

1                   BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD  
2   STATE OF WASHINGTON

3 FRIENDS OF GRAYS HARBOR and  
4 WASHINGTON ENVIRONMENTAL  
5 COUNCIL,

6                   Appellants,

7                   v.

8 CITY OF WESTPORT, MOX-CHEHALIS  
9 LLC, PORT OF GRAYS HARBOR, and  
10 STATE OF WASHINGTON,  
11 DEPARTMENT OF ECOLOGY,

12                   Respondents.

ELUHB NO. 03-001

RECORD REVIEW  
DECISION AND ORDER

11                   Appellants Friends of Grays Harbor (FOGH) and Washington Environmental Council  
12 (WEC), challenged the Shoreline Substantial Development Permit (SSDP) and Binding Site Plan  
13 Approval (BSP) issued by the City of Westport for a destination resort project known as the  
14 Links at Half Moon Bay. On August 4, 2005, the Environmental and Land Use Hearings Board  
15 held a hearing on the record review portion of the case in Grayland, Washington, and made a site  
16 visit to the project location and surrounding area. The record review case included the appeal of  
17 a shoreline substantial development permit (SSDP) and the appeal of a binding site plan  
18 approval. A separate de novo hearing was conducted in ELUHB No. 03-001, which addressed  
19 water quality certification under §401 of Clean Water Act, shoreline conditional use permit  
20 approval, and Ecology’s Coastal Zone Management Act compliance determination.  
21

1           During the record review case, counsel Knoll Lowney represented FOGH, counsel  
2 Jennifer Joseph represented WEC, counsel Barnett Kalikow and Charles Roe represented Mox-  
3 Chehalis, counsel Jeffrey S. Myers represented the City of Westport, Sr. Assistant Attorney  
4 General Joan Marchioro and Assistant Attorney General Thomas Young represented Ecology,  
5 and counsel Arthur A. Blauvelt III represented the Port of Grays Harbor. Administrative  
6 Appeals Judge, Phyllis Macleod, presided for the Board comprised of Bill Clarke, chair, William  
7 H. Lynch, David W. Danner,<sup>1</sup> Judy Wilson, O’Dean Williamson and Dan Smalley. Kim Otis of  
8 Gene Barker and Assoc., Olympia, Washington, recorded the proceedings.

9           The parties presented written briefs and oral arguments on the record review issues to the  
10 Board. Based upon the evidentiary record, the Board determines that the site is appropriate for  
11 development of a destination resort project. The entire Board agrees that the hotels, conference  
12 center, and golf clubhouse, as proposed, comply with Westport’s Shoreline Management  
13 Program (SMP) and the Shoreline Management Act (SMA). Three members of the Board  
14 determine that the condominiums are also in compliance with the Westport SMP and the SMA.  
15 Two members of the Board determine that the condominiums are an appropriate element of the  
16 resort project, but that the proposed condominium location does not comply with the Westport  
17 SMP or SMA. All members of the Board, however, agree the development of condominiums in  
18 the same area as the hotels and conference center would comply with the Westport SMP and the  
19 SMA.

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21 <sup>1</sup> Board member Danner was present at the hearing and participated in the Board discussion of the case. He is not a  
signatory to the decision because he accepted appointment to a position in another agency prior to completion of this  
decision.

1 While FOGH argued that the site is not appropriate for a resort development, Westport  
2 adopted local ordinances specifically for this proposed use and its SMP was approved by  
3 Ecology. The use of this site for resort development, including residential and commercial  
4 development and a golf course is consistent with the concept in the SMA of “planning for and  
5 fostering all reasonable uses.” Further, the Board recognizes the designation of this project as a  
6 qualifying local economic development project by the Governor’s Office. While such a  
7 designation does not change the substantive protections of the SMA, the economic development  
8 aspects of the project are a consideration in determining the reasonableness of the proposed use.  
9 Finally, the Board determines that the project is subject to a Binding Site Plan.

10 Factual Background

11 Project and Site.

12 The respondent Mox-Chehalis L.L.C. proposes a project known as the Links at Half  
13 Moon Bay, including the construction of two hotels, a conference center, a “Scottish Links” style  
14 golf course, ocean front condominiums, and supporting commercial development. It is  
15 anticipated Phase I of the development will include one hotel structure with conference center  
16 and some commercial/retail development. Phase I will also include the construction of the 18-  
17 hole golf course with all appurtenances including shelters/restrooms, cart paths, bridges, club  
18 house, golf maintenance building, and driving range. Utility and transportation infrastructure  
19 improvements will also be part of Phase I construction activities. Phase II will include  
20 construction of the second 200-room hotel, additional commercial/retail development, and  
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1 approximately 200 condominium units in eight buildings located near the parking lot for  
2 Westhaven State Park.

3 The project site is approximately 355 acres in size and is located in the northwest portion  
4 of the City of Westport near Point Chehalis, adjacent to Westhaven State Park and north of  
5 Westport Light State Park. The site is located in the Urban Shoreline Environment and is zoned  
6 Tourist Commercial. The property is bordered by the Pacific Ocean to the west and Half Moon  
7 Bay to the north, Westport Light State Park to the south, and Forrest Avenue to the east. The site  
8 is bisected in the northerly area by Jetty Access Road, which leads to Westhaven State Park and  
9 the South Jetty. A pedestrian walkway connecting Westhaven State Park and Westport Light  
10 State Park runs north/south along the western portion of the property. A pedestrian walkway  
11 also extends along the shore of Half Moon Bay north of the property leading toward a Coast  
12 Guard viewing tower and public parking area adjacent to Half Moon Bay. The public areas  
13 adjacent to the site contain some of the most frequently visited ocean beaches in the State of  
14 Washington. The Pacific Ocean beach and the Half Moon Bay beach are used by the public for a  
15 variety of shoreline uses including surfing, swimming, beachcombing, and picnicking.

16 In 1993, the Pacific Ocean breached the South Jetty west of the project site. Significant  
17 erosion ensued. The U.S. Army Corps of Engineers developed plans to repair and maintain the  
18 jetty as part of its mission to protect the Grays Harbor navigation channel. Part of the work  
19 undertaken in response to the jetty breach involved construction of a buried revetment along the  
20 easterly portion of the shoreline along Half Moon Bay. The Corps also built a wave diffraction  
21 mound and gravel transition beach on the west end of Half Moon Bay adjacent to the South Jetty.

1 Sandy dredge spoils are currently being placed on the beach and upland area of Half Moon Bay  
2 to help avoid future large-scale erosion.

3 Most major buildings contemplated by the developer for this project are located on  
4 uplands north of Jetty Access Road in areas that will not require filling wetlands. The  
5 condominium site, by contrast, is proposed on a small piece of upland south of the Jetty Access  
6 Road near the parking lot for Westhaven State Park. The proposed construction does not directly  
7 call for installation of bulkheads, riprap, seawalls, or other shoreline protection structures, but the  
8 appellants are concerned future erosion may result in armoring the shoreline of Half Moon Bay  
9 or South Beach to protect constructed improvements. Utilities will be located in the existing  
10 Jetty Access Road right of way to the maximum extent possible. The developer will be required  
11 to improve Jetty Access Road to include a sidewalk and bicycle path, which will improve public  
12 access to Westhaven State Park. A pedestrian walkway will be constructed to link the hotel and  
13 conference center with the City of Westport waterfront trail in the area. The developer will also  
14 be required to install paved access points from the trail to the beach every 660 feet along the  
15 trail.

16 The hotels are proposed on uplands in the northeast portion of the site, closer to the  
17 commercial property adjacent to the Westport Marina. The hotels will be visible from the  
18 commercial areas near the Westport marina, but they will not block views of the Pacific Ocean  
19 or Half Moon Bay from existing residences because there are apparently no residences in the  
20 area.

1           The 200 condominium units are designed in 8 buildings, 62 feet in height, located  
2 adjacent to the Westhaven State Park parking area and visible from Westhaven State Park, the  
3 Westport Light Trail, and the Half Moon Bay trail. The condominium buildings are landward of  
4 the trail property and will not block views of the Pacific Ocean or Half Moon Bay from the trails.  
5 After construction of the project, the view looking east from the Westport Light Trail will be  
6 significantly different from the existing view of undeveloped dunal terrain and an unobstructed  
7 horizon. The golf course and the condominiums will be visible from the public trail, and the  
8 condominium will cast shadows on areas used by the public.

9           The property south of Jetty Access Road is currently comprised of the small upland area  
10 slated for condominium construction, and a large expanse of undeveloped coastal dunes and  
11 interdunal wetlands extending well into Westport Light State Park. A delineation of  
12 jurisdictional wetlands on the site performed by Ecological Land Services, Inc. in 2000, showed  
13 170 wetlands on the site totaling approximately 150 acres. The easterly 100 plus acres of the site  
14 is a forested wetland with a more diverse habitat than the emergent and shrub areas that are  
15 predominant to the west. The site provides habitat for a number of different types of birds and  
16 animals and temporary resting grounds for north spring migrating shorebirds. Some seasonal  
17 habitat for fish refuge may be present in seasonally inundated areas connected to the Forrest  
18 Avenue ditch.

19           For many years the Port of Grays Harbor owned the property in question. During that  
20 time the area remained largely undeveloped, although there are signs people have used portions  
21 of the property for camping, walking, and off-road vehicle use. During 1995 and 1996, the Port

1 engaged in a public planning process that culminated in a decision, reflected in the Port's Master  
2 Plan, to encourage the sale of this property to private parties for development as a major  
3 destination resort. Development of a destination resort was seen as the central programmatic  
4 element in the revitalization and redevelopment of Westport. The City of Westport updated its  
5 Shorelines Master Program and Zoning Code in 1996 to allow for a master planned destination  
6 resort on this parcel. *Id.*

### 7 HISTORY OF THE PROJECT

8 Environmental review of the Links at Half Moon Bay destination golf resort development  
9 for this site began with the City of Westport issuing a Determination of Significance and Request  
10 for Comments on Scoping, which led to a scoping meeting and preparation of a Draft  
11 Environmental Impact Statement dated November 1, 2000. A Final Environmental Impact  
12 Statement (FEIS) was issued, dated March 23, 2001. The applicant also applied for a Master  
13 Plan Approval for the project and a shoreline substantial development permit and shoreline  
14 conditional use permit.

15 The City approved the master plan for the Links at Half Moon Bay after the Hearing  
16 Examiner held an open record predecision hearing to take testimony regarding the application on  
17 May 21 and May 23, 2001. Following a recommendation from the hearing examiner for  
18 conditional approval of the application, the City Council approved the Master Plan. The plan  
19 approval was challenged by FOGH in Thurston County Superior Court pursuant to the Land Use  
20 Petition Act, Ch. 36.70C RCW. The appellants also challenged the adequacy of the project FEIS  
21 in that proceeding. On January 29, 2002, the Superior Court issued an oral opinion dismissing

1 the SEPA claims for failure to exhaust administrative remedies. On March 1, 2002, a written  
2 order was entered dismissing the SEPA claims made in the LUPA action.

3 The Superior Court, however, remanded the master plan ordinance to the City of  
4 Westport based on an appearance of fairness violation. The City Council again approved a  
5 master plan ordinance for the Links at Half Moon Bay after a closed record hearing on  
6 September 10, 2002. The City Council proceeded to pass Ordinance 1277 on October 8, 2002,  
7 approving the Master Use Plan for the Links at Half Moon Bay. FOGH appealed the new  
8 approval to Thurston County Superior Court and the court upheld the master plan ordinance in  
9 an Order dated May 21, 2003.<sup>2</sup> FOGH did not appeal this decision.

10 In 2001, the City issued both a Shoreline Management Substantial Development Permit  
11 (SSDP) and a Shoreline Management Conditional Use Permit (CUP) for the project. A CUP was  
12 necessary to authorize filling wetlands as part of the golf course construction. The Department  
13 of Ecology denied the shoreline CUP and appealed the SSDP to the Shorelines Hearings Board  
14 (SHB). FOGH intervened in the SHB case. While the case was pending before the SHB, the  
15 applicant, the City of Westport, and Ecology engaged in a lengthy series of negotiations  
16 regarding revisions to the project plans and conditions. An agreement was ultimately reached,  
17 but the project had been modified to the extent that a new SSDP application and shoreline CUP

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20 <sup>2</sup> The Thurston County Superior Court upheld the Master Plan, but that decision was reached after the City's and the  
21 developer's representations that the details of development would be resolved through the binding site plan review  
process. See, Thurston County Superior Court Oral Opinion, p. 8, Thurston County Cause No. 02-2-01892-8.  
(WSH 01631).



1 was deemed appropriate. At the parties' request, the SHB remanded the appeal to the City of  
2 Westport for the processing of new applications.

3       Following the Superior Court's approval of the Master Plan ordinance and the SHB  
4 remand, the applicant submitted a new Joint Aquatic Resources Permit Application (JARPA) for  
5 issuance of a SSDP and shoreline CUP. That application contained the proposal on appeal in the  
6 current case. In conjunction with the new JARPA, the applicant filed an addendum to the FEIS  
7 addressing changes incorporated since the original FEIS.

8       The City of Westport Planning Commission held an open record hearing on the shoreline  
9 permits on September 10, 2003. The Planning Commission entered Findings of Fact and  
10 Conclusions of Law approving the SSDP and CUP on September 30, 2003. FOGH and WEC  
11 appealed the approval to the Westport City Council, which held a closed record appeal hearing  
12 on October 28, 2003. After refusing to allow supplementation of the evidentiary record to reflect  
13 significant October 2003 erosion events on Half Moon Bay, the Council affirmed the Planning  
14 Commission's decision on the SSDP and CUP on October 28, 2003. The Department of  
15 Ecology subsequently approved the shoreline CUP by letter dated December 4, 2003. FOGH  
16 and WEC timely appealed the shoreline decisions to the ELUHB Board in this case.

17       On or around November 19, 2003, Mox Chehalis, LLC applied to the City of Westport  
18 for a Binding Site Plan Review for the Links at Half Moon Bay Project. The application was  
19 referred to the Site Plan Review Board (SPRB) for consideration. The SPRB issued a decision  
20 on February 2, 2004, conditionally approving the application for Binding Site Plan Review.  
21 FOGH appealed the binding site plan approval to the Westport Hearing Examiner, who held an

1 open record hearing on the appeal April 8-9, 2004. The Examiner took evidence on a number of  
2 topics including testimony regarding storm-caused erosion during October-December 2003. The  
3 Hearing Examiner issued a decision dated April 21, 2004, upholding certain aspects of the appeal  
4 and rejecting others. (BSP 01072-01076).

5 The Examiner rejected arguments raised by FOGH alleging that the application was  
6 inadequate, that use of a binding site plan was inappropriate, that the plan did not conform to  
7 required setbacks, and that the project was contrary to the public interest. The hearing examiner  
8 upheld the FOGH appeal on the claim that the SPRB decision failed to make written findings on  
9 the items required by WMC 17.36B.060 and on the argument that actual dedications of  
10 easements and land for roads and utilities should have been required. The Hearing Examiner  
11 remanded the case to the SPRB for further consideration. The SPRB appealed the Hearing  
12 Examiner's decision to the City Council and FOGH cross-appealed.

13 The City Council conducted a closed record appeal of the Binding Site Plan decision on  
14 June 16, 2004, and issued a decision dated June 22, 2004, ruling in favor of the SPRB on appeal,  
15 and rejecting the appeal arguments raised by FOGH. (BSP 01151-01163). The City Council  
16 concluded the project did not need to obtain binding site plan review and therefore the findings  
17 required under WMC 17.36B.060 for binding site plan review were unnecessary. The Council  
18 further concluded dedications of property for roads and utilities did not need to be made at the  
19 time the of BSP approval. The Hearing Examiner's decision to rely on conclusions on setback  
20 compliance and public interest requirements reached by the Planning Commission during earlier  
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1 shoreline permit proceedings was affirmed by the City Council. FOGH appealed the City  
2 Council's decision on the Binding Site Plan appeal to the ELUHB Board.

3 The appeals of the SSDP and the Binding Site Plan approval were filed before the  
4 ELUHB Board because Mox-Chehalis applied to the State of Washington Office of Regulatory  
5 Assistance in July 2003, requesting the Links at Half Moon Bay be designated as a "qualifying  
6 project" under the Laws of 2003, Chapter 393, Section 3 (Ch. 43.21L, RCW). The Office of  
7 Regulatory Assistance found the project qualified because it was proposed in a "distressed area"  
8 as defined by the statute and was designed to provide at least thirty full-time year-round jobs.  
9 (RE-21). The Westport and Port of Grays Harbor governments have been looking for economic  
10 development opportunities to revitalize the tourist segment of the local economy, since  
11 traditional fishing and timber industries have declined in recent years.

### 12 Legal Analysis

#### 13 1.

14 The Environmental and Land Use Hearings Board has jurisdiction over the parties and  
15 the subject matter of this case pursuant to RCW 43.21L.020 which provides, in part:

16 The appeal process authorized in this chapter shall, notwithstanding any  
17 other provisions of this code, be the exclusive process for review of the  
18 decisions made by participating permit agencies on permit applications  
for a qualifying project.

19 In this case, the Washington Office of Permit Assistance has certified the Links at Half  
20 Moon Bay project as a qualifying project and the ELUHB Board is the appropriate forum for all  
21 final permit decisions on the qualifying project. This decision deals with those permit decisions

1 subject to record review—the shoreline substantial development permit and the binding site plan  
2 approval.

3 2.

4 The ELUHB considers the SSDP and binding site plan appeals on the basis of the  
5 evidentiary record from the local proceedings. No additional evidence was admitted during the  
6 ELUHB record review hearing process.<sup>3</sup> The burden of proof is on the appealing parties to show  
7 by a preponderance of the evidence that relief is appropriate.

8 3.

9 In deciding the case, the ELUHB Board applies the standards in RCW 43.21L.130:

10 (1) The Board shall review the decision record and all such evidence as is  
11 permitted to supplement the record for review restricted to the decision  
12 record or is required for de novo review under RCW 43.21L.120. The  
13 board may grant relief only if the party seeking relief has carried the  
14 burden of establishing that one of the standards set forth in (a) through (f)  
15 of this subsection has been met. The standards are:

14 (a) The body or officer that made the permit decision engaged in  
15 unlawful procedure or failed to follow a prescribed process, unless the  
16 error was harmless;

16 (b) The permit decision is an erroneous interpretation of the law, after  
17 allowing for such deference as is due the construction of a law by an  
18 agency with expertise;

17 (c) The permit decision is not supported by evidence that is substantial  
18 when viewed in light of the whole record before the board;

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21 <sup>3</sup> The appellants made a motion asking that the Board take judicial notice of certain items, but the Board is not granting the motion. The appellants made an inadequate showing of grounds for the Board to take judicial notice of the proffered material.

1 (d) The permit decision is a clearly erroneous application of the law to  
2 the facts;

3 (e) The permit decision is outside the authority or jurisdiction of the body  
4 or officer making the decision; or

5 (f) The permit decision violates the constitutional rights of the party  
6 seeking relief.

7 (2) The board may affirm or reverse each and every permit decision under  
8 review or remand the decision for modification or further proceedings  
9 involving the permit agencies.

10 BINDING SITE PLAN

11 4.

12 The City Council's decision on appeal overturned the Hearing Examiner's ruling that the  
13 Links at Half Moon Bay project was subject to binding site plan review. FOGH and WEC  
14 challenge the Westport City Council's conclusion that the Links at Half Moon Bay project did  
15 not need binding site plan review because no division of property was being proposed. The  
16 appellants also challenge the Council's corollary conclusion that the findings for a binding site  
17 plan contained in WMC 17.36B.060 were not required in this case. Finally FOGH and WEC  
18 contend the Council interpreted the law erroneously by failing to require concurrent dedication  
19 of rights-of-way, easements, and land under WMC 17.36B.080.

20 5.

21 The City Council concluded that WMC Chapter 17.36B, entitled "Binding Site Plans,"  
actually provides for two separate types of site plan review. The City contends binding site plan  
review only pertains to situations involving a division of land in lieu of subdivision approval.

1 Site plan review is apparently a separate process with less detailed and less stringent  
2 requirements. The provisions of WMC 17.36B do not make a clear delineation between the  
3 requirements and processes applicable to binding site plan review and those applicable to site  
4 plan review. An example of this lack of distinction is presented by WMC 17.36B.040, which  
5 outlines the required contents for an application. The code section makes no differentiation  
6 between binding site plan review and site plan review. By using the words “application for site  
7 plan approval,” the language governing application contents would pertain only to site plan  
8 review under the City’s argument. The application process for a binding site plan remains  
9 undefined. A review of the remainder of WMC 17.36B reveals no other section of the chapter  
10 that discusses the contents of an application for “binding” site plan review.

11 6.

12 The body designated to review applications is outlined in WMC 17.36B.050, which states  
13 the review board shall review the proposed site plan for “compliance with the provisions of this  
14 chapter and other applicable laws and regulations. The board may require additional information  
15 necessary for such review. The board shall determine whether the proposed use is served and  
16 makes adequate provision for the public health, safety, and general welfare.” The following  
17 section, WMC 17.36B.060, indicates a proposed binding site plan cannot be approved unless the  
18 board (apparently the same board identified in WMC 17.36B.050) makes written findings on  
19 specifically enumerated topics. The City argues that these two sections define the standards  
20 governing the consideration of two different types of site plan review. The remaining sections of  
21 the chapter 17.36B of the WMC also make inconsistent references to binding site plans and site

1 plans. The amendment procedure mentions only site plans. The duration of approval section  
2 mentions only binding site plans. No clear pattern distinguishes between the asserted processes  
3 for binding site plan review and site plan review. Construing Chapter 17.36B to create two  
4 distinct review processes renders each process incomplete and unworkable.

5 The City's suggested interpretation of WMC Chapter 17.36B is inconsistent with the  
6 rules of statutory construction that statutes should be read to give meaning to each part and to  
7 avoid absurd or strained consequences. *In re Eaton*, 110 Wn.2d 892, 901, 757 P.2d 961 (1988).  
8 Additional rules of statutory construction provide that provisions in a statute are read in the  
9 context of the statute as a whole, *Pope v. University of Washington*, 121 Wn. 2d 479, 489, 852  
10 P.2d 1055, 871 P.2d 590 (1993), cert. denied, 127 L.Ed. 2d 381 (1994); and that "[a]ll the  
11 provisions of an act must be considered in their relation to each other and, if possible,  
12 harmoniously construed to insure proper construction of each provision." *Publishers Forest*  
13 *Prods. Co. v State*, 81 Wn.2d 814, 816, 505 P.2d. 453 (1973).

14 7.

15 The City's asserted interpretation is also contrary to numerous formal statements  
16 contained in its own documents and project decisions. The Master Plan Ordinance for this  
17 project, Ordinance 1277, indicates in conditions 1, 8, 14, and 21 that various specific elements of  
18 the Links project will be addressed during *binding site plan review*. The zoning code provisions  
19 developed specifically to accommodate this type of destination resort development provide for  
20 *binding site plan review*:

1            17.21.30 Permitting processes. (a) The entire zone shall be planned as  
2 a whole, complete with integrated utility, transportation, land use, and  
3 landscaping layout and phasing through the master plan development  
4 process, Chapter 17.36A. When approved, the master plan, including the  
land use map, the development standards for the zone, and the phasing  
plan, shall be adopted by the city as part of the city development  
regulations and zoning code.

5            (b) The city shall process individual building projects through the  
6 ***binding site plan process*** as provided in Chapter 14.10. (Ord. 1146  
§2(part), 1998).

(emphasis added). The Planning Commission decision on the SDP/CUP for this project  
specifically states at paragraph 13: “The project requires a *binding site plan approval* under  
Westport Municipal Code chapter 17.36B.” The application received from Mox-Chehalis seeks  
a *binding site plan* approval and refers to the application for *binding site plan* approval in the  
transmittal memo from the applicant’s consultant Economic and Engineering Services. Both the  
Site Plan Review Board decision and the Westport Hearing Examiner decision state that they are  
granting *binding site plan* approval.

8.

Given the inconsistent nature of the code provisions in WMC Chapter 17.36B, and the  
contrary position taken by the City in a number of formal actions relating to the project, it is  
inappropriate to give substantial deference to the City’s most recent interpretation of the Code.  
The City’s conclusion that the Links at Half Moon Bay project does not require binding site plan  
approval is an error of law and must be reversed.



1  
2 Based on the Board's conclusion that a binding site plan approval was required for the  
3 project, the terms of WMC 17.36B.060 become relevant. The appellants claim the SPRB  
4 decision did not specifically make a finding that the public use and interest will be served by the  
5 platting of such binding site plan and any dedication. WMC 17.36B.060(2). The Hearing  
6 Examiner upheld this challenge to the BSP, but the City Council overturned it on the basis that  
7 findings and conclusions under 17.36B.060 were not required because the project did not require  
8 a binding site plan approval. The SPRB decision did not explicitly make a finding that the public  
9 use and interest would be served by the platting of the binding site plan. In that respect, the  
10 decision technically failed to comply with the requirements of WMC 17.36B.060(2). This  
11 omission appears to be an oversight since the SPRB did specifically find the Westport City  
12 Council approved a Master Plan Development for the project by adoption of ordinance 1277.  
13 The Master Plan Development ordinance concluded, "[A]s amended and conditioned, the public  
14 interest is served by the approval of the project." (WSH 01606). To achieve compliance with  
15 the applicable standards in WMC 17.36B.060, the decision must be remanded for inclusion of a  
16 specific finding under WMC 17.36B.060(2). Further, the Board notes that the required public  
17 interest determination for the BSP is limited only to considerations under the BSP statute. That  
18 is, the public interests at issue are not public interests relating to the shorelines or other  
19 environmental issues because the public interest in those subject matters have been considered  
20 under different permitting procedures. Rather, the public interest determination under the BSP is  
21 related to the adequacy of public works associated with the project.

1 10.

2 FOGH and WEC have also argued the BSP decision was incorrect because it did not  
3 require concurrent dedication of rights of way, easements, and land under WMC 17.36.080. The  
4 City argued such a conveyance of property was premature and inconsistent with City interests  
5 and standard practices. The City prefers to obtain title to such items after construction, so that  
6 precise locations and compliance with applicable construction standards can be verified. In the  
7 analogous platting process the applicant is not required to comply with final plat requirements at  
8 the preliminary plat stage. *Loveless v. Yantis*, 82 Wn.2d 754, 761, 513 P.2d 1023 (1973) Giving  
9 deference to the City's interpretation of the statute and its standard practices, the Board  
10 concludes that making the binding site plan final approval conditional on dedications, is an  
11 acceptable interpretation of WMC 17.36B and other applicable City public works ordinances.

12 SETBACK and LOCATION OF MARRAM GRASS LINE

13 11.

14 Challenges to the location of the marram grass line in the vicinity of the proposed  
15 condominiums and to compliance with the applicable setback were argued in both the SSDP case  
16 and the BSP case. During the SSDP case, FOGH raised the setback issue, but provided no expert  
17 testimony addressing the location of the marram grass line in relation to the proposed  
18 condominiums. The Planning Commission reviewed the evidence presented at the hearing and  
19 concluded that the appellants failed to contradict the delineation of Ordinary High Water Mark  
20 and marram grass line provided by the applicant's consultants, Economic and Engineering  
21 Services. The Planning Commission further found the setback requirements required by WMC

1 17.32.050(8) applied to buildings and not to infiltration ponds, roads, or utilities. (Finding of  
2 Fact 31).

3 12.

4 During the BSP case, FOGH presented the testimony of Sarah Cooke, PhD., an expert in  
5 aerial photography interpretation and in making ordinary high water mark determinations. Ms.  
6 Cooke testified the marram grass line had regressed shoreward a considerable distance since  
7 2000 and that “as of November 2000, ... there was no longer 200 feet between the projected  
8 location of the condominiums and the marram grass line.” The Hearing Examiner considered the  
9 evidence of erosion and concluded while the marram grass line may have continued to move  
10 after the Master Plan and SSDP approvals were granted, such activity is not unexpected. The  
11 Examiner found: “The exhibits show the planning commission and city council looked at  
12 substantially the same information before arriving at their decision to approve the Links at Half  
13 Moon Bay. The evidence shows the setback procedural requirement was satisfied.” (BSP  
14 01072). The appellants argue that the City improperly used collateral estoppel to resolve the  
15 issue of whether the 200-foot setback required by the Westport Shoreline Master Program was  
16 met in the binding site plan review.

17 13.

18 The Hearing Examiner considered the substance of the setback argument and observed  
19 that the 200-foot setback is a requirement arising from the Westport Shoreline Master Program.  
20 The Examiner concluded the 200 foot setback was required by the binding site plan, and the  
21 shoreline approvals and would be determined on the ground by the building inspector at the time

1 the foundation was poured. The Examiner did not consider the location of the line on a map  
2 controlling in the situation. The City Council upheld that portion of the Hearing Examiner's  
3 decision on appeal.

4 14.

5 The Board finds no error of law or clearly erroneous application of the law to the facts in  
6 connection with the setback arguments. The condominiums are required to meet the 200-foot  
7 setback at the time they are constructed. That location could change between mapping and  
8 construction. The procedure for measuring compliance with the 200-foot setback, however,  
9 must conform to the provisions of WMC 17.32.050(8):

10 (8)Setbacks. In OBR and TC zones the building setback shall be two  
11 hundred feet from the edge of the marram grass line. The line shall be  
12 determined as the average of the marram grass line measured two  
hundred feet on either side of the structure to be constructed.

13 The testimony of SPBR member Jim Mankin indicated the City failed to use the average of the  
14 marram grass line measured two hundred feet on either side of the condominium structure to  
15 determine setback compliance. Instead, a measurement was taken from the front of the  
16 condominium to the marram grass line. A protocol averaging the measurements taken 200 feet  
17 on either side of the structure is required by the controlling code section and should be adhered  
18 to when the setback is measured prior to construction. If necessary to comply with the 200 foot  
19 building setback, the building configuration will have to be modified prior to construction.

1 15.

2 Appellants further contend the provisions establishing the “building setback” at 200 feet  
3 from the marram grass line should have been applied to improvements such as stormwater  
4 ponds, roads, and the utility corridor. The City interpreted their code to require the 200-foot  
5 setback only for buildings, not other uses. The Board concludes the appellants have failed to  
6 show the City’s interpretation of the Westport Code on this issue is an error of law or a clearly  
7 erroneous application of the law to the facts.

8 **SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT**

9 16.

10 The City of Westport SSDP decision granted shoreline approval for the luxury hotel,  
11 conference center, and economy hotel, located north of Jetty Access Road, and the  
12 condominiums located south of Jetty Access Road. The appellants have challenged the project  
13 on the grounds that it is inconsistent with the policies of the Shoreline Management Act (RCW  
14 90.58.020) and is inconsistent with the public interest due to coastal erosion in the immediate  
15 vicinity. The Planning Commission decision found the hotel, conference center, and golf course  
16 clubhouse were commercial structures allowed in the TC zone and consistent with the  
17 requirements for commercial development in the WMC 17.32.055(1). (Decision ¶132). The  
18 Planning Commission analyzed the condominiums as residential uses allowed by WMC  
19 17.21.020 and found the buildings are located over 200 feet from the marram grass line along  
20 Half Moon Bay to the north and the Pacific Ocean to the west. (Decision ¶13). The Planning  
21

1 Commission made findings of fact relating to erosion in the area of the condominiums. The  
2 Commission adopted the opinion of Dr. Jeffrey Bradley, which concluded the Half Moon Bay  
3 beach configuration would maintain dynamic equilibrium. (Finding of Fact 63). The Planning  
4 Commission also cited the opinion of Dr. Phillip Osborne, Pacific International Engineering  
5 scientist, who concluded, “it is unlikely that coastal erosion will impact the Links at Half Moon  
6 Bay project site in light of the responses already adopted or planned to respond to coastal  
7 erosion.” (Finding of Fact 62). Dr. Osborne was presumably referring to the action taken by the  
8 Army Corps of Engineers to stabilize the South Jetty area.

9 17.

10 The Planning Commission Findings of Fact and Conclusions of Law were affirmed by  
11 the City Council in their decision on the closed record appeal of the shoreline SSDP and CUP.  
12 (WSH 04452-04453).

13 EROSION

14 18.

15 After the Planning Commission decision in late September 2003, a series of storms  
16 caused significant erosion along the Half Moon Bay shoreline. On October 14, 2003, the  
17 Westport City Council issued a “Proclamation of Emergency” in Resolution #672 providing in  
18 part:

19 WHEREAS, storms of the last week have eroded the remaining shoreline  
20 and are now directly impacting a City owned walking trail, and the  
21 storms predicted to hit the area within the coming days and weeks pose  
an imminent threat to Westhaven State Park; and

1 WHEREAS, damage to or the loss of these facilities will result in a large  
2 economic impact to the City, loss of public access to the beaches and  
3 surrounding areas, and result in environmental damage from debris being  
4 introduced into Half Moon Bay, therefore,

5 BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF  
6 WESTPORT, Grays Harbor COUNTY;

7 SECTION 1

8 That the Council agrees with the Mayor's determination that an  
9 emergency exists in the Westhaven State Park area of Half Moon Bay  
10 due to the loss of dunes which historically protected the state park area,  
11 and the predicted weather conditions consisting of high winds, high surf,  
12 and tide conditions in the City of Westport. The above pose a direct  
13 threat to public safety, and are endangering public infrastructure.

14 SECTION 2

15 That the Council supports the Mayor's authority to direct staff to take  
16 necessary steps to protect public safety and safeguard public property  
17 and is authorized to exercise powers vested under Section 1 of this  
18 resolution in the light of exigencies of an extreme emergency situation  
19 without regard to time-consuming procedures and formalities prescribed  
20 by law.

21 SECTION 3

Both the Mayor and Council strongly encourage all local, state, and  
federal agencies to respond and cooperate fully to resolve the current  
situation and protect the Westhaven State Park and South Jetty Beach  
area from further damage.

In response to this emergency, on or around October 16, 2005, the City constructed a seawall on  
the Half Moon Bay beach in an attempt to protect the public trail, road, and other landward

1 amenities at Westhaven State Park.<sup>4</sup> Ultimately, this effort proved unsuccessful and a portion of  
2 the public trail was lost to erosion.

3 19.

4 Testimony in the BSP case indicated further erosion damage occurred during the  
5 remainder of the winter of 2003-2004. In connection with federal court proceedings challenging  
6 the Corps of Engineers' proposal to place rock on the shore of Half Moon Bay as an interim  
7 stabilization strategy, Dr. Philip Osborne, the City's erosion expert, testified that as of December  
8 12, 2003, "It is my opinion that erosion is an imminent threat to the concrete public trail, asphalt  
9 road (including jetty access road and points of access to the jetty), utility lines located in the  
10 roadway, the parking lot, and the buildings containing bathrooms and changing rooms at  
11 Westhaven State Park. (BSP 231) The litigation resulted in the Corps taking the interim  
12 measure of placing 27,000 cubic yards of sand on the beach to prevent further destruction of  
13 infrastructure."<sup>5</sup> (BSP 853)

14 20.

15 The appellants argue the City Council erred in failing to consider the proffered evidence  
16 regarding erosion and the City's own emergency declaration and actions. Westport argues it had  
17 the discretion to allow the testimony or refuse to allow the testimony. Abuse of discretion is a  
18 high standard. An abuse of discretion occurs when a decision is based on untenable grounds or

---

19  
20 <sup>4</sup> This information was available to the City Council at the time of the closed record review. FOGH offered the  
evidence was allowed into the record of the later binding site plan case.

21 <sup>5</sup> The material in this paragraph was part of the record in the binding site plan case, but was not available to the City  
Council at the time the SSDP was considered.



1 when discretion is exercised in a manner that is manifestly unreasonable. *State v. Valdobinos*,  
2 122 Wn.2d 270, 279, 858 P.2d 199 (1993); *State v. Zunker*, 112 Wn.App. 130, 140, 48 P.3d 344  
3 (2002). This situation presents a particularly strong case for allowing supplementation of the  
4 record to include newly available evidence. The erosion that occurred during October 2003 was  
5 directly relevant to a critical element of the City's decision to approve the shoreline permits.  
6 Arguments and other evidence relating to the erosion issue had been made before the Planning  
7 Commission. The shoreline decision contained findings and opinions regarding erosion that  
8 were inconsistent with the severity of the erosion that occurred on Half Moon Bay in October  
9 2003. The information was available to the City Council prior to its final decision on the  
10 shoreline permits appeal. To disregard evidence so vital to a proper decision on the  
11 condominium portion of the project was not consistent with having the best information  
12 available for making an informed decision. However, even if the Board might decide otherwise,  
13 the City's refusal to reopen the record was not an abuse of discretion in violation of RCW  
14 43.21L140(a).

#### 15 COMPLIANCE WITH SMP AND SMA

#### 16 21.

17 The City concluded the Links at Half Moon Bay project complied with the Westport  
18 SMP and the SMA. The City reached this conclusion after the receipt and review of voluminous  
19 material evaluating the impacts a project of this type would have on the Westport community.  
20 An Environmental Impact Study was required for the project and a detailed analysis of the site  
21 and the environmental impacts attending development were included in the FEIS and the EIS

1 supplement. Public comment on the project was sought and included in the FEIS and the  
2 Planning Commission record on the shoreline permits.

3 22.

4 After considering all the information before it, the Planning Commission issued a  
5 decision addressing the major areas of controversy in the case. The view impacts caused by the  
6 project were analyzed and found minimal. (WSH 04400-04401) The setback challenges were  
7 considered and rejected for insufficient evidence of error. The hotel, conference center, and golf  
8 course clubhouse were found appropriate types of development for location in the TC zone. The  
9 City concluded improved public access to the shoreline would result from required  
10 improvements to the public trail system, creation of a link from the hotel/conference center to the  
11 Westport waterfront trail and upgrades to add a bike land and sidewalk on Jetty Access Road.

12 23.

13 The City analyzed the controversy over coastal erosion on the site and concluded the 200  
14 foot setback from the ordinary high water mark would prevent damage to constructed  
15 improvements. The City accepted evidence indicating erosion was being managed and would  
16 continue to be managed by the Army Corps of Engineers as part of its ongoing maintenance of  
17 the South Jetty area. Past erosion issues, such as the South Jetty breach in 1993, were known to  
18 the City throughout its planning process and decision- making on this project.

1 24.

2 The City entered Conclusions of Law on the shoreline permits indicating the proposed  
3 resort hotel/conference center, associated condominiums, and golf course are consistent with the  
4 Westport SMP and the policies of RCW 90.58.020. The Department of Ecology approved the  
5 shoreline CUP and supported the SSDP at hearing. The Board concludes the appellants have  
6 failed to establish the City's conclusions were unsupported by substantial evidence, constituted  
7 an error of law, or were a clearly erroneous application of the law to the facts.

8 25.

9  
10 The appellants' argue the City erred by allowing buildings over 50 feet in height and  
11 failing to apply yard setbacks contained in the TC zone. The City contends the Master Plan  
12 establishes the zoning and development standards applicable to the project and other more  
13 general restrictions are inapplicable. The Master Plan ordinance states it is adopted "to serve as  
14 the zoning for the property." (WSH 01607). The Ordinance goes on to indicate the conditions  
15 shall apply as development standards for the site. The appellants have failed to show the City's  
16 legal interpretation of these provisions constitutes an error.

17 26.

18  
19 The appellants' have also argued the SSDP is invalid because it does not recite the  
20 required time period for construction. The controlling time period is a matter of law and does  
21

1 not have to be recited in the permit document to be effective. Such an omission is not an error of  
2 law.

3  
4 27.

5 Challenges to the hotel/conference center based on the presence of Wetland HMB were  
6 not part of the record case and are discussed in the ELUHB's de novo decision on this project.  
7 Wetland and habitat impacts related to the golf course are also addressed exclusively in the  
8 shoreline conditional use portion of the de novo case.

9 Based upon the foregoing analysis, the Board enters the following:

10  
11 ORDER

12 1. The Binding Site Plan approval for the Links at Half Moon Bay is affirmed with  
13 the exception of the City's failure to make a finding under WMC 17.36.060(2). The Binding  
14 Site Plan is remanded to the City for further action on this point.

15  
16 2. The City of Westport decision approving a Shoreline Substantial Development  
17 Permit for the Links at Half Moon Bay project is affirmed.

1 Dated this 12<sup>th</sup> day of October 2005.

2 ENVIRONMENTAL AND LAND USE HEARINGS BOARD

3 See Concurrence and Dissent

4 BILL CLARKE, CHAIR

5 WILLIAM H. LYNCH, MEMBER

6 See Concurrence and Dissent

7 JUDY WILSON, MEMBER

8 O'DEAN WILLIAMSON, MEMBER

9 DAN SMALLEY, MEMBER

10 Phyllis K. Macleod  
11 Administrative Appeals Judge