

NO. 35961-8

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

BAINBRIDGE CITIZENS UNITED, a Washington nonprofit corporation
and GARY TRIPP, Director of Bainbridge Citizens United

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES
and DOUG SUTHERLAND, Commissioner of Public Lands,

Respondents.

RESPONDENTS' RESPONSE BRIEF TO APPELLANTS' BRIEF

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I. COUNTERSTATEMENT OF THE ISSUES

This case is an action for declaratory and injunctive relief brought by Appellants Bainbridge Citizens United and its director, Gary Tripp (collectively BCU). BCU seeks an order declaring that certain vessels moored in Eagle Harbor are violating WAC 332-30-171, relating to residential use, and WAC 332-30-127¹, relating to unauthorized use of state-owned aquatic lands. Specifically, BCU argues that WAC 332-30-127 imposes mandatory duties on the Department of Natural Resources (DNR), and that DNR's decision not to enforce this rule violates these mandatory duties. BCU further seeks an order to enforce such declaration against vessel owners.

Both parties moved for summary judgment in the trial court.² DNR argued that the case was not justiciable and that it did not have a mandatory duty to enforce the rule. The trial court issued an order granting DNR's motion and denying BCU's motion.

The legal issues in this case are as follows:

1. Whether DNR's broad management authority over state-owned aquatic lands is limited by its administrative rule governing

¹WAC 332-30-127 is attached as Appendix A.

²BCU conceded that this matter is not subject to review under Washington's Administrative Procedure Act under State Owned Forests v. Sutherland, 124 Wn. App. 400, 101 P.3d 880 (Div. I, 2004) review denied, 154 Wn.2d 1022, 116 P.3d 398 (2005). CP 164, n.2.

actions against unauthorized use of such lands, or whether such rule is merely one in an array of management options available to DNR.

2. Whether this case presents a justiciable controversy with respect to non-residential vessels not subject to the residential use rule package.

3. Whether this case presents a justiciable controversy capable of final and conclusive resolution when none of the vessel owners at issue are parties to this action.

4. Whether DNR's decision to refrain from enforcing WAC 332-30-127 against individual vessel owners while it works with local government to resolve long-term moorage issues in Eagle Harbor violates the public trust doctrine.

II. COUNTERSTATEMENT OF THE CASE

Eagle Harbor is a bay on the east side of Bainbridge Island with an area of approximately 483 acres at mean higher high tide.³ CP 117. This litigation concerns open water anchorage and moorage occurring in the central portion of Eagle Harbor referred in the record as "Middle Harbor." CP 119.

³Most tidally-influenced water bodies have two high tides within a 24-hour period. The higher of the two high tides is referred to as higher high tide. National Oceanic & Atmospheric Administration Tides and Currents, Tidal Datus, http://tidesandcurrents.noaa.gov/datum_options.html (last visited June 11, 2007). Hughes v. State, 67 Wn.2d 799, 808, 410 P.2d 20 (1966) reversed by, 389 U.S. 290, 88 S.Ct. 433, 19 L.Ed.2d 530 (1968).

Middle Harbor is the only area in Eagle Harbor that is available to the general public for anchorage and moorage. The U.S. Coast Guard prohibits anchorage and moorage in the Outer Harbor (harbor entrance) in order to protect the federal navigation channel and an area of capped contaminated sediments. CP 120; CP 66, ¶ 5, lines 11-13. The remaining inland portion of Eagle Harbor consists of privately-owned tidelands, which are generally not available to the public for anchorage and moorage because of their private ownership or because they have been designated as a “no anchor” habitat conservancy zone. CP 121-22. As such, open water vessel moorage and anchorage is concentrated in Middle Harbor. CP 120. There is no doubt that Middle Harbor can become congested with vessels, especially during the summer boating months. CP 67, ¶ 12, lines 14-15.

While BCU is generally displeased with the presence of moored and anchored vessels in the harbor, its legal arguments and most colorful complaints center on about 21 vessels and houseboats (CP 15, lines 1-3) referred to as the “liveaboards.” E.g., CP 5, line 11.

The presence of houseboats and vessels in Eagle Harbor, and other water bodies, has not gone unaddressed by DNR. Documents from 1999 and 2000 demonstrate DNR’s internal debate about whether any residential use (even that occurring on vessels) was an appropriate use of

state-owned aquatic lands. CP 195-96; CP 207-220. DNR's focus at that time was on the nature of the use, not the kind of structure containing the use. CP 241. DNR viewed any residential use as a non-water dependent use that should be discouraged, regardless of the type of structure that housed the residential use. CP 196. DNR was immediately focused on residential use occurring at marinas (CP 214), but was also concerned with residential use occurring in open water, unassociated with fixed moorage facilities. CP 198. Even at that time, DNR recognized that Eagle Harbor presented exceptional circumstances where it might approve residential use under the right conditions. CP 198; CP 207. DNR, however, needed to consider under what circumstances residential use could be tolerated.

After a certain amount of public controversy, including litigation, DNR decided to employ the rulemaking process as a means of collecting public input and further refining its policy on residential use. CP 315; CP 317. During the summer 2001, DNR held seven public workshops throughout the state to gather public input on the necessary elements of any proposed rule addressing residential use. CP 317. Based on this extensive public discussion, DNR proposed a new draft rule in January 2002. Following four hearings in early 2002, DNR further revised both the proposed rule and the Draft Environmental Impact Statement. CP 264; CP 318. The process and rationale for adopting what

eventually became known as the “residential use rule,” is documented in the Revised Draft and Final Environmental Impact Statements. CP 249-295; CP 305-348. This rule is actually a package of rule amendments, as well as a new rule containing DNR’s newly formulated guidance on residential use occurring on state-owned aquatic lands. WAC 332-30-106(23), (38), (45), (62), and (74) (definitions); WAC 332-30-115(4) (no residential use in harbor areas); WAC 332-30-139(5) (open water moorage and anchorage areas); WAC 332-30-144 (no residential use at private recreational docks); WAC 332-30-148 (no residential use at swim rafts and mooring buoys); and, WAC 332-30-171 (residential use in leased areas).

During the rulemaking process, DNR’s approach to residential use changed. Rather than banning all residential use occurring on state-owned aquatic lands, DNR concluded that residential use depended significantly on local planning. CP 325. DNR recognized that local governments have the tools and the responsibility to determine where residential use is appropriate and whether adequate public services existed to support residential use.

Through this rule package, DNR attempts to provide for a modest level of residential use, while not overburdening the local area with residential use that has not been considered, planned for, or approved.

DNR's residential use rule package empowers, but does not require, local governments to manage residential use in several ways. It allows local government to increase or decrease the percentage limit on the amount of residential use occurring at marinas. CP 325; WAC 332-30-171(2)(a). It also allows local government to identify areas for open water moorage through its shoreline planning processes. CP 325; WAC 332-30-171(8)(a); see also WAC 332-30-139(5). Further, DNR recognizes that many of the problems presented by residential use of state-owned aquatic lands are best addressed through local planning decisions. One example is aesthetic impact. CP 341. Floating houses and vessels may obstruct scenic views or may be unsightly. CP 341. The Shoreline Management Act, RCW 90.58, and local ordinances determine the appropriate controls on aesthetic elements of residential use on state-owned aquatic lands. CP 341. DNR decided not to make this value judgment on a state-wide basis, but to allow local governments to set the standard for aesthetic considerations reflecting the values of the local community.

Likewise, DNR noted that local government is in the best position to determine the capacity of the local community to provide for the public services and utilities needed by residential uses of aquatic lands. CP 344. Local government can assess the impacts associated with residential use

within its normal planning processes. CP 344. Rather than dictating a particular state-wide outcome, DNR intended its rule to afford a more collaborative approach to the issue of residential use on state-owned aquatic lands. See CP 316 (affording local jurisdiction more control may lead to collaborative land use decisions). In particular, DNR took this collaborative approach with the City of Bainbridge Island (City) with respect to open water anchorage in Eagle Harbor, including houseboats and residential vessels. CP 68, ¶ 15, lines 5-6.

The City has spent a great deal of time and effort examining its historic and current public use of Eagle Harbor and planning for future use. As early as 1994, the City's Comprehensive Plan identified that "water-based housing (live-aboard) is a viable component of the present and future low-income housing stock of Bainbridge Island." CP 141. In 1997, the City appointed a citizens' committee to create a Harbor Management Plan describing the policies, goals, and vision of the community regarding harbors of Bainbridge Island, including Eagle Harbor. CP 75. This effort culminated in the 1999 City of Bainbridge Island Harbor Management Plan (CP 71-111) which was adopted by City Ordinance. CP 140.

Consistent with its planning efforts, the City has taken steps to address the congestion in Eagle Harbor. The City established a

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navigational channel on the north side of Middle Harbor marked by buoys. CP 68, ¶ 17, lines 20-23. The City has also created the position of Harbor Master to administer the harbor. CP 68 ¶ 12, lines 22-23. Most significantly, the City has completed the Eagle Harbor Anchoring and Mooring Plan, which proposes a future open water anchorage and moorage area that will be operated by the City once it is implemented. CP 123-127. The anchoring and mooring plan recognizes that Eagle Harbor has historically been a place in which many cultures and diverse activities have existed together in harmony. CP 114. It states that diverse lifestyles are deemed precious to the Island citizens and must not be allowed to devolve into a monoculture of any persuasion. CP 114. This plan balances the competing needs of the community for unobstructed navigation and anchorage by creating the open water anchorage and moorage area in Middle Harbor. If approved by the City Council, this anchorage and moorage area will accommodate up to 50 vessels, including 20 residential-use vessels and houseboats. CP 124.

DNR staff worked cooperatively with the City throughout this planning process. A DNR staff member served as an *ex officio* member of the harbor commission. CP 66, ¶ 4, lines 6-7. Because of the City's efforts, DNR decided not to attempt to remove houseboats and residential vessels from the Harbor. CP 67-68. Furthermore, under

WAC 332-30-139(5), the City has until November 17, 2007, to authorize the open water anchorage and moorage under the City's Shoreline Master Program.⁴ WAC 332-30-139(5) provides that DNR may lease open water moorage and anchorage areas to local governments that have authorized the establishment of open water moorage and anchorage areas in their shoreline master programs within five years of the effective date of this rule. The effective date of the rule was November 17, 2002. WSR 01-21-076 (final rule filed); see RCW 34.05.380(2) (rule effective 30 days from filing). While RCW 90.58.080 requires local governments to amend their shoreline master programs by a specified schedule, nothing precludes the City from doing so by November 17, 2007 deadline. RCW 90.58.080(2)(b).

III. SUMMARY OF ARGUMENT

BCU argues that WAC 332-30-127 imposes a mandatory duty upon DNR to take enforcement action against owners of vessels moored without authorization on state-owned aquatic lands in Eagle Harbor. BCU argues that the court should order DNR to impose the provisions of this

⁴The Shoreline Management Act, RCW 90.58, grants local government the primary responsibility for shoreline planning required by the act. RCW 90.58.050. The plans developed by local governments are referred to as Shoreline Master Programs. RCW 90.58.030(3)(b). The City's updated master program required in RCW 90.58.080 will have a significant role in determining whether the anchorage and moorage will be an allowed use.

rule against violators. BCU further argues that DNR's failure to enforce this rule violates the public trust doctrine.

DNR manages state-owned aquatic lands pursuant to a statutory grant of authority. DNR must manage these lands for the public benefit within broad guidelines stated by the legislature. Much of DNR's management authority within these statutory guidelines is discretionary.

Pursuant to this management authority, DNR has chosen to work with the City to resolve unauthorized moorage issues in Eagle Harbor. Also under this management authority, DNR has adopted rules governing residential use of state-owned aquatic lands and governing its procedures for taking action against unauthorized users. By virtue of adopting these rules, however, DNR did not impose upon itself mandatory enforcement duties against unauthorized users. Instead, the rules reflect various management options DNR may choose to pursue in the exercise of its discretion. DNR's decision to work with the City to resolve long-term moorage issues and to refrain from imposing the provisions of WAC 332-30-127 against individual vessel owners is within its broad discretionary management authority.

Further, BCU does not present a judiciable controversy. WAC 332-30-127 is BCU's only basis for arguing that DNR must take action against the non-residential vessels anchored and moored in

Eagle Harbor. However, the interests that this rule serves do not fall within the zone of interests claimed by BCU. BCU's claimed interests only fall within the zone of interests advanced by the residential use rule package. BCU has no standing to enforce against non-residential uses. Even if it did, no law expressly prohibits their use. Even for the residential-use vessels, BCU cannot obtain final and conclusive determination of this controversy. The vessel owners and occupants are not parties and are not bound by such determination. Failure to include these affected parties relates directly to this court's jurisdiction, hindering its ability to bring about final and conclusive relief. At best, BCU seeks an impermissible advisory opinion as to the mandatory or directory nature of WAC 332-30-127.

Finally, DNR's actions in this matter do not violate the public trust doctrine because neither DNR, in particular, nor the State of Washington, as a whole, has surrendered any of its sovereign authority over Eagle Harbor. To the contrary, DNR and the City are attempting to balance the competing public uses occurring in the harbor consistent with the values of the local community as a whole.

IV. STANDARD OF REVIEW

The appellate court reviews an order of summary judgment de novo. Western Telepage, Inc. v. City of Tacoma Dep't of Financing,

140 Wn.2d 599, 607, 998 P.2d 884 (2000); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The parties agree that no genuine issues of material fact are in dispute and the questions presented to the trial court were appropriate for summary judgment disposition. Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. See CR 56(c).

Additionally, statutory interpretation is a question of law, which the appellate court reviews de novo. Western Telepage, 140 Wn.2d at 607; Enterprise Leasing, Inc. v. City of Tacoma, 139 Wn.2d 546, 552, 988 P.2d 961 (1999).

V. ARGUMENT

A. **DNR's Statutory Authority to Manage State-Owned Aquatic Lands for the Public Benefit is not Limited by WAC 332-30-127.**

BCU asks the court to require DNR to impose the provisions of WAC 332-30-127 against vessels it asserts are illegally present in Eagle Harbor. CP 17. In essence, BCU seeks to usurp DNR's discretionary decision-making authority. It would direct DNR's resources toward the action BCU prefers, rather than toward the action DNR has determined will be most effective and is most suitable to resolving the

problems at hand. BCU's position is contrary to the broad statutory authority the legislature has given to DNR to manage state-owned aquatic lands and its request was properly denied by the trial court.

1. DNR Manages State-Owned Aquatic Lands for the Benefit of all Citizens of the State.

At statehood, Washington State asserted ownership to a significant portion of aquatic lands, up to the line of ordinary high tide or ordinary high water. Const. art. XVII § 1. Today, the state owns approximately 2.4 million acres of beds of navigable waters, tidelands, and shorelands throughout Puget Sound, Washington's coastal waters, and the navigable rivers and lakes within the state.⁵ CP 257. DNR manages these lands on the public's behalf and leases these lands for uses such as marinas and mooring buoys. CP 257. DNR's management decisions are guided by a number of state laws codified in RCW Title 79, including the 1984 Aquatic Lands Act, currently codified in scattered sections throughout RCW 79.105. DNR is authorized to adopt rules within the confines

⁵Beds of navigable water are those lands lying waterward of and below the line of the extreme low tide mark in navigable tidal waters, such as Eagle Harbor, where no harbor lines have been established. CP 502; see RCW 79.105.060(2) (defining beds of navigable water). "Bedlands" is used interchangeably with the term "beds of navigable water." WAC 332-30-106(9). Tidelands are those lands lying between ordinary high tide and the line of extreme low tide. See RCW 79.105.060(4) (first class tidelands are those lying within corporate limits of any city). "Shorelands" are the shores of navigable water bodies not subject to tidal flow, lying between the line of ordinary high water and the line of navigability, or inner harbor line where established. RCW 79.105.060(3).

of the authority granted by the legislature. RCW 43.30.215(5); RCW 79.105.360.

In managing state-owned aquatic lands, DNR acts primarily as a proprietor and not as a regulator.⁶ The legislature delegated to DNR the authority “to manage these lands for the benefit of the public,” and recognized that aquatic lands are “faced with conflicting use demands.” RCW 79.105.010. The legislature set forth management guidelines to govern DNR’s authority in RCW 79.105.030, which provides as follows:

The management of state-owned aquatic lands shall be in conformance with constitutional and statutory requirements. The manager of state-owned aquatic lands shall strive to provide a balance of public benefits for all citizens of the state. The public benefits provided by state-owned aquatic lands are varied and include:

- (1) Encouraging direct public use and access;
- (2) Fostering water-dependent uses;
- (3) Ensuring environmental protection;
- (4) Utilizing renewable resources.

Generating revenue in a manner consistent with subsections (1) through (4) of this section is a public benefit.

DNR achieves this balancing of public benefits by engaging in a variety of proprietary activities, including selling, leasing and exchanging certain aquatic lands (RCW 79.105.100-.160;

⁶ The Commissioner of Public Lands is authorized by RCW 43.12.065 to adopt and enforce rules under police powers as necessary to promote public safety and the protection of public property. The rule at issue in this case, WAC 332-30-127, was not adopted under this authority, but under RCW 79.105.360, which relates to DNR’s proprietary management functions.

RCW 79.105.200; RCW 79.125.400), selling valuable materials gathered from aquatic lands (RCW 79.140), delegating management of aquatic lands to port districts (RCW 79.105.420), authorizing private recreational docks and mooring buoys (RCW 79.105.430), granting certain easements and rights of way (RCW 79.110), leasing lands for shellfish harvest (RCW 79.135.100-.170), and auctioning the right to harvest geoduck (RCW 79.135.200-.230). In effect, DNR functions as a landlord to over 2,000 square miles of marine beds of navigable waters and an undetermined amount of fresh water shoreland and beds. See WAC 332-30-100.

2. DNR Has Discretion to Determine How to Resolve Unauthorized Use of State-Owned Aquatic Lands.

As an administrative agency, DNR has those powers expressly granted to it by the legislature and those powers that are necessarily implied from its statutory delegation of authority. See Tuerk v. Dep't of Licensing, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994); Jackstadt v. Washington State Patrol, 96 Wn. App. 501, 512-13, 976 P.2d 190 (1999).

Agencies have implied authority to carry out their legislatively mandated purposes. When a power is granted to an agency, “everything lawful and necessary to the effectual execution of the power” is also granted by implication of law. Likewise, implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature.

Tuerk, 123 Wn.2d at 125 (citations omitted).

Although the legislature delegated broad management authority to DNR to manage state-owned aquatic lands for the benefit of all public citizens, it did not specifically address how DNR should or must handle unauthorized use of these lands.⁷ DNR necessarily has implied authority to address use of state-owned aquatic lands. It is this implied authority, as well as its specific rulemaking authority under RCW 79.105.360, which supported DNR's adoption of the residential use rule package and WAC 332-30-127. It is also this implied authority which gives DNR discretion to enforce WAC 332-30-127 against unauthorized vessels in Eagle Harbor or refrain from enforcement while it works collaboratively with the City.

3. WAC 332-30-127 Does not Create a Mandatory Enforcement Duty for DNR, but Instead Defines How DNR will Proceed if it Chooses to Take Action Against Individual Unauthorized Users.

Disgruntled with the presence of unauthorized moored vessels in Eagle Harbor, BCU asks this court to interpret WAC 332-30-127 as

⁷With respect to public lands in general, DNR is authorized to investigate and prosecute trespassers under RCW 79.02.300(3). Northlake Marine Works, Inc. v. Dep't of Natural Resources, 134 Wn. App. 272, 138 P.3d 626 (2006). This has never been interrupted as mandating prosecution of trespassers. See *infra* Part V.A.4. More specifically to aquatic lands, RCW 79.105.200 provides that DNR *may* require the payment of a use and occupancy fee in lieu of a lease where improvements have been placed without authorization on state-owned aquatic lands. Although this statute addresses one form of unauthorized use, this case does not involve the issue of unauthorized improvements on state-owned aquatic lands.

imposing a mandatory duty upon DNR and to force DNR to pursue enforcement actions against the vessel owners. BCU's argument fails because its interpretation of the rule ignores the discretionary authority granted to DNR by statute and because the language of the rule itself does not support such a result.

The procedures in WAC 332-30-127 provide that the responsible party of an unauthorized use "will" be notified by DNR of his status, "will" be assessed a monthly use and occupancy fee, and that an unlawful detainer action "will" be filed against a party in trespass under the terms of the rule. See WAC 332-30-127. Contrary to BCU's assertion, the terms "must" and "shall" do not appear in this rule. Appellants' Brief at 19-20. However, BCU argues that DNR's use of the term "will" in this rule creates a mandatory duty such that DNR must proceed under the rule when it is aware of an unauthorized use.

BCU's argument has superficial appeal because it seemingly gives effect to the term "will" and to WAC 332-30-171, which proscribes unauthorized residential use of state-owned aquatic lands. But BCU's argument fails to consider the rule in the context of the statutory scheme and the entire regulatory scheme governing DNR's management authority and responsibilities for state-owned aquatic land.

- a. **WAC 332-30-127 must not be read in isolation; when read in the proper context, the rule cannot be said to mandate action.**

“Rules of statutory construction apply to administrative rules and regulations.” City of Seattle v. Allison, 148 Wn.2d 75, 81, 59 P.3d 85 (2002); see also State v. Burke, 92 Wn.2d 474, 478, 598 P.2d 395 (1979). When a rule’s meaning is plain on its face, the court gives effect to that plain meaning. Allison, 148 Wn.2d at 81; State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). A provision’s plain meaning may be found by an “examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found[.]” Dep’t of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 10, 43 P.3d 4 (2002); C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wn.2d 699, 708-09, 985 P.2d 262 (1999). A term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole. Allison, 148 Wn.2d at 81; ITT Rayonier, Inc. v. Dalman, 122 Wn.2d 801, 807, 863 P.2d 64 (1993). “The court should not construe a regulation in a manner that is strained or leads to absurd results.” Allison, 148 Wn.2d at 81; see also Burke, 92 Wn.2d at 478.

Under the proper analysis, DNR’s use of the term “will” in WAC 332-30-127 should not be read in isolation, but in view of the

regulatory and statutory scheme as a whole. When the statutes governing DNR's management responsibilities and other parts of WAC 332-30 are considered together, it is clear that DNR did not limit its management discretion as asserted by BCU.

In granting DNR management authority over state-owned aquatic lands, the legislature provided broad guidelines to express a "management philosophy to guide the exercise of the state's ownership interest and the exercise of the department's management authority" RCW 79.105.020. The legislature directed DNR to "strive to provide a balance of public benefits for all citizens of the state." RCW 79.105.030. Nowhere did the legislature mandate DNR to take enforcement action against unauthorized users of state-owned aquatic lands. And, as noted, DNR's management authority is essentially proprietary. It necessarily includes the discretion needed to achieve maximum public benefit of state-owned aquatic lands. Similarly, WAC 332-30-100 articulates the broad management goals DNR will strive to achieve.

DNR asserts that by adopting WAC 332-30-127, it set forth the procedures that govern its actions against responsible parties when it chooses to take action against unauthorized use on an individual, case by case basis. However, DNR did not create a mandatory duty, where none existed before, to take such action whenever it is aware of an unauthorized

use of state-owned aquatic lands. DNR retains the option, as employed here, to work with local government to resolve unauthorized use problems rather than pursue individual vessel owners.

To construe the rule in the manner urged by BCU would subvert the greater duty DNR has to manage all state-owned aquatic lands for maximum public benefit. It would needlessly, and ill advisedly, require DNR to devote its resources to ousting responsible parties from using state-owned aquatic lands without authorization, regardless of whether such action would be of maximal public benefit. This is an absurd reading of the rule and not within the intent of DNR in adopting it. Nor is it consistent with the statutory context under which it was promulgated.

DNR's decision to work with the City and support its efforts toward long-term resolution of Eagle Harbor moorage issues is well within DNR's discretionary authority.

[W]here a statute is within [an] agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous Finally, deference to an agency's interpretation of its own regulations is also appropriate.

Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004)(citation omitted).

DNR correctly interprets WAC 332-30-127 in light of the broad management authority granted to it by the legislature in RCW 79.105.030. It allows DNR the discretion to determine how to utilize its resources for maximal public benefit, thus giving effect to legislative intent. BCU's interpretation of the rule detracts from DNR's management authority. It would potentially skew the application of DNR's resources to the limited geographic area of Eagle Harbor, to potential detriment of other state-owned aquatic lands for which DNR is responsible. It ignores DNR's determination that individual actions under the rule would not be as effective as a resolution wrought in conjunction with the local government – a determination well within its authority.

b. The word “will,” as used in WAC 332-30-127, is directory in nature.

BCU's argument that the language of the rule creates a mandatory duty for DNR is unpersuasive. Use of the term “will” in WAC 332-30-127 is directory rather than mandatory. The courts have had other occasions to consider whether language employed in administrative rules is mandatory or directory. In ITT Rayonier, Inc., the state Supreme Court considered a Department of Labor and Industries' (DLI) rule which stated that claims “must” be received within a certain timeframe. ITT Rayonier, Inc., 122 Wn.2d at 806. The enabling statute expressly

gave the Department broad discretion to consider claims at any time and expressed a preference for deciding disputes on the merits. ITT Rayonier, Inc., 122 Wn.2d at 808. Giving effect to the broad grant of authority and the intent of the statute, the court construed the term “must” in the rule as directory. Id. See also Anderson v. Weyerhaeuser Co., 116 Wn. App. 149, 154-55, 64 P.3d 669 (2003) (construing “shall” in administrative rule as directory consistent with discretionary authority of agency granted in statute). In this case, because the management authority granted to DNR in statute is discretionary, it requires a construction of the term “will” in WAC 332-30-127 to be directory. To construe it as mandatory would be contrary to legislative intent because it would remove discretion from DNR in how it could address unauthorized use on state-owned aquatic lands.

Faunce v. Carter, 26 Wn.2d 211, 173 P.2d 526 (1946), supports this conclusion because it supports the principle that whether the word “shall” is construed as an imperative or as directory depends on the intent of the legislature in using the word. Id. at 214. As discussed, the intent of DNR in adopting the residential rule package and WAC 332-30-127 was not to remove its discretion and create a mandatory duty for itself where none existed before.

4. DNR's Enforcement Discretion Is Not The Proper Subject Of Review By The Court.

Even if DNR were acting in a regulatory, rather than proprietary, capacity in managing state-owned aquatic lands in Eagle Harbor, BCU would not be entitled to the relief it seeks. Courts have repeatedly examined whether or not an agency can be required to undertake enforcement actions. See Heckler v. Chaney, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); Nat'l Elec. Contractor's Ass'n v. Riveland, 138 Wn.2d 9, 978 P.2d 481 (1999); Sierra Club v. Whitman, 268 F.3d 898 (9th Cir. 2001). In Heckler, the United State Supreme Court was asked to determine the extent to which the Food and Drug Administration's (FDA) decision not to exercise its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. Heckler, 470 U.S. at 828. In upholding the FDA's decision not to take enforcement action, the court noted that it had "recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Id. at 831. The reason for this is due to the "general unsuitability for judicial review of agency decisions to refuse enforcement." Id. The Supreme Court observed that "an agency decision not to enforce often involves a complicated balancing of a number of

factors which are peculiarly within its expertise.” Id. Indeed, “an agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.” Id. at 831-832; see also Sierra Club, 268 F.3d at 903 (EPA administrator’s discretion to make enforcement decisions under the Clean Water Act does not relieve EPA of mission to achieve compliance with the Act; “it simply means that the EPA must decide, within the limits set by Congress, the most effective way to accomplish the objectives of the Act as a whole.”).

The Heckler reasoning was adopted in Washington in Riveland, 138 Wn.2d at 31. Riveland involved a challenge to a decision of DLI refusing to enforce certain provisions of the electrical laws in the context of work performed by inmates. In ruling in favor of DLI, the court recognized that “[a]s a practical matter, decisions associated with exercising these enforcement powers are discretionary.” Id. at 32. The court adopted the reasoning in Heckler, which held “a presumption of unreviewability of decisions of an agency not to undertake enforcement action.” Id. at 31. Likewise, DNR’s decision to “enforce” WAC 332-30-127 against unauthorized vessels in Eagle Harbor is committed to its discretion and not subject to attack by BCU.

BCU relies on Adams v. Richardson, 480 F.2d 1159 (D.C. Cir., 1973) to argue that DNR has “abdicated its statutory duty to ‘manage’ these public lands.” Appellants’ Brief at 27. In Adams, the D.C. Circuit held that the Secretary of the Department of Health, Education, and Welfare (HEW) had abdicated its statutory responsibilities where, contrary to the intent of Congress, it continued to fund state educational systems that it knew were violating Title VI of the Civil Rights Act. The court called HEW’s failure to take appropriate action to terminate federal funding to segregated school systems a “dereliction of duty.” Adams, 480 F.2d at 1163. No such dereliction is present here. First, there is no similar statutory directive mandating DNR enforcement action against the unauthorized use of state-owned aquatic lands. And, as discussed in this brief, it is neither the intent nor effect of DNR’s rules to create such an enforcement duty. Second, DNR has properly exercised its statutory management authority by working with the City to achieve an effective resolution and that process continues.

For the same reasons, this case is distinguishable from Children’s Hosp. & Med. Center v. Dep’t of Health, 95 Wn. App. 858, 975 P.2d 567 (1999). In Children’s, the court found that the Department of Health had contravened a legislative directive to conduct a Certificate of Need review to evaluate whether a hospital could provide pediatric open heart

surgeries. Children's, 95 Wn. App. at 873-74. Here, DNR has not contravened any statutory directive. BCU's argument that DNR has abdicated its duty to manage state-owned aquatic lands in Eagle Harbor must fail.

Finally, there has been no drastic shift in DNR policy on the issue of unauthorized use of state-owned aquatic lands as suggested by BCU. Appellants' Brief at 28. BCU relies on case law under the federal Administrative Procedure Act (APA) to suggest that DNR has acted arbitrarily and capriciously by reversing position and failing to provide an explanation. Appellants' Brief at 28-29. However, the record does not establish any reversal in position by DNR, but only that DNR has chosen to pursue an alternative course to address unauthorized use in Eagle Harbor. BCU's argument is premised on its misinterpretation of WAC 332-30-127 and WAC 332-30-171 as binding DNR to one approach. As discussed in this brief, the rules do not have that effect and DNR has retained and exercised its discretionary authority over how it will approach this issue. Moreover, analysis of this case under APA case law is inapposite, as BCU itself has admitted that this case is not reviewable agency action under the state APA. See CP 164, n.2.

In summary, BCU does not acknowledge the discretionary management authority given to DNR by the legislature or DNR's exercise

of that authority. The legislature did not impose a mandatory duty on DNR to take enforcement action against vessels such as those moored in Eagle Harbor, nor did DNR create such a duty for itself.

B. BCU Should be Denied Declaratory Judgment Because It Cannot Meet the Justiciability Requirements Underlying the Uniform Declaratory Judgment Act.

The Uniform Declaratory Judgment Act (UDJA) provides in part that a person “whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020. Absent issues of broad overriding public import, the court’s jurisdiction is not invoked under the UDJA unless there is a justiciable controversy. To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) cert. denied, 535 U.S. 931, 122 S.Ct. 1304, 152 L.Ed.2d. 215 (2002).

A justiciable controversy requires:

“(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Wash. Educ. Ass’n v. Pub. Disclosure Comm’n, 150 Wn.2d 612, 622-23, 80 P.3d 608 (2003), quoting Diversified Indus. Dev. Corp. v. Ripley, 82

Wn.2d 811, 815, 514 P.2d 137 (1973). All four of the justiciability factors “must coalesce” to ensure that the court does not step into “the prohibited area of advisory opinions.” Id.

While BCU demonstrates a present and existing dispute between parties with opposing interests, BCU fails to satisfy the third factor with respect to the non-residential vessels and fails to establish the fourth factor with respect to both residential and non-residential vessels.

1. BCU has No Judicially Protected Interest in Enforcement of WAC 332-30-127 with Respect to Non-Residential Vessels Moored in Eagle Harbor.

The third justiciability requirement of a direct and substantial interest in the dispute encompasses the doctrine of standing. To-Ro, 144 Wn.2d at 414. Standing under the UDJA requires that the person seeking a declaratory judgment must have rights, status or other legal relations that are affected by a statute. Bercier v. Kiga, 127 Wn. App. 809, 823, 103 P.3d 232 (2004), review denied, 155 Wn.2d 1015, 124 P.3d 304 (2005). Standing requires a party to show that the interests sought to be protected are within the zone of interests to be protected or regulated by the statute in question and that the challenged action has caused injury in fact. Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

Courts often refer to the general purpose of the statute in question when evaluating whether a party's interests are within the zone of interests to be protected by the statute. Branson v. Port of Seattle, 152 Wn.2d 862, 876, n.7, 101 P.3d 67 (2004) ; To-RO, 144 Wn.2d at 414-15. In Branson, the court reviewed the purpose underlying the Revised Airport Act, RCW 14.08, and observed that RCW 14.08.020 declares that airports are to be built and operated for the public benefit. The court did not interpret this general purpose to reflect the intent to protect members of the public from fees charged to them by third parties such as rental car companies. Branson, 152 Wn.2d at 876, n.7. As such, a rental car customer did not have standing to challenge the reasonableness and uniformity of fees the Airport charged to rental car companies. Id. at 878.

Examining the purpose of rules at issue in this case shows that while BCU may have an interest in enforcement against residential vessels, it has no such interest with respect to non-residential vessels. BCU can cite to no law or rule that prohibits non-residential vessels from anchoring or mooring on state-owned aquatic lands because there is none. The prohibition against residential use has no application to non-residential use vessels. WAC 332-30-171(1). As such,

WAC 332-30-127 is BCU's only possible basis for arguing that DNR must remove the non-residential vessels.⁸

BCU's argument for standing is premised on the assumption that WAC 332-30-127 is intended to protect it against the multitude of harms its members experience, including rude and lawless behavior of the vessel owners, impaired water quality, declining local economy, declining property values, reduced access to their shoreline properties, difficulty navigating, and unsightly views. The language of WAC 332-30-127, however, demonstrates no intention to protect BCU or its members from such harms.

WAC 332-30-127 is not aimed at keeping the peace, protecting water quality, promoting the local economy, enhancing the value of private property, guaranteeing access to private property, improving navigation, or enhancing views from private property. WAC 332-30-127 seeks to promote the lease of state-owned aquatic lands and production of rental income for the state. The rule addresses only the rights and interests of the state and the "trespassing party", who is occupying state-owned aquatic land without consent. Nothing in the regulation even tangentially

⁸While the Derelict and Abandoned Vessel Act, RCW 79.100, certainly provides ample authority for DNR to remove vessels moored without DNR's consent, BCU cannot escape RCW 79.100.030(3), which states that the authority granted is permissive and no liability arises from the decision not to exercise authority.

references the interests of the owners of adjacent upland property or any other third parties.

The only possible interest BCU can claim in WAC 332-30-127 is its interest in seeing that the state receive revenue. Such an interest, however, is too remote, indirect, and insubstantial to afford relief under the UDJA. See To-Ro, 144 Wn.2d at 414-15 (trade show promoter had only an indirect interest in law prohibiting unlicensed dealers from displaying products at trade shows). The statutes governing DNR's management of state-owned aquatic lands do not reflect a purpose to protect BCU's claimed interests or to redress the harm BCU claims to experience. BCU's interests in non-residential vessel moorage does not fall within the zone of interests protected by the WAC 332-30-127, thus depriving it of standing under the UDJA.

In an effort to show injury in fact, BCU claims to be especially bothered by vessels moored in Eagle Harbor because of its members' proximity to the vessels. The members' status as adjoining landowners, however, does not grant them any standing to challenge DNR's management of the harbor in the context of this case.

Unlike most states, Washington adamantly rejects the concept that riparian landowners have any protected property interest in adjoining navigable waters. Van Siclén v. Muir, 44 Wn. 361, 87 P. 498 (1906).

[R]iparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good.

Eisenbach v. Hatfield, 2 Wn. 236, 253, 26 P. 539 (1891). This means that BCU and its members have no special interest in navigable waters adjoining their property or in viewing navigable waters. See Wilbour v. Gallagher, 77 Wn.2d 306, 318, 462 P.2d 232 (1969) (public trust does not include a right to a view). BCU can claim no interest that is distinguishable from any other member of the public. See Crane Towing, Inc., v. Gorton, 89 Wn.2d 161, 172-173, 570 P.2d 428 (1977) (person who has merely the same interest as the public may not maintain an action for declaratory relief to test statute).

In summary, with respect to non-residential vessels, BCU does not have a judicially enforceable right under WAC 332-30-127. There is no statute or rule which provides a “legal right capable of judicial protection” that this court may enforce in BCU’s favor. WA Fed’n of State Employees v. State Pers. Bd., 23 Wn. App. 142, 148, 594 P.2d 1375 (1979), citing 1 W. Anderson, Actions for Declaratory Judgments §§ 185-187 (1951). BCU’s alleged interests are not within the zone of interests addressed by WAC 332-30-127. Its claims are not justiciable and must be dismissed.

2. With Respect to Both Residential and Non-Residential Vessels, BCU cannot show that a Determination will be Final and Conclusive.

The fourth justiciability requirement is that a judicial determination of the claim will be final and conclusive. “The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree . . . would not terminate the uncertainty or controversy” RCW 7.24.060. In addition to asking for a ruling on the extent of DNR’s discretion to enforce, BCU also seeks an order declaring that certain vessels are violating WAC 332-30-171 and/or WAC 332-30-127⁹ and an injunction compelling DNR to take action against these vessels. CP 17. Granting this relief will not result in a final and conclusive determination. To the contrary, the controversy will continue. Even if DNR were compelled to evict vessels from the harbor, the vessel owners are not parties to this action. As such, they are not bound by any ruling of this court. See Seattle v. Fontanilla, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996) (one is not bound by a judgment in litigation to which he is not a party). If the vessel owners object to DNR’s action, they may institute their own litigation.

The UDJA’s justiciability requirements requires that all interested persons be made parties to an action. RCW 7.24.110 provides that “when

⁹BCU’s prayer for relief cites to WAC 332-30-127, which is clearly an error.

declaratory relief is sought, all persons shall be made parties who have or claim *any interest which would be affected* by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding” (emphasis added). Failure to join an affected party in an action under the UDJA relates directly to the court’s jurisdiction. Henry v. Town of Oakville, 30 Wn. App. 240, 633 P.2d 892 (1981). The owners and occupants of the vessels and houseboats that BCU seeks to oust have a direct and substantial interest in this matter. BCU asks the court to take solace in the fact that it legally cannot adjudicate the interests of these parties in its absence. Appellants’ Brief at 40-41. But without these truly interested parties, this court can only render an advisory ruling as to the mandatory or discretionary nature of DNR’s authority. Without the presence of these vessel owners, this court is precluded from bringing final resolution of this controversy.

BCU cannot obtain conclusive relief under the UDJA in this matter. This court should affirm the trial court’s dismissal of this matter and allow DNR and the City to continue with its cooperative efforts to create an open anchorage and moorage area in Eagle Harbor, which is the best way to balance competing public interests and achieve resolution.

C. The State Has Relinquished None Of Its Title Or Sovereignty To The Lands At Issue So As To Violate Public Trust Doctrine.

“The public trust doctrine evolved out of the public necessity for access to navigable waters and shorelands.” Rettkowski v. Dep’t of Ecology, 122 Wn.2d 219, 232, 858 P.2d 232 (1993). The doctrine is premised on the notion that the state’s ownership of the lands underlying navigable waters is comprised of two distinct aspects—the *jus privatum* and the *jus publicum*. Caminiti v. Boyle, 107 Wn.2d 662, 668-69, 732 P.2d 989 (1987). The *jus publicum*, or the public trust doctrine, is the right of navigation, together with the incidental rights of fishing, boating, swimming, water skiing, and other related recreational uses generally regarded as corollary to the navigation and use of public waters. Caminiti, 107 Wn.2d at 669 (quoting Wilbour v. Gallagher, 77 Wn.2d 306, 316, 462 P.2d 232 (1969)). In contrast, the *jus privatum* is the private nature of state ownership, which includes the authority to convey. See City of New Whatcom v. Fairhaven Land Co., 24 Wn. 493, 499, 64 P. 735 (1901) (discussing dual nature of sovereign ownership). The doctrine recognizes that while the state may have the power to dispose of and invest others with the ownership of tidelands and shorelands (*jus privatum*), the state can never sell or otherwise abdicate state sovereignty or dominion over

such tidelands and shorelands (*jus publicum*).¹⁰ Caminiti, 107 Wn.2d at 666.

In order to protect the public interest in tidelands and shorelands, the court has articulated a two-part test for determining whether the state has violated the public trust doctrine:

Accordingly, we must inquire as to: (1) whether the State, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the State (a) has promoted the interest of the public in the *jus publicum*, or (b) has not substantially impaired it.

Caminiti, 107 Wn.2d at 670.

BCU argues that DNR's exercise of discretion in Eagle Harbor is an impermissible abdication of state sovereignty. What BCU fails to acknowledge is that the duty imposed by the public trust doctrine devolves upon the state as a whole and not to DNR alone. See Rettkowski, 122 Wn.2d at 232 (doctrine devolves to the state as a whole not on any particular agency thereof). Nothing in the record or the law supports BCU's contention that the state has surrendered sovereignty over these lands. To the contrary, the state, through article XI, section 11 of the Washington State Constitution (Const. art. XI § 11) authorizes any county, city, town or township to "make and enforce within its limits all such local

¹⁰Although the doctrine is usually discussed in cases involving tidelands and shorelands, it generally applies to beds of navigable water as well. Caminiti, 107 Wn.2d at 665, n.4.

police, sanitary and other regulations as are not in conflict with general laws.” This municipal authority includes the power to regulate navigation in accordance with local needs, so long as the regulation does not conflict with state or federal laws. See Weden v. San Juan County, 135 Wn.2d 678, 690-696, 958 P.2d 273 (1998) (county ordinance regulating the use of personal watercraft is valid because it does not conflict with a general law, is a reasonable exercise of the county’s police power, and the subject matter of the ordinance is local). Additionally, the legislature expressly enumerated the powers of first class cities to include the power to “control, regulate, or prohibit the anchorage . . . of all watercrafts . . . within [the city’s] jurisdiction.” RCW 35.22.280(26). In short, the legislature vested the City with police power over the navigable waters within its jurisdiction.

In furtherance of this authority, the City enacted ordinances aimed at protecting these waters. BIMC 12.40.050 (CP 64). DNR continues to exercise sovereignty over the navigable waters under a panoply of statutes, including, for example, the Oil and Hazardous Substance Spill Prevention and Response Act (RCW 90.56), the State Model Toxics Control Act (RCW 70.105D), and the State Hydraulics Act (RCW 77.55). Of particular significance is DNR’s protection and management of these

lands under the Shoreline Management Act of 1971, RCW 90.58. As provided in RCW 90.58.020:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest.

As noted in Caminiti, “the requirements of the ‘public trust doctrine’ are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971, RCW 90.58.” Caminiti, 107 Wn.2d at 670, citing Portage Bay-Roanoke Park Community Council v. Shorelines Hearings Bd., 92 Wn.2d 1, 4, 593 P.2d 151 (1979).

This case is analogous to Caminiti, which involved a challenge to legislation that allowed owners of residential property abutting state-owned tidelands and shorelands to install and maintain private recreational docks free of charge. Caminiti, 107 Wn.2d at 665-66. In applying the two-part test, the Caminiti court noted that in enacting RCW 79.90.105¹¹, the legislature had given up relatively little right of control and had not conveyed any title to aquatic lands. Caminiti, 107 Wn.2d at 672. The statute was limited in scope, only applying to private residential usage and not to commercial usage. Id. The statute authorized

¹¹RCW 79.90.105 was re-codified in Laws of 2005, ch. 155, § 106, p. 472-473 and is now codified at RCW 79.105.430 (1) and (2).

DNR to regulate the docks through its powers of revocation. Further, the docks remained subject to local regulation governing construction, size, and length. Id. Also, the state exercised control through the State Hydraulics Act and other state laws. Id. at 673. Finally, the court noted that abutting landowners have no riparian rights to tidelands and shorelands; accordingly, the ultimate state control exists because the legislature can revoke the statute at any time. Id.

In Eagle Harbor, all the state and local regulations governing use and conduct still apply to vessels moored in the harbor; nothing has altered this sovereign authority. Further, proprietarily, DNR has done nothing to convey any fee interest or *jus privatum* in Middle Harbor. DNR has neither leased nor sold any interest to the vessel owners in Eagle Harbor. At any time, DNR could assert its authority as a proprietor and ask these vessels to leave by imposing the sequence of procedural steps outlined in WAC 332-30-127.¹² DNR, as a land owner, may also avail itself to other available remedies such as bringing an action to eject under RCW 7.28 or an unlawful detainer action under RCW 59.12, two of several possible options.

¹²Adverse possession of bed and shores of navigable waters below the line of high water does not run against the state. Brace & Hergert Mill Co. v. State, 49 Wn. 326, 337, 95 P. 278 (1908); RCW 7.28.090 (claim of title under adverse possession shall not extend to lands owned by the state nor to lands held for any public purpose).

Neither the state as a whole, nor DNR as an individual state agency, has violated the public trust doctrine. To the contrary, DNR is cooperating with the City in its efforts to identify the unique needs of the local community and balance the competing demands of the public to use Eagle Harbor. CP 68, lines 1-12.

In claiming to protect the public interests, BCU ignores the fact that those mooring and anchoring in the harbor are also members of the public. The public trust doctrine is flexible and can accommodate the changing public needs. Ralph Johnson, The Public Trust Doctrine and Coastal Zone Management in Washington State, 67 Wash. L. Rev. 521, 526 (July 1992). No Washington case has explored the scope of this doctrine with respect to public moorage and anchorage, but courts in other jurisdictions have struggled with competing public uses. Wisely, these courts have noted that no single public interest in using navigable waters is absolute. See e.g. Wisconsin v. Village of Lake Delton, 93 Wis.2d 78, 96, 286 N.W.2d 622 (Wis. 1979) (zoning a small portion of the lake for water-ski exhibition did not violate of the public trust doctrine). “Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis.” Id. Professor Johnson would agree:

As the list of protected public trust interests grows, new questions arise. Conflict will arise between two or more public trust interests It is unlikely that courts will or even should set up a rigid hierarchy of public trust uses. A better answer is balancing competing uses.

67 Wash. L. Rev. 521, 574.

Such balancing should be left to policymakers who have been authorized by the legislature to make such decisions within the confines provided by the legislature. The City is currently engaged in this balancing and DNR is seeking to facilitate, rather than hinder this process.

VI. CONCLUSION

For the reasons set forth above, DNR respectfully requests the court to affirm the trial court order granting DNR's motion for summary

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judgment and denying BCU's motions for summary judgment and reconsideration.

RESPECTFULLY SUBMITTED this 18th day of June, 2007.

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Appendix A

WAC 332-30-127 Unauthorized use and occupancy of aquatic lands (see RCW 79.105.200 and 79.125.200). (1) Aquatic lands determined to be state owned, but occupied for private use through accident or without prior approval, may be leased if found to be in the public interest.

(2) Upon discovery of an unauthorized use of aquatic land, the responsible party will be immediately notified of his status. If the use will not be authorized, he will be served notice in writing requiring him to vacate the premises within thirty days. If the law and department policy will permit the use, the occupant is to be encouraged to lease the premises.

(3) The trespassing party occupying aquatic lands without authority will be assessed a monthly use and occupancy fee for such use beginning at the time notification of state ownership is first provided to them and continuing until they have vacated the premises or arranged for a right to occupy through execution of a lease as provided by law.

(4) The use and occupancy fee is sixty percent higher than full fair market rental and is intended to encourage either normal leasing or vacation of aquatic land.

(5) In those limited circumstances when a use cannot be authorized by a lease even though it may be in the public interest to permit the structure or activity, the fair market rental will be charged and billed on an annual basis.

(6) The use and occupancy billing is to be made after the use has occurred and conveys no rights in advance. Payment is due by the tenth of the month following the original notification, and if not received, a notice is to be sent. If payment is not received within thirty days of this notice and monthly thereafter by the tenth of each month during the period of the use and occupancy lease or if the improvement has not been removed from the aquatic land, an unlawful detainer action against the party in trespass will be filed along with an action to collect past due rental.

[Statutory Authority: RCW 79.105.360, 06-06-005 (Order 724), § 332-30-127, filed 2/16/06, effective 3/19/06. Statutory Authority: RCW 43.30.150, 80-09-005 (Order 343), § 332-30-127, filed 7/3/80.]

NO. 35961-8

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

BAINBRIDGE CITIZENS UNITED, a
Washington nonprofit corporation; and
GARY TRIPP, Director of Bainbridge
Citizens United,

Appellants,

v.

WASHINGTON STATE
DEPARTMENT OF NATURAL
RESOURCES, and DOUG
SUTHERLAND, Commissioner of
Public Lands,

Respondents.

DECLARATION OF
SERVICE

I, MARILYN WHITFELDT, hereby certify and declare under penalty of perjury under the laws of the State of Washington, that on June 18, 2007, I served a true and correct copy of the following documents:

1. Respondents' Response Brief to Appellants' Brief, and
2. Declaration of Service

Upon counsel of record in the manner indicated below:

ORIGINAL

VIA U.S. FIRST CLASS MAIL TO:

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COURT OF APPEALS
DIVISION I
07 JUN 19 P11 2:45
STATE OF WASHINGTON
BY _____
DEPUTY

EXECUTED this 18th day of June, 2007, at Olympia,

Washington.



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