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SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondent.

PETITION FOR REVIEW

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I. PETITION FOR REVIEW

The Washington State Department of Ecology (Ecology) petitions the Court to review the Court of Appeals' opinion, filed on December 12, 2005, in *Twin Bridge Marine Park v. Ecology*, No. 54277-0-1. A copy of the published decision is attached as Appendix A, along with the decisions by the administrative agency on review, the Shorelines Hearings Board (SHB) (Appendices B and C).

II. ISSUES PRESENTED FOR REVIEW

This Court has decided several cases where a party's failure to appeal a local land use decision under the Land Use Petition Act (LUPA) barred an untimely lawsuit to invalidate the local decision. *E.g.*, *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005). In *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002), the Court applied this principle to a local decision authorized by the Shoreline Management Act (SMA) and held that when Ecology did not appeal a local decision that a project was not in SMA jurisdiction, Ecology could not collaterally attack that decision.

The instant case arose from a SHB decision affirming an Ecology order that imposed \$59,000 in penalties against Twin Bridge Marina (Twin Bridge). The Board found that Twin Bridge constructed buildings

and began use of the shoreline in violation of the conditions and limits in SMA conditional use permits.¹ In particular, Twin Bridge constructed 70,000 square feet of buildings and other intensive development to create a dry-storage marina complex in violation of its conditional use permit which allowed development of 5,000 square feet of office and storage, and use of the site for a marine construction business. Twin Bridge, however, obtained county building permits for the marina construction, and Ecology did not appeal the building permits under LUPA.

Issue 1. Does the bar to an untimely appeal of a building permit in LUPA also bar Ecology's authority under the SMA to penalize development that violated the terms of a conditional use permit approved by Ecology?

Issue 2. Does a county have authority to alter the scope of development allowed by a final SMA conditional use permit approved by Ecology when it issues a building permit allowing construction and use that is inconsistent with the conditional use permit?

¹ An SMA conditional use permit must be approved by local government and Ecology, and requires Ecology approval to be revised. RCW 90.58.140(10); WAC 173-27-100(6).

III. STATEMENT OF THE CASE

A. Statement of Facts

Twin Bridge Marine Park constructed and now operates a large “dry-storage” marina on the shoreline of the Swinomish Channel in Skagit County. The marina includes two large buildings, in excess of 66,000 and 7,600 square feet, a specially designed forklift to lift boats from the water and store them in the marina building, a reinforced concrete pier on which the forklift operates, and numerous accessory structures such as parking, boat washing facilities, septic pump out facilities, boat repair, fueling, and retail facilities. Findings of Fact, Conclusions of Law and Order, *Twin Bridge Marine Park v. Ecology*, SHB No. 01-016 and 01-017 (2002), Findings of Fact (FOF) IX, XVI, and XVII. The marina is on the shoreline of the Channel adjacent to Padilla Bay. SHB FOF I; SHB Ex. R-91.²

In addition to various local, state, and federal permits, a marina on the shoreline requires a permit under the SMA. *See, e.g.*, RCW 90.58.140(2), (10). When Twin Bridge built the marina, it held shoreline

² The SHB FOF, Conclusions of Law and Order in this case are in the Appendix at Tab B. These SHB’s findings are verities because Twin Bridge did not assign error to them and did not argue they were unsupported by substantial evidence. *E.g., Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995); *see also* RAP 10.3(h) (in an appeal from an administrative adjudication the party claiming erroneous findings must assign error whether appellant or respondent). “Ex” refers to the Exhibits introduced before the SHB.

conditional use permits, numbered “7-82” and “15-86,” approved by local government and Ecology in the 1980s. Those permits did not allow construction of a marina complex on the site. They allowed development and use of the site for a marine construction and dredging business. SHB FOF V, VI, VII. Specifically, the permits allowed construction of a small office building of approximately 5,000 (not 70,000) square feet, as well as storage of construction materials and equipment, dredges, dredge tenders, and dredge pipe. Exs. R-3, R-6.

At the time Twin Bridge obtained its original shoreline conditional use permits, it was engaged in the marine construction and dredging business, not a marina business. When Ecology approved the original conditional use permits, it expressly limited them and expressly required modification if Twin Bridge pursued additional or different development. SHB FOF IX. For example:

[T]his permit [CUP #7-82] 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

SHB FOF V; Ex. R-4 (emphasis added).

At some point, Twin Bridge’s business plan changed to the marina, although its conditional use permits did not allow that development and

use. SHB FOF IX. Consistent with the language in the permits, Ecology told Twin Bridge a number of times over the years that a new or updated permit would be needed for new developments or new shoreline commercial uses not expressly authorized in the original conditional use permits. SHB Conclusion of Law (COL) VIII, X; Exs. R-17, R-19, R-39; SHB Order Denying Motion to Vacate at 11.³ Twin Bridge nonetheless “chose to ignore and/or reject” Ecology’s position; instead it relied on building permits from the county to complete the new buildings, new hard surfacing, new drainage improvements, and all the development necessary to create the large dry storage marina. SHB COL X; Ex. R-47. The SHB noted that “Skagit County apparently concluded the existing CUP 7-82 covered the shoreline aspects of the project.” SHB FOF IX.

Ecology and Twin Bridge settled Ecology’s first penalty. Under that settlement, Twin Bridge agreed that it would “pursue in good faith [an] application for a new” permit for the marina complex, and it would “not resume work on the site until all required federal, state, and local permits have been obtained.” SHB FOF XI, XII; Ex. R-50, R-80. However, Twin Bridge did not wait for the county to issue the new shoreline permit before completing the marina. SHB FOF XIII. When the county reinstated the building permits to end an appeal filed by

³ The SHB’s Order Denying Motion to Vacate is in the Appendix at Tab C.

Anacortes,⁴ but over two years before the county actually issued the required new shoreline permit, Twin Bridge simply finished construction of its marina and opened for business. SHB FOF XIII; Ex. R-93. This led to Ecology imposing penalties totaling \$59,000.⁵

B. Administrative Hearing and Decision

Twin Bridge appealed the orders imposing penalties to the SHB. Among other arguments, Twin Bridge argued that because Skagit County gave building permits for the marina buildings, penalties imposed for violating the shoreline conditional use permits should be treated as a collateral attack on the building permits. Ex. R-92. This has been the sole legal argument for Twin Bridge in the courts. *See Ecology Br. at 5.*

After three days of hearing, the SHB issued a Findings of Fact, Conclusions of Law and Order affirming Ecology's penalties in full. *See Appendix B.* The SHB found that Twin Bridge engaged in construction and development contrary to the limits of, and not authorized by, the shoreline conditional use permits. SHB FOF XIV; COL XI; COL IV

⁴ In that Anacortes appeal, the county hearing examiner suspended the building permits because he recognized that those permits were invalid without a new shoreline permit. His decision however was vacated in settlement of the litigation with Anacortes. *See Ex. R-52.*

⁵ The only relief now sought by Ecology is to affirm the SHB's order upholding the penalties. Ecology initially ordered Twin Bridge to cease and desist activities inconsistent with the former conditional use permit, but Twin Bridge eventually obtained final permits allowing the marina complex and use. Ecology petitions for review here because of the important legal issues at stake and the potential for future development, inconsistent with the SMA, to be authorized by a building permit.

(“The shoreline permits of record in CUP 7-82 and 15-86 (as revised) did not discuss or authorize any of [the] improvements” constructed by Twin Bridge.) Twin Bridge’s violation was “intentional and knowing.” COL X.

Shortly after, Twin Bridge asked the SHB to vacate the order based on this Court’s intervening decision in *Samuel’s Furniture v. Dep’t of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2002). Twin Bridge argued that, under *Samuel’s*, Ecology should have first appealed the Skagit County building permits under LUPA before taking enforcement action against Twin Bridge. The SHB rejected this argument. The SHB concluded that *Samuel’s Furniture* did not apply because Ecology was not collaterally attacking an authorized local decision that development was not within the shoreline jurisdiction:

The *Samuel’s* Court did not attempt to address . . . [LUPA’s] 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. . . .

Order Denying Motion to Vacate, pp. 6-7. Additionally, the SHB held that *Samuel’s Furniture* did not apply because Twin Bridge violated conditional use permits, which the county could not unilaterally modify:

Ecology consistently informed Twin Bridge the marina construction fell outside the scope of the existing

shoreline permits, which were conditional use permits. Ecology 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. . . . 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 shoreland area to proceed without shoreline permits simply because the local government has erroneously issued a building permit.

Order Denying Motion to Vacate, p. 11 (emphasis added).

C. Decisions on Judicial Review

The superior court reversed the SHB’s decision by erroneously describing the original conditional use permits as “substantial development permits” which do not require Ecology’s review or approval. The county building permit decisions were thus recast as unappealed local decisions that the marina complex was consistent with what had been allowed by the earlier shoreline permits.⁶

A two judge majority of the Court of Appeals broadly held that the county “necessarily determined,” or made an “inferential decision,” that the existing permits allowed the marina development and use. *Twin Bridge Marine Park L.L.C. v. Dep’t of Ecology*, No. 54277-0-I, slip op. at 1, 13, and n.6. (Wn. App. Dec. 12, 2005) (Becker, J., dissenting). The Court held that Ecology could not exercise the authority expressly granted

⁶ Ecology assigned error to the superior court findings and conclusions, because substantial evidence supported the violations found by the SHB and did not support the revised version of facts found by the court. Ecology Br. at 3, 18-19, and 27.

by the SMA to approve and enforce the conditional use permit because Ecology did not appeal that inferential decision under LUPA. Notwithstanding the express requirement of Ecology's approval for conditional use permits under RCW 90.58.140(10), the majority concluded that *Samuel's Furniture* applied because Ecology and the county were taking contrary positions on a shoreline permit, and the developer could simply rely on the county decision. *Twin Bridge Marine Park, L.L.C.*, slip.op. at 12, n.6.

Judge Becker dissented, distinguishing *Samuel's Furniture*:

Unlike [*Samuel's Furniture*], Twin Bridge was subject to conditional use permits previously approved by Ecology for activity on the site. . . . The issue presented now is whether that decision was exclusively Skagit County's to make, or whether the Shoreline Management Act authorizes Ecology to enforce its own interpretation of the conditional use permits, even if it differs from Skagit County's.

. . . [A]s the Court noted in *Samuel's Furniture*, the Act does give Ecology the responsibility of reviewing conditional use permits for approval. RCW 90.58.140(10); see *Samuel's Furniture*, 147 Wn.2d at 455 n. 13. . . . In deciding to approve the original conditional use permits, Ecology clearly stated that the approval was subject to the understanding that the permits did not authorize uses and activities on the site not specifically designated in the permits. . . . Because Twin Bridge accepted Ecology's limitations without challenge, development of the property was subject to the limited scope of conditional use permits as Ecology consistently interpreted them.

Twin Bridge Marine Park, L.L.C., slip op. at 6 (emphasis added).

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

As explained below, this case is appropriate for review under RAP 13.4(b)(1), because the decision of the Court of Appeals conflicts with the decision of this Court in *Samuel's Furniture*.

Second, this case is appropriate for review under RAP 13.4(b)(4), because it presents an issue of substantial public interest that should be determined by the Supreme Court. Conditional use permits “protect the public interest,” “protect[] property rights,” and “foster reasonable and appropriate uses of the shoreline.” RCW 90.58.020. Under the Court of Appeals’ interpretation of *Samuel's Furniture*, an unappealed local building permit overrides the public and private interests protected by express shoreline permit conditions. Review is necessary because the principle of finality expressed in LUPA now overrides the finality of the separate conditional use permit. What was written to be a shield for a building permit has become a sword barring enforcement of legal rights that exist separate from the unappealed local permit.

A. The Court of Appeals’ Decision Conflicts With *Samuel's Furniture* by Imposing LUPA as a Bar to Enforcement of Express Shoreline Management Act Permits

In *Samuel's Furniture*, the Court acknowledged the SMA’s goals of managing and protecting state shorelines through permitting. *See* 147 Wn.2d at 448-49. It did not interpose LUPA as a bar to permit

enforcement. Instead, the Court said: “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.” 147 Wn.2d at 456 (emphasis added). The opinion below conflicts with this statement. The SHB found that Twin Bridge had “obtained a permit” and “violated the conditions of the permit.” The court held that Ecology was “prevented from taking action.”

The majority opinion conflicts with how this Court in *Samuel’s* preserved the SMA and did not allow LUPA to override its express provisions. *Samuel’s Furniture* explained how it filled a void in the SMA when local government and Ecology disagreed over whether a project was in shoreline jurisdiction. Because the local government was authorized to make the jurisdictional decision, and because there was no avenue for appeal under the SMA, the Court held that LUPA was the avenue for appeal and finality. 147 Wn.2d at 460. In contrast, a dispute over what is allowed by a shoreline conditional use permit can be appealed, and by law that task is assigned to the SHB. By holding that a local decision must be appealed under LUPA, the Court overrode the substantive permit requirements of the SMA, and removed the SHB as the statewide arbiter

of disputes regarding shoreline permits. LUPA preserves the jurisdiction of the SHB over SMA permitting decisions. RCW 36.70C.030(1)(a)(ii).

The inconsistency by the majority is shown by its failure to give any meaning to this Court's explanation in *Samuel's Furniture*:

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. *See* RCW 90.58.210(2). Thus, before 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), their permit decisions may also determine whether development is within the jurisdiction of SMA. When a local decision concludes that there is no SMA jurisdiction, 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).

147 Wn.2d at 457 (emphasis added). This premise in *Samuel's Furniture* is also stated earlier in the opinion. 147 Wn.2d at 453, n.12 ("we must still 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"). On reconsideration, the Court added language to distinguish conditional use permits and variances noting that they are subject to Ecology's authority. 147 Wn.2d at 455, n.13.

These passages show the conflict and error. *Samuel's Furniture* dealt with local government making a final decision on jurisdiction. This case presents the different issue of whether local government can unilaterally change or redetermine the scope of a shoreline conditional use permit without the Ecology approval called for by RCW 90.58.140(10) (Ecology must review and approve SMA conditional use permits and variances). Similarly, Ecology's long standing regulation says that local government has no authority to amend or modify conditional use permits unilaterally, without Ecology review or approval:

If the revision to the original permit involves a conditional use or variance, local government shall submit the revision to the department for the department's approval, approval with conditions, or denial, and shall indicate that the revision is being submitted under the requirements of this subsection. The department shall render and transmit to local government and the applicant its final decision within fifteen days of the date of the department's receipt of the submittal from local government. Local government shall notify parties of record of the department's final decision.

WAC 173-27-100(6).⁷

The lack of local government authority to unilaterally determine that a marina complex was allowed by the conditional use permits

⁷ This regulation also demonstrates how Twin Bridge was not in the void faced by the developer in *Samuel's Furniture*, who had no appeal once local government decided that no shoreline permit was needed. When a conditional use permit needs to be changed to accommodate new business plans, the developer may seek permits, revisions, and appeal permit decisions to the SHB.

demonstrates a substantial conflict between the Court of Appeals' decision and *Samuel's Furniture*. It also illustrates the significance of the issue here. Twin Bridge used a local decision on building permits to redefine what was allowed by an approved, final conditional use permit. Twin Bridge used a permit issued for a 5,000 square foot construction business building to develop 70,000 square feet of marina complex and associated construction.

Samuel's Furniture harmonized the SMA and LUPA to address a unique, but authorized local decision regarding jurisdiction that was not otherwise subject to appeal under the SMA. Here, the Court of Appeals cited LUPA to override a permit that Ecology had conditioned and approved. While citing to the laudable goal that the building permit have some finality, the Court of Appeals eliminated any finality for the unappealed SMA conditional use permit.

The Court of Appeals relied on statutory language that local governments "exclusively" administer the SMA permit system to support its key conclusion that the building permits could "inferentially" determine what is allowed by the conditional use permit. *Twin Bridge Marine Park, L.L.C.*, slip. op. at 10, 13. But that conclusion is contrary to the SMA and to footnote 13 in *Samuel's Furniture*. The Court's reasoning

demonstrates a conflict with *Samuel's Furniture* justifying review by this Court.

B. LUPA Bars Invalidation of Final Permits, Not Independent Legal Rights

The Court should take review to clarify that where there is an independent legal basis for rights and remedies, the failure to file a LUPA appeal of a local permit does not make that local permit superior to those other rights. The limited nature of the LUPA bar is explicit. For example, LUPA does not bar independent rights a person may have to damages or compensation. *See* RCW 35.70C.030(1)(c). It does not bar review of decisions that by law go to the SHB or Growth Management Hearings Board. RCW 36.70C.030(1)(a)(ii).

The nature of the LUPA bar can be given full effect by barring review of the local decision without barring exercise of separate legal rights. Thus, if a local permit allows construction of a building that would trespass on neighboring property, LUPA finality for the permit should not bar the neighbor from enforcing property rights to abate the trespass. While the neighbor *could have* used LUPA to complain about the trespass, the permit can have finality without barring independent property rights. The constitution, property law, federal permits, or separate state permit

requirements may have independent viability to be enforced without directly reviewing the validity of the local decision.

Samuel's Furniture is consistent with this approach. The local decision in that case implemented the SMA in the sense that the local government had consciously reviewed the relevant facts and circumstances to determine whether the project was within shoreline jurisdiction. 147 Wn.2d at 460. The local decision was not merely an inference drawn from an inconsistent local action. See 147 Wn.2d at 463 (if "Ecology desires specific notice of a local government's decision that a particular project does not fall within the shoreline jurisdiction, Ecology can promulgate rules to ensure that this occurs.") LUPA therefore applied because Ecology's demand for a shoreline permit in *Samuel's Furniture* would have required invalidation of the authorized local decision on jurisdiction.

In contrast, the SHB here enforced the conditional use permit terms without reviewing or invalidating the building permits. The SHB simply gave effect to the conditional use permit terms as written. Admittedly, the penalties should have delayed use of the building permits until the shoreline permits were updated. Enforcement of shoreline permits could frustrate local decisions but only if the local decision is inconsistent with the shoreline permits. Frustration of the local decision is

a consequence of giving effect to the SMA, which requires compliance with conditional use permits. This is no different than if property or trespass law delays or frustrates use of a building permit.

This measured approach to LUPA is particularly appropriate because of the broad scope of LUPA. *Chelan County v. Nykreim*, 146 Wn.2d 904, 927, 52 P.3d 1 (2002) (applying it to ministerial decisions). LUPA applies to land use decisions that might involve no public notice. *Habitat Watch*, 155 Wn.2d 397 at 420. (Chambers, J., concurring, to observe the harsh effect of the LUPA bar).

Review of this case would allow the Court to address the scope of the bar in LUPA. Under *Samuel's Furniture*, LUPA does not bar Ecology's express power to enforce SMA conditional use permits. Independent rights may be enforced without review or invalidation of the local decision and are not barred by LUPA.⁸

C. The *Twin Bridge* Decision Affects Significant Public Interests by Frustrating the Enforcement of Shoreline Permits

The ruling below affects significant public interests because it frustrates enforcement of express terms in a final shoreline conditional use permit. As construed by the Court of Appeals, an unappealed local land

⁸ This does not mean that a final permit might not be a defense to certain claims arising from other laws such as nuisance, or that equitable rights might not exist. But those questions are substantively different than simply barring legal rights as untimely, when they do not depend on the local decision.

use decision bars Ecology (and local government) from exercising express SMA powers to remedy development in violation of conditional use permits. This undermines the finality and enforceability of the very permit conditions that protect neighboring property interests and preserve the statewide interests protected by the SMA.

Under land use law, conditional use permits are used to address projects with unique characteristics that do not fit in a general classification and require special conditions. *See generally, Evergreen State Builders, Inc. v. Pierce County*, 9 Wn. App. 973, 516 P.2d 775 (1973). Conditional use permits under the SMA are appropriate only when “extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect.” RCW 90.58.100(5). Public review and state approval of conditional use permits ensures that the policies and purposes of the SMA and local master programs are implemented.⁹ As the SHB noted, Ecology’s authority is an important part of the balance struck in the SMA between state and local government administration. SHB Order Denying Motion to Vacate, pp. 11-12. Ecology has resources, expertise, and statewide perspective; it can back up

⁹ The SMA was passed by vote of the people in 1971 because “there is great concern throughout the state” concerning appropriate use, protection, restoration, and preservation of state shorelines. RCW 90.58.020. Reported conditional use permit decisions include a variety of permits for hotels, golf courses, mining, or recreational development.

local decisions and ensure consistency with statewide interests. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994). This permit system is the primary means of implementing SMA policies. *Clam Shacks of America, Inc. v. Skagit County*, 109 Wn.2d 91, 743 P.2d 265 (1987).

The *Twin Bridge* opinion interferes with the statutory system for approval and enforcement of conditional use permits. It is also illogical. If local government changes a shoreline conditional use permit explicitly, the change requires Ecology approval. RCW 90.58.140(10), WAC 173-27-100(6). But, according to the Court of Appeals, if local government acts inconsistently by issuing a building permit, so there is an inference of disagreement with Ecology, it effectively may change the same permit without Ecology approval, and without any public involvement or review.

The decision below, moreover, may compel litigation that was previously unnecessary. Before, a developer might get a local decision to allow an evolving business plan, anticipating an orderly future revision of the SMA permit. Until now, the public and Ecology could rely on the conditional use permit process. Now, the public or Ecology may need to litigate every inconsistency with shoreline permit conditions because the Court of Appeals affirms a process that allows an end run around final conditional use permit conditions. The original permit conditions are at risk if an interested party fails to vigilantly review every local decision.

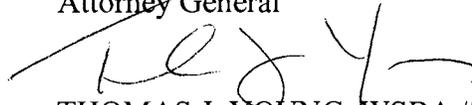
This Court should address this new cloud over shoreline permits. This Court should decide whether people can rely on the express conditions in shoreline conditional use permits and the processes for enforcing and modifying those permits. Finality for a local land use decision should be harmonized with preserving independent remedies under the SMA.

V. CONCLUSION

Ecology respectfully asks the Court to grant the petition.

RESPECTFULLY SUBMITTED this 11 day of January, 2006.

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SUPREME COURT OF THE 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

1/11/06
TK

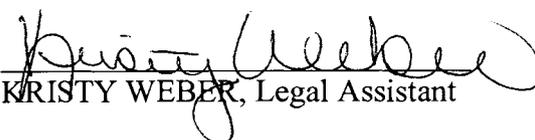
Pursuant to RCW 9A.72.085, I certify that on the 11th day of January, 2006, I caused to be served Department of Ecology's Petition for Review, and this Certificate of Service in the above-captioned matter, upon the parties herein, as indicated below:

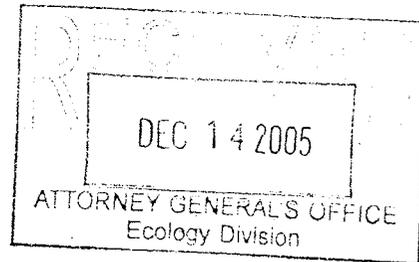
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 11th day of January, 2006.


KRISTY WEBER, Legal Assistant



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TWIN BRIDGE MARINE PARK,)
L.L.C., and KEN YOUNGSMAN)
(KEN YOUNGSMAN AND)
ASSOCIATES),)
Respondent,)
v.)
WASHINGTON STATE,)
DEPARTMENT OF ECOLOGY,)
Appellant.)

NO. 54277-0-1

DIVISION ONE

Published Opinion

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COLEMAN, J.—The Department of Ecology appeals a Superior Court order dismissing penalties imposed by Ecology on Twin Bridge Marine Park. Ecology argues on appeal that the Shoreline Management Act (SMA) grants Ecology broad authority to enforce the SMA, including the authority to impose penalties for shoreline development that violates the SMA. Ecology further argues that Twin Bridge constructed a marina without a necessary shoreline permit, that existing shoreline permits did not authorize its activities; that the development violated the SMA, and that building permits issued by Skagit County for the development do not bar Ecology's enforcement actions. We affirm.

When Skagit County issued and later reinstated the building permits for Twin Bridge, it necessarily determined that the marina project was consistent with the existing

shoreline permits and that the project did not require another shoreline permit. Under the reasoning of our Supreme Court's decision in Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002), amended on denial of reconsideration by 63 P.3d 764 (2003), Ecology was required to appeal Skagit County's determination through a Land Use Petition Act (LUPA) challenge in order to establish its jurisdiction to impose penalties on Twin Bridge. In addition, the resumption of construction work by Twin Bridge before its acquisition of a shoreline permit did not violate a stipulation and agreed order of dismissal between Twin Bridge and Ecology, as the language of the stipulation and agreed order did not require Twin Bridge to obtain a shoreline permit before resuming work.

FACTS

Twin Bridge owns a triangular piece of property in Skagit County near Swinomish Channel. Ken Youngsman, Twin Bridge's predecessor in interest, bought the land in the 1970s with plans to develop the property as a base of operations for his marine construction and dredging business. The development called for mooring dredges, dredge tenders, and other vessels used in the business in a moorage basin, and storing materials and equipment on the upland portions of the site. Youngsman also planned for two buildings: an office building of less than 1,000 square feet, and one repair/storage building of approximately 4,000 square feet. An environmental review was conducted of Youngsman's proposed actions on the site in a 1975 Final Environmental Impact Statement (FEIS).

Youngsman obtained two shoreline substantial development/conditional use permits from Skagit County. Permit 7-82 allowed for the "placement of about 90,000

yards of landfill, construction and operation of a marine dredging and construction business and the storage of construction materials and equipment.” Ecology wrote to Skagit County and Youngsman to say,

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.^[1]

Youngsman later obtained a revision to one of the two permits.

Youngsman made plans for a more ambitious development of his property as a marina. The development would consist of a dry-stack storage facility with a capacity of about 350 recreational boats, a reinforced concrete pad for lowering boats into the lagoon, a second building for office and retail operations, a large forklift for moving boats from the storage building to the lagoon and for lowering boats from the reinforced concrete pad, boat washing facilities, septic pump-out equipment, fuel dispensing, and paving and drainage improvements. Skagit County issued a Final Environmental Impact Statement Addendum modifying the 1975 FEIS and determining that the “revision is ‘insignificant’ and does not have a probable significant adverse impact on the environment.” The county also issued two amended building permits for the project.² The first building permit allowed for the construction of a building

¹ The other permit, Permit 15-86, allowed for the hydraulic dredging of about 40,000 cubic yards of material with upland disposal on site for the creation of a boat basin.

² Twin Bridge originally obtained three building permits, but changed its plans soon after issuance and decided to build two larger buildings instead of the three buildings. Skagit County amended the first two building permits to reflect these changes.

approximately 58,000 square feet in size. Ecology did not receive official notice of the building permits but learned informally of them. The City of Anacortes appealed the issuance of the building permits under LUPA, but Ecology did not.

When construction under the building permits began, Ecology issued a notice of correction to Twin Bridge. The notice requested Twin Bridge to stop work at the site and obtain a new shoreline permit for use of the site as a marina and for the structures and site work placed within the shoreline. Twin Bridge did not stop work, and Ecology issued its first administrative order and penalty. The order required Twin Bridge to stop work, obtain a new shoreline permit, and pay a penalty of \$17,000. Twin Bridge appealed to the Shoreline Hearings Board. At about the same time, the Skagit County hearing examiner suspended the two building permits on the ground that the project required a new shoreline substantial development/conditional use permit. Twin Bridge stopped work, with exceptions for safety reasons. Twin Bridge applied under protest for a new shoreline permit authorizing use of the site as a marina with buildings with related improvements. Ecology and Twin Bridge reached a settlement agreement. The agreement provided:

1. Ecology hereby withdraws its Penalty Order No. 00SEANR-1209 issued to Ken Youngsman 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. Youngsman or his associates, Ecology reserves the right to appeal the permit to the Shorelines Hearings 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.
2. Mr. Youngsman hereby dismisses his appeal in this matter.

Twin Bridge reached a separate agreement with Skagit County and the City of Anacortes, and Skagit County gave approval to Twin Bridge to continue the work authorized under the two building permits. Skagit County sent a copy of the agreement to Ecology. Ecology did not file a LUPA petition appealing the reinstatement of the building permits. Twin Bridge resumed construction on the site. Skagit County had not finished processing Twin Bridge's application for a new shoreline permit. Ecology issued a second administrative order and penalty requiring Twin Bridge to stop work, reinstated the earlier penalty of \$17,000, and added another \$17,000 penalty. Twin Bridge completed construction of the two buildings. It received approval for occupancy from Skagit County and opened for business as a marina. Ecology issued its third order and notice of penalty, assessing an additional penalty of \$25,000 and ordering Twin Bridge to cease construction and operations until shoreline permits authorizing the construction and use were obtained. Twin Bridge appealed the second and third orders and notices of penalty to the Shorelines Hearings Board.

The Board found that the reinforced concrete pad, several boat washing areas, utility lines, a septic tank, an oil-water separator, asphalt parking spaces and much of the paving were located within 200 feet of the moorage basin. The Board also found that improvements outside the 200-foot zone, including the boat storage building and a building for offices and retail/repair operations, gas tanks, a bioswale system, and several septic tanks were directly linked to construction within the 200-foot zone. The Board additionally made this finding of fact: "Skagit County apparently concluded the existing CUP 7-82 covered the shoreline aspects of the project since Mr. Youngsman

was not required to obtain a revision or seek a new shoreline substantial development permit or conditional use permit.”

The Board ruled that many of the improvements within 200 feet of the moorage lagoon were substantial developments under the SMA, were not authorized by the substantial development/conditional use permits, and were undertaken without a required shoreline permit in violation of RCW 90.58.140. The Board further ruled that the improvements inside and outside the 200-foot zone constituted a single integrated project and that Twin Bridge should have obtained a shoreline permit for the shoreline portions of the project before constructing the upland components of the design. The Board additionally ruled that Twin Bridge violated its settlement agreement with Ecology when it resumed development without acquiring a new shoreline permit. Furthermore, the Board ruled that Ecology’s decision not to appeal the building permits under LUPA did not prohibit Ecology from issuing a shoreline enforcement order for Twin Bridge’s construction and operation of the marina.³ The Board finally ruled that Ecology had consistently taken the position that the marina required new shoreline permits, and that reliance on Skagit County’s building permits did not give rise to relief for Twin Bridge. The Board affirmed Ecology’s orders and notices of penalty for a total penalty of \$59,000.

The Washington Supreme Court issued its decision in Samuel’s Furniture, Inc. v. Dep’t of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002), amended on denial of

³ The Board made its decision on July 17, 2002. At that time, the Court of Appeals had ruled in Samuel’s Furniture v. Washington State Dep’t of Ecology, 105 Wn. App. 278, 19 P.3d 474 (2001), but the Washington Supreme Court had not issued its Samuel’s Furniture decision reversing the Court of Appeals. Under the Court of Appeals decision, Ecology would not have been required to make a LUPA challenge.

reconsideration by 63 P.3d 764 (2003). Twin Bridge moved the Board to vacate its decision in light of Samuel's Furniture, but the Board denied the motion.⁴

Twin Bridge appealed the Board's decision to the Skagit County Superior Court. It asked the court to take as additional evidence the newly issued shoreline substantial development permit. The court granted the motion. It issued its own findings of fact and conclusions of law, and it reversed the Board. In finding of fact 5, the court found that by its issuance of the two building permits and the EIS addendum, the County authorized construction of the marina and decided, "[T]he two then-existing Shoreline Substantial Development Permits on that property were adequate to allow the approved construction." In finding of fact 18, the court found that the County's approval "of the requested Shoreline Substantial Development Permit does not include nor require a Shoreline Conditional Use Permit for the marina and associated uses." The court ruled that because WAC 173-27-140 prohibited local jurisdictions from authorizing shoreline development inconsistent with the SMA, the County's issuance of the building permits required a determination that the project "was encompassed by the existing Shoreline Substantial Development Permits." The court further ruled that Ecology's failure to file a timely LUPA challenge to the reissuance of the building permits vested Twin Bridge's rights in those permits and precluded Ecology from making a collateral attack on activities authorized by the building permits. The court additionally ruled that Ecology's orders were impermissible collateral attacks, made without jurisdiction. The court held

⁴ In the meantime, Skagit County issued a shoreline substantial development permit. The project is now completed and approved, and the only outstanding issues are the penalties assessed by Ecology and appealed by Twin Bridge.

that the orders must be dismissed and that the Board's decision must be reversed.

Ecology appealed.

ANALYSIS

We begin by analyzing whether Ecology was required to file a LUPA petition challenging the building permits issued by Skagit County for Twin Bridge's marina project before imposing penalties on Twin Bridge for the development.⁵ Ecology argues that it imposed penalties on Twin Bridge under a grant of broad enforcement authority to it by the SMA. Twin Bridge argues that the Superior Court correctly ruled that the reasoning of Samuel's Furniture applies to this dispute and that LUPA required Ecology to appeal the building permits. Ecology contends that the Superior Court should have limited Samuel's Furniture to its jurisdictional holding and that LUPA does not limit its enforcement authority.

In Samuel's Furniture, our Supreme Court held that Ecology is required to file a timely LUPA petition 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. Samuel's Furniture, 147 Wn.2d at 444. The City of Ferndale, which was the local government with the authority to issue permits, had determined that Samuel's Furniture did not need to obtain a shoreline permit for an extension to its store because the extension was not in the shoreline jurisdiction. Samuel's Furniture, 147 Wn.2d at 444. The City issued a fill and grade permit and a building permit for the

⁵ In reviewing an administrative decision, an appellate court stands in the same position as the Superior Court. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). An appellate court reviews the agency's factual findings under the substantial evidence standard and conclusions of law de novo. Wenatchee Sportsmen, 141 Wn.2d at 176.

extension. Samuel's Furniture, 147 Wn.2d at 444. Ecology asserted that the extension was within the shoreline jurisdiction and that construction could not proceed without a shoreline substantial development permit. Samuel's Furniture, 147 Wn.2d at 445. The City issued a stop work order, but then determined after reviewing its Shoreline Management Program and shoreline jurisdiction map, that the extension was not in the shoreline jurisdiction and withdrew the stop work order. Samuel's Furniture, 147 Wn.2d at 445. Ecology maintained that the project was within the shoreline jurisdiction and informed Samuel's Furniture that it would be unable to obtain a shoreline substantial development permit because the area would be considered a conservancy shoreline environment. Samuel's Furniture, 147 Wn.2d at 445-46. Samuel's Furniture sought declaratory relief in Superior Court. Samuel's Furniture, 147 Wn.2d at 446. The Washington Supreme Court ultimately ruled that Ecology could not penalize Samuel's Furniture because it failed to challenge through a LUPA petition the City's decisions to issue the fill and grade or building permits and to withdraw the stop work order. Samuel's Furniture, 147 Wn.2d at 448.

Ecology urges this court to limit Samuel's Furniture to situations in which a local government has determined that a project is not within the shoreline jurisdiction, which was the precise issue before the Supreme Court. Because no one disputes that Twin Bridge's marina project falls within the shoreline jurisdiction, Ecology argues that it has the authority to enforce the SMA without appealing the County's issuance of the building permits through a LUPA petition.

Twin Bridge argues, however, that the reasoning of Samuel's Furniture applies to this dispute and that it requires Ecology to file a LUPA petition challenging the issuance

of permits when the issuance represents a decision by the local government that the development is consistent with already existing shoreline permits and that a further shoreline development permit is not required. Ecology's authority to enforce provisions of the SMA includes (1) its authority to review and approve or disapprove variance and conditional use permits, (2) its ability to appeal a decision granting, denying, or rescinding a shoreline substantial development permit to the Shorelines Hearings Board, and (3) its authority to issue penalties if a party fails to conform to the terms of a permit issued under the SMA or undertakes shoreline development without obtaining a permit required under the SMA. RCW 90.58.140(10), .180(2), 210(2), (3). But the administration of the permit system "shall be performed exclusively by the local government." Samuel's Furniture, 147 Wn.2d at 448 (quoting RCW 90.58.140(3)). A local government's exclusive authority to administer the permit system necessarily means that the local government has the authority to determine that a shoreline project is consistent with already existing shoreline permits and that further shoreline permits are not necessary.

Twin Bridge further argues that Skagit County made the determination that its development was consistent with the County's shoreline master plan and Twin Bridge's existing shoreline permits when it issued the two building permits. The Samuel's Furniture court noted that WAC 173-27-140 prohibits local governments from authorizing development on shorelines unless it is consistent with the "policy and provisions of the [SMA] and the master program." Samuel's Furniture, 147 Wn.2d at 450 (quoting WAC 173-27-140). In the dispute between Samuel's Furniture and Ecology, the court ruled that because WAC 173-27-140 prohibits local governments

from authorizing shoreline development inconsistent with the SMA, a local government's issuance of fill and grade and building permits "necessarily required a determination that the project was outside the shoreline jurisdiction." Samuel's Furniture, 147 Wn.2d at 451. If Ecology disagreed, it could have challenged the issuance of those permits under RCW 36.70C.130(1)(b) (erroneous interpretation of the law) or RCW 36.70C.130(1)(d) (clearly erroneous application of the law to the facts). Samuel's Furniture, 147 Wn.2d at 451.

The court further stated that the grant of enforcement authority to Ecology under RCW 90.58.210 does not enable Ecology "to reverse local government decisions." Samuel's Furniture, 147 Wn.2d at 456. If Ecology had such authority, it would not need to appeal permit decisions to the Board under RCW 90.58.180(2) and would no longer share enforcement authority with local governments. Samuel's Furniture, 147 Wn.2d at 456. "Using RCW 90.58.210 to collaterally attack a local government decision would be at odds with the policy of cooperation encompassed in RCW 90.58.050." Samuel's Furniture, 147 Wn.2d at 456. Requiring Ecology to file a LUPA petition to contest a local government's decision to allow a land use action would also serve the State's "strong public policy favoring administrative finality in land use decisions." Samuel's Furniture, 147 Wn.2d at 458 (quoting Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d 30, 48, 26 P.3d 241 (2001)). Blanket enforcement authority by Ecology would conflict with the public policy favoring administrative finality, as a developer could be subject to enforcement by Ecology while relying in good faith on a local government's determination. Samuel's Furniture, 147 Wn.2d at 458.

The Supreme Court's analysis in Samuel's Furniture is equally applicable here.

As the trial judge stated in her well-reasoned letter opinion:

I am unable to distinguish this case from Samuel's in any meaningful way. The challenged decision is a land use decision by a local government. It is a final decision appealable under LUPA. It is not exempt from LUPA. And requiring Ecology to pursue the issue through a LUPA appeal satisfies the same policy considerations outlined in Samuel's.

We agree. There is nothing in the majority's reasoning that would permit limiting the reach of the court's holding to a local government's decision that a project was not within shoreline jurisdiction. Our holding does not extend Samuel's Furniture; we merely apply, as we must, its reasoning to the case at hand. Because WAC 173-27-140 prohibits a local government from authorizing shoreline development unless it is consistent with the SMA and the local government's shoreline master program, the issuance of the building permits necessarily required a determination by the County that Twin Bridge's new plans were consistent with the already existing shoreline permits. Both the Board and the Superior Court found that the County decided that the existing shoreline permits covered the shoreline aspects of Twin Bridge's marina project.

As the Samuel's Furniture court ruled, local governments such as Skagit County are the exclusive administrators of the shoreline permitting process. Furthermore, public policy favors administrative finality in land use decisions.⁶ Developers such as

⁶ The dissent attempts to distinguish Samuel's Furniture by reasoning that because Ecology had to approve the conditional use permits, it had the authority to enforce them according to its own interpretation of their scope. This approach, however, ignores the issue—Ecology is telling the developer that the conditional use permits do not authorize the proposed development and that they must obtain a new substantial development permit and the permitting authority (Skagit County) is telling the developer that a new substantial development permit is unnecessary. These contradictory positions create the same problems articulated by the Supreme Court in Samuel's Furniture.

Twin Bridge must be able to act in good faith on permits issued by local governments without concern that Ecology will later impose penalties under RCW 90.58.210.

Ecology disagreed with Skagit County's determination that the existing shoreline permits encompassed Twin Bridge's marina. On this record, we know that Ecology made its position known early to the County and to Twin Bridge, that the County knew Ecology's stance, and that the County decided differently. But Samuel's Furniture limits Ecology's oversight and independent enforcement role when a local government has determined that a development is consistent with the SMA. Under the analysis of Samuel's Furniture, Ecology must invoke LUPA to challenge a permit that it believes is inconsistent with the SMA, or it must enlist the aid of the local government. An inferential decision by the local government that an additional shoreline permit is not required must be appealed through LUPA to the Superior Court.⁷ Directly imposing a penalty through RCW 90.58.210 would constitute a collateral attack on a local government decision at odds with the policy of cooperation contemplated in RCW 90.58.050.

Ecology also argues that Twin Bridge violated the stipulation and agreed order of dismissal and that this violation constitutes an independent basis for affirming Ecology's

⁷ Ecology contends that it has explicit authority to impose penalties under RCW 90.58.210(2), (3), that nothing in the SMA suggests that Ecology must file a LUPA petition to challenge a building permit and that the Legislature did not intend to amend the SMA when it enacted LUPA. But Samuel's Furniture indicates that Ecology does not have the broad independent oversight role that it believed it had. We are sympathetic to the responsibility of Ecology to act "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." RCW 90.58.050. But in light of Samuel's Furniture, it may be necessary for Ecology to seek legislative changes so that it might have greater oversight authority.

penalties. The stipulated and agreed order of dismissal, resulting from a settlement agreement between Ecology and Twin Bridge of Twin Bridge's appeal of Ecology's initial penalty, required Youngsman to continue to pursue in good faith his application for a new shoreline substantial development permit and to refrain from resuming work until Twin Bridge had obtained "all required federal, state, and local permits." But Twin Bridge did not violate this agreement by resuming work before it had acquired a new shoreline permit. By issuing the building permits, Skagit County made the inferential decision that Twin Bridge did not need to obtain a new shoreline permit. The County reaffirmed this decision a second time when it reached a settlement with the City of Anacortes and approved a resumption of work under the building permits. Thus, Twin Bridges had all the necessary permits. The agreement required Twin Bridge to continue pursuing its application for a new shoreline permit, which it did, but the clear language of the agreement did not bar Twin Bridge under these circumstances from resuming construction work before it obtained the shoreline permit. Twin Bridge therefore did not violate the stipulation and agreed order of dismissal.

In conclusion, we affirm the decision of the Superior Court reversing the Board's order and dismissing Ecology's penalties and orders.

Columan, J.

WE CONCUR:

Azid, J.

Twin Bridge Marine Park v. WA. State Dept. of Ecology
No. 54277-0-1

BECKER, J. (dissenting) -- The history of the Twin Bridge project establishes that it was subject to the Department of Ecology's authority over shoreline conditional use permits. Accordingly, I respectfully dissent from the majority's conclusion that the outcome of this case is controlled by Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002).

Twin Bridge obtained two substantial development/conditional use permits from Skagit County in the 1980's. The permits, #7-82 and #15-86, authorized use of the site for placement of landfill, operation of a marine construction and dredging business, and creation of a boat basin in which to moor the construction and dredging equipment.

Ecology has direct authority over shoreline conditional use permits. "Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval." RCW 90.58.140(10). Ecology may attach special conditions to a conditional use permit "to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program." WAC 173-27-160. Ecology may penalize violations of these permits "jointly with local government," or alone. WAC 173-27-280(1).

After reviewing each of the two permits, Ecology approved of them as meeting the intent of the master program and the criteria set forth in the

Washington Administrative Code for granting a conditional use.¹ Ecology repeatedly emphasized that approval was for the designated uses only. For instance, Ecology informed Twin Bridge:

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. [²]

Twin Bridge carried out the site development authorized by these conditional use permits, although delay was occasioned by litigation with the State Department of Fish and Wildlife over the necessary hydraulic permit. In 1998 Ecology approved a revision to permit #15-86 to authorize a redesign of the moorage basin agreed to by Fish and Wildlife, subject to three additional conditions. Condition 3 of Ecology's approval was that "All uses and activities not specifically authorized in Permits #SHL 7-82 and 15-86 are prohibited."³

Twin Bridge began to plan further development of the site as a backshore marina. The main structure was to be outside the shoreline jurisdiction, that is to say more than 200 feet from the shore. See RCW 90.58.030(2)(f). But within the shoreline jurisdiction, there would be appurtenant structures, hard surfacing, and

¹ Exhibit R-4, R-9 (Department's Exhibits from Shoreline Hearing Board proceedings).

² Exhibit R-4.

³ Exhibit R-23.

drainage improvements. Twin Bridge applied to the County in 1999 for building permits. The County issued two building permits on March 7, 2000.⁴

Twin Bridge began construction. Ecology issued a Notice of Correction on May 1, 2000, advising that the new use and structures exceeded the scope of the conditional use permits as approved by Ecology.⁵ Twin Bridge wrote to Ecology on May 22, 2000, urging that the new construction should be seen as complying with permits #7-82 and #15-86. The letter asserts that the current construction activities within the shorelines were “controlled by” and implicitly authorized by the existing conditional use permits.⁶ Ecology, adhering to its position that the new development was not “within the scope or intent” of the original conditional use permits, issued a stop work order on June 21, 2000.⁷

On the same day, the Skagit County Hearing Examiner decided— apparently in response to an appeal of the building permits brought by the City of Anacortes—that a new shoreline substantial development/conditional use permit was required for the proposed development. Enforcing the Hearing Examiner’s decision, Skagit County issued its own stop work order, along with a notice of suspension of the building permits, on June 27, 2000.⁸ Twin Bridge stopped work, and submitted an application on July 1, 2000, for a new substantial

⁴ Exhibit R-41.

⁵ Exhibit R-46.

⁶ Exhibit R-47.

⁷ Exhibit R-50 (Allegation of Law 20).

⁸ Exhibit R-52.

development/conditional use permit "under protest" of Ecology's stop work order.⁹

Also, Twin Bridge apparently appealed the Hearing Examiner's decision to the county commissioners. On February 9, 2001, unknown to Ecology (Ecology had not been a participant in the Anacortes appeal of the building permits), Twin Bridge resolved its appeal by signing a settlement agreement with Anacortes and Skagit County. The settlement agreement and other materials relating to the Anacortes appeal are not in our record, but Ecology acknowledges that the settlement vacated the hearing examiner's decision that a new shoreline permit was required.¹⁰ On February 12, 2001, citing the authority of the settlement agreement, Skagit County lifted its notice of suspension of the building permits, and authorized work to begin in compliance with the building permits.¹¹

Meanwhile, Twin Bridge was in the process of obtaining Ecology's agreement to withdraw the penalty on condition that Twin Bridge would "continue to pursue in good faith" its application for a new substantial development permit and not resume work until "all required" permits had been obtained.¹² A stipulation to this effect, and an agreed order of dismissal of the Twin Bridge's appeal of the penalty order to the Shoreline Hearings Board, was approved by the Board on February 16, 2001. Notwithstanding this agreement, Twin Bridge

⁹ Exhibit R-53.

¹⁰ Brief of Appellant at 10 n.6.

¹¹ Exhibit A-2.

¹² Exhibit R-80.

immediately resumed work on the project—thus provoking further penalty orders from Ecology and giving rise to the present dispute.

The majority concludes that Twin Bridge's resumption of work did not justify enforcement action by Ecology because the County's reinstatement of the building permits implicitly decided that further shoreline permits were not required, and Ecology must now accept that implicit decision as correct because Ecology failed to challenge it in a timely manner under the Land Use Petition Act.¹³ The majority finds this result compelled by Samuel's Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 54 P.3d 1194 (2002). The majority reasons that Twin Bridge, like the developer in Samuel's Furniture, was entitled to act in good faith on the building permits issued by the local government, without concern that Ecology would later impose penalties.

But Twin Bridge is not like the developer in Samuel's Furniture. Unlike that developer, Twin Bridge was subject to conditional use permits previously approved by Ecology for activity on the site. As shown by its letter of May 22, 2000, Twin Bridge took the position that the expansion of the project from a moorage basin and dredging business into a backshore marina was within the scope of those conditional use permits.¹⁴ Ecology consistently maintained the opposite – that the scope of the permits was limited to the uses and activities they specifically designated. By reinstating the building permits, Skagit County

¹³ Majority, at 14.

¹⁴ Exhibit R-47.

implicitly sided with Twin Bridge and decided that the new activities were within the scope of the old permits. The issue presented now is whether that decision was exclusively Skagit County's to make, or whether the Shoreline Management Act authorizes Ecology to enforce its own interpretation of the conditional use permits, even if it differs from Skagit County's.

The Shoreline Management Act does not give Ecology the right to directly review a local government's decision regarding a substantial development permit. Samuel's Furniture, 147 Wn.2d at 455. However, as the Court noted in Samuel's Furniture, the Act does give Ecology the responsibility of reviewing conditional use permits for approval. RCW 90.58.140(10); see Samuel's Furniture, 147 Wn.2d at 455 n.13. This distinction is key. A shoreline conditional use permit issued by a local government is not valid except as approved by Ecology. In deciding to approve the original conditional use permits, Ecology clearly stated that the approval was subject to the understanding that the permits did not authorize uses and activities on the site not specifically designated in the permits. If Twin Bridge was dissatisfied with Ecology's limitations on the scope of the permits, Twin Bridge should have said so at the time or used the appeal process in the Shoreline Management Act to challenge them. Because Twin Bridge accepted Ecology's limitations without challenge, development of the property was subject to the limited scope of conditional use permits as Ecology consistently interpreted them.

I would hold that Ecology has authority to enforce the conditional use permits according to its own interpretation of their scope. As the majority concludes, the Shoreline Hearings Board was in error to conclude that Ecology could penalize Twin Bridge for proceeding without a required substantial development permit; Skagit County had exclusive authority to decide whether such a permit was required and its decision will stand because Ecology did not appeal it.¹⁵ However, we may affirm on any ground sufficiently developed before the Board. I would affirm on the basis that Ecology could penalize Twin Bridge for expanding its existing business as if the new uses and structures were authorized by the existing conditional use permit, when Ecology – using its independent authority – had decided they were not. Samuel's Furniture does not deprive Ecology of that authority.

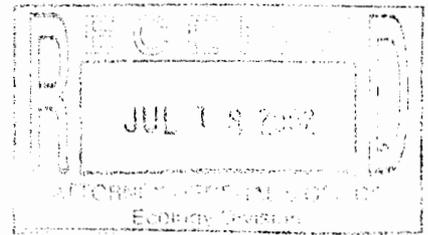
It is an unwarranted extension of Samuel's Furniture to require Ecology to first challenge the County's issuance of the building permits in superior court as if only a local land use decision were involved. The Shoreline Management Act, referred to and approved by a vote of the people, is intended to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." RCW 90.58.020. Ecology's independent authority to penalize violations of conditional use permits is a significant part of the enforcement mechanism set forth in the Act, and nothing in Samuel's Furniture allows it to be

¹⁵ Majority, at 14.

No. 54277-0-1/8

undermined. The Shoreline Hearings Board's decision to affirm the penalties issued by Ecology should be affirmed.

Becker, J.



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
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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. Youngman'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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20
21 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
shall also be subject to a civil penalty not to exceed one thousand dollars
17 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

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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". . . .

V.

1
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

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
OF LAW AND ORDER

SHB NOS. 01-016 & 01-017

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 Kaleen Cottingham
12 Kaleen Cottingham, Member

13 William H. Lynch
14 William H. Lynch, Member

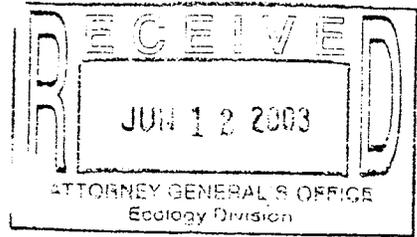
15 Judy Wilson
16 Judy Wilson, Member

17 Dan Smalley
18 Dan Smalley, Member

19 Phyllis Shraner
20 Phyllis Shraner, Member

21 Phyllis K. Macleod
Phyllis K. Macleod
Administrative Appeals Judge, Presiding

51



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.

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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

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
conditions:

20 a. Mr. Youngsman shall continue to pursue in good faith his application
21 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.

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

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

20 Despite the statutory framework authorizing Ecology to issue penalties and orders to
21 cease and desist and indicating the Board is to hear appeals of such actions, Twin Bridge claims
the Board has no jurisdiction in this case under the supreme court’s recent holding in *Samuel’s
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
9 petition challenging the City's decision to issue either the fill and grade or
10 building permits or to withdraw the stop work order.

11 *Samuel's* 147 Wn. 2d at 448.

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

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

21 *Samuel's* 147 Wn. 2d at 463.

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

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 to 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

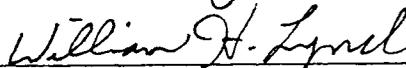
10 Based on the foregoing analysis the Twin Bridge motion to vacate the Board's decision
11 and dismiss the case is DENIED.

12
13 DONE this 11th day of June 2003.

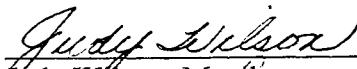
14 SHORELINES HEARINGS BOARD

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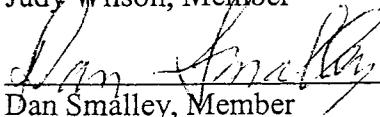
16 Kaleen Cottingham, Member

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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
Phyllis Shrauger, Member

Phyllis K. Macleod
Phyllis K. Macleod
Administrative Appeals Judge, Presiding