

NO. 34780-6-II

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

KELLY and SALLY SAMSON, husband and wife; and ROBERT and  
JOANNE HACKER, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND; STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

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**ECOLOGY'S RESPONSE BRIEF**

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## I. INTRODUCTION

Under the Shoreline Management Act (SMA), RCW 90.58, every local government has a “shoreline master program” (SMP) which the Act defines as a comprehensive use plan, including use regulations and standards, for all shorelines “developed in accordance with the policies enunciated in RCW 90.58.020.” RCW 90.58.030(3)(b). The adoption and amendment of local government SMPs is subject to review and approval by the Department of Ecology (Ecology). RCW 90.58.090(1).

In this case, the City of Bainbridge Island amended its SMP to limit dock construction in Blakely Harbor to two joint use docks and one community dock. The amendment was supported by evidence documenting the aesthetic, navigational, and recreational values of Blakely Harbor and the need to limit dock construction to preserve those values. At the time the City adopted the amendment and submitted it to Ecology for approval, Ecology’s rules for reviewing master programs, known as master program “guidelines,” had been repealed and invalidated. Ecology therefore applied the SMA directly to the amendment and approved it.

Appellants challenged Ecology’s approval and the underlying amendment. On review, both the Central Growth Management Hearings Board (Board) and the superior court affirmed Ecology’s action. The

superior court held that it would have been error for Ecology to apply its later-adopted guidelines retroactively to the amendment. Further, both the Board and the superior court found that the amendment was consistent with the later guidelines, even if they were applicable. The amendment is consistent with the guidelines and the Act because preservation of aesthetic, navigational, and recreational values is encouraged and even required by the SMA. This Court should affirm.

## **II. ISSUES PRESENTED**

1. Did Ecology act within its discretion in determining that the 2004 SMP guidelines were not “applicable” to the City’s amendment, when the guidelines were not in effect either at the time the City adopted the amendment, nor when the City submitted the amendment to Ecology, nor during the public comment periods on the amendment?

2. Is the City’s amendment limiting dock development in Blakely Harbor to two joint use docks and one community dock consistent with the goals and policies of the SMA which, among other things, require preservation of the natural character of the shoreline and the avoidance of “piecemeal development?”

3. Is the City’s amendment limiting dock development in Blakely Harbor based on cumulative impacts to views, aesthetics,

recreation, navigation, and ecological resources consistent with Ecology's 2004 shoreline guidelines?

4. Does the City's amendment of its SMP contravene the public trust doctrine, conflict with state law, or violate substantive due process or equal protection?

5. Did the trial court properly deny Appellants' motion to supplement the administrative record when the proffered evidence did not meet any of the criteria for supplementation under the Administrative Procedure Act (APA)?

### **III. STATEMENT OF THE CASE**

#### **A. Overview Of The SMA**

The SMA, RCW 90.58, establishes a comprehensive scheme of shoreline regulation, the purpose of which is to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. *See generally Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203-04, 884 P.2d 910 (1994). The Act puts primary responsibility on local governments such as the City to adopt SMPs "for regulation of uses of the shorelines of the state" pursuant to guidelines promulgated by Ecology. RCW 90.58.080(1). Shorelines of the state include "shorelines of statewide significance," which are accorded special emphasis in

RCW 90.58.030(2)(e), and the majority of water areas of the state and their associated shorelands. *See* RCW 90.58.030(2)(d).

To be effective, a master program or amendment to a master program must be submitted to Ecology for review and approval. RCW 90.58.090(1). A SMP, similar to a local zoning code, divides the shoreline into various “environments” and establishes use and development standards for each environment. *See generally* WAC 173-26-201(3)(f). Within each environment, certain uses and development are allowed or conditioned, and uses and development are prohibited. Among the overarching goals of the Act, the master program must provide for public access to the shorelines, implement the use preferences established in RCW 90.58.020, and preserve the natural character of the shoreline “as fully as possible.” *See Buechel*, 125 Wn.2d at 203.

The Act requires SMPs to meet a particular set of priorities on “shorelines of statewide significance.”<sup>1</sup> These priorities are: (1) recognize and protect the statewide interest over the 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

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<sup>1</sup> Blakely Harbor is a “shoreline of statewide significance” waterward of the line of extreme low tide. RCW 90.58.030(2)(e)(iii). The tidelands and adjacent uplands of Blakely Harbor are within the definition of “shorelines” and “shorelands.” RCW 90.58.030(2)(d), (f).

public access to publicly owned areas of the shorelines; (6) increase recreational opportunities for the public in the shoreline; and (7) provide for any other element as appropriate and necessary. RCW 90.58.020.

In addition to the uses allowed or prohibited by each master program, the SMA requires all “substantial” shoreline developments, with some exceptions, to obtain a shoreline substantial development permit. RCW 90.58.140(2); *see Clam Shacks of America, Inc. v. Skagit Cy.*, 109 Wn.2d 91, 743 P.2d 265 (1987). The permit cannot be issued unless the development is consistent with the specific requirements of the local SMP and applicable policies of the SMA. Certain uses and developments, such as single family residences, are exempt from the requirement to obtain a substantial development permit, but even such exempt developments still must be consistent with the Act and the uses allowed or prohibited in the master program. *See* RCW 90.58.030(3)(e); *Putnam v. Carroll*, 13 Wn. App. 201, 204, 534 P.2d 132 (1975).

Under the SMA, it is common for local governments to limit or prohibit entirely dock and pier development within some portion of their jurisdiction. *See, e.g., Carlson v. San Juan Cy.*, WWGMHB No. 00-2-016 (Sep. 15, 2000) (affirming prohibition on private dock construction on

Waldron Island); *Port Townsend Shoreline Master Program*,<sup>2</sup> DR 9.4.1 (prohibiting private residential docks throughout the city). As the Board noted in this particular case, the City prohibits docks entirely within the “natural environment” designations for the City of Bainbridge Island and allows docks only by conditional use permit in the “conservancy environment” areas of the City. Board Decision at 9.

**B. Statement Of Facts**

The facts surrounding the amendment are set forth in detail in the Board’s Decision. In summary, Blakely Harbor is one of the last undeveloped anchorages in central Puget Sound. It is used extensively by the public for kayaking, boating, swimming, scuba diving, and other recreational purposes. Board Decision at 7. The City conducted a cumulative impacts analysis to determine what effects unrestricted dock construction would have on the Harbor. Board’s Record, Ex. C-2.1, Blakely Harbor Cumulative Impact Assessment. This analysis concluded that unrestricted dock construction would have significant impacts on views and navigation, and create risks to natural resources including species listed as endangered or threatened under the Endangered Species Act. *Id.* at 24.

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<sup>2</sup> Available at <http://www.cityofpt.us/DSD/SMP>.

An extensive body of scientific literature documents negative impacts that dock and pier development can have on shoreline ecological functions, navigation, and aesthetics. *See* Board's Record, Ex. C-2.1, at 18–19; C-228, at 51. Based on its analysis of the impacts, the City adopted an amendment to its SMP to limit dock construction in the Harbor to two joint use docks of up to five slips each (one on each side of the Harbor), and one community dock for public use. Board's Record, Ex. C-131, Ordinance No. 2003-30.

The City's amendment started with public comment and review at the local level, after which the City adopted the amendment by ordinance and submitted it to Ecology for approval in September 2003. Board's Record, Ex. C-144. At that time, there were no SMP guidelines in effect. *See* Laws of 2003, ch. 321, § 1 (referring to the lack of shoreline guidelines). Ecology had adopted the shoreline guidelines originally in the 1970s. In 2000, Ecology repealed the original guidelines and adopted new ones. In 2001, however, the Shorelines Hearings Board invalidated the 2000 guidelines. *Ass'n of Washington Bus. v. Dep't of Ecology*, SHB No. 00-037 (Aug. 27, 2001). Ecology and various stakeholders then entered into negotiations to resolve the controversy. These negotiations resulted in proposal of the current guidelines, which Ecology adopted in December 2003 and which became effective on January 17, 2004. Board

Decision at 8. Thus, in the interim between 2001 and 2004 there were no guidelines in effect.

When Ecology received the City's amendment in September 2003, it held a public comment period as required by WAC 173-26-120. This comment period ended on November 30, 2003. Board's Record, Ex. C-211. Ecology forwarded the public comments it received to the City for response. The City submitted its responses back to Ecology on January 23, 2004. *Id.* On February 6, 2004, Ecology issued written Findings and Conclusions approving the City's amendment pursuant to WAC 173-26-120(7).

In its Findings and Conclusions, Ecology considered the consistency of the City's amendment with the policy of the SMA set forth in RCW 90.58.020. Board's Record, Ex. C-211. Although the new guidelines became effective just days before Ecology's decision, Ecology did not apply them to the amendment. Ecology determine that the new guidelines were not "applicable" to the amendment because they were not in effect at the time the amendment was adopted by the City and submitted to Ecology, nor were they in effect during the City's or Ecology's public comment periods. Based on these facts, Ecology determined that it would be inappropriate to apply the new guidelines retroactively to the pending amendment.

### **C. Proceedings At The Board**

Appellants filed a petition for review of Ecology's approval of the amendment with the Board pursuant to RCW 90.58.190(2). The Board, after reviewing the City's and Ecology's record of the amendment, and hearing argument, issued a Final Decision and Order denying the appeal on January 19, 2005 (Board Decision).

Regarding the guidelines, the Board concluded that, in the absence of any legal authority on the issue, deference should be given to Ecology's interpretation that the 2004 guidelines were not "applicable." Board Decision at 13. Because Appellants alleged that the amendment was inconsistent with those guidelines, the Board went on to conclude that the amendment was consistent with the guidelines in any event. Board Decision at 13–16.

The Board also concluded that the amendment was consistent with the goals and policies of the SMA. Board Decision at 10–12. The Board noted that, pursuant to *Spencer v. Bainbridge Island*, SHB No. 97-43 (Feb. 1998), and RCW 90.58.020, private residential docks are not a priority use of the shoreline. The Board further noted that, even if they were priority uses, the City had authority under the SMA and *Buechel, supra*, to decide where such uses could be allowed:

It is within the authority of the local government, in developing and amending its master program, to determine *where* various priority uses may be located . . . . The City of Bainbridge Island does not allow docks within the natural and aquatic conservancy environments, allows them only as conditional uses in the conservancy environment, and now has amended its SMP to prohibit new single-use private docks in Blakely Harbor. This is well within the City's authority given the record and consistent with the goals and policies of the SMA . . . .

Board Decision at 12. Finally, the Board rejected Appellants' claim that the amendment was prohibited by WAC 173-26-090. Board Decision at 17-20.

**D. Proceedings At The Superior Court**

Appellants filed a petition for judicial review of the Board's Decision with the Thurston County Superior Court pursuant to the APA, Chapter 34.05 RCW. CP 5-83. Appellants filed motions to supplement the administrative record with a deposition and other information from a different case. CP 88-89. The court, however, denied the motions because the information did not meet the criteria for supplementation under RCW 34.05.562. CP 182-84.

On the merits, the court affirmed the Board on all issues. CP 176-81. The court held that "[i]n enacting [the amendment], the City was planning in the manner intended by the SMA, which is to plan in a way to protect shorelines . . . but still allow reasonable use of private

property.” CP 178. The court concluded that the amendment was consistent with the SMA, that the new guidelines did not apply retroactively, and that substantial evidence supported the Board’s conclusion that the amendment was consistent with the guidelines in any event. *Id.* The court also rejected Appellants constitutional claims. CP 179. This appeal followed.

#### IV. ARGUMENT

##### A. **The Board And The Superior Court Properly Rejected Retroactive Application Of The New Guidelines To This Amendment**

Appellants contend that Ecology’s decision in this matter is in error because Ecology did not apply its new guidelines retroactively to the amendment. This contention should be rejected. Ecology’s interpretation that the new guidelines did not apply to the amendment was within its discretion and should be accorded substantial deference.

Interpretation of agency regulations is ultimately the responsibility of the courts, but courts give “great deference” to an agency’s interpretation of its own regulations, absent a “compelling indication” that the agency’s interpretation conflicts with legislative intent or is in excess of its authority. *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007); *Washington Cedar & Supply Co., Inc. v. Dep’t of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007)

(court gives “substantial weight” to an agency’s interpretation of statutes and regulations within its area of expertise so long as the interpretation is “plausible” and not contrary to legislative intent and purpose); *Lang v. Dep’t of Health*, 138 Wn. App. 235, 243, 156 P.3d 919 (2007).

Here, Ecology’s review and approval of the City’s amendment during the period without guidelines was consistent with the terms of the SMA. RCW 90.58.090(2)(d) requires Ecology to make “written findings and conclusions regarding the consistency of the proposal with the policy of RCW 90.58.020 and the *applicable* guidelines” (emphasis added). Ecology determined the 2004 guidelines were not “applicable” to this amendment because they did not become effective until well after the amendment was adopted by the City, submitted to Ecology for approval, and public comment on the proposal had concluded. In the absence of “applicable” guidelines, the sole requirement in the statute is for Ecology to determine the consistency of the proposal with RCW 90.58.020, which Ecology did in this case.

The Board, in considering this issue, deferred to Ecology’s interpretation. Board Decision at 18. Similarly, in rejecting Appellants’ contention that Ecology should have applied the new guidelines retroactively, the superior court held:

[T]he Department of Ecology correctly determined that the 'new' guidelines were not applicable to Ordinance No. 2003-30. In this regard, *the Department followed the well-settled rule that statutes and regulations are not applied retroactively unless they are remedial or procedural.* It would have been error for the Department of Ecology to have applied the new regulations when they had not been adopted at the time the City adopted Ordinance 2003-30.

CP 178 (emphasis added).

Ecology's decision, and the Board and superior court rulings, should be affirmed under the facts of this case. The City council adopted the amendment by ordinance in September 2003. Board's Record, Ex. C-131. Before that, the City held numerous public hearings and workshops regarding the amendment. *See* Board's Record, Exs. C-15, -19, -27, -45, -53, -61. The City formally submitted the amendment to Ecology on September 25, 2003. Board's Record, Ex. C-144. Ecology held another round of public comment in November 2003. Throughout this public process, there were no guidelines in effect or "applicable" because the 2000 guidelines had been invalidated in 2001.

Because the new guidelines were not in effect when the amendment was submitted, the City never had the opportunity to consider the applicability of the new guidelines to the amendment. Moreover, because the new guidelines were not in effect when the public comment periods held, the public never had the opportunity to comment on the

applicability of the guidelines to the amendment. Had Ecology applied the new guidelines retroactively, it would have done so without public or local government comment or review. Such retroactive application is inconsistent not only with general rules of statutory construction but also with the cooperative program of shoreline management that is envisioned by the SMA. *See* RCW 90.58.050. A “cooperative program” assumes that Ecology will apply the same rules to an SMP amendment as the local government has applied.

Because Appellants have not demonstrated that Ecology’s interpretation of its own rules, and the statute it administers, is contrary to Legislature purpose or intent, the Court should accord deference to and affirm Ecology’s interpretation.

**B. The City’s Amendment Is Consistent With The Policies Of The SMA**

In the absence of “applicable” guidelines, the sole requirement in the statute is for Ecology to determine the consistency of the City’s amendment with RCW 90.58.020. Appellants contend that the amendment is inconsistent with the SMA. On this issue, Appellants bear the heavy burden of demonstrating inconsistency by clear and convincing evidence:

If the appeal to the growth management hearings board concerns a shoreline of statewide significance, the board

shall uphold the decision by the department unless the board, *by clear and convincing evidence*, determines that the decision of the department is inconsistent with the policy of RCW 90.58.020 . . .

RCW 90.58.190(2)(c) (emphasis added). Appellants did not carry this burden below and cannot carry it here.

As noted above, Blakely Harbor below the line of extreme low tide is a “shoreline of statewide significance.” In developing master program regulations for such shorelines, the SMA directs that the local government give priority to the “statewide interest over the local interest”; to “preserve the natural character of the shoreline”; and to “protect the resources and ecology of the shoreline.” RCW 90.58.020. The statute directs Ecology to approve an SMP regulating such shorelines when “the program provides the optimum implementation of the policy of this chapter to satisfy the statewide interest.” RCW 90.58.090(5).

Furthermore, the SMA shall “be read, interpreted, applied, and implemented as a whole consistent with decisions of the shorelines hearings board and Washington courts . . . .” Laws of 2003, ch. 321, *codified after* RCW 90.58.030. The Shorelines Hearings Board has, in numerous cases, affirmed that individual private dock construction may be inconsistent with the SMA, and may be denied, where it results in direct or cumulative impacts to views, navigation, aesthetics, or ecological

resources. *E.g.*, *Fladseth v. Mason Cy.*, SHB No. 05-026, CL 13–16 (May 2007); *May v. Robertson*, SHB No. 06-031, CL 16–18 (Apr. 2007); *Genotti v. Mason Cy.*, SHB No. 99-011, CL XII (Oct. 1999); *Close v. San Juan Cy.*, SHB No. 99-021, CL IV (Jan. 2000).

This construction of the SMA also has been upheld by Washington courts. *Bellevue Farm Owners Ass'n v. Shorelines Hearings Bd.*, 100 Wn. App. 341, 355–62, 997 P.2d 380 (2000) (upholding Board decision denying permit to construct 345 foot dock based on aesthetic and cumulative impacts); *see also Buechel*, 125 Wn.2d at 209 (upholding denial of permit to construct single family residence based in part on cumulative impacts); *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 337, 969 P.2d 1072 (1998) (upholding denial of overwater residence based on prohibition in the master program).

While these cases concern shoreline permits, the principle that shoreline uses and developments may be prohibited or limited due to impacts to views, aesthetics, navigation, or other shoreline functions equally supports adoption of the City's master program denying such uses on an area-wide basis. The City's amendment serves the SMA's policy in RCW 90.58.020 to avoid the "piecemeal and uncoordinated" development of the state's shorelines by prohibiting inconsistent uses programmatically rather than proceeding in a piecemeal, permit-by-permit fashion.

These cases also refute Appellants' contention that the City's amendment is inconsistent with the SMA because it denies a priority use of the shoreline. Appellants' Opening Brief (App. Br.) at 28–29. First, the Shorelines Hearings Board has held that individual private residential docks are not a priority use of the shoreline under the SMA. *Spencer*, SHB No. 97-43, CL VII. Second, even if such docks have some priority, local governments do not have to allow them everywhere. Under RCW 90.58.020, certain uses are given priority only “in those limited instances when authorized.” As explained in *Buechel*:

The landowner argues that . . . residential use must be given priority under the SMA. This is inaccurate. The landowner relies on the SMA which states that ‘[a]lterations of the natural condition of the shorelines of the state, *in those limited instances when authorized*, shall be given priority for single family residences and . . . shoreline recreational uses.’ . . . However, in this case the residential use was not ‘authorized’; in fact, it was prohibited by the regulations . . . .

*Buechel*, 125 Wn.2d at 209.

So long as the local government makes reasonable allowance for priority uses in the jurisdiction as a whole, it is perfectly consistent with the SMA, and even required, for it to prohibit or restrict such uses in certain locations. This is especially true for shorelines of statewide significance like Blakely Harbor, because the statute directs local governments to give priority on such shorelines to preservation of their

natural character (priority 2) and protection of the resources and ecology of the shoreline (priority 4) over public access to the shoreline (priority 5) or recreational opportunities (priority 6). RCW 90.58.020.

Appellants cannot demonstrate by clear and convincing evidence that the City's amendment is inconsistent with the SMA. They fail, quite simply, because the amendment is exactly the balanced approach to shoreline management that the Act requires. It preserves the natural character of the Harbor, and its resources and ecology, while still allowing for recreational and other public and private uses.

In the end, Appellants' claim is nothing more than an assertion that the SMA cannot restrict their "right" to build an individual dock on their property. Since, however, the SMA was enacted for the very purpose of preventing such "uncoordinated and piecemeal" development, Appellants' claim must fail.

**C. The SMP Amendment Is Consistent With the 2004 Guidelines In Any Event**

At the Board, Appellants argued that the amendment was not consistent with the 2004 guidelines. *See* Petitioners' Opening Brief filed with the Board at 19–22 (arguing that the amendment is inconsistent with WAC 173-26-186(8)(d)); Petitioners' Reply Brief filed with the Board at 21 ("[p]etitioners raised the argument of compliance with the new SMA

guidelines in its Petition for Review.”). Appellants did not argue for a remand to Ecology to consider the amendment under those guidelines. Thus, the Board addressed the issue of consistency with the 2004 guidelines in its decision.

Now, on appeal, Appellants argue that the Board should have remanded the amendment to Ecology for application of the guidelines. However, because Appellants did not raise this argument to the Board, they cannot raise it now. *See* RCW 34.05.554 (petitioner on judicial review under the APA cannot raise new issues). If, by addressing Appellants’ arguments regarding consistency with the new guidelines, the Board erred, it was an error invited by Appellants of which they cannot now complain. *See Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (party cannot set up an error at trial and then complain of it on appeal).

In any event, the Board and the superior court both concluded that the amendment was consistent with the new guidelines, even if those guidelines were applicable. Board Decision at 13–16; CP 178. These decisions should be affirmed.

Ecology’s 2004 guidelines are codified in Chapter 173-26 WAC. Among the requirements, WAC 173-26-186(8)(d) requires local

governments to evaluate the cumulative impacts of shoreline development and develop regulations to address those foreseeable impacts:

Local master programs shall evaluate and consider cumulative impacts of reasonably foreseeable future development on shoreline ecological functions and other shoreline functions fostered by the policy goals of the act. To ensure no net loss of ecological functions and protection of other shoreline functions and/or uses, *master programs shall contain policies, programs, and regulations that address adverse cumulative impacts* and fairly allocate the burden of addressing cumulative impacts among development opportunities . . . .

WAC 173-26-186(8)(d) (emphasis added).

The City's evaluation and master program amendment is fully consistent with this guideline. *See* Board Decision at 14–16. The Blakely Harbor Cumulative Impacts Assessment projected reasonably foreseeable dock development in the Harbor and evaluated the cumulative impacts to views, navigation, and ecological resources that likely would occur from that development. Board's Record, Ex. C-2.1. The City then adopted SMP regulations, based on the assessment, to minimize the impacts from dock development and achieve no net loss of shoreline ecological functions. This process is exactly what is required under the new guidelines.

Similarly, WAC 173-26-201(3)(d)(iii) specifically requires local government to

consider and address cumulative impacts on other functions and uses of the shoreline that are consistent with the [A]ct. For example, a *cumulative impact of allowing development of docks or piers could be interference with navigation on a water body.*

In light of this provision and the specific example, the Appellants cannot show harmful error from Ecology's decision not to apply the 2004 guidelines to the City's 2003 amendment.

Here, the City's Cumulative Impacts Assessment projected that, unless dock construction were restricted, 45 docks would likely be built in the Harbor of an average length of 325 feet. Board's Record, Ex. C-2.1<sup>3</sup> The Assessment arrived at the number of docks by looking at the number of parcels on the Harbor and making assumptions about the number of docks that would be built based on percentages found in other harbors on the Island. The analysis discounted parcels that were not likely to be developed due to size, location or configuration, that likely would not develop docks based on existing easements or covenants, and parcels that likely would develop joint use docks based on existing regulations. Board's Record, Ex. C-2.1, at 8.

The Assessment then modeled impacts on views, navigation, and ecological resources based on the predicted build out. Regarding views, the Assessment found "significant view corridor narrowing, including an

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<sup>3</sup> This was the "predicted" build out level. At maximum build out, the analysis projected 59 docks.

almost 58% reduction in view from the Blakely Harbor Park, approximately 27% reduction from the eastern Country Club Road vista, and view reductions from the remaining vistas ranging from approximately 41 to 47 percent.” Board’s Record, Ex. C-2.1, at 11. Regarding navigation, the Assessment found that 31.5 percent of the Harbor would be lost to navigation by powered vessels at the predicted build out. *Id.* at 14. Regarding natural resources, the Assessment did not quantify such impacts, but found that unrestricted dock development created risks to natural resources from both direct and indirect impacts. *Id.* at 22–23.

Appellants challenge the Assessment on a variety of grounds, but their criticisms are not supported by any evidence, are refuted by the Assessment itself, and do not meet the clear and convincing evidence standard. They claim, for example, that the 45 docks predicted by the Assessment is inaccurate because the number of docks currently existing is only 6. According to them, past development is the best prediction of future development. App. Br. at 21. However, their argument that past development is a predictor of future development is not supported by the opinion of any land use expert and makes little sense in the context of planning for growth.

Appellants also claim that the Assessment failed to take into consideration restrictive covenants on certain parcels, ownership of part of the Harbor by the park district, and the fact that docks in the Harbor, due to topography, must be lengthy and thus expensive to build. App. Br. at 22. In fact, the Assessment took into account these factors, and others, and significantly discounted the number of docks likely to be built in the predicted scenario versus maximum build out. For example, the Assessment predicted that only 50 percent of parcels developed with residences would build docks, which is lower than the 60 percent observed on other parts of the Island. Board's Record, Ex. C-2.1, at 8. The Assessment also assumed a predicted build out of only 94 residences, versus a maximum possible build out of 307 residences based on existing zoning densities.

Next, Appellants claim that the Assessment did not take into account the beneficial effects of other regulatory programs. App. Br. at 23. In fact, the Assessment did consider the effects of other regulatory programs. The predicted build out scenario was based on "known parcel restrictions" including zoning density, "basic critical area analysis," known restrictive covenants/easements, and "existing regulations." Board's Record, Ex. C-2.1, at 7–8. The Assessment modeled the predicted docks on a "standard design that reflects . . . typical mitigation

measures and regulatory requirements.” *Id.* at 7. The Assessment gave no specific discount in the predicted number of docks for “other regulatory programs” because, other than the SMA, no other regulatory program would deny the construction of docks in the Harbor.

Appellants further attack the City’s decision for failing to “fairly allocate the burden of addressing cumulative impacts.” App. Br. at 23. According to the Appellants, they were unfairly singled out because the amendment only applies to Blakely Harbor. However, the City clearly documented the need for the amendment by citing Blakely Harbor’s scenic and recreational attributes, and its relatively low level of existing dock development. Blakely Harbor differs from other harbors on the Island which are mostly already developed with docks. The City rationally concluded that Blakely Harbor should be preserved from high levels of dock development to preserve its aesthetic, navigational, and ecological character. There is nothing unfair or arbitrary in its doing so.

Nor does the amendment prevent Appellants from boating and other recreational pursuits in the Harbor. The amendment allows construction of two joint use docks and one community dock for public use. It also allows use of mooring buoys. Bainbridge Island precludes dock development entirely in the natural environment elsewhere on the Island. Thus, rather than being unfairly singled out, the City’s amendment

fairly distributes the burden associated with preserving a quality of life important to the City in a way that benefits all residents of the Harbor.

Appellants also argue that the amendment is inconsistent with the guidelines because none of the suggested environment designations in the guidelines require regulations prohibiting docks. App. Br. at 24–25. This argument establishes only that the amendment is not compulsory under those particular sections of the guidelines. It does not establish that the City’s amendment is not required by the other sections of the guidelines cited above. Nor does it establish that the amendment is inconsistent with the guidelines as a whole.

Moreover, the guidelines allow local governments flexibility to use different environment designations from the suggested ones, and allow local governments to tailor regulations to meet local needs and aspirations. *See* WAC 173-26-211(4)(c) (local government may establish a different designation system provided it is consistent with the purposes and policies of the act); WAC 173-26-186(9) (local governments have discretion to balance policy goals of this chapter and to modify master programs to reflect changing circumstances); WAC 173-26-171(3)(a) (guidelines allow local governments substantial discretion to adopt master programs reflecting local circumstances). As the Board held, the amendment here is

well within the local government's discretionary authority to determine where piers and docks should be located. *See* Board Decision at 12.

In short, the Appellants cannot show that the City's action is inconsistent with any language or intent in Ecology's guidelines. The Cumulative Impacts Assessment made reasonable and appropriate assumptions about the level of expected dock development in the Harbor. The superior court and the Board properly rejected Appellants' claim that the amendment was inconsistent with those guidelines.

**D. Appellants' Constitutional Claims Are Without Merit**

Appellants make a variety of constitutional claims that the superior court rejected. These are (1) the amendment violates the public trust doctrine; (2) the amendment conflicts with the general laws of the state; and (3) the amendment violates substantive due process and equal protection. These claims are without merit and the superior court's rejection of them should be affirmed. Appellants bear a heavy burden of establishing that a regulation results in a constitutional violation. *Orion Corp. v. State*, 109 Wn.2d 621, 658, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). Appellants cannot meet this burden.

**1. The City's Ordinance Does Not Violate The Public Trust Doctrine**

Appellants argue that the amendment violates the state's public trust doctrine because it prevents them from constructing a private dock and thereby accessing public waters. In fact, the amendment is fully consistent with the public trust doctrine because, as discussed above, it is consistent with the statutory expression of that doctrine, namely, the SMA.

The public trust doctrine protects the public's interest in navigational and recreational use of navigable waters. Under the doctrine, the public has an interest in navigable waters and the lands underlying them in the nature of a covenant that runs with the land. This interest gives the public the right to traverse such waters for navigational, recreational, and other purposes such as swimming, fishing, and boating. *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969); *Caminiti v. Boyle*, 107 Wn.2d 662, 668–69, 732 P.2d 989 (1987); *Orion Corp.*, 109 Wn.2d at 640–41.

The City's amendment protects the public's interest in navigational and recreational use of Blakely Harbor. Appellants misconstrue the doctrine as if enshrines a right to construct individual, private docks, because a person could use such a dock for navigation purposes. But unregulated docks also impair the public's use of the navigable waters, as

shown by the City's assessment and the record below. The limitations on dock construction are therefore *supported* by the public trust doctrine, not prohibited by it. *See Weden v. San Juan Cy.*, 135 Wn.2d 678, 700, 958 P.2d 273 (1998) (rejecting an argument that unregulated use of jet skis is protected by the public trust doctrine. “[I]t would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state.”).

It was to advance the goals of the public trust doctrine that the people enacted the SMA. The SMA creates a framework for regulating private development to protect these important public trust doctrine interests in navigable waters. *See Wilbour*, 77 Wn.2d at 316 n.13. Appellants' arguments stand the doctrine on its head by arguing that the City cannot preserve public navigational or recreational interests in the Harbor.

## **2. The Amendment Does Not Conflict With State Law**

Appellants also argue that the amendment conflicts with state law. An ordinance violates article XI, section 11 of the Washington Constitution if it directly and irreconcilably conflicts with a state statute. *Brown v. City of Yakima*, 116 Wn.2d 556, 561, 807 P.2d 353 (1991). If the two enactments can be harmonized, however, no conflict will be found. *Id.* Unconstitutional conflict is found where an ordinance permits

that which is forbidden by state law, or prohibits that which state law permits. *Trimen Dev. Co. v. King Cy.*, 124 Wn.2d 261, 269, 877 P.2d 187 (1994); *City of Bellingham v. Schampera*, 57 Wn.2d 106, 110–11, 356 P.2d 292 (1960).

To claim a conflict with state law, the Appellants argue that the ordinance forbids construction of docks in Blakely Harbor while the state law allows such docks. The Appellants, however, cite to provisions of the 2004 guidelines, WAC 173-26-231(3)(b) and WAC 173-27-040(2)(g). As explained above, these guidelines do not “allow” docks; the guidelines help local government develop appropriate SMPs.

Here again, Appellants stand the applicable law on its head. The City’s amendment is fully consistent with Ecology’s guidelines and the SMA. Neither the SMA, the guidelines, nor any other state law or regulation grants Appellants a “right” to construct a private residential dock. To the contrary, Appellants’ ability to construct a dock is subject to regulation under the SMA, and under numerous other applicable state laws. *See* RCW 77.55.021 (hydraulic project approval required); RCW 79.105.430 (landowner may construct a dock on state-owned tidelands “subject to applicable local, state, and federal rules and regulations governing location, design, construction, size and, length . . .”).

Turning to the guidelines, WAC 173-26-231(3)(b) says that residential docks are water dependent uses; however, as discussed above, it does not follow that such docks must be allowed everywhere. Similarly, WAC 173-27-040(g) merely says that docks under a certain dollar threshold are exempt from the requirement to obtain a substantial development permit; however, other such docks are not exempt from the Act and require a permit. The exemption does not confer any “right” to construct a dock. *See Putnam*, 13 Wn. App. at 204. The amendment to the City’s master program does not conflict with either of these regulations.

Appellants cite *Biggers v. Bainbridge Island*, \_\_\_ Wn.2d \_\_\_, 169 P.3d 14 (2007) in support of their arguments. In *Biggers*, five members of a divided Court upheld the City’s authority to impose a moratorium on pier and dock development, but concluded under the specific facts of the case that the moratorium was invalid. The issues addressed in *Biggers* do not suggest a statutory dock building right.

Moreover, the ruling in *Biggers* does not support Appellants’ constitutional contentions because the divided decision is limited to its facts and the narrow holding that the moratoriums were invalid. *See W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (where justices divided, holding of the court is the position taken

by those concurring on the narrowest grounds). The plurality opinion cited by Appellants' Opening Brief at 41 did not command a majority of justices and therefore has limited precedential value. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004).

**3. The Amendment Does Not Violate Due Process Or Equal Protection**

**a. Substantive Due Process**

In *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990), the court announced an approach to evaluating when restrictions on land use and development meet the test for substantive due process: (1) is the regulation aimed at achieving a legitimate public purpose; (2) does it use means that are reasonably necessary to achieve that purpose; and (3) is it unduly oppressive to the landowner. *Id.* If an ordinance is invalid under a substantive due process analysis, the proper remedy is to strike the ordinance. *Id.* at 331–32. The purpose of this analysis is to prevent the use of excessive police power that would require an individual “to shoulder an economic burden, which in justice and fairness the public should rightfully bear.” *Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993).

Before engaging in substantive due process review, the Court should consider how appellate decisions counsel a limited approach to

such judicial scrutiny. Substantial deference is owed to legislative policy decisions and the judiciary should not strike down legislation merely because a court disagrees with the economic theory or approach to solving a societal problem. As the Court stated in *Jones v. King County*:

In applying the substantive due process test we give deference to legislative policy decisions. . . . ‘If the court can reasonably conceive of a state of facts warranting the legislation, those facts will be presumed to exist.’

*Jones v. King Cy.*, 74 Wn. App. 467, 479, 874 P.2d 853 (1994) (citations omitted).

In this case, Appellants cannot demonstrate any of the *Presbytery* factors. Appellants cannot demonstrate that the amendment fails to serve a legitimate public purpose. Protecting the public interest in navigation, recreation, and ecological values is a legitimate public purpose sanctioned by the SMA itself. Nor can Appellants demonstrate that the amendment fails to use a measured and reasonable means of advancing this purpose. Limiting dock development in the Harbor clearly advances the public purpose of protecting the Harbor’s aesthetic, navigational, and recreational values. Moreover, the amendment is not a “ban” on docks, as Appellants contend, because it allows two joint use docks and one community dock.

Finally, Appellants cannot demonstrate that the amendment is an “undue burden” because it is precisely targeted at prohibiting the very

development giving rise to the harm. *Weden*, 135 Wn.2d at 703 (“[i]t defies logic to suggest an ordinance is unduly oppressive when it regulates only the activity which is directly responsible for the harm.”). Appellants submit no evidence whatsoever of any diminution in value of their property, or of any other hardship, resulting from the amendment. They stand on the same footing as many other waterfront owners where dock construction is limited or prohibited. Appellants’ due process claim is without merit.

**b. Equal Protection**

To show a violation of the equal protection clause under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, a party must establish that the challenged law treats unequally two similarly situated classes of people. *State v. Blilie*, 132 Wn.2d 484, 493, 939 P.2d 691 (1997); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 634–35, 911 P.2d 1319 (1996); *see also Matter of Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984) (“[t]he equal protection clause requires that persons similarly situated with respect to the legitimate purposes of the laws receive like treatment.”).

The first step in conducting any equal protection analysis is determining the appropriate standard of review. *Tunstall v. Bergeson*, 141 Wn.2d 201, 225, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001). In

the absence of any argument that the challenged ordinance violates a fundamental right or inclusion in a suspect class, rational basis review applies. *See Tunstall*, 141 Wn.2d at 226. Here, there is no colorable basis for claiming that government is affecting a fundamental right or a suspect class, so the rational basis test applies.

Under the rational basis test, the court determines whether (1) the governmental action applies alike to all members within the designated class; (2) there are reasonable grounds to distinguish between those within and those without the class; and (3) the classification has a rational relationship to the legislative purpose. *Convention Ctr. Coalition v. City of Seattle*, 107 Wn.2d 370, 378–79, 730 P.2d 636 (1986); *Thurston Cy. Rental Owners Ass’n v. Thurston Cy.*, 85 Wn. App. 171, 185, 931 P.2d 208 (1997). The court will not rule that an ordinance is invalid under a rational basis review unless it rests on grounds “wholly irrelevant to the achievement of a legitimate state objective.” *Nielsen v. Wash. State Bar Ass’n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978) (citing *McGowan v. Maryland*, 366 U.S. 420, 425–26, 393, 81 S. Ct. 1101, 6 L. Ed. 2d (1961)). Concerning the third prong, a classification must be “purely arbitrary” to overcome the strong presumption of constitutionality. *Thurston Cy. Rental Owners Ass’n*, 85 Wn. App. at 186.

The City legitimately determined that Blakely Harbor, because of its status as a relatively undeveloped shoreline with high recreational values, should be preserved to the maximum extent possible from pier and dock development. Board's Record, Ex. C-131. The City stated:

New dock development should be limited in Blakely Harbor because it is the least developed harbor in Central Puget Sound and is prized by the Bainbridge Island community and residents throughout Washington State for its scenic beauty, unique rocky shore, and navigable water. . . . Blakely Harbor is also prized by fish and wildlife for its diversity of habitats and lack of overwater structures. In fact, part of the harbor had been previously proposed as a marine protected area and is a popular dive site because of the ecological diversity and abundance there.

Board's Record, Ex. C-126.

The amendment applies equally to all of the affected landowners in Blakely Harbor. To the extent the amendment imposes a requirement on property owners in Blakely Harbor that does not apply to other shoreline owners in other areas of the Island, that requirement is justified by the recreational, aesthetic, and natural resource values the Harbor possesses. Also, the regulation legitimately focuses on a particular type of use, pier and dock development, that is directly related to the values sought to be preserved. By their very nature, SMP provisions must be tailored to the values and characteristics of each particular stretch of shoreline. It can not be established that the ordinance amending the City's SMP is irrational.

Therefore, Appellants' challenge to the ordinance on equal protection grounds must be rejected.

**E. The Superior Court Properly Denied Appellants' Motion To Supplement The Record**

At the superior court, Appellants sought to supplement the record with the deposition of a Bainbridge Island official taken in a different case. CP 88. The superior court denied this request because the evidence did not meet any of the standards for supplementation of the record under the APA. CP 180. This decision should be affirmed.

RCW 34.05.562 limits the ability of the court on judicial review under the APA to take additional evidence to certain specific circumstances, namely, where the evidence is needed to decide (1) improper constitution of the decision-making body or other grounds for disqualification; (2) unlawfulness of procedure; or (3) material facts not required to be determined on the agency record.

Here, the proffered evidence had nothing to do with any of these factors. Rather, the evidence was simply an attempt by Appellants to call into question the validity of the assumptions made in the Cumulative Impacts Assessment. The evidence was not submitted to the Board nor was it part of the City's or Ecology's record reviewed by the Board. The evidence did not even support Appellants' claims. The deposition

testimony simply acknowledged that, under a different set of assumptions than those in the Assessment, a different number of docks would be predicted. CP 173. The superior court properly refused to consider this unremarkable fact.

## V. CONCLUSION

For the reasons stated above, the superior court and the Board should be affirmed and the appeal dismissed.

RESPECTFULLY SUBMITTED this 24 day of March 2008.

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NO. 34780-6-II

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

KELLY and SALLY SAMSON,  
husband and wife; and ROBERT and  
JOANNE HACKER, husband and wife,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND;  
STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY; and  
CENTRAL PUGET SOUND  
GROWTH MANAGEMENT  
HEARINGS BOARD,

Respondents.

CERTIFICATE OF  
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 24th day of  
March 2008, I caused to be served Respondent Department of Ecology's  
Response Brief in the above-captioned matter upon the parties herein as  
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the foregoing being the last known business addresses.

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

DATED this 24th day of March 2008 in Olympia, Washington.

  
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NICOLE D. HOLMAN, Legal Assistant