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NO. 542770

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

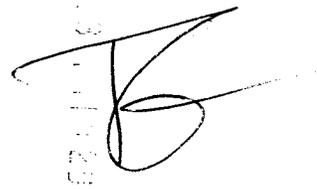
TWIN BRIDGE MARINE PARK, ET AL.,

Respondents,

v.

DEPARTMENT OF ECOLOGY, a department of
the State of Washington,

Appellant.



DEPARTMENT OF ECOLOGY'S OPENING BRIEF

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I. INTRODUCTION

This case involves judicial review of a decision of the Shoreline Hearings Board (SHB) affirming penalties imposed by the Department of Ecology for development in violation of the Shoreline Management Act (SMA). The Superior Court reversed the SHB in reliance on *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). In *Samuel's Furniture*, the Supreme Court ruled that after a local government has determined that a project is outside Shoreline Management Act jurisdiction, and Ecology has not appealed that jurisdictional determination under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, then Ecology may not take SMA enforcement actions that collaterally attack the determination on SMA jurisdiction.

In this case, however, there was no dispute that the development involved was within the SMA jurisdiction of Chapter 90.58 RCW. This case arose when Ecology enforced the SMA after Twin Bridge Marine Park (Twin Bridge) engaged in a development in the shorelands that was inconsistent with the conditions of its previously issued SMA conditional use permits. On administrative review, the Shoreline Hearings Board affirmed Ecology's enforcement action. The Board, the state agency authorized to interpret the SMA in quasi-judicial proceedings, unanimously rejected application of *Samuel's Furniture* to this case. The

Board concluded that *Samuel's Furniture* involved a dispute over whether the project was located in shoreline jurisdiction, while this case involved a project undisputedly within state shorelands. The Board also concluded that, unlike *Samuel's Furniture*, Twin Bridge acted in direct violation of permit conditions that had been imposed by Ecology, and in direct violation of its agreement to obtain a new shoreline permit to authorize the project.

On judicial review, the superior court concluded that because the local government had issued building permits for the project that Ecology did not appeal under LUPA, Ecology could not take enforcement action. The superior court thus expanded *Samuel's Furniture* to cases where the project is located in shoreline jurisdiction and there is no dispute that the project as built was in violation of existing SMA conditional use permits. Ecology asks this court to conclude, as did the Shorelines Hearings Board, that *Samuel's Furniture* does not apply and that Ecology's enforcement actions against Twin Bridge should be affirmed.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred by reversing the decisions of the Shorelines Hearings Board, which were not erroneous under the standards of review in the Administrative Procedures Act, RCW 34.05.570.

2. The Superior Court erred by entering its own Findings of Fact and Conclusions of Law when, under the APA, it should have affirmed the Shoreline Hearings Board.

3. The Superior Court erred by entering Findings of Fact No. 5.

4. The Superior Court erred by entering Conclusions of Law, Nos. 1-11.

III. STATEMENT OF ISSUES

1. Where the Shoreline Management Act expressly authorizes Ecology to take enforcement actions against development that violates the SMA or conditions of permits issued under the SMA and where the Shorelines Hearings Board entered findings that Twin Bridge engaged in development in the shoreline not approved by a permit under the SMA and inconsistent with conditions of Twin Bridge's SMA conditional use permits, did the SMA authorize Ecology to impose penalties against Twin Bridge for violation of the permit conditions and for violation of the SMA? (Assignments of Error Nos. 1-4)

2. When Twin Bridge obtained local building permits for the development within the shoreline jurisdiction but did not obtain a modification of existing SMA conditional use permits and did not obtain a new SMA permit, was Ecology required to appeal those building permits under the Land Use Petition Act ("LUPA"), or face a bar that precluded

enforcement of the SMA conditional use permits and the SMA?
(Assignments of Error Nos. 1-4)

3. Was there ever a final decision made by the local government that was appealable under LUPA, when the local government issued the building permits as a result of a negotiated settlement that did not involve Ecology and the local government's apparent decision that the development was covered by the existing shoreline conditional use permits was subject to review by Ecology? (Assignments of Error Nos. 1-4)

4. Did Twin Bridge waive its argument under *Samuel's Furniture* when Twin Bridge knowingly and voluntarily agreed to obtain a new shoreline permit notwithstanding issuance of the building permits by the local government? (Assignments of Error Nos. 1-4)

IV. STATEMENT OF FACTS

A. **Twin Bridge Constructed A Marina Within Shoreline Jurisdiction With No Shoreline Permit Authorizing That Development And In Violation Of Its Existing Shoreline Permits**

The following facts are established by the findings and conclusions of the SHB or by uncontested evidence in the administrative record.

Twin Bridge owns land in Skagit County along the Swinomish Channel. *See* Ex. R-44.¹ In the 1980s, Twin Bridge's predecessors in interest acquired Shoreline Conditional Use Permits (CUPs)² to develop the property as headquarters for their marine construction and dredging business. Exs. R-3, R-6. The intended uses for the site were for storage of tugboats, dredges, dredge tenders, dredge pipe, and other construction equipment. *See generally, Skagit Co. v. Dep't of Ecology*, 93 Wn.2d 742, 743-44, 613 P.2d 115 (1980); Tr. p. 33. A small building of approximately 4,000 sq. ft. was to be located on the site to serve as an office for the marine construction and dredging business. A Final Environmental Impact Statement (FEIS) completed in 1975 described the proposal in detail. Ex. R-1.

Over the years, Twin Bridge changed its intentions for the site. By the 1990s, Twin Bridge wanted to build a large backshore or upland marina on the site, instead of the marine construction and dredging business that had been the subject of the prior shoreline conditional use permits. *See* Tr. pp. 9-10. This new proposal included many structures

¹ "Ex. R-_" refers to the Respondent's exhibits admitted at the Shorelines Hearings Board hearing. The exhibits were not separately numbered as individual clerk's papers. "Tr." refers to the transcript of the Shorelines Hearings Board hearing.

² A "conditional use permit" or "CUP" originates with an application to local government under its approved shoreline master program and the SMA, but a CUP requires Ecology approval to be valid. RCW 90.58.140(10); *Samuel's Furniture, Inc.*, 147 Wn.2d at 455 n. 13.

and uses that were not approved in the original shoreline CUPs and which were inconsistent with conditions of the CUPs. *See Findings of Fact, Conclusions of Law, and Order, FOF III, p. 3.*³

For example, the marina proposal involved construction of two very large buildings, in excess of 50,000 sq. ft., in which to store recreational boats. Tr. pp. 12-13. The proposal also involved using a forklift to lift boats from the water and place them in the storage building. A partially over-water reinforced concrete pad was proposed on which the forklift would operate. Numerous accessory structures also were proposed, including septic pump-out facilities, fueling facilities, boat washing facilities, parking, and utilities. None of those developments were approved in the original permits and many of them were inconsistent with conditions of the original permits. *See Tr. p. 62.*⁴

Over the years, Ecology on several occasions emphasized to Twin Bridge that only those structures and uses authorized in the original CUPs were allowed on the site. Other structures, such as those for the marina,

³ The Board's Findings and Conclusions are attached hereto as Appendix A.

⁴ As the Board found: "Twin Bridge constructed a number of improvements within two hundred feet of the moorage lagoon. The ten-inch thick reinforced concrete launching pad, vessel washing areas, paving, utility installations, and the sewage pump-out facilities were all placed within shoreline jurisdiction The shoreline permits of record in CUP 7-82 and CUP 15-86 (as revised) did not discuss or authorize any of these improvements." FOF, CL and Order, p. 13. The Board further found that, although the two marina buildings are located just outside shoreline jurisdiction, they are part of an integrated project including development within shoreline jurisdiction. *Id.* P. 15.

were unauthorized and required a new shoreline permit. For example, in its letter approving CUP 7-82, Ecology stated:

It is our understanding that this permit only authorizes 90,000 cubic yards of fill to be placed on site and subsequent use of the site for the operation of a marine construction and dredging business to include storage of materials and equipment. Any other substantial development on the site such as buildings, shore structures, hard surfacing, and drainage improvements will be submitted as a new permit or a revision to this permit pursuant to WAC 173-14-064.

Ex. R-4; *see also* R-17 (“it appears that the present marine park proposal is substantively different from the originally permitted moorage basin proposal”); R-19 (“if the revised proposal were to constitute a change of use, new shoreline permits would be required”); R-39 (“none of the specific developments now proposed to be located within shoreline jurisdiction are consistent with the requirements for like developments in the existing shoreline permits”).

In 2000, Skagit County issued Twin Bridge county building permits allowing Twin Bridge to construct the large storage building, and another building associated with the marina, on the site. Ex. R-41. In an apparent effort to comply with the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, the County also issued an “addendum” to the 1975 FEIS in which the County claimed that the change from a marine

construction and dredging business to a marina was “insignificant.” Ex. R-40.⁵ The County, which did not testify at the hearing before the Shorelines Hearings Board, never explained why it did not require a new shoreline permit for the project.

The City of Anacortes (Anacortes) appealed the building permits under LUPA. Ecology did not receive official notice of the building permits and did not participate in that appeal, although Ecology later learned of both the permits and the pending appeal. Tr. at pp. 106-107, 111, 122-23. The county hearings examiner vacated the building permits on the grounds that a new shoreline permit was required. Ex. R-52 (“Skagit County Hearings Examiner decision dated June 21, 2000, concludes that a new shoreline substantial development permit/conditional use permit is required for the proposed development”). At approximately the same time, Ecology issued a penalty to Twin Bridge for unauthorized development within shoreline jurisdiction and for violation of the terms and conditions of the existing CUPs. *See* Ex. R-50.

⁵ This addendum was clearly an erroneous application of SEPA by the County because the impacts of the marina were vastly different from the impacts discussed in the 1975 EIS. The impacts of the marina included increased storm water runoff from the expanded parking areas and much larger buildings; water quality impacts from septic pump-out, fuel dispensing, and boat washing associated with the marina; and impacts from increased boat and car traffic. *See* Tr. at p. 45-47; 71-72. None of these impacts were contemplated in the original proposal or discussed in the 1975 EIS. Tr. pp. 71-72

Thereafter, Twin Bridge entered into settlement discussions with Ecology, the City of Anacortes and Skagit County to resolve the issues related to development of the marina. In February of 2001, Twin Bridge signed a stipulation with Ecology that required Twin Bridge to apply for and obtain a new shoreline substantial development permit for the marina project. Ex. R-80. Twin Bridge also agreed to stop work on the project until it obtained the new permit. The settlement stated:

1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to Ken Youngsman [Twin Bridge] on or about June 21, 2000, subject to the following conditions:

a. Mr. Youngsman shall continue to pursue in good faith his application for a new Shoreline Substantial Development Permit for the Twin Bridge Marine Park.

b. In the event that Skagit County issues a Substantial Development Permit to Mr. Young[s]man or his associates, Ecology reserves the right to appeal the permit to the Shorelines Hearing Board and to raise any issue therein.

c. Mr. Youngsman, his associates, and contractors shall not resume work on the site until all required federal, state, and local permits have been obtained.

Ex. R-80. Pursuant to this agreement, Twin Bridge submitted an application to Skagit County for a new substantial development permit for the marina. Ex. R-53. This application included a joint aquatic resource permit application, biological evaluation, and SEPA checklist. *See* Exs. R-61, 62.

However, unbeknownst to Ecology, Twin Bridge at approximately the same time signed a settlement agreement with Anacortes and Skagit County that resolved Anacortes' LUPA appeal and reinstated the building permits. *See* Ex. A-2; Tr. at pp. 125-26.⁶ Upon on this reinstatement of the building permits, Twin Bridge resumed work on the project even though no new shoreline permit had yet been issued. Ex. R-81.

Upon learning that Twin Bridge had resumed work without a new shoreline permit, Ecology issued additional penalties and cease and desist orders to Twin Bridge for violation of the settlement agreement, further unauthorized construction and violation of the SMA, and further violations of the existing shoreline CUPs. Exs. R-82, R-93. Twin Bridge ignored these orders, however, and proceeded to complete the marina construction and open for business in June 2001. Ex. R-90. Much later, in April 2003, Skagit County finally issued to Twin Bridge a new shoreline substantial development permit for the marina. *See* CP at 431.

B. The Shorelines Hearings Board Affirmed The Penalties In Their Entirety, Finding That Twin Bridge Willfully Violated The SMA. The Shorelines Hearings Board Properly Distinguished This Case From Samuels Furniture

Twin Bridge appealed Ecology's penalties and orders to the Shorelines Hearings Board pursuant to RCW 90.58.210(4). The Board

⁶ The settlement also vacated the hearings examiner's decision that a new shoreline permit was required.

conducted a 3 day hearing on the appeal pursuant to the Administrative Procedures Act. *See* CP at 117-398.⁷ The Board heard testimony from Ecology and from Twin Bridge. As noted above, the County did not testify. At the conclusion of the hearing, the Board entered Findings of Fact, Conclusions of Law and a decision affirming Ecology's penalties and orders in full. *See* Appendix A.

The Board found and concluded that Twin Bridge willfully violated the Shoreline Management Act in defiance of Ecology's position:

While Twin Bridge has obviously invested heavily in this project, it is equally clear that Ecology has consistently taken the position shoreline permits are required for construction and operation of an upland marina on the site. Twin Bridge was fully aware of Ecology's position at the time it constructed the improvements within the shoreline and when it resumed construction in February 2001. Twin Bridge chose to ignore and/or reject Ecology's role in enforcing the shoreline act and to rely exclusively on the building permits issued by Skagit County. Rather than resolving the ongoing permit controversy with Ecology, Twin Bridge moved forward with construction and operation despite Ecology's position. Reliance on the county permits, with full knowledge of Ecology's contrary position, was an intentional and knowing act and does not give rise to any relief from the otherwise applicable provisions of the SMA.

Conclusions of Law X., p. 18 (emphasis added).

⁷ The transcript of the Board hearing contains only the testimony of Ecology's witness Alice Schisel because the remainder of the transcript was not ordered by Twin Bridge. Twin Bridge did not contest the facts found by the Board but instead focused on the argument that *Samuel's Furniture* precluded Ecology from issuing penalties for development without obtaining SMA permits.

Twin Bridge appealed the Board's decision to Skagit County Superior Court. Subsequently, the Supreme Court issued (and revised) its opinion in *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). Based on *Samuel's Furniture*, Twin Bridge filed a motion with the Board to vacate the Board's Findings of Fact on the theory that Ecology had no authority to take enforcement action and should have appealed the Skagit County building permits before enforcing the SMA. CP at 46-49. The Board, however, issued a supplemental order that distinguished this case from *Samuel's Furniture* and rejected Twin Bridge's argument. Order Denying Motion to Vacate at 9⁸

The Board ruled that *Samuel's Furniture* was limited to a situation where the local government determines that a project is located outside shoreline jurisdiction whereas here there was no dispute that a shoreline permit was required:

The *Samuel's* court did not attempt to address the Land Use Petition Act's (LUPA) impact on cases involving the undisputed need for a shoreline permit. Twin Bridge would have this Board construe the *Samuel's* decision broadly to preclude Ecology from acting to enforce the shoreline act against a party who knows a shoreline permit is required. Twin Bridge contends, even when a shoreline permit is needed, if a local government issues a building permit, and a LUPA appeal is not filed, Ecology cannot require compliance with the SMA through either penalties or

⁸ The Board's Order Denying Motion to Vacate is attached hereto as Appendix B.

administrative orders. Sound statutory and public policy grounds exist for rejecting this call to expand the *Samuel's* holding to a much larger group of cases.

Order Denying Motion to Vacate at 6-7.

The Board concluded that the SMA is intended to preserve and protect statewide interests in shorelines, that it establishes a specific regulatory regime to do so, and that Ecology is granted a special role in that scheme to ensure protection of statewide interests that might not be adequately considered by local governments when they issue building permits. Order Denying Motion to Vacate at 7-8.

The Board also distinguished *Samuel's Furniture* from this case because this case involved Twin Bridge's violation of conditional use permits, where the SMA grants Ecology final approval authority:

[E]cology has an even greater role under the SMA in the case of conditional use permits, since the department makes the final decision on their issuance. The scope and extent of the previously issued conditional use permits was a major issue in the case and is properly before the Shorelines Hearings Board on appeal. If the conditional use permits were insufficient to authorize the project, as the Board found they were, a new shoreline permit of some type would be necessary. All of these issues fall within the expertise of the Shorelines Hearings Board. It would be contrary to the statutory framework for consideration of shoreline issues to expand the holding in *Samuel's* to allow a project using every inch of the two hundred foot shoreline area to proceed without shoreline permits simply because the local government has erroneously issued a building permit.

Order Denying Motion to Vacate at 11.

In light of the Board's ruling in response to Twin Bridge's motion, Ecology sought direct review in this court pursuant to RCW 34.05.518. However, the Board did not certify direct review. CP at 57-61. Twin Bridge continued to pursue its petition for judicial review of the Board's rulings affirming the penalties in Skagit County Superior Court, which ultimately reversed the Board's decision. CP at 427-434. Contrary to the Board, the Skagit County Court ruled that *Samuel's Furniture* did apply to this case and that Ecology's penalties and orders should be vacated. CP at 424-426. This appeal followed.

V. SUMMARY OF ARGUMENT

The Shoreline Management Act grants express authority to Ecology to enforce the Act by penalizing persons who violate the terms and conditions of SMA permits or who undertake development on state shorelands without an SMA permit. Twin Bridge argues, and the superior court ruled, that this express authority has been impliedly modified by the Land Use Petition Act. The court ruled that under LUPA Ecology must appeal local government building permits allowing development in violation of SMA permits or without an SMA permit. The Shoreline Hearings Board, the quasi judicial body created by the SMA with expertise in interpreting the Act, rejected this argument. This court should

affirm the Board because the Board's decision is based on sound findings and conclusions which the superior court had no reason to reverse.

Contrary to Twin Bridge's argument, there is no statutory basis on which to conclude that Ecology's legislatively granted authority in the SMA is impliedly limited by LUPA. Nothing in the SMA suggests that a LUPA appeal is a prerequisite to exercise of Ecology's enforcement authority and nothing in LUPA suggests that the Legislature intended that it repeal or amend that express SMA authority. To the contrary, the two statutes can be harmonized by recognizing that while Ecology may have the opportunity to appeal local building permits, and may be barred from challenging those permits if it does not do so, the bar does not apply to Ecology's SMA enforcement authority.

This way of harmonizing the two Acts is consistent with the ruling in *Samuel's Furniture, Inc. v. Ecology*, 147 Wn.2d at 440. The court there held that where the local government makes a jurisdictional determination that no SMA permit is required, then Ecology must appeal that decision under LUPA rather than taking enforcement action that collaterally attacks the local jurisdictional decision. The *Samuel's* decision, however, as the Board concluded, is limited to jurisdictional determinations. It does not apply to cases where the need for an SMA permit is undisputed or where there is a violation of the terms of an SMA permit as in this case.

Samuel's Furniture also does not apply here because the local government decision that Twin Bridge relies on was not an appealable decision under LUPA. It was not appealable because the County decision arose out of a settlement of other litigation and thus was not a decision on the merits of the SMA issue. Additionally, Twin Bridge argues that the building permits were in essence a decision regarding the scope of Twin Bridge's SMA permits. However, the scope of what was permissible under Twin Bridge's existing SMA permits was a decision for Ecology to make, not the local government, because those permits were conditional use permits over which Ecology has final authority under RCW 90.58.140(10). Rather than engage in the fiction that the local building permits were silent modifications of the SMA permits, this court should reverse the superior court and reinstate the decision of the SHB.

VI. STANDARD OF REVIEW

Judicial review of SHB decisions is governed by the Administrative Procedure Act (APA). *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201, 884 P.2d 910, 914 (1994). Under the APA, the "error of law" standard applies to legal issues. *Cohn v. Dep't of Corrections*, 78 Wn. App. 63, 66, 895 P.2d 857, 859 (1995); *Jefferson Co. v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987, 995 (1994). This standard is *de novo* review. However, "[c]ourts give great deference to the agency

interpretation of statutes when the agency is charged with the responsibility of administering the statutes.” *Cohn*, 78 Wn. App. at 69. *See Shoreline Community College Dist. No. 7 v. Employment Sec. Dep’t*, 120 Wn.2d 394, 401, 842 P.2d 938, 942 (1992); *Northwest Steelhead and Salmon Council of Trout Unlimited v. Dep’t of Fisheries*, 78 Wn. App. 778, 786-87, 896 P.2d 1292, 1297 (1995).

The “substantial evidence” standard, in contrast, applies to issues of fact determined by the SHB. “Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise.” *See Jefferson Co.*, 73 Wn. App. at 588; *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 674, 887 P.2d 411, 416 (1994), *review denied*, 126 Wn.2d 1018, 894 P.2d 564 (1995). This deferential review is applied to the Board’s factual findings as an appellate court would defer to a trial court’s findings. *See Snohomish Co. v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84, 87 (1991). Any of the Board’s findings not challenged by the original petitioner are verities on review. *See Patterson*, 76 Wn. App. at 674.⁹

Furthermore, courts have on numerous occasions noted that deference is due to the decisions of the SHB. *Buechel v. Dep’t of Ecology*, 125 Wn.2d at 203; *Weyerhaeuser Co. v. King Co.*, 91 Wn.2d 721, 727, 592

P.2d 1108 (1979); *San Juan Co. v. Dep't of Natural Resources*, 28 Wn. App. 796, 626 P.2d 995 (1981); *Jefferson Co.*, 73 Wn. App. at 589. In *San Juan Co.*, this court stated that the "SHB is the body charged with review of the local decisions to grant or deny a development permit and to determine whether such action is consistent with the master program." Similarly, in *Buechel*, 125 Wn.2d at 203, the Supreme Court stated that "due deference will be given to the specialized knowledge and expertise of the Board." (citing cases). Under the APA, the well established standard of review provides that an appellate court reviews the agency decision and agency record without consideration of the findings and conclusions of the superior court. *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). Because the court of appeals reviews the same record on the same basis as the superior court, findings of fact and conclusions of law entered by the superior court are superfluous. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352 (1995).¹⁰

There is an exception to this rule in cases where the superior court takes new evidence under RCW 34.05.562. See *Postema v. Pollution*

⁹ In this case Twin Bridge has not challenged any of the Board's findings of fact.

¹⁰ In this case, the superior court's findings and conclusions are faulty because they do not follow the direction of RCW 34.05.075 and identify errors in the findings and conclusions of the SHB. Instead, the superior court adopted a new set of findings and conclusions that do not identify any errors by the SHB.

Control Hearings Bd., 142 Wn.2d 68, 100, 11 P.3d 726 (2000). If the superior court hears testimony, for example, and makes findings of fact based on that testimony, then those findings are accorded the deference due any other factual findings by the superior court. *Waste Mgmt. of Seattle, Inc.*, 123 Wn.2d at 633-34.

In this case, the superior court did not hear any new testimony. The superior court admitted as “new” evidence the permit that Twin Bridge ultimately received for the project, but the court did not justify the admission of the document under RCW 34.05.562. Furthermore, the superior court admitted the permit solely for the purpose of showing that the permit exists. The superior court made no findings of fact or conclusions of law based on the existence of that permit nor did it rely on the existence of that permit in its memorandum decision. CP at 424-426. Indeed, the fact that Twin Bridge ultimately received a permit from Skagit County for the marina is irrelevant to the question presented here, which is whether penalties issued before Twin Bridge obtained that permit are lawful and appropriate.¹¹

¹¹ Additionally, since Ecology has not sought injunctive relief in the form of removal of the marina, the existence of the new belated permit is irrelevant.

VII. ARGUMENT

A. **The Shoreline Management Act Grants Ecology Specific And Broad Authority To Enforce Violations Of SMA Permits And To Enforce Against Developments Undertaken Without SMA Permits.**

A significant factor in the Board's rejection of Twin Bridge's argument here was its reliance on the statutory structure of the SMA and the strong legislative declaration of public policy in the SMA to preserve and protect state shorelines from inappropriate development. *See Buechel*, 125 Wn.2d. at 203. According to the Board, requiring Ecology to pursue a LUPA appeal of local building permits, of which in most cases Ecology receives no notice (*See Tr. p. 111*), is inconsistent with the broad and explicit grant of authority given to Ecology to enforce the Act. The barrier to SMA enforcement that Twin Bridge proposes would frustrate both the purposes and the express language of the SMA.

RCW 90.58.020 states that the "shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation." The statute declares that there is "clear and urgent demand for a planned, rational, and concerted effort ... to prevent the inherent harm in an uncoordinated and piecemeal development of the

state's shorelines."¹² The statute further declares that "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."

Consistent with this policy, the statute requires local governments to develop "Shoreline Master Programs" that include policies and regulations over development on state shorelines. RCW 90.58.080. These master programs must be consistent with guidelines promulgated by Ecology. RCW 90.58.060. Prior to undertaking development on state shorelines, local governments must issue a permit consistent with the master program and the Act specifically allowing the development. RCW 90.58.140. The Act further states that it is to be broadly construed to effectuate its purposes. RCW 90.58.900.

The statute grants Ecology specific authority to implement the SMA in several respects. First, Ecology has the power to appeal to the Shorelines Hearings Board substantial development permits issued by local governments. RCW 90.58.180(2). Second, all permits for variances and conditional uses issued by local governments must be sent to Ecology for its review and approval. RCW 90.58.140(10). Third, Ecology is given broad power to enforce the provisions of the Act. RCW 90.58.210.

¹² The SMA defines shorelands to include all land within 200 feet of most state waterbodies, including the Swinomish Channel. RCW 90.58.020(2)(f).

RCW 90.58.210(1) states:

[T]he attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

RCW 90.58.210(2), (3) specifically authorize Ecology or the local government to issue penalties for failure “to conform to the terms of a permit issued under this chapter” and for “development on the shorelines of the state without first obtaining any permit required under this chapter.” *See Samuel’s Furniture, Inc.*, 147 Wn.2d at 457 (“Ecology’s enforcement authority under RCW 90.58.210(3) is limited to situations involving development on shorelines without a permit, and where there is a violation of the permit terms.”)

B. The Board Properly Rejected Twin Bridge’s Arguments That Ecology Should Have Appealed The County Building Permits Or Face A Bar To Enforcement Of The SMA

The Board, in rejecting Twin Bridge’s arguments here, ruled that it would be inconsistent with the statutory scheme established by the SMA to require Ecology to file a LUPA appeal before taking enforcement action in cases where there is no dispute that a shoreline permit is required:

Expanding the mandatory filing of a LUPA appeal to projects clearly located within the shoreline would be inconsistent with the protections of the Act and the defined role of the Department of Ecology. This is a particularly

troubling prospect since Ecology does not receive any meaningful notice of building permits issued by the many local governments throughout the state. Expanding the LUPA requirement to cases requiring shoreline permits would undoubtedly result in diminished protection for the shorelines of the state.

Order Denying Motion to Vacate at p. 9.

The Board recognized that, in those limited cases where the local government has issued a determination that the project is not within the SMA jurisdiction, the Supreme Court decision in *Samuel's Furniture* requires Ecology to appeal the local government's jurisdictional decision under LUPA because, before Ecology may invoke its enforcement authority, its "jurisdiction must first be established." *Samuel's Furniture, Inc.*, 147 Wn.2d at 457. The Board properly refused to extend that rationale to cases such as this one, where there is no jurisdictional dispute and the requirement to obtain a shoreline permit is clear. This interpretation of the SMA and *Samuel's Furniture* by the Board should be affirmed for the following reasons.

1. LUPA Did Not Impliedly Amend The SMA.

As noted above, the SMA grants Ecology explicit authority to enforce with penalties both violations of existing permit conditions and development in the shorelands without a permit. RCW 90.58.210(2), (3). Nothing in the SMA remotely suggests that Ecology must first appeal a

local building permit under LUPA before exercising its granted authority in RCW 90.58.210. That is because the SMA, enacted in 1972, predates LUPA substantially and has never been amended to refer to LUPA. Twin Bridge’s argument, therefore, rests on the assumption that the Legislature impliedly amended the SMA when it enacted LUPA in 1995.

Implied amendment of a statute by a later enactment is strongly disfavored under the law. *In Re Det. of R.S.*, 124 Wn.2d 766, 774, 881 P.2d 972, (1994). The courts “will not assume that the Legislature would attempt to effect a significant change in the law by mere implication.” *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992). “[A]uthority is legion that implied repeals of statutes are disfavored and courts have a duty to interpret statutes so as to give them effect.” *Dep’t of Labor & Industries v. National Security Consultants, Inc.*, 112 Wn. App. 34, 38 n. 4, 47 P.3d 960 (2002). When a later enactment can be harmonized with existing provisions and purposes of a statutory scheme, there is no implied amendment. *See Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995).

The courts have found implied repeal only in two circumstances: (1) when the subsequent legislation covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supercede the prior legislation, or (2) the two acts are so clearly

inconsistent with and repugnant to each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect. *Amalgamated Transit Union Legislative Council v. State*, 145 Wn.2d 544, 552, 40 P.3d 656 (2002).

Here, Twin Bridge cannot establish that the Legislature intended, by enacting LUPA, an implied amendment or repeal of RCW 90.58.210. First, such an implied amendment would be inconsistent with RCW 90.58.900 which mandates that the SMA be interpreted broadly to effectuate its purposes. Requiring Ecology to appeal building permits under LUPA before taking enforcement action does not effectuate the purposes of the SMA because Ecology generally receives no notice of building permits. Also, the record developed at the local level when a building permit is issued is usually inadequate to address SMA issues. *See Toandos Peninsula Ass'n v. Jefferson Co.*, 32 Wn. App. 473, 648 P.2d 448 (1982). Further, local decision makers are not in position to decide SMA issues with the expertise and statewide consistency envisioned by the Legislature when it enacted the SMA and established the Shorelines Hearings Board.

Second, LUPA does not “cover the entire subject” of the SMA nor can it be construed to supercede the SMA. LUPA “replaced the writ of certiorari for appeal of land use decisions” and is “the exclusive means of

judicial review of land use decisions.” RCW 36.70C.030. LUPA is a procedural statute that specifies the means by which review of local land use decisions may be sought. In contrast to the SMA, LUPA says nothing substantive about how state shorelines are to be regulated, about what kinds of developments are favored on state shorelines, what kinds of permits are needed, or what the specific appeal processes are that apply to shoreline permits. *See* RCW 90.58.020.

LUPA has never been construed, for example, to replace the statutory process set forth in the SMA for appeal of shoreline substantial development permits, shoreline variances or shoreline conditional use permits. *See* RCW 90.58.180. LUPA expressly exempts these permits from its coverage, RCW 36.70C.030(1)(a)(ii), evidencing a legislative intent not to supercede the SMA but instead to compliment the SMA by addressing other types of local land use decisions.

Third, the two acts are not so inconsistent with or repugnant to each other that they cannot be harmonized. The two acts may be harmonized by holding that, even if Ecology had the opportunity under LUPA to appeal the building permits issued to Twin Bridge, the bar created by the failure to appeal applies only to a collateral challenge to those building permits, it does not apply to Ecology’s enforcement authority under RCW 90.58.210. To develop within the shoreline, at least

two permits are needed: 1) a building permit and 2) a shoreline permit. Failure to appeal the building permit may bar Ecology from challenging that permit but it does not bar Ecology from enforcing a party's failure to obtain the shoreline permit or a party's failure to abide by conditions imposed in an existing shoreline permit. In other words, by not engaging in a LUPA appeal, Ecology could not argue that the building permit here was improperly issued under the building code or local ordinance. But Ecology faced no barrier to determining that the development required a permit under the SMA or violated terms of an Ecology approved CUP.

2. **The Superior Court Had No Factual Or Legal Reason To Treat This Building Permits As Express Or Implied Modifications Of SMA Conditional Use Permits That by Law Require Ecology Approval.**

The conclusion that LUPA does not affect Ecology's SMA authority to enforce CUP requirements and conditions follows even if the issuance of the building permit by the local government requires the local government to also make a decision that the development is consistent with an existing SMA permit or does not require an SMA permit. In such a case, the shoreline decision of the local government is, at best, an implicit one and cannot be the subject of a LUPA appeal. Here, for example, as to the compliance of the development with the existing SMA CUPs, the local building permits were not shown to be nor found to be a

“final determination . . . on a application for a project permit or other governmental approval” within the meaning of RCW 36.70C.020(1)(a). Instead, the only “final determination” made by the local government that could have been appealed under LUPA was the building permit itself not the implicit or *sub silentio* determination that no new shoreline permit was required. This distinction makes sense because LUPA is a type of limited review on the record. RCW 36.70C.120. The only record on review of a building permit is the permit itself and the application for it. Here, there was no record that would allow meaningful review of the apparent local government decision that the development was consistent with the existing SMA permits.

Distinguishing the local building permit from the SMA permits effectively harmonizes LUPA with the detailed provisions in the SMA for public notice and comment on SMA permits. It also avoids the superior court’s ruling under which the existence of a uniform appeal right under LUPA is transformed into an implied limitation on Ecology’s express enforcement authority in the SMA. For that reason, it is the interpretation that should be adopted by the court.

In the present case, the record showed that the county hearings examiner determined that a new shoreline permit was required. Ex. R-52. Twin Bridge appealed that determination to the county commissioners

and, while the appeal was pending, entered into a settlement of the building permit dispute with the County and the City of Anacortes. CP 429. This settlement required the County to reinstate the building permits but in no meaningful sense can it be characterized as a “final determination” by the local jurisdiction’s “highest level of authority” on the merits of the question of whether the project complied with the existing SMA permits or required a new permit. Rather, the settlement is more properly characterized as a decision by the County and Anacortes to forego further litigation. Requiring Ecology to appeal this settlement agreement under LUPA before taking enforcement action under the SMA makes no sense because the agreement was not an appealable decision under LUPA nor was the agreement an express public determination about the SMA permits which were the subject of separate proceedings.

In short, it is inconsistent with the SMA’s emphasis on coordinated planning and prevention of piecemeal development to read LUPA as impliedly amending the SMA permit process and Ecology’s enforcement authority in RCW 90.58.210. For projects within SMA jurisdiction, the Legislature intended that an SMA review and approval process be followed to ensure protection against inappropriate development, protection of the public interest, and implementation of the SMA’s goals and policies. As the Board correctly noted, such review does not occur

when a local government issues a building permit. *See* Order Denying Motion to Vacate at 7-8.

C. Samuel's Furniture Is Distinguishable From This Case Because This Case Does Not Involve A Jurisdictional Determination By The Local Government But Instead Involves A Violation Of Permit Conditions.

In *Samuel's Furniture*, a developer seeking to construct an addition to his furniture store in Ferndale went to the city and was told that no shoreline permit was needed because the proposed development was not in shoreline jurisdiction. *Samuel's Furniture, Inc.*, 147 Wn.2d at 444-45. When he proceeded with the project, Ecology advised him that it believed that a shoreline permit was required. After threat of enforcement action by Ecology, the developer brought a declaratory judgment action in superior court seeking a determination that the project was outside shoreline jurisdiction. Among other things, he argued that LUPA barred Ecology from taking enforcement action because Ecology did not appeal the city's jurisdictional decision within 21 days as required by LUPA.

The Supreme Court eventually agreed and concluded that Ecology's general oversight role under the SMA¹³ was not sufficiently specific to render the local government's jurisdictional decision non-final. *Samuel's Furniture, Inc.*, 147 Wn.2d at 454-56. The Supreme Court

recognized that Ecology has express power to take enforcement action where a permit is required or there is a violation of the terms of the SMA permit. The court, however, also ruled that, before Ecology can evoke RCW 90.58.210, its jurisdiction must first be established under LUPA. *Id.* at 457.

The court emphasized in many places that its holding is limited to the narrow issue of jurisdiction:

We hold that Ecology is required to file a timely LUPA petition in order to challenge a local government's decision to allow a development project when the local government has determined that the project is not within the shoreline jurisdiction.

147 Wn.2d at 444. The Court phrased the "single" issue before it as:

[W]hether Ecology is prevented from collaterally attacking the City's determination that the Samuel's project is outside the shoreline jurisdiction because it failed to file a timely LUPA petition challenging the City's decision to issue either the fill and grade or building permits or to withdraw the stop work order.

147 Wn.2d at 448. The Court emphasized that the situation before it involved a jurisdictional decision where Ecology's action was contrary to a final, prior, lawful determination that the project was outside shoreline jurisdiction:

¹³ See RCW 90.58.050 which states that Ecology "shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of this chapter."

[B]efore Ecology may issue cease and desist orders, require corrective action, or issue penalties, Ecology's jurisdiction must first be established. Because local governments are given the exclusive authority to administer the permit system, RCW 90.58.140(3), . . . it would then be appropriate to require Ecology to appeal a decision to allow a land use action without obtaining a substantial development permit in order to establish its jurisdiction to issue penalties under RCW 90.58.210(3).

Samuel's Furniture, 147 Wn.2d at 457. The Court's opinion is replete with references to the jurisdictional nature of the local government's decision. *E.g.*, 147 Wn.2d at 449, 450, 458, 459, 462. The Court's express holding is narrowly phrased as follows:

We hold that Ecology must file a timely LUPA petition challenging a local government's decision to allow a development project after it has determined that the project at issue is not within the shoreline boundary. If Ecology fails to file a LUPA petition under such circumstances, it cannot collaterally challenge the local government's determination that the project is not within shoreline jurisdiction by bringing independent enforcement actions against the property owner or developer.

147 Wn.2d at 463.

The Board's ruling in this case is consistent with *Samuel's Furniture*. As the *Samuel's Furniture* court ruled, before Ecology can invoke RCW 90.58.210, its "jurisdiction must first be established." *Samuel's Furniture, Inc.*, 147 Wn.2d at 457. In this case, in contrast, there is no question of jurisdiction. There is no basis, therefore, to conclude that RCW 90.58.210 does not apply. To the contrary, the explicit grant of

enforcement authority in that statute allows Ecology to proceed directly without any prior LUPA appeal.

The supreme court anticipated this different type of case when it emphasized in *Samuel's Furniture* that Ecology "would not be prevented from taking action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate the conditions of the permit." *Samuel's Furniture, Inc.*, 147 Wn.2d. at 456. Both of these things happened here. Twin Bridge ignored the shoreline permitting process by constructing a marina on state shorelands without a permit and it violated the terms and conditions of its existing shoreline permits by constructing structures and engaging in uses not authorized in those permits. Thus, Ecology had authority to penalize Twin Bridge.

In this case, rather than relying on an explicit local decision that the Twin Bridge project was outside shoreline jurisdiction, Twin Bridge can only point to the SHB statement that the County "apparently" concluded that the project was covered by the existing conditional use permits for development in the shoreline jurisdiction. *See* Exhibits R-18, R-33, R-35, R-40; Findings of Fact, Conclusions of Law and Order, Finding of Fact IX ("Skagit County apparently concluded the existing

CUP 7-82 covered the shoreline aspects of the project . . .”).¹⁴ This mistake by the County was then reversed by the county hearing examiner who initially concluded that a new shoreline permit was needed. It was only pursuant to a settlement agreement, and not a reasoned decision on the merits, that the County ultimately reinstated the building permits. The record, however, never shows where the County affirmatively determined or contended that the project was not subject to shoreline jurisdiction or that the original CUPs which had been approved by Ecology were not valid and applicable.

The holding of *Samuel's Furniture* does not apply here. There is no factual or legal reason for by-passing the detailed permitting, public review, and enforcement processes of the SMA simply because the local government issued a building permit inconsistent with the existing shoreline CUPs.

¹⁴ As Ecology explained at the hearing, the County's "apparent" position was untenable. See Tr. at 61-62. Shoreline permits authorize specific developments and uses. See *Hayes v. Yount*, 87 Wn.2d 280, 295, 552 P.2d 1038 (1976). The change in the proposal from a marine construction and dredging business to a marina was significant because the new proposal involved many new structures, uses, and impacts that were not considered in the original permit process.

D. In The Circumstances Of This Case, Where Ecology Repeatedly Advised Twin Bridge That The Marina Was Not Authorized By Its Existing Permits, Enforcement Of The SMA And SMA Permit Conditions Does Not Contradict Any Principles Of Finality

The Court in *Samuel's* was guided by the principle that finality is an important policy goal for land use decisions. 147 Wn.2d at 458-60. The Court expressed concern that *Samuel's* had relied on the local government determination that the project was outside SMA jurisdiction and that Ecology was seeking "blanket" authority to overturn those permits perhaps months or years later. These concerns are not present in this case.

Here, Twin Bridge repeatedly was told by Ecology that its marina proposal was inconsistent with the existing CUPs and required a new shoreline permit. *See, e.g.* Ex. R-16, R-17, R-19. Twin Bridge knew that Ecology had express statutory authority to approve, deny, or condition the conditional use permits under the Shoreline Management Act, RCW 90.58.140. As the Board found:

Unlike the developers in *Samuel's*, Twin Bridge always knew the marina project would require shoreline approval. Twin Bridge was fully aware of Ecology's position that a new substantial development permit was necessary for the marina. After the building permit was issued, and the

initial penalty assessed, the project proponents went so far as to enter into a settlement agreement with Ecology that obligated them to seek a new substantial development permit.

Order Denying Motion to Vacate at 10. (Emphasis added).

Thus, this case does not present the policy concerns expressed in *Samuel's Furniture*. This case did not present a situation where Ecology was collaterally attacking a local determination that Ecology did not have jurisdiction over the development. Rather, Ecology was simply enforcing the conditions of the permits it approved. Twin Bridge's argument that *Samuel's Furniture* should be extended to this case cannot be reconciled with the Legislative intent that Ecology "tak[e] action against a party who completely ignores the shoreline permitting process or one who obtains a permit and then proceeds to violate the conditions of the permit." 147 Wn.2d at 456.

E. This Case Involves Compliance With Conditional Use Permits Over Which Ecology Has Specific Approval And Enforcement Authority

Under LUPA, only "final determinations" by the local jurisdiction's "highest level of authority" are subject to the twenty-one day appeal deadline. RCW 36.70C.202(1); *Horan v. City of Federal Way*, 110 Wn. App. 204, 209, 39 P.3d 366 (2002); *Tugwell v. Kittitas Co.*, 90 Wn. App. 1, 7, 951 P.2d 272 (1997). Here, Ecology was not required to appeal

the County determination regarding the scope of the original shoreline CUPs because the SMA grants to Ecology final review authority over CUPs.

RCW 90.58.140(10) gives Ecology the authority to approve or deny shoreline conditional use permits. This authority includes the authority to impose conditions to achieve compliance with the SMA. WAC 173-27-160; *e.g.*, *Snohomish Sand & Gravel v. Ecology*, SHB No. 95-47 (1996). The SMA grants Ecology authority to approve or deny CUPs because such permits represent exceptions to the norm and state oversight is needed to ensure that the purposes of the Act are not undermined by such exceptions. *See* RCW 90.58.100(5); *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998). The SMA also gives Ecology the authority to ensure compliance with permit conditions, including conditional use permit conditions. RCW 90.58.210(2).

Here, when Ecology approved CUP 7-82, it stated:

It is our understanding that this permit only authorizes 90,000 cubic yards of fill to be placed onsite and subsequent use of the site for the operation of a marine construction and dredging business to include storage of materials and equipment. *Any other substantial development on the site such as buildings, shore structures, hard surfacing and drainage improvements will be submitted as a new permit or a revision to this permit*

Exhibit R-4 (italics added).

With respect to CUP 15-86, Ecology stated:

The Department of Ecology has reviewed the above-referenced conditional use permit for hydraulic dredging of approximately 40,000 cubic yards of material for construction of a boat basin with dock and dolphins for moorage of dredging and construction equipment with disposal of spoils on an adjacent upland. We concur that the proposal meets the intent of the master program and the criteria set forth in WAC 173-14-140 for granting a conditional use.

Exhibit R-9.

On several occasions over the years, Ecology reiterated that the CUPs authorized only particular developments and uses and not those ultimately constructed by Twin Bridge. *See* FOF, CL and Order at 17-18. Exhibits R-12, R-16, R-17, R-19, R-23, R-39. Ecology's Notice of Correction, issued May 1, 2000, stated that the project was not in compliance with the existing CUPs:

Ecology believes the above-referenced developments and activities are in violation of the CUPs and portions of the County's SMP. The present development and activities exceed the authorizations in CUPs Nos. 7-82 and 15-86 and represent a change in use from that authorized in the CUPs. Because you are not in conformance with the CUPs, you are violating the following . . . RCW 90.58.210(2).

Exhibit R-46, p. 4.

Ecology's penalties and orders were based on non-compliance with the existing CUPs as well as the failure to obtain a new shoreline permit. Exhibit R-50, p. 8 ("the proposed use of the site as a 'back-shore or upland

marina' is not within the scope or intent of the original CUPs The proposed developments within shoreline jurisdiction appurtenant to the buildings approved by Skagit County are not within the scope or intent of the original CUPs"). Exhibit R-82 at p. 4, R-93 at p. 5 ("work and operations performed in the past and currently being performed on the subject site are in violation of the SMA since the existing CUPs Nos. 7-82 and 15-86 did not authorize construction or operation of a marina on the subject property.").

This court should recognize that it makes no sense for the Legislature to authorize Ecology to condition approval of conditional use permits in RCW 90.58.140, and then conclude that, under *Samuel's*, Ecology has no authority to enforce such conditions pursuant to RCW 90.58.210. Such a ruling would create an incentive for developers to obtain a minor local government permit inconsistent with a previous shoreline conditional use permit simply to create an argument that the local permit "determined" that the inconsistent development was allowed under the CUP. The public notice and comment process that applies to CUPs under the SMA would be subverted by such a holding.

For example, under the Twin Bridge argument, a local government might issue a "grade and fill permit" for a development with a two acre footprint. This grade and fill permit would then preclude enforcement of

an express SMA permit condition that allowed only a one acre footprint. The SMA permit condition might have been the product of careful local and state review, or even the product of judicial review, but it would be barred from enforcement because there had been a LUPA opportunity to appeal the inconsistent local grade and fill permit. This untenable reading of *Samuel's Furniture* frustrates the public interest that was supposed to be protected by both the substance and processes of the SMA permits.

There is no need for that ruling here, because the Supreme Court in *Samuel's Furniture* recognized that, in those situations when Ecology has specific review authority over local government decisions, it is not required to file a LUPA appeal:

We must . . . decide whether Ecology has review authority over a local governmental determination that a project is not within the shoreline jurisdiction in order to determine whether Ecology was required to appeal the decision pursuant to LUPA.

147 Wn.2d at 453 n.12 (emphasis added). Plainly, the Court recognized that where Ecology has authority to review a local government decision – as in its authority to approve and enforce a conditional use permit – then the right to take a LUPA appeal does not bar enforcement of the SMA. This is because a CUP under the SMA is, in both law and fact, a permission granted by the State acting through Ecology. It is not accurately characterized as a purely local government permit.

Here, for example, Ecology approved CUPs 7-82 and 15-86 with specific limitations on what they authorized. See Exhibit R-4 (“[a]ny other substantial development on the site . . . will be submitted as a new permit”). Under RCW 90.58.210(2), Ecology has authority to enforce those limitations. Ecology, not Skagit County, was the final arbiter of what was approved under CUP 7-82 and 15-86 because Ecology issued those approvals, not the County. While RCW 90.58.050 may not give Ecology general authority to review all local government decisions, as the Supreme Court held, RCW 90.58.140(10) specifically gives Ecology review authority here, thus distinguishing this case from *Samuel’s Furniture*.

F. Twin Bridge Agreed To Obtain All Necessary Permits, Including A New Shoreline Permit, And Its Failure To Do So Is An Independent Basis For Affirming Of Ecology’s Orders And Penalties

In February 2001, Ecology and Twin Bridge signed a Stipulation and Agreed Order of Dismissal. That agreement required Twin Bridge to obtain a new shoreline substantial development permit and it required Twin Bridge to stop work “until all required federal, state and local permits have been obtained.” Ex. R-80.

Within days of signing this agreement, Twin Bridge resumed work on the site even though Twin Bridge did not at that time have a new

shoreline permit authorizing the work nor did it have a permit from the Army Corps of Engineers authorizing the over-water construction already performed. Exhibits R-81, R-100. Twin Bridge's resumption of work on the site was a violation of the Stipulation that authorized Ecology, pursuant to the agreement's terms, to reinstate its original penalty of \$17,000 and impose new penalties. For reasons that have already been thoroughly explained, and upheld by the Board, the phrase "all required federal, state and local permits" included a new shoreline permit:

The settlement agreement states that Twin Bridge "shall not resume work on the site until all required federal, state and local permits have been obtained." Twin Bridge was required to have a shoreline permit to construct the project improvements located within the 200-foot shoreline area. The existing permits CUP 7-82 and CUP 15-86 did not extend to the improvements Twin Bridge installed. The Board concludes that resuming construction before obtaining the required shoreline permit(s) was a violation of the settlement agreement.

Findings of Fact, Conclusions of Law and Order, CL at VII.

Twin Bridge signed the Stipulation and Agreed Order of Dismissal well after the building permits had been issued by Skagit County in 2000. Thus, Twin Bridge agreed to obtain a new shoreline permit even though it had available to it the argument it makes now to the effect that Ecology was barred from taking enforcement action by its failure to appeal the building permits issued by Skagit County. In effect, the Stipulation constitutes a waiver of the argument Twin Bridge now makes because,

notwithstanding that argument, Twin Bridge agreed to obtain a new shoreline permit, as well as all other required permits, before resuming work on the site.

Further, at the time Ecology issued its first penalty and order, in June 2000, the City of Anacortes' appeal of Twin Bridge's building permits already was pending. The County suspended those permits on June 23, 2000, two days after Ecology's order. Exhibit R-52. Thus, at the time Ecology issued its first order, there was no final decision for Ecology to appeal under LUPA. The subsequent penalties and orders were issued after Twin Bridge agreed to obtain all permits in the Stipulation and were based in part on Twin Bridge's failure to comply with that agreement and the earlier orders. Exhibits R-82 at p. 3 ("Ecology is reinstating Penalty Order No. 00SEANR-1209 due to the failure of Mr. Youngsman and his associates to abide by the Stipulation and Agreed Order of Dismissal. Ecology is also imposing a new penalty for work performed at the site since February 26, 2001 . . ."). Exhibit R-93 at p. 5 ("Work and operations performed in the past and currently being performed on the subject site constitute a breach of the Stipulation and Agreed Order of Dismissal and of Shoreline Penalty and Orders Nos. 00-SEANR-1209 and 01-SEANR-2101."). Twin Bridge's failure to abide by the Stipulation, and by the terms of Ecology's orders, are independent bases to affirm

Ecology's penalties and orders regardless of whether *Samuel's Furniture* is found to apply to this case.

VIII. CONCLUSION

For the reasons stated above, the court should affirm the decision of the Shorelines Hearings Board affirming Ecology's penalties and orders in this matter, and reverse the decision of the superior court.

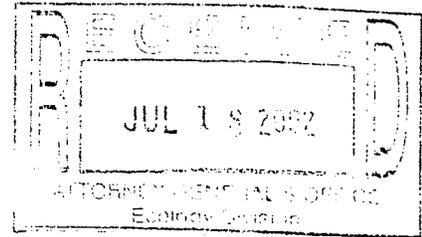
Respectfully submitted this 12 day of August, 2004.

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK, L.L.C.
and KEN YOUNGSMAN (KEN
YOUNGSMAN AND ASSOCIATES),

Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Respondent.

SHB NO. 01-016 & 01-017

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

This matter came on for hearing before the Shorelines Hearings Board (Board) on May 28-31, 2002 in Lacey, Washington. The Petitioners Twin Bridge Marine Park L.L.C. and Ken Youngsman, Ken Youngsman and Associates, (Twin Bridge) appealed penalties and orders issued by the Department of Ecology (Ecology) alleging construction and operation of an upland marina facility without proper shoreline permits.

The Board was comprised of Kaleen Cottingham, William H. Lynch, Judy Wilson, Phyllis Shrauger, and Dan Smalley. Board chair Robert V. Jensen recused himself from the case. Administrative Appeals Judge, Phyllis K. Macleod, presided for the Board. Counsel Craig Magnusson represented the petitioners at the hearing, and Assistant Attorney General, Thomas Young represented respondent Ecology. Cindy L. Ide, Betty Koharski, and Kim Otis of Gene Barker & Associates, Inc., Olympia, Washington, provided court reporting of the proceedings.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER
SHB NOS. 01-016 & 01-017

1 Witnesses were sworn and heard, exhibits were introduced, and the parties presented
2 arguments to the Board. Based upon the evidence presented, the Board makes the following:

3 **FINDINGS OF FACT**

4 I.

5 Twin Bridge owns a triangular piece of property in Skagit County, Washington, on Josh
6 Green Lane, a roadway running parallel to State Highway 20, shortly before the highway crosses
7 a bridge over the Swinomish Channel. The location will be referred to in this opinion as the
8 Twin Bridge property. The west boundary of the parcel fronts on the Swinomish Channel and
9 the site now contains a man-made moorage basin installed by Mr. Youngsman. The property is
10 very near Padilla Bay, a wildlife habitat area and designated National Estuarine Research
11 Reserve.

12 II.

13 The Twin Bridge property was acquired by Ken Youngsman in the early 1970's. Mr.
14 Youngsman owned and operated a company known as "Marine Construction and Dredging,
15 Inc.", which engaged in dredging and in constructing docks, piers, bulkheads, and other marine
16 facilities. Mr. Youngsman initially planned to use the Twin Bridge property as the base of
17 operations for his dredging and marine construction business. This project called for mooring
18 dredges, dredge tenders, and other vessels used in the business in the moorage basin, and storing
19 materials and equipment on the upland portions of the site. Two buildings were proposed: one
20 office building of less than 1,000 square feet, and one repair/storage building of approximately

1 4,000 square feet. To prepare the upland portions of the site Youngsman planned to place dredge
2 spoils on the upland property.

3 III.

4 Environmental review was conducted of Mr. Youngsman's proposed actions on the site
5 under the State Environmental Policy Act in a 1975 Final Environmental Impact Statement
6 (FEIS). The FEIS evaluated primarily a proposed zone change from Agricultural to Industrial.
7 It further addressed dredging a lagoon, disposal of fill material on the northern half of the inland
8 portion of the site, construction of a dock and dolphins for company vessels, construction of an
9 office/shop building of approximately 960 square feet, a repair/storage building of approximately
10 4,000 square feet and a communications antenna, expansion of a gravel road to provide access,
11 later construction of a railroad siding, and expansion of fill operations on the south portion of the
12 site to provide a disposal site for dredge spoils generated from maintenance of the Swinomish
13 Channel.

14 The FEIS did not mention any type of marina use, launching facilities, paving, reinforced
15 cement pads, boat washing, parking for substantial numbers of vehicles, retail services open to
16 the public, traffic or impacts associated with numerous customers frequenting the site, upland or
17 on the dock fueling, sewage pump-out or drainage swales. The evaluated project was limited to
18 a headquarters for Marine Construction and Dredging's business. The only further
19 environmental documentation relating to the site was contained in later addendums to the 1975
20 FEIS.

1 IV.

2 Mr. Youngman's early efforts to develop the property as a headquarters for his business
3 were interrupted by a number of years of litigation over the project. He first obtained a shoreline
4 substantial development permit from Skagit County in 1976. The permit approved placement of
5 dredge spoils on the 11-acre site and use of the area for storage of construction equipment and
6 office space for his dredging business. A Shoreline Hearings Board decision limited the dredge
7 spoils placement to 4 acres on the site. The decision was appealed and the Washington Supreme
8 Court disapproved any placement of dredge spoils in a June 1980 decision, *Skagit County v.*
9 *Dep't of Ecology*, 93 Wn. 2d 742, 751, 613 P.2d 115 (1980).

10 V.

11 After the shoreline permitting case was remanded to Skagit County, two shoreline
12 conditional use/substantial development permits (CUPs) were issued to Mr. Youngsman. CUP
13 7-82 was issued in December 1984 authorizing "placement of about 90,000 yards of landfill,
14 construction and operation of a marine dredging and construction business and the storage of
15 construction materials and equipment." Ecology approved CUP 7-82 in a letter dated March 20,
16 1985 which stated:

17
18 It is our understanding that this permit only authorizes 90,000 cubic
19 yards of fill to be placed on site and subsequent use of the site for the
20 operation of a marine construction and dredging business to include
21 storage of materials and equipment. Any other substantial development
on the site such as buildings, shore structures, hard surfacing, and
drainage improvements will be submitted as a new permit or a revision
to this permit pursuant to WAC 173-14-064.

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VI.

Skagit County issued CUP/SDP 15-86 to Marine Construction and Dredging Company in July 1986. The permit authorized “Hydraulic dredging of approximately 40,000 cubic yards of material with upland disposal on site for the creation of a boat basin, with dock and dolphins, to moor the applicant’s dredging and construction equipment.” No buildings, utilities, paving, or public access were included in the project description or approval.

VII.

Dredging and filling activities under CUP 7-82 and CUP 15-86 did not begin immediately. The project was delayed by litigation over the configuration of the manmade moorage basin. Mr. Youngsman was involved for several years in litigation with the Washington Department of Fish and Wildlife and others over the dredging proposal. When the litigation was ultimately concluded, Skagit County determined that CUPs 7-82 and 15-86 were still valid despite the passage of time because they were related and construction had been prevented by the litigation. The dispute over the moorage basin was actually resolved through a settlement that provided for reconfiguration of the moorage basin. Mr. Youngsman sought a revision of CUP 15-86 to accommodate the reconfiguration contemplated by the settlement. In March 1998 Ecology and Skagit County granted a revision to CUP 15-86 to reflect reconfiguration of the basin. No additional uses were authorized as part of the revision.

1 VIII.

2 Mr. Youngsman began to dredge the moorage lagoon in the spring of 1998. At about this
3 same time he began to investigate a proposal to sell or lease the property to a company named
4 Northern Marine Inc., a builder of heavy-duty vessels of industrial and commercial lineage.
5 Extensive facilities would have been needed for the Northern Marine use. Skagit County
6 approved the proposal as a revision to CUP 7-82, but Ecology denied it for failure to meet the
7 criteria in WAC 173-27-100. Mr. Youngsman did not appeal Ecology's decision or pursue the
8 proposal further.

9 IX.

10 At some point Mr. Youngsman's intentions for the property changed from a storage yard
11 and headquarters for his marine construction business to a drystack boat storage concept. By
12 1999, when Mr. Youngsman applied to Skagit County for three building permits on the site, the
13 plans included an intention to build a dry-stack storage facility capable of holding approximately
14 350 recreational boats of various sizes. A second building would house office and retail
15 facilities. The boats would be moved from the storage building to the moorage lagoon by a large
16 forklift, which would lower the boats from a reinforced concrete pad into the water. The site
17 plans associated with the building permit applications included utilities for the buildings, a
18 reinforced concrete pad, boat washing facilities, septic pump-out equipment, fuel dispensing,
19 paving, and drainage improvements. Skagit County apparently concluded the existing CUP 7-82
20 covered the shoreline aspects of the project since Mr. Youngsman was not required to obtain a
21 revision or seek a new shoreline substantial development permit or conditional use permit.

1 Skagit County issued building permits 99-1065 and 99-1226 for the project on March 7, 2000.
2 Ecology did not appeal issuance of the building permits under the Land Use Petition Act. The
3 City of Anacortes did lodge such an appeal.

4 X.

5 In March 2000 Skagit County also issued a Final Environmental Impact Statement
6 Addendum for the project stating: "This addendum modifies the Final Environmental Impact
7 Statement (FEIS 1975) for Shoreline Substantial Development/Conditional Use Permits # 7-82
8 and 15-86. Building permits #99-1065 and 99-1226 modify fill and grade permit #95-0474 by
9 adding drainage and site plan details as well as clearly identifying the building's configuration,
10 location, and size." The document goes on to determine "that the revision is 'insignificant' and
11 does not have a probable significant adverse impact on the environment. A Final Environmental
12 Impact Statement was issued in 1975 for the original proposal. This addendum adds information
13 about the proposal but does not substantially change the analysis of significant impacts or
14 alternatives in the existing environmental document." No additional environmental review was
15 conducted for the upland marina proposal or the specific improvements being constructed on
16 shorelands.

17 XI.

18 When construction under the building permits began on the site, Ecology issued a Notice
19 of Correction to Twin Bridge dated May 1, 2000. This notice requested that Twin Bridge stop
20 work at the site and obtain a new shoreline permit for use of the site as a marina and for the
21 structures and site work placed within the shoreline. Twin Bridge chose not to stop work and

1 Ecology then issued its first administrative order and penalty (00SEANR-1209) to Twin Bridge
2 on June 21, 2000. The order required Twin Bridge to stop work at the site, obtain a new
3 shoreline permit, and pay a penalty of \$17,000.

4 XII.

5 Ken Youngsman appealed the Order and Notice of Penalty to the Shorelines Hearings
6 Board. In the meantime Twin Bridge stopped construction and grading work at the site with
7 certain authorized safety exceptions. The company also submitted a permit application to Skagit
8 County for a new shoreline permit authorizing use of the site as a marina with buildings, and
9 related improvements such as boat washing and fuel dispensing facilities. The application
10 included a SEPA checklist, Joint Aquatic Resource Permit Application (JARPA), and Shoreline
11 Development Checklist. The applicant, Twin Bridge, supplied additional requested information
12 to Skagit County in October 2000. In February of 2001, Ecology and Twin Bridge entered into a
13 settlement agreement of the 00SEANR-1209 appeal. The stipulations provided as follows:

- 14
- 15 1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to Ken
16 Youngsman on or about June 21, 2000, subject to the following conditions:
 - 17 a. Mr. Youngsman shall continue to pursue in good faith his application for a new
18 Shoreline Substantial Development Permit for the Twin Bridge Marine Park.
 - 19 b. In the event that Skagit County issues a Substantial Development Permit to Mr.
20 Youngsman or his associates, Ecology reserves the right to appeal the permit to
21 the Shorelines Hearings Board and to raise any issue therein.

1 c. Mr. Youngsman, his associates, and contractors shall not resume work on the site
2 until all required federal, state, and local permits have been obtained.

3 2. Mr. Youngsman hereby dismisses his appeal in this matter.

4 XIII.

5 At the time the settlement agreement was negotiated, the Skagit County building permits
6 were suspended. Pursuant to a settlement of other litigation, the permits were reinstated
7 shortly after the settlement agreement in 00SEANR-1209 was signed and Twin Bridge
8 resumed work on the site. When Twin Bridge resumed construction, Skagit County was still
9 processing Twin Bridge's application for a new shoreline permit. At the time of hearing in
10 this case Skagit County had not yet rendered a decision on Twin Bridge's new shoreline
11 permit application.¹

12 XIV.

13 When Twin Bridge proceeded with construction on the site, Ecology issued a second
14 administrative order and penalty (No. 01SEANR-2101) requiring Twin Bridge to stop work
15 on the site, reinstating the \$17,000 penalty from 00SEANR-1209, and adding another penalty
16 of \$17,000. This order was issued March 5, 2001. Rather than stopping work on the site,
17 Twin Bridge continued with construction, alleging it was fully authorized to proceed under
18 the Skagit County building permits. Twin Bridge completed construction of the two

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¹ In addition, a controversy existed over the need for a permit from the U.S. Army Corps of Engineers for work done on the moorage basin. It is not necessary for the Board to resolve the issue of what federal permits might have been required or what jurisdiction the Board might have to address such issues.

1 buildings on the site and received approval for occupancy from Skagit County in late May
2 2001. The facility opened for business as a marina in June 2001.

3 XV.

4 On June 27, 2001, Ecology issued its third Order and Notice of Penalty Incurred
5 (01SEANR-3032 & 01SEANR-3031) to Twin Bridge, assessing an additional penalty of
6 \$25,000 and ordering Twin Bridge to cease construction and operations on the site until
7 shoreline permits authorizing the construction and use are obtained. Twin Bridge appealed
8 Order No. 01SEANR-3032 and 01SEANR-3031 to this Board. The appeal was given SHB
9 No. 01-017. Twin Bridge separately appealed Order 01SEANR-2101, which was given SHB
10 No. 01-016. The cases were consolidated for hearing before the Board.

11 XVI.

12 The improvements constructed within 200 feet of the manmade moorage basin include
13 paving much of the area between the storage building and installing a ten-inch thick
14 reinforced concrete pad used by the forklift in launching boats. The concrete pad is wholly
15 within the shoreline and extends partially over the water. A boat washing facility is located
16 in the area between the storage building and the concrete pad. One boat washing area
17 involves the use of detergent. Several others areas are established within the 200-foot zone
18 for a clear water wash. Utility lines, a septic tank, an oil water separator, and asphalt parking
19 spaces have been included within the 200-foot shoreline area. A sewage pump-out unit is
20 located on a dock over the water.

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XVII.

Additional improvements directly linked to construction within the 200-foot zone have also been erected. The 66,000 square foot boat storage building (Building A) has been completed approximately 201 feet from the moorage basin. A second building 7,600 square feet in size (Building B) for offices and retail/repair has also been constructed. At the time of the hearing a lessee was operating a boat repair and retail boat/accessory operation in Building B. Gas tanks have been installed on the site upland of the 200-foot line and fuel transfer is occurring. A bioswale system draining into the moorage basin and several septic tanks are also located upland of the 200-foot line. Much of the general vicinity has been paved or asphalted for access and parking.

XVIII.

The upland and shoreland facilities on the Twin Bridge site are currently being used for storage and launching of recreational boats and associated activities such as fueling, repair, marine retail, administration, and washing and sewage disposal. Twin Bridge did not discontinue or limit its activity in response to Ecology's issuance of Order 01SEANR-2101 and Orders 01SEANR-3031 and 01SEANR-3032. In fact, the project has recently been expanded to include Cap Sante Marine's repair and marine retail business.

XIX.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

Based on the foregoing Findings of Fact, the Board enters the following

1 CONCLUSIONS OF LAW

2 I.

3 The Board has jurisdiction of the parties and the subject matter of this case under RCW
4 90.58.210(4). The Board hears the case *de novo*. The Department of Ecology has the burden of
5 proving that a violation has occurred, that the amounts of the penalties assessed are reasonable,
6 and that a cease and desist order is justified.

7 II.

8 RCW 90.58.140 prohibits substantial development on shorelines of the state without a
9 permit:

10 A substantial development shall not be undertaken on shorelines of the
11 state without first obtaining a permit from the government entity having
administrative jurisdiction under this chapter.

12 The Shoreline Act also authorizes Ecology to assess civil penalties for development undertaken
13 without a permit:

14 Any person who shall fail to conform to the terms of a permit issued
15 under this chapter or who shall undertake development on the shorelines
16 of the state without first obtaining any permit required under this chapter
17 shall also be subject to a civil penalty not to exceed one thousand dollars
for each violation.

18 RCW 90.58.210(2)

19 III.

20 Twin Bridge has argued that shoreline jurisdiction on this site should be measured from
21 the edge of the main Swinomish Channel and not from the edge of the manmade moorage basin.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

SHB NOS. 01-016 & 01-017

1 The moorage basin is connected directly to the water of the Swinomish Channel. Creation of the
2 moorage lagoon modified the ordinary high water mark in this area. RCW 90.58.030(2)(b)
3 indicates the ordinary high water mark is measured from a mark upon the soil distinguishing the
4 character of the vegetation from the abutting upland "as it may naturally change thereafter, or as
5 it may change thereafter in accordance with permits issued by a local government or the
6 department" In this case the ordinary high water mark is properly placed at the edge of the
7 moorage lagoon. The shorelands subject to regulation under the act are "those lands extending
8 landward for two hundred feet in all directions as measured on a horizontal plane from the
9 ordinary high water mark." RCW 90.58.030(2)(f).

10 IV.

11 Twin Bridge constructed a number of improvements within two hundred feet of the
12 moorage lagoon. The ten-inch thick reinforced concrete launching pad, vessel washing areas,
13 paving, utility installations, and the sewage pump out facilities were all placed within shoreline
14 jurisdiction. These improvements are properly considered substantial developments under RCW
15 90.58.030(3)(e).² The shoreline permits of record in CUP 7-82 and CUP 15-86 (as revised) did
16 not discuss or authorize any of those improvements. Construction of these improvements within
17 two hundred feet of the moorage basin was undertaken without a shoreline permit in violation of
18 RCW 90.58.140.

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21 ² RCW 90.58.030(3)(e) defines substantial development as "any development of which the total cost or fair market value exceeds two thousand five hundred dollars, or any development which materially interferes with the normal public use of the water of shorelines of the state". . . .

FINDINGS OF FACT, CONCLUSIONS
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V.

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2 Ecology contends the SEPA review conducted in connection with the construction and
3 operation of the storage/marina facilities on the site was inadequate. The March 2000 addendum
4 to the FEIS concludes that the proposal did not substantially change the analysis of significant
5 impacts or alternatives from those in the 1975 FEIS. This conclusion is unsupported by the
6 record. The 1975 FEIS did not address the majority of the improvements contemplated by the
7 building and grading permits issued to Twin Bridge. The original concept evaluated in 1975 did
8 not include public storage or moorage facilities. The buildings evaluated in 1975 totaled no
9 more than 5,000 square feet. The 1999 building permits authorized one building with 66,000
10 square feet for the storage of up to 350 boats, and a second building of 7,600 square feet for
11 offices and retail/repair. The original concept did not involve paving. The building permit site
12 plans show extensive paving for parking and access. The original plan did not discuss boat
13 washing, the bioswale system, sewage pump-out, the ten-inch thick concrete pad, or traffic
14 concerns associated with a public marina. Chemicals and other toxic materials common to
15 vessel repair and maintenance activities anticipated under the current proposal were not
16 evaluated. To the extent fueling was mentioned in the FEIS, it was limited to a fuel barge. No
17 upland fueling was evaluated and no land to water fuel transport was considered. In light of the
18 many notable differences between the environmental issues raised by a business
19 headquarters/open storage yard as evaluated in 1975, and the upland marina for 350 vessels
20 addressed by the building/grading permits, the conclusion that the revision is "insignificant" is
21 clearly erroneous.

1 VI.

2 Twin Bridge argues that construction of the storage buildings and other improvements
3 outside the 200-foot shoreline area was fully authorized without consideration of the Shoreline
4 Management Act. The boat storage building is located immediately upland of the 200 foot line.
5 The doors of the building open to the water side and use of the storage facility as an upland
6 marina for recreational vessels is dependent upon access to the water across the shoreland area.
7 Use of the shoreland area is an integral part of building design and use. The forklift traverses the
8 area between the building and the water to the concrete launching pad each time a boat is
9 retrieved from or returned to storage for a customer. The upland and shoreline components of
10 this project are directly and integrally related. The Board and the courts have previously held
11 that upland components of an integrated shoreline project cannot be constructed until a shoreline
12 permit is obtained for the shoreline portions of the project. *Merkel v. Port of Brownsville*, 8 Wn.
13 App. 844, 509 P.2d 390(1973); *Allegra Development Co., Inc. et al. v. Wright Hotels, Inc., et al.*,
14 SHB No. 99-08, 99-09(1999). The issue presented in this case is the same as the issue stated in
15 *Merkel*: “The question, therefore, is whether the port may take a single project and divide it into
16 segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal
17 administrative approvals upon the vitality of these acts compels us to answer in the negative.”
18 *Merkel* at 851. The *Merkel* court goes on to discuss the coercive effect of constructing one
19 segment of the proposal upon the other portion. In this case Twin Bridge’s attempt to separate
20 the buildings located 201 feet from the ordinary high water mark from the launching activities
21 and improvement in the shoreline is an artificial division of a single integrated project. Twin

FINDINGS OF FACT, CONCLUSIONS
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1 Bridges should have obtained a shoreline permit for the shoreline portions of the project before
2 constructing the upland components of the design. Failure and/or refusal to do so constitute a
3 violation of the SMA.

4 VII.

5 Twin Bridge has argued the case is properly narrowed to the sole issue of whether the
6 settlement agreement entered into by the parties resolving the appeal of penalty 00SEANR-1209
7 was breached. A settlement agreement reached between an applicant and Ecology cannot
8 supplant the provisions and protections of the SMA. The public interest is a significant
9 consideration under the Act, and its protection cannot be diminished by any settlement
10 agreement.

11 The settlement agreement in question, however, does not compromise the public interest
12 if properly construed. The settlement agreement states that Twin Bridge "shall not resume work
13 on the site until all required federal, state and local permits have been obtained." Twin Bridge
14 was required to have a shoreline permit to construct the project improvements located within the
15 200-foot shoreline area. The existing permits CUP 7-82 and CUP 15-86 did not extend to the
16 improvements Twin Bridge installed. The Board concludes that resuming construction before
17 obtaining the required shoreline permit(s) was a violation of the settlement agreement.

18 VIII.

19 Twin Bridge argues that Ecology cannot issue a shoreline enforcement order for
20 construction and operation of the marina because it did not appeal the Skagit County building
21 permits under the Land Use Petition Act (LUPA). Skagit County did issue building permits

1 covering the construction performed on the site. Ecology, on the other hand, consistently took
2 the position a shoreline permit was needed for construction and operation of the on-site
3 improvements. Relevant authority does not support Twin Bridge's argument that Ecology is
4 prevented from enforcement action because it did not appeal the building permits under LUPA.
5 Under the SMA, Ecology is given an oversight role that includes the ability to independently
6 enforce the terms of the Act if a local government fails to do so. *See, Samuel's Furniture v.*
7 *Ecology*, 105 Wn. App. 278, 19 P.3d 474 (2001) *pet. rev. granted*, 145 Wn. 2d 1001 (2001).³

8 IX.

9 The parties have presented conflicting arguments regarding whether a shoreline permit is
10 unnecessary because Twin Bridges is engaged in a "permitted use" under the shoreline act. Twin
11 Bridge contends that a "permitted use" can be conducted without a permit. Ecology argues the
12 term "permitted use" means a permit is required. Categorizing a use as "permitted" does not
13 eliminate the need for obtaining a shoreline permit for construction, and potentially for
14 operation, of a permitted use. In this context a permitted use is one that is allowed and not
15 prohibited. The term does not address the issue of which permits might be required to engage in
16 the use permitted. As applied to this case, the fact that a marina is a permitted use under the
17 Skagit County Master Program does not answer the question whether a substantial development
18 permit or conditional use permit is needed for the project. Designation as a permitted use simply
19 means that marinas are one of the activities that can properly be allowed in this shoreline area.

20 _____
21 ³ Contrary to Twin Bridge's arguments, Ecology had no responsibility to rescind permits the agency did not believe covered the actions in controversy. Rescission would not address failure to have permits for activity or action

1 The Board has concluded a shoreline substantial development permit was necessary before
2 constructing the improvements on this site. The Board is not ruling on whether a conditional use
3 permit is required to run a marina under the Skagit County Master Program since it is not
4 necessary to reach that issue to resolve the case and the record does not contain the local
5 government's analysis of this question.

6 X.

7 While Twin Bridge has obviously invested heavily in this project, it is equally clear that
8 Ecology has consistently taken the position shoreline permits are required for construction and
9 operation of an upland marina on the site. Twin Bridge was fully aware of Ecology's position at
10 the time it constructed the improvements within the shoreline and when it resumed construction
11 in February 2001. Twin Bridge chose to ignore and/or reject Ecology's role in enforcing the
12 shoreline act and to rely exclusively on the building permits issued by Skagit County. Rather
13 than resolving the ongoing permit controversy with Ecology, Twin Bridge moved forward with
14 construction and operation despite Ecology's position. Reliance on the county permits, with full
15 knowledge of Ecology's contrary position, was an intentional and knowing act and does not give
16 rise to any relief from the otherwise applicable provisions of the SMA.

17 XI.

18 The Board concludes a shoreline substantial development permit was required for
19 construction of improvements within 200 feet of the moorage lagoon. Such a permit was not
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21 outside the scope of the relevant permits. The permits in place were not invalid. They simply did not cover the activity in question.

FINDINGS OF FACT, CONCLUSIONS
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1 obtained prior to construction of the existing improvements. The shoreline permit should also
2 have been obtained prior to building the upland portions of the integrated marina development.

3 XII.

4 When the Board finds liability for violations under RCW 90.58.210 the severity of the
5 violation is reviewed based on several factors including: (1) the nature and extent of the
6 violation including any damage or risk to the public or to public resources, (2) the need to
7 promote compliance with the law, (3) whether the persons took steps to mitigate their actions
8 after being informed of illegality and prior to issuance of a penalty order, and (4) whether there
9 have been prior violations. *Dorsey v. Island Cy. and Ecology*, SHB Nos. 89-72, 90-12 (1990).
10 Given the knowing and continuing nature of the violation, the magnitude of the project, and the
11 potential for impact on the shoreline environment and public shoreline resources posed by the
12 unapproved activities in this location, the penalty amounts assessed are reasonable and should be
13 upheld. Failure to uphold the penalties assessed for failure to obtain necessary shoreline permits
14 prior to construction within the shoreline would not promote compliance with the SMA.

15 XIII.

16 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

17 Based on the foregoing Findings of Fact and Conclusions of Law, the Board enters the
18 following:

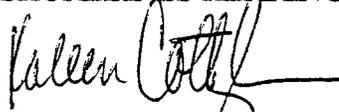
19 ORDER

20 Twin Bridge has constructed improvements and engaged in activity subject to the SMA
21 without necessary permits, in violation of the Shoreline Management Act. Penalty 01SEANR-

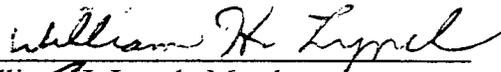
1 2101 in the amount of \$34,000 (including \$17,000 reinstated from Penalty 00SEANR-1209) and
2 Penalties 01SEANR-3032 and 01SEANR-3031 in the amount of \$25,000 are affirmed for a total
3 penalty affirmed of \$59,000. The Ecology Order to cease and desist is affirmed to the extent it
4 prohibits activity utilizing the 200 feet of shorelands on the site. For example moving boats from
5 storage to the launch area, across the shorelands uses the shorelands and should be discontinued
6 until a shoreline permit authorizing construction of the shoreland improvements is obtained. The
7 cease and desist order is not affirmed to the extent it attempts to address activities outside the
8 200 foot line if those activities do not utilize or rely upon uses within the shorelands.

9 DONE this 17th day of July 2002.

10 SHORELINES HEARINGS BOARD

11 

12 Kaleen Cottingham, Member

13 

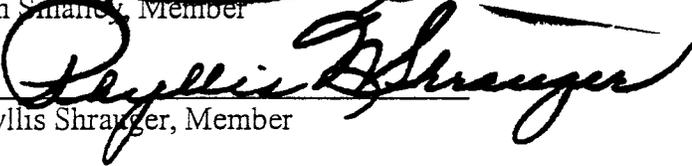
14 William H. Lynch, Member

15 

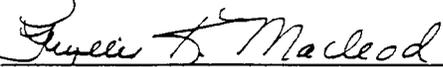
16 Judy Wilson, Member

17 

18 Dan Smalley, Member

19 

20 Phyllis Shrauger, Member

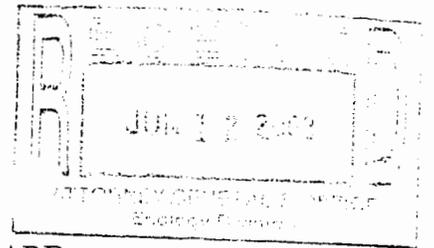
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Phyllis K. Macleod

Administrative Appeals Judge, Presiding

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

SHB NOS. 01-016 & 01-017



BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK, L.L.C.
and KEN YOUNGSMAN (KEN
YOUNGSMAN AND ASSOCIATES),

Petitioners,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Respondent.

SHB NO. 01-016 & 01-017

ORDER DENYING MOTION TO
VACATE

This matter came on for hearing before the Shorelines Hearings Board (Board) on May 28-31, 2002, in Lacey, Washington. The Petitioners, Twin Bridge Marine Park L.L.C. and Ken Youngsman, Ken Youngsman and Associates, (Twin Bridge) appealed penalties and orders issued by the Department of Ecology (Ecology) relating to construction and operation of an upland marina facility.

The Board was comprised of Kaleen Cottingham, William H. Lynch, Judy Wilson, Phyllis Shrauger, and Dan Smalley. Board chair Robert V. Jensen recused himself from the case. Administrative Appeals Judge, Phyllis K. Macleod, presided for the Board. Counsel Craig Magnusson represented the petitioners at the hearing, and Assistant Attorney General, Thomas Young represented respondent Ecology.

The Board issued a decision in the case on July 17, 2002, upholding Ecology's penalties and orders against Twin Bridge. Twin Bridge petitioned for reconsideration of the Board's

ORDER DENYING MOTION TO VACATE
SHB NOS. 01-016 & 01-017

1 decision on July 29, 2002, arguing the Washington Supreme Court ruling in *Chelan County v.*
2 *Nykreim*, 146 Wn.2d 904, 52 P. 3d 1 (2002) mandated a different result. The Board denied
3 reconsideration and Twin Bridge appealed the Board's decision to Skagit County Superior Court.
4 After the Supreme Court decision was rendered in *Samuels' Furniture v. Ecology*, 147 Wn. 2d
5 440, 63 P.3d 764 (2002), Twin Bridge moved this Board to vacate its ruling and dismiss the case.
6 The Skagit County Superior Court entered an order staying action on the appeal during the
7 Board's consideration of Twin Bridge's motion. The parties presented briefing and oral
8 argument to the Board on the motion to vacate and dismiss. Counsel, Kurt A. Denke, appeared
9 with Mr. Magnusson on behalf of Twin Bridge during oral arguments on the motion to vacate
10 and dismiss. Based upon the written submissions of the parties, and the arguments of counsel,
11 the Board enters the following decision.

12 Facts

13 The facts of this case are set forth in some detail in the Board's Final Findings of Fact,
14 Conclusions of Law and Order dated July 17, 2002. The decision outlines the history of project
15 development plans for the property dating from the mid 1970s. The original concept was a
16 storage yard and headquarters for owner Ken Youngsman's marine dredging business.
17 Conditional use permits 7-82 and 15-86, authorizing dredging, filling, and limited construction,
18 were issued in connection with that proposal. The marine dredging proposal was not
19 constructed. Long term litigation with other entities over various elements of the dredging and
20 filling delayed implementation. Mr. Youngsman later proposed leasing the property to a builder
21 of large commercial vessels. Ecology refused to approve the improvements under the

1 conditional use permits for the prior project. Ultimately the concept changed to a dry-stack
2 marina facility. Twin Bridge constructed a large upland storage building capable of holding
3 approximately 350 recreational vessels. The building was located 201 feet from the water's
4 edge. The boats housed in the storage building were to be moved by forklift across a paved area
5 covering the 200-foot shoreland. Construction between the building and the water included a
6 ten-inch thick concrete reinforced pad, boat washing facilities, paving, drainage improvements,
7 and infrastructure.

8 Skagit County issued building permits for the improvements on March 7, 2000. Ecology
9 did not file a LUPA appeal. Ecology had been engaged in discussions with the developer
10 throughout this period. Soon after construction commenced on the site, Ecology issued a Notice
11 of Correction to Twin Bridge indicating work should be stopped until a new shoreline permit
12 was obtained authorizing construction of improvements and use of the site for a marina. When
13 Twin Bridge chose not to stop work, Ecology issued its first administrative order and penalty
14 (00SEANR-1209) on June 21, 2000. Mr. Youngsman appealed the Order and Notice of Penalty
15 to the Shorelines Hearings Board. The parties to the appeal entered into a settlement agreement
16 resolving the case. The meaning and intent of the agreement was disputed at the hearing. The
17 language provided:

- 18 1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to
19 Ken Youngsman on or about June 21, 2000, subject to the following
20 conditions:
 - 21 a. Mr. Youngsman shall continue to pursue in good faith his application
for a new Shoreline Substantial Development Permit for the Twin Bridge
Marine Park.

1
2 b. In the event that Skagit County issues a Substantial Development
3 Permit to Mr. Youngsman or his associates, Ecology reserves the right to
4 appeal the permit to the Shorelines Hearing board and to raise any issue
5 therein.

6
7 c. Mr. Youngsman, his associates, and contractors, shall not resume work
8 on the site until all required federal, state, and local permits have been
9 obtained.

10 By this agreement, Twin Bridge agreed to seek a shoreline substantial development permit for
11 the Twin Bridge Marine Park. Twin Bridge did pursue the permit and it was eventually issued,
12 subject to conditions, in April 2003. The Board found Twin Bridge had violated the settlement
13 agreement by continuing construction within the shorelands without necessary shoreline permits.
14 The only shoreline permits in existence during construction were the conditional use permits
15 pertaining to the marine dredging headquarters proposal in the mid 1980s. Ecology found the
16 Twin Bridge construction went beyond the activity authorized by those conditional use permits.
17 The Board agreed the conditional use permits did not extend to activities necessary for the dry-
18 stack marina project.¹

19 When Twin Bridge proceeded with construction after the settlement, Ecology issued
20 further orders and penalties, which reinstated the initial penalty and added new penalties and
21

¹ The parties presented argument on whether the Board's decision found a substantial development permit was needed or whether the Board found the conditional use permits did not cover the project. The Board's opinion covered both of those issues concluding that the conditional use permits did not authorize the marina improvements and that a shoreline permit was needed for the construction. The decision did not address whether a conditional use permit was needed to engage in marina operations because it was not necessary to reaching a decision in the case. The local government did not testify at the shoreline hearing about the need for a conditional use permit under the local master program. The argued distinction does not compel a particular result on the facts of this case.

1 required actions. (01SEANR-2101, 01SEANR-3032 and 01SEANR-3031). Those orders and
2 penalties were appealed to the Shorelines Hearings Board in these consolidated cases.

3 Analysis

4 The Board issued a decision in this matter on July 17, 2002, sustaining the penalties
5 issued by Ecology. The order to cease and desist was also affirmed to the extent it applied to
6 activity occurring within the 200-foot shorelands area. Ecology imposed the penalties against
7 Twin Bridge under RCW 90.58.210(2), which provides:

8 Any person who shall fail to conform to the terms of a permit issued under
9 this chapter or who shall undertake development on the shorelines of the
10 state without first obtaining any permit required under this chapter shall also
11 be subject to a civil penalty not to exceed one thousand dollars for each
12 violation. Each permit violation or each day of continued development
13 without a required permit shall constitute a separate violation.

12 The administrative order was issued under RCW 90.58.210(3) which authorizes Ecology to order
13 the “acts constituting the violation or violations to cease and desist or, in appropriate cases,
14 requiring necessary corrective action to be taken within a specific and reasonable time.”

15 In hearing the case and rendering a decision, the Board was operating under the authority
16 contained in RCW 90.58.210(4) which states in part: “. . . Any penalty imposed pursuant to this
17 section by the department shall be subject to review by the shorelines hearings board.”

18 Despite the statutory framework authorizing Ecology to issue penalties and orders to
19 cease and desist and indicating the Board is to hear appeals of such actions, Twin Bridge claims
20 the Board has no jurisdiction in this case under the supreme court’s recent holding in *Samuel’s*
21 *Furniture v. Ecology*, 147 Wn. 2d 440, 63 P.3d 764 (2002). The *Samuel’s Furniture* opinion

1 involved a dispute over whether a development project was within shoreline management act
2 jurisdiction. The Shorelines Hearings Board has never had jurisdiction over appeals of the
3 threshold issue of whether a shoreline permit is needed or if an exemption applies.² Such
4 challenges are brought in superior court. The *Samuel's* case examined the necessary procedure
5 and timing for such a jurisdictional challenge. The issue as enunciated by the court was:

6 The single issue before this court is whether Ecology is prevented from
7 collaterally attacking the City's determination that the Samuel's project is
8 outside the shoreline jurisdiction because it failed to file a timely LUPA
petition challenging the City's decision to issue either the fill and grade or
building permits or to withdraw the stop work order.

9
10 *Samuel's* 147 Wn. 2d at 448.

11 In keeping with this formulation of the issue, the holding in the case was limited to the
12 jurisdictional controversy existing in *Samuel's*:

13 We hold that Ecology must file a timely LUPA petition challenging a local
14 government's decision to allow a development project after it has
15 determined that the project at issue is not within the shoreline boundary. If
Ecology fails to file a LUPA petition under such circumstances, it cannot
collaterally challenge the local government's determination that the project
is not within the shoreline jurisdiction by bringing independent enforcement
actions against the property owner or developer.

16
17 *Samuel's* 147 Wn. 2d at 463.

18 The *Samuel's* court did not attempt to address the Land Use Petition Act's (LUPA)
19 impact on cases involving the undisputed need for a shoreline permit. Twin Bridge would have
20 this Board construe the *Samuel's* decision broadly to preclude Ecology from acting to enforce the

21 ² Like *Samuel's Furniture*, the *Grundy v. Brack Family Trust, Thurston County*, No. 26347-5-II (Ct. App. Div 2, March 18, 2003) decision, cited to the Board as supplemental authority on the motion, involved a Thurston County determination that the project qualified for an exemption from shoreline permit requirements.

1 shoreline act against a party who knows a shoreline permit is required. Twin Bridge contends,
2 even when a shoreline permit is needed, if a local government issues a building permit, and a
3 LUPA appeal is not filed, Ecology cannot require compliance with the SMA through either
4 penalties or administrative orders. Sound statutory and public policy grounds exist for rejecting
5 this call to expand the *Samuel's* holding to a much larger group of cases.

6 The Shoreline Management Act (SMA or Act) is a statute designed specifically to protect
7 and preserve the unique nature of Washington's shorelines. As the legislature found in the Act:
8 "the shorelines of the state are among the most valuable and fragile of its natural resources and
9 that there is great concern throughout the state relating to their utilization, protection, restoration,
10 and preservation." RCW 90.58.020. The legislature went on to observe:

11 that much of the shorelines of the state and the uplands adjacent thereto are
12 in private ownership; that unrestricted construction on the privately owned
13 or publicly owned shorelines of the state is not in the best public interest;
14 and therefore, coordinated planning is necessary in order to protect the
15 public interest associated with the shorelines of the state while, at the same
16 time recognizing and protecting private property rights consistent with the
17 public interest.

18 RCW 90.58.020.

19 The Shoreline Management Act is a distinct and intentional regulatory structure designed
20 to give extra protection to the vulnerable and limited resources located along the state's
21 shorelines. Unlike many building permit situations, development on shorelines has the potential
to impact many unique values, ranging from recreation to aesthetics to riparian habitat.

1 Shorelines are different from standard building sites and the Shoreline Management Act
2 acknowledges and protects that distinct nature.

3 Consistent with the genesis and purpose of the SMA, the Act contains a specific
4 direction to interpret its terms broadly in support of shoreline protection: “This chapter is
5 exempted from the rule of strict construction, and it shall be liberally construed to give full effect
6 to the objectives and purposes for which it was enacted.” RCW 90.58.900. The distinct nature
7 of the shoreline act is further demonstrated by RCW 90.58.140(1), which prohibits development
8 on the shorelines of the state unless it is consistent with the policy of the Act, even if a
9 substantial development permit is not required. The SMA is not a typical development
10 regulation. It reaches beyond local borders to protect the interests of all citizens of the state in its
11 shorelines.

12 Ecology is assigned a significant role in this process. The Department is responsible for
13 assisting the local governments in developing local master programs and is charged with taking
14 action to ensure compliance with the Act is achieved. Ecology is not on the front line for many
15 permits, but both its review and enforcement functions are directly established in RCW
16 90.58.050: “The department shall act primarily in a supportive and review capacity with an
17 emphasis on providing assistance to local government and on insuring compliance with the
18 policy and provisions of this chapter.” (Emphasis added). Ecology should not be considered the
19 same as any other interested party when activity is proposed within a shoreline. Ecology is
20 charged with reviewing and enforcing shoreline regulations to assure the protection of broader
21 statewide and public interests.

1 Expanding the mandatory filing of a LUPA appeal to projects clearly located within the
2 shoreline would be inconsistent with the protections of the Act and the defined role of the
3 Department of Ecology. This is a particularly troubling prospect since Ecology does not receive
4 any meaningful notice of building permits issued by the many local governments throughout the
5 state. Expanding the LUPA requirement to cases requiring shoreline permits would undoubtedly
6 result in diminished protection for the shorelines of the state.

7 The facts of the Twin Bridge case differ from those in *Samuel's Furniture* in ways that
8 support a different result. While the *Samuel's* case involved a dispute over whether the proposal
9 was even subject to shoreline regulation, the Twin Bridge proposal is clearly located in the
10 shorelands of the Swinomish Channel. By its terms, LUPA specifically exempts those land use
11 decisions subject to review by the shorelines hearings board from its coverage, stating: "...this
12 chapter does not apply to ... (ii) Land use decisions of a local jurisdiction that are subject to
13 review by a quasi-judicial body created by state law, such as the shorelines hearings board or the
14 growth management hearings board." RCW 36.70C.030(1)(a)(ii). The *Samuel's* holding is
15 limited by its terms to situations where a local government has decided, "to allow a development
16 project after it has determined that the project at issue is not within the shoreline boundary." The
17 facts of this case fall outside that holding and no sound basis exists for extending the LUPA
18 appeal requirements to projects located squarely within jurisdictional shorelands.

19 Equitable considerations and undue delay, which were present in recent Washington
20 Supreme Court decisions on administrative finality, are lacking in this case. Beginning with
21 *Wenatchee Sportsmen*, the supreme court noted the extended time between action on the permit

1 in question and the subsequent challenge. The developer in *Wenatchee Sportsmen* obtained
2 initial approval of a rezone in August 1996, but a challenge was first raised after subsequent
3 subdivision approval in April 1998. Likewise, the court in *Skamania County v. Columbia River*
4 *Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) was concerned about the inequity of
5 requiring a homeowner to move a structure that was over half constructed before the building
6 permit was ever challenged. In *Chelan County v. Nykriem* 146 Wn. 2d 904, 52 P. 3d 1 (2002)
7 the county filed an action fourteen months after it had issued a boundary line adjustment. The
8 *Samuel's Furniture* majority, as well, noted the effort and expenditure the applicant made before
9 Ecology's action against the project. In this case, Ecology did not delay in opposing the project,
10 and equitable principles provide no justification for relief.

11 Unlike the developers in *Samuel's*, Twin Bridge always knew the marina project would
12 require shoreline approval. Twin Bridge was fully aware of Ecology's position that a new
13 substantial development permit was necessary for the marina. After the building permit was
14 issued, and the initial penalty was assessed, the project proponents went so far as to enter into a
15 settlement agreement with Ecology that obligated them to seek a new substantial development
16 permit. The settlement provided:

17 2. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to
18 Ken Youngsman on or about June 21, 2000, subject to the following
conditions:

19 a. Mr. Youngsman shall continue to pursue in good faith his application
20 for a new Shoreline Substantial Development Permit for the Twin Bridge
Marine Park.

1 b. In the event that Skagit County issues a Substantial Development
2 Permit to Mr. Youngsman or his associates, Ecology reserves the right
3 appeal the permit to the Shorelines Hearing board and to raise any issue
4 therein.

5 c. Mr. Youngsman, his associates, and contractors shall not resume work
6 on the site until all required federal, state, and local permits have been
7 obtained.

8 The Board found Twin Bridge had breached the settlement agreement by continuing
9 construction without obtaining the needed substantial development permit. Unlike the *Samuel's*
10 case, Twin Bridge knew it needed a permit, applied for it, and ultimately received a shoreline
11 substantial development permit subject to a number of conditions.

12 Ecology consistently informed Twin Bridge the marina construction fell outside the
13 scope of the existing shoreline permits, which were conditional use permits. Ecology has an
14 even greater role under the SMA in the case of conditional use permits, since the department
15 makes the final decision on their issuance. The scope and extent of the previously issued
16 conditional use permits was a major issue in the case and is properly before the Shorelines
17 Hearings Board on appeal. If the conditional use permits were insufficient to authorize the
18 project, as the Board found they were, a new shoreline permit of some type would be necessary.
19 All of these issues fall within the expertise of the Shorelines Hearings Board. It would be
20 contrary to the statutory framework for consideration of shoreline issues to expand the holding in
21 *Samuel's* to allow a project using every inch of the two hundred foot shoreland area to proceed
22 without shoreline permits simply because the local government has erroneously issued a building
23 permit. Ecology has been given an oversight role in enforcement of the SMA to provide a

1 broader view of the public interest and a consistent interpretation of regulations throughout the
2 state. This balance between local and state roles should be maintained for cases squarely within
3 shoreline jurisdiction.

4 The Twin Bridge case does not fall within the language of the Supreme Court's holding
5 in *Samuel's Furniture*. The Board concludes there is an insufficient basis in law or policy to
6 expand the holding in *Samuel's* to cases requiring a shoreline permit. The Shoreline
7 Management Act contemplates Ecology review and enforcement for those cases located clearly
8 within the shorelands.

9 ORDER

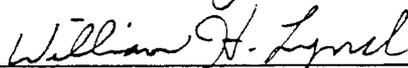
10 Based on the foregoing analysis the Twin Bridge motion to vacate the Board's decision
11 and dismiss the case is DENIED.

12
13 DONE this 11th day of June 2003.

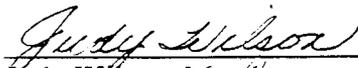
14 SHORELINES HEARINGS BOARD

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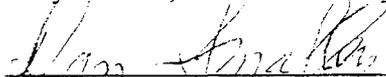
16 Kaleen Cottingham, Member

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18 William H. Lynch, Member

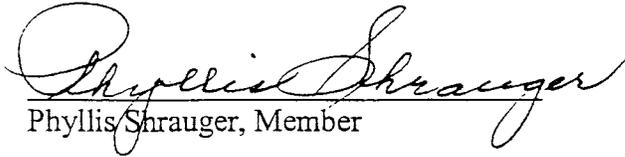
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20 Judy Wilson, Member

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Dan Smalley, Member

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Phyllis Shrauger, Member


Phyllis K. Macleod
Administrative Appeals Judge, Presiding



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

Ecology Division

2425 Bristol Court SW 2nd Floor • Olympia WA 98502

Mailing Address: PO Box 40117 • Olympia WA 98504-0117

(360) 586-6770

August 12, 2004

Sent VIA OVERNIGHT MAIL

RICHARD D. JOHNSON
Court Administrator/Clerk
Court of Appeals Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

RE: **Washington State Dep't of Ecology v. Twin Bridge Marine Park, et. al.**
Court of Appeals, Division I No. 542770-I
Skagit County Superior Court No. 02-2-01572-0

Dear Clerk:

Enclosed for filing in the above matter is Appellant Department of Ecology's Opening Brief, and a Certificate of Service. I have also enclosed a copy for confirmation along with a return envelope.

Should you have any questions, please do not hesitate to call our office. Thank you for your assistance in this matter.

Very truly yours,

KAREN SUTTER
Legal Assistant to
THOMAS J. YOUNG
Assistant Attorney General
(360) 586-3648

kr
Enclosures
cc: Craig Magnusson.

2004/AUG 13 4:10P 29



NO. 542770-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

TWIN BRIDGE MARINE PARK, L.L.C.,
AND KEN YOUNGSMAN (KEN
YOUNGSMAN AND ASSOCIATES),

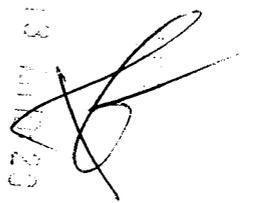
Respondents,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Appellant,

CERTIFICATE
OF SERVICE

4-11-2004 10:18 AM


Pursuant to RCW 9A.72.085, I certify that on the 12th day of August, 2004, I caused to be served Ecology's Opening Brief, and this Certificate of Service in the above-captioned matter, upon the parties herein, as indicated below:

Craig D. Magnusson
J. Todd Henry
Oles Morrison Rinker & Baker LLP
701 Pike Street, Suite 1700
Seattle, WA 98101

U.S. Mail
 Hand Delivered
 Overnight Express
 By Fax (206) 682-6234

the foregoing being the last known address.

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

DATED this 12th day of August 2004, in Olympia, Washington.


KAREN SUTTER, Legal Assistant