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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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**FRIENDS OF GRAYS HARBOR and WASHINGTON  
ENVIRONMENTAL COUNCIL,**

**Appellants,**

v.

**CITY OF WESTPORT, MOX-CHEHALIS LLC, PORT OF GRAYS  
HARBOR, and STATE OF WASHINGTON DEPARTMENT OF  
ECOLOGY,**

**Respondents.**

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**APPELLANTS' OPENING BRIEF**

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## TABLE OF ACRONYMS

<b>BSP</b>	Binding Site Plan
<b>CL</b>	Conclusions of Law
<b>ELUHB</b>	Environmental and Land Use Hearings Board
<b>FF</b>	Findings of Fact
<b>FOGH</b>	Friends of Grays Harbor
<b>HE</b>	City of Westport Hearing Examiner
<b>JARPA</b>	Joint Aquatic Resources Permit Application
<b>LUPA</b>	Land Use Petition Act
<b>PC</b>	City of Westport Planning Commission
<b>SCUP</b>	Shoreline Conditional Use Permit
<b>SMA</b>	Shoreline Management Act
<b>SSDP</b>	Shoreline Substantial Development Permit
<b>SPRB</b>	Site Plan Review Board
<b>WEC</b>	Washington Environmental Council
<b>WDFW</b>	Washington Department of Fish & Wildlife
<b>WMC</b>	Westport Municipal Code
<b>WSMP</b>	Westport Shoreline Master Program

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## **I. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

- No. 1. The City of Westport erred in finding that the Project complied with the policies of the Shoreline Management Act and the Westport Shoreline Master Program.
- No. 2. The City erred by failing to supplement the shoreline record with evidence regarding the October 2003 erosion event.
- No. 3. The City wrongly precluded Appellants from litigating the issue of setback compliance in the binding site plan appeal based on the Planning Commission's findings in the shoreline appeal.
- No. 4. The City erred in allowing compliance with setback requirements to be determined when Project construction begins.
- No. 5. The City erred in applying its setback requirement only to "buildings," rather than all "structures," and by failing to comply with designated procedures for measuring the setback.
- No. 6. The City erred in interpreting WMC 17.36B.080 to allow dedications of easements for the Project after final BSP approval.

### **Issues Pertaining to Assignments of Error**

- No. 1. Is a 200-unit condominium complex adjacent to the State's most heavily visited coastal beaches and an erosion-prone shoreline consistent with the policies of the Shoreline Management Act and

the local Shoreline Master Program?

- No. 2. Is it an abuse of discretion for the City, which is charged with determining the suitability of development in the shoreline area, to refuse to consider evidence of a recent, major erosion event at the Project site when approving a shoreline permit for the Project?
- No. 3. Can collateral estoppel be applied to an issue when the party estopped properly raised the issue in the lower forum and appealed all adverse decisions on the issue, or, alternatively, when the party estopped was not a party to the proceeding afforded preclusive effect and circumstances have changed substantially since the issue was determined in the first proceeding?
- No. 4. May the City delay a determination of setback compliance until the time of construction despite clear statutory language that it must make such a finding before approving a binding site plan?
- No. 5. Does a setback requirement that must be measured “on either side of the structure to be constructed” apply only to “buildings,” and is it sufficient for the City to measure the setback only directly in front of the proposed structure?
- No. 6. Does a statute that prohibits a binding site plan from being “finally approved until or concurrent with a [required] dedication” allow dedications after approval of a final binding site plan?

## **II. STATEMENT OF THE CASE**

### **A. Introduction**

This case involves a challenge to the Links at Half Moon Bay project (the “Project”), a resort development located on Washington’s southwestern coast near some of the State’s most scenic natural shorelines. This appeal by Friends of Grays Harbor (“FOGH”) and Washington Environmental Council (“WEC”) focuses on one component of the proposed Project – a 200-unit condominium complex that is to be constructed immediately adjacent to the State’s most popular coastal beaches and directly behind a rapidly eroding shoreline.

The appeal challenges two permits issued by the City of Westport (“City”) to Mox-Chehalis LLC, the Project developer: a shoreline substantial development permit (“SSDP”) and a binding site plan (“BSP”) permit. The approval of the condominiums by the City should be reversed because it is contrary to the Shoreline Management Act (“SMA”), the Westport Shoreline Master Program (“WSMP”) and the protections they afford this shoreline of statewide significance. Construction of eight private residential buildings over 60 feet in height directly upland from these public beaches and the natural shoreline and within an area that is actively threatened by coastal erosion is patently inconsistent with the broad environmental policies of the SMA and WSMP. In addition, the

City willfully ignored substantial and relevant evidence regarding a major erosion event at the Project site in 2003. These errors were compounded by the City's failure to properly apply zoning regulations regarding setbacks and concurrent dedications designed to protect the public's health, safety and property interests.

**B. Statement of Facts.**

**1. The Links at Half Moon Bay Project.**

The Project consists of an 18-hole golf course, 200-unit condominium complex, two hotels, convention center, and associated resort and golf course amenities. WSH<sup>1</sup> 4397-98; WSH 18 *et seq.* (Joint Aquatic Resources Permit Application ("JARPA") project diagrams). The Project is proposed on a 355-acre site in the northwest portion of the City adjacent to Westhaven State Park. *Id.* Half Moon Bay is to the north and northwest, and on the south the Project is bounded by Westport Light State Park. *Id.*; WSH 4397-98. The western edge of the Project abuts the Pacific Ocean at South Beach and contains the Westport Light Trail, a pedestrian trail connecting the two state parks. *Id.* A parking lot at the

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<sup>1</sup> Appellants' record citations use the numbering from the City of Westport's administrative record in its permitting decisions. "BSP" refers to the record of the City's binding site plan proceedings. "WSH" refers to the record of Westport's shorelines permitting decision. "HE Tr." refers to the transcript from the Hearing Examiner's April 8-9, 2004, open record hearing on the binding site plan approval.

western end of Jetty Access Road serves Westhaven State Park and has a small restroom building. The Project site is otherwise undeveloped. *Id.*

The portion of the Project to the North of Jetty Access Road, which bisects the site, is roughly 55 acres in size and is adjacent to the City's existing commercial and maritime district. WSH 18 (General Site Plan). Here, the Project developer proposes to build the hotels, convention center, golf clubhouse, and associated amenities. *Id.*; WSH 4397-98. This area is also protected from coastal erosion by a revetment built by the U.S. Army Corps of Engineers in 1999. BSP 876.

The 300 acres of the Project site south of Jetty Access Road feature an extensive interdunal wetland system. BSP 642; WSH 4001 (Interdunal wetland inventory). It is also the heart of the State Parks complex that contains "the most frequently visited ocean beaches in the State of Washington." BSP 410 (Washington Department of Fish & Wildlife ("WDFW") comments). Visitors to the adjacent Westhaven State Park, Westport Light State Park, the Half Moon Bay and Pacific Ocean shorelines and the public trail connecting the parks "are interested primarily in the natural environment and the recreational amenities it offers". *Id.*

Describing the impact the Project would have on the two parks,

Washington Parks noted that

[t]he placement of condos adjacent to Westhaven State Park, two one-half million gallon water storage tanks, and an extensive golf course would drastically change the aesthetics of the park areas. Visitors to both State Parks presently enjoy the aesthetics of a secluded dunal wilderness area. . . . Visitors to Westport Light State Park and Westhaven State Park enjoy the unique wildlife, vegetation and habitat of the dunal wetlands.

BSP 416-17.

The wetlands on the site are unique in their size and ecological value. The largest of them has been delineated at approximately 237 acres in size and extends throughout the Project site and deep into Westport Light State Park. WSH 4001 *et seq.*; BSP 621 *et seq.* (Interdunal wetland inventory). The wetlands are productive habitat for numerous plant and animal species, including Coho salmon. WSH 3947 *et seq.* (WDFW comments); WSH 4398-99; BSP 407. The WDFW described the ecological value of the wetlands mosaic as

the largest block of undeveloped single ownership interdunal wetlands in the Westport area. These wetlands are not only critical habitat themselves, but are performing the critical function of infiltration and biofiltration of untreated stormwater from adjacent developments.

BSP 407 *et seq.*; WSH 474.

The Project will impact approximately 25 acres of wetlands, including 9.96 acres of fill and 14.63 acres that will be deforested<sup>2</sup> and permanently mowed, preventing the natural succession of plant communities. WSH 1 *et seq.* (JARPA Exhs. 16A and 16B); BSP 779 (General Site Plan). Indeed, construction of one hole of the golf course alone will necessitate clearing almost two acres of forested wetlands. WSH 1 *et seq.* (JARPA, Ex. 16A). Additionally, the Project will impact 31 acres of wetland buffers. WSH 902 *et seq.* (EIS Addendum, Att. 1, App. C).

## **2. The Condominium Complex.**

This appeal challenges the proposed 200-unit condominium complex and its associated amenities. These condominiums are permitted to be 62 feet tall, twice as high as any other building in Westport. WSH 3139 (Grunbaum Decl. and photos). They are so closely situated that they will appear to be one massive building that will cast shadows on the adjacent public beach and parking lot in Westhaven State Park. WSH 2049. Unlike the other buildings of the Project, the condominiums are isolated from the City's urban center, over one-half mile away from the proposed hotel and conference center. WSH 18 (General Site Plan).

This location is highly constrained and imperils both the

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<sup>2</sup> Much of the impacted wetlands are currently forested by trees ranging from 20 to 60 feet in height. See WSH 902 (Addendum Ex. A, Wetland Mitigation Plan).

environment and the safety of the Project itself. The condominiums are less than 200 feet from a rapidly eroding shoreline that experienced a major erosion event in Fall of 2003. *See* BSP 61 (10/14/03 Declaration of Emergency); BSP 63 *et seq.* (City's emergency shoreline stabilization); BSP 288 *et seq.* (Myers Suppl. Decl. and photos of shoreline stabilization failure).

The site plans for the Project show that the northernmost part of the condominiums is *exactly 200 feet* from the marram grass line as it existed in August 2000. BSP 1050. However, as the Hearing Examiner confirmed, coastal erosion since 2000 has shifted the line substantially landward. BSP 1072 (¶ II); *see also* BSP 63 *et seq.*; BSP 288 *et seq.* In addition, much of the development associated with the condominiums is closer to the shoreline than the 200-foot minimum required by local law. For example, the applicant was required to extend utility lines, including new water and sewage lines, and upgrade and provide stormwater controls for Jetty Access Road, WSH 1 *et seq.* (JARPA Exhs. 3, 10, 12); BSP 958, and these improvements all lie between the condominiums and the eroding shoreline. *Id.*

To the south, the condominium site is so constrained by the extensive wetlands that in some cases the buildings intrude on legally protected wetland buffers. BSP 1048. Indeed, to fit the entire complex

into this tight location, the City had to rely on the legally questionable approach of buffer-width-averaging. *Id.* As the condominiums are currently situated, it would be impossible to make any adjustment to their location without further encroaching upon these wetlands. *Id.*; WSH 18.

Nearly all of these ecological harms and safety risks could be avoided by relocating the condos upland or eliminating them from the Project altogether. In fact, the developer has prepared plans showing that the condominiums could be located at the proposed site of the economy hotel, north of Jetty Access Road. WSH 3627; WSH 18.

### **3. Coastal Erosion at the Project Site.**

The Project site has experienced substantial erosion in the past and is likely to continue to be at risk for future erosion events. Federal and State agencies that have studied erosion in the area have uniformly supported this conclusion, and their views were confirmed by a major erosion event in the Fall of 2003.

#### **a. Federal and State Agencies Agree that the Project Site Is at Risk for Erosion.**

Federal and State agencies have studied the erosion problem in the vicinity of the Project site extensively. The U.S. Army Corps of Engineers, Department of Ecology, Department of Parks and Recreation and WDFW all concluded that erosion on both South Beach and Half

Moon Bay continues to threaten the Project site.

The Corps' 1997 report was the most comprehensive study of the erosion threat in the area and confirmed the existence of a long-term erosion trend on both Half Moon Bay and South Beach.<sup>3</sup> The Corps criticized the Project, noting that erosion experts have rejected the possibility of long-term shoreline stability:

[C]ontinued erosion of the shoreline adjacent to the South Jetty, if left unchecked, would result in the formation of a permanent breach between the South Jetty and the adjacent South Beach. The planned location of the [Project] is within the expected erosion zone if a breach reforms.

BSP 459; WSH 1592. (internal quotations omitted). Every scenario studied by the Corps showed significant erosion effects on the Project site. In addition, the Corps concluded that beach nourishment would not be sufficient to halt this erosion threat.<sup>4</sup>

State agencies reached the same conclusions. The Department of Ecology concluded that “[b]ased on current scientific knowledge, over time, erosion or flooding of this area cannot be ruled out” and advised that

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<sup>3</sup> See U.S. Army Corps of Engineers, Evaluation Report, Long Term Maintenance of the South Jetty at Grays Harbor, Washington (June 1997) (“Evaluation Report”). Appellants do not have a precise WSH cite for this 200-page document but believe it is located in the range WSH 2468 - 2900. The Corps found that -30 to -40 feet/year was a reasonable long-term average rate of recession for the shoreline immediately south of the South Jetty. Evaluation Report at 14. It found that “[a]lthough the average long term recession rate along the Half Moon Bay shoreline is -5 to -10 feet/year, the rate of erosion appears to vary widely” and was as high as -70 feet/year in 1993-94. Evaluation Report at 15.

<sup>4</sup> See Evaluation Report, located between WSH 2468 and 2900, note 3 above.

“[t]he sustainability of such development in such vulnerable areas needs to be carefully considered . . . .” BSP 400-401; WSH 474. During the Fall 2003 major erosion event, Ecology’s coastal engineers wrote:

[B]each erosion along the Half Moon Bay and the ocean coast is serious again. This erosion should not be a surprise, in fact it is fully anticipated. . . . [T]he beach is returning to its long-term erosion trend.

BSP 556. Similarly, WDFW observed that the “[Project] site is located in an area of recent and ongoing erosion. . . . Any development is therefore at great risk from erosion that will inevitably occur during the life of the project.” BSP 405-406; WSH 474.

**b. Respondents and Their Experts Have Waffled on the Risk of Erosion to the Project.**

Respondents have repeatedly changed their opinions and directly contradicted themselves with regard to the issue of erosion. The following chronology demonstrates Respondents’ inconsistent positions.

**August 2001 – erosion is not a problem.** During the 2001 master plan permitting, Respondents denied the erosion threat and the City approved the master plan. WSH 1598.

**November 2001 – erosion emergency.** After the permit was granted, the City declared an emergency in November 2001, finding that over 40 feet of sand erosion had occurred on both sides of South Jetty in one month and that it required “immediate action to prevent a breach in

that area.” BSP 538. The Corps took emergency action, placing fill and gravel on the South Beach and Half Moon Bay shorelines.

**October 2002 – erosion is not a problem.** In its 2002 master plan decision, Respondents again denied the erosion threat and reissued the master plan approval. WSH 1604-05.

**January 2003 – erosion emergency.** A contractor for the Corps made emergency repairs to the haul road and placed gravel and fill along the western shore of Half Moon Bay. WSH 3742.

**September 2003 – erosion is not a problem.** During the 2003 shoreline hearing for the Project, the City’s expert declared that the erosion threat in Half Moon Bay was minimal. WSH 1660 *et seq.* The Planning Commission issued the shoreline permits, concluding that no erosion threat existed. WSH 4408, 4410. This conclusion was based in large part on the testimony of Dr. Phillip Osborne that “it is unlikely that coastal erosion will impact the [Project] site.” WSH 4407 (FF 62).

**October 2003 – erosion emergency.** On the weekend of October 12, 2003, a series of storms eroded the Half Moon Bay shoreline, causing significant damage just north of the proposed condominium location. The City demanded assistance from State and federal agencies because the erosion was threatening Jetty Access Road and a nearby paved walking path. BSP 695. This major erosion threat prompted the City Council to

declare (again) that “an emergency exists” and direct the City to “take necessary steps to protect public safety and safeguard public property.” BSP 61; *see generally* BSP 48-76 (Lewis Decl. with attached emergency proclamation and photos). By October 16, the City took matters into its own hands and constructed a major seawall on the beach. *Id.* In the following week, additional storms destroyed the seawall and eroded the beach landward. *Id.* Despite rebuilding the seawall several times, erosion eventually washed the public trail into Half Moon Bay. *Id.*; BSP 681. To support the City’s complete reversal of the position it had taken less than a month earlier before the Planning Commission, Dr. Osborne directly contradicted his earlier testimony: “It is my opinion that erosion is an imminent threat to [the infrastructure adjacent to the proposed condominium location].” BSP 231, 853.<sup>5</sup> The City’s attorney and City Manager similarly testified to an erosion emergency in the vicinity of the condominiums. BSP 48, 368.

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<sup>5</sup> Dr. Osborne provided this opinion in a 2003 federal court proceeding regarding erosion control strategies in Half Moon Bay. BSP 231, 853.

**C. Procedural History.**

**1. Previous Litigation.**

The first litigation over this Project involved FOGH's challenge under the Land Use Petition Act ("LUPA") to the City's approval of the Master Plan. After one remand by Thurston County Superior Court, the City again approved the Master Plan by enacting Ordinance No. 1277 on October 8, 2002. WSH 1597. FOGH appealed the new approval and the court rejected this challenge because the Respondents represented that they would resolve the details of development through the BSP review process. WSH 1631 (Court's May 21, 2003, oral opinion at 8).

**2. The Shoreline Substantial Development Permit.**

Mox-Chehalis submitted a revised application for an SSDP to the City in July 2003.<sup>6</sup> The City's Planning Commission accepted public comment and held an open record hearing on September 10, 2003. WSH 4394-95. FOGH and WEC submitted comments as members of the public. The Planning Commission entered Findings of Fact and Conclusions of Law approving the permits on September 30, 2003. WSH 4394-4412. The Planning Commission found that the 200-foot setback

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<sup>6</sup> The first SSDP application submitted by Mox-Chehalis was approved by the City in 2001. Ecology challenged the permit before the Shoreline Hearings Board, and the parties ultimately agreed that the applicant should submit a new application for the modified proposal. In 2003, Mox-Chehalis submitted a new JARPA for issuance of an SSDP and shoreline conditional use permit ("CUP"). The proposal described in the July 2003 JARPA is the Project at issue here. See WSH 1 *et seq.* (JARPA).

requirements in the City's zoning code, WMC 17.32.050(a)(8),<sup>7</sup> were satisfied and that they only applied to buildings, not other structures such as infiltration ponds, roads and utilities. WSH 4401 (FF 31). The Planning Commission discounted all of the erosion evidence submitted by Appellants, including extensive government studies, because no "expert witness" had been submitted, and held that substantial evidence supported the conclusion that the Project site was unlikely to erode in the future. WSH 4408 (FF 64). The Planning Commission also concluded that the Project, as conditioned, was consistent with the policies of the SMA and the WSMP. WSH 4408 (CL 1-3).

FOGH and WEC appealed the decision to the City Council, which held a closed record hearing on October 28, 2003. Because of the intervening storm erosion at the Project site in October 2003, Appellants sought to supplement the record before the Council with new information regarding the recent erosion, including the City's own declaration of emergency and emergency beach armoring. The City refused to consider the new evidence and affirmed the permit approvals in a two-page decision issued the same day as the hearing. WSH 4452-54. The City's decision summarily concluded that the findings and conclusions of the

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<sup>7</sup> Relevant sections of the Westport Municipal Code ("WMC") are attached in the Appendix.

Planning Commission were supported by substantial evidence and were not a clearly erroneous interpretation of the law or application of the law to the facts. WSH 4453.

On appeal of the decision to the Environmental Land Use Hearings Board (“ELUHB”),<sup>8</sup> FOGH challenged the City’s refusal to hear the new evidence regarding the effects of the 2003 erosion event and its determination that the Project was consistent with the SMA’s and WSMP’s policies.<sup>9</sup> After a hearing based on the City’s administrative record, a three-person majority of the ELUHB panel held in favor of the Respondents on all shoreline issues. *Friends of Grays Harbor v. City of Westport*, (Oct. 12, 2005, ELUHB No. 03-001) at 22-27 (CL 18-24) (“ELUHB Majority”). In a lengthy and thorough dissent, two members of the panel agreed that the City had abused its discretion by refusing to hear the additional erosion evidence and that the condominiums were not consistent with the policies of the SMA or WSMP. *Id.* (Clarke and Wilson, *dissenting*) (“ELUHB Dissent”).

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<sup>8</sup> The ELUHB was established to hear consolidated appeals on “qualifying economic development projects.” RCW 43.21L.005.

<sup>9</sup> In a separate, related appeal, FOGH and WEC challenged the shoreline CUP and Ecology’s § 401 certification. After an open record hearing on these issues, the ELUHB held in favor of Appellants on their 401 certification challenge.

### 3. The Binding Site Plan Review.

Following its representations in superior court that the details of the Project would be developed in the BSP approval process, Mox-Chehalis applied to the City for a BSP review of the Project in November 2003. The City's Site Plan Review Board ("SPRB") conditionally approved the application on February 2, 2004.<sup>10</sup> BSP 1062-67. The SPRB found, without reference to the Planning Commission's SSDP decision, that the BSP application met the setback requirements of WMC 17.36B.040(9)(C) and complied with other applicable regulations. BSP 1065 (¶¶ 6, 7). In later testimony, SPRB member Jim Mankin confirmed that in the BSP review process, the SPRB had explicitly determined that the Project complied with setback requirements and that the BSP approval was based in part upon setback compliance. (HE Tr. at 49.)

FOGH appealed the decision to the City's Hearing Examiner.<sup>11</sup> At the open record hearing in April 2004, FOGH presented evidence of the effects of the Fall 2003 erosion event on the shoreline and setback requirements and expert and lay testimony that the 200-foot separation between the marram grass line and the proposed location of the condominiums no longer existed. The SPRB's attorney cross-examined

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<sup>10</sup> The SPRB's decision refers to itself as the Site Plan Review Committee. BSP 1062.

<sup>11</sup> Washington Environmental Council was not a party to the BSP appeal.

FOGH's witnesses on the setback issue. The Hearing Examiner issued a decision on April 21, 2004, upholding some aspects of the appeal and rejecting others. BSP 1071-76. With respect to erosion and setback compliance, the Hearing Examiner rejected FOGH's appeal in a less-than-clear opinion. BSP 1072 (¶ II). Despite this ultimate conclusion, the Hearing Examiner found that the marram grass line had "continued to move" after the SSDP was approved, including in the area directly between the shoreline and the proposed condominiums. *Id.* Respondents never appealed this finding. In rejecting FOGH's setback claim, the Hearing Examiner referred to the Planning Commission's setback determination in the SSDP decision, but did not explicitly rely on it or apply collateral estoppel. *Id.*

On cross-appeals of this decision, the City Council held a closed record hearing and decided every issue in favor of the SPRB and against FOGH. BSP 1151-63. In particular, the City held that, contrary to its representations in superior court, the Project did not need to undergo BSP review. BSP 1155-57. It also found that dedications of property for roads and utilities could be made after BSP approval, setback requirements could be satisfied at the time of construction, setback compliance was a WSMP issue under the Planning Commission's jurisdiction, and FOGH was collaterally estopped from challenging the Project's setback

compliance based on the Planning Commission's SSDP decision, even though it was made prior to the October 2003 storm erosion at Half Moon Bay. BSP 1158-62.

FOGH and WEC appealed the City's decision to the ELUHB, which considered the issues on the same record that had been before the City. ELUHB Majority at 12 (CL 2). The ELUHB held that the Project was subject to the City's BSP review process. *Id.* at 13-17 (CL 4-9). It affirmed the City's decision that setback compliance could be determined at the time of construction rather than when the BSP was approved and that the setback rules only applied to "buildings" and not other Project structures. *Id.* at 19-21 (CL 13-15). However, the ELUHB determined that the City misapplied its own setback procedures because it had not averaged the setback measurements 200 feet on each side of the condominiums. *Id.* at 20 (CL 14). The ELUHB advised the City that if, in correctly applying this methodology, the setback is not 200 feet, "the building configuration will have to be modified prior to construction." *Id.* With respect to the dedication of easements, the ELUHB agreed with the City's interpretation of its zoning code that dedications were not necessary at the time of BSP approval. *Id.* at 18 (CL 10).

#### **4. The Current Appeal.**

On November 9, 2005, FOGH and WEC filed a petition for review

in Thurston County Superior Court. Respondents sought and received direct review by the Court of Appeals, pursuant to RCW 43.21L.140.

### **III. SUMMARY OF ARGUMENT**

The City erred in approving the SSDP and BSP permits for the Links at Half Moon Bay Project. In the shoreline process, the City misapplied the law to the facts in determining that the proposed condominiums were consistent with the substantive policies of the SMA and the WSMP. It did so without any analysis of the most important policies and by disregarding the adverse impacts that eight residential buildings would have on the natural beaches, shoreline recreational opportunities, public access and unobstructed views. The City's approval of both permits was tainted by its refusal to consider any evidence regarding major erosion that occurred at Half Moon Bay in October 2003 – during the permitting process. The City abused its discretion in the shoreline process by declining to supplement the record with the new evidence, and it erred by applying collateral estoppel to the same evidence in the BSP process.

The City also failed to comply with the plain language of its zoning code, instead authorizing dedications of easements, rights-of-way and land for the Project after the condominiums are constructed instead of concurrent with BSP approval (and prior to any construction), allowing

setback compliance to be satisfied at the time of construction rather than when the BSP is approved, and applying the setback provisions only to buildings rather than to all structures of the Project. The City's decisions violated fundamental rules of statutory construction and were inconsistent with the purpose of protecting public safety and the shoreline environment.

#### IV. ARGUMENT

##### A. Standard Of Review

This case is different from the typical appeal of an agency order because it involves the recently enacted ELUHB statute, RCW 43.21L. The purpose of the statute was to “reform the process of appeal and review of final permit decisions made by . . . local governments for qualifying economic development projects.” RCW 43.21L.005. The Legislature intended the reformed process to be the “exclusive process for review of [such decisions],” thereby “superseding other existing administrative board and judicial appeal procedures.” *Id.* Indeed, the “appeal process authorized in this chapter shall, *notwithstanding any other provisions of this code*, be the exclusive process for review” of qualifying permit decisions. RCW 43.21L.020 (emphasis added). Although the ELUHB statute is meant to be the only avenue for judicial review of an ELUHB decision, it provides no standards for such review. *See* RCW 43.21L.130.

In conducting closed record review of the City's permit decisions, the ELUHB acted as an appellate body, a role equivalent to the superior court's review of a local government's decision under LUPA, RCW 36.70C. As a superior court would do under LUPA, the ELUHB applied the standard of review specified in the statute creating the exclusive review process (here RCW 43.21L.130) directly to the City's administrative record, accepting no new evidence. ELUHB Majority at 12-13 (CL 2-3); cf. RCW 36.70C.130.<sup>12</sup>

The present appeal is thus equivalent to an appeal from a superior court's record review decision under LUPA. It is well-established that in such situations the Court of Appeals reviews the administrative record of the local government under the same standards as the superior court. *See, e.g., Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 47, 52 P.3d 522 (2002) (*de novo* appellate review of the local government's record under LUPA standards of review).

Accordingly, this Court should apply the following standards of review to the City's administrative record:

the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are: . . .

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<sup>12</sup> The ELUHB agreed with Respondents that RCW 43.21L was modeled on LUPA and decided FOGH's appeal accordingly.

(b) The permit decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by an agency with expertise;

(c) The permit decision is not supported by evidence that is substantial when viewed in light of the whole record before the board;

(d) The permit decision is a clearly erroneous application of the law to the facts.

RCW 43.21L.130.

The City's decision to exclude additional erosion evidence in the SSDP appeal is reviewed for abuse of discretion. *State v. Divincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The City's application of collateral estoppel is reviewed *de novo*. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

**B. The City's Approval Of 200 Condominiums Adjacent To The State's Most Popular Beach And An Eroding Shoreline Was Contrary To The Policies Of The Shoreline Management Act And Local Shoreline Master Program**

The City of Westport, which has no buildings over two stories in height, approved the development of eight five-story condominiums in the middle of a natural area adjacent to the two most heavily visited coastal parks in the State. The proposed location of the condominiums in the extreme northwestern corner of the property is over a half-mile from the Project's other buildings and next to an area of shoreline that recently

experienced extreme erosion. In considering whether to approve the development, the City was required to determine that it was consistent with the policies of the SMA and the WSMP. These policies are intended to protect statewide interests, including the public's interest in the preservation of natural shorelines and their aesthetic qualities and public access to and recreational opportunities in the State's shorelines. The City approved the development despite the fact that it is contrary to every one of these policies. A thorough application of these shoreline policies demonstrates that the condominiums are simply the wrong development in the wrong place. They are not "reasonable and appropriate uses" of the shoreline, and the City erred in finding them consistent with the State's and City's shoreline policies.

**1. The City's Approval of the Condominiums Was Inconsistent with the Policies of the Shoreline Management Act.**

The Legislature enacted the Shoreline Management Act in 1971, recognizing that the "shorelines of the state are among the most valuable and fragile of its natural resources" and that development and other uses were placing "ever increasing pressures" on shoreline areas. RCW 90.58.020. In response to these concerns regarding the "utilization, protection, restoration and preservation" of shorelines of the state, the Legislature set forth a policy to foster coordinated planning of shoreline

development, prioritization of public interest uses in shoreline areas and preservation of the aesthetic qualities of the natural shoreline environment.

*Id.* Succinctly stated, the policy requires that shorelines of the State be managed “by planning for and fostering *all reasonable and appropriate uses.*” *Id.* (emphasis added). The primary goal of the State’s shoreline policy was to ensure that any development in shoreline areas would “promote and enhance the public interest.” *Id.*

Consistent with the SMA’s public interest emphasis, the Legislature required the Department of Ecology and local governments to manage shorelines in “the interest of all of the people” by giving preference, in the following order, to uses that:

- (1) Recognize and protect the statewide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline.

*Id.* In implementing this policy of reasonable and appropriate public interest uses of State shorelines, “the public’s opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally.” *Id.* The policy of the SMA

plays a substantive role in shoreline permit determinations, *see, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 821, 828 P.2d 549 (1992); *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 350, 997 P.2d 380 (2000); *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588-94, 870 P.2d 987 (1994), and it is to be “broadly construed in order to protect the state shorelines as fully as possible,” *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994).

The shorelines adjacent to the Project site, Westhaven State Park, and Westport Light State Park are designated shorelines of statewide significance and are therefore subject to the SMA's policy. RCW 90.58.030(2)(e)(i), .140; City of Westport Comprehensive Plan (“Comp. Plan”) at 44 (Ch. 2(E)(2)) (WSH 1533). The City, as required by the SMA, has incorporated the policy and use preferences of RCW 90.58.020 into its Shoreline Master Program and must ensure that all development within the shorelines is consistent with the SMA's applicable policies and preferences. *See* Comp. Plan at 36-44 (Ch. 2) (WSH 1525-33); WMC 17.32.080(c)(1)(A). The Project is within the shoreline and may only be approved if it is consistent with the SMA's policies. Indeed Ecology, the agency primarily responsible for enforcing the SMA, *see* RCW 90.58.050, informed the City in 2000 that the “[policies of the SMA] will be used in

our evaluation of the merits of this proposal. It is incumbent on the applicant to demonstrate that these conditions are met,” BSP 399.

The City, which affirmed the Planning Commission’s approval of the SSDP application in a two-page decision, never made a determination of whether the condominiums – or the Project as a whole – were consistent with the SMA’s policy and use preferences. Instead, it summarily concluded that the Planning Commission’s findings of fact were supported by substantial evidence and its conclusions of law were not a clearly erroneous application of the law to the facts. WSH 4453. The Planning Commission’s decision, in turn, contained no factual findings regarding the Project’s compliance with the policies of the SMA and completely failed to analyze the first three policies (*i.e.* the most important use preferences) of RCW 90.58.020. Simply put, there was never any serious consideration of the consistency of the condominiums with the SMA’s policies and use preferences. For these reasons alone, the City’s decision was a clearly erroneous application of law to the facts and should be reversed. RCW 43.21L.130(1)(d). Indeed, the City’s decision, which this Court reviews *de novo*, should also be reversed because it fails to state any grounds on which it can be upheld. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 445 (1983) (holding that an agency’s action must be

evaluated on the basis articulated by the agency, not *post hoc* rationalizations by its attorneys). When considering all of the SMA's policies and use preferences individually – as the City and Planning Commission should have done – the City's error is manifest. Contrary to the City's conclusions, the record is replete with evidence starkly demonstrating the incompatibility of the proposed condominiums with public use and enjoyment of the surrounding area's natural shoreline.

**a. Approval of the Condominiums Prioritizes Local Interests over Statewide Interests.**

Neither the Planning Commission nor the City addressed the first rule of shoreline use preferences, which is to “[r]ecognize and protect the statewide interest over local interest.” RCW 90.58.020. Here, the statewide interests are clear and substantial. The condominium site is located adjacent to Westhaven State Park and Westport Light State Park, which are the most visited coastal beaches in the State. BSP 410. Visitors to the parks are primarily attracted by the “natural environment and recreational amenities they offer” as well as the “aesthetics of a secluded dunal wilderness area.” BSP 410, 416-17. The SMA itself defines these shorelines as a significant statewide interest. RCW 90.58.030(2)(e)(i).

In contrast, the development of 200 privately owned condominiums has negligible, if any, statewide benefits. The Planning

Commission and City failed entirely to consider the SMA's preference for statewide interests. Indeed, the only interest served appears to be local economic development, which is not preferred under any policy of the SMA. Even this finding – which was never actually made by the Planning Commission or the City – is dubious, as the sale of the condominiums will largely benefit an unknown group of private investors. The only reference in the SMA's policies to economic development in the shoreline is limited by the requirement that such developments be “particularly dependant on their location on or use of the shorelines.” RCW 90.58.020. While the ELUHB statute did change certain procedural aspects of challenges to qualifying economic development projects, *see* RCW 43.21L.050, it did not alter the underlying substantive provisions of the SMA applicable to shoreline permits, including its policies and use preferences, ELUHB Majority at 3; ELUHB Dissent at 10.

**b. Approval of the Condominiums Fails to Preserve the Natural Character of the Shoreline and Irreparably Alters the Physical and Aesthetic Qualities of the Project Site.**

The second-most preferred shoreline use is to “[p]reserve the natural character of the shoreline.” RCW 90.58.020. In addition, in implementing the SMA policies, the City was required to preserve “the public’s opportunity to enjoy the physical and aesthetic qualities of natural

shorelines . . . to the greatest extent feasible.” *Id.* The construction of eight 62-foot tall buildings adjacent to the natural shoreline is directly contrary to these policies. The site of the condominiums, which is separated by over one-half mile of open land from the proposed hotel and conference center, is undeveloped and largely in its natural state. Visitors to this “secluded dunal wilderness area” are drawn by its natural state and significant aesthetic qualities. BSP 410, 416-17.

The condominiums will be out of scale with this area of substantial beauty, adding numerous five-story structures that would tower over the adjacent public shorelines and state parks and cast shadows onto the shorelines area. WSH 2049. By contrast, Westport has no buildings taller than two stories and there is no significant development in the state parks. WSH 3139 *et. seq.* (Grunbaum Decl. and photos). Under the proposal, the natural landscape would begin to take on the appearance of a suburban subdivision, as the condominiums will be visible from the beach areas, the Westhaven parking lot and dune-top trails. WSH 1 (JARPA Exhs. 22A-E). Formerly unobstructed views from Jetty Access Road, Half Moon Bay and the Lighthouse Park Trail would have a significant visual intrusion, detracting from the aesthetic qualities of the area that appeal to so many visitors. *Id.*; BSP 410, 416-17. Nonetheless, the Planning Commission only considered whether views from Westhaven State Park and the trail

connecting it to Westport Light State Park would be completely blocked, not whether they would substantially impaired.<sup>13</sup> WSH 4401 (FF 29).

The City's approval of the Links project authorizes construction of condominiums that are situated in the precise location that destroys, rather than preserves, the natural shoreline. Accordingly, the City erroneously applied the law to the facts in finding the proposed development to be consistent with the SMA policies.

**c. The Condominiums Eliminate Public Access to Publicly Owned Shoreline Areas.**

The SMA policies prioritize those shoreline uses which “increase public access to publicly owned areas of the shorelines.” RCW 90.58.020. Prior to its planned sale and development, the Project site, including the proposed location of the condominiums, was publicly owned and was treated by the Port of Grays Harbor and local residents as a de facto park. WSH 3129. For decades, the site was regularly used for such activities as birding, hiking and other recreation. *Id.* Construction of the condominiums will eliminate public access to this area of the shoreline and the activities that had taken place there.

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<sup>13</sup> Moreover, the illustrations relied upon by the Planning Commission for this conclusion were provided by Mox-Chehalis in the JARPA and are from the partially blocked perspective of the water's edge, rather than from the heavily visited Jetty Access Road, Lighthouse Park Trail, and the parking lot. *See* WSH 1 *et seq.* (JARPA, Tab BB).

**d. The Condominiums Will Decrease Recreational Opportunities.**

The City's approval of the condominiums fails to "promote and enhance the public interest" because it does not "[i]ncrease recreational opportunities *for the public* in the shoreline." RCW 90.58.020 (emphasis added). Contrary to the SMA policies, the condominiums will eliminate the traditional recreational activities of birding and hiking that have been enjoyed by the public for decades at the site, WSH 2007-2057, and will aesthetically impair the areas that the public uses recreationally, WSH 2049. The Planning Commission found that the Project as a whole would increase demand for public access to the shorelines. WSH 4402 (FF 35). But this finding only applies to Project components such as the bike path and sidewalk along Jetty Access Road and the golf course.<sup>14</sup> See WSH 4401-02 (FF 33, 35). The *condominiums* themselves do not increase recreational opportunities *for the public*. Rather, at most, they enhance somewhat the access opportunities for those few who purchase a condominium unit.

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<sup>14</sup> The conclusion that the golf course enhances access for the public is debatable, as tee times will be reserved for condominium owners and guests at the luxury hotel. See WSH 3655 (Links Market Analysis at 4.7) ("Within just three year therefore, the *Links* becomes a place where the casual local visitor simply cannot even reserve a tee time.")

**e. The Condominiums Are Not Dependent on the Shoreline.**

The SMA's policy of promoting public enjoyment of the "physical and aesthetic qualities of natural shorelines" also includes an explicit preference for uses that are "unique to or dependent upon use of the state's shoreline," such as marinas and piers. RCW 90.58.020. No aspect of the condominiums is "dependent on [its] location on or use of the shorelines." *Id.* Indeed, their proposed location in an area that has recently experienced extreme erosion events makes them far less secure than if they had been located upland, close to the Project's hotels and conference center.

**2. Approval of the Condominiums Was Inconsistent with the Policies of the Westport Shoreline Master Program.**

Shoreline substantial development permits must also be consistent with the WSMP. WMC 17.32.080(c)(1)(C); WAC 173-27-150(1)(c). The WSMP is a combination of Chapter 9 of the City's Comprehensive Plan and Title 17, Chapter 32 of the Westport Municipal Code. WMC 17.32.020. As with the SMA, the WSMP contains numerous policy statements which are binding on the City's approval of the proposed condominiums. *See* Comp. Plan at 36-44 (Ch. 2) (WSH 1525-33).

**a. The Condominiums Are Isolated From the City's Other Developed Areas and Detract from the Shoreline's Aesthetic Qualities.**

The WSMP policies for residential development state that “[i]nfill within presently developed areas should be encouraged in order to utilize existing utilities.” Comp. Plan at 42 (Ch. 2(B)(12)(d)) (WSH 1531). In addition, such development should be designed with consideration for “aesthetic enhancement.” *Id.* (Ch. 2(B)(12)(a) (WSH 1531).

The proposed condominiums cannot fairly be considered to be an aesthetic enhancement. Rather, they will completely change the character of the surrounding State Parks complex and significantly impair, not enhance, its aesthetic qualities. Moreover, the condominiums are over one-half mile from the other buildings of the Project and existing commercial and residential development in the City, making them stick out like a sore thumb. WSH 18; WSH 3139 *et seq.* (Grunbaum Decl. and attached photos). They also require new utility corridors, BSP 1033, which in addition to conflicting with the Comprehensive Plan, would be placed directly in the erosion zone.

**b. The Condominiums Are High-Density Development Incompatible with the Interdunal Area.**

The WSMP's policies for Accreted Oceanfront Lands allows only "low-density development" in the ecologically important interdunal areas where the Condominiums would be located. Comp. Plan at 42 (Ch. 2(C)(1)(c)) (WSH 1531). Here, the City approved construction of 200 condominium units on a small footprint that was highly constrained by the surrounding wetlands and dunes. This design is simply inconsistent with the WSMP's policy requiring low-density development.

**c. Approval of the Condominiums Does Not Facilitate Recreational Uses of or Public Access to Shorelines.**

The WSMP's policies state that "[d]evelopments which provide recreational uses facilitating public access to shorelines, and other uses dependent upon shoreline locations is [sic] encouraged." Comp. Plan at 40 (Ch. 2(B)(13)(a)) (WSH 1529). As discussed above in Parts IV.B.1.c-e, above, the condominiums do not improve – and in fact eliminate – public access to shoreline areas, decrease recreational opportunities and do not provide uses dependent on their shoreline location.

**d. The Condominiums Reduce the Public's View of the Water and Shorelines.**

Shoreline uses "shall be designed and operated to avoid blocking, reducing, or adversely interfering with the public's visual access to the

water and shorelines.” WMC 17.32.060(g)(4)(B). The Planning Commission considered that the condominiums are “oriented so that they are landward of the state park property and will not block views of either the Pacific Ocean or Half Moon Bay.” WSH 4401 (FF 29). This analysis is incomplete and fails to address the fact that the condominiums *reduce* and *adversely interfere* with the currently unobstructed views from Jetty Access Road, Half Moon Bay and the Lighthouse Park Trail. Indeed, the Planning Commission’s conclusion that the condominiums will not block views of the water is incorrect, as from several vantage points, they will block a central portion of the vista, including existing views of the 300-acre wetland complex on the site.

For these reasons, the City erroneously applied the law to the facts in finding that the proposed condominiums are consistent with the policies of the SMA and the WSMP.

**C. The City Erred In Refusing To Consider Substantial And Relevant Evidence Regarding Erosion In Both The Shoreline Permit And Binding Site Plan Proceedings.**

The City’s determination to approve the Project led it to exclude and ignore information presented by FOGH and WEC regarding erosion in the vicinity of the proposed condominiums and the effect of this erosion on setback requirements. Following the major erosion event at Half Moon Bay in the Fall of 2003, the City abused its discretion by refusing to

consider the new erosion evidence in the SSDP appeal. Later, even though the Hearing Examiner had considered such evidence, the City again excluded it from the BSP appeal on the basis of collateral estoppel. These errors resulted in permit approvals based on incomplete and inaccurate information for a Project that would pose a substantial risk to public safety, private investment, and the long-term integrity of the shoreline.

**1. The City Abused Its Discretion By Refusing to Hear Erosion Evidence in the Shoreline Appeal.**

Because the SMA requires shorelines to be managed for “all reasonable and appropriate uses,” RCW 90.58.020, evidence demonstrating that a severe erosion risk exists at the site of the proposed condominiums, which could either jeopardize the safety of the structures or require long-term armoring of the adjacent beach, was central to the City’s approval of the SSDP.

Despite the direct relevance of the October 2003 storm erosion and infrastructure damage at Half Moon Bay, the City – less than one month after it had issued an emergency proclamation that storm erosion posed an “imminent threat” and “extreme emergency situation,” BSP 61-62 (emergency proclamation) – refused to consider any new evidence regarding erosion and resulting beach armoring in the vicinity of the

proposed condominiums.<sup>15</sup> The City’s refusal to consider any additional evidence – whether from the Appellants *or* Respondents – regarding the recent erosion event was unreasonable and demonstrated willful ignorance of a major public safety issue directly affecting the proposed development. The City’s reliance on stale erosion information is further called into question because Dr. Osborne, the City’s erosion expert on whom the Planning Commission relied, contradicted himself three months later, stating that erosion was “an imminent threat” to the Half Moon Bay shoreline. *Compare* BSP 231, 853 *with* WSH 4407 (erosion “unlikely” to impact the Project site). In short, the City never considered the information it needed to make an informed decision that the condominiums were a reasonable and appropriate use of the shoreline.

The City’s October 30, 2003, decision affirming the SSDP approval never refers to the major erosion events that occurred earlier that month or justifies its exclusion of the new erosion evidence offered by Appellants. *See* WSH 4452-54. The City thus abused its discretion because its refusal to hear new and relevant erosion evidence was “manifestly unreasonable, based on untenable grounds, [and] based on

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<sup>15</sup> The City Council even refused to allow Appellants to place the excluded evidence in the record for purposes of appellate review. This October 2003 erosion evidence was included in the BSP record, however, and is attached in the Appendix for this Court’s review.

untenable reasons.” *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995); *see also* ELUHB Majority at 25 (CL 20) (finding a “particularly strong case” for admission of “vital” new erosion evidence); ELUHB Dissent at 3-6 (finding an abuse of discretion).

**2. The City Erred in Applying Collateral Estoppel to Exclude Evidence Regarding Erosion and Setback Compliance in the BSP Proceeding.**

In the BSP review process in late 2003 and 2004, FOGH submitted substantial evidence regarding the October 2003 erosion events and their effect on setback compliance of the condominiums. Here, when confronted with the erosion evidence that it had refused to consider in the SSDP appeal, the City evaded the issue again by asserting that the Planning Commission’s pre-erosion decision had determined the setback compliance issue once and for all. The City’s application of collateral estoppel to these issues, which in effect turned back the clock to September 2003, was in error.

**a. Collateral Estoppel Cannot Apply Because Setback Compliance Is a BSP Review Issue and FOGH Has Raised and Appealed It.**

The City’s zoning code requires each application for binding site plan approval to show “[a]ll proposed and existing buildings and setback lines sufficiently accurate to ensure compliance with setback requirements.” WMC 17.36B.040(9)(c) (emphasis added). In addition, the

SPRB must “review the proposed site plan for compliance with provisions of [WMC 17.36B] and other applicable laws and regulations,” WMC 17.36B.050, and make written findings that the BSP conforms with such laws before approving it, WMC 17.36B.060(3).

Pursuant to these requirements, the SPRB made an independent and explicit finding that the proposed BSP did comply with the 200-foot setback. *See* BSP 1065 (¶¶ 6, 7) (finding compliance with WMC 17.36B.040 and other applicable regulations). Indeed, an SPRB member testified to this effect before the Hearing Examiner. *See* HE Tr. at 49 (Mankin testimony)). FOGH appealed this conclusion to the Hearing Examiner and then to the City Council. BSP 1072, 1158-60. Thus, FOGH raised the issue of setback compliance at the outset of the BSP proceeding, and it was decided adversely to FOGH in every forum. FOGH has appealed the adverse decisions on the setback issue all the way to this Court, and it cannot be precluded by collateral estoppel. The City therefore erred in refusing to consider FOGH’s setback evidence on this basis.<sup>16</sup>

**b. Collateral Estoppel Cannot Arise From the Planning Commission’s Shoreline Decision.**

Even if the Court were to conclude that collateral estoppel could, in theory, apply to the setback issue determined in the BSP proceeding, the

---

<sup>16</sup> The City also erred in finding the setback requirement did not apply to any structures other than buildings, as discussed in Part IV.D.2.b below.

Court should not give it preclusive effect under the facts and procedural history of this case. Collateral estoppel is an affirmative defense<sup>17</sup> that requires the party seeking application of the doctrine to establish:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

*Christensen*, 152 Wn.2d at 307 (citations omitted). Collateral estoppel may apply to agency findings, but only after three additional factors are considered:

(1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations.

*Id.* at 307-08 (citations omitted).

Respondents have failed to carry their burden with respect to several of these factors. First, the issues are not identical because of a substantial change in circumstances between the September 2003 Planning Commission decision and the 2004 BSP proceedings. *See Malland v. Dep't of Ret. Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985) (change in circumstances negates identity of issues). The major erosion events of the

---

<sup>17</sup> Because the SPRB litigated the setback issue by cross-examining FOGH's expert witness Dr. Sarah Cooke (HE Tr. 13), it has waived the estoppel defense.

Fall of 2003 altered the shoreline and marram grass line of Half Moon Bay and affected the previous setback measurements in areas relevant to the condominiums. This fact was confirmed by the Hearing Examiner. BSP 1072 (¶ II). Moreover, the Planning Commission's finding of setback compliance was based on an incorrect methodology. As the ELUHB found, the City failed to average setback measurements on both sides of the condominiums to determine compliance, as required by WMC 17.32.050(a)(8). ELUHB Majority at 20 (CL 14). The Planning Commission applied the same, incorrect methodology (*see* HE Tr. at 45-46 (Mankin testimony)), and its finding should not estop FOGH.

Second, the Planning Commission's decision was not a final judgment on the merits because it was subject to appeal and FOGH and WEC have appealed it. WMC 17.32.080(d)(3) (Planning Commission's "decision shall be final unless an appeal is filed"). Thus, this case is contrary to *Willapa Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn. App. 417, 423, 62 P.3d 912 (2003), where this Court held that a failure to appeal an earlier SSDP approval resulted in a final judgment. *See also Cassinelli v. City of Seattle*, SHB Nos. 93-46, 93-47, 1994 Wa Env Lexis 220, at \*5-\*6 (May 1994) (¶ XV) (citing *McDaniels v. Carlson*, 108 Wn.2d 299, 306-08, 738 P.2d 254 (1987)) (Under the SMA, local government's shoreline permit decision is not a final decision with

preclusive effect).

Third, FOGH was not a “party” to the Planning Commission proceeding, but rather participated as a member the public submitting comments. The Shorelines Hearings Board has held that non-signatories to a permit cannot be estopped when they challenge later permits. *Mukai v. City of Seattle*, SHB Nos. 00-029, 00-032, 2001 WL 363036, at \*3 (March 5, 2001).

Fourth, the Planning Commission’s informal hearing on the shoreline permits application was substantially different from the procedures utilized by courts and agencies acting in a quasi-judicial role. As the Shorelines Hearings Board has held, the doctrine only applies to administrative agencies acting in a judicial capacity, and permitting is not an adjudication. *Mukai*, 2001 WL at \*2-\*3 (citing *Reninger v. Dep’t of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)). Accordingly, FOGH did not have a “full and fair opportunity to litigate the issue in the first forum,” and it would be an injustice to apply collateral estoppel to FOGH in this case. *Christensen*, 152 Wn.2d at 309,<sup>18</sup> *see also* Teglund,

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<sup>18</sup> Application of collateral estoppel in this case would be fundamentally unfair for other reasons as well. The Planning Commission decision occurred before the major erosion events of October 2003. Since that time, FOGH persistently attempted to present new erosion evidence to the City. These efforts were rejected outright in the SSDP appeal, as discussed above in Part IV.C.1, above. Moreover, FOGH has repeatedly been told (*e.g.*, in its challenge to the Master Plan in Thurston County Superior Court) that the issue of

14A Civil Procedure § 35.51, at 503 (1st ed. 2003) (preclusive effect of administrative determinations often vulnerable to challenge).

**D. The City Erred By Failing To Comply With The Plain Language Of Local Ordinances Designed To Protect The Environment And Prevent Unsafe Developments.**

**1. The City's Zoning Code Unambiguously Mandates that Dedications of Right-of-ways, Easements and Land Be Made Concurrently With Binding Site Plan Approval.**

WMC 17.36B.080 provides that “[a] site plan shall not be finally approved *until or concurrent with* a dedication of required rights-of-way, easements, and land.” WMC 17.36B.080 (emphasis added). The requirement that dedications occur “concurrent with” BSP approvals is consistent with other provisions of the City’s BSP review process. *See* WMC 17.36B.040(9)(D) (BSP application required to show “[a]ll areas . . . to be dedicated” to public use); WMC 17.36B.060 (BSP and dedications “shall not be approved” before SPRB’s written findings). Concurrent dedications serve important public purposes, such as protecting public property. *See, e.g., Richardson v. Cox*, 108 Wn. App. 881, 890-92, 26 P.3d 970 (2001) (dedications are difficult to enforce after site plan approval). In addition, at the time the BSP was approved in February 2004, the roadway to be dedicated was at risk of washing away because of

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setbacks would be decided during the binding site plan process pursuant to the plain language of the City’s zoning code.

erosion. Concurrent dedication would have assured that public health and safety needs required to be considered in WMC 17.36B.060(1) would have been part of the BSP review process.

The City's interpretation of WMC 17.36B.080 to require only that Mox-Chehalis "identif[y] areas to be dedicated concurrent with the" BSP and make actual dedications of such areas upon completion of the Project, BSP 1162, is contrary to the rules of statutory construction. A statute must be construed to give effect to the intent of the legislature, as expressed in its plain language and ordinary meaning. *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000). Because WMC 17.36B.080 unambiguously requires that any dedications occur concurrently with BSP approval, this Court need not inquire further. *In re Estate of Jones*, 152 Wn.2d 1, 11, 100 P.3d 805 (2004) ("Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words."). Indeed, under the City's interpretation, WMC 17.36B.080 would become mere surplusage, another violation of statutory construction. *Wascisin v. Olsen*, 90 Wn. App. 440, 444, 953 P.2d 467 (1997) ("[A] statute must be interpreted so as to give all of its language meaning.").

In sum, the City's failure to require dedications concurrent with

BSP approval was contrary to the statutory language and placed the public's property and health and safety interests in jeopardy.

**2. The City Erred in Interpreting the Setback Provisions of Its Zoning Code.**

Both the SSDP and the BSP should be reversed because in approving both permits the City erred in interpreting its setback provisions and in actually applying the setback. *See Buechel*, 125 Wn.2d at 201 (affirming denial of variance by Shoreline Hearings Board for construction that would have violated local SMP's setback requirements). These errors are critical because the setback requirements are designed to protect natural shorelines and upland ecological systems. Because of the severe erosion in October 2003, there was a substantial shift in the marram grass line and the corresponding setback measurement relevant to the condominiums. Indeed, by the time of the Hearing Examiner's open record hearing in April 2004, several components of the Project, including the condominium's utility corridor, were much closer than 200 feet. Nonetheless, as discussed in Part IV.C above, the City refused to hear relevant erosion information presented by FOGH and WEC. It compounded this error by narrowly applying the setback requirements only to buildings and authorizing the setbacks to be satisfied as late as the pouring of the condominium foundation.

At the Project site, the City's zoning code requires that

the building setback shall be 200 feet from the edge of the marram grass line. The line shall be determined as the average of the marram grass line measured 200 feet on either side of the structure to be constructed.

WMC 17.32.050(a)(8). Compliance with setbacks is particularly important because they protect the natural shoreline environment. *See* WAC 173-26-231(3)(a)(i). Indeed, the City's own Master Program recognizes that healthy dunes, which are damaged by any excavation, protect upland ecological systems. Comp. Plan at 42 (Ch. 2(C)(1)(a)) (WSH 1531).

Yet throughout its consideration of this Project, the City has misapplied its own setback requirements by measuring the marram grass line only in front of the proposed condominiums, not 200 feet to either side. *See* ELUHB Majority at 20 (CL 14). This error is critical because the City's declaration of emergency and emergency shoreline armoring occurred within this measurement area. BSP 48 *et seq.* (Lewis Decl.).

**a. The City Failed to Require Setback Compliance at the Time of BSP Approval.**

The BSP cannot be approved without a finding that applicable setback requirements are satisfied. WMC 17.36B.060(3). In addition, the BSP application must show all "setback lines sufficiently accurate to ensure compliance with setback requirements." WMC 17.36B.040(9)(C).

Despite this plain language, the City held that compliance with setback requirements was only necessary “when the project is constructed.” BSP 1159. Under this reasoning, as the ELUHB found, the setback requirement must be met “at the time [the condominiums] are constructed” because their “location could change between mapping and construction.” ELUHB Majority at 20 (CL 14). It advised that if the marram grass line shifts to create a setback violation, the problem can be solved by modifying the building configuration prior to construction. *Id.* This interpretation of the setback provisions disregards the plain statutory language and discounts the reality at the Project site. The condominiums cannot easily be “modified” because they abut highly regulated wetlands. The buildings cannot simply be relocated after the public process has been completed, without notice, comment or opportunity to appeal. Such public involvement is particularly important where, as here, the City has consistently failed to apply its setback methodology correctly.

**b. The Setback Provisions Apply to All Structures.**

The Planning Commission held that the setback requirement of WMC 17.32.050(a)(8) applied only to “‘buildings’, not to infiltration ponds, roads, . . . utilities,” or other structures. WSH 4401 (FF 31). This is contrary to the plain language of the statute, which applies to the “structure to be constructed.” WMC 17.32.050(a)(8). The term

“structure” is broadly defined in the WSMP, while “building” or “building setback” is not defined. *see* WMC 17.32.020. This is understandable because “building setback” is a generic term meaning *development setback*, and does not indicate a legislative intent to regulate only “buildings.” *See, e.g.*, RCW 43.22.460 (authorizing local jurisdictions to adopt “building setbacks” for “commercial structures”). Indeed, long before the enactment of the WSMP, the Shoreline Hearings Board had explicitly held that “building setbacks” regulate structures, not just buildings. *See, e.g., Peterson v. Templin Found.*, SHB No. 99-4, 1999 WL 1094988 (Nov. 10, 1999) (road and home); *Champion v. Mason County*, SHB No. 89-67, 1990 WL 197896, at \*3 (Oct. 9, 1990) (CL III, fence and wall); *Slater v. Ecology*, SHB No. 87-15, 1987 WL 56657, at \*2 (Nov. 6, 1987) (CL I, deck). The Department of Ecology has also used “building setback” to refer generically to a development setback. *See* Department of Ecology, *Wetland Buffers: Use and Effectiveness*, at 29 (1992) (available at <http://www.ecy.wa.gov/pubs/92010.pdf>).

Based on the plain language of the City’s setback requirement, the purpose that building setbacks serve (*i.e.* shoreline protection), and the generic understanding of the term “building setback,” the setback provision in WMC 17.32.050(a)(8) should apply to all structures

associated with the Project.<sup>19</sup> If it did not, swimming pools, tennis courts, utilities and other non-building structures could be placed immediately adjacent to the shoreline.

**c. The City Erroneously Interpreted Its Setback Methodology.**

The City wrongly interpreted its setback provisions to allow the marram grass line to be measured directly in front of the Project structures, while WMC 17.32.050(a)(8) explicitly requires the line to be measured “200 feet on either side of the structure to be constructed.” This error was confirmed by the ELUHB. ELUHB Majority at 20 (CL 14). The City utilized this flawed interpretation in its SSDP and BSP approvals. *Id.*; (HE Tr. at 45-46 (Mankin testimony)). Accordingly, the City’s erroneous legal interpretation and failure to follow designated setback procedures in both the shoreline and BSP permit processes requires reversal of both approvals. RCW 43.21L.130(1)(a), (b).

**V. CONCLUSION**

For the foregoing reasons, Appellants FOGH and WEC request that the Court reverse the City’s approval of the Shoreline Substantial Development Permit and Binding Site Plan and set aside both permits.

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<sup>19</sup> Given its interpretation of the building setback provision, the City has not evaluated which Project components meet the definition of “structure” and whether any such structures are within the 200-foot setback.

Respectfully submitted, this 14th day of August, 2006,

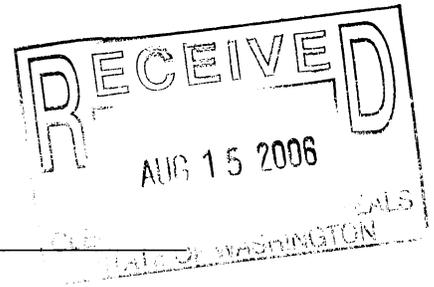
Smith & Lowney PLLC

By   
Knoll Lowney, WSBA # 23457

Ziontz, Chestnut, Varnell,  
Berley & Slonim

By   
Brian C. Gruber, WSBA # 32210

No. 34113-1-II



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**THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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**FRIENDS OF GRAYS HARBOR and WASHINGTON  
ENVIRONMENTAL COUNCIL,**

**Appellants,**

**v.**

**CITY OF WESTPORT, MOX-CHEHALIS LLC, PORT OF GRAYS  
HARBOR, and STATE OF WASHINGTON DEPARTMENT OF  
ECOLOGY,**

**Respondents.**

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**APPELLANTS' OPENING BRIEF  
--APPENDICES--**

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Berley & Slonim  
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(206) 448-1230

*Attorneys for Appellants Friends of Grays Harbor and Washington  
Environmental Council*

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- 1 Joint Aquatic Resources Permit Application Form for the Link Bay
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- 3 Photographs of 2003 Erosion Emergency
- 4 Documents re: 2003 Erosion Emergency
- 5 Westport City Code, Chapter 17.32, Shorelines Master Program
- 6 Westport City Code, Chapter 17.36B, Binding Site Plans
- 7 City of Westport Planning Commission Shorelines Substantial Development Permit Conditional Use Permit
- 8 Decision on Administrative Appeal of Planning Commission Decision Approving Shoreline Substantial Development and Conditional Use Permits
- 9 Bindings Site Plan (“BSP”) Approval
- 10 City of Westport Hearing Examiner’s Decision on BSP
- 11 Decision of Westport City Council on BSP

**Joint Aquatic Resources Permit Application Form  
for  
The Links at Half Moon Bay**

**July 2003**

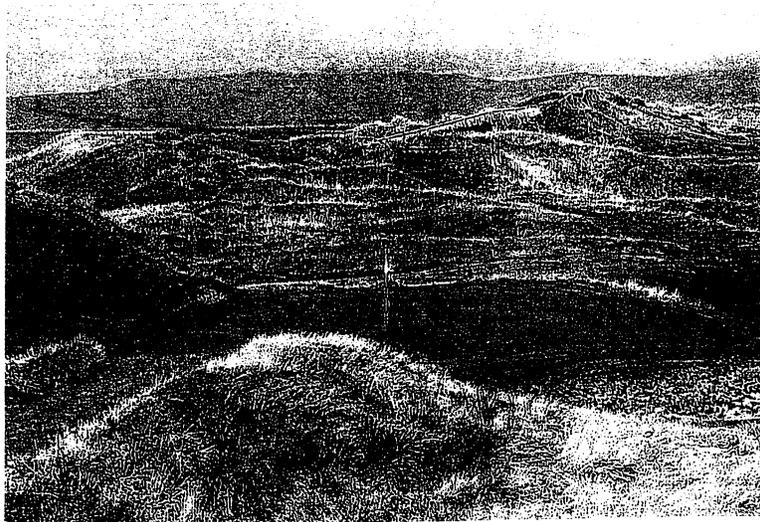


EXHIBIT 20  
page \_\_\_\_\_ of \_\_\_\_\_



**Economic and Engineering Services, Inc.**

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Mount Vernon

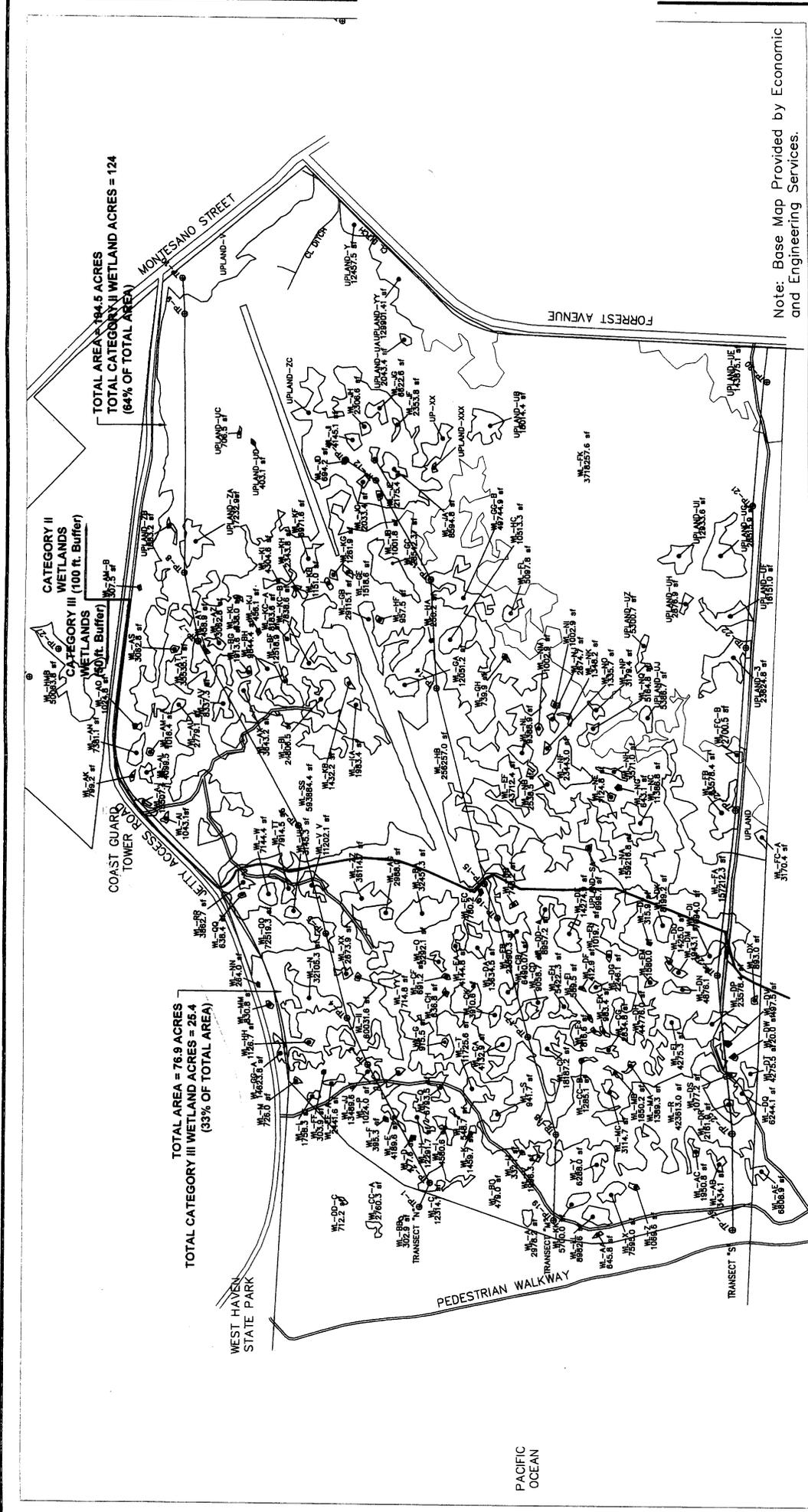
Olympia

Portland

Tri-Cities

WSH 1





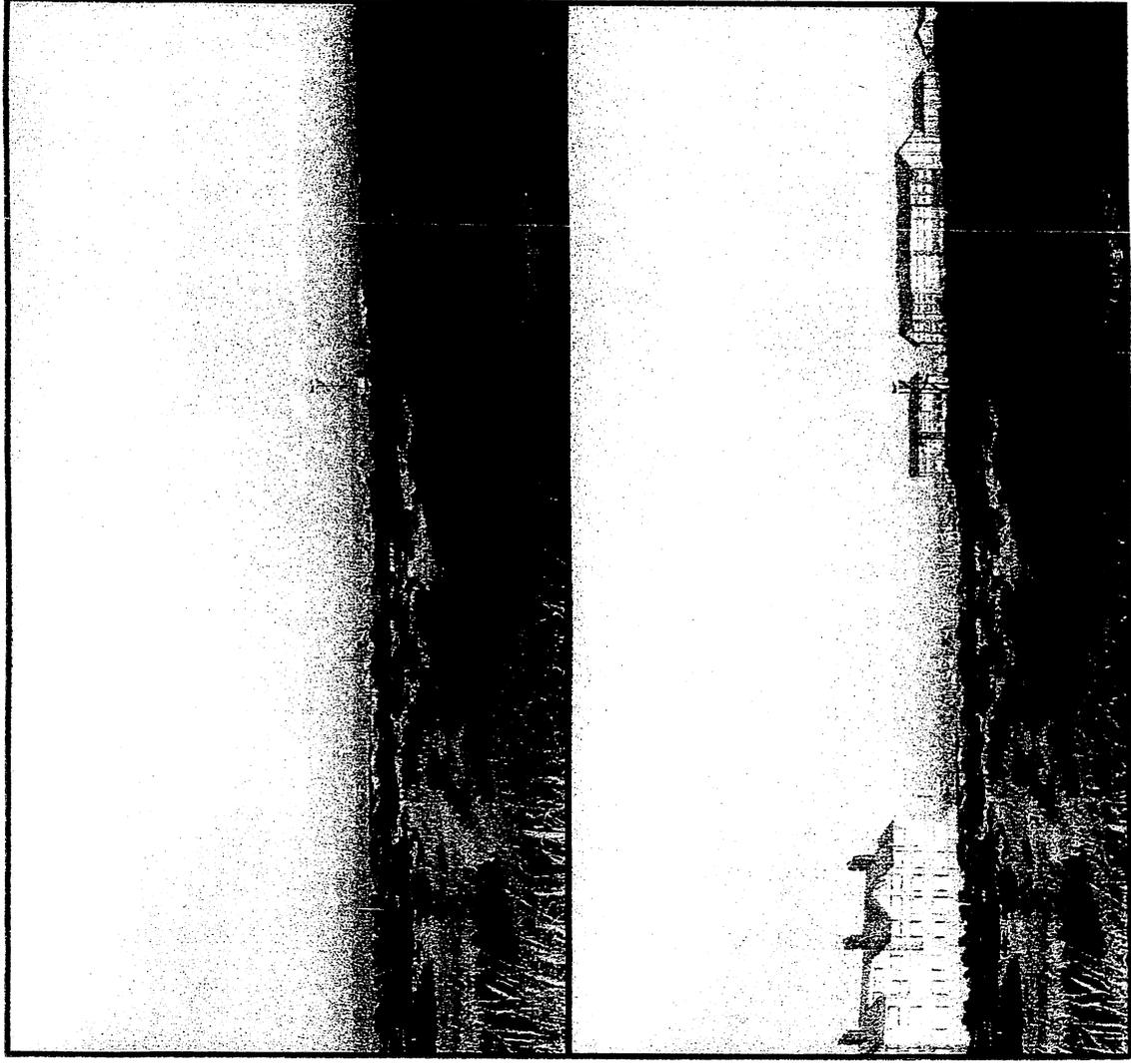
Note: Base Map Provided by Economic and Engineering Services.

EXHIBIT 14  
WETLAND DELINEATION AND CATEGORIZATION MAP  
LINKS AT WESTPORT GOLF COURSE

DATE 9/02  
DWN. AA  
APPR. \_\_\_\_\_  
REVIS: 1/27/03

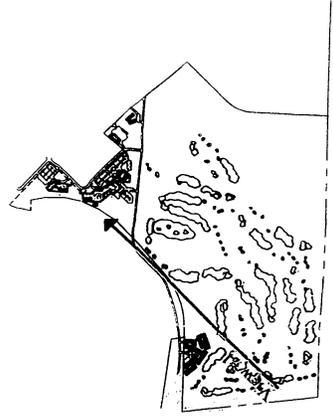
ECOLOGICAL LAND SERVICES, INC.  
NATURAL RESOURCE CONSULTING  
AND LAND PLANNING  
1339 Commerce Ave., Suite 311  
Longview, WA 98632  
(360) 578-1371 Fax: (360) 414-9305

View Before



View After

INDEX MAP



**EXHIBIT 22A**  
**MOX CHEHALIS**  
**Links at Half Moon Bay**

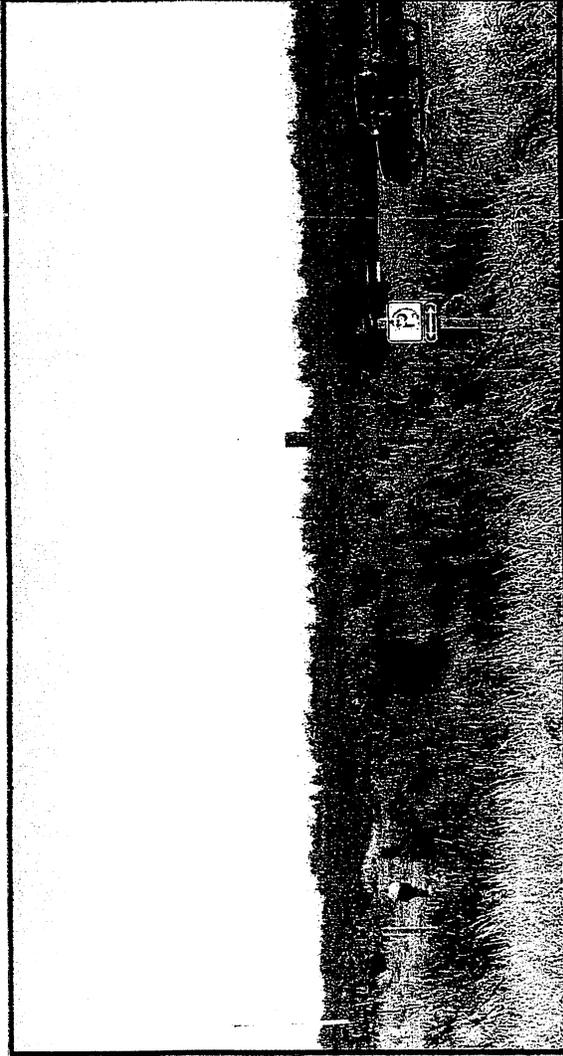
View #1  
 June 2003  
 JARPA

**ees** ECONOMIC AND ENGINEERING SERVICES, INC.

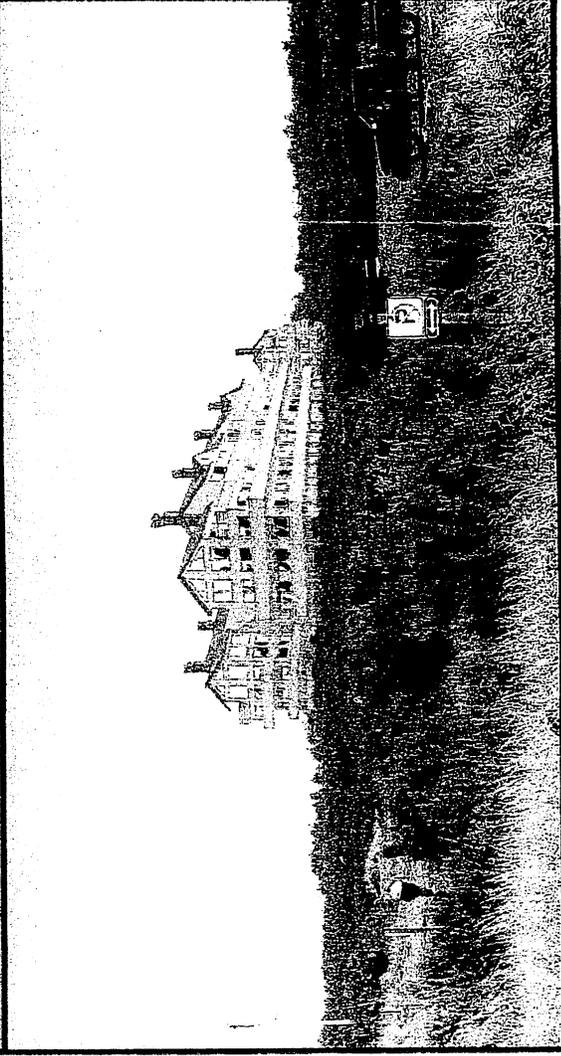




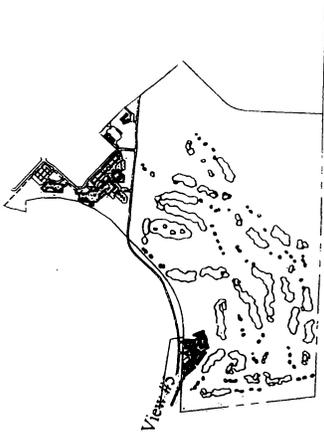
View Before



View After



INDEX MAP



**EXHIBIT 22E**  
**MOX CHEHALIS**  
**Links at Half Moon Bay**

View #5  
June 2003  
JARPA



ECONOMIC AND ENGINEERING SERVICES, INC.



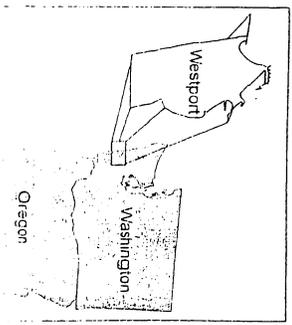
**Westport, WA: Inter-dunal Wetland Inventory**  
**CZM306 Grant Agreement No. G9900203**





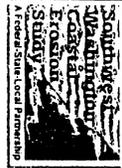
**Legend**

- 1/1995 shoreline
- 1/1 Kilometer grid
- Elevation contour (m)
- Wetland

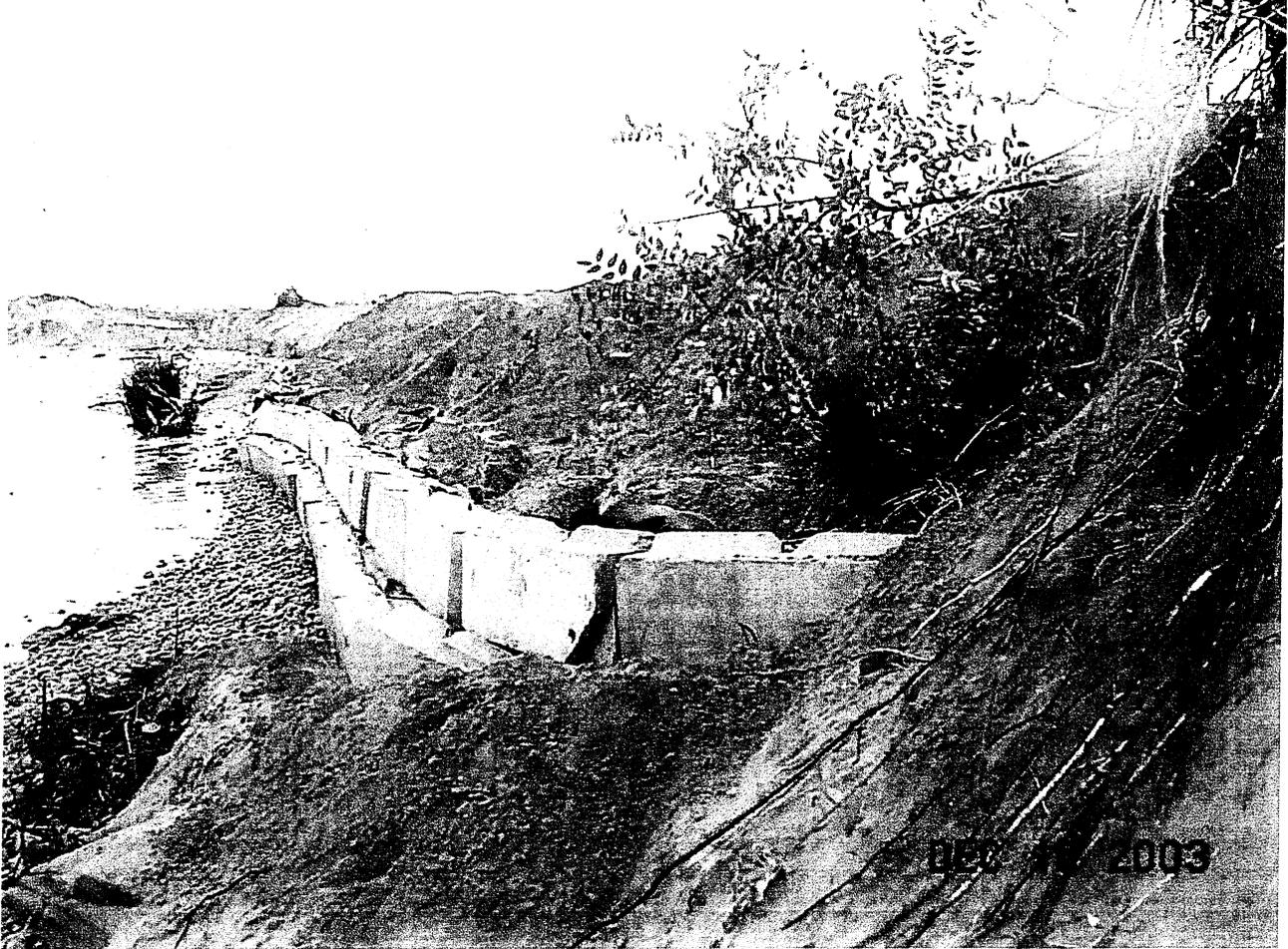
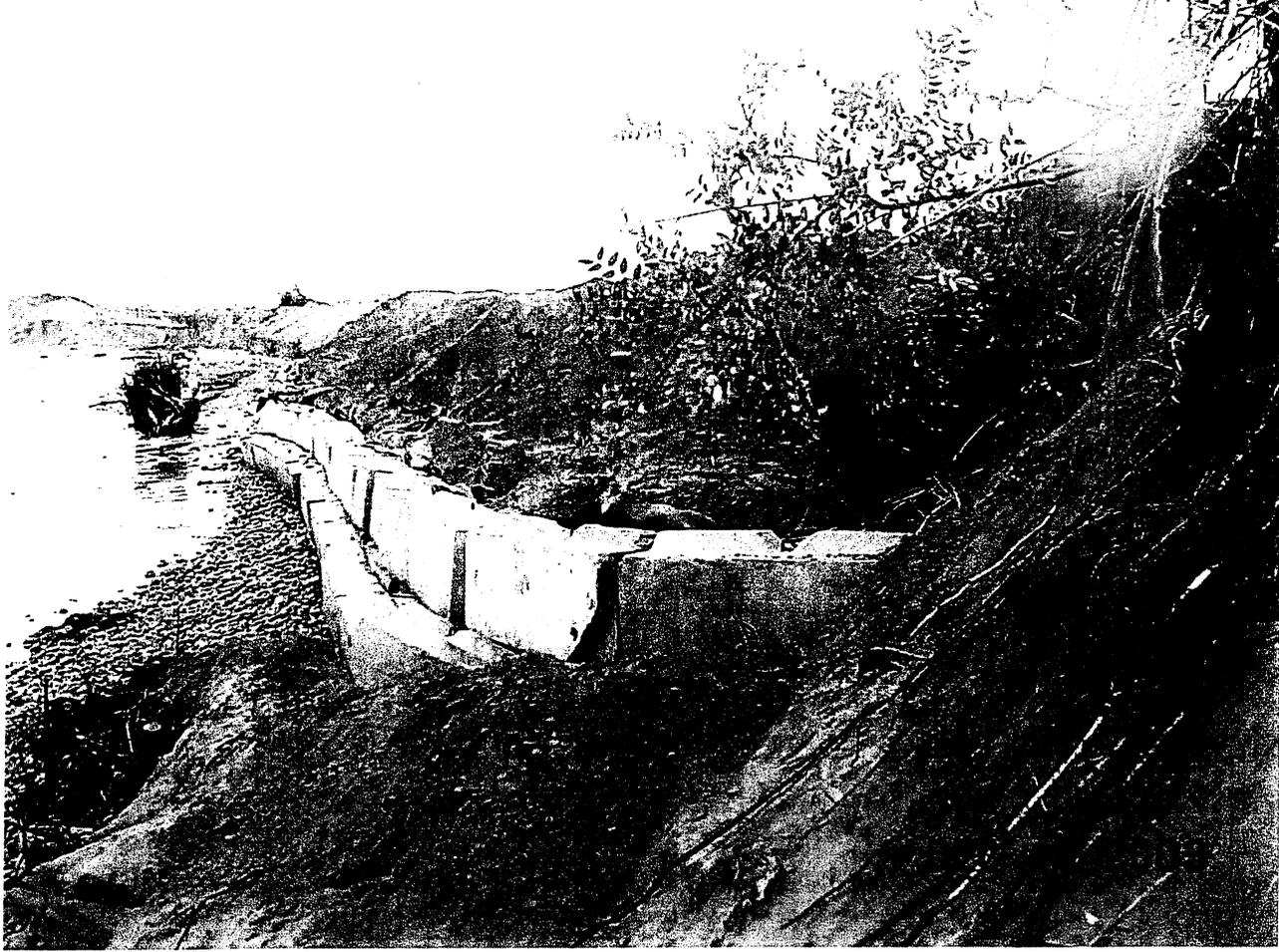


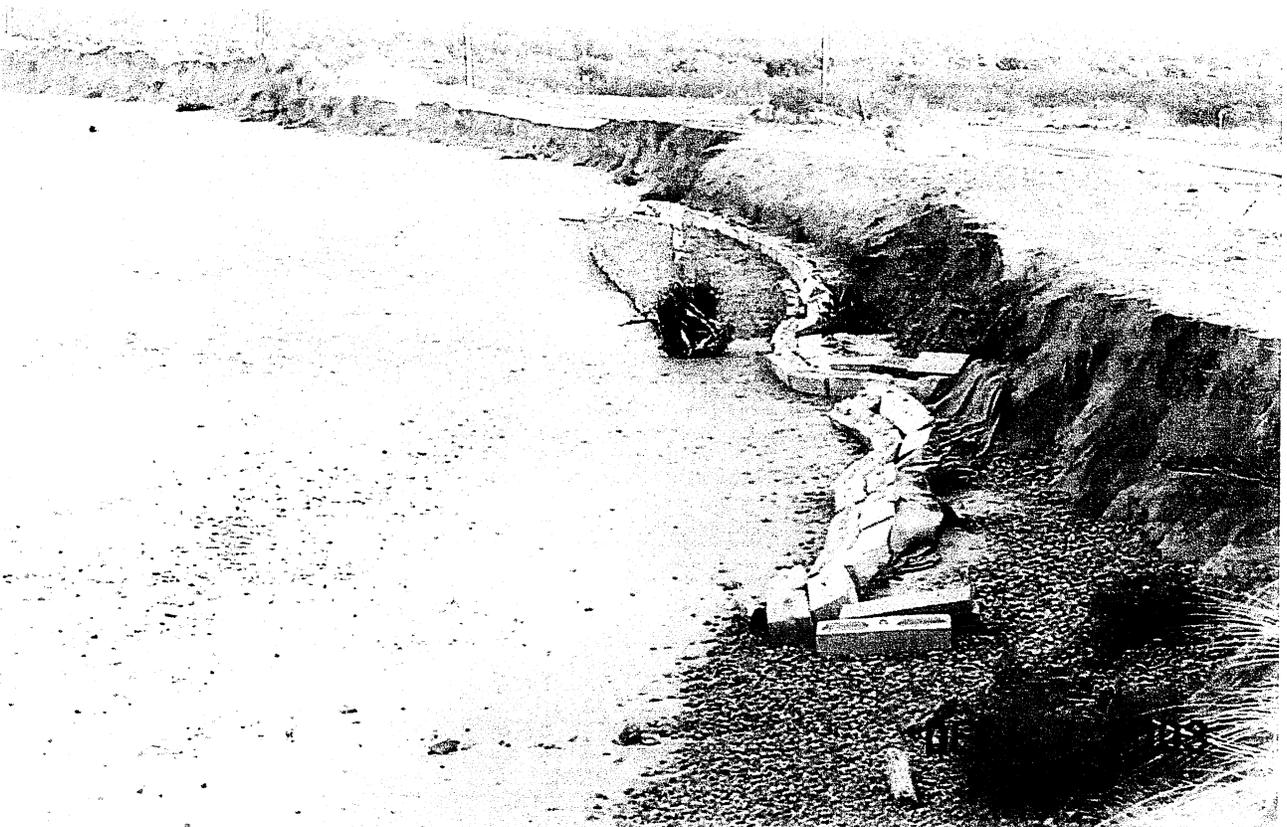
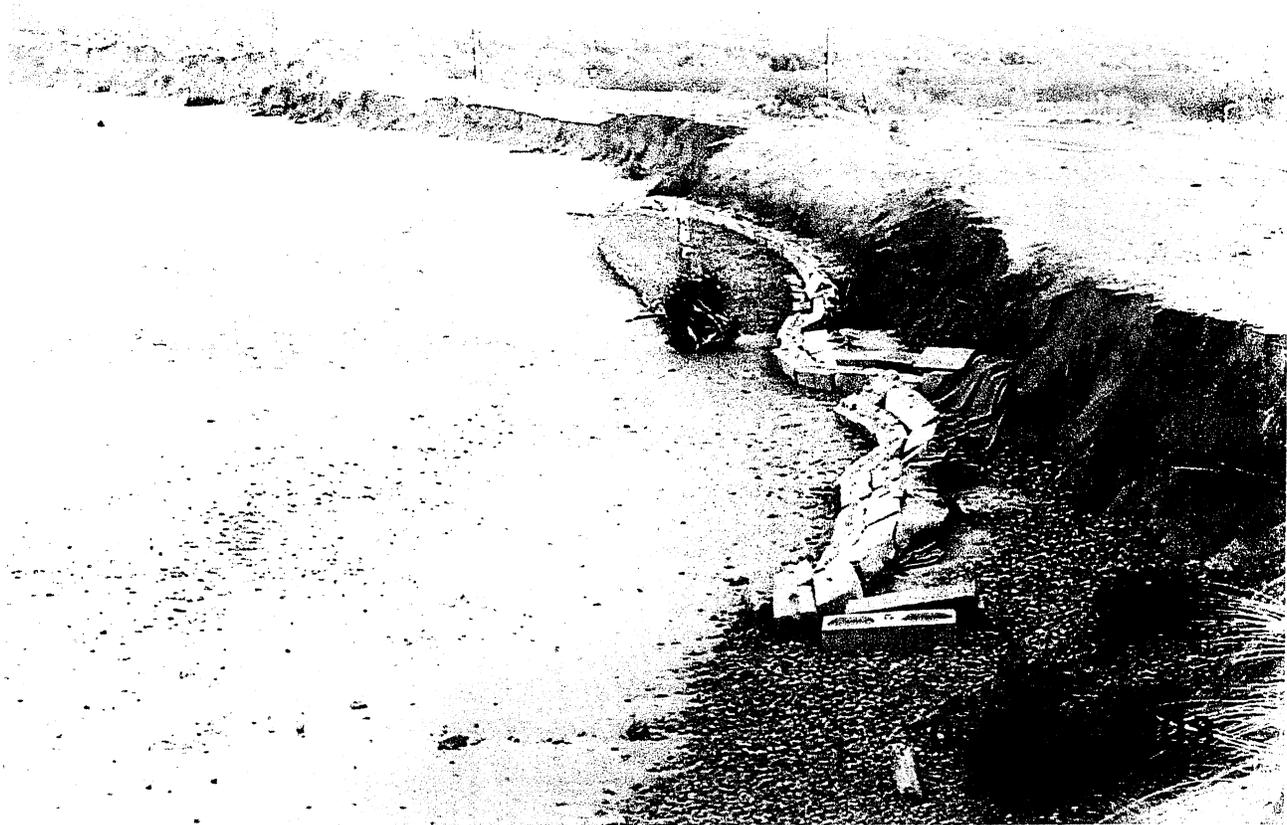
Disclaimer: Neither the State of Washington nor any agency, officer, or employee of the State warrants the accuracy, reliability, or timeliness of any information published by this system, nor endorses any products or services linked from this system, and shall not be held liable for any losses caused by reliance on the accuracy, reliability, or timeliness of such information. Portions of this information may be incorrect or out of date. Any user who relies on any information obtained from this map does so at their own risk. This information is provided as a cooperative agreement with the National Oceanic & Atmospheric Administration and does not necessarily reflect the views of NOAA or any of its subsidiaries.

Data Sources: The background image was derived from WA Department of Natural Resources Flight QI 37 1:12,500 scale black and white photographs. These photos were scanned and orthorectified by the WA Department of Ecology Coastal Monitoring & Seaview Program (CMAP). The 1995 shoreline was derived from NOAA Flight 154-R-95 1:12,500 scale color photographs. The photographs were scanned and orthorectified, and the shoreline was digitized by CMAP. Contour elevations were derived by CMAP from the 1959 ADUCELTER survey conducted by NASA, NOAA and the USGS.



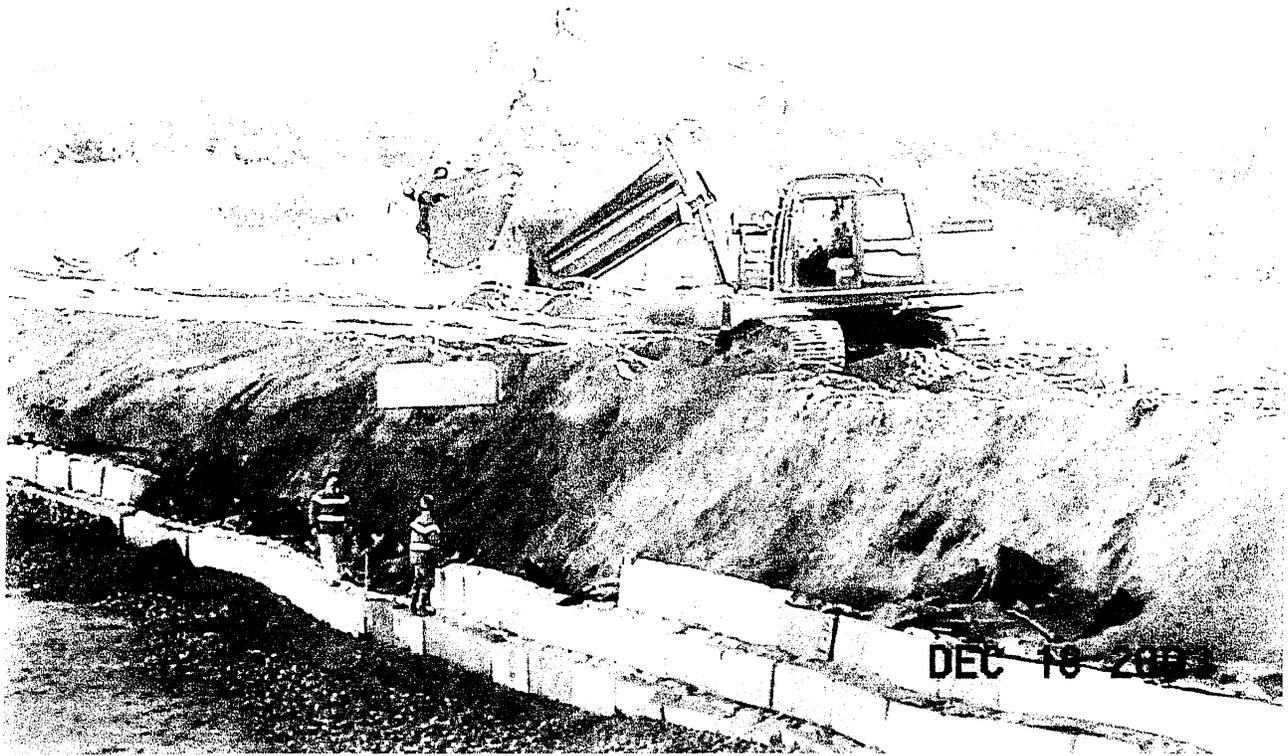


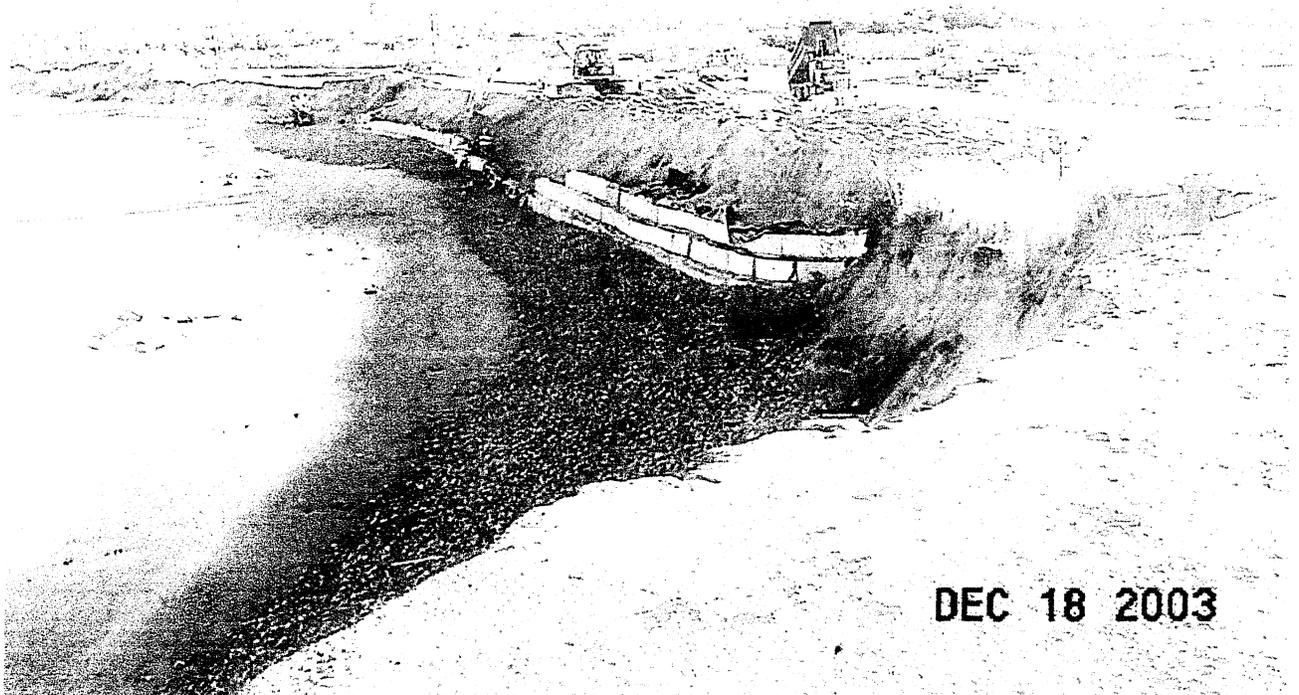
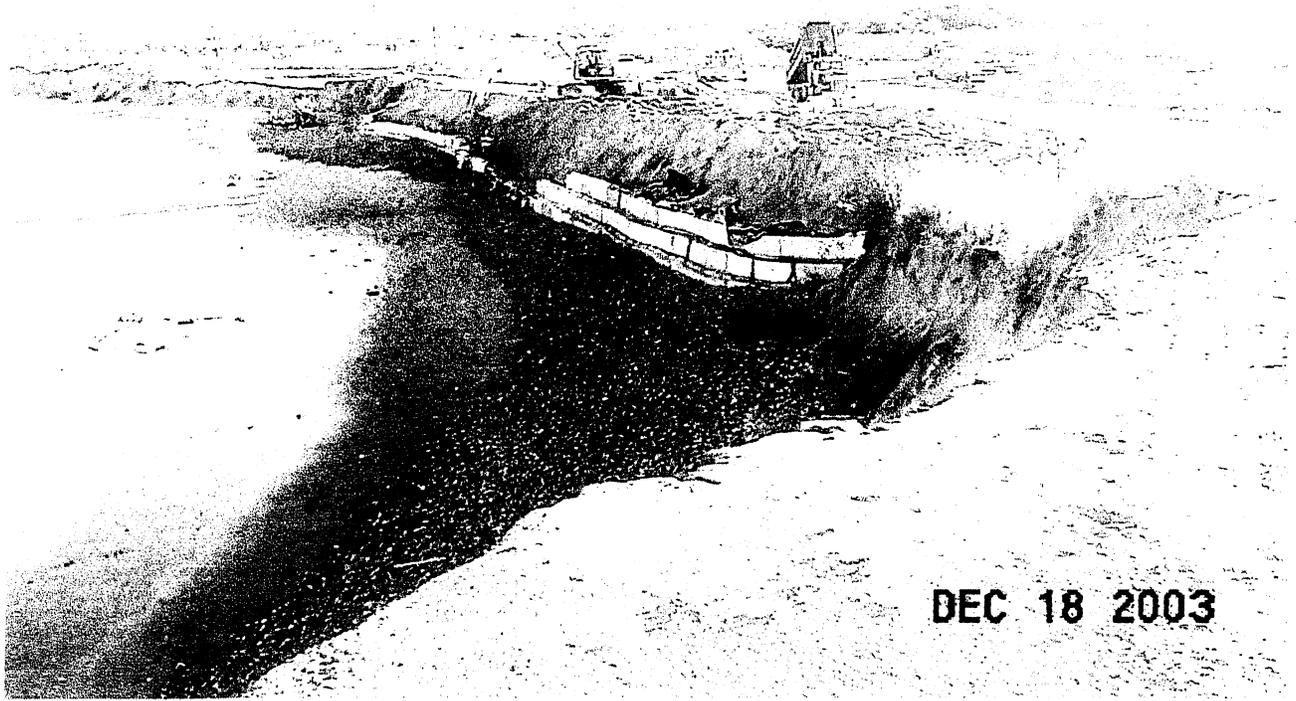


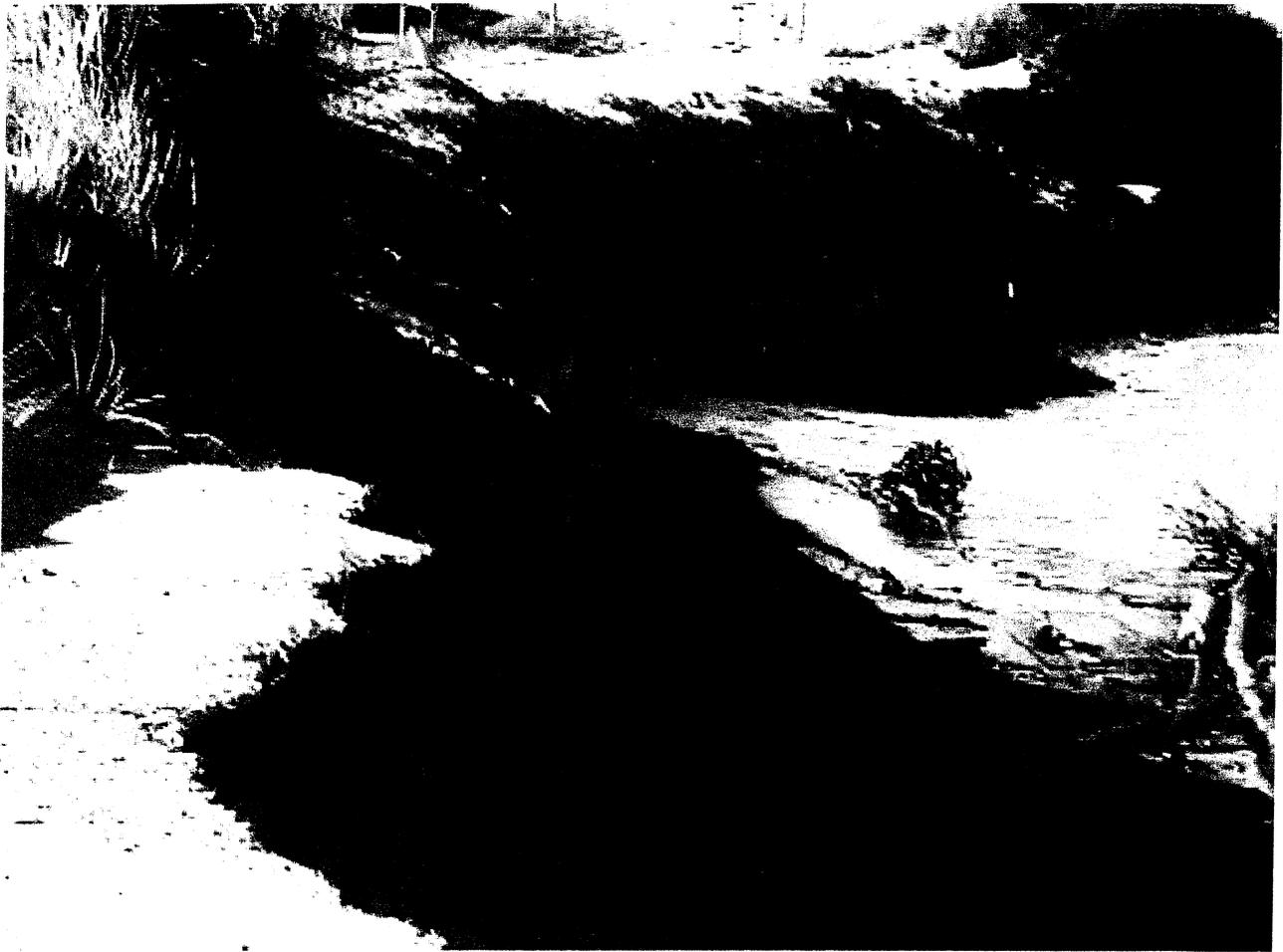
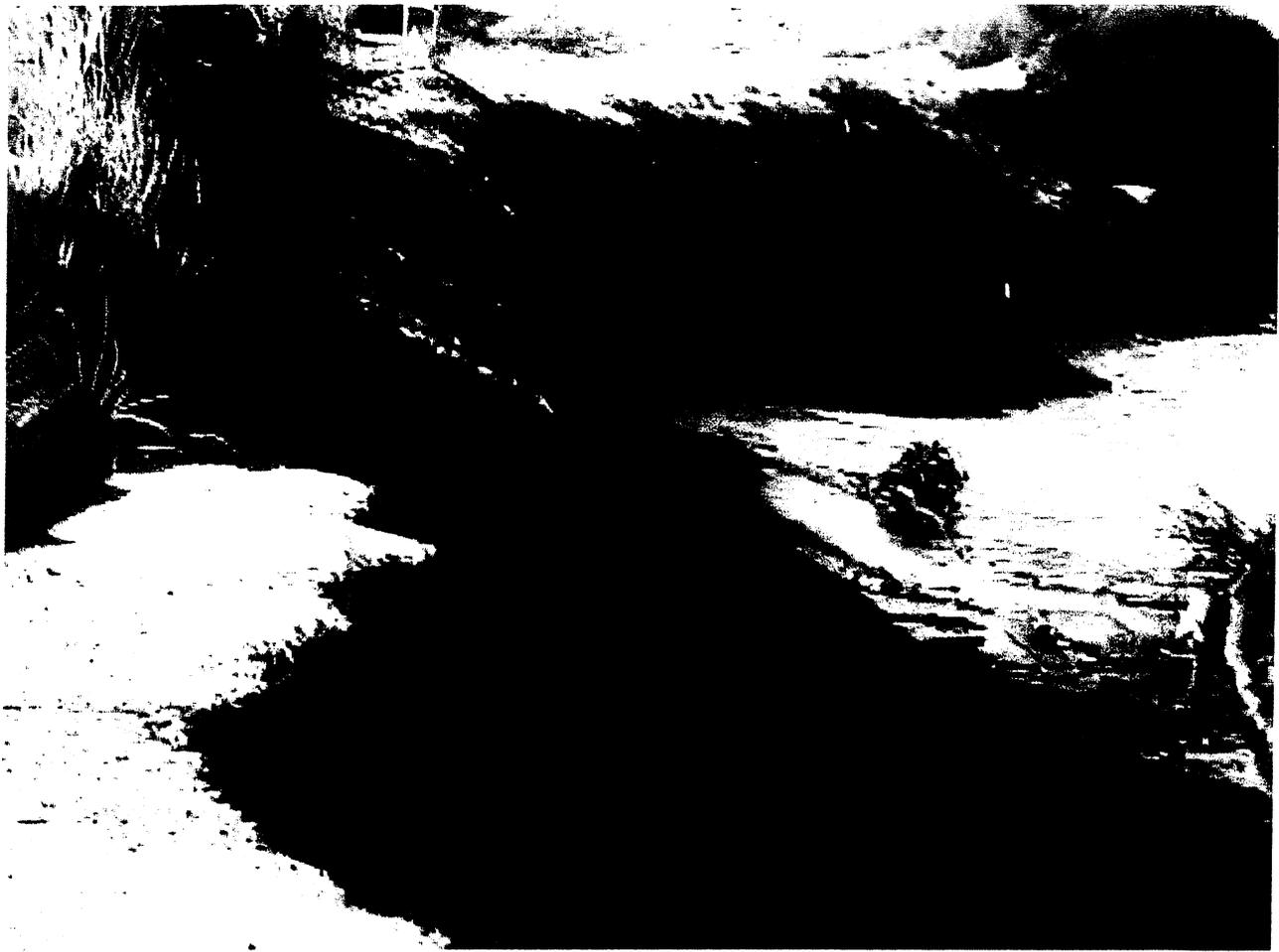


BSP 00472

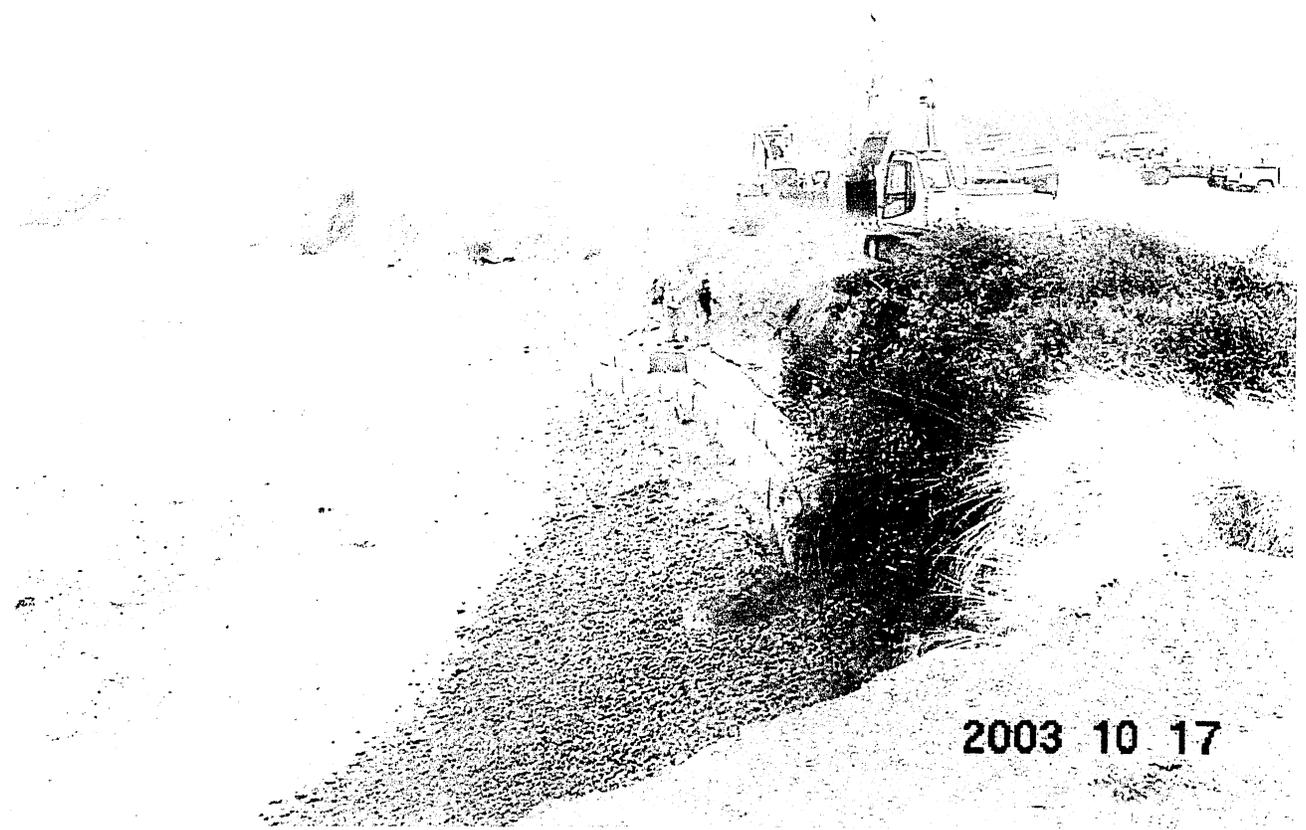




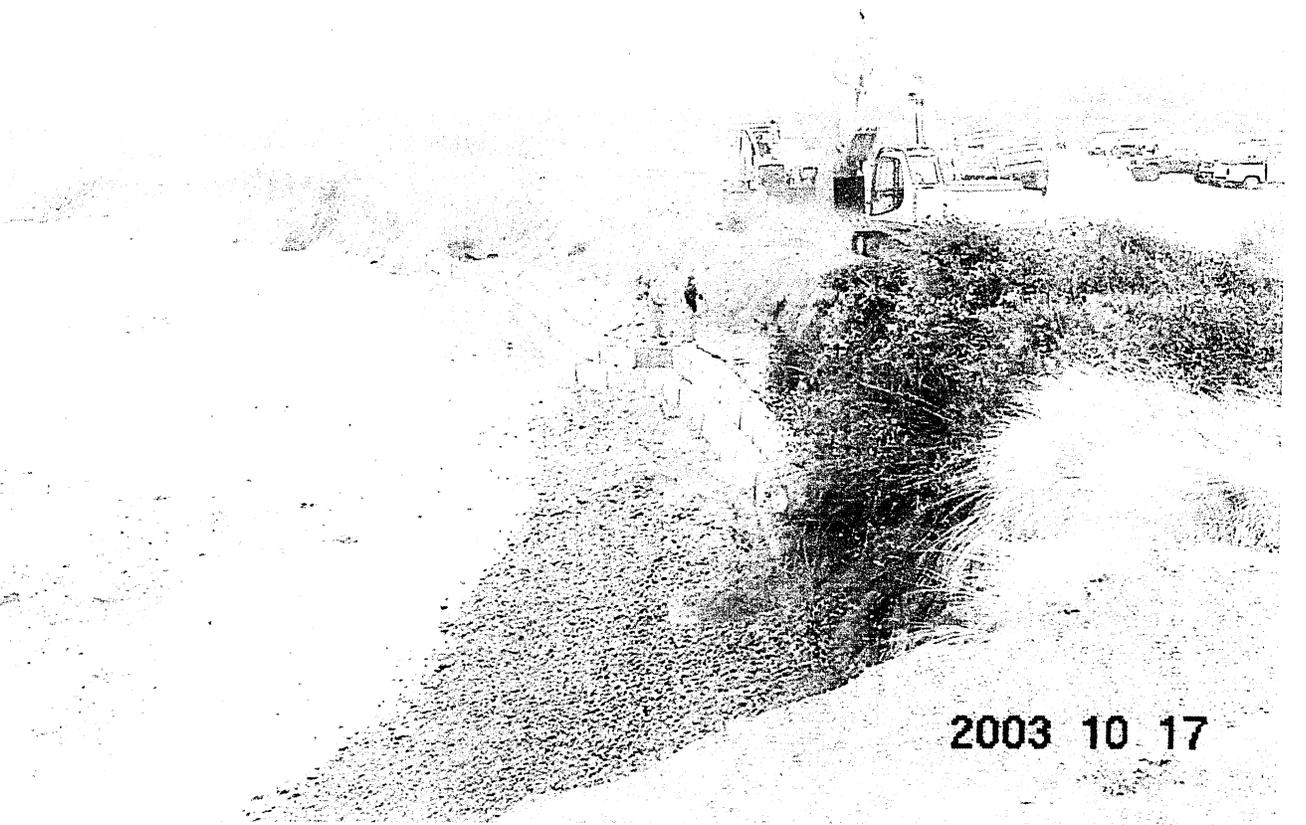






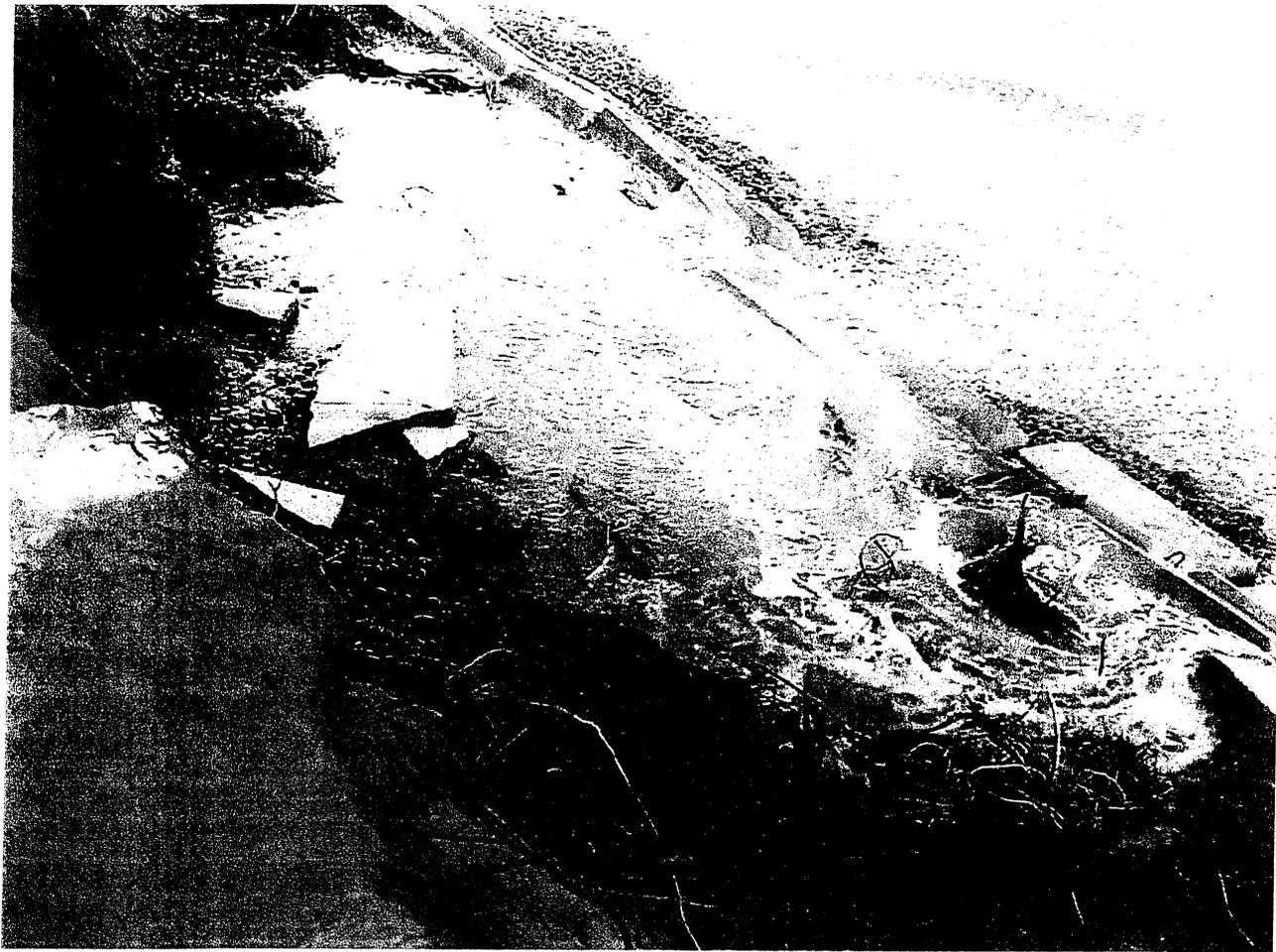


2003 10 17



2003 10 17





**CITY OF WESTPORT  
RESOLUTION #672  
PROCLAMATION OF EMERGENCY**

WHEREAS, the area of the South Jetty Breach Fill immediately adjacent to and including Westhaven State Park, located within the City of Westport have been experiencing localized erosion for the last two years; and

WHEREAS, the erosion experienced in this area is the direct result of previous projects and structures completed by the Corps of Engineers, and not due to natural processes; and

WHEREAS, the City of Westport has been working directly with the Corps of Engineers for the same period to design, permit and construct a project to place gravel and cobble material adjacent to the area to prevent further erosion until a long term solution can be identified; and

WHEREAS, the Corps of Engineers has been unable to complete the permitting process or obtain the necessary permit concurrences from various state and federal agencies; and

WHEREAS, storms of the last week have eroded the remaining shoreline and are now directly impacting a City owned walking trail, and the storms predicted to hit the area within the coming days and weeks pose an imminent threat to Westhaven State Park; and

WHEREAS, damage to or the loss of these facilities will result in a large economic impact to the City, loss of public access to the beaches and surrounding areas, and result in environmental damage from debris being introduced into Half Moon Bay; therefore.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WESTPORT, Grays Harbor COUNTY;

**SECTION 1**

That the Council agrees with the Mayor's determination that an emergency exists in the Westhaven State Park area of Half Moon Bay due to the loss of dunes which historically protected the state park area, and the predicted weather conditions consisting of high winds, high surf, and tide conditions in the City of Westport. The above pose a direct threat to public safety, and are endangering public infrastructure;

**SECTION 2**

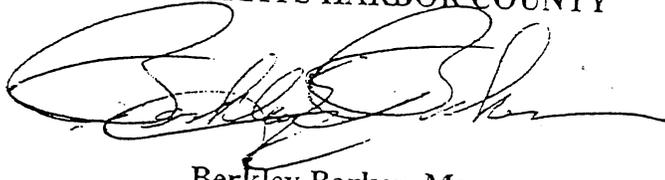
That the Council supports the Mayor's authority to direct staff to take necessary steps to protect public safety and safeguard public property and is authorized to exercise powers vested under Section 1 of this resolution in the light of exigencies of an extreme emergency situation without regard to time-consuming procedures and formalities prescribed by law.

SECTION 3

Both the Mayor and Council strongly encourage all local, state, and federal agencies to respond and cooperate fully to resolve the current situation and protect the Westhaven State Park and South Jetty Breach area from further damage.

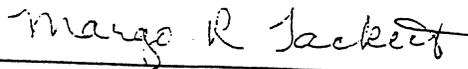
PASSED THIS 14th DAY OF OCTOBER, 2003 BY THE CITY COUNCIL OF THE CITY OF WESTPORT

CITY OF WESTPORT  
GRAYS HARBOR COUNTY



Berkley Barker, Mayor  
Dated: 14 October, 2003

ATTEST:



Margo Tackett, Clerk Treasurer

WORLD 10-13-03

## Weekend storm causes serious erosion at Westport

BY JOHN DEWESE  
DAILY WORLD WRITER

WESTPORT — Westhaven State Park in north Westport is without power today after 30-foot seas exposed the park's power transformer and undermined the oceanfront concrete trail Sunday afternoon.

The park will remain open during normal daylight hours today and portable toilets will be available for visitors, Park Assistant Manager Rich Burdette said.

This weekend's stormy weather eroded at least a foot of the gravel and sand supporting the concrete trail that runs from Westport's South Jetty to Park Access Road. About 100 feet of the trail closest to the jetty is already closed, Westport City Administrator Randy Lewis said. The city is responsible for the trail, which runs alongside Half Moon Bay.

"The state park is going into the bay pretty rapidly based on previous erosion," Lewis said.

He is worried that larger storms this winter will threaten the park's restrooms and parking lot.

Part of the problem is the \$10 million Army Corps of Engineers project to protect the South Shore jetty and Westhaven State Park has not been working as well as projected, Westport Mayor Berkley Barker said.

In 1999, the Corps built a wave "defraction mound" that extends northeast of the jetty and was meant to deflect waves from pounding the Westhaven beach. This mound, which is 15 feet above low tide and 100 feet wide, is too short to provide much protection during winter storms, when waves regularly reach 30 feet or higher, Barker said.

"If we get another 30-foot sea, we'll lose it," Barker said about the coastal trail.

The city's sewer, water and power lines to the park are also in danger of being eroded, Lewis said. Those lines need to be secured lest the park need to be closed to the public.

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1 THE HONORABLE RONALD LEIGHTON

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6  
7 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

8  
9 WILDLIFE FOREVER OF GRAYS HARBOR; and  
ARTHUR GRUNBAUM

10 Plaintiffs,

11 vs.

12 COLONEL DEBRA M. LEWIS; BRIGADIER  
GENERAL WILLIAM T. GRISOLI; and UNITED  
STATES ARMY CORPS OF ENGINEERS

13 Defendants.

NO. CV03-3747

DECLARATION OF RANDY LEWIS

14  
15 PURSUANT TO 28 U.S.C. § 1746 (1976), RANDY LEWIS, hereby declares  
16 as follows:

17 1. I am the City Administrator for the City of Westport, am competent to  
18 testify herein and make this declaration based upon personal knowledge.

19 2. The City of Westport owns a public trail which abuts Half Moon Bay  
20 and traverses through Westhaven State Park connecting the downtown marina  
21 area and Westhaven State Park and continuing along the Pacific Coast to its  
22 terminus in Westport Light State Park. In addition, the City has utility lines which  
23 serve Westhaven State Park located in Jetty Access Road and there are electrical  
24 lines located between the trail and parking lot serving Westhaven State Park. The  
25 Port of Grays Harbor owns Jetty Access Road and has deeded easements to the  
26 Washington State Parks, but has also reserved rights of access to the Jetty for  
maintenance purposes.

DECLARATION OF RANDY LEWIS - 1

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.  
ATTORNEYS AT LAW  
910 LAKERIDGE WAY S.W.  
P.O. BOX 11880  
OF YMPIA WASHINGTON 98596-1880

H  
BSP 00048

1           3.     The City of Westport is deeply concerned that delays in implementing  
2 the gravel and cobble transition beach project will cause irreparable harm to City  
3 owned infrastructure and preclude recreational use of this entire area. Specifically,  
4 the area of erosion which has occurred since the onset of winter storms in October  
5 2003 threatens to undermine City owned trails and Jetty Access Road which is  
6 the only means of access to Westhaven State Park. If left unchecked, the City is  
7 deeply concerned that the entirety of Westhaven State Park, which is a major  
8 tourist destination in the City of Westport, will be lost. In addition, the City owned  
9 trail would be completely lost if the erosion is allowed to go unchecked.

10           4.     The gravel transition beach project was originally proposed by the  
11 Corp of Engineers by a public notice issued on June 27, 2003. The timetable for  
12 completion of the work set forth in that notice was prior to the onset of winter  
13 storms, in September and October, 2003. However, delays in obtaining agency  
14 concurrence prevented the Corp from beginning work until after winter storms  
15 began. As a result, winter storms began occurring in early October 2003, resulting  
16 in significant erosion which threatens to undermine the City trail. In early October  
17 a large storm caused significant incutting at the end of the existing gravel  
18 transition area. This resulted in the loss of several feet of beach which had  
19 previously existed between Half Moon Bay and the City owned trail. Erosion has  
20 rapidly moved toward the City owned trail and the parking lot and road serving  
21 Westhaven State Park.

22           5.     The City has consistently voiced its concerns to the Corps and  
23 requested urgent action in order to prevent loss of the City owned trail. The City  
24 sent a letter to Col. Debra Lewis expressing its concerns on October 10, 2003. A  
25 true and correct copy of this letter is attached as Exhibit No. 1. This letter also  
26 included photographs which show the conditions along Half Moon Bay where  
erosion occurred. The first picture was taken on July 17, 2003, shortly after the

1 public notice of the project was issued and prior to the onset of winter storms.

2 The second and third pictures were taken on October 9, 2003 and show that the  
3 area between the City trail and the edge of the erosion area had been reduced by  
4 about 20 - 40 feet. The erosion observed in these pictures occurred after a severe  
5 winter storm in early October.

6 6. On October 16, 2003, the City of Westport City Council declared an  
7 emergency and authorized the Mayor and City Administrator to take steps in order  
8 to safeguard public infrastructure threatened by the recent erosion. A true and  
9 correct copy of the City's Declaration of Emergency is attached as Exhibit No. 2.

10 7. As a result of the emergency, the City of Westport proposed  
11 installation of ecology blocks and importation of clean sand to stabilize the  
12 shoreline underlying the City trail. A true and correct copy of the City's project  
13 description and a map depicting the area where the ecology blocks and sand would  
14 be placed is attached as Exhibit No. 3. Due to the extent of erosion, the City was  
15 unable to place the full extent of material contemplated by this project. Instead,  
16 placing about 3,000 cubic yards of sand and 175 feet of ecology blocks.

17 8. The City stabilization project was not an unpermitted illegal project as  
18 alleged by plaintiff Wildlife Forever. The City obtained a hydraulics permit from the  
19 State Department of Fish and Wildlife, a true and correct copy of which is attached  
20 as Exhibit No. 4. In addition, the City contacted the Corps of Engineers to  
21 determine whether or not a permit was needed under Section 404 of the Clean  
22 Water Act or Section 10 of the Rivers and Harbors Act of 1899. A true and  
23 correct copy of a letter dated October 16, 2003 received from the Corps stating  
24 that no such permits were required is attached as Exhibit 5. The City was  
25 informed by the Corps that the work was outside Corps jurisdiction and no permit  
26 was necessary.

1           9. Attached hereto as Exhibits 6-10 are a series of photographs that  
2 document the erosion emergency now confronted by the City of Westport. Exhibit  
3 6 was taken on July 17, 2003 and depicts the shore adjacent to the City trail, road  
4 and parking lot of Westhaven State Park. Exhibit 7 was taken on October 13,  
5 2003, immediately prior to the City's emergency declaration. It shows how  
6 erosion has begun to undercut the City trail. Exhibit 8 was taken on October 17,  
7 2003 upon completion of the City stabilization project. It depicts the sand and  
8 ecology blocks placed by the City to forestall further erosion of the trail and Jetty  
9 Access Road. Exhibit 9 was taken on November 26, 2003 and depicts the waves  
10 eroding the City's stabilization project. Some of the ecology blocks at the ends are  
11 beginning to collapse. Exhibit 10 was taken on November 29, 2003. It shows the  
12 most recent extent of erosion along Half Moon Bay.

13           10. The City stabilization project is at best a stop gap measure designed  
14 to prevent the loss of the City trail and other public infrastructure until the Corp is  
15 able to implement the gravel transition beach project. At present, erosion has  
16 began to sluff away at the ecology blocks and the City does not believe that they  
17 will last through this winter. At the current rate of erosion, it is highly doubtful  
18 that it will survive until after expiration of a temporary restraining order.

19           11. The assertion by plaintiffs that all agencies are opposed to the gravel  
20 transition beach project is misleading and should not be relied upon to presume  
21 that no action is preferable. Although the various agencies expressed questions  
22 and/or concerns, all the agencies required to concur or issue permits for this  
23 project did so. Moreover, in conversations that I have had with Robert Berkle of  
24 the Washington Department of Fish and Wildlife, he stated that the 12 inch minus  
25 proposal which is preferred by the Corp is preferable to the status quo. He agreed  
26 that an alternative using 80 percent three inch gravel or less would be less  
effective at preventing erosion and increase the likelihood that additional gravel

1 would need to be placed on the beach before a permanent solution could be  
2 adopted. Additionally, smaller cobble sizes would spread out over a larger area and  
3 be more impactful to the environment than the 12 inch proposed by the Corp.

4 12. Additionally, it is important to remember that this project is an  
5 extension of the existing gravel transition beach area which was included as part  
6 of the 1999 Jetty repair project, which itself was designed to complete repairs  
7 necessitated by a breach at the South Jetty in 1994. The remedy for that breach  
8 was to build a wave defraction mound and gravel transition beach along Half Moon  
9 Bay. As demonstrated by the public notice of this project, the intent of the Corp  
10 project is to place gravel along the beach as originally proposed by the engineers  
11 who designed the previous placement of the gravel transition area. The original  
12 design was cut back largely to placate environmental groups such as the plaintiffs  
13 who have a political desire to minimize the amount of gravel placed along the  
14 beach. However, because the design was compromised to address largely political  
15 concerns, the design did not perform as originally intended and had resulted in  
16 incutting which now threatens the City trail. However, to my knowledge, there  
17 have been no adverse environmental impacts identified to salmonids, benthic  
18 organisms or other wildlife in Half Moon Bay by any resource agency or other  
19 expert as a result of the placement of the existing gravel transition beach area.

20 11. The City of Westport opposes the motion for a temporary restraining  
21 order. The City of Westport intends to file a motion to intervene in this matter.  
22 The City received notice that this action had been filed at approximately 3:30 p.m.  
23 on December 1, 2003 and did not have time to prepare such a motion in time for  
24 presentation to the court before the hearing on the motion for a temporary  
25 restraining order.  
26

DECLARATION OF RANDY LEWIS - 5

CASE NO. C 02-5529JKA

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.  
ATTORNEYS AT LAW  
910 LAKERIDGE WAY S.W.  
P.O. BOX 11880  
OLYMPIA, WASHINGTON 98508-1880  
(360) 754-3480 FAX: (360) 357-3511

BSP 00052

1 I MAKE THIS DECLARATION UNDER PENALTY OF PERJURY UNDER THE LAWS  
2 OF THE UNITED STATES OF AMERICAN AND THE STATE OF WASHINGTON.

3 DATED this 2<sup>nd</sup> day of December, 2003 at Olympia, Washington.  
4

5   
6 Randy Lewis

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**Jeffrey S. Myers**

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**From:** "Randy Lewis" <cityadm@techline.com>  
**To:** "Jeffrey S. Myers" <jmyers@lldkb.com>  
**Sent:** Monday, December 01, 2003 6:44 PM  
**Attach:** P7170950.JPG; P1010981\_2.JPG; P1010982\_2.JPG  
**Subject:** Fw: Placement Of Transition Gravel And Cobble, Westport, Washington, Ref: CENWS-OD-TS-NS-21

— Original Message —

**From:** Randy Lewis  
**To:** [col.debra.lewis@NWS02.usace.army.mil](mailto:col.debra.lewis@NWS02.usace.army.mil); [lrc.edward.lefler@NWS02.usace.army.mil](mailto:lrc.edward.lefler@NWS02.usace.army.mil)  
**Cc:** [Arden, Hiram T NWS](mailto:Arden.Hiram.T.NWS); [Robert M. Parry@NWS02.usace.army.mil](mailto:Robert.M.Parry@NWS02.usace.army.mil)  
**Sent:** Friday, October 10, 2003 11:05 AM  
**Subject:** Placement Of Transition Gravel And Cobble, Westport, Washington, Ref: CENWS-OD-TS-NS-21

Dear Colonel Lewis,

This Email is sent on behalf of the Mayor. Although I haven't seen a written response, it is our understanding that the Seattle District has resolved the issue of Corps authority for the above project. While we, as one of the local project sponsors are glad to hear of this decision, it comes very late in this process. The internal debate on the issue of authority has delayed the completion of the necessary steps in the permitting process. This delay has pushed the project out of the window of favorable weather conditions and into the storm season.

In fact, the project site is currently being impacted by ongoing storm waves which are predicted to last for several more days. The current conditions constitute an imminent threat to infrastructure of both the City and Washington State Parks. These facilities include one of the most used day-use parks in the state, a City owned walking trail, and utilities including power, water, and sewer lines. Damage to/loss of these facilities will result in major environmental damage to Half Moon Bay. They are also directly impacting the area of the breach fill adjacent to the area that was replanted by the Corps.

Since last year at this time, the Corps has lost the South Jetty Access Road which was used for maintenance activities by the Corps, as well as impacting to the area of the South Jetty by the Coast Guard during operations. This was documented in their comments on in the public notice for the project. The South Jetty Access Road was located between the currently threatened local facilities and Half Moon Bay. Had the Corps taken timely action to protect the Jetty Access Road, none of the local facilities would be at risk. I have attached three photos to help you understand the current condition. Below is a brief explanation:

1. # P7170950 was taken on July 17 2003. The camera is facing east from a point on the breach fill just north of the state park restrooms. At this point, the Jetty Access Road is already gone. It was lost during storms last November. The distance from the edge of the scarp to the trail varies between approximately 40 to 60 feet.
2. # P1010981\_2 was taken yesterday afternoon from the same area. The distance between the scarp and trail is within 20 feet in two locations. The large rock visible is a remnant from either corps projects completed many years ago, or the previous state park facilities that were lost during the original breach.
3. # P1010982\_2 was also taken yesterday from the same spot as #2. This is looking north towards the mound.

I would point out that most of the 20+ feet lost between photos 1 and 2 has been lost in the last couple of days. Measurements by our staff showed that we lost approximately 8 feet between yesterday and the day before.

As I understand the current project status, the Corps still has to respond to the agency comments on the EA, obtain concurrence from some of the agencies, and then advertise and select a contractor. The best scenario under the current pace is for this to be completed and for work to commence at the end of November or beginning of December. As you can see from the above, that time frame isn't adequate to prevent a major loss of infrastructure. I also want to clear up one misunderstanding by your staff. The State Park has stated that the

12/2/2003  
BSP 00054

EXHIBIT

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restrooms were constructed so that they could be removed if necessary. In discussions with local staff, that is not an easy process, and there isn't currently another site to relocate the facilities to. Also, the parking lot and utilities aren't portable, and will be soon lost. State Parks does not have sufficient land available to relocate their facilities, so they will have to work with adjacent property owners. Any relocation will also impact jurisdictional wetlands that border the facilities. Although the City trail was constructed in sections, that does not make it easy to remove the concrete surface. As an engineer, you can appreciate the difficulty in trying to restore the trail sections once removed, to the remaining trail at the end of the project. It may not even be possible.

I realize I have spent a great deal of emphasis on the impacts to local facilities, which isn't the primary basis of the Corps authority for this project. However, it is totally unreasonable for the Corps to ignore the current situation, or the impact of further delay in this project. The Corp's immediate completion of the proposed project may prevent a much larger cost to the tax payers we all serve. We consider the current situation an emergency. This is exactly the position we have been trying to avoid for the last year and a half while working with the Corps on this project. We are asking for your assistance in resolving this situation, either by moving forward with the proposed project immediately, or by identifying another alternative which results in the protection of, or restoration of our facilities.

I have left a phone message with your office. Please contact me at your earliest convenience to discuss resolution of this situation.

Sincerely,

Randy Lewis  
City Administrator  
City of Westport

---

**CITY OF WESTPORT  
RESOLUTION #672  
PROCLAMATION OF EMERGENCY**

WHEREAS, the area of the South Jetty Breach Fill immediately adjacent to and including Westhaven State Park, located within the City of Westport have been experiencing localized erosion for the last two years; and

WHEREAS, the erosion experienced in this area is the direct result of previous projects and structures completed by the Corps of Engineers, and not due to natural processes; and

WHEREAS, the City of Westport has been working directly with the Corps of Engineers for the same period to design, permit and construct a project to place gravel and cobble material adjacent to the area to prevent further erosion until a long term solution can be identified; and

WHEREAS, the Corps of Engineers has been unable to complete the permitting process or obtain the necessary permit concurrences from various state and federal agencies; and

WHEREAS, storms of the last week have eroded the remaining shoreline and are now directly impacting a City owned walking trail, and the storms predicted to hit the area within the coming days and weeks pose an imminent threat to Westhaven State Park; and

WHEREAS, damage to or the loss of these facilities will result in a large economic impact to the City, loss of public access to the beaches and surrounding areas, and result in environmental damage from debris being introduced into Half Moon Bay, therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WESTPORT, Grays Harbor COUNTY;

**SECTION 1**

That the Council agrees with the Mayor's determination that an emergency exists in the Westhaven State Park area of Half Moon Bay due to the loss of dunes which historically protected the state park area, and the predicted weather conditions consisting of high winds, high surf, and tide conditions in the City of Westport. The above pose a direct threat to public safety, and are endangering public infrastructure;

**SECTION 2**

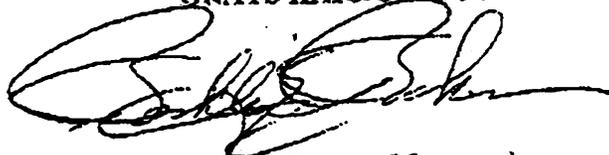
That the Council supports the Mayor's authority to direct staff to take necessary steps to protect public safety and safeguard public property and is authorized to exercise powers vested under Section 1 of this resolution in the light of exigencies of an extreme emergency situation without regard to time-consuming procedures and formalities prescribed by law.

SECTION 3

Both the Mayor and Council strongly encourage all local, state, and federal agencies to respond and cooperate fully to resolve the current situation and protect the Westhaven State Park and South Jetty Breach area from further damage.

PASSED THIS 14th DAY OF OCTOBER, 2003 BY THE CITY COUNCIL OF THE CITY OF WESTPORT

CITY OF WESTPORT  
GRAYS HARBOR COUNTY



Berkley Barker, Mayor  
Dated: 14 October, 2003

ATTEST:

Margo R Tackert  
Margo Tackert, Clerk Treasurer



# City of Westport

740 N. Montesano • P.O. Box 505 • Westport, WA 98595 • ci.westport.wa.us

## Project Description—Half Moon Bay/Westhaven State Park Erosion Protection October 16, 2003

Due to the imminent storm, an emergency measure is necessary to protect City and other public infrastructure from damage. The project will place approximately 7,000 cubic yards of imported clean sand immediately adjacent to 350 lineal feet of Westhaven State Park along the shoreline of Half Moon Bay. The sand will be placed on the existing Westport Light Trail Phase 2 and a berm will be formed between the existing trail and Half Moon Bay. On the waterward side of the fill, "ecology block" will be used to secure the sand and provide bank stabilization. Equipment to be used primarily includes an excavator and track hoe. No equipment is to be used on the beach or waterward of the ordinary high water mark.

City Hall - Administration  
360 268 0131  
360-268-0921 Fax

Municipal Court  
360-268 0125  
360-268-1363 Fax

Police Department  
360-268-9197  
360 268 1363 Fax

Public Works  
360-268-0835  
360-268-0921 Fax

Fire Department  
360-268-9235

lmail:  
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cityadmin@techline.com

westportcourt@netscape.net

records@olympic.com  
chief@olympic.com

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cityplan@techline.com

wfchief@techline.com

BSP 00063

FYURIT

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**HYDRAULIC PROJECT APPROVAL**  
RCW 77.55.100 - appeal pursuant to Chapter 34.05 RCW

State of Washington  
Department of Fish and Wildlife  
Region 6 Office  
48 Devonshire Road  
Montesano, Washington 98953-9018

DATE OF ISSUE: October 16, 2003

LOG NUMBER: EM-E1568-01

PERMITEE	AUTHORIZED AGENT OR CONTRACTOR
City of Westport Post Office Box 505 Westport, Washington 98595 (360) 268-0131	Not Applicable

**PROJECT DESCRIPTION:** Place Transition Gravel and Cobble on Beach

**PROJECT LOCATION:** Westhaven State Park, Westport, Latitude 46.90406 North, Longitude 124.12923 West

#	WRIA WATER BODY	TRIBUTARY TO	1/4 SEC.	SEC.	TOWNSHIP	RANGE	COUNTY
1	22.9020 Half Moon Bay	Grays Harbor	01	16	North	12	West Grays Harbor

**NOTE:** This emergency HPA is a follow up to an emergency verbal approval issued on October 16, 2003. It is issued with the understanding that the proposed work is necessary to address emergency conditions. The permittee shall set up an on-site meeting with the Area Habitat Biologist listed below, as soon as possible but not less than 30 days after work is completed, to determine if additional measures will be necessary to restore fish habitat that may have been damaged as a result of this emergency action.

PROVISIONS

1. **TIMING LIMITATIONS:** The project may begin immediately and shall be completed by February 14, 2005, provided:
  - a. Work below the ordinary high water line shall not occur from February 15 through July 14 of any year for the protection of migrating juvenile salmonids.
2. Work shall be accomplished per plans and specifications entitled, Public Notice CENWS-OD-TS-NS-21, dated June 27, 2003, and submitted to the Washington Department of Fish and Wildlife, except as modified by this Hydraulic Project Approval. These plans reflect design criteria per Chapter 220-110 WAC. These plans reflect mitigation procedures to significantly reduce or eliminate impacts to fish resources. A copy of these plans shall be available on site during construction.
3. All manmade debris on the beach, such as asphalt, concrete, angular rock, metal, plastic, glass, and other unnatural debris shall be removed and disposed of upland such that it does not enter waters of the state.
4. Rock for the transition beach shall be composed of clean, rounded, 12 inch minus gravel with at least 80% of the gravel 3 inches in diameter or less. Sand may also be placed.
5. If any other materials, such as ecology blocks and filter fabric, are used to temporarily stabilize the area, such materials shall be removed as soon as sufficient transition rock material is available, shall be removed before transition rock is placed, and shall be removed before February 15, 2004.



**HYDRAULIC PROJECT APPROVAL**  
RCW 77.55.100 - appeal pursuant to Chapter 34.05 RCW

State of Washington  
Department of Fish and Wildlife  
Region 6 Office  
48 Deereholm Road  
Montesano, Washington 98843-9618

DATE OF ISSUE: October 16, 2003

LOG NUMBER: EM-E1568-01

6. Project activities shall not occur when the project area is inundated by tidal waters to the greatest extent possible.
7. Use of equipment on the beach shall be held to a minimum, confined to a single access point, and limited to the footprint of the transition beach or any other unnatural material proposed to be removed, such as the ramment jerry. Construction materials shall not touch the beach outside this work corridor.
8. Tracks of equipment shall not operate in the water.
9. Bed material shall not be utilized for project construction or fills.
10. All trenches, depressions, or holes created in the beach area shall be backfilled prior to inundation by tidal waters.
11. Removal or destruction of overhanging bankline vegetation shall be limited to that necessary for the construction of the project.
12. All natural habitat features on the beach larger than 12 inches in diameter, including trees, stumps, and logs, shall be retained on the beach following construction. These habitat features may be moved during construction if necessary.
13. Project activities shall be conducted to minimize siltation of the beach area and bed.
14. If a fish kill occurs or fish are observed in distress, the project activity shall immediately cease and WDFW Habitat Program shall be notified immediately.
15. All debris or deleterious material resulting from construction shall be removed from the beach area and bed and prevented from entering waters of the state.
16. No petroleum products or other deleterious materials shall enter surface waters.
17. Materials shall not be burned below the ordinary high water line.
18. Project activities shall not degrade water quality to the detriment of fish life.

SEPA: Exempt Emergency

APPLICATION ACCEPTED: August 21, 2003

ENFORCEMENT OFFICER: Nixon 042 [P1]

Robert L. Burkle (360) 249-1217  
Assistant Habitat Program Manager

for Director  
WDFW

cc: Justine Barton, EPA Seattle  
Loree Randall, WDOE Lacey  
Bill Jolly, WSPRC Tumwater  
Sue Patande, Key Memory, Stephan Kalinowski, WDFW



**HYDRAULIC PROJECT APPROVAL**  
RCW 77.55.100 - appeal pursuant to Chapter 34.05 RCW

State of Washington  
Department of Fish and Wildlife  
Region 6 Office  
46 Devonshire Road  
Mundwinn, Washington 98563-0618

DATE OF ISSUE: October 16, 2003

LOG NUMBER: EM-E1568-01

**GENERAL PROVISIONS**

This Hydraulic Project Approval (HPA) pertains only to the provisions of the Fisheries Code (RCW 77.55 - formerly RCW 75.20). Additional authorization from other public agencies may be necessary for this project.

This HPA shall be available on the job site at all times and all its provisions followed by the permittee and operator(s) performing the work.

This HPA does not authorize trespass.

The person(s) to whom this HPA is issued may be held liable for any loss or damage to fish life or fish habitat which results from failure to comply with the provisions of this HPA.

Failure to comply with the provisions of this Hydraulic Project Approval could result in a civil penalty of up to one hundred dollars per day or a gross misdemeanor charge, possibly punishable by fine and/or imprisonment.

All HPAs issued pursuant to RCW 77.55.100 or 77.55.200 are subject to additional restrictions, conditions or revocation if the Department of Fish and Wildlife determines that new biological or physical information indicates the need for such action. The permittee has the right pursuant to Chapter 34.04 RCW to appeal such decisions. All HPAs issued pursuant to RCW 77.55.110 may be modified by the Department of Fish and Wildlife due to changed conditions after consultation with the permittee: PROVIDED HOWEVER, that such modifications shall be subject to appeal to the Hydraulic Appeals Board established in RCW 77.55.170.

**APPEALS - GENERAL INFORMATION**

IF YOU WISH TO APPEAL A DENIAL OF OR CONDITIONS PROVIDED IN A HYDRAULIC PROJECT APPROVAL, THERE ARE INFORMAL AND FORMAL APPEAL PROCESSES AVAILABLE.

**A.**  
INFORMAL APPEALS (WAC 220-110-340) OF DEPARTMENT ACTIONS TAKEN PURSUANT TO RCW 77.55.100, 77.55.110, 77.55.140, 77.55.190, 77.55.200, and 77.55.290:

A person who is aggrieved or adversely affected by the following Department actions may request an informal review of:

(A)

The denial or issuance of a HPA, or the conditions or provisions made part of a HPA; or

(B)

An order imposing civil penalties.

It is recommended that an aggrieved party contact the Area Habitat Biologist and discuss the concerns. Most problems are resolved at this level, but if not, you may elevate your concerns to his/her supervisor. A request for an INFORMAL REVIEW shall be in WRITING to the Department of Fish and Wildlife, 600 Capitol Way North, Olympia, Washington 98501-1091 and shall be RECEIVED by the Department within 30-days of the denial or issuance of a HPA or receipt of an order imposing civil penalties. The 30-day time requirement may be stayed by the Department if negotiations are occurring between the aggrieved party and the Area Habitat Biologist and/or his/her supervisor. The Habitat Protection Services Division Manager



**HYDRAULIC PROJECT APPROVAL**  
RCW 77.55.100 - appeal pursuant to Chapter 34.05 RCW

State of Washington  
Department of Fish and Wildlife  
Region 6 Office  
48 Devonshire Road  
Montesano, Washington 98943-9618

DATE OF ISSUE: October 16, 2003

LOG NUMBER: EM-E1568-01

or his/her designee shall conduct a review and recommend a decision to the Director or its designee. If you are not satisfied with the results of this informal appeal, a formal appeal may be filed.

**B. FORMAL APPEALS (WAC 220-110-350) OF DEPARTMENT ACTIONS TAKEN PURSUANT TO RCW 77.55.100 OR 77.55.140:**

A person who is aggrieved or adversely affected by the following Department actions may request a formal review of:

(A)

The denial or issuance of a HPA, or the conditions or provisions made part of a HPA;

(B)

An order imposing civil penalties; or

(C)

Any other "agency action" for which an adjudicative proceeding is required under the Administrative Procedure Act, Chapter 34.05 RCW.

A request for a FORMAL APPEAL shall be in WRITING to the Department of Fish and Wildlife, 600 Capitol Way North, Olympia, Washington 98501-1091, shall be plainly labeled as "REQUEST FOR FORMAL APPEAL" and shall be RECEIVED DURING OFFICE HOURS by the Department within 30-days of the Department action that is being challenged. The time period for requesting a formal appeal is suspended during consideration of a timely informal appeal. If there has been an informal appeal, the deadline for requesting a formal appeal shall be within 30-days of the date of the Department's written decision in response to the informal appeal.

**C. FORMAL APPEALS OF DEPARTMENT ACTIONS TAKEN PURSUANT TO RCW 77.55.110, 77.55.200, 77.55.230, or 77.55.290:**

A person who is aggrieved or adversely affected by the denial or issuance of a HPA, or the conditions or provisions made part of a HPA may request a formal appeal. The request for FORMAL APPEAL shall be in WRITING to the Hydraulic Appeals Board per WAC 259-04 at Environmental Hearings Office, 422A Sixth Avenue SE, Building Two - Rowe Six, Lacey, Washington 98504; telephones 360/459-6327.

**D. FORMAL APPEALS OF DEPARTMENT ACTIONS TAKEN PURSUANT TO CHAPTER 393, LAWS OF 2003:**

A person who is aggrieved or adversely affected by the denial or issuance of a HPA, or the conditions or provisions made part of a HPA may request a formal appeal. The FORMAL APPEAL shall be in accordance with the provisions of Chapter 393. The request for FORMAL APPEAL shall be in WRITING to the Environmental and Land Use Hearings Board.

**E. FAILURE TO APPEAL WITHIN THE REQUIRED TIME PERIODS RESULTS IN FORFEITURE OF ALL APPEAL RIGHTS. IF THERE IS NO TIMELY REQUEST FOR AN APPEAL, THE DEPARTMENT ACTION SHALL BE FINAL AND UNAPPEALABLE.**



APPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 3735  
SEATTLE, WASHINGTON 98124-3735



Regulatory Branch

OCT 16 2003

City of Westport  
Mr. Randy Lewis  
740 North Montesano  
Westport, Washington 98595

Reference: 200301101  
Westport, City of

Dear Mr. Lewis:

We have received your letter dated October 16, 2003, regarding bank erosion along Half Moon Bay along the Westhaven State Port your property located at Westport, Washington. You state that, per the enclosed drawing, a 350 lineal foot portion of the shoreline fronting the Westhaven State Park eroded away during the recent storm events (10 - 12 October 2003). You are proposing to place up to 7,000 cubic yards of imported clean sand immediately adjacent to the park to protect the remaining bank and infrastructure.

Under Section 10 of the Rivers and Harbors Act of 1899, a Department of the Army permit is normally required from the U.S. Army Corps of Engineers (Corps) for work in or affecting navigable waters of the U.S. Under Section 404 of the Clean Water Act, a Department of the Army (DA) permit is normally required for the discharge of dredged or fill material into waters of the United States, including wetlands and navigable waters of the U.S.

Under current Corps regulations and policy, uplands that are lost as a result of storm, flood, or other discrete event may be replaced without a DA permit. The information you provided substantiates that the work will occur in an area that was, within the past 2 years, upland and that the work will not extend beyond the original (pre-event) limits. This limit is as established in the topographic map interpreted from aeriels dated September 2, 2003. Based on the information you have provided, no DA permit is required for your proposed work.

In the project vicinity, a number of fish and wildlife species have been listed as threatened and/or endangered under the Endangered Species Act, therefore, we will provide a copy of this letter to the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS). If you have questions in this regard, please contact the NMFS and USFWS.

EXHIBIT 5

- 2 -

National Marine Fisheries Service  
Habitat Branch  
510 Desmond Drive Southeast, Suite 103  
Lacey, Washington 98503-1263

U.S. Fish and Wildlife Service  
Oregon Fish and Wildlife Office  
2600 Southeast 98<sup>th</sup> Avenue, Suite 100  
Portland, Oregon 97266

While a DA permit is not required, local, state, and other Federal requirements may apply.  
If you have any questions, please contact Muffy Walker at (206) 764-6915.

Sincerely,



Michelle Walker  
Chief, South Application Review Section

Enclosures

# calls for erosion meeting

BY JOHN DEWEESE  
DAILY WORLD WRITER

Prompted by beach erosion from weekend storms, the U.S. Army Corps of Engineers has called for an emergency meeting this week to discuss what can be done to protect Westhaven State Park and still meet environmental concerns.

Westport Mayor Berkley Barker hopes the Corps can save the city's new concrete sidewalk, which runs through the park from the Coast Guard tower in Westport to the South Jetty before heading south to Westport Light State Park. After a Sunday afternoon storm sent 25-foot swells pounding into Half Moon Bay, the sidewalk now balances precariously above high tide. There used to be at least 15 feet of beach between the surf zone and the trail, Barker said. Now there's about a foot.

Once again, Westport faces erosion problems as the winter storm season approaches. Since 1993, Westport has been working with the Corps to stabilize Half Moon Bay. The Corps built a wave "diffraction mound" in 1999 that extends northeast of the jetty and is meant to bend waves entering Half Moon Bay.

The Corps has been looking at long-term solutions to protect Westhaven, which Park Assistant Manager Rich Burdette said is one of the most popular daytime use parks in all of Washington. Westport's stake in protecting the park includes not just saving the sidewalk, but also ensuring the park continues to draw tourists, City Manager Randy Lewis said.

The sidewalk project was finished this summer because Westport needed to spend a \$330,000 grant by the end of the year, Lewis said. The only path for the sidewalk was along the Westhaven beach, since it couldn't be cut through nearby wetlands to the south.



DAILY WORLD / JOHN DEWEESE

Westport Mayor Berkley Barker and council member Eugene Hall inspect erosion damage to a walkway at Half Moon Bay Monday. The erosion occurred over the weekend.

hoped the Corps would have finished some stop-gap measure to protect the park. The problem Westhaven beach faces is the diffraction mound curls ocean waves around the Half Moon Bay's western edge across the beach. When waves travel parallel to the beach, they actually cause more erosion than when they strike perpendicularly, Lewis said.

Lewis hoped the Corps would cobble the shoreline, placing about 50,000 cubic yards of 12-inch diameter stones in the eroding area. Lewis said it's completely unreasonable for the Corps to continue replacing sand on a weekly basis. This gravel would not only anchor the sand but also absorb the shock of major surges, Lewis said.

"We hoped it would buy more time for a long-term fix," Barker said.

The Corps had to stop its cobble project due to concerns by both federal and state environmental agencies, project manager Hiram Arden said. Arden oversees the Grays Harbor navigation project, which includes the south jetty and the Half Moon Bay cobble project.

Officials at the Environmental Protection Agency and the U.S. Fish and Wildlife Department have stated the cobble would cause a negative impact on shore birds and spawning groundfish, such as surf smelt. The Department of Ecology has also voiced concerns and has refused to certify the project, Arden said.

"It's been a show stopper



DAILY WORLD / JOHN DEWEESE

State park officials were forced to close access to the walkway.

approvals," Arden said.

The Corps has called for an emergency meeting this week to discuss what could be done to protect the park and meet environmental concerns, including using smaller gravel over a larger area.

Arthur "R.D." Grunbaum, co-founder of the nonprofit environmental group Friends of Grays Harbor, said there are two scientifically feasible solutions to the Westhaven problem; the Corps could continue to replace the sand that's washed away or the ocean can be allowed to naturally change the coastline, which may mean losing the current park site.

"You can let it go. That's the best thing to do, because nature has a way of finding its own equilibrium," he said.

Grunbaum, who sat on Governor Gary Locke's Coastal Erosion Task Force, described Washington's coastline as very dynamic.

conclusion that we step back and not place development in that coastal area," he said. "Unfortunately, Mayor Barker and the City of Westport pulled out of the discussion."

The environmental discussions do not sufficiently address the needs of the people of Westport, Barker said. He is also suspicious that the Friends of Grays Harbor is trying to sacrifice the park in order to stop other proposed coastal projects, including the Links at Half Moon Bay golf resort.

"It irritates me these people would sacrifice us and the local economy for their own agenda," the mayor said.

In Grunbaum's opinion, taxpayer money should not be spent to constantly protect side projects which may very well be destroyed by the elements.

"When you spend public funds, it should be not only to protect humans, but also

BSP 00694



# City of Westport

740 N. Montesano • P.O. Box 505 • Westport, WA 98595 • [citywestport.wa.us](http://citywestport.wa.us)

October 13, 2003

Rex Derr, Director  
 Washington State Parks Commission  
 P.O. Box 42650  
 Olympia, WA 98504-2669

RE: Westhaven State Park

Dear Mr. Derr:

Over the last ten years, the City of Westport, Port of Grays Harbor, Grays Harbor County, as well as the Coastal Communities, an organization representing many jurisdictions within Grays Harbor and Pacific Counties, have actively engaged the Army Corps of Engineers to develop and pursue projects that have resulted in the reduction of erosion adjacent to the South Jetty of Grays Harbor and associated ocean beaches and Half Moon Bay. Although a major portion of the Westhaven State Park was lost during the breach in 1993, Washington State Parks has not actively participated in these efforts. Currently, the Corps is conducting both numerical and physical modeling in order to develop a long term management program to ensure the stability of the area.

Over the last two years, erosion has been occurring inside Half Moon Bay directly adjacent to the Westhaven State Park. The park is one of the most popular day-use parks in the state, and is a major source of tourism-based revenue for the City. Earlier this year, the Corps proposed as an interim measure the placement of gravel and cobble materials to protect an area of the breach fill. This would also result in protection of the current parking area for the state park, and pedestrian walking trail built by the City. The Corps received a very mildly supportive letter; however there hasn't been any additional contact or indication that Washington State Parks is concerned about the impending loss of this state asset.

As of this morning, the shoreline has receded to the edge of the City's new walkway. Grays Harbor PLD had to secure the power to the state park because the power line is also threatened. The City has taken steps to close and mark the trail to protect pedestrians. During yesterday's storm, waves were overtopping the area, and in our opinion a large portion of the existing parking lot and pedestrian areas could be impacted by debris, including logs carried by the waves. It is our understanding that the position of your agency is to reroute the power to the south end of the parking area and progressively shut down portions of the parking areas as the shoreline recedes. Apparently you will increasingly rely on use of portable toilets.

Hall Administration 360-268-0131 360-268-0921 Fax Email: <a href="mailto:cityhall@techline.com">cityhall@techline.com</a> <a href="mailto:cityplans@techline.com">cityplans@techline.com</a>	Municipal Court 360-268-0125 360-268-1363 Fax <a href="http://westport.wa.us/city/courts/courts.asp">westport.wa.us/city/courts/courts.asp</a>	Police Department 360-268-9197 360-268-1363 Fax <a href="mailto:records@citynet.com">records@citynet.com</a> <a href="mailto:chief@citynet.com">chief@citynet.com</a>	Public Works 360-268-0855 360-268-0921 Fax <a href="mailto:westportbldg@techline.com">westportbldg@techline.com</a> <a href="mailto:cityplanning@techline.com">cityplanning@techline.com</a>	Fire Department 360-268-9235 <a href="mailto:wildchick@techline.com">wildchick@techline.com</a>
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BSP 00696

October 13, 2003

RE: Westhaven State Park

The City strongly encourages State Parks to actively engage the Corps of Engineers, and work to aggressively seek a solution to protect the Westhaven State Park from further damage. We have heard comments from members of your staff that indicate your agency cannot or will not oppose natural processes in order to save facilities. Although it may be accurate to describe erosion in general as a natural process, that is not the current situation. The erosion that is occurring in Hall Moon Bay is a response to the presence of man-made structures that began with the construction of the South Jetty in the 1800's by the Corps and continued into recent times.

I look forward to a response from you in this issue. Feel free to contact my City Administrator, Randy Lewis, at the number listed below if you need additional information or have questions.

Sincerely,



The Honorable Berkley E. Barker  
Mayor  
City of Westport



# City of Westport

740 N. Montesano • P.O. Box 505 • Westport, WA 98595 • ci.westport.wa.us

October 15, 2003

Mr. Eliot Scull, Chairman  
 Ms. Cecilia Vogt, Vice Chairwoman  
 Mr. Mickey Fearn, Secretary  
 Mr. Clyde B. Anderson, Commissioner  
 Mr. Joe Toller, Commissioner  
 Mr. Robert C. Petersen, Commissioner  
 Ms. Joan K. Thomas, Commissioner  
 Washington State Parks Commission  
 c/o Rex Derr, Director  
 P.O. Box 42650  
 Olympia, WA 98504-2669

RE: Westhaven State Park

Dear Members of the Washington State Parks Commission:

This letter is a follow up to the letter I faxed to your Director, Mr. Derr on October 13. In that letter, I requested the Parks Commission immediately engage the U. S. Army Corps of Engineers to request their immediate assistance in stabilizing the shoreline adjacent to the Westhaven State Park, which is located in the City of Westport. I have attached a copy of that letter so that I don't need to repeat the information contained in it.

During phone conversations between my City Administrator and Mr. Bill Jolly of your staff, we were informed that not only was State Parks not going to engage the Corps of Engineers to stabilize the shoreline and protect Westhaven State Park, that you are actually planning to remove all of the infrastructure from the area and dismantle the park. The policy of the State Parks Commission, as explained by Mr. Jolly is to protect public access to the beaches, and not oppose natural processes at the coastal facilities.

I want to clear up one misunderstanding. I believe it is totally misguided to call the erosion at Westhaven State Park a natural process. The park facilities are located immediately adjacent to the Corps of Engineers Navigation Project, including an area of sand fill that was originally placed in 1993 to fill the breach that occurred between the jetty and shore, the hard structures of the jetty, and a diffraction mound that was built in the winter of 2000. The current erosion being experienced at Westhaven State Park is a result of the performance of these man-made structures.

City Hall - Administration  
 360-268-0111  
 360-268-0921 Fax

Municipal Court  
 360-268-0125  
 360-268-1363 Fax

Police Department  
 360-268-9197  
 360-268-1363 Fax

Public Works  
 360-268-0835  
 360-268-0921 Fax

Fire Department  
 360-268-9125

Email  
 ci@ci.westport.wa.us

westportcourt@comcast.net

records@olympnet.com

westportbludge@ci.westport.wa.us

wldcharlie@earthline.com

**BSP 00698**

October 15, 2003

RE: Westhaven State Park

The performance of the diffraction mound was compromised by modifications in design and construction based upon concerns expressed by regulatory agencies and local special interest groups. None of these concerns were based upon technical data. What is happening in Half Moon Bay is a reaction to man's intervention, not a natural process.

The Corps of Engineers, which has a responsibility to protect the navigation channel, has proposed a project that will protect the shoreline adjacent to both their structures and the Half Moon Bay Shoreline of Westhaven State Park AT NO COST to the State Parks Commission. The proposed project has now become bogged down in the permitting review. The lack of support from the adjacent property owner, State Parks, has been noted by both the Corps of Engineers, and the regulatory agencies that must provide concurrence.

Even now, when the Corps of Engineers is trying to complete a project that would stabilize the shoreline for a sufficient time frame to conclude and implement the results of a study on a long term (25 year) management plan, the State Parks Commission is spending money to dismantle Westhaven State Park and lose this state asset. This is totally inconsistent with a mandate to protect public access to the beaches of the State. Once the facilities are removed and the shoreline is allowed to recede, all of the existing access will be lost especially for the elderly and disabled who can now drive, park and utilize fully accessible trails to view the area.

With this letter, I am repeating my request for the Washington State Parks Commission to reverse its current position and actively engage the Corps of Engineers to respond immediately. I am also requesting you engage the Washington Department of Ecology and any federal agencies that must provide concurrence for the proposed project to go forward immediately.

If the State Parks Commission refuses to take the above action, then I am requesting the State Parks Commission immediately transfer all of the property of Westhaven State Park, and any funds designated for removal of the facilities to the City of Westport, who will assume the role of steward of this public property and maintain public access to the area.

Because of the emergency nature of the current situation, an immediate response to my requests is necessary. This response needs to be in writing, and contain the basis for the decision that is made. Feel free to contact my City Administrator, Randy Lewis, at the number listed below if you need additional information or have questions.

Sincerely,



The Honorable Berkley E. Barker  
Mayor  
City of Westport



Brady  
Bill Kelly  
T-41

STATE OF WASHINGTON  
WASHINGTON STATE PARKS AND RECREATION COMMISSION

7150 Cleanwater Lane • P.O. Box 42650 • Olympia, Washington 98504-2650 • (360) 902-8500

Internet Address: <http://www.parks.wa.gov>

TDD (Telecommunications Device for the Deaf): (360) 664-3133

October 16, 2003

The Honorable Berkley E. Barker, Mayor  
City of Westport  
740 North Montesano Street  
Westport, Washington 98595

Subject: Westhaven State Park - Half Moon Bay

Dear Mayor Barker:

Thank you for your communications of October 13 and October 15, 2003 regarding erosion along the shoreline of Half Moon Bay. I am sensitive to your situation and do not want to be an obstacle to any permissible solution you are able to achieve. Please know that we support any appropriate measures to assure the protection of the public's beaches and their safe access to them.

I do want to make it clear that Westhaven State Park is an important public asset that provides access to a number of ocean beach related experiences and recreational activities. The park has become very popular for surfers in particular. Annual visitation to Westhaven State Park for all uses is approximately 30,000 visitors per year. The Washington Coast is unique to our nation, a treasure for our state and a real economic and quality-of-life asset to your community. I am happy to attest to the significant value of Westhaven State Park as a state recreational resource and as an economic asset to the City of Westport.

We are prepared to remove the restroom structure at Westhaven State Park should that become necessary. It is my hope that this action won't be required however, the building was designed to be removable in case it was threatened by loss to coastal erosion. We are also prepared to remove roadway asphalt to keep it from falling into and contaminating marine waters.

71

BSP 00701



The Honorable Berkley E. Barker, Mayor

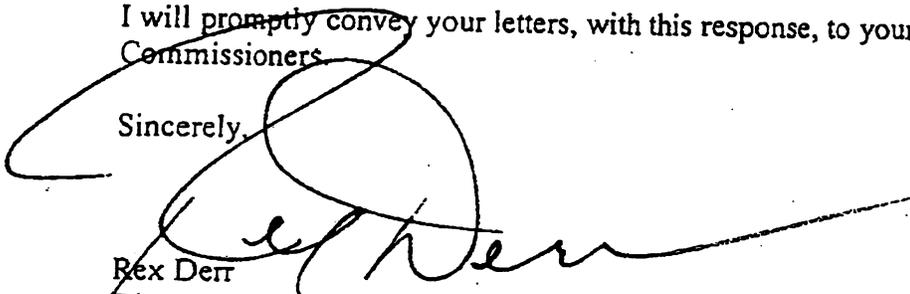
Page 2

October 16, 2003

Washington State Parks is not a regulatory agency, nor are we in a position to make decisions about the causes of coastal erosion. We have neither the funding nor the expertise to comment on what constitutes an appropriate response to the coastal erosion now taking place in Half Moon Bay. For these reasons we will not take the lead in engaging others in support of any proposed project.

I will promptly convey your letters, with this response, to your State Parks Commissioners.

Sincerely,



Rex Derr  
Director

str

cc: Washington State Parks Commissioners  
Senator Mark Doumit  
Representative Brian Blake  
Representative Brian Hatfield  
Representative Lynn Kessler  
Ron Shultz, Executive Policy Advisor  
Hiram Arden, USACE  
Sue Patnude, Regional Director, Region 6 – WDFW  
Beryl Fernandes, Regional Director, SW Region – DOE  
Frank Boteler, Deputy Director  
Larry Fairleigh, Assistant Director, Resources Development Division  
Fred Romero, Administrator, Policy Planning and Legislation  
Virginia Painter, Public Affairs Administrator  
J. Paul Malmberg, Southwest Region Manager  
Ed Girard, Twin Harbors State Park Manager

**BSP 00702**

# State considers removing Westhaven restrooms

*City of Westport declares emergency and dumps sand to slow erosion.*

**BY LEVI PULKKINEN**  
DAILY WORLD WRITER

**WESTPORT** — While the state Parks & Recreation Commission prepares to remove or relocate key structures at Westhaven State Park, the City of Westport has declared an emer-

gency and placed sand in a growing gap under the new trail ringing Half Moon Bay.

The city, which supports a U.S. Army Corps of Engineers plan to place 40,000 tons of rock on the shore, has long been at odds with Parks and other state agencies concerning erosion on the bay.

While the agencies discuss possible actions with local governments and environmental organizations, the City of Westport filled the hole under the loop trail Thursday as a inter-

im solution, Mayor Berkley Barker told *The Daily World* today.

"We are going to protect our infrastructure; we're going to protect a vital part of our local economy," Barker said.

Spokeswomen from both the state Department of Ecology and the U.S. Army Corps of Engineers said the city's actions, as described to them, either do not require permitting or could qualify for a permit to be issued later.

"The Department of Ecology

supports using sand as a short-term fix here until a longer-term plan can be developed," Ecology spokeswoman Sandy Howard said.

While Barker said he believes the erosion at Half Moon Bay is caused by the Corps work protecting the Grays Harbor navigation channel, he blamed its inaction on the environmental organization, Friends of Grays Harbor. FOGH has opposed any "hard

See **WESTHAVEN**, Page A5

## WESTHAVEN

FROM PAGE 1

olution" on the bay, including the most recent incarnation of the gravel-cobble plan.

"There comes a time when you have to stand up and be counted," Barker said. "It was time to quit playing games. ... If we waited for (the Corps) to make FOGH happy, we wouldn't have a Westport left."

In late July, the Corps released a draft version of a project that would have had 40,000 tons of 3 to 12-inch diameter rock dumped on the shores of Half Moon Bay, extending from the bay's center to a diffraction mound on its western edge. Finished in 2000, the mound, which was designed to bend waves, was supposed to be larger; the amount of cobble much greater.

The project was scheduled to go forward in September of this year, but was delayed because of environmental concerns.

FOGH member Linda Orgel said she believes the project would have destroyed vital habitat — at taxpayer expense. The Corps has already spent millions of federal dollars protecting the beach and the South Jetty, a Corps spokeswoman said.

"There were a lot of people who objected to that plan, because that's very prime habitat," Orgel said, adding that cobble placed on the beach since 2000 has failed to stop erosion there, and that much of it has washed out to sea.

Barker said that, had the diffraction mound been built and the cobble placed as originally proposed, the bay would have been protected. He said that changes insisted upon by environmental organizations hamstrung the project, causing it to fail.

"The environmentalist

lobby and FOGH intervened on that design and a different mound was built, one that was smaller and not as effective," the mayor said. "FOGH is aware of that, the environmentalists are aware of that, but they continue to impede the Corps."

Calling Half Moon Bay "a very high priority" for Seattle District Commander Colonel Debra M. Lewis, Spokeswoman Patricia Graesser said the Corps is currently working with state agencies to determine what type of project will be permissible to them.

"Once concerns can be addressed, a contractor could mobilize fairly quickly," Graesser said.

Bill Jolly, environmental programs coordinator for Parks, said his agency is drawing up plans to pull back the restrooms and other infrastructure at Westhaven but has not, to his knowledge, committed to a course of action. He said the agency is doing so as a "prudent matter" to protect its

capital investment in the park and to prevent potential pollution.

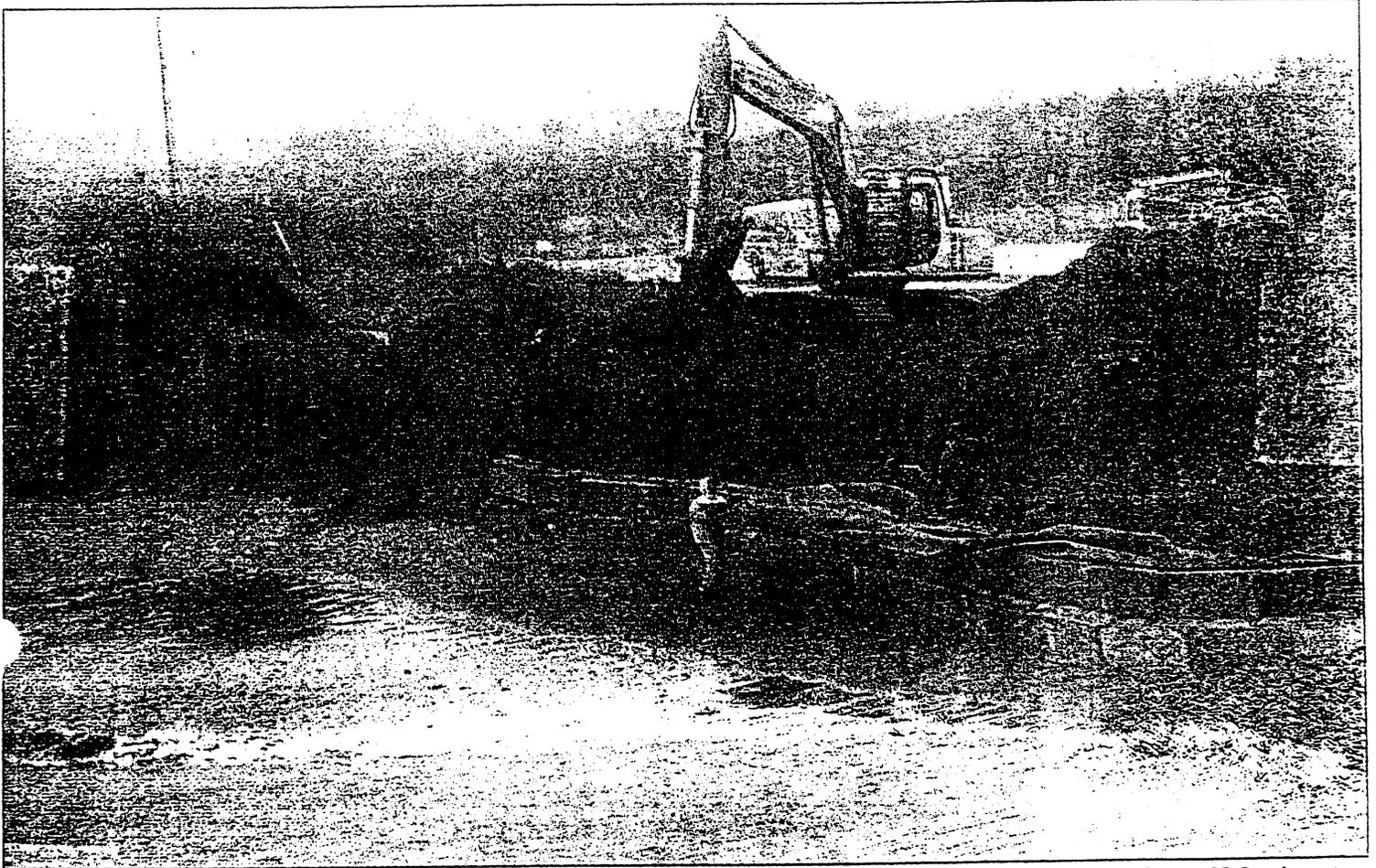
"What we're trying to do is be responsible about those facilities," Jolly said.

City planner Ryan Andrews said Parks has asked him to draw up a list of permits necessary to remove the structures and the drive into the park. He also said it would be a surprise to him if Parks abandoned one of its most popular parks in the state.

"It's an interesting position to take on the state park, since it is one of their most popular day use parks," he said. "They're essentially giving that up."

Jolly said Parks may relocate the facilities further from the dynamic surf zone to protect them, but that it would not support armoring the shore as a solution. He said doing so would be inconsistent with the agency's mandate to provide the public with access to the state's natural places while protecting their character.

# FROM THE FRONT



DAILY WORLD / KEVIN HONG

A crew works in a driving rain this morning to install walls of sand and stone blocks at Half Moon Bay, adjacent to Westhaven State Park.



DAILY WORLD / KEVIN HONG

Part of Westhaven State Park's concrete sidewalk is blocked as a crew works to build a wall to hinder erosion. Access to the sidewalk was closed due to erosion caused by last Sunday's storm.

# City adds emergency fill at Half Moon



City workers and Bramfield Construction stair-stepped ecology blocks covered with filter fabric at the Half Moon Bay erosion site on Thursday and Friday of last week. Approximately 1700 cubic yards of clean sand was then placed against the temporary bulkhead in an effort to slow erosion at the site. City of Westport Photo

By Barb Aue

Acting under the authority of an Emergency Proclamation, last Thursday, October 16th, Westport Mayor Berkley Barker ordered city staff to come up with a plan to slow erosion along the City's Lighthouse Dune Trail in Westhaven State Park. Approximately 70 feet of the cement walking trail was undermined by high seas pushed by heavy winds and severe rainstorms late last week and through the weekend. In all, approximately 350 feet of the Half Moon Bay shoreline has been affected by recent storm activity.

Late Thursday morning, staff, with the approval of engineers from the City's erosion consultants, Pacific International Engineering, came up with a plan that

called for stair-stepping ecology blocks covered in heavy duty filter fabric to be laid in front of the exposed section of dune trail, as well as 50 feet to both the east and west. Clean sand was then spread on top of that material. The work was done between tides in driving rain. Local company, Brumfield Construction, was given the contract for the emergency work, with city crew placing the filter cloth in alternating layers as the ecology blocks were lowered over the bank. No equipment was used on the beach during the emergency fix.

On Friday, more sand was brought in extending to the west to tie in with stronger ground. In all, approximately 1,700 cubic yards of sand was used in the project.

Public Works Director Greg

Barnes reported to Westport City Council members late Friday afternoon that although by and large the project was holding as planned, there was an area at the base of the ecology blocks in the center of the eroded area that had been somewhat undermined overnight.

Early Saturday morning, Mayor Barker, City Administrator Randy Lewis, and Barnes inspected the site. "We were really encouraged by what we saw," reported Barker Saturday afternoon. "Overnight, the tide and wave action pushed cobble that was already on the beach at the west end of the newest erosion site further to the east, right down in front of the ecology blocks. That seems to be doing the trick," he said.

City officials hope that this

temporary fix will buy enough time for the U.S. Army Corps of Engineers (Corps) to complete the permitting processes needed to add more cobble to the beach at the base of the sand fill. As a part of continuing maintenance of the area in an attempt to prevent the same kind of breach between the South Jetty and Half Moon Bay that occurred in the winter of 1993, the Corps has proposed placing cobble along the Half Moon Bay shoreline. The permitting process for the project began last March, with public notices going out in June. The Corps noted at the time that the work needed to be done by the fall storm season. However, objections from various state and federal agencies, including the

Washington State Department of Fish and Wildlife, the state Department of Ecology, and the National Marine Fisheries Service stopped the project. The Corps has scheduled a meeting for today with the permitting agencies on the cobble project. The meeting is expected to include a site visit.

City officials say they are hoping that with a little luck and cooperation from Mother Nature, they may have managed to save the Lighthouse Dune Trail Extension long enough for the Corps to take action at Half Moon Bay, that will not only protect the dune trail but ensure the safety of critical City of Westport infrastructure nearby.

As of this morning, the project appears to be holding well, despite continuous rain.

# Councilman says mayor overstepped authority

By Barb Aue

In a special meeting of the Westport City Council on Friday afternoon, October 17th, City Councilman Gene Hall expressed strong opposition to actions taken by Mayor Berkley Barker in handling recent erosion at Half Moon Bay. At the previous Tuesday's council meeting, the City Council unanimously passed a Proclamation of Emergency due to erosion caused on the southern edge of Half Moon Bay. High winds and major storm activity over several days eroded more than ten feet of shoreline in a four hour period. As a result, an approximate 70' section of the Lighthouse Dune Trail extension that the city constructed last summer was undermined by about a foot.

With no help coming from the U.S. Army Corps of Engineers or the Washington State Parks Department, city officials decided it was time to take matters into their own hands in an attempt to protect the city's investment and a potential threat to city infrastructure. With the Proclamation of Emergency in hand, Mayor Barker ordered city staff to come up with a plan to plug the cut in the bank in hopes of preventing further damage through the continuing storm series.

At question, according to Hall, is whether or not the Mayor has the power to expend city funds without a majority approval vote of the City Council. The proclamation itself states, "That the Council supports the Mayor's authority to direct staff to take necessary steps to protect public safety and safeguard public property..." but does not specifically refer to the expenditure of city funds to do so. According to Westport City Clerk Treasurer Margo Tackett, council members were contacted by telephone twice on Thursday, October 16th. The first call at mid-morning informed council members that Brumfield Construction had been contacted and agreed to place sand, ecology blocks, and heavy-duty filter fabric along the outer edge of

the dune trail where erosion had undermined it, as well as 50 feet in either direction. All Council members, with the exception of Sonny Johnson, who was unavailable, were told at that time that the cost estimate for the project would be somewhere between \$10,000 and \$20,000.

Later that same afternoon, Tackett says she again contacted council members by telephone, this time reaching them all. "There were three items discussed in that call. They included notification of a special council meeting the following day; what each council member's interpretation of the mayor's powers were in regards to expending city funds under the Emergency Proclamation; and each member was polled as to whether or not they would support an expenditure of between \$50,000 and \$60,000 of City funds to be borrowed from the Water Reserve Fund, should it become necessary," said Tackett. According to the clerk-treasurer, all council members with the exception of Mr. Hall replied in the affirmative to the mayor taking whatever steps were necessary including expenditure of funds up to \$60,000 to protect the trail from further undermining and protect public safety.

At the special council meeting Friday afternoon at 4 p.m., Mr. Hall stated that he was under the impression that both phone calls were for information purposes only and that he wasn't being polled about anything. In a heated exchange with Barker, Hall said, "You cannot spend city funds without the specific authorization of the majority of the council. It's the law. I don't care what you say otherwise. Ask your own attorney!" Barker begged to differ.

When asked for a legal opinion, City Attorney Wayne Hagen stated that since the proclamation passed on Tues-

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day's meeting gives the mayor the power to "...to take necessary steps to protect public

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safety and safeguard public property..." financial expenditures would logically be included, even though they are not specifically referred to in the document.

Hall also questioned the fact that work on the emergency project began before required permitting was officially in place. Barker justified the work start on the basis that an approximate four-hour window between tides existed on Thursday during which work could be done. City Administrator Randy Lewis added that, "Although the Port of Grays Harbor deeded the land to the state parks, it retained authority. I spoke with Port officials on the phone and as property owner, the Port gave us authority for the temporary fix.

"South Beach State Parks Supervisor Ed Girard made it very clear that while State Parks was not opposed to our decision, that the City was responsible for obtaining any necessary permits. During the course of the day yesterday, we consulted not only with the Port but Grays Harbor County, the Department of Ecology, WDF&W, and the Corps of Engineers. The Corps determined that since we weren't intending to do any work beyond the mean low water mark, no permit was necessary.

"We received a Hydraulic Project Approval from Fish and Wildlife shortly after the

actual work began. Given all that contact information, we felt very safe in taking that low tide window to go ahead and start the work. Obviously there are some directions we've taken that some, or at least one of you, is not comfortable with but no one was trying to go crazy on staff. We felt we were doing it in the best interests of the city," Lewis said.

Hall was still not satisfied. "When I found out that we started the physical work without permits I got really upset. We just opened the door and stepped our foot into more potential litigation and this has to stop. And I figure it's going to stop in, about another two weeks," he added, referring to the hotly contested mayoral election race that will be decided November 4th.

Still unconvinced of whether or not the situation warranted the fill action before permits were officially in place, he maintained that, "We still should have had an engineer to tell us there was imminent danger."

At the end of Friday's special meeting, which Councilman Sonny Johnson did not attend, council members voted 3 to 1 to confirm authorization for the estimated \$24,000 already spent on the temporary erosion fix at Half Moon Bay, as well as up to an additional \$29,000 for work done on Friday and potentially on Saturday. Councilman Hall cast the lone NO vote.





Chapter 17.32

SHORELINE MANAGEMENT OVERLAY

Sections:

- 17.32.010 Purpose.
- 17.32.015 Administration.
- 17.32.020 Definitions.
- 17.32.030 Application of regulations.
- 17.32.040 Shoreline environments.
- 17.32.050 Shoreline environment guidelines.
- 17.32.055 Shoreline use activities.
- 17.32.060 Shoreline development guidelines.
- 17.32.065 Wetlands and critical areas.
- 17.32.070 Nonconformities.
- 17.32.080 Shoreline permits.
- 17.32.090 Appeal.
- 17.32.100 Amendments and boundary changes.
- 17.32.110 Permit violations.
- 17.32.120 Notes on the Westport comprehensive land use shoreline and zoning map.

17.32.010 Purpose. This chapter is intended to carry out one of the responsibilities imposed on the city by the Shoreline Management Act of 1971 through an overlay shoreline regulation incorporated in the city's zoning code. (Ord. 1146 §2(part), 1998).

17.32.015 Administration. (a) Administrator. The city public works director or in the public works director's absence, the city administrator, shall be the administrator of this chapter, and shall perform all the duties ascribed to the administrator in this chapter, and shall administer the permit and notification systems.

(b) Interpretation. The terms of this regulation shall be interpreted to be consistent with the State Shoreline Management Act, Chapter 90.58 RCW and the implementing regulations of chapters 173-16, 173-22, 173-26, and 173-27 WAC. (Ord. 1146 §2(part), 1998).

17.32.020 Definitions. As used in this chapter, unless context requires otherwise, the following definitions will apply for purposes of this chapter:

"Adoption by rule" means an official action by the department to make a local government shoreline master program effective through rule consistent with the requirements of the Administrative Procedure Act, Chapter 34.05 RCW, thereby incorporating the adopted shoreline master program or amendment into the State Master Program.

"Act" means Chapter 90.58 RCW the Shoreline Management Act of 1971, as amended.

"Average grade level" means the average of the natural or existing topography of the portion of the lot, parcel, or tract of real property which will be directly under the proposed building or structure. Calculation of the average grade level shall be made by averaging the ground elevations at the midpoint of all exterior walls of the proposed structure.

"Boathouse" means a structure designed for storage of vessels located over water or in upland areas.

"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 state of water level.

"Development regulations" means the controls placed on development or land use activities by a county or city, such as zoning ordinances, critical areas ordinances, all portions of a Shoreline Master Program other than goals and policies approved or adopted under Chapter 90.58 RCW, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances, together with any amendments thereto.

"Exempt" developments are those set forth in WAC 173-27-070 and RCW 90.58.030(3)(e), 90.58.140(9), 90.58.147, 90.58.355 and 90.58.515 which are not required to obtain a substantial development permit but which must otherwise

comply with applicable provisions of the Shoreline management Act and the Westport shoreline master program.

"Extreme low tide" means the lowest line on the land reached by a receding tide.

"Fair market value" of a development means the open market bid price for conducting the work, using the equipment and facilities, and purchase of the goods, services and materials necessary to accomplish the development.

"Floating home" is a structure designed and operated substantially as a permanently based over-water residence. Floating homes are not vessels and lack adequate self-propulsion and steering equipment to operate as a vessel. They are typically served by permanent utilities and semi-permanent anchorage/moorage facilities.

"Floodplain" is synonymous with 100-year floodplain and means that land area susceptible to being inundated by stream derived water with a one percent chance of being equaled or exceeded in any given year. The limit of this area shall be based upon flood ordinance regulation maps or a reasonable method which meets the objectives of the Shoreline Management Act.

"Floodway" means those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually, said floodway being identified, under normal condition, by changes in surface soil conditions or changes in types or quality of vegetative ground cover condition. The floodway shall not include those lands that can reasonably be expected to be protected from flood waters by flood control devices maintained by or maintained under license from the federal government, the state, or a political subdivision of the state.

"Guidelines" means those standards adopted by the department to implement the policy of the Shorelines Management Act.

"Height" is measured from average grade level to the highest point of a structure, excluding antennas, chimneys and similar appurtenances.

"Houseboat" is a vessel, principally used as an over-water residence. Houseboats are licensed and designed for use as a mobile structure with detachable utilities or facilities, anchoring and the presence of adequate self-propulsion and steering equipment to operate as a vessel. Principal use as an over-water residence means occupancy in a single location, for a period exceeding two months in any one calendar year. This definition includes liveaboard vessels.

"Local government" means city of Westport.

"Ordinary high water mark" is a mark that will be found by examining the bend and banks and ascertaining whether the presence and action of waters are so common and

usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland.

(A) In high-energy tidal water environments where the action of the waves or currents is sufficient to prevent vegetation establishment below mean higher high tide, the ordinary high water mark is coincident with the line of vegetation. Where there is no vegetative cover for less than one hundred feet parallel to the shoreline, the ordinary high water mark is the average tidal elevation of the adjacent lines of vegetation. Where the ordinary high water mark cannot be found, it is the elevation of mean higher high tide.

(B) In low-energy tidal water environments where the action of waves and currents is not sufficient to prevent vegetation establishment below mean higher high tide, the ordinary high water mark is coincident with the landward limit of salt tolerant vegetation, which means the vegetation is tolerant of interstitial soil salinities greater than or equal to 0.5 parts per thousand.

"Permit" means any substantial development, variance, conditional use permit or revision authorized under Chapter 90.58 RCW.

"Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation or agency of the state or local governmental unit however designated.

"Primary dune" means the first system of dunes shoreward of the water, having little or no vegetation, which are intolerant of unnatural disturbances. The primary dune is the equivalent of the foreshore dune as identified by the Soil Conservation Service<sup>2</sup> and in Westport is covered by the dune protection zone which extends up to one hundred feet shoreward of the primary or foreshore dune.

"Priority" for shoreland developments where authorized, is defined at RCW 90.58.020 and shall include uses which permit a significant number of people to use or enjoy the city's shorelines, including water dependent uses, public use and access, and residential uses consistent with environmental protection.

"Shorelands" or "Shoreland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of the SMA.

The following shall be interpreted as the upland extent of shoreline jurisdiction within the city:

(A) The Westhaven Area. The upland extent of shoreline jurisdiction shall be the ordinary high water

mark plus two hundred feet and associated wetlands line of ordinary high water plus two hundred feet for the city core, Westhaven area (see areas "A" to "A" as identified on the Westport comprehensive land use, shoreline and zoning map);

(B) The ocean beach area bounded on the north by Ocean Avenue extended and on the south by the city limits. The upland extent of shoreline jurisdiction shall be a line drawn at the upland toe of the primary dune together with associated interdunal wetlands, easterly edge of the beach deflation plain to the OBR I area (see areas "B" to "B" as identified on the Westport comprehensive land use, shoreline and zoning map);

(C) The ocean beach area bounded on the north by the south boundary of Westhaven State Park and on the south by Ocean Avenue extended. The upland extent of shoreline jurisdiction shall be the 100-year floodplain or a line drawn at the upland toe of the primary dune together with associated interdunal wetlands, whichever location that is further upland, for the property designated TC (see areas "C" to "C" as identified on the Westport comprehensive land use, shoreline, and zoning map);

(d) The East Shore of Westport. The upland extent of shoreline jurisdiction shall be the ordinary high water mark plus two hundred feet and associated wetlands. USCOE designated wetland edge from Firecracker Point east and south to the city limits (see areas "D" to "D" as identified on the Westport comprehensive land use, shoreline and zoning map).

The shoreland boundary has been mapped by the city and the map shall be the primary guide for purposes of this chapter. The map may be amended by request from an owner, with a field delineation more accurately locating the identified boundary.

"Shoreline master program" for the city means the comprehensive plan Chapter 9 together with maps, diagrams, charts, or other descriptive material and text, a statement of desired goals, and development standards identified in Title 17 of the Westport Municipal Code, particularly, Chapter 17.32 herein.

"Shorelines" means all the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them, except (i) shorelines of state-wide significance, (ii) shorelines on streams where the mean annual flow is twenty cubic feet per second or less, and (iii) shorelines on lakes less than twenty acres in size.

"Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance within the state.

"Shorelines of state-wide significance" relevant to the Westport area include the area between the ordinary

high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries and inlets and the shorelands associated therewith.

"Structure" means a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner, whether installed on, above or below the surface of the ground or water, except for vessels.

"Substantial development" shall mean any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter (as further explained under WAC 173-27-040):

(A) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;

(B) Construction of the normal protective bulkhead common to single-family residences;

(C) Emergency construction necessary to protect property from damage by the elements;

(D) Construction of a barn or similar agricultural structure and practices normal or necessary for farming on shorelands;

(E) Construction or modification of navigational aids such as channel markers and anchor buoys;

(F) Construction on shorelands by an owner, lessee, or contract purchaser of a single-family residence and appurtenance for his own use or for the use of his family, which residence does not exceed a height permitted in the underlying zone and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this chapter;

(G) Construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of a single-family residence, the cost of which does not exceed two thousand five hundred dollars, if in salt water, or not to exceed ten thousand dollars if in fresh water. A dock is a landing and moorage facility for watercraft and does not include storage facilities, decks, or other appurtenances. Any subsequent construction exceeding two thousand five hundred dollars and occurring within five years of completion of the prior construction shall be considered a substantial development;

(H) Operation, maintenance, or construction of canals, waterways, drains, reservoirs developed as part of an irrigation system for the primary purpose of using system

waters, including the return flow and artificially stored ground water from the irrigation of lands;

(I) The marking of property lines or corners on state-owned lands, when such marking does not significantly interfere with normal public use of the surface of the water;

(J) Operation and maintenance of dikes, ditches, drains, or other facilities existing on June 4, 1975 which are part of an agricultural drainage or diking system;

(K) Any project with a certification from the Governor pursuant to Chapter 80.50 RCW;

(L) Site exploration activities, as defined in RCW 90.58.030(3)(e)(xi), needed to prepare for a development application as long as said exploration activities do not interfere with normal public use of surface waters of the state, have no significant adverse impacts to the environment, the site is restored to pre-existing conditions, private entities post a performance bond, and the exploration activity is not subject to the permit requirements of RCW 90.58.550;

(M) Removing or controlling aquatic noxious weeds, as defined in RCW 17.26.020, through the use of an herbicide or other treatment method, as recommended by Department of Agriculture or Department of Ecology, per Chapter 43.21C RCW.

(N) Watershed restoration projects as reviewed and approved by the administrator; and

(O) Any other exemption as described or further explained in WAC 173-27-040.

Use, Conditional. "Conditional use" means a use, development, or substantial development which is classified as a conditional use or is not classified within the applicable master program. Conditional uses generally conform to the policies and management objectives of an environment, but because of potential problems inherent with the specific use or activity, may not be appropriate in every situation. Conditional uses are allowable only if sufficient care is taken to avoid predictable negative impacts through the application of project/site specific conditions. These conditions may include limitations on the scope and scale of the proposed use. A conditional use may be found to be not permissible after a specific case review.

Use, Permitted. "Permitted use" means a use that conforms to the Westport shoreline management program, and may be undertaken subject to the policies and requirements of this chapter and applicable permits.

"Variance" means a means to grant relief from the specific bulk, dimensional or performance standards set forth in Westport's shoreline management program.

"Water-dependent use" means a use or portion of a use which cannot exist in any other location and is dependent

on the water by reason of the intrinsic nature of its operations. Examples of water-dependent uses may include ship cargo terminal loading areas, ferry and passenger terminals, barge loading facilities, ship building and dry docking, marinas, aquaculture, float plane facilities and sewer outfalls.

"Water-enjoyment use" is a recreational use, or other use facilitating public access to the shoreline as a primary characteristic of the use; or a use that provides for recreational use or aesthetic enjoyment of the shoreline for a substantial number of people as a general characteristic of the use and which through the location, design, and operation assures the public's ability to enjoy the physical and aesthetic qualities of the shoreline. In order to qualify as a water-enjoyment use, the use must be open to the general public and the shoreline-oriented space within the project must be devoted to the specific aspects of the use that fosters shoreline enjoyment. Primary water-enjoyment uses may include parks, piers and other improvements facilitating public access to shorelines of the state; and general water-enjoyment uses may include single-family residential, restaurants, museums, aquariums, scientific/ecological reserves, resorts, and mixed-use commercial; provided that such uses conform to the above water-enjoyment specifications and the provisions of the Shoreline master program.

"Water-oriented use" is any combination of water-dependent, water-related, and/or water-enjoyment uses. Water-oriented uses, together with single-family residential uses, and serves as an all-encompassing definition for priority uses under the Shoreline Management Act. Residential uses and particularly single-family residential uses are priority uses under the Shoreline Management Act and are considered water-oriented uses in the city. Nonwater-oriented, except single-family residential uses, serves to describe those uses which have little or no relationship to the shoreline and are not considered priority uses under the Act. Examples include professional offices, automobile sales or repair shops, mini-storage facilities, multifamily residential development, department stores, and gas stations.

"Water-related use" is a use or portion of a use which is not intrinsically dependent on a waterfront location but whose economic viability is dependent upon a waterfront location because: (A) of a functional requirement for a waterfront location such as the arrival or shipment of materials by water, or the need for large quantities of water; or (B) the use provides a necessary service supportive of the water-dependent commercial activities and the proximity of the use to its customers makes its services less expensive and/or more convenient. Examples include manufacturers of ship parts large enough that transporta-

tion becomes a significant factor in the product's cost, water-transported foods. Examples of water-related uses may include warehousing of goods transported by water, seafood processing plants, hydroelectric generating plants, gravel storage when transported by barge, oil refineries where transport is by tanker, and log storage. Westport considers multifamily and mixed use residential developments to be water-related in that much of Westport's attraction is as a seashore and water sports-oriented destination resort community. As such, residential structures for sale, long-term lease, and other term occupancy all facilitate the water-related nature of the Westport economy.

"Wetlands" means areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

Wetlands are further explained in the "Washington State Wetlands Identification and Delineation Manual" as prepared by the Department of Ecology, Publication No. 96-94 date March 1997.

Wetlands, Associated. "Associated wetlands" means those wetlands which are in proximity to and either influence or are influenced by tidal waters or a lake or stream subject to the Shoreline Management Act. (Ord. 1189 Atch. A §2, 1999; Ord. 1146 §2(part), 1998).

17.32.030 Application of regulations. These regulations shall apply to all the lands in the city identified as shorelines, and shall apply to every person, firm, corporation, local and state governmental agency, and other entities which would develop, use, and/or own lands, shorelands, or waters under the control of these regulations. Further, these regulations apply to all existing and future conditions within the area of jurisdiction except as provided in Section 17.32.070.

(1) All structures or other development within the shorelines of Westport are required to comply with Chapter 17.32 WMC herein, whether or not the development is "substantial" or "exempt" as defined in Section 17.32.020.

barge berthing; ship berthing; port terminal facilities; nonappurtenant signs; agricultural uses and structures; outfall; diking; bank line erosion control; new shoreline works and structures; causeways; and landfills consistent with the other requirements of this chapter.

(7) Standards.

(A) All structural developments intended for human occupancy in the urban shoreline shall be located in areas of the shoreline outside of the high energy zones (also known as high velocity or "V" zones) which are subject to potentially dangerous flooding or erosion, as identified on the FEMA map for the city dated May 5, 1981, Panel No. 530067 0005 C.

(B) Roads, utilities, and other infrastructure intended for dedication to the public shall be located outside of the high energy zones identified on the map which are subject to potentially dangerous flooding or erosion or flooding to the extent possible. Where a high energy area must be crossed, construction must be done consistent with the nature of the hazards likely to be encountered, and in a manner which does not increase or change the likely area of disturbance.

(C) Grading and filling operations consistent with the permitted uses shall be permitted shoreward of the primary dune, where such dune is ascertainable. Modifications in the primary dune are permitted only where other alternatives are not available and then only when necessary to serve a public purpose (e.g., road, public access, utility, or safety measure) and not merely private or recreational purposes. Grading and filling will not be permitted for the purpose of creating new land out of the waters of the state.

(D) Shoreline protective structures, docks, and piers. Shoreline protective structures, docks, and piers are permitted within the harbor area (any urban shoreline lying easterly of the main jetty) and any extension of the main jetty necessary to protect the main jetty or improve its functioning. The normal maintenance and repair of existing shoreline works and structures shall be exempt from the requirement to obtain a shoreline substantial development or conditional use permit pursuant to RCW 90.58.030 (3)(e)(i).

(E) All projects within the MUTC and the tourist commercial zones abutting the shoreline shall make provision for access or use of the shoreline area for the enjoyment of the owners, tenants, and guests of the project, or where appropriate, the public as a whole.

(8) Setbacks. In OBR and TC zones the building setback shall be two hundred feet from the edge of the marram grass line. The line shall be determined as the average of the marram grass line measured two hundred feet on either side of the structure to be constructed. In all

other zones, the setback shall be shoreward of the line of ordinary high water except for those uses approved for over water -- marinas, ferry terminals, water-dependent industry.

(b) Conservancy Shoreline Environment.

(1) Purpose and Intent. The conservancy environment is intended to protect areas for purposes that directly use or depend on natural systems. While it is not intended that such areas will be preserved in their natural state, the activities which occur in these areas shall be compatible the natural systems. It is the intent of this classification to allow uses which depend on the natural ecological system for production of food for recreation, for recognized scientific research, or for public access for recreational uses. Recreation uses will be water dependent and designed to maintain the quality of the natural elements of the areas.

(2) Designation. The shorelines described at 17.32.120 and identified on the map described below shall be designated "conservancy."

(3) Map. The shoreline boundary is identified on the map entitled "City of Westport Comprehensive Land Use, Shoreline and Zoning Map" dated October, 1997 is adopted as the official zoning map for the city and is part of the city zoning code and development regulations.

(4) Management Objectives. The conservancy environment is intended to establish an eastern line of limitation for the expanding urban areas of Westport and to protect the salt marsh in the eastern portion of the city.

(5) Permitted Uses. The permitted uses in the conservancy environment are those fostered by the lands, wetlands, shorelands, and water of that environment. The following uses are permitted subject to compliance with the city of Westport shoreline master program policies and regulations: Oyster culture; aquaculture; commercial fishing and shellfish harvesting; navigational aids; public boat ramps; boating; public fishing areas; passive and subsistence agriculture; local market farming; tree farms; wildlife refuges; living resource production and habitat.

(6) Conditional Uses. Except on the Pacific Ocean Beach, the following uses may be permitted when they comply with the Master Program Policies and Regulations and the criteria for conditional uses in the City of Westport Shoreline Master Program: Single-family dwelling; parks, pathways, and other public accesses; piling and mooring dolphins; outfalls, bankline erosion control; shoreline protective structures: new shoreline works and structures; landfills associated with approved shoreline permits and consistent with the other regulations of this master program.

that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where this master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

(B) Shoreline uses and activities shall be designed and operated to avoid blocking, reducing, or adversely interfering with the public's visual access to the water and shorelines.

(C) Public lands such as street ends, rights-of-way and utilities shall provide visual access to the water and shoreline in accordance with RCW 35.79.035 and RCW 36.87.130.

(h) Signage.

(1) In all environments public safety signs and signs not exceeding two square feet posted to warn against hunting, fishing, trespassing, and hazards are permitted. Signs erected by a public agency to warn of hazards; traffic requirements; or to notify the public of fish, shellfish and game regulations; or interpretive and educational signs are permitted within all environments.

(2) All signs shall be located and designed to minimize interference with vistas, viewpoints and visual access to the shoreline. No sign shall be placed in a required view corridor. No sign shall be placed on trees or other natural features.

(3) Signs related to specific on-site uses or activities shall not exceed thirty-two square feet in surface area. On-site freestanding signs shall not exceed six feet in height. When feasible, signs shall be flush-mounted against existing buildings.

(4) Sign plans and designs shall be submitted for review and approval at the time of shoreline permit approval.

(i) Stormwater Management.

(1) All shoreline development, both during and after construction, shall minimize any increase in surface runoff through control, treatment and release of surface water runoff so that the receiving water quality and shore properties and features are not adversely effected. Control measures include but are not limited to dikes, catch basins or settling ponds, oil interceptor drains, grassy swales, planted buffers and fugitive dust controls. (Ord. 1189 Attch. A §4, 1999; Ord. 1146 §2(part), 1998).

17.32.065 Wetlands and critical areas. (a) Adoption of Documents.

(1) State. For purposes of the shoreline master program, the city adopts the Washington State Manual, as prepared by the Department of Ecology, Publication No. 96-94, dated March, 1997.

beyond the confines of the vicinity map, provide another vicinity map showing the precise location of the disposal site and its distance to the nearest city or town;

(C) Give a brief narrative description of the general nature of the improvements and land use within one thousand feet in all directions from development site (i.e., residential to the north, commercial to the south, etc.).

The administrator and/or the city may require such other information as is found to be reasonable necessary to review the application.

(c) Review Criteria for Shoreline Permits.

(1) Review Criteria for Shoreline Substantial Developments. As required by WAC 173-27-150, the city shall only grant a substantial development permit when the proposed development is consistent with:

(A) The policies and procedures of the Shorelines Management Act;

(B) The provisions of the state implementing regulations; and

(C) Westport's Shoreline Master Program.

(2) Review Criteria for Shoreline Conditional Uses. The purpose of a conditional use is to allow greater flexibility in varying the application of the use regulations of this chapter in a manner consistent with the policies of RCW 90.58.020: provided, that approval of conditional uses should also be granted in circumstance where denial of the use would result in a thwarting of the policy enumerated in RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by the city to prevent any undesirable effects of the proposed use. In accordance with WAC 173-27-160:

(A) Uses which are classified or set forth in Title 17 WMC as conditional uses may be authorized provided the applicant can demonstrate all of the following:

(i) The proposed use will be consistent with the policies of the Shorelines Management Act and the Westport shoreline master program;

(ii) The proposed use will not interfere with the normal public use of public shorelines;

(iii) The proposed use is compatible with other authorized uses in the area or uses planned for the area under the city's comprehensive plan and shoreline master program.

(iv) The proposed use of the site and design of the proposed project will cause no unreasonably adverse effects to aquatic and shorelines areas;

(v) The proposed use will not have substantial adverse cumulative effects;

(vi) There will not be substantial detrimental effects to the public's interest in the area, including normal public use of the shorelines.

(A) Form of Notice. Pursuant to WAC 173-27-110, the notice shall inform the public of:

- (i) The date the application was made and the dated the application was determined to be complete;
- (ii) A description of the proposed project action and a list of the project permits included in the subject application;
- (iii) The identification of other permits not included in the subject application, if known;
- (iv) The identification of existing environmental documents that evaluate the proposed project and where such documents may be reviewed;
- (v) A statement of the public comment period, which shall be at least thirty days (except for applications for limited utility extension and bulkheads which have a twenty-day comment period, per WAC 173-24-120);
- (vi) The date, time, and place of the public hearing, if any;
- (vii) A statement of preliminary determination, if one has been made;
- (viii) The procedure and time limitation for commencing a challenge to the action.

(B) Method of Notice. The city shall provide notice in accordance with WAC 173-27-110(4) and include at least one of the following noticing methods:

- (i) Mailing of the notice to the latest recorded real property owners as shown by the records of the county assessor within three hundred feet of the property boundary of the subject proposal;
- (ii) Posting the notice in a conspicuous manner on the property upon which the project is to be undertaken; or
- (iii) Publishing the notice in the local newspaper.

(3) Permit Review. The land use hearing examiner shall hold an open record public hearing to hear public comment on the application. Thereafter the land use hearing examiner shall approve, modify, or deny the application. The decision shall be based on whether the application conforms with the Shorelines Management Act, the state implementing regulations, and the goals, policies and regulations of this chapter. The decision shall be final unless an appeal is filed with the city council within ten days after the effective date of the land use hearing examiner's recommendation (see Section 17.32.090 (2) for local-level appeal). Records will be kept for all hearings.



Chapter 17.36BBINDING SITE PLANSSections:

- 17.36B.010 Binding site plan option.
- 17.36B.020 Site plan requirement.
- 17.36B.030 Presubmission conference.
- 17.36B.040 Application content.
- 17.36B.050 Review.
- 17.36B.060 Findings and conclusions.
- 17.36B.070 Amendment.
- 17.36B.080 Dedication.
- 17.36B.090 Development.
- 17.36B.100 Duration of approval.
- 17.36B.110 Appeals.
- 17.36B.120 Design standards and improvements.
- 17.36B.130 Increased public service standards, roads, sewer, water, stormwater.
- 17.36B.140 Waiver of standards and provisions.
- 17.36B.150 Noncompliance with site plan.
- 17.36B.160 Effect of approval.
- 17.36B.170 Violation.

17.36B.010 Binding site plan option. In lieu of subdivision approval, a subdivider or developer of commercially or industrially zoned property, mobile home parks or condominiums may choose to request approval of a binding site plan pursuant to this chapter and RCW 58.17.035. (Ord. 1146 §2(part), 1998).

17.36B.020 Site plan requirement. Site plan review and approval is required prior to:

- (1) The use of land either for the location of any commercial or industrial building or for any building in which more than one dwelling unit would be contained;
- (2) The acceptance of any dedication of land to the city for transportation, open space, or other purposes which is independent of other development review. Such review shall include the current and proposed use and the development of adjacent and associated lands;
- (3) Development of any mobile home park governed by this code. Such development shall be designed in accordance with the standards set forth in this code; or
- (4) Development of any planned unit district governed by this code which requires divisions of land for sale or lease. (Ord. 1146 §2(part), 1998).

17.36B.030 Presubmission conference. Prior to applying for site plan approval, an applicant may request a presubmission conference. (Ord. 1146 §2(part), 1998).

17.36B.040 Application content. Each application for site plan approval shall contain ten copies of the following information:

- (1) The title and location of the proposed development;
- (2) The names, addresses, and telephone numbers of the applicant, of the owner of the site, of any architect, planner, designer, or engineer responsible for preparation of the plan, and of any authorized representative of the applicant;
- (3) The proposed use of the site and buildings;
- (4) The current zoning of the proposed development site and any other zoning within three hundred feet of the site;
- (5) Total area of the development site and of existing and proposed impermeable surfaces to an accuracy of one-hundredth acre;
- (6) The proposed number of dwelling units in the development;
- (7) The proposed area in square feet of existing and proposed gross commercial floor area;
- (8) A description of existing and proposed commercial or industrial uses;
- (9) A site plan drawing of one or more sheets at a scale of not less than one inch to one hundred feet showing, at minimum:
  - (A) The location of all existing and proposed structures, including buildings, fences, culverts, bridges, roads, and streets,
  - (B) The boundaries of the property proposed to be developed,
  - (C) All proposed and existing buildings and setback lines sufficiently accurate to ensure compliance with setback requirements,
  - (D) All areas, if any, to be preserved as buffers or to be dedicated to a public, private, or community use or for open space under the provisions of this title,
  - (E) All existing and proposed easements,
  - (F) The location of all existing and proposed utility structures and lines,
  - (G) Existing and proposed stormwater retention, drainage, and treatment systems,
  - (H) All means of vehicular and pedestrian ingress and egress to and from the site and the size and location of driveways, streets, and roads,
  - (I) The location and design of off-street parking areas, showing their size, locations of internal circulation, and parking spaces,

- (J) Landscaping location and type;
- (10) Contours of sufficient interval to indicate the topography of the entire tract for a sufficient distance beyond the boundaries of the proposed project, as follows:
  - (A) Up to five percent slope--two foot contours,
  - (B) Five percent and greater slope--five foot contours. (Ord. 1146 §2(part), 1998).

17.36B.050 Review. The site plan review board (the city public works director; representatives of building, utility, and transportation services; and a member of the city planning commission) shall review the proposed site plan for compliance with the provisions of this chapter and other applicable laws and regulations. The board may require additional information necessary for such review. The board shall determine whether the proposed use is served and makes adequate provision for the public health, safety, and general welfare. (Ord. 1146 §2(part), 1998).

17.36B.060 Findings and conclusions. A proposed binding site plan and any dedication shall not be approved unless the board makes written findings that:

- (1) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage, and general welfare and for such 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 (if applicable), sidewalks, and other features assuring safe walking conditions for students who only walk to and from school;
- (2) The public use and interest will be served by the platting of such binding site plan and any dedication;
- (3) The proposed binding site plan is in conformity with applicable zoning and other development regulations;
- (4) Public facilities impacted by the proposed binding site plan will be adequate and available to serve the binding site plan concurrently with the development of a plan to finance needed public facilities in time to assure retention of an adequate level of service;
- (5) The project is within an approved sewer service area for projects on sewer, and adequate capacity exists or is planned with funding sources in place.

Upon such findings the binding site plan shall be approved. The board may require dedication of land to a public body, provision of public improvements to serve the binding site plan, and/or impact fees as a condition of binding site plan approval. Dedication shall be clearly shown on the plat. The board shall not as a condition of approval of any binding site plan require a release from damages to be procured from other property owners. (Ord. 1146 §2(part), 1998).

17.36B.070 Amendment. A site plan approved by the board shall not be altered unless such amendment is approved by the board. If such amendment is determined to be substantial, the board may require that a new site plan be submitted. (Ord. 1146 §2(part), 1998).

17.36B.080 Dedication. A site plan shall not be finally approved until or concurrent with a dedication of required rights-of-way, easements and land. (Ord. 1146 §2(part), 1998).

17.36B.090 Development. Development permits, including grading permits and building permits, may be issued concurrently with site plan approval, but all such permits shall require a certificate of occupancy under the UBC for use and no such certificate shall be issued unless all dedications and public facilities and services necessary to serve the project and other improvements called for by the site plan are complete and have been accepted by the city, or adequately guaranteed for timely completion through bonds approved by the public works director. (Ord. 1146 §2(part), 1998).

17.36B.100 Duration of approval. (a) Approval of a binding site plan shall be effective for a period of between two and ten years from the date of approval by the board on such terms and interim milestones as the board may deem appropriate. During this time the terms and conditions upon which approval was given will not be changed without the approval of the board.

(b) Whenever a planned use of a land is to be implemented in phases over a period of more than three years, the applicant may submit an application requesting review and approval of a phased development plan. Approval may be granted for an extended period of development upon finding that such plan is of sufficient flexibility to vary with changing circumstances and that such approval is in the public interest. Such application shall outline and such approval shall specify with particularity which aspects of the site plan are vested and which are subject to subsequent changes in city or other standards or regulations. The approval of such phased plan shall identify the duration of the approvals granted. (Ord. 1146 §2(part), 1998).

17.36B.110 Appeals. The decision of the board may be appealed to the city council as record review under Chapter 36.70C RCW. (Ord. 1146 §2(part), 1998).

17.36B.120 Design standards and improvements. All site plans are subject to and shall comply with those construction and facility improvement standards set forth in city development standards or as may be approved through the PUD process. (Ord. 1146 §2(part), 1998).

17.36B.130 Increased public service standards, roads, sewer, water, stormwater. If a building or occupancy permit is sought after final site plan approval which would result in a greater density or different use than that approved for the original development, higher public services may be required as a result. The building permit shall not be granted until the public services serving the lot are built to the higher standard or an agreement and bond to guarantee such construction is accepted by the city. (Ord. 1146 §2(part), 1998).

17.36B.140 Waiver of standards and provisions. To invite innovative design within a PUD, when a proposed site plan would conflict with any engineering standard or provision of the city development code pertaining to sewer, water, road, or stormwater standards, the board may modify such standard or provision upon finding that the proposal is consistent with sound engineering practices, the proposal will better serve the PUD than the city standards, and the city will not otherwise be harmed by the change. (Ord. 1146 §2(part), 1998).

17.36B.150 Noncompliance with site plan. Development of the area subject to the approved site plan shall conform with the approved site plan. Any development, use, or density which fails to substantially conform to the site plan as approved by the board constitutes a violation of this chapter. The city may order stop work on any such violation and may decline to issue any approvals or permits within the plan area until the violation is corrected. (Ord. 1146 §2(part), 1998).

17.36B.160 Effect of approval. A binding site plan shall be governed by the terms of approval of the final plan for a period not less than five years. Approved lots in a binding site plan shall be a valid land use notwithstanding any change in zoning for a period of five years from the effective date of the final decision approving the binding site plan. A final plan shall vest the lots within such plan with a right to hookup to sewer and water for a period of five years after the date of recording of the final plan. Thereafter, hookup to sewer and water shall be available on a first-come, first-served basis as measured by the date of application for building permits, and subject to adequate capacity being available in the system. (Ord. 1146 §2(part), 1998).

17.36B.170 Violation. Any use of land which requires site plan review and approval as provided in this chapter for which approval is not obtained constitutes a violation of this chapter. Where a violation is determined to occur, the city may (1) issue a stop work notice until the violation is cured, (2) refuse to issue any permit or approval on the site until the violation is cured, and/or (3) take such other steps as authorized by the City Code, State Building Code, and/or the laws of the state of Washington. (Ord. 1146 §2(part), 1998).

## Chapter 17.40

### BOARD OF ADJUSTMENT

#### Sections:

- 17.40.010 Established.
- 17.40.020 Membership.
- 17.40.030 Appointment.
- 17.40.040 Officers.
- 17.40.050 Meetings.

17.40.010 Established. There is established a board of adjustment which shall have the powers and duties provided in this title. (Ord. 1146 §2(part), 1998).

17.40.020 Membership. The board of adjustment shall consist of five members all of whom shall serve without salary. Their terms shall be for four years, and they may be reappointed, provided no individual shall serve more than eight consecutive years. No member of the planning commission or city council shall be a member of the board of adjustment. (Ord. 1146 §2(part), 1998).

17.40.030 Appointment. The members shall be appointed by the mayor with the consent of the council and shall consist of residents of the city having an understanding of the benefits of zoning to the municipality. In case a vacancy should occur, for any cause, the mayor shall fill such vacancy for the unexpired portion of the term by making an appointment with the consent of the council. The members of the board may be removed by the mayor, subject to the approval of the council, for such causes as he shall deem sufficient, which shall be set forth in a letter filed with the council. (Ord. 1146 §2(part), 1998).

17.40.040 Officers. The board of adjustment shall elect a chairman and vice-chairman from among its members. The secretary of the board of adjustment shall be the city



**CITY OF WESTPORT  
PLANNING COMMISSION**

**SHORELINES SUBSTANTIAL DEVELOPMENT PERMIT  
CONDITIONAL USE PERMIT**

**LINKS AT HALF MOON BAY**

This matter concerns applications filed by Mox Chehalis LLC for issuance of a Shoreline Substantial Development Permit and Conditional Use Permit for a master planned resort development known as the Links at Half Moon Bay in the City of Westport. Pursuant to WMC 17.32.080, the City of Westport Planning Commission held a public hearing on these applications on September 10, 2003. After consideration of the written comments and testimony submitted at the hearing, the Planning Commission now enters the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

**A. Application / Background**

1. On July 10, 2003, Mox Chehalis LLC filed a Joint Aquatic Resources Permit Application (JARPA) seeking approval of a Shoreline Substantial Development Permit and Shorelines Conditional Use Permit. After receiving comments from the City, a revised JARPA was submitted on July 28, 2003. Exhibit A. The revised JARPA application was determined to be complete by the City of Westport and a Notice of Complete Application and Notice of Public Hearing was issued on August 8, 2003. Exhibit F. This notice was mailed to property owners of record within 300 feet of the subject site. On August 14, 2003 this notice was also published in *The Montesano Vidette*, and in *The South Beach Bulletin*.
2. This proposal was the subject of a prior application and hearing in 2001. On May 31, 2000, the City issued a Determination of Significance and Request for Comments on Scope of EIS. On November 1, 2000 the City issued a Notice of Availability of Draft Environmental Impact Statement. On March 23, 2001 the City issued a Notice of Availability of Final Environmental Impact Statement.
3. The application seeks shoreline permits to implement a master plan for development of the subject property that was approved by the Westport City Council on October 8, 2002, when it adopted Ordinance 1277. Exhibit G.3. The ordinance approving the Master Plan was challenged by Friends of Grays Harbor (FOGH) in a Land Use Petition Action entitled *Friends of Grays Harbor v. City of Westport, et.al.*, Thurston County Superior Court No. 02-2-1982-8. On May 21, 2003, the Thurston County Superior Court entered a judgment affirming the City Council's approval of Ordinance 1277 and finding the Environmental Impact Statement issued in 2001 to be adequate. Exhibit G.4.

4. An Addendum to the Environmental Impact Statement was prepared and adopted by the City on August 8, 2003.
5. On September 10, 2003, a public hearing was held at Ocosta High School, 2580 South Montesano Street, Westport, WA, 98595. All witnesses were sworn and testimony and exhibits were considered. The Planning Commission admitted the following Exhibits:
  - A. JARPA
  - B. DEIS
  - C. FEIS
  - D. Addendum (including transmittal letter & adoption form)
    - D.1 Attachment 2 of Addendum (Draft Natural Resource Management Plan)
  - E. Office of Permit Assistance Determination that project qualifies under SB 5776
  - F. Completeness Determination and Hearing Notice
  - G. Staff Report
    - G.1 Westport Shoreline Master Program (Chapter 9 of "The City of Westport Comprehensive Plan" and Chapter 17.32 WMC)
    - G.2 City of Westport Zoning Map
    - G.3 City of Westport Ordinance No. 1277
    - G.4 Judgment and Order Affirming Land Use Decision (including transcript of oral decision)
    - G.5 Port Master Plan (excerpts concerning Westport)
  - H. Declaration of Pacific International Engineering re: erosion issues
    - H.1 South Jetty Sediment Processes Study
    - H.2 South Beach Shoreline Change Analysis
    - H.3 Draft Env. Assessment, HMB Transition Gravel & Cobble Placement
    - H.4 Corps Public Notice, HMB Transition Gravel & Cobble Placement
    - H.5 Curriculum Vitae for P. Osborne
  - I. Public Comment Letters
    - I.1. Greta Davis
    - I.2. Ginger Wireman
    - I.3. Ellen Pickell
    - I.4. Board of County Commissioners
    - I.5. Dorothy & Bert Harrison
    - I.6. Westport Charterboat Association—Mark Cedergreen
    - I.7. Gabriel Van Lelyveld
    - I.8. Linda Orgel

- I.9. Washington Environmental Council—Jerry Gorsline
- I.10. Katherine J. Undis
- I.11. Lou Burell
- I.12. Wildlife Forever of Grays Harbor—Dean Schwickerath
- I.13. David Hamm
- I.14. S. Gilfillan
- I.15. Delwin D. & Barbara J. Fandrich
- I.16. Willapa/Grays Harbor Oyster Growers Association—Brady Engvall
- I.17. Carol Sunde
- I.18. Teri Franklin
- I.19. George F. & Judith A. Hoefling
- I.20. Lavern & Dorothy Adkins
- I.21. Abraham Ringel
- I.22. Gregory Brooks
- I.23. Grays Harbor Paper—Patrick D. Quigg
- I.24. Quigg Bros., Inc.—John Quigg
- I.25. Wildlife Forever of Grays Harbor
- I.26. Better Bricks Daylighting Lab Seattle—Joel Loveland
- I.27. Bett Simpson
- I.28. Matthew Zepeda
- I.29. Department of Ecology—Linda Hoffman
- I.30. WA State Department of Transportation
- I.31. Surfrider Foundation – Ian Miller

**J. Lowney Exhibits**

- J.1. Submittal from the official record
- J.2. Comment Letter and Submittal received 9/10/03
- J.3. FOGH Submission 1
- J.4. FOGH Submission 2
- J.5. FOGH Submission 3
- J.6. FOGH Submission 4
- J.7. FOGH Submission 5

**K. Applicant Exhibits**

- K.1. Testimony of Rick Robbins
- K.2. Testimony of Frances Naglich
- K.3. Testimony of Jeffrey Bradley
- K.4. Testimony of John Lape
- K.5. Testimony of Doug Howie
- K.6. Testimony of Charles Peacock
- K.7. National Geographic's article titled "Greener Golf"
- K.8. Groundwater study by Economic Engineering Services.

**B. SHORELINES JURISDICTION**

- 6. The current application seeks approval of a Shoreline Substantial Development Permit for

construction of two hotels, conference center, retail buildings and eight condominium buildings containing 200 dwelling units. A Shorelines Conditional Use Permit is sought for approval of the golf course, club house, maintenance and other appurtenant facilities. A Shorelines Conditional Use Permit is required because the applicant proposes to fill wetlands as part of the golf course proposal. WMC 17.32.050(6).

7. The proposed project site includes development within the "Westhaven Area" of the Shorelines defined by WMC 17.32.020 (Definition of Shorelines part A). The proposal also seeks to fill certain delineated wetlands in the JARPA (Exhibit A.14) and map titled Wetland Delineation. These wetlands are associated interdunal wetlands within shoreline jurisdiction and lie within the designated urban environment shown on the City of Westport Official Comprehensive Land Use, Shoreline & Zoning Map. Exhibit G.2. The delineated wetlands are within shoreline jurisdiction as defined by WMC 17.32.020 (definition of Shorelands part (c)).

### **C. PROJECT DESCRIPTION / SITE FEATURES**

8. The project is proposed on a 355 acre site divided by Jetty access Road into two parcels. The northerly parcel is approximately 55 acres and is the proposed location for the hotels, conference center, retail and golf course clubhouse. The southerly parcel is approximately 300 acres and is the proposed location for the golf course and condominium cluster. The site is located in the northwest portion of the City of Westport adjacent to Westhaven State Park, with approximately 2,600 lineal feet of Pacific Ocean frontage to the west, in Section 1, Township 16 North, Range 12 West, Willamette Meridian. Half Moon Bay lies to the north and northwest of the project site. The Point Chehalis Revetment lies between Half Moon Bay and the proposed location of the hotels. The property is bounded on the south by Westport Light State Park.
9. The Links at Half Moon Bay is proposed as a two-phase project. Phase 1 includes construction of the golf course and hotel/conference center complex. Phase 2 depends on the timing of capacity improvements to the city's water system. For this permit, the Links at Half Moon Bay seeks construction approval of the 18 hole links style golf course, golf clubhouse together with maintenance shop, condominiums, conference center and luxury hotel. The luxury hotel and conference center are proposed to be 6 stories and 84 feet in height. The proposed building footprint is 94,100 square feet, including a parking garage beneath the building, and will contain 200 guest rooms.
10. The applicant proposes two one-story retail buildings with a building footprint of 8,000 square feet each. The buildings will be not more than 26 feet in height.
11. The applicant proposes an economy hotel adjacent to the luxury hotel/conference center. The economy hotel will be on a footprint of 40,710 square feet, contain 5 stories, underground parking and a maximum height of 70 feet. The economy hotel is proposed for construction during Phase II of the development.
12. The applicant proposes a cluster of eight buildings containing 200 condominium units on

the southerly 300 acre parcel. Such buildings are located over 200 feet from the marram grass line along Half Moon Bay to the north and the Pacific Ocean to the west. Exhibit A.4A.

13. Appurtenant construction under the shoreline substantial development permit includes water, sewer and other utility services, hotel boardwalk, hotel parking and related road work as shown on site plans submitted by the applicant. The shoreline substantial development permit does not authorize construction until other permits are issued. The project requires a binding site plan approval under Westport Municipal Code chapter 17.36B. It also requires approval under Section 404 of the federal Clean Water Act for wetland filling.
14. From Half Moon Bay, the project including golf course, hotels and conference center lays a minimum of 400 feet landward of the OHW mark and over 300 feet landward of the associated V Zone landward boundary. Although the budget hotel lies within in an A0 flood zone, this portion of the proposed project does not lie within shoreline jurisdiction in the Westhaven shorelands segment.
15. The large majority of the property is currently undeveloped. The western portion of the property contains the Westport Light Trail, which provides a pedestrian trail connecting Westhaven State Park and Westport Light State Park. This trail will not be altered by the proposed development. The remaining portions of the property are undeveloped and occasionally have unauthorized camping, hiking and off-road vehicle use. The unauthorized use of the property has resulted in littering and degradation of sensitive areas, including wetlands.
16. Six upland plant communities were identified on the subject property during the EIS process. The plant communities were identified and described primarily on the basis of species composition. They are: American Beachgrass Community; American Dunegrass Community; European Beachgrass Community; Meadow; Scotch Broom; Upland Forest. The American Beachgrass and American Dunegrass Communities have stabilized the foredune. The European Beachgrass Community occurs in both the foredune and the deflection plain areas. The Meadow, scotchbroom and Upland Forest Communities inhabit the drier knolls and ridges of the deflection plain, and they represent increasingly more stabilized dunes and higher successional communities.
17. The wetlands on the site are threatened by invasive, non-native plant species, particularly Scotch broom which covers approximately 50 acres of the site with infestation 30 percent or more. Testimony of Naglich. Absent human intervention, the proliferation of scotch broom and other non native species will continue and threatens loss of wetland habitat and significant deterioration of wetland functions and values. The proliferation of scotch broom could double or triple in size in the next ten years and could interrupt the natural succession of native plants and diminish native plant diversity. *Id.*
18. Based on information from the Washington State Department of Fish and Wildlife, Priority Habitats and Species Program, five ETS terrestrial animal species occur in the

vicinity of the site. They are: bald eagle; marbled murrelet; brown pelican; snowy plover; Oregon silverspot butterfly.

19. The project site does not support a significant migration route for most terrestrial species such as most mammals, amphibians, and reptiles. However, the entire Grays Harbor vicinity is recognized as a significant migratory stopover for over 20 species of shorebirds. The diverse interior habitats are likely utilized by a variety of migrating songbirds. However, the inland areas on-site are not recognized as a significant migratory stopover for songbirds. Migrating waterfowl, primarily dabblers such as mallards, are likely to occupy on-site wetlands during migration. However, waterfowl presence is likely infrequent because ponded water is limited on-site.
20. Aquatic habitat is limited to the marine coastline located along the western site of the site. The tidal and subtidal shoreline consists of unconsolidated substrate comprised entirely of sand. This is considered a priority habitat by Fish and Wildlife. Driftwood is abundant in the vicinity of the hightide line adjacent to the foredunes. The remaining portion of the shoreline is generally devoid of natural debris and vegetation.
21. Based on information from Fish and Wildlife Priority Habitats and Species Program and NOAA Fisheries, five ETS species could occur in the vicinity of the site: Coastal Cutthroat Trout; SW Washington Coho Salmon; Leatherback Sea Turtle; Green Sea Turtle; Loggerhead Sea Turtle.
22. Because no aquatic habitats occur on-site, the site does not provide migration routes for aquatic species. The marine habitat adjacent to the site is occupied by a variety of fish and other marine species. Many of these species undergo cyclic migrations.
23. The surficial geology of the proposed project area is characterized by nonglacial beach deposits of the Holocene Epoch. Native soils consist almost exclusively of fine sand. It appears sand and gravel deposits along with small layers of silt and clay extend to a depth of greater than 400 feet in portions of the spit. The proposed project site is located on the northern tip of an approximately 4-mile long sand spit referred to as the Westport Peninsula. On-site geologic landforms include sandy beaches, active sand dunes, depressions between sand dunes, stabilized sand dunes, and wetlands.
24. In general, on-site soils consist primarily of deep sand deposited by wind and wave action from the Pacific Ocean. The majority of the site consists of Soil Type #35 (Dune Land), which is a deep and well-drained type with fine sand; this soil type contains active dunes continually shifted by ocean winds and interdunal areas. Ground water is often encountered on-site in perched ground water bearing zones. During the rainy winter months, ground water is occasionally encountered at or near ground surface.
25. The topography of the Westport Peninsula is characterized by gently sloping sandy beaches and sand dunes. Elevations at the site range from sea level to approximately 20 feet. Daily sea level fluctuations at the City of Westport due to tides typically range from 8 to 12 feet. Significant man-made topographic features in the vicinity of the proposed

project include the United States Coast Guard Tower, remnants of the Hoquiam Radio Range Station, City Wastewater Treatment Plant, South Jetty, and sand stockpiles on top of the Point Chehalis Revetment. In general, the land where the proposed project is located is flat with an overall slope of approximately 0 to 3 percent. Individual sand dunes may have slopes of up to 30 percent. The site is not located near wave cut sea cliffs, steep hillsides, or other landforms associated with slope failure. The potential for flood hazards are relatively high in the City and surrounding areas since developed areas are located on relatively flat land immediately adjacent to the Pacific Ocean. The proposed location of the budget hotel and the proposed location of the eastern half of the links are within the 100-year flood area (Zone A). A portion of the western boundary of the site is located within the 100-year coastal flood area propagated by wave action. Regulations for development within designated flood hazard areas are specified in the City's Municipal Code, Chapter 15.12. The City's code requires the minimum elevation for new structures in designated 100-year flood areas to be at least 1-foot above the 100-year base flood elevation. The City restricts new construction in Zone V unless the structure is water-dependent or provides public recreational access to the shoreline.

26. Both surface and ground water is highly variable during the year. Surface water, if any, generally flows north and east where it enters drainage ditches that discharge into maintained roadside ditches. The site contains no natural streams, developed storm water facilities, or established waterways that would convey significant surface flow. Surface water occurs on the site from precipitation during storm events and high ground water levels resulting in inundation of wetlands. The most significant conveyance structure is a constructed ditch located on the east boundary along Forrest Avenue. It conveys surface water runoff from Forrest Avenue and accumulates subsurface flows north to an existing culvert, where flows cross Forrest Avenue and continues east towards South Bay. Because the ditch does not convey significant flows originating from surface water runoff from the site, water which occurs on the site via precipitation is assumed to be stored in wetlands and/or lost to a combination of evapotranspiration and ground water recharge.
27. Jurisdictional wetlands within the boundaries of the project site were delineated between February and August, 2000. A total of 167 wetlands were flagged and subsequently surveyed and mapped, for a total of 148 acres. Wetlands on the project site are comprised of emergent (25 acres), scrub-shrub (12 acres), and forested vegetative communities surrounded by uplands vegetated with European beachgrass, scotch broom, and shore pine (111 acres). Hydrology at the site is influenced by both surface water and ground water and is highly variable throughout the year. The majority of the wetland areas are inundated during the winter months and dry during the summer months.

#### **D. SHORELINE MASTER PROGRAM REQUIREMENTS**

28. The bulk and height of the hotel and conference center alters the Marina skyline. It will be visible from adjacent properties, including Westhaven State Park. This change to the skyline is logical and expected for this urban shoreline. Views from Westhaven State Park, as well as other areas accessible by the public were presented by the JARPA (Exhibit A. 22A - E). The proposal will not block the view of the shoreline of a

significant number of residences adjoining such shorelines and complies with WMC 17.32.060(g)(4). The adjoining property does not contain residences. The hotels will be visible from the marina district, which is predominantly commercial. No testimony was introduced indicating that the project will block residential views. The existing views from the marina district of Westport, as shown on Exhibit A.22D, indicate that the Pacific Ocean is not visible from the public viewing tower. Thus, the proposal will not block views of the water from the marina district.

29. The condominiums will be visible from Westhaven State Park and the Westport Light Trail, as indicated on Exhibits A.22A and A.22.E. The condominiums are oriented so that they are landward of the state park property and will not block views of either the Pacific Ocean or Half Moon Bay.
30. The proposal utilizes existing roadways and proposes improvements to Jetty Access Road, which currently connects Westhaven State Park to Montesano Avenue. Utilities are proposed to be located in road right of way to the extent feasible as shown on Exhibit A.10 – A.13. By using existing rights of way, the proposed roads and utilities avoid high energy areas to the extent possible. The improvements to Jetty Access Road are within existing road rights of way and will not adversely impact wetlands.
31. The project meets the 200 foot building setback requirements in WMC 17.32.050(8). In opposition to the proposal, Friends of Grays Harbor (FOGH) argued that the roads, utilities and infiltration ponds are within the 200 foot setback and that the setback lines were not properly delineated. FOGH presented no expert testimony to contradict the delineation of the Ordinary High Water Mark and marram grass line provided by the applicant's consultants, Economic and Engineering Services (EES) or to offer an alternative delineation showing that the proposal is within 200 feet of the marram grass line. Exhibit A.4A shows that no development of any building is proposed within the 200 foot setback area. The marram grass line and OHWM depicted by EES is consistent with the EIS, the Addendum and depictions used by the Army Corps of Engineers in evaluating erosion near the South Jetty. Absent any expert testimony to support FOGH's assertion that the EES delineation is erroneous, the delineation of the OHWM and Marram grass line are found to be accurate. Moreover, the setback line required in WMC 17.32.050(8) applies to "buildings", not to infiltration ponds, roads, or utilities.
32. The hotel, conference center and golf course clubhouse are located in the TC zone, which is designed to accommodate new commercial uses. WMC 17.32.055(1). These structures are commercial development and take advantage of significant views of Half Moon Bay and the surrounding area. Parking is provided away from the water's edge and landward of the structures from the beach. These structures comply with the requirements for commercial development in WMC 17.32.055(1).
33. The condominiums are residential uses allowed by WMC 17.21.020. The condominiums are located along Jetty Access Road, which will be improved to include sidewalks and bike paths facilitating access to Westhaven State Park. The City of Westport has constructed a trail connecting the marina district with Westhaven State Park, which lies

across Jetty Access Road from the condominiums. No overwater residential construction is proposed. During construction of the condominiums, the developer will use best management practices to prevent erosion and protect existing vegetation. The site will be connected to City water and sewer services. Exhibit A.12. The site will be restored pursuant to the site's landscaping plan. Exhibit A.17D. The condominiums comply with the requirements for residential development in WMC 17.32.055(2).

34. The proposal includes landscaping plans indicating how the site will be restored upon completion of construction. Exhibit A.17A – D. Sidcasting of construction debris will not be allowed and all construction waste materials will be hauled off-site. Restoration is necessary only for cleaning up construction areas and removal of litter, debris and solid waste resulting from construction activities. The applicant does not propose to dispose of construction debris or other solid waste on site.
35. The project will increase demand for public access to the shorelines. The golf course increases direct access for recreational use of the shorelines. Provision of recreational facilities is a priority use in the shorelines under WMC 17.32.055(13). Additional public access will be provided by connecting the hotels and conference center to the existing City of Westport Trail and by creating additional public access from the Westport Light Trail to public beaches along the Pacific Ocean to the west of the marram grass line every 660 linear feet.
36. The developer proposes to manage stormwater at the golf course through a natural drainage system designed to take advantage of the well drained sandy soils located on-site. The proposal is to allow runoff to infiltrate into the ground as near as possible to the location where it lands. The proposal eliminates the need for underground piping or catch basins at the golf course and meets the requirements of the latest version Storm Water Management Manual(s) for Western Washington. Testimony of Howie.
37. Other areas of the project will be drained through more traditional treatment facilities. Runoff from impervious surfaces will be collected, treated and detained to remove pollutants and reduce flow rates. See Exhibit A.7A – 8.D. This is done in compliance with the requirements of the Stormwater Manual. Testimony of Howie. No expert testimony was introduced to contradict the testimony of Mr. Howie that the stormwater systems meet the requirements of the Drainage Manual and will protect water quality. Thus, the proposal provides adequate control and treatment of stormwater as required by WMC 17.32.060(i).
38. Maintenance activities associated with the hotel complex, condominiums and associated commercial development are not anticipated to result in heavy use of these pesticides, herbicides and fertilizers. Maintenance on the golf course will include mowing, fertilization, irrigation, cultivation and the use of Integrated Pest Management. The use of pesticides, herbicides, and fertilizers can lead to adverse impacts on the local environment and health. The City of Westport's water supply is partially located to the south of the site. Expert testimony supplied by Dr. Peacock indicated that water quality will not be impacted by the golf course proposal if the Signature program and the Natural

Resource Management Plan are followed.

39. A Natural Resources Management Plan has been developed for the golf course. Exhibit D.1 (EIS Addendum Attachment 2). The focus of the NRMP is on prevention of environmental problems by incorporating Best Management Practices (BMPs) into the design of the golf course and maintenance facility, and the use of Integrated Pest Management (IPM) to control pests; control potential problems through appropriate turfgrass cultural practices; and detection by conducting an environmental monitoring program that evaluates the effectiveness of the management program.
40. Dr. Charles Peacock, an expert with Audubon International, testified concerning the ability of the NRMP to protect water quality. He has significant experience working with golf courses through the Audubon Signature Program and authored the NRMP for this project. From his experience, no golf course that maintained certification in compliance with the Signature Program has suffered any significant adverse impacts on water quality or a violation of water quality standards. Dr. Peacock opined that the proposal will not adversely impact water quality in Half Moon Bay or in Grays Harbor. He further testified that it will not cause any adverse impacts on shellfish areas located near the Elk River Estuary.
41. Other witnesses testified that BMPs and IPM strategies have been used by cranberry growers in the area to successfully protect water quality in the area. The BMPs and IPM strategies in the NRMP will protect water quality from measurable adverse impacts due to operation of the golf course.

#### **E. WETLANDS ISSUES**

42. The golf course is permitted in the urban environment at this site. The layout of the golf course is such that fairways, greens, paths, bridges and the driving range enter shoreline jurisdiction and fills required to build these features are proposed within delineated wetlands. The master program generally prohibits wetland fills in the urban shoreline environment except as provided in WMC 17.32.065(d)(1), which allows exceptions to buffer and filling restrictions when necessitated by public use needs. One of the enumerated public uses for which exceptions are provided is for recreation. WMC 17.32.065(d)(1)(I).
43. The golf course layout is integrated with other aspects of the proposed master plan development described in the EIS and application. The golf course layout mitigates impacts to wetlands first by avoiding wetland impacts where possible. The golf course generally satisfies WAC 173-27-160(1)(b) and avoids and mitigates wetlands impacts to the greatest extent feasible.
44. The golf course satisfies a public use need. Filling of wetlands is necessary to allow construction of a public golf course that provides needed recreational opportunities in the shoreline. The Shorelines Master program comprehensive plan policies contemplate that Westport will be a major destination recreation center associated with golf and

conference activity. Exhibit G.1, (Comprehensive Plan, Ch. 9 at 41). According to the uncontradicted expert testimony, filling of the wetlands is necessary for construction of the golf course. Testimony of Robbins, Ex. K.1. After multiple revisions, the amount of fill required for the golf course was reduced to 9.96 acres. The design of the golf course will not remove any dunes and will use the dunes as a prominent feature of the course.  
*Id.*

45. Those opposed to the proposed golf course suggested that an alternative design, such as a 9 hole design or one using the upland location of the condominiums be substituted for the design created by Mr. Robbins and proposed by Mox Chehalis. No expert testimony was presented that indicated it would be feasible to do so. Mr. Robbins testified that a 9 hole design would not meet the requirements of the golfing community and would not be sufficient to support the demands of a resort as proposed and allow for any local play. He further testified that the design impacted wetlands only where there was no viable alternative to the routing of a golf hole and only to the extent necessary to create a playable course. No testimony contradicted Mr. Robbins on these points. In light of Mr. Robbins testimony, an alternative design would not be feasible nor is there any evidence supporting the argument that it would result in fewer impacts to wetlands. The design proposed by the applicant minimizes wetlands impacts to those necessary for construction of the golf course.
46. The proposed golf course will be open and available to the public. It provides opportunities for recreation by allowing refreshment of body and mind through forms of play, amusement and relaxation. WMC 17.32.055(13). Because the public will have increased recreational access within the shoreline area, this is a priority use under WMC 17.32.055(13)(A). The golf course is a needed public use within the meaning of WMC 17.32.065(d). It is therefore exempt from buffer requirements and filling is allowed pursuant to WMC 17.32.065(d)(1).
47. The mitigation proposed in the Wetland Mitigation Plan is consistent with the requirements of WMC 17.32.065(e). The applicant provided a delineation report that was not contradicted by any qualified expert testimony. The report identifies wetlands on the western portion of the 300 acre parcel and Wetland HMB on the 55 acre parcel as Category III wetlands. The wetlands on the eastern portion of the 300 acre parcel are classified as Category II wetlands. Exhibit A.14; Naglich testimony.
48. Buffers along Category II wetlands are required to be a minimum of 50 feet from any structure. In the area adjacent to the condominium cluster, the proposal meets this standard by buffer averaging as allowed by WMC 17.32.065(e)(1). Exhibit A.17E demonstrates that the applicant will increase buffers surrounding wetlands lying within 50 feet of the condominium building. The total square footage of the buffer areas surrounding these wetlands using 50 foot buffers is 1.12 acres or 49,222 square feet. The proposed buffer area is equal to this amount. The minimum width of the buffer is not less than 25 feet. Additionally, WMC 17.32.065(e)(1) requires that all additional areas used for buffer averaging be enhanced. Therefore, all increased buffer areas shall be required to be planted with native wetland species as proposed by the wetlands mitigation plan.

This will ensure protection of the wetland area. No expert testimony was presented by opponents that the buffer averaging requirements were not met by the proposal as shown in Exhibit A.17E.

49. The area surrounding Wetland HMB also relies upon buffer averaging. A 50 foot buffer is required for this wetland under WMC 17.32.065(e). Exhibit A.17F demonstrates that the minimum square footage required for buffers is .009 acres or 3,917 square feet. The proposal increases the buffer by adding 3,917 square feet as additional buffer area. It will be planted with native plants to ensure protection of the wetland area. No expert testimony was presented by opponents that the buffer averaging requirements were not met by the proposal as shown in Exhibit A.17F.
50. The Wetland Mitigation Plan accurately describes the probable impacts to wetlands and proposes a plan to mitigate these impacts. The proposed mitigation meets the requirement to provide a 2:1 ratio of mitigation for filling of wetlands. The Wetland Mitigation Plan provides more than 2:1 mitigation for the functions and values impacted by golf course construction and the filling. As shown in the testimony of Frances Naglich, the only expert who testified concerning wetlands mitigation, the Wetland Mitigation Plan provides more than a 2:1 ratio in creation and restoration of wetlands, including both on-site mitigation and off-site mitigation. Although the City code does not require mitigation for impacts to buffers, the Wetland Mitigation Plan includes mitigation for buffer impacts by providing preservation of threatened wetlands and enhancement of potentially affected areas. Additionally, the Wetland Mitigation Plan will remove scotch broom and maintain the site to prevent proliferation of non-native species from diminishing the extent of wetlands and deterioration of wetlands functions and values.
51. The June 2003 Wetland Mitigation Plan identifies impacts to 9.96 acres of wetland from direct filling, 14.63 acres of wetland from mowing/pruning, and 0.23 acres from excavation. Total wetland buffer impacts from the golf course fairways are 31.27 acres; however, allowing for credit to be applied for preserving un-impacted wetland buffers of 18.91 acres, the net wetland buffer impact is 12.36 acres. This buffer "averaging" approach was used at the direction of the Department of Ecology. Buffer averaging, or any form of buffer mitigation, is not required for the fairways and practice range by Westport Municipal Code because they are not structures. The methodology for determining net buffer impacts is discussed in the June 2003 Wetland Mitigation Plan. A wetland buffer impact of 0.27 acres occurs adjacent to the condominiums. Other wetland buffer impacts include those related to construction of "structures" associated with the golf course, including raised boardwalks, oyster shell cart paths, comfort stations, and irrigation pump houses. The combined impact for these structures in the wetland buffer is equal to 1.3 acres.
52. Buffers in the traditional sense are not used extensively throughout the golf course area and are exempt under WMC 17.32.065(d)(1). To provide buffer function, wetland edges will be planted with native shrubs and trees.

53. The June 2003 Wetland Mitigation Plan proposes a combination of on and off-site wetland mitigation measures. On-site mitigation includes wetland creation/restoration of 5.21 acres in 21 on-site locations; preservation of 107 acres of at-risk wetlands; upland buffer enhancement of 22.32 acres; wetland buffer averaging and enhancement equal to 1.13 acres; and buffer averaging at the hotel/conference center to mitigate 0.09 acres of buffer encroachment by landscaping. Off-site mitigation includes Firecracker Point (7 acres, Seastrand Bog (14 acres) and Mar Vista (30 acres.) A 10-year post-construction monitoring program will be implemented.
54. WMC 17.32.055(8)(D) sets forth the standards for landfilling in shoreline areas. The proposed filling is designed and located to avoid and minimize impacts to existing ecological values and will not create a hazard to adjacent life, property or natural resource systems.
55. The proposed fill will be vegetated and erosion is unlikely. Adequate provision is made to prevent erosion associated with the fill during golf course construction by complying with BMPs set forth in the Drainage Manual. Fill material will be obtained from sources on site and from clean fill imported from the mitigation site at Firecracker Point. No solid waste will be deposited as fill.
56. The proposed fill is for a priority use under WMC 17.32.055(8)(D)(iv) as a public recreational facility. The proposed fill will not result in reduction of surface water area. It will not impair navigation, water flow or circulation. The proposed fill will not result in a reduction of water quality, provided the golf course maintains best management practices set forth in the Audubon International Signature Program. Any loss of habitat is mitigated as provided in the EIS and wetland mitigation plan.
57. The recommended conditions contained in the Staff Report are appropriate to mitigate expected impacts of the proposal and to meet the requirements of the City Regulations regarding wetland filling.

## **F. COASTAL EROSION**

58. Considerable comment and discussion has been offered regarding the impact of possible future coastal erosion on this site; however, nothing related to this proposal has been demonstrated to have any effects on coastal erosion. The only expert testimony at the public hearing indicated that the coastal areas near the project site have reached a condition of dynamic stability. *Simpson testimony, Exhibit G 26, 27.* No expert testimony was introduced to rebut Mr. Simpson's conclusion that the area has reached a condition of dynamic stability.
59. Opponents rely primarily on statements by the Corps of Engineers which state that erosion will continue and may result in reformation of the breach if left unchecked. The erosion threat adjacent to the South Jetty has not been left unchecked. The Corps of Engineers immediately responded to the initial breach in 1993 by initiating an interim

solution to fill the breach. That action was followed by a study completed in June 1997 which recommended extension of the buried revetment and beach nourishment as a long term solution to the erosion problem. The first phase extended the revetment 1900 feet south along Half Moon Bay in March 1999. The second phase of the revetment extension was modified because the response measures implemented by the Corps were demonstrated to be more effective than initially anticipated in slowing erosion. A modified repair was proposed to construct a wave diffraction mound and gravel transition beach adjacent to the South Jetty. This repair is intended to extend the life of the existing breach fill material and reduce the need for periodic beach nourishment. The construction of the extension to the revetment, the wave diffraction mound and gravel transition beach prevent wave and sediment erosion processes from threatening the development area where structures are to be located.

60. The South Jetty is essential for maintenance of navigation depths in the entrance of Grays Harbor. As a consequence of beach nourishment, the short-term shoreline position trend near south jetty is nearly stable. Since the 1994 breach, several projects have been undertaken by the Corps to protect the south jetty, including construction of the wave diffraction mound, gravel transition beach and placement of dredge sediment on south beach near south jetty. In 2002, the Corps of Engineers completed placement of 135,000 cubic yards of dredge materials to prevent a reoccurrence of the 1994 breach adjacent to the south jetty.
61. The proposed condominium location is over 1200 feet from the location of the 1993 breach adjacent to the South Jetty. The City was aware of the 1993 breach when the Shoreline Master Program and current zoning was adopted in 1998, both of which expressly allow condominiums in this location, subject to a 200 foot setback from the ordinary high water mark. The proposed condominium location is not within a high energy zone or high erosion area ("V Zone") as designated by FEMA. It is several hundred feet away from the area where erosion has been observed in Half Moon Bay in the form of endcutting at the terminus of the gravel transition beach where the Corps currently proposes extension of the gravel transition beach. The applicant has acknowledged that there is some risk from coastal erosion. No bulkheads, rip-rap, or other shoreline protection structures are proposed as part of this project. It is therefore appropriate to inform future purchasers of the risk of coastal erosion by recording an appropriate notice.
62. Expert opinion was considered as to the likelihood of impacts from coastal erosion at the project site. Testimony was heard from Pacific International Engineering, who assisted the Corps of Engineers in designing the wave diffraction mound and in conducting studies to monitor its effects. Pacific International Engineering has extensive experience in evaluating coastal erosion, with the City of Westport and through the Coastal Communities of Southwest Washington. PIE conducts ongoing monitoring along South Beach and Half Moon Bay. In April 2003 and August 2003, Dr. Phillip Osborne, a PIE scientist, co-authored two studies that evaluated erosion along South Beach and Half Moon Bay. Pacific International Engineering testified that, based on the most recent information, it is our opinion that it is unlikely that coastal erosion will impact the Links

at Half Moon Bay project site in light of the responses already adopted or planned to respond to coastal erosion.

63. A second expert, Dr. Jeffrey Bradley, was retained by the applicant to evaluate coastal erosion and the potential for impact on the project site. He has experience working for the Corps of Engineers and is an expert on coastal erosion issues. He testified that based upon his experience, the Corps of Engineers will not allow the south jetty to breach again because it would undermine the Grays Harbor navigation channel. He stated that recurrence of such a breach was the most likely way that the project could be affected by coastal erosion. He concluded that the Half Moon Bay beach configuration would maintain dynamic equilibrium.
64. The opponents presented excerpts of reports prepared during the 1990s to evaluate alternatives when the Corps was evaluating measures to repair the 1994 breach. No expert testimony was presented to evaluate the most recent data and no opinions were offered that the location of the condominiums is likely to be undermined by erosion. Based upon the most recent erosion studies and the uncontradicted testimony of experts at the hearing, there is no substantial evidence to support a conclusion that the site is likely to erode. On the other hand, the expert testimony does support the conclusion that the project site is not likely to erode.

## **II. CONCLUSIONS OF LAW**

1. As conditioned, this proposal is consistent with the purposes of the Shoreline Management Act goals and policies as contained in RCW 90.58.020. The proposed resort hotel/conference center with associated condominiums and golf course preserves, to the greatest extent feasible, the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state consistent with the overall best interest of the state and the people generally. As conditioned herein, the Links at Half Moon Bay proposal is found to be consistent with the policies of RCW 90.58.020.
2. The Shoreline Master Program contains in Chapter 9 of the Westport Comprehensive Plan lists a number of goals and policies applicable to this proposal, particularly goals on economic development, recreation, land use, tourist and commercial activities policies, recreation policies, and urban shoreline environment policies. This proposal is consistent with these goals and policies.
3. The proposal is consistent with the development regulations set forth in the City of Westport Shoreline Master Program, Ch. 17.32 WMC.
4. Chapter 17.32.065 addresses wetlands and critical areas. Section 17.32.065(d)(1) exempts wetland buffer requirements and fill prohibitions when done for public use needs, including public recreation purposes. All wetland buffer exemptions and fill activities proposed with this project are for golf course purposes, are necessary for a public use need and therefore are exempt from the restrictions.

5. As conditioned, this proposal is consistent with the State Shoreline Regulations, WAC 173-27.
6. As conditioned, the Links at Half Moon Bay proposal will not interfere with the normal public use of public shorelines.
7. As conditioned, the Links at Half Moon Bay proposal, its uses and design, is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program.
8. The proposed use will cause no significant adverse effects to the shoreline.
9. The public interest suffers no substantial detrimental effect from the proposal.
10. Cumulative impacts of additional requests for like actions in the area will not occur. This is the only large interdunal site zoned Tourist Commercial that is undeveloped in the city. Substantial adverse effects to the shoreline environment were not found from additional requests for like actions.
11. Environmental Review for this proposal consisted of a Determination of Significance and Request for Comments on Scoping, a scoping meeting, preparation of a Draft Environmental Impact Statement, a 30-day public comment period which was extended by an additional 14 days, preparation of a Final Environmental Impact Statement, and preparation of an Addendum to the EIS. Preparation of the DEIS, EIS and Addendum was under the direction of the City.
12. The DEIS, FEIS and Addendum contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposal. The DEIS, FEIS and Addendum reasonably discuss alternatives, including the no action alternative, and identify probable environmental consequences of these alternatives. The DEIS, FEIS and Addendum include sufficient information on the significant aspects of probable environmental effects that supports a reasoned choice among the alternatives.
13. The DEIS, FEIS and Addendum identify potential adverse environmental impacts that will result from this proposal, and proposed measures to mitigate these impacts where possible and feasible. The DEIS, FEIS and Addendum are found to be in compliance with the State Environmental Policy Act, the SEPA Rules, and with Westport's SEPA ordinance, and are found to be adequate.
14. Adoption of the mitigation measures contained in the DEIS, FEIS and Addendum, along with the mitigation measures recommended elsewhere in this report, will adequately mitigate expected significant adverse environmental impacts caused by this proposal.
15. As conditioned, this proposal will not be detrimental to the public's health, safety, and general welfare.

16. Proper notice of this hearing was given as prescribed by City of Westport ordinances and State regulations.

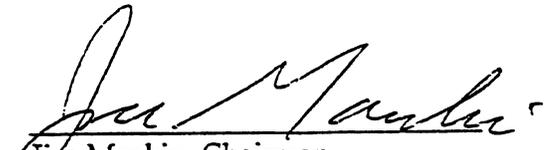
### III. CONDITIONS

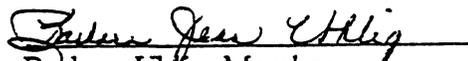
The Shorelines Substantial Development Permit and Conditional Use Permit are hereby APPROVED subject to the following conditions:

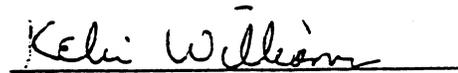
1. Wetland mitigation shall be provided as set forth in the Wetland Mitigation Plan, Exhibit D (EIS Addendum, Attachment 1). Prior to the commencement of any construction of the golf course, the applicant shall provide the City, for review and approval, a Final Wetland Mitigation Plan, as approved by the Corps of Engineers and the Washington State Department of Ecology.
2. Prior to the commencement of any construction of the golf course, the applicant shall submit to the City for review and approval a Final Natural Resource Management Plan prepared by Audubon International. The 18-hole golf course shall only operate after obtaining and maintaining Audubon International certification under their Signature Program. The applicant shall provide the City with a current copy of this certification, or in the event the Signature Program is discontinued, certification by an equivalent program approved by the shoreline administrator of the City of Westport or designee approved by the Mayor. The application of fertilizers, herbicides and insecticides shall be prohibited in the event certification is denied.
3. The design of the stormwater facilities for the proposal shall provide for on-site retention of stormwater; however any emergency overflow shall be directed to the current drainage system that empties into the bay at the north end of the airport.
4. The final golf course layout must be approved by the Corps of Engineers as part of the section 404 Clean Water Act approval process, the Department of Ecology, and demonstrate compliance with the terms and conditions of the Shorelines Substantial Development Permit and Conditional Use Permit.
5. Fencing between the site and Westport Light State Park and along the existing Westport Lighthouse Trail is prohibited.
6. The Applicant shall provide for public access to publicly owned ocean beaches by constructing a natural trail, 5 feet in width, with signage, connecting the existing Westport Light Trail System to the west side of the marram grass line every 660 feet along the ocean side.
7. Prior to commencement of construction of the golf course, a public dedication (or perpetual easement) of the land encompassed by the existing access easement for the Westport Light Trail (Phase 1)) for public access and recreation shall be executed and appropriately recorded.

8. The applicant shall construct an ADA hard surfaced trail system connecting the motel boardwalk to the Westport Light Trail System in Phase 2. Compliance shall be demonstrated at the Site Plan Review.
9. All areas of increased buffer used for buffer averaging surrounding the condominium cluster and Wetland HMB shall be enhanced with native species in the manner described in Section 4.6 of the Wetland Mitigation Plan.
10. Prior to the commencement of any construction, relying in whole or in part, on Jetty Access Road for access, the applicant must present written proof to the City that approved access to the relevant portion of Jetty Access Road has been obtained from the owners of the property (i.e., State Parks, Port of Grays Harbor.)
11. The applicant shall install frontage improvements to Jetty Access Road as shown in Exhibit A.8A – D.
12. The applicant proposes to use natural features to provide stormwater drainage in compliance with the latest version of the Department of Ecology's Storm Water Treatment Manual(s) for Western Washington, and provides for on site storage and treatment. If the design entails an emergency overflow, such overflow shall be drained to the current drainage system that empties into the bay at the north end of the airport. The applicant shall be required to pay the cost of any required improvements to improve the tide gate and culvert passing under North Montesano Street.
13. Prior to the commencement of any construction, the applicant shall present to the City, for review and approval, a plan to make known to future owners and residents within the project that possible future coastal erosion could adversely impact their properties and possessions. The applicant shall be required to record on titles and on condominium declarations a notice advising future owners of such erosion risk.
14. All construction debris and solid waste resulting from construction activities shall be disposed of off site. Restoration shall be accomplished by landscaping in accordance with the landscaping plans set forth in the JARPA.
15. All signage shall comply with the requirements of WMC 17.32.060(h)(1-3). Compliance will be demonstrated prior to issuance of building permits.
16. All of the mitigation measures identified in the Draft and Final Environmental Impact Statements shall be implemented.

Dated this 30<sup>th</sup> day of September, 2003.

  
Jim Mankin, Chairman  
City of Westport Planning Commission

  
Barbara Uhlig, Member  
City of Westport Planning Commission

  
Kelci Williams, Member  
City of Westport Planning Commission





# City of Westport

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Date: October 30, 2003

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Re: Decision of Administrative Appeal of Planning Commission Decision for the Links at Half Moon Bay SSDP and CUP.

Enclosed is the decision of the City of Westport City Council affirming the decision of the City of Westport Planning Commission for the Shoreline Substantial Development and Conditional Use Permit for the Links at Half Moon Bay.

Sincerely,

Ryan Andrews  
City Planner

cc: Charles B. Roe  
Marc Horton  
Jeffrey S. Myers  
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RECEIVED

**BEFORE THE CITY COUNCIL  
FOR THE CITY OF WESTPORT**

FRIENDS OF GRAYS HARBOR and  
WASHINGTON ENVIRONMENTAL  
COUNCIL,

Appellants,

v.

CITY OF WESTPORT PLANNING  
COMMISSION,

Respondent,

MOX CHEHALIS, LLC

Applicant,

and PORT OF GRAYS HARBOR,

Owner.

DECISION ON ADMINISTRATIVE  
APPEAL OF PLANNING COMMISSION  
DECISION APPROVING SHORELINE  
SUBSTANTIAL DEVELOPMENT AND  
CONDITIONAL USE PERMITS

THIS MATTER came before the Westport City Council on October 28, 2003 to consider the administrative appeal of Friends of Grays Harbor and Washington Environmental Council concerning the September 30, 2003 decision of the City of Westport Planning Commission to approve Shoreline Substantial Development and Shoreline Conditional Use Permits for the proposed master planned resort development known as the Links at Half Moon Bay.

An open record public hearing was held on September 10, 2003 before the City of Westport Planning Commission to consider public testimony on a Joint Aquatic Resource Permit Application (JARPA) filed by Mox Chehalis LLC on July 28 2003. The application proposed development of a luxury hotel / convention center, 18 hole championship golf course, and condominiums on two parcels totaling 355 acres in Westport. The property is owned by the Port of Grays Harbor, who has a contract to sell to Mox Chehalis LLC. This proposal was determined to be a qualifying project pursuant to Chapter 393, Laws of 2003.

On September 30, 2003, the Planning Commission issued a written decision approving the application for Shoreline Substantial Development and Conditional Use Permits. On October 8, 2003, Friends of Grays Harbor and the Washington Environmental Council (hereafter collectively referred to as "Appellants") timely filed an administrative appeal of the Planning Commission's decision approving the permits pursuant to WMC 17.32.090.

Pursuant to Westport Municipal Code 17.32.090, the City Council reviewed the  
DECISION - 1

record created at the open record public hearing conducted by the Planning Commission. The Council reviewed the appeal and Statement of Issues submitted by Appellants, a Response filed by Applicant and heard oral argument of the parties.

After reviewing the files and records herein, and being fully advised, the City Council finds as follows:

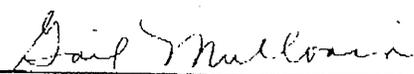
1. The Findings of Fact set forth in the September 30, 2003 Decision of the Planning Commission are supported by substantial evidence in the record.
2. The Conclusions of Law set forth in the September 30, 2003 Decision of the Planning Commission are not erroneous interpretations of the law and are not a clearly erroneous application of the law to the facts.
3. The procedures used by the Planning Commission in consideration of this matter were consistent with Chapter 17.32 WMC and were lawful. Appellants fail to specifically identify what procedural errors are alleged to have been committed.

In consideration of the foregoing, the City Council hereby AFFIRMS the findings of fact and conclusions of law contained in the September 30, 2003 Planning Commission Decision.

This decision is the final decision of the City of Westport. Any appeal of this decision shall be made to the Environmental and Land Use Hearings Board in accordance with Chapter 393, Laws of 2003.

Passed by the Council of the City of Westport this 28<sup>th</sup> day of October, 2003

APPROVED:

  
GAIL MULLVAIN, MAYOR PRO TEM

ATTEST:

  
MARGO R TACKETT, CMC  
CLERK-TREASURER





# City of Westport

740 N. Montesano • P.O. Box 505 • Westport, WA 98595 • ci.westport.wa.us

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February 2, 2004

Chuck Maples  
Mox Chehalis, LLC  
1001 Cooper Point Road SW  
Suite 140-357  
Olympia, WA 98502

Subject: Links at Half Moon Bay Site Plan Review Approval

Dear Chuck:

On December 19, 2003, the City of Westport Site Plan Review Committee reviewed the above-referenced matter. The Committee has **approved** the site plan and application **with conditions** as noted below.

## **CONDITIONS OF APPROVAL:**

### **Planning Department**

1. A detailed planting plan including planting types, schedule, and location shall be approved by the planning department prior to the issuance of building permits. (WMC 17.36B.040(9)(J))
2. Compliance with parking requirements for the number of stalls located under the buildings will be required before issuance of building permits for individual buildings. (WMC 17:36.220)
3. Any off-site areas disturbed during construction shall be restored to the original condition to the satisfactory of the planning department.
4. Grays Harbor Transit shall be consulted prior to construction of street improvements for the necessary installation of transit-related facilities.

### **Building Department**

1. Barrier free parking must be provided on-site in accordance with WAC 51.40, Section 1107.1.6.

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City Hall - Administration  
360-268-0131  
360-268-0921 Fax

Municipal Court  
360-268-0125  
360-268-1363 Fax

Police Department  
360-268-9197  
360-268-1363 Fax

Public Works  
360-268-0835  
360-268-0921 Fax

Fire Department  
360-268-9235

Email:

**BSP 01062**

2. An architect licensed in the State of Washington shall prepare and stamp all building permit plans and specifications submitted with the building permit application. (WMC 15.04.010)
3. A Washington State licensed engineer is required for all structural drawings and specifications associated with the building permit application. (RCW 18.43)
4. All structures shall be designed and constructed in with accordance with the latest edition of the Building, Plumbing, Mechanical, Energy, and Ventilation & Indoor Air Quality Codes as adopted by the City of Westport. (WMC 15.04.010, RCW 19.27, 19.27A )
5. All structures located within special flood hazard areas shall be designed and constructed in accordance with the City of Westport flood damage prevention ordinance. (WMC 15.12)

#### **Water Department**

1. All water system improvements shall be designed by an engineer licensed in the state of Washington and submitted to the City for review and approval. Water system engineering drawings shall be approved by the water department before permits are issued for utilities. (WMC 13.04)
2. Utility easements shall be recorded prior to issuance of permits for utilities.
3. Backflow prevention devices shall be installed at the location of each water meter prior to water being supplied.
4. Water shall be connected to the existing 8" water line located on Dock Street not the 10" line along Harms Street as proposed. Engineering drawings shall be required to reflect this change.

#### **Wastewater Department**

1. All wastewater system improvements shall be designed by an engineer licensed in the state of Washington and submitted to the City for review and approval. Sewer system engineering drawings shall be approved by the wastewater department before permits are issued for utilities. (WMC 13.08)
2. Utility easements shall be recorded prior to issuance of permits for utilities.
3. The applicant shall be required to make improvements to Wastewater Pump Station No. 2 as specified by the City.
4. The applicant shall be required to provide three additional composting bins to the City.

5. Pump stations and telemetry shall meet City specifications (WMC 13.08).
6. Swimming pools shall be de-chlorinated prior to discharge into the wastewater treatment system if the discharge will cause a noticeable affect in treatment quality within the plant.

#### **Street Department**

1. Specifications for street improvements including curb, gutter, sidewalk and stormwater along Harms Street shall be approved by the street department prior to installation of the improvements. (WMC 12.04)

#### **Fire Department**

1. All design elements shall be constructed in accordance with the International Fire Code.
2. Storz fittings or comparable fitting approved by the Westport Fire Department shall be installed on all fire hydrants.

#### **GENERAL FINDINGS:**

The Committee's review of the site plan is based upon the following findings of fact:

1. The subject parcel is located west of N. Forrest St. and N. Montesano St. between Westport Light State Park and Westhaven State Park, located in a portion of Section 1, Township 16N, Range 12W, Westport, Washington. Assessor's parcel numbers: 616120143001, 616120132001, 616120143002, 616120142001, 616120112002, 616120112004, 616121221000.
2. The subject proposal is to construct a 94,100 s.f. luxury hotel and convention center, 18-hole golf course, 40,710 s.f. economy hotel, 19,500 s.f. golf club house, 7,500 s.f. golf maintenance building, 4-500 s.f. golf course shelters, 123,254 s.f. of condominiums, and 8,000 s.f. of retail space.
3. The approval is for a Binding Site Plan Review application submitted by Economic and Engineering Services, Inc. on November 20, 2003 and resubmitted on December 8, 2003 in response to comments received as part of the administrative review.
4. The subject property is zoned Tourist Commercial (TC). The proposal is an allowed use in the TC zone. Title 17 (the City's Zoning Ordinance) of the Westport Municipal Code specifies requirements applicable to the development of the subject property.

5. The Westport City Council has previously approved a Master Plan Development permit for the project on October 8, 2002 by adoption of ordinance number 1277.
6. The Site Plan Review application, as amended, meets the requirements of WMC 17.36B.040, which specifies the application requirements.
7. As conditioned, the proposed binding site plan is in conformity with applicable zoning and other development regulations as adopted in City of Westport Ordinance 1146.
8. As conditioned, appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage, and general welfare and for such 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 (if applicable), sidewalks, and other features assuring safe walking conditions for students who only walk to and from school.
9. Public facilities impacted by the proposed binding site plan will be adequate and available to serve the binding site plan concurrently with the development of a plan to finance needed public facilities in time to assure retention of an adequate level of service.
10. The project is within an approved sewer service area for projects on sewer, and adequate capacity exists or is planned with funding sources in place.
11. Title 12 and Title 13 of the Westport Municipal Code, set forth specific street and utility improvements applicable to the subject property. As conditioned, adequate measures have been made to provide street and utility improvements in accordance with Titles 12 and 13 of the Westport Municipal Code.
12. As conditioned, adequate measures have been made to provide sanitary sewer services in accordance with the City of Westport Municipal Code.
13. As conditioned, adequate measures have been made for stormwater control in accordance with the policies of the City of Westport.
14. The International Building Code adopted by City of Westport ordinance number 1288 has specific requirements applicable to development of the subject property. As conditioned, this proposal is in accordance with the International Building Code as adopted by the City of Westport.

15. The International Fire Code has specific requirements applicable to the development of the subject property.
16. As conditioned, adequate measures have been made to provide potable water for consumption and fire control to this development in accordance with the Westport Municipal Codes and the International Fire Code.
17. At the time of processing this application, adequate sanitary sewer and domestic water capacity are available. Actual guarantee of services is not secured until all applicable connection fees are paid.
18. As conditioned, this proposal will not be detrimental to the public's health safety and general welfare.

**EXPIRATION OF APPROVAL:**

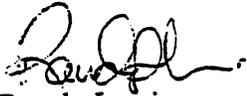
Approval of the site plan shall be effective for the duration of the previously approved Shoreline Substantial Development Permit and Conditional Use Permit provided that any appeals of such permit shall stay the effective date of the binding site plan approval.

**FINALITY OF DECISION/RIGHT OF APPEAL:**

The decision of the Committee is final unless a written appeal is made to the Westport Hearings Examiner. The written notice of appeal must be filed with the Planning Department at Westport City Hall prior to 5:00 p.m. on February 16, 2004. An appeal may be made by the applicant, a person who believes that they have been negatively impacted, the Planning Commission, or other public agencies. The timely filing of an appeal shall stay the effective date of the Committee's decision until the appeal is adjudicated by the Hearings Examiner.

February 2, 2004  
Page 6

Signed this 2<sup>nd</sup> day of February, 2004:



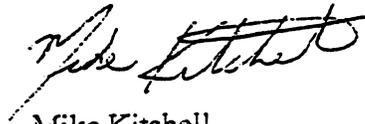
Randy Lewis  
Public Works Director



Ryan Andrews  
Building Services Representative



Jim Mankin  
Planning Commission Representative



Mike Kitchell  
Utility Services Representative



Greg Barnes  
Transportation Services Representative

Cc: Patricia Tow, Administrative Secretary  
Darrin Graham, Building Official  
Dan Prater, Fire Chief  
Chuck Channell, Water Superintendent  
Bob Patrick  
Jeff Myers  
Marc Horton—EES, 626 Columbia Street NW, Suite 2A, Olympia, WA 98501



**BEFORE THE CITY OF WESTPORT  
HEARING EXAMINER**

FRIENDS OF GRAYS HARBOR, appellants, appeal CITY OF WESTPORT BINDING SITE PLAN REVIEW COMMITTEE approval of binding site plan titled Links at Half Moon Bay.

THIS MATTER come before the City of Westport Hearing Examiner on April 8, 2004 in public hearing within the City of Westport council chambers located at 506 N. Montesano Street, City of Westport and said public hearing was continued to April 9, 2004. The hearing examiner conducted an open record appeal hearing and after considering the evidence provided by testimony of witnesses and examining the files and records herein, decides this appeal as follows:

**I**

Petitioners' complaint number 1 that the notice for the binding site plan decision was inadequate was withdrawn and is removed from the appeal.

**II**

Petitioners' complaint number 2 that the application was inadequate in that it failed to correctly show setback lines or accurately show the contour lines required by WMC 17.36B.040 is rejected by the hearing examiner.

Exhibit C7, site plan drawing exhibit 2 and exhibit 7 and testimony show that both contour lines and setback lines were determined and provided using acceptable surveying methods and standards. Mr. Lowney submitted exhibits and argument to show that the shoreline at Half Moon Bay is the subject of on going erosion and erosion repair. The exhibits and testimony from all parties documented the shoreline changes as well as the reviews that were performed on the issue of erosion. The evidence shows that the ordinary high water mark and/or marram grass line as well as affected dune elevation move in relation to erosion and continued to move after the Master Plan and Shoreline Substantial Development Permit with Conditional Use approvals. It is noted that this finding is consistent with the definition of OHWM found in RCW 90.58.030(2)(b). The movement is greatest between transect lines 2 and 4. (Exhibit C4) Between transect lines 4 and 5 the evidence showed erosion to the west and relative stability to the east. The evidence shows the condominiums located south of the shoreline lying between transect lines 4 and 5. Finding of fact number 37 of City of Westport Ordinance No. 1277 (Exhibit C1) relates the condominium setback to the ordinary high water mark. This setback is also addressed at finding 31 of the Shoreline Substantial Development Permit with Conditional Use (Exhibit C-2). The exhibits show the planning commission and city council looked at substantially the same information before arriving at their decision to approve the Links at Half Moon Bay. The evidence shows the setback procedural requirement was satisfied.

Marc Horton, witness for the project sponsor and former Department of Ecology section head expressed his opinion that the 200 foot building setback did not apply in the urban RP portion of Half Moon Bay. In considering this statement, the hearing examiner found the city to be correct in applying the 200 foot building setback specified at WMC 17.32.050(8). The condominiums are sited in the urban TC designated shoreline and the setback is 200 feet regardless of intervening conservancy and urban RP designations lying between the condominiums and the ordinary high water mark. Please see exhibit B1 showing the zoning and shoreline designations.

### III

Petitioners' complaint number 3 that the use of a binding site plan is inappropriate as the project does not satisfy the requirements of RCW 58.17.035 is rejected by the hearing examiner.

RCW 58.17.035 is the City's enabling statute for devising alternative procedures for the division of land that fit into one of three enumerated categories. These categories are reflected in WMC 17.36B.010 which provides that "in lieu of subdivision approval, a subdivider or developer of commercially or industrially zoned property, mobile home parks or condominiums may choose to request approval of a binding site plan pursuant to this chapter and RCW 58.17.035." A prerequisite for these three categories is that a subdivision in the meaning of RCW 58.17.020(1) be intended. RCW 58.17.035's opening paragraph states "(a) city, town or county may adopt by ordinance procedures for the **divisions of land** by use of a binding site plan as an alternative to the procedures required by this chapter. The **ordinance shall be limited and only apply to one or more of the following**: (1) The use of a bindings site plan to **divisions** for sale or lease of commercially or industrially zoned property as provided in RCW 58.170.40(4); (2) **divisions of property** for lease as provided for in RCW 58.17.040(5); and (3) **divisions of property** as provided for in RCW 58.17.040(7). Such ordinance may apply the same or different requirements and procedures to each of the three types of divisions and shall provide for the alteration or vacation of the binding site plan, and may provide for the administrative approval of the binding site plan." (emphasis added).

The city gave testimony that WMC 17.36B.010 allows projects not contemplating a subdivision to be reviewed as a binding site plan. This is accomplished by extracting a portion of WMC 17.36B.010 which was read to state "...or a developer of commercially or industrially zoned property, ... ..may choose to request approval of a binding site plan pursuant to this chapter and RCW 58.17.035." The hearing examiner finds this to be an error in interpretation. A developer of commercially or industrially zoned property must also be subdividing land to choose to request approval of a binding site plan. The entire text of WMC 17.36B.010 begins by announcing that "(in) lieu of subdivision approval," and ends by connecting the binding site plan "pursuant to this chapter and RCW 58.17.035". RCW 58.17.035 is unambiguous in announcing that binding site plans may only regulate certain kinds of divisions encompassed by the definition of subdivision at RCW 58.17.020(1).

Barnett Kalikow stated that Mox Chehalis LLC will not and did not intend to subdivide its ownership. The land will remain in the ownership of Mox Chehalis LLC. Given the interpretation by the city that development of commercially or industrially zoned property may elect binding site plan review and an announcement that no subdivision of land is intended, the hearing examiner finds that the petitioner is correct to complain that the binding site plan is inappropriate.

The factual representations on the binding site plan application show that the Links at Half Moon Bay contain the elements to qualify it for consideration under WMC 17.36B. A careful reading of the definition of "subdivision" shows that title 58.17 RCW identifies two distinct kinds of property divisions. Subdivision "is the division or redivision of land into five or more lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or transfer of ownership, except as provided in subsection (6) of this section."(RCW 58.17.020(1)). The definition talks about divisions of land and divisions for the purpose of sale, lease, or transfer of ownership. The first kind of division creates new lots by recording plats. The second kind of division apportions real property (space) for sale, lease, or transfer of ownership. An example of this type of division is the sale, lease or transfer of ownership to mobile home sites in a mobile home park. Here there is no division of the land, however, there is a sale, lease or transfer of ownership to a mobile home site, which may or may not contain a mobile home or trailer.

The Links at Half Moon Bay application shows eight condominium buildings (See Exhibit C5 and C7). RCW 64.34.020(9) defines the word condominium to mean "real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the unit owners, and unless a declaration and a survey map and plans have been recorded pursuant to this chapter". This definition allows common sense to conclude that the Links at Half Moon Bay involves a subdivision within the meaning of RCW 58.17.020(1). That is a condominium requires divisions for the purpose of sale, lease, or transfer of ownership if it is regulated by Title 64.34 RCW, the state condominium act.

#### IV

Petitioners' complaint number 4 that the site planning committee did not make required written findings pursuant to WMC 17.36B.060 that the project is in the public interest is supported by the hearing examiner.

WMC 17.36B.060 states that a proposed binding site plan and any dedication shall not be approved unless the board makes written findings that: "(2) The public use and interest will be served by the platting of such binding site plan and any dedication". The city testified that a finding for the public use and interest was not required because the Links at Half Moon Bay did not involve platting. As discussed above, the binding site plan is an alternative method of land division. Its maps constitute a plat and the process of binding site plan review and approval constitute platting. RCW 58.17.020(2) defines a plat as "a map or representation of a subdivision, showing thereon the division of tracts or parcels of

land into lots, blocks, streets and alleys, or **other divisions and dedications**" (emphasis added).

V

Petitioners' complaint number 5 that the site plan should not be approved because it does not conform to setback requirements is rejected by the hearing examiner.

The application for binding site plan review and exhibits show that the condominiums are proposed in a future Phase II and is dependent on a major water supply improvement that is pending but does not have a date of completion. This evidence is found in Exhibit C1 at findings 30 and 31, Exhibit C2 finding 9 and Exhibit C5. Shoreline permits are required to commence construction within two years and be completed within five years with procedures for a one year extension of the deadline. If construction on the condominiums do not commence within the timelines of a substantial development permit, a new shoreline substantial development permit must be secured. The 200 foot setback rule is a requirement of the Westport Shoreline Master Program which is incorporated as part of the State Shoreline Management Act. The act exempts these rules from strict construction and requires the exercise of liberal construction. Liberal construction requires the city to implement the Master Program rules within the spirit that is intended to be accomplished by the ACT. In this instance, the building inspector is required to measure a 200 foot setback at the time of foundation inspection and authorization to pour the foundation. He is not to rely solely on a map showing the OHWM at a snap shot in time. The discussion about the location of the OHWM/grassline shown on a map is not controlling in this context.

The defense of a setback line that may not meet the requirement at the time of construction using the vesting argument arising in *Talbot v. Gray*, 11Wn. App.807, 811,525 p.2d801 does not apply in this case. In the *Talbot v. Gray* case the following was found: *"From June 1, 1971, the effective date of the Shoreline Management Act, until December 11, 1971, the effective date of Seattle ordinance No. 100423, the City of Seattle issued permits for substantial development pursuant to the policy in RCW 90.58.020, and to the department of ecology guidelines. Following December 11, the City issued permits pursuant to Seattle ordinance No. 100423. Grays' obligations and rights to develop vested on November 18, 1971, when they applied for a substantial development permit. The applicable rule adopted by the court in Hull v. Hunt, 53 Wn.2d 125, 331 P.2d 856 (1958) and recently approved in Eastlake Community Council v. Roanoke Assoc., Inc., 82 Wn.2d 475, 481, 513 P.2d 36 (1973) is [T]he right vests when the party . . . applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit."* (MRSC municipal code and court decision legal research service data source) One has to keep in mind the distinction between rules that are changing as a result of new legislation and the application of a standard in an area where physical changes take place. The City of Westport's Shoreline Master Program setback requirement has not changed. If the city council changed setback after the shoreline application and to the detriment of the applicant, the vesting rule would apply. In

our case, once the building permit is issued, and the shoreline recedes thereafter, the condominiums are vested.

## VI

Petitioners' complaint number 6 that the binding site plan should not be approved because it does not make adequate provisions for public health, safety and general welfare, and is contrary to the public interest is not supported by the hearing examiner.

Petitioners' exhibits and testimony establish the extent of erosion that has and continues to affect the Washington State Parks and Recreation Commission property northwesterly of the proposed condominiums. Exhibits C1 and C2 show that the City Council and Planning Commission considered the erosion effects along the Ocean and Half Moon Bay. Both the City Council and Planning Commission entered required findings on adequate provisions for public health, safety and general welfare, and public interest.

## VII

Petitioners' complaint number 7 that the dedication of required right-of-way easements and land was not required concurrently with the approval of the site plan pursuant to WMC 17.36B.080 is supported by the hearing examiner.

WMC 17.36B.080 states that "a site plan shall not be finally approved until or concurrent with a dedication of required rights-of-way, easement and land." The city testified that this requirement was impossible because the utility ordinance, WMC 13.04.06, required building the improvements that go into a dedicated right-of-way or easement before it can be accepted by the city. The relationship of WMC 17.04.06 to the requirement set forth in WMC 17.36B.080 does not bind one to the other. They are separate requirements. WMC 17.36B.080 require a dedication of rights-of-way, easement and land at the time the binding site plan is finally approved. There is no requirement to build anything in the dedicated area. WMC 13.04.06 addresses the ownership of water system improvements. It requires new water line improvements to be turned over to the city along with any easements and or rights-of-way associated therewith if it wants to connect to the city water system.

A straightforward implementation of WMC 17.36B.080 is to require a dedication sheet as part of the drawing submittal. The elements of the dedication sheet would include signatures of all owners who freely grant the surveyed rights-of-way or easements and the signature of the mayor and other necessary parties accepting the dedication on behalf of the city along with title report to show clear title. Required improvements within such dedicated rights-of-way or easements would be built after construction drawings and permits are approved.

Testimony was given that access and utilities serving the condominium complex could not be dedicated because it was proposed on land owned by the Washington State Parks and Recreation Commission. Further testimony stated that the exact location of the road on

Washington State Parks and Recreation Commission property depended on restrictions imposed by this owner. These limitations do not excuse the Site Plan Review Committee from enforcing the standards under WMC 17.36B.080. In fact it is an essential and integral part of WMC 17.36B.060(1) if the committee made the required finding and conclusion to show that appropriate provisions were made for "streets or roads, alleys, other public ways". This connection between WMC 17.36B.080 and WMC 17.36B.060(1) is especially relevant because the evidence and exhibits did not show the nature of the easement over the road built on Washington Sate Parks and Recreation Commission property.

### Hearing Examiner Decision

The appeal is sustained and binding site plan approval is remanded to the City of Westport Site Plan Review Committee.

Signed this 21<sup>st</sup> day of April 2004 by *Kenneth Kimura* Kenneth Kimura, City of Westport Hearing Examiner

#### Attachments:

Taped proceedings from April 8, 2004 and April 9, 2004

Exhibits A1 through A81

Exhibits B1 through B3

Exhibits C1 through C10



**BEFORE THE CITY COUNCIL  
FOR THE CITY OF WESTPORT**

FRIENDS OF GRAYS HARBOR,  
Respondent/Cross Appellant,

v.

CITY OF WESTPORT SITE PLAN  
REVIEW BOARD,

Appellant/ Cross-Respondent,  
and MOX CHEHALIS, LLC,,

Appellant/ Cross-Respondent

**DECISION OF CITY COUNCIL**

**I. INTRODUCTION**

This matter comes before the Westport City Council for hearing on June 16, 2004. A closed record hearing was held to consider appeals filed by the City of Westport Site Plan Review Board, an appeal filed by Mox Chehalis L.L.C., and a cross appeal filed by Friends of Grays Harbor (FOGH). These appeals arise from a decision of the City of Westport Hearing Examiner dated April 21, 2004, to approve in part and remand portions of site plan approval issued by the City's Site Plan Review Board on February 2, 2004.

Appellate argument was presented by Jeffrey S. Myers on behalf of the Site Plan Review Board, Barnett Kalikow on behalf of Mox Chehalis L.L.C. and Davida Finger on behalf of FOGH.

DECISION OF CITY COUNCIL - 1

BSP 01151

## II. OBJECTION TO REPRESENTATION BY MR. MYERS

As an initial matter, FOGH objected to the representation of the Site Plan Review Board by Jeffrey S. Myers of Law, Lyman, Daniel, Kamerrer & Bogdanovich due to an alleged conflict of interest arising from Mr. Myers prior advice to the City in land use decisions and appeals concerning the Links at Half Moon Bay project, which is the underlying subject of this appeal. Mr. Myers advised the City on matters concerning the adoption of an ordinance approving a Master Plan and Shoreline Permits for this project and represented the City in defending appeals brought by FOGH concerning these approvals in Thurston County Superior Court and the Shorelines Hearings Board. This challenge requires the City Council to determine the facts relating to the scope of Mr. Myers representation.

FOGH alleged that Mr. Myers had advised the City Council in prior appeals. The only appeal to the City Council previously filed by FOGH relating to the Links matter was an appeal of the Planning Commission decision to issue shoreline permits for the project. That decision was appealed by FOGH and the Washington Environmental Council to the City Council in October 2003. The City Council held a closed record hearing to consider the shoreline appeal, which was attended by Mr. Lowney as counsel for the appellants. During these proceedings, the City Council was advised by Wayne Hagen, of Edwards & Hagen, the City Attorney, not by Mr. Myers, who argued in support of the permit decision on behalf of City staff. No objection was raised by FOGH to the roles of the

City Attorney, who advised the City Council, or to the role of Mr. Myers. This is exactly the same arrangement that Mr. Lowney was informed would be made for the site plan appeal.

In its objection, FOGH requested that the City Council appoint separate legal representation to advise the Council in this matter because Mr. Myers has previously represented the City. In this appeal, the City Council was provided legal counsel by the City Attorney, Wayne Hagen, of Edwards & Hagen. Mr. Myers did not provide any legal advice to the City Council concerning this appeal and had no communication with the City Council except for filing the Notice of Appeal, briefs and statements made at the closed record hearing. Mr. Hagen, the City Attorney, is not associated with Mr. Myers' law firm. They are in separate law firms, maintain separate files, and Mr. Myers does not have access to any confidences communicated by the City Council to Mr. Hagen in this matter. Furthermore, there are no confidences arising from Mr. Myers' previous representation of the City which are at issue in this matter.

Mr. Myers filed a Declaration on May 10, 2004 responding to FOGH's objection. FOGH has not refuted that declaration. Pursuant to his request, Mr. Myers was advised by the City Attorney that there was no conflict of interest and that he could continue to handle this appeal. Thereafter, Mr. Myers filed legal briefs in this matter prior to the closed record hearing.

The City Council hereby determines that there is no conflict of interest arising from the representation of the Site Plan Review

Board by Mr. Myers in these circumstances. The arrangements for separate legal counsel for the City Council are identical to the arrangements made in prior litigation between the same parties in which Mr. Myers advocated the position of City staff. FOGH did not object to Mr. Myers' role in this proceedings, and has waived any right to object. Furthermore, the arrangements for separate legal counsel have been approved by Washington courts in administrative appeals, even where attorneys share the same office. *Amoss v. University of Washington*, 40 Wn. App. 667 (1985); *Sherman v. State*, 128 Wn.2d 164 (1995); *Medical Review Board v. Johnston*, 99 Wn.2d 466 (1983). Since Mr. Myers and Mr. Hagen are from separate law firms, their separate representation of the appellant and City Council respectively is appropriate.

### III. HEARING EXAMINER DECISION

#### A. Public Notice.

Section I of the Hearing Examiner's Decision is AFFIRMED. FOGH agreed to dismiss its challenge to the public notice in this matter before the Hearing Examiner. FOGH has abandoned this issue by not raising it in its Notice of Appeal.

#### B. Adequacy of Application.

Section II of the Hearing Examiner's Decision is AFFIRMED. The City Council finds against appellant FOGH in its second assignment of error, that the Hearing Examiner made a legal error in finding that the binding site plan application adequately showed contour lines and setback lines.

The Hearing Examiner correctly determined that the site plan application submitted by Mox Chehalis L.L.C. was factually adequate under WMC 17.36B.040. This factual finding is supported by substantial evidence including the testimony of Randy Lewis and Jim Mankin and Exhibit C-5, which is the Site Plan Application. FOGH's objections to the application contents relate to whether the project complies with applicable standards, not their inclusion in or omission from the application. The Hearing Examiner correctly determined that the application itself was adequate,

**C. Binding Site Plan Analysis.**

Section III of the Hearing Examiner's Decision is REVERSED. The City Council finds in favor of appellant Site Plan Review Board in its first assignment of error, that the Hearing Examiner erred in Section III of the decision by concluding that Chapter 17.36B WMC applies only to binding site plans in lieu of subdivisions. The City Council further finds in favor of appellant Site Plan Review Board in its second assignment of error, that the Hearing Examiner erred in Section III of the decision by concluding that a subdivision was proposed by the site plan submitted by Mox Chehalis LLC.

The Hearing Examiner erred by characterizing the Mox Chehalis application as a "binding site plan." The Hearing Examiner further erred by holding that Chapter 17.36B WMC applied only to binding site plans under RCW 58.17.035.

Chapter 17.36B WMC contains two separate provisions relating to "site plan review" and review of a "binding site plan." Review

of a "binding site plan" is provided for in WMC 17.36B.010 where a division of land is proposed in lieu of a formal subdivision process. WMC 17.36B.020 requires "site plan review" for developments involving industrial, commercial and multi-family projects. The Mox Chehalis site plan is required by WMC 17.36B.020 to obtain site plan review. Since no division of land is proposed by Mox Chehalis in its application, the Examiner's conclusion to review the site plan application as a "binding site plan" under WMC 17.36B.010 was an error of law.

The inclusion of condominiums within the site plan does not necessarily require a binding site plan or subdivision process. In *Crispin v City of Seattle*, 149 Wn.2d 896, 71 P.3rd 208 (2003), the Supreme Court approved a condominium project which used a boundary line adjustment and did not require a binding site plan or subdivision as contended by opponents of the condominium project. FOGH has cited to the unpublished decision of the Court of Appeals in *Crispin*, which was subsequently reversed by the Supreme Court. In briefing this matter to the Hearing Examiner, FOGH's citation to the unpublished opinion without disclosure of the Supreme Court's opinion reversing the opinion may have mislead the Examiner into an erroneous legal determination. It would be impossible to reach the result that the Supreme Court approved in *Crispin v. Seattle*, if a binding site plan was required by the mere inclusion of condominiums.

Mox Chehalis may seek to divide property in the future, but it has not done so in the site plan application in this case. As

such, issues relating to standards for a binding site plan were not before the Site Plan Review Board and are not ripe. If the owner seeks to divide the area of the condominiums in the future, when condominium declarations are filed, it may do so by filing a boundary line adjustment, binding site plan, subdivision or other process, as appropriate.

**D. Findings Required for Binding Site Plans**

Section IV of the Hearing Examiner's decision is REVERSED. The City Council finds in favor of appellant Site Plan Review Board in its third assignment of error, that the Hearing Examiner erred in Section IV of the decision by concluding that the Site Plan Review Board failed to make findings required by WMC 17.36B.060.

WMC 17.36B.060 sets forth standards and requires findings which are to be made for binding site plans. This section applies only when there is a division of land proposed since this is a requirement for there to be a "binding site plan."

The Hearing Examiner erred by applying WMC 17.36B.060 instead of WMC 17.36.050, which sets forth the standards applicable for review of site plan applications. FOGH does not contend that the site plan violates the standards set forth in WMC 17.36B.050 and the Site Plan Review Board did not err in its decision to approve the site plan application.

The Hearing Examiner further erred by finding that the site plan application involved a "plat." The definition of a plat in RCW 58.17.020 is the representation of a "subdivision" which is defined to involve the "division of land." Since no division of

land is proposed by the application filed by Mox Chehalis, the site plan is not a plat and the requirements of WMC 17.36B.060 do not apply.

**E. Setback Requirements.**

Section V of the Hearing Examiner Decision is AFFIRMED. The City Council finds against appellant FOGH in its first and third assignments of error, that the Hearing Examiner made a legal error by applying collateral estoppel based on previous decisions by the City Council and Planning Commission and dismissing petitioner's complaints and that the Hearing Examiner made a legal error in finding that the setback lines need not be re-measured at the binding site plan stage and affirms the Hearing Examiner.

The Hearing Examiner was correct to reject FOGH's appeal concerning setback compliance in this matter. The setback is a Shoreline Master Program requirement that is within the jurisdiction of the Planning Commission. The Planning Commission issued a decision finding compliance with the 200 foot setback on September 30, 2003. This decision was sustained on appeal by the Westport City Council on October 30, 2003. During the Planning Commission hearing and subsequent appeal, the issue of compliance with the 200 foot setback was raised by FOGH and a decision was entered finding that the project complies with the 200 foot shoreline setback requirement. The Hearing Examiner is not authorized in the review of a site plan application to reconsider or alter the findings and conclusions of the Planning Commission in determining compliance with the Shoreline Master Program.

The Hearing Examiner correctly found that the City is obligated to enforce the 200 foot shoreline setback required by the Shorelines Substantial Development permit and shown on the site plan application when the project is constructed.

The Hearing Examiner was also correct not to reconsider the decision of the Planning Commission under the doctrine of collateral estoppel. FOPGH contends that there were changed circumstances that allow the issue to be revisited, relying on *Hilltop Terrace Homeowners Ass'n v. Island County*, 126 Wn.2d 22, 31 (1995) and *Weyerhaeuser v. Tacoma Pierce County Health Dept.*, PCHB No. 99-067. The portions cited by FOPGH from the *Weyerhaeuser* decision are actually from a dissenting opinion and do not control. *Hilltop Terrace* is distinguishable because it dealt with whether changes to an application would avoid the preclusive effect of a previous permit denial. This case does not involve any changes to the proposed project, nor a previous permit denial.

In any event, the factual circumstances since the Planning Commission found the project complied with the 200 foot setback have not materially changed. Substantial evidence shows that the marram grass line has not retreated in the areas immediate adjacent to the condominiums. The 200 foot setback is measured from the marram grass line. FOPGH's evidence pointed to erosion which occurred at West Haven State Park in the winter of 2003. It did not address the area immediately affronting the condominiums which is to the east of transect four on measurements prepared by Pacific International Engineering. These measurements taken in March of

2003 and again on December 19, 2003, show that the marram grass line along the primary bluff has not been materially altered. Hence, there is no reason to reconsider the issue of compliance with the 200 foot setback requirement. Because there was no material change in the application before the Planning Commission and the Site Plan Review Committee and there is not material change of conditions, the Hearing Examiner correctly rejected FOGH's appeal.

**F. Public Interest.**

Section VI of the Hearing Examiner Decision is AFFIRMED. The Hearing Examiner correctly refused to reconsider findings that the project is in the public interest. In this appeal, as in prior appeals of the master plan for the Links at Half Moon Bay approved by Ord. No. 1277, FOGH contends that the likelihood of future erosion threatens to undermine facilities constructed as part of the Links at Half Moon Bay and that, therefore, the project is not in the public interest. The City considered these arguments as part of adoption of Ord. No. 1277 and made findings that the project is in the public interest. These findings were appealed to the Thurston County Superior Court, which affirmed the City Council's decision and findings that the project was within the public interest. FOGH has presented no factual or legal basis to require the Site Plan Review Board to revisit these findings and the issues previously decided by the City Council.

The City Council finds against appellant FOGH in its unassigned but briefed allegation of error that is set forth under

heading D on page 4 of FOGH's appeal memorandum; that the Hearing Examiner erred in finding that all requirements of a binding site plan lieu of subdivision were satisfied. The Site Plan Review Board correctly made findings that the site plan provided for public, health, safety and welfare required by WMC 17.36B.050. The Hearing Examiner Decision to uphold the Site Plan Review Board's findings was correct.

**G. Dedications.**

Section VII of the Hearing Examiner's Decision is REVERSED. The City Council finds in favor of appellant Site Plan Review Board in its fourth assignment of error, that the Hearing Examiner erred in Section VII of the decision by requiring that deeds finalizing dedications be executed prior to or concurrent with approval of site plan review instead of after completion of construction as required by other provisions of the Westport Municipal Code. The Hearing Examiner is reversed on the imposition of such requirements.

WMC 17.36B.080 is intended to assure that developers complete any dedications of required rights of way, easements and land. The language of WMC 17.36B.080 does not specify when deeds of dedication are to be offered, nor does it specify the process for acceptance of dedications. The Site Plan Review Board did not exercise the authority given to it by WMV 17.36B.060 to require dedications because this project did not propose to divide land and was therefore not being reviewed as a "binding site plan" under that section.

To the extent that any dedications are required, the Hearing Examiner's interpretation of WMC 17.36B.080 was incorrect and leads to strained, absurd consequences. The application for site plan approval identifies areas which will be dedicated to the City upon completion of road improvements and other infrastructure. In its testimony before the Hearing Examiner, the applicant acknowledged that it intends to dedicate these areas after completion of the infrastructure. The applicant thus satisfied the requirement to identify areas to be dedicated concurrent with the site plan. The process of making those dedications should be consistent with establishing practices identified by the testimony of City Administrator, Randy Lewis, and other City ordinances. This practice will require Mox Chehalis to offer deeds of dedication describing the areas dedicated upon completion of the road improvements and other infrastructure. The City shall, thereafter, inspect such facilities to assure that they meet City standards and verify the accuracy of the legal descriptions in prior to acceptance to the deeds of dedication.

The City Council also agrees with appellant Mox Chehalis LLC in its fourth assignment of error. The Hearing Examiner erred in holding that Mox Chehalis was required to dedicate Jetty Access Road on land owned by the Washington State Parks. This was not required by the SPRB or any other decision of the City. To the extent that the Hearing Examiner would seek to impose such a requirement, the examiner lacks authority and has not made findings supported by substantial evidence to support such a requirement.

IV. CONCLUSION

Based on the foregoing conclusions, the decision of the Site Plan Review Board to approve the site plan application submitted by Mox Chehalis for the Links at Half Moon Bay is reinstated. This decision is the final decision of the City of Westport. Any appeal of this decision shall be made to the Environmental and Land Use Hearings Board in accordance with RCW 43.21L.

PASSED by the Council of the City of Westport this 22<sup>nd</sup> day of June, 2004.

APPROVED:

Gail Mullvain 6-22-04  
Gail Mullvain, Council Person

Eugene M. Hall 6-22-04  
Eugene Hall, Council Person

Ken Bowe  
Ken Bowe, Council Person

ATTEST:

Margo R. Tackett  
Margo Tackett, CMC  
Clerk/Treasurer

APPROVED:

Michael Bruce  
Michael Bruce, Mayor

