

Polly Stoker

From: Phyllis Farrell <phyllisfarrell681@hotmail.com>
Sent: Tuesday, August 20, 2019 2:21 PM
To: Patrick Townsend
Cc: Kathryn Townsend; Laura Hendricks; Kathy Knight; Anne Van Sweringen; Lois Ward; fredndanrc@aol.com; PlanningCommission
Subject: Re: Comments on proposed SMP

Thanks Patrick! I have family visiting and will be unable to attend the 8/21 meeting either.

I have already provided written and public comments advocating maintaining Shoreline buffers for sea level rise and "no net loss", banning or at least regulating hydraulic harvesting, and phasing out the use of the tons of PVC pipe and plastic netting used in industrial aquaculture. Your comments below should alert the Planning Commission to the problems in the permitting process language.

I am hoping our Planning Commission and staff make strong recommendations for the SMP to protect our shorelines for salmon/ Orca recovery.

Phyllis

Sent from my iPad

On Aug 20, 2019, at 11:46 AM, Patrick Townsend <patrick.townsend@townsendsecurity.com> wrote:

Dear Planning Commissioners:
Ave

The proposed SMP changes the permitting type for geoduck aquaculture from the current Substantial Shoreline Development Permit (SSDP) to a Conditional User Permit (CUP). This seems extraordinarily inappropriate and misguided given that Thurston County initially determined that a SSDP permit was required for geoduck aquaculture due to the presence of plastic and net structures in the tideland. The decision by Thurston County was appealed by the shellfish industry, and the courts upheld the view of Thurston County. Thurston County expended considerable taxpayer resources developing and defending the requirement for an SSDP, and other counties followed this precedent. It appears to be an arbitrary and capricious action at this point to abandon the legal rulings, the monetary investment and all the study related to those rulings. Given the cumulative impact analysis of the Army Corps showing impacts of aquaculture on eelgrass, forage fish, and the ecosystem that includes endangered and threatened species like salmon and Southern Resident Killer Whales, it is ill-conceived that the County should arbitrarily change the regulations. The requirement for permitting is "no net loss."

Please review the attached two documents from Judge Thomas R. Bjorgen and Judge Gary Tabor, who both ruled that PVC put into the tideland for geoduck farming constitutes a structure and therefore requires a shoreline

substantial development permit. The question of the discrepancy in the Draft SMP Update between permitting of geoduck aquaculture requiring a CUP and other shellfish aquaculture requiring SSDP must also be explained.

We are out of town and will not be able to attend the Planning Commission meeting on August 21, 2019. We will provide more extensive comments related to permitting for geoduck aquaculture when we return.

Thank you,

Patrick and Kathryn Townsend

Patrick Townsend
CEO

<20111028_TaylorArcadia_vs_ThursCnty_Superior_Tabor.pdf>

<20110121_ThurstonCnty_HearingExaminer_Bjorgen_Order_SDP.pdf>

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

TAYLOR SHELLFISH COMPANY,)
INC.,)
)
Petitioners,)
)
vs.)
)
THURSTON COUNTY, et al.,) SUPERIOR COURT NO.
) 11-2-01019-5
)
Respondents.)

RULING OF THE COURT

BE IT REMEMBERED that on October 21, 2011,
the above-entitled and numbered cause came on for
hearing before JUDGE GARY R. TABOR, Thurston County
Superior Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter
Certificate No. 2154
Post Office Box 11012
Olympia, WA 98508-0112
(360)786-5571
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A P P E A R A N C E S

For the Plaintiff: LAURA C. KISIELIUS
 Attorney at Law
 PLAUCHE & STOCK
 811 First Avenue, Suite 630
 Seattle, WA 98104

For the Defendant: JEFFREY G. FANCHER
 Deputy Prosecuting Attorney
 2000 Lakeridge Drive SW
 Olympia, WA 98502

1 October 21, 2011

Olympia, Washington

2 AFTERNOON SESSION

3 Department 4

Hon. Gary R. Tabor, Presiding

4 APPEARANCES:

5 For the Petitioners, Laura C. Kisielius,
6 Attorney at Law; for the Respondent, Jeffrey G.
7 Fancher, Deputy Prosecuting Attorney

8 Pamela R. Jones, Official Reporter

9 * * * * *

10 THE COURT: Counsel, in my time as a judge,
11 one of my goals has been to try to do my preparation
12 up front when matters come before me so that, if
13 possible, I can issue a ruling after I've heard oral
14 argument. It's come back to me that some people
15 think, well, how can a judge just rule off the top of
16 their head. I've spent considerable time going
17 through the briefing and the record in this
18 particular case to try to understand the issues.
19 Counsels' arguments here today have been helpful to
20 me, but I am prepared to issue a ruling.

21 I've somewhat jokingly said also over the years,
22 that a judge has a pretty thankless job, because
23 anytime a judge rules, half the room is mad at the
24 judge. And while that's somewhat tongue in cheek,
25 it's still obvious that somebody wins and somebody
loses in issues that come before a court. That does

1 not mean that I don't take matters very seriously.
2 I've also said that I have to call things the way I
3 see them, and that does not mean that I'm taking my
4 job less than very seriously.

5 While I recognize that in many cases any decision
6 that this Court makes may be reviewed by a higher
7 court, that does not in any way remove the
8 responsibility from this Court to rule as I think the
9 law and/or the facts require. I think that counsel
10 both agree that the primary issue in this particular
11 case boils down to definitions, and so we start out
12 with the idea that there may be cases of substantial
13 development requiring a specific permit process or
14 review. I don't think anybody disagrees that this
15 would be substantial, but the issue is, is it a
16 development or are these three applications
17 developments. It is only a development if the
18 definition of "structure" applies, and so I've heard
19 extensive argument. There's been extensive briefing
20 about what the term "structure" means.

21 There has been an Attorney General's Opinion that
22 indicated that the term "structure" did not apply to
23 this type of situation in the opinion of the Attorney
24 General. Well, everybody has conceded that this
25 Court is not bound by an Attorney General's Opinion.

1 It doesn't mean that I shouldn't take it into
2 account, doesn't mean that I can't agree with it, it
3 means I don't have to. I guess I would just pose
4 this: If the Attorney General had ruled that this
5 was a structure, I suspect that petitioners here
6 would be arguing that I don't have to follow the
7 Attorney General's Opinion and they would be right.
8 The issue is how I'm going to interpret this, because
9 I agree that on issues of law this Court has the
10 right to a de novo determination.

11 Now, by saying that, however, that does bring into
12 play another issue. While my determination of the
13 law can be de novo, I don't believe that I'm required
14 here today to determine what the law is. Now, I may
15 very well do so and give you my opinion; I'm not sure
16 that that's required. I think what's required is
17 whether I determine that the standard has been met
18 and the standard is "clearly erroneous." Everybody
19 agrees that that's the standard at least as to a
20 portion of this. The petitioners have argued that it
21 is clearly erroneous because it didn't follow what
22 the law is if I accept the definition of "structure"
23 that they pose.

24 By having to reach the issue of whether or not
25 there is this clearly erroneous standard being met

1 here, however, I think I have to go back to what
2 everybody has had to argue about structure. I found
3 the hearings examiner's review of interpretation of
4 the term "structure" extremely helpful. And by
5 saying that, let me just stop for a moment and say
6 one other thing.

7 When I was an attorney sitting on the other side
8 of this bench, one of my pet peeves was a judge
9 ruling on something that I'd argued and taking all
10 day to do it, and it really frustrated me when I had
11 to sit and listen to a judge drone on and on not
12 knowing where the judge was going. And so one of my
13 attempts to deal with that from the very beginning is
14 I try not to beat around the bush too far. There is
15 a danger to that. By telling you where I'm going,
16 some people may not hear another word that I say if
17 I've ruled against them. On the other hand, that's
18 why we have a court reporter. People can go back,
19 and I am going to tell you where I'm going and I'm
20 going to go back and cover some of the territory that
21 brings me there.

22 I'm denying the petitioner's appeal in this case
23 because I believe that the term "structure" does
24 apply to a situation such as this. I believe that
25 the hearings examiner's analysis of this, including

1 looking at definitions of words, was clearly more
2 in-depth and, in my opinion, appropriate than the
3 Attorney General's Opinion. As Mr. Fancher has
4 pointed out, the Attorney General's Opinion about the
5 idea of structure, first of all, misinterprets the
6 fact that there are two provisions to that
7 definition, and secondly, only gives a few lines of
8 analysis.

9 I believe, first of all, that the PVC tubes that
10 we've talked about have been artificially built
11 despite argument about "built" really means joined
12 together, which I don't agree with because that's the
13 second part of the two-part test. "Artificially
14 built" can mean manufactured or in some other way
15 fashioned. It is built. It's clear that that's
16 built.

17 And secondly, as to "parts joined together," it
18 seems to me that it is clear that when you take
19 however many thousand tubes we're talking about and
20 place them in a rather precise location in reference
21 to one another, that is, a relative position of
22 approximately one every square foot or slightly less
23 than that, in the case of one of the farms, when the
24 domain, if you will, the area of the farm is
25 determined by those so-called juvenile clams, I found

1 that a little bit interesting, that term, but I
2 understand we're talking about very small little
3 clams that are being planted, if you will, in those
4 tubes in the location that's allowed if the permit is
5 issued, inside those tubes that are sunk into the
6 sand are covered either individually or by an area
7 netting. That is clearly, in my opinion, joined
8 together in some definite manner. There is a
9 relationship between the various tubes, in my
10 opinion.

11 Now, having determined that I believe that's the
12 commonsense determination of the law, I go back to
13 the idea that I don't think I have to determine what
14 the law is. I think what I just told you was
15 probably dicta, because I think the real issue for me
16 is whether or not the petitioners in this case have
17 met their burden of proof for challenging this
18 particular finding by, ultimately, the Board of
19 County Commissioners, and that's clearly erroneous.
20 "Clearly erroneous" means by definition that it's
21 absolutely without question. There are very few
22 issues in the law that are absolutely without
23 question. I realize there are standards, criminal
24 matters are beyond a reasonable doubt, most civil
25 matters are by a preponderance of the evidence, but

1 an issue of saying absolutely this is what it means
2 and no definition otherwise could be accepted is not
3 met in this particular case.

4 When I look at the analysis by the hearings
5 examiner versus the analysis by the Attorney General,
6 and I guess I need to address the analysis that went
7 along with the Attorney General by the Ecology saying
8 that because of the Attorney General Opinion, the
9 only issue for these types of projects is whether or
10 not there is interference with normal public use of
11 the surface waters. I don't agree with that.

12 But let me then go a step further in saying even
13 if I am mistaken that Ecology's rule should be the
14 standard, there is a troubling issue that, well,
15 while it was addressed by the petitioners, I still
16 think causes a problem in this particular case, and
17 that is that Ecology in coming up with rules, while
18 they did say that the Attorney General's Opinion
19 should be part of those rules, they also pointed out
20 that these rules, which they then call guidelines,
21 don't apply to jurisdictions that have master
22 programs already in effect that are already approved.
23 That's the case here. And so I don't believe that
24 those guidelines specifically apply. I believe
25 there's a reason for that, and that is because the

1 local jurisdiction has been given deference about
2 coming up with particular plans that accomplish the
3 purposes of the Shoreline Management Act. While I
4 recognize that there may have to be a review of a
5 particular jurisdiction's decisions in that regard, I
6 believe that the purposes that were cited by Mr.
7 Fancher, both in his brief and orally here today,
8 really go a considerable distance to say that there's
9 a reason for allowing local jurisdictions to make
10 decisions in cases like this.

11 I do not find that the County Commissioners
12 exceeded their authority by clearly and erroneously
13 determining that this was a substantial development.
14 Their reliance upon the decision by the hearings
15 examiner was within their discretion. They did not
16 have to find for that, and so I'm upholding the
17 decision by the Board of County Commissioners.

18 Now, there are several other issues that I need to
19 address even though you know where I'm going. First
20 of all, it my determination that I am only looking at
21 the first issue of the four issues that were
22 originally addressed. The parties here agree that
23 the fourth issue about whether or not there's
24 potential interference with normal public use of the
25 surface waters is reserved for another day anyway.

1 But the second and third issues as to whether or not
2 the method of harvest would remove some amount of
3 sand or other minerals from the seabed, and third,
4 that the tubes and netting would be an obstruction on
5 the beach, are simply not ripe. Actually, I hadn't
6 considered an argument that this was a ripeness
7 issue, but that made absolute sense when I heard the
8 two attorneys address it in that respect. I believe
9 that the hearings examiner did not specifically rule
10 on those issues two and three. As a matter of fact,
11 he indicated that he would need more facts before he
12 decided either issue, specifically as to number two,
13 the removal of sand or minerals, and as to number
14 three, there was more information that needed to be
15 considered.

16 I noted, as has been pointed out here both orally
17 and in the briefs, that there was a clear agreement
18 by the growers that's found at record page 1181, that
19 summary judgment is appropriate on the three grounds,
20 but it goes on to say that if there is an issue that
21 needs more factual determination, that there would
22 need to be a further hearing. That was never
23 requested, and so I'm not even going to go behind the
24 decision by the hearings examiner and actually the
25 decision by the Board of County Commissioners that's

1 specifically here for review today because those two
2 issues are not ripe.

3 Now finally, in regard to telling you why I'm
4 ruling as I've told you I am, I need to address the
5 constitutional issues. First of all, the
6 constitutional attack has a standard that is probably
7 greater than any other standard I can think of, and
8 that is, a court would have to find that the decision
9 was arbitrary and capricious. My understanding of
10 that standard is that I would have to find that no
11 person in their right mind could ever rule in such a
12 way, totally arbitrary, totally capricious. It does
13 not concern itself with what the law says or what the
14 facts are. It simply is a ruling without
15 explanation. I don't find that to be the case here.

16 The primary argument is, again, that the County
17 Commissioners did not address the WAC, which I
18 pointed out is only a guideline, it is only a
19 recommendation, and it is specifically not applicable
20 to the County, as I understand it. And then finally,
21 as to the whole process, I've read with interest the
22 process that occurred in this particular case from
23 the two meetings, the public meetings. They were
24 public, they were open to anyone that wanted to
25 appear, they did not concern any of these three

1 projects, they were informational meetings, and while
2 the County Commissioners may have indicated that the
3 Department could move forward as they saw fit, they
4 did not predetermine any of these issues.

5 I'll also note with some interest that the
6 petitioners were given the specific opportunity to
7 object to the Board of County Commissioners at the
8 time of the hearing. That's in the record, page 7
9 and 8. They chose not to file any objection. Now, I
10 realize that constitutional issues didn't have to be
11 raised with the hearing examiner or with the Board of
12 County Commissioners, they can be raised to this
13 Court, but there was no challenge to the Board of
14 County Commissioners as being inappropriately
15 comprised or that the fact that one County
16 Commissioner had, apparently, talked with a
17 representative of one of the petitioners; that there
18 had been these public meetings in which, apparently,
19 there weren't any specific invitations that went out
20 to the petitioner parties in this particular case.
21 But as I said, I don't find that those meetings were
22 specifically on the issue that would later come
23 before the Board of County Commissioners.

24 Let me just point out that if the petitioners had
25 won in a hearing before -- well, let's go back.

1 Let's say they'd won with the Department, then there
2 wouldn't have been a reason to complain. If they had
3 won with the hearings examiner, there wouldn't be a
4 reason to complain and they wouldn't be filing any
5 review by the Board of County Commissioners. Now, I
6 understand that the Department might, in that regard,
7 but it simply does not appear to this Court that
8 there was any violation of fundamental fairness or
9 due process in the fact that a County Commission
10 wears a number of hats at a number of different
11 times, and the fact that they were talking with one
12 of their Departments about issues that, while similar
13 and in general on the same subject, they were not
14 predetermining how they would decide a case when it
15 came before them in their administrative review
16 capacity or judicial capacity, if you will. And so I
17 do not find that there was a violation of due process
18 in this particular case.

19 Again, perhaps this is dicta, interesting that at
20 one point the petitioners felt that they might not
21 pursue requesting the permits until there had been
22 further rulings by the state. At some point, then,
23 they determined that they were going to go forward
24 with objecting to having to present or request
25 permits in this regard. Perhaps, and I don't know

1 and that's why this is probably dicta, they saw the
2 writing on the wall that the Department of Ecology
3 was actually going to formulate plans that appear to
4 be more onerous as far as the review that would take
5 place.

6 In that regard, it's interesting to this Court
7 that the argument was that while definitions apply,
8 and thus the petitioners should win, the plan doesn't
9 apply because it's not in effect yet because the
10 County has not implemented the changes and has a time
11 period to do that. I understood that was December of
12 this year, but I also heard that there was a one-year
13 time period that could be set out if that's
14 requested. In any event, this whole procedure
15 involved whether or not a particular requirement
16 would be placed upon the petitioners which they
17 indicate is quite burdensome, or had the matter not
18 come along as it did, what would have been a more
19 burdensome or onerous process after the guidelines
20 that have now been spoken of are implemented.

21 Finally, let me say that while I understand this
22 appeal was about words, it's really interesting to
23 me, and I asked I guess both counsel about this, the
24 legislature, and this is a statute, 28B.20.475 at
25 subsection (5) specifically states that they want

1 more study about how structures should be addressed
2 in these types of situations. Specifically, they
3 said the environmental effects of structures commonly
4 used in the aquaculture industry to protect juvenile
5 geoducks from predation. It seems to me that the
6 idea of structure has been an issue that reasonable
7 minds could differ on all along in this particular
8 case, and I do not find that the Department of
9 Ecology and their definition of "structure" is so
10 iron clad that there is not an opportunity for
11 reasonable minds to differ and, thus, the standard
12 that I pointed out earlier as clearly erroneous has
13 not been met in this particular case, and, if push
14 comes to shove, this Court would say Ecology's
15 definition of "structure" was not appropriate, and
16 that the plain meaning of the term "structure" is
17 more appropriately found in the analysis of the
18 hearing examiner.

19 And so having ruled, are there any issues that I
20 need to address that I failed to cover?

21 MR. FANCHER: Not from the County, Your Honor.

22 THE COURT: Then you will prepare findings or
23 an order. I don't know that there have been to be
24 findings and conclusions in that we have a record
25 here.

1 MR. FANCHER: That's correct. Usually in a
2 LUPA we just do an order very simple, either -- well,
3 in this case it would just be denying the petition
4 and because any review further up is a de novo
5 anyway, so that's how it usually works.

6 THE COURT: All right. Then I assume that
7 you'll need some time to prepare that. What I would
8 suggest is if the two attorneys or the parties in
9 this case in consultation with one another can agree
10 as to language, that's fine, just submit that ex
11 parte. If there needs to be a hearing based upon a
12 disagreement about language, then you would need to
13 note that for a presentation hearing.

14 MR. FANCHER: Thank you, Your Honor.

15 THE COURT: I appreciate the hard work on both
16 sides in this case. We'll be in recess.

17 MS. KISIELIUS: Thank you, Your Honor.

18 (A recess was had.)
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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 28th day of October, 2011.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT
OF THE HEARING EXAMINER FOR
THURSTON COUNTY**

CASE NOS: 2010100540, 2010100420, and 2010100421 (Appeal of three administrative determinations by Resource Stewardship Department)

APPELLANTS: Taylor Shellfish Co., Inc., d/b/a Taylor Shellfish Farms; and Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood.

SUMMARY OF APPEALS: Taylor Shellfish Farms and Arcadia Point Seafood appeal determinations by the Thurston County Resource Stewardship Department that certain proposed geoduck aquaculture operations are "developments" under the state Shoreline Management Act.

SUMMARY OF ORDER:

The Department's summary judgment motion that the proposed geoduck operations are a "development" under the SMA because they involve "construction of a structure" is granted. The Appellants' summary judgment motion on the same issue is denied.

The summary judgment motions by the parties on whether the proposed operations are a "development" under the SMA because they involve "removal of any sand, gravel, or minerals" are denied due to the presence of genuine issues of material fact.

On the third ground of the administrative determinations, whether the tubes and netting serve as an obstruction on the beach, summary judgment is granted in favor of the Appellants on the issue of sediment movement: the proposed operations are not developments due to their effect on the movement of sediment. Summary judgment is not entered at this time on the other issues relating to this third ground, due to the need for further examination of the public trust doctrine and review of whether any Shoreline Hearings Board decisions address whether the "placing of obstructions" includes obstructions to marine life.

RECORD:

The procedural history of these motions is described in the Order, below. The following documents are relevant to these motions and are admitted into the record:

Exhibit 1. Appeal dated July 6, 2010 by Taylor Shellfish Co., Inc., d/b/a Taylor Shellfish Farms of the administrative determination dated June 30, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100540. This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 2. Appeal dated July 8, 2010 (stamped as received by Development Services on July 9, 2010) by Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood of the administrative determination dated July 1, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100420.

This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 3. Appeal dated July 8, 2010 (stamped as received by Development Services on July 9, 2010) by Blind Dog Enterprises LTD, d/b/a/ Arcadia Point Seafood of the administrative determination dated July 1, 2010 by the Thurston County Resource Stewardship Department relating to proposed geoduck aquaculture operation, Project No. 2010100421.

This exhibit contains the Appeal of Administrative Decision form, the Notice of Appeal of Administrative Decision, and attachments.

Exhibit 4. E-mail sent August 23, 2010 from Thomas Bjorgen to the parties.

Exhibit 5. E-mail sent August 24, 2010 from Thomas Bjorgen to the parties (Prehearing order).

Exhibit 6. E-mail sent October 26, 2010 from Thomas Bjorgen to the parties (Second prehearing order).

Exhibit 7. E-mail sent November 2, 2010 from Thomas Bjorgen to the parties (Second prehearing order supplement).

Exhibit 8. E-mail sent November 24, 2010 from Laura Kisielius to Thomas Bjorgen.

Exhibit 9. Stipulated Facts Regarding Proposed Geoduck Farm Operations, dated December 3, 2010, and accompanying e-mail sent December 3, 2010 from Laura Kisielius to Thomas Bjorgen.

Exhibit 10. E-mail sent December 8, 2010 from Thomas Bjorgen to the parties (Third prehearing order).

Exhibit 11. Appellants' Motion in Limine, dated December 8, 2010, with attachments.

Exhibit 12. Thurston County's Response to Motion in Limine, dated December 15, 2010, with attachments.

Exhibit 13. Appellants' Reply in Support of Motion in Limine, dated December 22, 2010, with attachments.

Exhibit 14. E-mail sent January 3, 2011 from Thomas Bjorgen to the parties.

Exhibit 15. E-mail sent January 3, 2011 from Jeff Fancher to Thomas Bjorgen, and e-mail sent January 4, 2011 from Laura Kisielius to Thomas Bjorgen.

Exhibit 16. E-mail sent January 6, 2011 from Thomas Bjorgen to the parties.

No testimony was taken in deciding these motions.

ORDER

A. Nature and location of the proposed geoduck operations.

The Appellants desire to establish shellfish farms on tidelands along Henderson Inlet in unincorporated Thurston County. To that end, Appellant Taylor Shellfish leased tidelands on Thurston County Assessor's Parcel No. 11905230300, known as the Lockhart property. Appellant Arcadia Point leased two tideland parcels, Assessor's Parcel No. 11905330200 (the McClure property) and Assessor's Parcel No. 11905230400 (the Thiesen property). The Lockhart and Thiesen properties are adjacent. The McClure property is approximately 1/4 mile south of the Thiesen property. Ex. 9, Stipulated Facts, Section 1.

Arcadia Point intends to use the McClure and Thiesen properties for geoduck farming. Its proposed method of operation is set out in Sections 4, 5, 8 and 9 of the Stipulated Facts at Ex. 9. In summary, the area on which the geoduck operations would be located on the McClure property is from .60 to .75 acres in size. On the Thiesen property the area is approximately 1.0 to 1.5 acres. PVC tubes four inches in diameter and ten inches in length would be pushed vertically into the beach substrate at a density not to exceed one tube per square foot. Approximately four to six inches of each tube will be exposed at the surface of the sand when the tide is out. Juvenile geoduck clams will be inserted into each tube, which will then be covered with a mesh cap secured with a rubber band. The purpose of the tubes and mesh caps is to prevent predators from killing juvenile geoducks. In 12 months or less, the mesh caps will be removed and the tubes will be covered with area netting to contain the tubes as the geoducks grow and push the tubes from the sand and to protect them from predators. The net is secured using "U" shaped rebar, which will be pushed in flush with the sand. No later than 24 months after insertion, the tubes and area netting will be removed entirely, although the netting may be installed again depending on the level of benthic predators. Between five and seven years after planting, the geoducks will be removed. Harvesting will take place by loosening the sand around the geoduck using a pressurized hose and nozzle and a vessel-mounted high volume, low pressure water pump. The clams would be extracted one at a time by hand. Ex. 9, Stipulated Facts, Sections 4, 5, 8 and 9.

Taylor Shellfish intends to use the Lockhart property for geoduck farming. The area subject to the operations would be from .12 to .9 acres in size. Its proposed method of operation is the same as that described above, with the small differences noted in Section 6 of the Stipulated Facts. These differences are not relevant to the decision of these motions.

The parties stipulate that the purpose of the area or canopy nets "can be to contain loose tubes, to prevent predators from killing juvenile geoducks, or both." Ex. 9, Section 8.

B. Procedural history.

The Appellants and the County staff disagreed whether the proposed activities constituted "development" under RCW 90.58.030 (3), part of the state Shoreline Management Act (SMA). The Appellants and the County Staff agreed that the Appellants would submit information to the County for the sole purpose of allowing the Staff to administratively determine whether the proposals were "developments" under the SMA. The Appellants submitted this information. Ex. 9, Stipulated Facts, Sections 2 and 3.

On June 30, 2010 the Resource Stewardship Department issued an administrative determination for the proposal on the Lockhart property, found at Ex. 1. On July 1, 2010 the Department issued administrative determinations for the proposals on the Thiesen and McClure properties, found, respectively, at Ex. 2 and 3.

Each of these administrative determinations concluded that the proposed activities constituted "development" under the SMA.¹ Each determination rested on the same four grounds:

1. The placement of tubes and netting on the beach constitutes construction of a structure.
2. The method of harvest will remove some amount of sand and other minerals from the seabed.
3. The tubes and netting serve as an obstruction on the beach.
4. The tubes and netting, even though temporary, will potentially interfere with the normal public use of the surface waters, particularly during low tides.

See Ex. 1, 2 and 3.

On July 6, 2010 Taylor Shellfish Farms appealed the Department's determination relating to the proposed operations on the Lockhart property. On July 9, 2010 Arcadia Point Seafood appealed the administrative determinations relating to the proposed operations on the Thiesen and McClure properties.

On December 3, 2010 the parties submitted a set of stipulated facts, found at Ex. 9.

On December 8, 2010 the Appellants submitted a motion in limine, found at Ex. 11, asking that issues related to the first three grounds of the administrative determinations set out above be determined as a matter of law on the basis of the stipulated facts, without the submission of testimony. The motion also asked that the fourth ground be determined after a hearing, with the opportunity to submit testimony and other evidence.

On December 15, 2010 the Department filed its response to the motion in limine, found at Ex. 12. The Department opposed the motion in limine and also asked that, based solely on

¹ Each of these determinations also concludes that the proposals are "substantial" developments, because they exceed the set monetary threshold. Their characterizations as "substantial" is not at issue in these appeals.

the stipulated facts, all three proposals be found to meet the definition of development, obviating the need for a hearing on the appeals.

On December 22, 2010 Appellants filed their reply in support of their motion in limine, found at Ex. 13. Among other matters, the Appellants characterized the Department's position as seeking to convert the motion in limine to a partial summary judgment motion requesting a decision on the first three grounds of the administrative determinations as a matter of law based on the stipulated facts. After receiving clarification from each party, the Hearing Examiner at Ex. 16 characterized the posture of the motions as follows:

Each party requests summary judgment in its favor on each of the first three grounds on which the administrative determinations at issue are based. Each party asks that summary judgment be granted on the basis of the stipulated facts of December 3, 2010.

Neither party asks to submit additional briefing on the summary judgment motions.

Each party agrees that the fourth ground of the administrative determinations would be decided through an evidentiary hearing. The results of the summary judgment motions may affect whether that ground is reached.

If any part of the motion in limine remains live after the summary judgment decision, it will be decided soon after.

C. The summary judgment motions.

1. Authorization of summary judgment motions.

Summary judgment in Superior Court is granted

"if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Superior Court Civil Rule (CR) 56.

Chapter II, Section 2.6 of the Hearing Examiner Rules imposes a page limitation for motions, plainly implying that motions are authorized. The heart of summary judgment is simply the determination that under agreed or uncontested facts, a party is entitled to prevail under applicable law. Since this determination would be made without an evidentiary hearing, it is suitable for decision by motion under the Hearing Examiner Rules, especially when all parties agree to it. Thus, summary judgment is one of the motions impliedly authorized by the Hearing Examiner Rules.

2. Interpretation of relevant SMA provisions.

Each party makes a number of arguments as to how the SMA should be interpreted in resolving the issues presented by this appeal. These more general points are addressed before reaching the specific issues on appeal.

The Department points out that RCW 90.58.900 states that the SMA

"is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted."

The Department also notes that the Supreme Court has held that "the SMA is to be broadly construed in order to protect the state shorelines as fully as possible." Buechel v. Department of Ecology, 125 Wn.2d 196, 203 (1994).

The SMA serves both the purposes of protecting the natural and ecological functions of the shorelines and planning for and fostering all reasonable and appropriate uses. See 90.58.020. Therefore, the mandate of RCW 90.58.900 to liberally construe the Act to serve its purposes does not perceptibly push in either direction in construing the definition of development. The holding in Buechel, on the other hand, has much less of the protean about it. The Court's direction to broadly construe the Act to protect the shorelines as fully as possible leans in favor of a broader scope of the definition of "development", everything else being equal, since that will ensure a more thorough implementation of shoreline policies through the permitting process.

The Appellants contend that the broader scope of "development" argued by the Department is inconsistent with the policies of the SMA. The Appellants state that RCW 90.58.020 directs that preference be given to shoreline uses that, among other things, recognize and protect the statewide interest over local interest, result in long term over short term benefit, and protect the resources and ecology of the shoreline. The Appellants then cite to WAC 173-26-241 (3) (b) which states that shellfish aquaculture is of statewide interest and that, "properly managed, it can result in long-term over short-term benefit and can protect the resources and ecology of the shoreline." Therefore, Appellants argue, shellfish aquaculture is a preferred use under RCW 90.58.020, leaving the Department's broad reading of "development" inconsistent with the Act.

However, the statement in RCW 90.58.020 on which the Appellants rely applies to shorelines of statewide significance, and the sites at issue are not such shorelines under the definitions in RCW 90.58.030. On the other hand, the preferences in RCW 90.58.020 cited by the Appellants do seem consistent with the general purposes of the Act. This shows that the Appellants' argument retains its force, even if these are not shorelines of statewide significance.

Turning to the merits of that argument, RCW 90.58.020 states in pertinent part:

"The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:

(1) Recognize and protect the statewide interest over local interest;

- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary."

This, by its express terms, is a ranking of preference among different uses. It does not suggest that any use, no matter how highly ranked, should be preferred over no development by narrowing the scope of permitting requirements. Such a conclusion would ignore the status of the natural features of the shorelines as an element of the statewide interest and the highly ranked position of the natural character of the shorelines in the hierarchy of preferences in RCW 90.58.020. Thus, these policies do not favor either interpretation of "development" in these appeals.

The Appellants state also that shellfish beds are identified as both priority habitats and critical saltwater habitats by the state shoreline rules. They argue that the Department's attempt to regulate shellfish beds as developments is antithetical to the SMA's protection of critical saltwater habitats and that a similar argument was rejected by the Ninth Circuit in APHETI v. Taylor Resources, 299 F.3d 1007 (2002). The issue in that case, in the words of the Court, was

"whether the mussel shells, mussel feces and other biological materials emitted from mussels grown on harvesting rafts . . . constitute the discharge of pollutants from a point source without a permit in violation of the Clean Water Act."

APHETI, supra. The Court answered this question in the negative for a number of reasons. Most pertinently, the Court stated that

"Congress plainly and explicitly listed the "protection and *propagation* of . . . shellfish" as one of the goals of reduced pollution and cleaner water. 33 U.S.C. § 1251(a)(2) (emphasis added) . . . It would be anomalous to conclude that the living shellfish sought to be *protected* under the Act are, at the same time, "pollutants," the discharge of which may be *proscribed* by the Act. Such a holding would contravene clear congressional intent, give unintended effect to the ambiguous language of the Act and undermine the integrity of its prohibitions."

Id. at 1016. The Applicant argues it is similarly anomalous to conclude that shellfish beds to be protected from encroaching development are also regulated as development under the SMA. Ex. 13, pp. 6-7.

The Appellants' argument is supported by the inference in APHETI that the Clean Water Act's goal of protecting and propagating shellfish means that the natural emissions of shellfish are not subject to NPDES permits. The shoreline rules have a similar goal of protecting

shellfish beds as critical saltwater habitats. The heart of the Court's reasoning, though, was the anomaly of deeming shellfish protected by the Act to be pollutants which can be proscribed under the Act. A similar contradiction is not present in requiring shellfish operations to obtain a permit under the SMA, since the more particular scrutiny afforded by the permit process should better reconcile potentially conflicting shoreline policies touching shellfish farming. Without deciding the issue, the rationale of APHETI could provide an argument against denial of a permit once the merits of the permit are reached. For the reasons given, though, I do not believe it supports any exemption from the permit process itself.

WAC 173.26.020 (24) defines priority habitat as "a habitat type with unique or significant value to one or more species." It states further that an area classified as priority habitat must have one or more of thirteen listed attributes, one of which is "shellfish bed". However, to say that a priority habitat may be a shellfish bed does not imply that all shellfish beds are priority habitats. To do so ignores the heart of the definition that a priority habitat must have unique or significant value to one or more species. The stipulated facts and cited legal authority are insufficient to show that the beds in question are priority habitats.

On the other hand, WAC 173-26-221 (2) (c) (iii) does plainly define critical saltwater habitats to include all commercial and recreational shellfish beds, among other items.² Master programs, according to WAC 173-26-221 (2) (c) (iii) (B), "shall include policies and regulations to protect critical saltwater habitats and should implement planning policies and programs to restore such habitats." This subsection states further that "all public and private tidelands or bedlands suitable for shellfish harvest shall be classified as critical areas", presumably critical saltwater habitats.

The designation of shellfish beds as a critical area, though, hardly implies a blanket exemption from shoreline permit requirements. On the contrary, the complexities of applying other shoreline policies in light of those protecting critical saltwater habitats, if anything, increases the worth of a principled permit process. Designation as a critical saltwater habitat does not support a narrower reading of "development" and a consequently narrower scope of the permit process.

3. The first ground of the administrative determinations: that the placement of tubes and netting on the beach constitutes construction of a structure.

By agreement of the parties, the facts on which summary judgment will be decided are those set out in the stipulation of facts at Ex. 9. Those facts relevant to decision of this first ground are set out in Sections 4, 5, 6 and 8 of the stipulation and are summarized above, although not necessarily comprehensively. Any factual allegations not set out in the stipulation will be considered, if at all, only in deciding whether genuine issues of material fact are present.

² WAC 173-26 comprises the 2003 shoreline rules, which govern the adoption of shoreline master programs. The County's current SMP was adopted before those rules were promulgated and therefore is not subject to their terms. WAC 173-26-010, however, states that "[t]he provisions of this chapter implement the requirements of [the SMA]." Therefore, I believe the Appellants are correct that these rules may be consulted in interpreting the SMA, even though the County's new master program is not yet adopted.

Factual allegations outside the stipulation will not be considered in establishing any matter of fact.

A substantial development permit (SDP) is required for a use or activity on the shorelines which is both "substantial" and a "development". RCW 90.58.140. Under RCW 90.58.030 (3) (e), a development is "substantial" if its total cost or fair market value exceeds \$5718 or if it materially interferes with the normal public use of the water or shorelines of the state. It is not disputed that the cost or value of each proposed operation would exceed this monetary threshold. Thus, the validity of the administrative determinations turns on whether the proposed geoduck operations count as "development".

"Development" is defined by RCW 90.58.030 (3) (a) as

"a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;"

This definition is the same as that in WAC 173-27-030.

Under these definitions, the key question in the challenge to the first ground of the administrative determinations is whether the proposed operations will involve "construction" of a "structure".

The shoreline rules define "structure" as

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

WAC 173-27-030 (15).

The Thurston Region Shoreline Master Program (SMP), on the other hand, defines "structure" as

"[a]nything constructed in the ground, or anything erected which requires location on the ground or water, or is attached to something having location on or in the ground or water."

This definition, especially its reference to "anything erected which requires location on the ground or water", could, in this context, be substantially broader than the definition in WAC 173-27-030 (15).

Local master programs must be consistent with the shoreline rules found in the WAC. RCW 90.58.080 (1).³ An ordinance improperly conflicts with a statute if it "permits or licenses

³ See Footnote 2, above.

that which the statute forbids and prohibits, and vice versa." Weden v. San Juan County, 135 Wn.2d 678, 693 (1998); citing Bellingham v. Schampera, 57 Wn.2d 106, 111 (1960). The broader scope of the definition of "structure" in the SMP, above, does not prohibit that which the statute (or rule) permits, but rather it arguably requires an SDP for an activity for which the statute or rule would not. The requiring of a permit, though, could have just as severe consequences as a flat prohibition. Thus, the Weden/Schampera approach seems also suited to determining whether an SMP's broader definition of "development" would conflict with the WAC rule. Since the broader SMP definition would require an SDP for a use for which the WAC rule would not, it would raise an impermissible conflict by analogy to those decisions.

Perhaps an even more basic principle in determining whether a subordinate level of government may expand restrictions adopted at a superior level is legislative intent. See Ray v. ARCO, 435 U.S. 151 (1978). In that case the Supreme Court held that certain state regulations of oil tankers were preempted by federal law, because

"[e]nforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers."

Ray, 435 U.S. at 165. Although the SMA is focused on local control, it does include detailed definitions as to what counts as a substantial development and establishes the permit for a substantial development as a centerpiece of shoreline regulation. This permitting scheme was adopted by the legislature in service of the sometimes jostling goals of protecting the natural and ecological functions of the shorelines, while planning for and fostering all reasonable and appropriate uses. See 90.58.020.

The adoption of detailed permit thresholds to serve potentially conflicting goals strongly suggests that the legislature intended they be followed. Although a county has ample scope in adopting the policies under which SDPs are judged, I think it must accept the state's call as to when they are required. Therefore, the definition of structure in WAC 173-27-030 (15) will control.

Returning to the examination of that definition, the geoduck activities described in the stipulation do not constitute "a permanent or temporary edifice or building". Thus, they do not involve a structure under the first element of the definition.

The second element is disjunctive: "any piece of work artificially built or composed of parts joined together in some definite manner . . ." Under this, a use involves a structure if it involves a "piece of work artificially built". Under customary definitions, the PVC tubes are pieces of work and are artificially built. This seems plainly to classify them as structures under WAC 173-27-030 (15). The Appellants argue to the contrary that although the tubes are artificial, the tubes and netting together are not a piece of work artificially built, since "built" is defined as "composed of pieces or parts joined systematically". Ex. 13, p. 10. Since the tubes are not joined together by the net, the Appellants argue, the use is not "built" under applicable definitions. Id.

Under this argument, a use could consist of different structures (pieces of work artificially built), but would not itself be a structure unless the constituent structures were "joined

systematically". This position taxes logic with the result that a use consisting exclusively of structures would itself not be a structure unless the constituent structures were satisfactorily joined. Similarly, it contradicts the definition of structure as "any piece of work artificially built". (Emph. mine.) It also would effectively remove the "or" from the definition of structure by requiring that constituent structures also be joined systematically. For these reasons, I don't believe this argument is consistent either with the text of the definitions or the purposes they serve. The proposed geoduck operations involve structures.

The second prong of the disjunctive definition noted above is "a piece of work . . . composed of parts joined together in some definite manner". Whether the proposal involves a structure under this definition is less certain. The only way in which the PVC tubes are arguably "joined together" in the proposed operations is through the area net which is spread over them. The net is not attached to the tubes, but is stretched over them and anchored to the sea bottom with rebar. The Appellants argue through a forceful analogy that if this is enough to make a structure, then every woodpile with a tarp over it is also a structure, since the tarp protects the pile from the elements as the net protects the geoducks from predators. If it be objected that the net also holds loose tubes together, the analogy could be modified to a tarp spread over a pile of leaves to keep them from blowing away. In either event, deeming the presence of the tarp sufficient to transform the pile into a structure seems counter to both ordinary usage and the building codes.

What may seem absurd under one set of laws, though, is not necessarily so under others. As far as process is concerned, the heart of the purpose of the SMA is the recognition that

"coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."

RCW 90.58.020.

Turning to substance, the legislature stated that

"[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto."

RCW 90.58.020.

The SMA implements these policies in part through a permit system. The definition of development is in large part the litmus showing when a permit is required for a proposed use. Whether or not it is absurd to deem the tarp to make a structure, it is not irrational or absurd for the legislature to decide that having parts joined together in some definite manner makes a piece of work a "structure" in applying this prong of the definition of development. To fully serve the SMA policies just noted, interpretation should lean in the direction of the broader reading of these definitions. Inclusion of a doubtful case in the permit process better serves those policies, both procedural and substantive, than exclusion.

The PVC tubes, mesh caps and nets are pieces of work, individually or collectively. The tubes are parts of that work. Their array or configuration is in "a definite manner". The question, then, is whether they are "joined together" in that manner.

The area net is spread over and comes into contact with the tubes, but is not attached to them. The two purposes of the nets are to contain loose tubes and afford protection from predators. Ex. 9. Thus, the nets do not hold the tubes together or in place. Only when they come loose does the net contain them.

"Join" is not defined in the SMA, its implementing rules or the SMP. The principal dictionary definitions of "join" are

"to put or bring together and fasten, connect or relate so as to form a single unit, a whole or continuity . . .

to put or bring into close contact, association or relationship . . .

to come into the company of . . ."

Webster's Third New International Dictionary (1976). The third of these entries, though, is likely not apt, since its examples all relate to persons.

The use of the terms "fasten" and "connect" in the first entry suggests that the net does not "join" the tubes, since the net is not attached to them and only holds them together if they come loose from the sea bottom. On the other hand, the facts that the net is anchored so as to close the area of the tubes to predators and that it is placed to contain the tubes as they are pushed from the sand suggests that it brings the parts into association or relationship, thus falling within the second entry. Ordinary English usage welcomes either reading.

The objective of statutory construction is "to ascertain legislative intent as expressed in the statute." Martin v. Meier, 111 Wn.2d 471, 479 (1988). More specifically,

"[i]n determining the meaning of words used but not defined in a statute, a court must give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute [cit. om.] 'Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purposes of the statute.' [cit. om.]"

PUD of Lewis County v. WPPSS, 104 Wn.2d 353, 369 (1985). In short, the "paramount concern"

"is to ensure that the statute is interpreted consistently with the underlying policy of the statute."

Safeco Insurance Co. v. Meyering, 102 Wn.2d 385, 392 (1984).

For the reasons expressed above, when the text of the law and available definitions leave the matter equally doubtful, the procedural and substantive policies of the SMA are better served by navigating the permit process. Therefore, the PVC tubes should be deemed "joined" for purposes of the definition of "structure".

The final step is to determine whether the use involves the "construction" of a structure, as stated in RCW 90.58.030 (3) (a), when none of the constituent parts of the operations is actually constructed in the shoreline. Although "construction" is not defined in the SMA, other definitions in it answer this question.

RCW 90.58.030 (3) (e) defines substantial development and exempts from its scope the "construction or modification of navigational aids such as channel markers and anchor buoy." Unless they are deemed "obstructions", navigational aids would only be deemed developments or substantial developments by virtue of involving construction of a structure. Buoys and the like are constructed on shore and placed in waters subject to the SMA. Thus, under the Act the placement of structures in the shorelines counts as construction. Therefore, placement of the tubes and nets involve "construction" of a structure.

These conclusions, however, are contradicted by Attorney General Opinion (AGO) 2007 No. 1. That opinion addressed, among others, the question whether shoreline substantial development permits are required for planting, growing and harvesting farm-raised geoducks by private parties. The method of geoduck operations examined by the AGO is virtually the same as that involved in these appeals. The AGO concluded that geoduck operations would fall within the definition of "development" in the SMA only if they caused substantial interference with normal public use of the surface waters, one of the elements of that definition. The AGO concluded that geoduck operations would not fall within any of the other elements of the definition of development.

The AGO cited the definition of structure from WAC 173-27-030 (15) as "a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite manner", the same definition analysed above. The AGO noted that the PVC tubes are not edifices or buildings and do not form an edifice or building taken together. The opinion stated also that the tubes are not parts joined together in a definite manner. Therefore, it concluded, geoduck operations do not involve structures.

This analysis, however, ignored without explanation the element of the definition including "any piece of work artificially built". In doing so, the AGO read the word "or" out of the definition in violation of the canon of construction that a legislative body is presumed not to have used superfluous words and that meaning, if possible, must be accorded to every word in a statute. See Applied Industrial Materials v. Melton, 74 Wn. App. 73 (1994). The only way of

according meaning to every word in the definition of "structure" is to deem it also to include "any piece of work artificially built". When that is done, as shown above, the proposed operations must be deemed to involve structures.

In addressing the "composed of parts joined together" prong of the definition, the AGO concluded that the tubes do not meet this description, but did not analyse the definition of "join" or the structure or function of the area net. Those analyses, as shown above, indicate that the tubes and net constitute a structure under this prong also.

The AGO states that its conclusion is reinforced by the decision in Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801 (1992), in which the Court rejected the argument that the removal of railroad trestles was a development, because it modified a structure. The Department argues at Ex. 12 that Cowiche Canyon has no application to this case, because it involves removal, not installation. The Appellants reply at Ex. 13 that the relevance of the case lies in its use of a common-sense approach in concluding that removal is not modification. The Appellants are correct, but the analysis above applies that common-sense approach in concluding that these operations are structures under the definition.

As the Appellants point out in Ex. 13, Attorney General Opinions are not controlling, but are entitled to great weight. Thurston County v. City of Olympia, 151 Wn.2d 171, 177 (2004). As also pointed out by Appellants, greater weight attaches to an agency interpretation when the legislature acquiesces in that interpretation, and the legislature has not overturned this AGO, even though it has adopted legislation concerning geoducks since its issuance. Legislative acquiescence, however, "is not conclusive, but is merely one factor to consider." Meyering, 102 Wn.2d at 392.

These rules, I believe, mean that an Attorney General Opinion is something more than a tiebreaker if a decision cannot be made on other grounds. They mean, at least, that an AGO must play a prominent and weighty role in making the decision. It is not, however, conclusive.

Here the AGO failed to consider part of the definition which it was construing, the element deeming "any piece of work artificially built" to be a structure. Nor did it offer any analysis construing the definition to exclude that element. This decision, therefore, does not so much disagree with the AGO's analysis, as fill in an element not treated in it. This decision does disagree with the AGO's conclusions, but, for the reasons above, I believe that disagreement is well founded.

The other element of the definition, "piece of work . . . composed of parts joined together in some definite manner . . ." is, as noted, a much closer call. As such, the deference accorded Attorney General Opinions becomes more important. However, as noted the AGO does not analyse the definition of "join" or the structure or function of the area net. When that is done, and the policies of the SMA and the canons of construction are examined, the discussion above shows, I believe, that the better interpretation is that this counts as a structure. Following the AGO in spite of this would elevate "great weight" to conclusiveness, which is not the role of an AGO.

4. The second ground of the administrative determinations: that the proposal will involve the removal of sand, gravel or minerals.

As noted, "development" is defined by RCW 90.58.030 (3) (a) to include "removal of any sand, gravel, or minerals".

The Department states at Ex. 12, pp. 9-10, that proposed operations will remove sand from the site, will generate a turbid plume which transports sediment off the site, will result in loss of elevation at the site due to sand removal, and will increase erosion during storms. The Department bases these factual allegations on a consultant statement and the Washington Geoduck Growers Environmental Codes of Practice, part of Ex. 12.

None of these factual allegations are included in the stipulation of facts at Ex. 9. The principal stipulated facts concerning harvesting are that the sand around the geoduck will be loosened using a pressurized hose and nozzle and a vessel-mounted high volume, low pressure water pump. The clams will then be extracted one at a time by hand. See Ex. 9, Sections 4 and 9.

The parties have stipulated that the summary judgment motions will be decided on the basis of the stipulated facts. This is consistent with the nature of summary judgment, which can only rely on facts which are agreed or which raise no material issue. See CR 56. The Appellants make clear at Ex. 13, p. 2 that they dispute the factual allegations made by the Department in Ex. 12 and are ready to offer contrary evidence.

For these reasons, the factual allegations in Ex. 12 cannot be relied on for the truth of the matters asserted. Only the facts stipulated in Ex. 9 may play that role. The allegations in Ex. 12, however, along with the Appellants' statement at Ex. 13, p. 2, show that the amount and nature of sand or sediment removal is a genuine issue of fact.

The Department points out also that the definition of development includes "removal of **any** sand, gravel, or minerals" (emph. added) and argues that by their nature these operations will result in some removal of sand and sediment through injection of pressurized water and loosening of the geoducks. Based on the stipulation only, I expect the Department is correct in this factual assertion. However, I do not believe the Department is correct in the implied corollary, that the disturbance of the minutest amount of sediment counts as removal under the definition. If that were the case, as the Appellants argue, walking on the beach at low tide would be a "development", since some sand or mud would be removed on shoes. To avoid this strained or absurd consequence, some minimal amount or type of removal of beach material must be allowed without triggering characterization as a development. The nature of that threshold need not be determined here. Its presence, though, means that the Department's argument cannot be accepted.

The Appellants invoke in their favor the canon of construction providing that the meaning of words may be indicated or controlled by those with which they are associated. See State v. Roggenkamp, 153 Wn.2d 614, 623 (2005). They argue that since sand, gravel, and minerals are all materials that are mined in the shorelines, this prong of the definition is intended only to capture the mining of those materials. The purpose of the canons of construction, as with all statutory construction, is to identify and serve legislative intent. Martin, supra. To determine that intent, a court will look first to the language of the statute. Where statutory language is plain and unambiguous, a statute's meaning must be derived from its wording. SEIU v. Superintendent of Public Instruction, 104 Wn.2d 344, 348 (1985).

The use of the word "any" in this definition signals a plain intent to include actions beyond mining. The ambiguity in the *de minimus* threshold just discussed is best dissolved by judicial implication of a reasonable minimum level, not through narrowing the definition's scope to contradict its terms. Further, the inclusion of "dredging" in the definition of development, an activity commonly associated with seabed mining, suggests that the prong of the definition under consideration was intended to reach beyond mining. The reference to "removal of any sand, gravel, or minerals" is not restricted to mining.

The Appellants' principal argument on this point rests on the AGO discussed above and the adherence of the Department of Ecology and Department of Natural Resources to it. The AGO characterized geoduck harvesting as incidentally releasing silt and sediment which may temporarily be found in the surrounding water. AGO 2007 No. 1, p. 2. The AGO concluded that this did not involve the "removal of any sand, gravel, or minerals" for two reasons. First, the disruption of substrate around a geoduck cannot legally be distinguished from clam digging or raking and it would be too burdensome to require substantial development permits for all significant clam beds. *Id.* at 7. Second, only a "minimal" amount of materials would be removed.

The Attorney General is authorized to give written opinions "upon constitutional or legal questions." RCW 43.10.030 (7). The conclusion that a specific set of facts falls within a statutory definition is an opinion on a legal question. Thus, this AGO's analysis of whether described geoduck operations constituted a structure was an authorized role of an AGO. Here, in contrast, without citing any evidence, the AGO concludes that the geoduck operations will only remove a "minimal" amount of materials and thus do not meet this prong of the definition of development. This conclusion is announced, no matter what the consistency of the substrate, what the pressure of the water used, what the length of water injection, or what the characteristics of water or current; and without any consideration of how much sand or sediment might in fact be removed under these varying conditions. These are factual determinations and, as the assertions of the Appellants and Department suggest, likely highly contested factual determinations. As such, they are not amenable to determination as a matter of law or by definition. The AGO's attempt to do so, I believe, was beyond the authority of RCW 43.10.030 (7).

The AGO also expresses concern that a contrary interpretation would have the unintended consequence of requiring other clam operations to obtain a substantial development permit. This would be persuasive if it were established that geoduck and other clam harvesting disrupts a similar amount of substrate and that other clam harvesting is exempt from obtaining a substantial development permit. The first point is a matter of fact which is assumed by the AGO. The second is a legal issue which is touched only through the statement: "We find no indication that the SMA has ever treated clam harvesting, alone, as development." AGO 2007 No. 1, p. 2. The lack of such an indication, however, does not necessarily show that all clam harvesting is in fact exempt under the SMA.

Whether these geoduck proposals constitute development through the removal of any sand, gravel, or minerals raises a number of issues of material fact and is not amenable to resolution through this AGO. Therefore, the summary judgment motions by Appellants and the Department on this issue are denied.

5. The third ground of the administrative determinations: that the tubes and netting serve as an obstruction on the beach.

RCW 90.58.030 (3) (a) defines development to include "placing of obstructions". Because the definition also includes "any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters", the obstructions referred to seem intended to be other than those interfering with normal public use of the surface of the waters. The administrative determination on appeal is consistent with this view, finding that the tubes and netting are an obstruction "on the beach".

The tidelands on which these operations are proposed are privately owned. See Ex. 9, Section 1. Under general principles of property law, the private owners could exclude the public from walking on their beaches. See Presbytery of Seattle v. King County, 114 Wn.2d 320 (1990) (the right to exclude others is one of the fundamental attributes of property ownership). The AGO discussed above concluded that tubes could obstruct one walking on the beach, but that would only be relevant if the public had a right to use the tidelands. Thus, the AGO concluded, a geoduck operation on private tidelands would not constitute development through the placing of obstructions. Implicit in this holding is the view that "obstructions" refers to the impeding of human passage, not that of fish, shellfish or sediment.

The AGO's conclusion that tubes and nets cannot obstruct public passage on beaches which the public has no right to use is sound in both logic and policy. Before resting in that conclusion, though, the public trust doctrine must be examined.

Our Supreme Court outlined the public trust doctrine in the following holdings from Caminiti v. Boyle, 107 Wn.2d 662 (1987):

". . . the State's ownership of tidelands and shorelands is not limited to the ordinary incidents of legal title, but is comprised of two distinct aspects.

The first aspect of such state ownership is historically referred to as the *jus privatum* or private property interest. As owner, the state holds full proprietary rights in tidelands and shorelands and has fee simple title to such lands. Thus, the state may convey title to tidelands and shorelands in any manner and for any purpose not forbidden by the state or federal constitutions and its grantees take title as absolutely as if the transaction were between private individuals . . .

The second aspect of the state's ownership of tidelands and shorelands is historically referred to as the *jus publicum* or public authority interest . . . More recently, this *jus publicum* interest was more particularly expressed by this court in WILBOUR v. GALLAGHER, 77 Wn.2d 306, 316, 462 P.2d 232, 40 A.L.R.3d 760 (1969), CERT. DENIED, 400 U.S. 878 (1970) as the right

'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'

The state can no more convey or give away this *jus publicum* interest than it can "abdicate its police powers in the administration of government and the preservation of the peace . . . Thus it is that the sovereignty and dominion over this state's tidelands and

shorelands, as distinguished from TITLE, always remains in the State, and the State holds such dominion in trust for the public. It is this principle which is referred to as the 'public trust doctrine'."

Caminiti, 107 Wn.2d at 668-670 (footnotes and citations omitted). See also Wilbour v. Gallagher, 77 Wn.2d 366 (1969), State v. Longshore, 141 Wn.2d 414 (2000), and Washington State Geoduck Harvest Assoc. v. DNR, 124 Wn. App. 441 (2004).

The requirements of the public trust doctrine, the Court held, "are fully met by the legislatively drawn controls imposed by the Shoreline Management Act . . ." Caminiti, 107 Wn.2d at 670.

As stated in the excerpt from Wilbour v. Gallagher, above, the public trust doctrine protects the right of navigation,

"together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."

In the unpublished opinion of Bainbridge Island v. Brennan, No. 31816-4-II, (2005), Division II of the Court of Appeals held that under the public trust doctrine, the public may use tidelands when covered by water, but the public has no right to walk across private property when the tide is out.

The Supreme Court approached the same issue in State v. Longshore, above, when it decided that the public trust doctrine does not give the public the right to gather naturally growing shellfish on private property. The Court expressly stated, though, that it did not determine whether the public has a right to cross over private tidelands on foot. Longshore, 141 Wn.2d at 429, n. 9.

With the unpublished status of Brennan and the express "non-decision" of Longshore, the fairest conclusion is that our appellate courts have not yet decided whether the public trust doctrine gives the public the right to walk across private tidelands. Consistently with the AGO, whether the PVC tubes are obstructions on the beach and hence "developments" depends on whether the public has that right. Given the complexities of the application of the public trust doctrine, this is not an issue that should be decided without briefing. Therefore, the summary judgment motions on this issue should not be decided at this time.

The remaining issue is the Department's contention that the tubes and nets constitute obstructions on the beach, because they impede the passage of fish and other sea creatures or the flow of sediment.

"Obstruction" is not defined in either the SMA, its implementing rules, or the SMP. No case law or Shoreline Hearings Board decisions on the meaning of obstruction were cited. As noted, the AGO takes the position that obstruction applies only to human passage. The Department argues that the mandate to construe the SMA broadly to protect the state shorelines as fully as possible means that obstructions to marine life must also be considered. The Appellants cite the AGO, point out that the Department's consultants conclude that the effect of the tubes on sediment movement is likely negligible, point out that requiring marine

animals to move around the tubes does not comport with the accepted definition of obstruction, and raise a number of factual issues.

With none of the arguments being definitive, I would normally defer to the view expressed in the AGO, because it is a rational way of implementing the purposes of the SMA. However, because the issue might be treated in the decisions of the Shoreline Hearings Board, it makes most sense to allow the parties to research that, if desired, before deciding whether obstructions of marine life count as obstructions under the definition of development. The one holding that can be made at this time is that the proposed operations do not meet the definition of development due to their effect on sediment flow. Even if the obstruction of sediment flow fell within the definition of development, the facts alleged by the Department, if considered, would show only that the proposals' effect on sediment movement would be negligible. Thus, assuming all pertinent legal and factual issues favorably to the Department, no obstruction of sediment would be shown.

D. Summary of order.

1. The Department's summary judgment motion that the proposed geoduck operations are a "development" under the SMA because they involve "construction of a structure" is granted. The Appellants' summary judgment motion on the same issue is denied. The first ground of the administrative determinations on appeal, that the placement of tubes and netting on the beach constitutes construction of a structure and consequently a development, is upheld.

2. The summary judgment motions by the parties on whether the proposed operations are a "development" under the SMA because they involve "removal of any sand, gravel, or minerals" are denied due to the presence of genuine issues of material fact.

3. On the third ground of the administrative determinations, whether the tubes and netting serve as an obstruction on the beach, summary judgment is granted in favor of the Appellants on the issue of sediment movement: the proposed operations are not developments due to their effect on the movement of sediment. Summary judgment is not entered at this time on the other issues relating to this third ground, due to the need for further examination of the public trust doctrine and review of whether any Shoreline Hearings Board decisions address whether the "placing of obstructions" includes obstructions to marine life.

4. The effect of the above decisions is that the proposed operations are deemed "developments" under the SMA under the first ground of the administrative determinations, requiring a substantial development permit for the proposals. Thus, unless this determination is reversed, a hearing on a substantial development permit is required for the proposed operations, and the appeals of the other grounds of the administrative determinations are mooted, as well as the motion in limine.

Dated this 21st day of January, 2011.

Thomas R. Bjorgen

Thurston County Hearing Examiner