall be submitted at time of applications for development or building permits in the future, and shall include site preparation, structural fill, foundation and floor support, and drainage among other necessary considerations. A note on the face of the final land division map shall state the same.

20. An erosion control plan and Storm Water Prevention Plan are required as a condition for the issuance of a fill & grade permit.
21. Fire hydrant location shall be approved by Chelan County Fire District #7 and Public Works, and shall be installed prior to final short plat approval.
22. The Applicant shall obtain all necessary and required local, state or federal permits or approvals, for all work required as a condition of the approval of the final short plat.
23. All future development on the Project Property shall comply with CMC 17.62 Outdoor Lighting on Public or Private Property.
24. Except as expressly provided in this Decision, no waterward improvements are being considered in this Decision. Any waterward improvements that may be proposed as part of a use or structure on the Project Property will have to be reviewed independently of this Decision.
25. All fees incurred by the City in connection with the review of the Project Proposal and the issuance of the Decision, and any reviews of the interpretation or compliance with the conditions required for final short plat approval (but not an appeal of this Decision) shall be paid prior to filing the final short plat.
26. Environmental review has been completed for the Proposed Project, only. Development proposals must comply with CMC Title 14 and the Washington State Environmental Policy Act (SEPA).
27. Any future development on the Project Property shall be subject to the foregoing conditions, and the provisions of the City's development standards in effect at the time of a completed building permit being submitted, whichever is stricter.
28. Upon completion of all short plat approval conditions and improvements, a final land division map and subdivision guarantee in accordance with Title 16 of the Chelan Municipal Code shall be submitted to the Planning Department for review and approval and shall be recorded with Chelan County Auditor once approved by the City.

Craig Gildroy

Craig Gildroy, Director
City of Chelan,
Department of Planning and
Community Development
July 25, 2011

SUB 2010-01
Goodfellow Fingers
Page 31 of 32

APPEAL NOTICE: Anyone aggrieved by this decision may appeal it to the City of Chelan Hearing Examiner, pursuant to the provisions regarding "Closed Record Appeals" identified in Section 19.18.010 and Chapter 19.34 of the Chelan Municipal Code. Such appeal must be filed within 14 calendar days of the issuance of the Decision.