BEFORE THE ENVIRONMENTAL AND LAND USE HEARINGS BOARD

FRIENDS OF GRAYS HARBOR and WASHINGTON ENVIRONMENTAL COUNCIL Appellants, v. CITY OF WESTPORT et al. Respondents	)	ELUHB 03-001 *ET SEQ*. APPELLANTS' OPENING BRIEF ON CLOSED RECORD APPEAL ISSUES.

Appellants Friends of Grays Harbor ("FOGH") and Washington Environmental Council ("WEC") respectfully submit this opening brief on closed record appeal issues.

I. INTRODUCTION.

This case is about a private development proposal to build a golf and condominium resort on some of the state's most precious shorelines. More fundamentally, though, it is a test of the Shorelines Management Act's promise that in deciding the fate of our shorelines, statewide and long-term interests are to take priority.

As the Board is aware, the Links at Half Moon Bay project is the first case involving the Environmental and Land Use Hearings Board ("ELUHB"). This briefing focuses on the two of the Links appeals that are to be decided on the "record" created by the City of Westport:

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

- **Shoreline Appeal.** FOGH and WEC have appealed the City of Westport's approval of the shoreline substantial development permit.
- **Binding Site Plan.** FOGH's has appealed Westport's approval of the binding site plan.

This brief begins with the issues of erosion and setbacks, because those issues are common to both closed record appeals. Specifically, Appellants argue that (1) the City erred in using willful blindness and the doctrine of collateral estoppel to disregard the continued threat of erosion and setback violations; (2) the City erred in both decisions because building major development directly behind a rapidly eroding shoreline is contrary to the public interest; (3) the City erred in relying upon inaccurate data and improper methodology in calculating the setback; and (4) the City erred in approving a project that violates setback requirements.

Next, the brief addresses the issues that are presented only in the binding site plan appeal, mostly relating to local zoning requirements and procedures. The Hearing Examiner found for FOGH on these appeal issues, and the City Council made clear errors of law in its reversal.

Finally, the brief addresses the issues unique to the Appellants' challenge to Westport's decision on the shorelines substantial development permit ("SSDP"). The brief addresses errors in the City's decision, relating to compliance with the Westport Shorelines Master Program ("WSMP") and the Shorelines Management Act ("SMA").

Issues relating to the shorelines Conditional Use Permit ("CUP") are not addressed in this briefing. In a pre-hearing conference held June 10th, Judge McLeod informed the parties that the Board would hear only a single appeal of the CUP, and that appeal would be *de novo*. Pursuant to these instructions,

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Appellants have removed all argument relating to the CUP – including *all wetland claims* -- from this closed record briefing. Appellants will present these issues in the *de novo* CUP appeal.

Similarly, to avoid duplication, water quality issues will be presented only in the context of the 401 appeal, and have not been briefed in this closed record briefing. Wetlands and water quality are briefly addressed in the Statement of Facts to provide context to other appeal issues.

II. STATEMENT OF FACTS[1]

A. THE PROJECT WOULD DESTROY ONE OF THE MOST IMPORTANT AND FRAGILE PUBLIC SHORELINES IN THE STATE.

Every resource agency looking at this project has recognized that the project would have a significant impact on a rare and fragile ecosystem. Both records contain the comments of Department of Ecology, Department of Parks and Recreation, Corps of Engineers, Washington Fish and Wildlife, and Washington Department of Natural Resources. BSP 395 (Ecology); BSP 405 (WDFW); BSP 413 (Parks); BSP 422, 458 (Corps); BSP 424 (DNR); *See also* WSH 474 (comment letters in FEIS). **TAB A.**

The agencies raised similar concerns, as follows:

Issue Raised	**Corps**	**WDFW**	**Ecology**	**DNR**	**Parks**
Project within erosion zone.	**Yes**	**Yes**	**Yes**	**Yes**	**Yes**
Impacts to public open			**Yes**	**Yes**	**Yes**

[1] The Statement of Facts includes references to the binding site plan record, designated as BSP, and Westport's shorelines record, designated as WSH. In evaluating "factual issues and the conclusions drawn from the factual issues" relating to a specific permit, the Board should limit its consideration to the record specific to that permit. WAC 199-08-500(2). The Argument section of this brief limits references to the specific record to assist the Board in this record-specific evaluation. However, most issues in this case can be considered legal issues in which the Board's evaluation is not confined to the record. *Id.*

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

space / public access					
Impacts to wetlands.		**Yes**	**Yes**		**Yes**
Water quality		**Yes**	**Yes**	**Yes**	**Yes**
Habitat		**Yes**	**Yes**		**Yes**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

1. The site provides a critical amenity to popular State Parks.

The site is the heart of a State Parks complex that contains "the most frequently visited ocean beaches in the State of Washington." BSP 410 (WDFW comments). **TAB A.** Directly to the north is Westhaven State Park and Half Moon Bay; to the south is Westport Light State Park. Linking the two State Parks is the public shoreline of the Pacific Ocean and an interdunal public trail. "Visitors to these sites are interested primarily in the natural environment and the recreational amenities it offers". *Id.*

In its comments on the project, Washington Parks noted that

> **The placement of condos adjacent to Westhaven State Park, two one-half million gallon water storage tanks, and an extensive golf course would drastically change the aesthetics of the park areas. Visitors to both State Parks presently enjoy the aesthetics of a secluded dunal wilderness area.**
> ...
> **Visitors to Westport Light State Park and Westhaven State Park enjoy the unique wildlife, vegetation and habitat of the dunal wetlands.**

BSP 416-17 (emphasis added). **TAB A.**

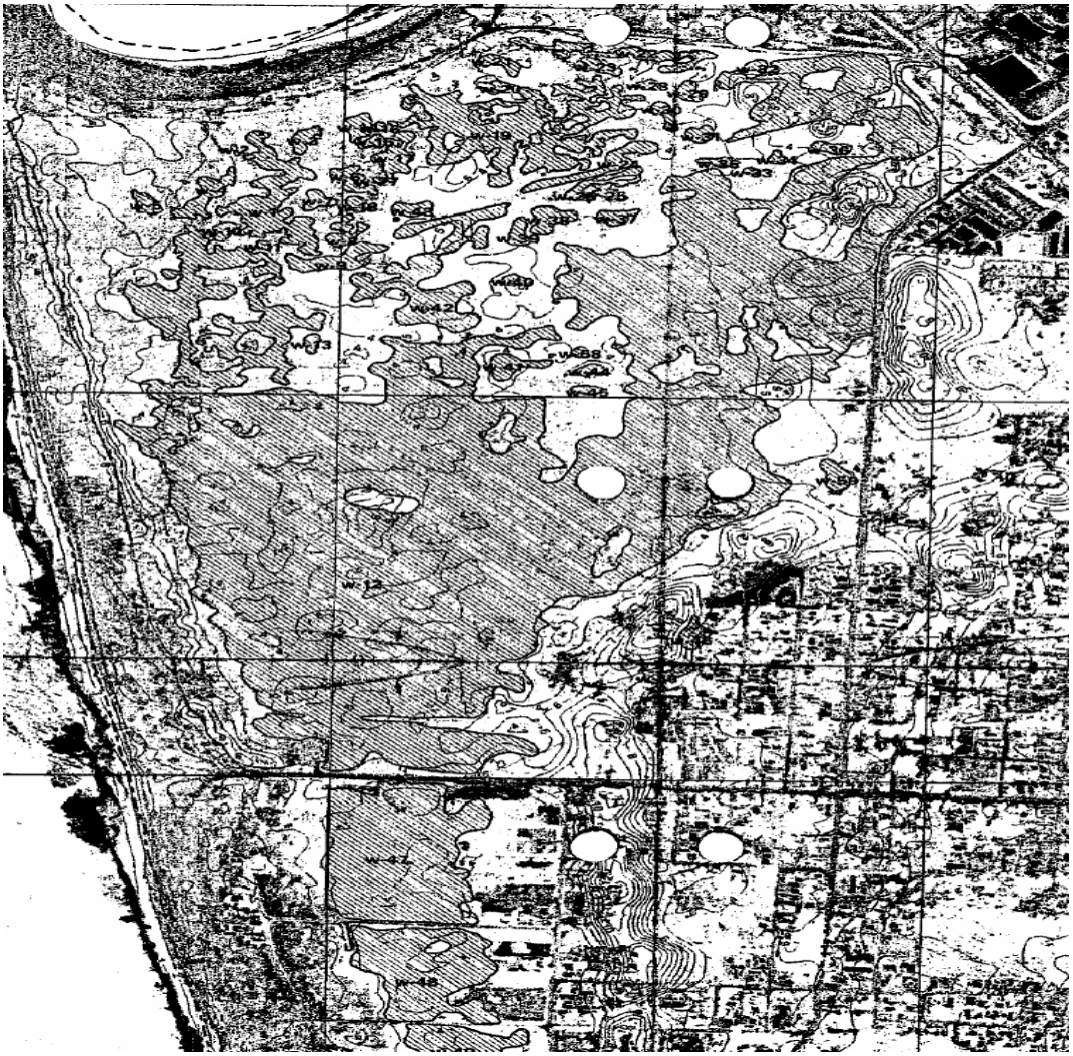
2. The project would destroy over 55 acres of rare, category II interdunal wetlands and buffers.

a. A mosaic of rare interdunal wetlands and uplands covers virtually the entire site and extend across Westport Light State Park.

The wetland delineation map submitted by the applicant shows a mosaic of interdunal wetlands covering virtually the entire site. *See* BSP 779; WSH 902. An interdunal wetland inventory conducted in part by Westport confirmed that this mosaic extends south along the coast and includes the entire Wesport Light State Park. WSH 4001 *et seq.*; BSP 621 *et seq.* **TAB B.**

The findings of the Wetland Inventory are shown on the following map, with the crosshatched sections indicating the wetland areas in this interdunal system.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883



Indeed, the main wetland on the project site, labeled by the inventory as W-12, is the largest wetland in the mosaic and extends deep into the State Park.

> Wetlands inventoried cover approximately 350 acres, with the majority of the wetland area occurring in one wetland, referred to as Wetland W-12. **W-12 is a large wetland area (approximately 237 acres) located on the Port of Grays Harbor Property and extending southward into the Westport Light State Park. …**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Interdunal Wetland Inventory, 5-6 (emphasis added) (BSP 621 *et seq.;* WSH 4001 *et seq*).

TAB B. *See* BSP 650 (Applicant's consultant confirmed that wetlands on Westport Light State Park extend to the project site). **TAB C.**

In its comments on the DEIS, the Washington State Department of Fish and Wildlife described the importance of these wetlands:

> The site is predominantly wetlands. … **It is the largest block of undeveloped single ownership interdunal wetlands in the Westport area. These wetlands are not only critical habitat themselves, but are performing the critical function of infiltration and biofiltration of untreated stormwater from adjacent developments. This property, the vast majority (73%) of which is interdunal and early successional forested wetlands, drains into the extensive saltmarsh bordering the City of Westport, which is a tributary itself to the Elk River estuarine system. This system supports an abundant spawning population of herring,** which spawn on saltmarsh vegetation and eelgrass, and **which are extremely sensitive to water quality impacts … This species of baitfish comprises critical forage for pacific salmonids, among them the ESA listed Bull Trout found in adjacent Grays Harbor.**

BSP 407 *et seq. (emphasis added);* WSH 474 *(included in FEIS).* **TAB A.**

WDFW concluded that if the project is built, the "***Wetland ecosystems on the site will be compromised and damaged. Stormwater will be imperfectly detained and treated, leading to contaminated discharge to the adjacent saltmarsh wetlands.***" *Id.*

Loss of wetlands means loss of habitat. WDFW confirmed that if the Links is built, ***"Impacts to habitat will likely be severe and difficult to mitigate.*** So much wetland habitat has been lost or fragmented in this area in recent years that ***these remaining wetlands are critical and will need to be preserved on site."*** BSP 583. **TAB A.** Washington Parks confirmed "These wetlands have more value because they are ***rare in the state of Washington***." BSP 417. **TAB A.**

b. The proposal creates over 55 acres of wetland and buffer impacts.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The site plan demonstrates that 13 of the 18 golf holes and the practice range require wetland fill or wetland excavation. JARPA, WSH 1; BSP 779 (Exhibit 16A and 16B). **TAB D.** In addition, approximately 13 acres of wetlands—most of which are now forested—will be permanently mowed, preventing the succession of plant communities. *Id. at* Exs. 16A, 16B, 17G. Combined, the applicant acknowledges approximately 25 acres of wetland impacts.

The applicant proposes 31.27 acres of wetland buffer impacts *just for the fairways*, but has never quantified or proposed mitigation for the buffer impacts for other features of the golf course, such as tees and greens, paths, restrooms, lakes, and the like.[2]

Much of the impacted wetlands are currently forested by trees ranging from 20 to 60 feet in height. *See* Wetland Mitigation Plan. Department of Ecology found that "much of the site is forested with scrub pine species, and the habitat value appears to be INCREASING as the complexity of the system develops." BSP 402. **TAB A.**

The Applicant made no effort to avoid forested wetlands. Almost two acres of forested wetlands will be permanently deforested *just for Hole 10.* JARPA, Ex. 16A. **TAB D.**

3. The interdunal wetlands contain important habitat for Coho salmon and snowy plover.

Around February 1, 2002, the Department of Fish and Wildlife found 4-5" Coho smolt at the edge of the wetland complex on the site on Forrest Avenue. WSH 3947 *et seq*. **TAB E.** The wetlands on the site were 4-5 feet deep with standing water in this area. *Id*. Thus, Coho had access to the large

[2] The Applicant determined there would be 31+ acres of wetland impacts from the "fairways only." *See* Appendix C to Wetland Mitigation Plan. The 31+ number came from the "fairway buffer calculations."

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

wetland complex on the site that extends to Westport Light State Park. These Coho are a candidate species under the Endangered Species Act. *Id*.

In addition, the snowy plover is listed as Threatened under the Endangered Species Act, and is listed as Endangered by the State. The proposed project impacts two of the seven recognized locations of current or historical snowy plover *breeding and wintering areas* in Washington State: the Half Moon Bay shoreline and Firecracker Point. WSH 3942 *et seq.* **TAB E.** Washington Parks is concerned about the loss of potential snowy plover and surf-smelt habitats from the project. BSP 418. **TAB A.**

4. Contamination from the golf course will be discharged to the estuary, which already suffers impaired water quality.

As the Board will learn during the *de novo* appeal, surface water from the site discharges into salt marshes in Grays Harbor Estuary. These areas are critical to salmonids, utilized for oyster farming, and extremely susceptible to pollution. *BSP 407*. Grays Harbor estuary in the vicinity of the discharge is already on the 303(d) list for impaired for water quality.

5. The site is threatened by coastal erosion.

The U.S. Army Corps of Engineers, the Department of Ecology, Department of Parks and Recreation, and Department of Fish & Wildlife all criticized the Links Project because it is sited in an area threatened by coastal erosion. The evidence in both records shows that both the "South Beach" to the west and Half Moon Bay to the north have suffered extreme erosion in recent years and are in a long term erosion trend.

a. State and Federal Agencies have extensively studied erosion in the area and concluded that the Links site will be at risk over the life of the project.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Appellants have not retained an expert testimony on erosion because State and Federal agencies have extensively studied the erosion problem in the vicinity of the site. These agencies have concluded that erosion on both the South Beach and Half Moon Bay is continuing to threaten the Links site. Moreover, in the most comprehensive study of the erosion threat in the area, the Corps confirmed this long-term erosion trend on both Half Moon Bay and the South Beach.[4]

In criticizing the Links project due to the erosion threat, the Corps noted that national experts on erosion have rejected the conclusion of shoreline stability. It wrote, ***"The Corps study confirmed that 'continued erosion of the shoreline adjacent to the South Jetty, if left unchecked, would result in the formation of a permanent breach between the South Jetty and the adjacent South Beach.' The 'planned location of the [Links] development is within the expected erosion zone if a breach reforms.'"*** **TAB A.**

Every scenario studied by the Corps showed significant erosion impacting the project site. Indeed, the Corps found that beach nourishment is insufficient to halt the erosion threatening the Links site.

[4] *See* U.S. Army Corps of Engineers, Evaluation Report, Long Term Maintenance of the South Jetty at Grays Harbor, Washington (June 1997)("Evaluation Report"). The Corps found that "-30 to -40 feet/year may be a reasonable long term (10-50 year) average rate of recession for the shoreline immediately south of the South Jetty." Evaluation Report, at 14. It found that "Although the average long term recession rate along the Half Moon Bay shoreline is -5 to -10 feet/year, the rate of erosion appears to vary widely." *Id*. at 15. In 1993-94, erosion was approximately -70 feet/year. *Id*. WSH __.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Additionally, Ecology, which also employs coastal engineers that have extensively studied the site, concluded that "[b]ased on current scientific knowledge, over time, erosion or flooding of this area cannot be ruled out." Ecology stated "***The sustainability of such development in such vulnerable areas needs to be carefully considered against the relevant statutory policies and regulations before concluding it would be in the best interest of the citizens of the state to allow such development***." **TAB A.** Ecology left this "careful consideration" to this Board.

Similarly, the Department of Fish & Wildlife concluded, "The [Links] site is located in an area of recent and ongoing erosion. … Most of the development is proposed to occur in the predicted erosion area. ***Any development is therefore at great risk from erosion that will inevitably occur during the life of the project."*** **TAB A.**

b. Respondents and their experts have no credibility on the erosion issue.

Respondents have developed a pattern of hypocrisy and inconsistency with regard to the issue of erosion. They deny the threat of coastal erosion while the permitting process ensues, and then immediately turn around and declare erosion emergencies and demand the Corps of Engineers take emergency action to protect public infrastructure. The following chronology paints a compelling picture of this inconsistency, and demonstrates Respondents' lack of credibility on this issue.

- **August 2001 -- erosion is no problem.** During the 2001 master plan permitting, Respondents deny erosion threat and the City Council approves the master plan.
- **November 2001 -- erosion is an emergency.** After permit is granted, City of Westport declares an emergency on November 28, 2001, stating that in just five weeks "the sand spit adjacent to the South Jetty has lost approximately 80 feet on the Half Moon Bay side, and 40

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

feet from the ocean side. … ***We at the City of Westport consider this an emergency*** situation that requires immediate action to prevent a breach in that area." BSP 538. **TAB F.** The Corps took emergency action, placing 125,000 cubic yards of fill on the South Beach shoreline just northwest of the Links site, and 40,000 cubic yards of gravel on the Half Moon Bay shoreline.

- **October 2002 -- erosion is no problem.** In its 2002 master plan decision, Respondents again denied the erosion threat and reissued the master plan approval.
- **January 2002 -- erosion is an emergency.** "In January 2002, the Corps' contractor for the South Jetty Maintenance project made emergency repairs to the haul road and placed 13,000 cubic yards of gravels and cobbles along the western shore of Half Moon Bay." 2002 Final EA, Corps of Engineers, at p. 1. WSH 3742.
- **September 2003 -- erosion is no problem.** During the 2003 shorelines hearing, the City submitted a declaration of its expert, Harry Hosey, minimizing the erosion threat in Half Moon Bay. WSH 1660 *et seq.* The Planning Commission issues the shorelines permits, concluding that there is no erosion threat, as discussed below. WSH 4395.
- **October 2003, erosion is an emergency.** Within a month after the shoreline permit is granted, Westport again declares "***an emergency exists***" and places shoreline armoring on the beach of Half Moon Bay. *See* **TABS F-I .**

Westport and its consultants freely admit the erosion threat during the "emergency" periods (when no permits are being decided and Westport is looking for the Corps to protect the shoreline). For example, in an internal memorandum, Westport's consultants Pacific International Engineering ("PIE")

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

admitted that "***constructed features shown on the [Links] site plan are within the zone in which the shoreline could recede by episodic storm erosion***." Their consultant Parametrix similarly warned, ***"We hope [the applicants] are fully aware of the possible severe… coastal erosion … and other possible effects of the environment on their project."***

During the 2003 emergency, Westport's administrator, Randy Lewis, stated: ***"Basically erosion is going to continue. .. We're not so arrogant that we're going to say we can stand up and put a halt to mother nature***."

During the 2003 emergency, Ecology's coastal engineers wrote: ***"[B]each erosion along the Half Moon Bay and the ocean coast is serious again. This erosion should not be a surprise, in fact it is fully anticipated. The temporary benefit of sand accumulation resulting from the 97-98 El Nino is over, and the beach is returning to its long-term erosion trend."*** Ecology's scientists publicly stated that this area "is essentially in an erosion mode, and there's no expectation that it's going to change. … we basically have a net loss of sand along those beaches."

B. PREVIOUS LITIGATION.

The first litigation in this case involved the Master Plan Development approval, which is the process by which zoning is adopted in the Tourist Commercial Zone. The Hearing Examiner issued his Findings and Conclusions on the Master Plan on June 15, 2001. Of particular import, the Hearing Examiner found that the proposed condominiums on the shore of Half Moon Bay were inconsistent with recreational uses at the State Park. *See* Hearing Examiner Decision and Order on Master Plan. The City Council disagreed with this finding and approved the project, including the condominiums, in an Ordinance adopted August 14, 2001.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

FOGH and another environmental organization brought suit in Thurston County Superior Court, and the Superior Court remanded due to for a violation of the Appearance of Fairness Doctrine.

After the City Council cured this defect, FOGH again challenged the Master Program to Superior Court, arguing primarily that the master plan was too vague. Respondents in the case—Westport, Mox Chehalis, and Port of Grays Harbor—successfully argued that the Master Plan could be general because detailed review would occur during the binding site plan process.

The history of the case before the Shorelines Hearings Board is stated in Appellants' Opposition to Motion to Dismiss, at pages 6-9, which is hereby incorporated by reference.

C. HISTORY OF THE CLOSED RECORD DECISIONS AND THE 2003 EROSION EMERGENCY.

1. The Planning Commission found that the erosion problem was in check.

In its September 30, 2002 decision, the Planning Commission made numerous findings on the erosion issue necessary to its grant of the shorelines permits. For example, it found that the project met the 200-foot setback requirement, that the coastal areas near the project had reached "dynamic stability," and that the project site was not likely to erode. *See* Findings, 31, 58, 61, 62, 63, 64 (WSH 4393 *et seq*). **Tab O.** Based upon these findings and others, the Planning Commission concluded that the proposal would not harm the public interest, and was not detrimental to the public's health, safety, and welfare, *Conclusion 9, 15.*

2. In the month following the Planning Commission's Shoreline decision, Half Moon Bay experienced serious erosion, threatening City infrastructure and causing Westport to declare an emergency and install emergency armoring of the Half Moon Bay shoreline.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The Planning Commission's findings and conclusions were almost immediately proven incorrect.

In October, the month of leading up to the appeal of the shoreline permits before the City Council, a series of erosion events along the beach of Half Moon Bay proved that the Links project ***was*** at risk from erosion.

- On the weekend of October 12th, a series of dramatic storms caused serious erosion on the Half Moon Bay shoreline, just north of the Links site. The shoreline in front of the proposed condominiums and other project features significantly retreated.
- On October 13th, the City demanded that the Parks Department intervene to stabilize the shoreline of Half Moon Bay because the storms were threatening Jetty Access Road and the public trail north of the Links site**.** *BSP 695.* **TAB G.** Days later, the Parks Commission stated that they were prepared to remove structures that were threatened by erosion, and to remove parts of the roadway that fell into the water. BSP 670. **TAB G.**
- On October 14th, the City proclaimed that the erosion on Half Moon Bay constituted an emergency. It stated, ***"an emergency exists in the Westhaven State Park area of Half Moon Bay due to the loss of dunes which historically protected the state park area, and the predicted weather conditions*** *consisting of high winds, high surf, and tide conditions in the City of Westport.* ***The above pose a direct threat to public safety, and are endangering public welfare."*** BSP 61. **TAB G.**
- The proclamation of emergency directed the City ***"to take necessary steps to protect public safety and safeguard public property … without regard to the time-consuming procedures and formalities prescribed by law."*** *Id.* **TAB G.**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

- On October 16th, taking matters into its own hands, the City constructed a major seawall on the beach. *See* testimony of Randy Lewis, Photos. **TABS H, I.** In the following week, storms destroyed the seawall and eroded the beach landward several times, and each time the City rebuilt the wall closer to the Links project. *Id.*
- Erosion washed the public trail into Half Moon Bay. *BSP 681*. **TAB I.**

The following series of photos show Westport's futile attempts to control erosion along Half Moon Bay – in front of the Westhaven State Park parking lot -- and the ultimate loss of the public trail (BSP 670 *et seq)*. **TAB I.**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

3. In approving the shoreline permits, the City Council refused to consider or take judicial notice of its own declaration of emergency or emergency armoring of Half Moon Bay.

Appellants attempted to introduce evidence of the erosion emergency and the City Council's declaration of emergency and emergency armoring during the City Council's appeal hearing on October 28th. Appellants argued that "since that [Planning Commission] hearing happened, I think we all know, once again, that erosion is a serious issue. You, this Council, declared an emergency … city infrastructure that was destroyed." *October 28th Transcript, p. 10 et seq.*

Appellants argued that the evidence presented at the Planning Commission hearing had been proven incorrect and there was no longer a 200-foot setback between the shoreline and the development, as required by the Westport Shoreline Master Program. *Id.* at pages 13-14. Remarkably, the City Council refused to consider the dramatic events of the previous month, including the erosion damage to

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

infrastructure, the Council's own declaration of emergency, and the emergency actions taken by the City to protect the shoreline in front of the Links site. *Id.*

The City Council demonstrated a complete lack of concern for the public interest when it refused to admit the evidence or allow an offer of proof, and then mischaracterized the erosion problem as ***"the rain took some sand off the beach*** on Half Moon Bay." *Id.* at page 32, lls. 10-12

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

4. In a 2004 federal lawsuit, the City's experts testified that emergency action was necessary to prevent erosion from washing Jetty Access Road and the utilities beneath it into Half Moon Bay.

Responding to Westport's call for help, the Corps proposed to place 25,000 cubic yards of rock on the Half Moon Bay beach as an interim measure to stabilize the shoreline. Arthur Grunbaum, a member of FOGH, filed suit in Federal District Court in Tacoma (No. C03-5666 RBL), and obtained a temporary restraining order to stop the project.

Westport and the Port argued that without emergency action erosion would destroy Jetty Access Road, the utilities under the road, the parking lot and restrooms for Westhaven State Park, and what remained of the public trail. *See* BSP 48-76 (declaration of Randy Lewis); BSP 289-309 (Supp. declaration of Jeff Myers); BSP 333-345 (Westport and Port's Memorandum on Preliminary Injunction); BSP 347-349 (declaration of Philip Osborne); BSP 368-370 (declaration of Jeffrey Myers); BSP 227-233(second declaration of Osborne). **TAB H.**

The City argued that ***"the threat to the public trail, the Jetty Access Road and Westhaven State Park is imminent. … If the court forecloses additional erosion control… the loss of the trail, bathroom, roadway and parking lot would result in these structures being washed into Half Moon Bay"***

The City's erosion expert Dr. Philip Osborne testified:

> As of December 12, 2003, distances from the existing park infrastructure to the erosional scarp above the shoreline are as follows:
>
> a. Distance to footpath: 0 feet
> b. Distance to roadway: 36 feet
> c. Distance to public restrooms and change-rooms: 60 feet.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

> **Without any remedial measures to stabilize the current location of the shoreline, the sidewalk and road could be breached during one moderate storm.** There is a high likelihood that more than one such storm will happen this winter [03-04].

BSP 229 (emphasis added). He concluded, "***It is my opinion that erosion is an imminent treat to the concrete public trail, asphalt road (including jetty access road and points of access to the jetty), utility lines located in the roadway, the parking lot, and the buildings containing bathrooms and changing rooms at Westhaven State Park."*** BSP 231. **TAB H.**

Westport admitted to the Federal Court that there was erosion just adjacent to the condominiums and directly north of the proposed manmade lake. Westport's attorney testified, "As of December 18, 2003, the scarp is approximately 75 feet from the edge of Jetty Access Road at the entrance to the Westhaven State Park parking lot." BSP 290. **TAB H.**

Ultimately, the Court allowed the Corps to take an interim measure of placing 27,000 cubic yards of sand on the beach to prevent further destruction of infrastructure. *See* Final EA, BSP 853 *et. seq.* The Final Environmental Assessment for this project details the history of the erosion threat in Half Moon Bay and makes it clear that the future of the project site is uncertain. **TAB K.**

5. All of the erosion evidence came into the Hearing Examiner's record on the Binding Site Plan appeal.

Unlike the City Council, the Hearing Examiner allowed all of the evidence of the 2003 erosion emergency into the record. This included all of the City's testimony from the Federal Court case, the City's declaration of emergency and photos showing the erosion and the City's futile efforts at combating erosion. The Examiner also admitted extensive eyewitness and expert testimony showing that the erosion in the winter of 2003 caused the marram grass to recede.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

a. The Examiner admitted expert testimony that the marram grass line had receded and that setbacks were violated.

Sarah Cooke, an ecologist with extensive experience in aerial photography interpretation and ordinary high water mark determinations, testified that even by November 2001, the marram grass line in the area of the condominiums had receded landward an average of 4 feet. Transcript (4/8/04) at 3-4. Based upon aerial photographic interpretation, a site visit, subsequent aerial photographs, and all the studies done by the Corps, Cooke concluded "that the marram grass line has regressed shoreward … a considerable distance since 2000." *April 8, 2004 Transcript, p. 9.* Cooke further testified, ***"As of … November 2001, … there was no longer 200 feet between the projected location of the condominiums and the marram grass line."*** *Id.*, p. 17. She testified that erosion has been ongoing since that time.

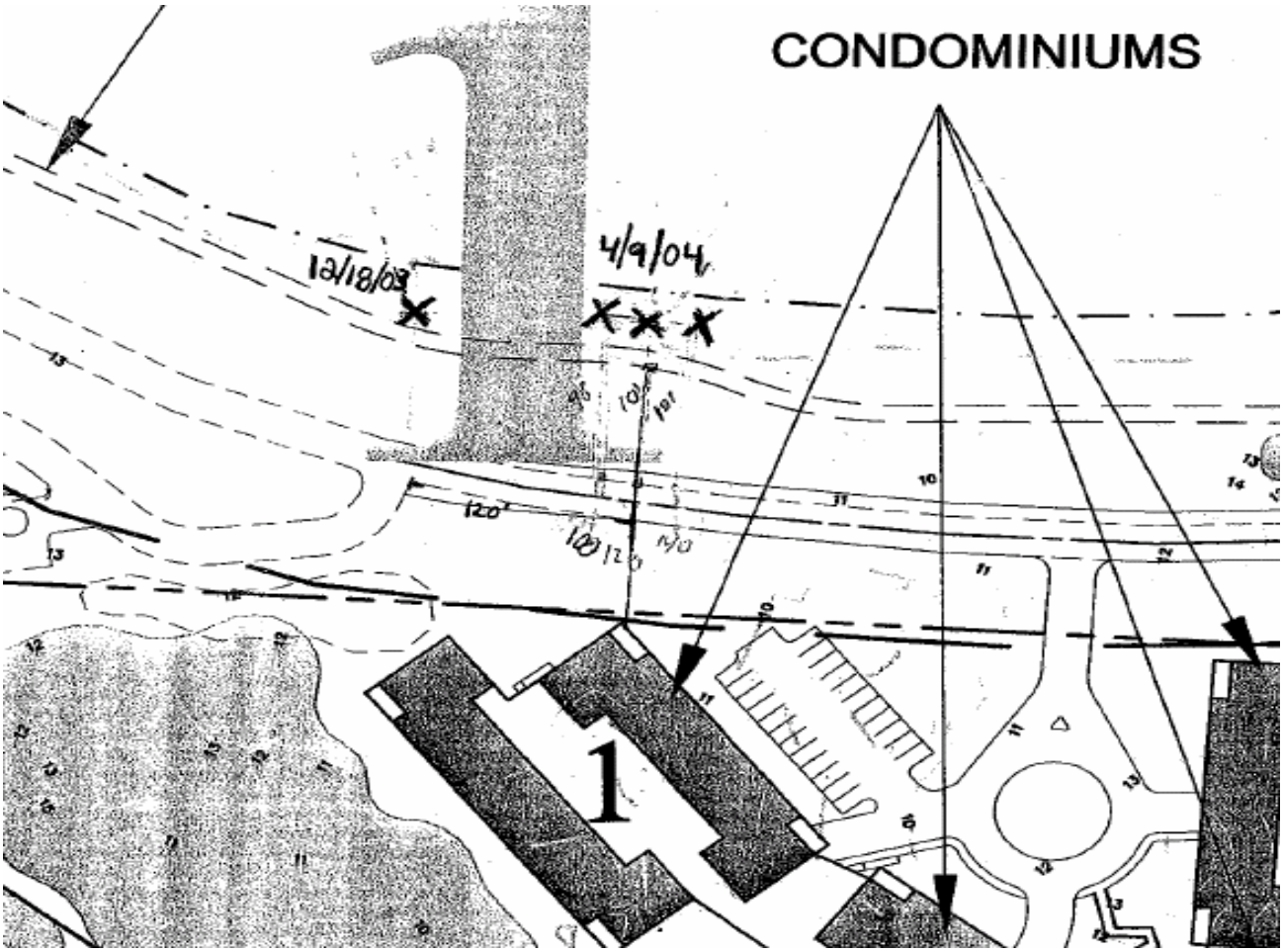
In addition, the Hearing Examiner admitted evidence showing that the marram grass line had receded directly in front of the condominiums. This testimony was admitted over Mox Chehalis' strenuous objections. *April 8th Transcript*, p. 129. Arthur Grunbaum testified that he took measurements on the morning of the hearing and, as of that date, the marram grass line had receded significantly from the August 2000 line shown on the Applicant's Site Plan. *Id.*, p. 130 *et seq.*

The Examiner admitted the following demonstrative exhibit showing the position of the marram grass line during and after the 2003 erosion emergency. It plots a point on the marram grass line on

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

December 18th, 2003, as testified to by the City Attorney, and the position on April 9, 2004, measured by Mr. Grunbaum. BSP 928. **TAB J.**[6]

The dashed line shows the marram grass line as of August 2000 – from the Site Plan -- whereas both the City Attorney and Mr. Grunbaum found the line in 2003 to be significantly further south, as plotted below.



[6] Attached is an excerpt of the demonstrative exhibit. It has been cleaned up for easier viewing.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

D. FOGH SUCCESSFULLY APPEALED THE ADMINISTRATIVE DECISION OF THE SITE PLAN REVIEW BOARD TO THE WESTPORT HEARING EXAMINER.

1. The Hearing Examiner's decision.

The Site Plan Review Board issued the Binding Site Plan on February 2, 2004. BSP 01061. On February 13, 2004, FOGH appealed the decision to the Westport Hearing Examiner. BSP 1. The Examiner held an open record hearing on April 8-9, 2004.

On April 21, 2004, the Hearing Examiner found for FOGH on the following critical issues and remanded the matter back to the SPRB. BSP 1071; **TAB L**:

- The Examiner agreed that the SPRB failed to make required written findings pursuant to WMC 17.36B.060 that the project is in the public interest. BSP 1073.
- The Examiner agreed that the SPRB failed to require the Applicant to dedicate easements of rights-of-way and land concurrent with the binding site plan approval, as required by WMC 17.36.B.080. BSP 1074.

2. The Site Plan Review Board appealed four purely legal questions to the Westport City Council.

Rather than cure these defects, the SPRB appealed the Examiner's decision to the City Council. The SPRB made four assignments of error, challenging the Examiner's decision that a binding site plan was required (Section III of decision), that a public interest finding was required (Section IV), and that concurrent dedication was required. (Section VII). *See* BSP 01077-8 (assignments of error in Board's appeal to City Council). **TAB M.**

3. The SPRB did not appeal the Hearing Examiner's finding that erosion had caused the marram grass line along Half Moon Bay to recede after issuance of the Master Plan and Shoreline CUP.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The majority of the testimony at the hearing involved the recent erosion emergency in Half Moon Bay, experienced in the winter of 2003-2004. FOGH presented extensive documentation of the erosion along Half Moon Bay to prove three points:

- The binding site plan application failed to show "all proposed and existing buildings and setback lines sufficiently accurate to ensure compliance with setback requirements" as required by WMC 17.36B.040(9);
- The 200-foot setback from the marram grass line was violated; and
- The public interest would be violated by placing a major condominium complex, a new road system, and new sewage and utility lines less than 200 feet from a rapidly eroding beach.

The Examiner's decision included the following findings of fact on this issue:

> **The evidence shows that the ordinary high water mark and/or marram grass line** … **continued to move after the Master Plan and Shoreline Substantial Development Permit with Conditional Use approvals. ... The movement is greatest between transect lines 2 and 4 (Exhibit C4). Between transect line 4 and 5 the evidence showed erosion to the west and relative stability to the east**. The evidence shows the condominiums located south of the shoreline lying between transects 4 and 5.

BSP 01071 (emphasis added). **TAB L.**

The SPRB did <u>not</u> appeal this factual finding to the City Council. *See* BSP 01077-92, **TAB M.** Yet, in ruling on a cross claim the City Council affirmed this part of the Examiner's decision. BSP 1155. **TAB N.**

4. The City Council overturned the Hearing Examiner by finding that the Links project does <u>not</u> require a binding site plan and no findings were required under WMC 17.36B.060.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The SPRB's primary argument was that the Hearing Examiner was incorrect in holding that the Links project required a "binding site plan." *See* BSP 1088 *et seq*. (notice of appeal and memorandum); BSP 1129 *et seq*. The SPRB argued that:

> WMC 17.36B addresses two different types of land use actions, a "binding site plan" for the division of land allowed under RCW 58.17.035, and "site plan review" of certain development proposals detailed in WMC 17.36B.020. In this case, no division of land is proposed, so the appropriate action and response by the SPRB was to review the application as a Site Plan under WMC 17.36B.020, not as a "binding site plan**"** under RCW 58.17.035.

BSP 1138. Thus, the Board argued that the Examiner erred in requiring the approval to meet the requirements of a "binding site plan." The City Council accepted this argument in reversing Sections III and IV of the Hearing Examiner's decision. The decision stated:

> **[The] Hearing Examiner erred in Section IV of the decision by concluding that the Site Plan Review Board failed to make findings required by WMC 17.36B.060. WMC 17.36B.060 sets forth standards and requires findings which are to be made for binding site plans.** ... The Hearing Examiner erred in applying WMC 17.36B.060 instead of WMC 17.36B.050, which sets for the standards applicable for review of site plan applications.

BSP 1157 (emphasis added). **TAB N.**

5. The City Council rejected FOGH's appeal issues relating to erosion and setbacks based upon collateral estoppel.

The City Council used collateral estoppel to ignore the unrebutted evidence proving that: (1) the August 2000 marram grass line on the binding site plan application was inaccurate, (2) setbacks were now violated, and (3) building the Links project in the erosion zone is contrary to the public interest. BSP 1158-60. **TAB N.**

6. The City Council allowed its own attorney to represent the site plan review board in the closed record appeal.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

In reviewing the SPRB's appeal of the Hearing Examiner's decision, the City Council was acting as an appellate body expected to remain impartial. Yet the City Council allowed Mr. Myers—the City Council's attorney—to represent FOGH's opponent in the appeal.

FOGH immediately objected, arguing that this was equivalent to a judge allowing her own law clerk to represent one party to a case before her. Such a judge would naturally defer to the arguments of her own clerk. An opposing party, lacking insider representation, has little hope of a fair process. Indeed, now Mr. Myers is representing the City Council before this Board.

When the City Council denied FOGH's objection, asserting that FOGH had somehow waived its right to have an impartial and fair hearing – FOGH knew the case was over. BSP 1154.

However, both FOGH and Washington Environmental Council want this matter to be decided **on the merits**. While the City Council appeal was a sham, the Hearing Examiner created a sufficient record for this Board to reach the merits of the appeal. Therefore, Appellants are not pursuing procedural arguments that would merely delay's this Board's attention to the important environmental issues at stake.

III. ARGUMENTS COMMON TO BOTH RECORD APPEALS

A. STANDARD OF REVIEW.

The Board should reverse the City's decisions on the shorelines permit and binding site plan approval because (1) both permit decisions rely upon an erroneous interpretation of the law, even after allowing for such deference as is due the construction of law by an agency with expertise; (2) the decisions are not supported by substantial evidence; and (3) the decisions rely upon an erroneous application of law to facts. *See* RCW 43.21L.130.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

B. THE CITY COUNCIL ERRED IN USING COLLATERAL ESTOPPEL AND WILLFUL BLINDNESS TO IGNORE THE THREAT OF EROSION AND VIOLATIONS OF SETBACKS.

1. In the shorelines appeal, the City Council erred in refusing to consider evidence or take judicial notice of the 2003 erosion emergency or the Council's own declaration of emergency.

By the time the City Council held its appeal of the shorelines permits, it knew the Planning Commission's findings on erosion were incorrect. Having declared an erosion emergency and having installed emergency armoring of Half Moon Bay, the City Council knew that erosion in Half Moon Bay was **not** under control,

The City Council refused Appellants' attempts to introduce evidence of the 2003 erosion emergency into the record and refused to take notice of its own declaration of emergency and emergency actions. The City Council had the discretion to consider this evidence under LUPA. *Citizens to Preserve Pioneer Park v. Mercer Island*, 106 Wn.App. 461 (2001). In addition, sitting as an appellate body, the City Council should have at least taken judicial notice of its own recent legislative actions:

> On appeal, however, we may take judicial notice of legislative facts to reach our legal conclusions despite an inadequate factual basis in the trial record. *See Wyman v. Wallace*, 15 Wn. App. 395, 549 P.2d 71 (1976), *aff'd*, 94 Wn.2d 99, 615 P.2d 452 (1980). "Legislative facts" are social, economic, and scientific realities or facts that enable the court to interpret the law. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980); *see also Houser v. State*, 85 Wn.2d 803, 807, 540 P.2d 412 (1975), *overruled on other grounds, State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980) (legislative facts supply premises in the process of legal reasoning). An appellate court has the power to take judicial notice of legislative facts sua sponte; the court is not limited to only those legislative facts furnished by the parties.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

State v. Balzer, 91 Wn. App. 44, 58 (1998). It was an abuse of discretion for the City Council to ignore its own declaration of emergency and emergency armoring when it directly undermined the decision on appeal before it.

2. In the binding site plan appeal, the City Council erred using collateral estoppel to ignore the Hearing Examiner's extensive and unrebutted record of the 2003 erosion emergency and the projects' setback violations.

Unlike the City Council, the Hearing Examiner admitted all of the evidence of the 2003 erosion emergency into the binding site plan record. The Examiner's April 2004 hearing on the binding site plan occurred seven months after the Planning Commission's September 10, 2003, hearing on the shorelines permits.

For example, the Hearing Examiner's record included photos of the erosion and the City's emergency shoreline armoring, the City's declaration of emergency, and numerous declarations submitted by the City to a federal judge claiming that erosion was threatening Jetty Access Road, utilities underneath it, and the public trail along Half Moon Bay. There were even photos of the storm washing the public trail into Half Moon Bay. *See* **TABS F, G, H, I, K.**

a. Setbacks are a binding site plan issue.

WMC 17.36B.040(9)(c) requires each application for site plan approval to show "All proposed and existing buildings and setback lines sufficiently accurate to ensure compliance with setback requirements." Under WMC 17.36B.050, the Site Plan Review Board must "review the proposed site plan for compliance with provisions of this chapter [Chapter 17, the Zoning Code], and other applicable laws and regulations." Under WMC 17.36B.060(3), the SPRB cannot approve the binding site plan

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

unless it makes written findings that "the proposed binding site plan is in conformity with applicable zoning and other development regulations."

FOGH claimed in its cross-appeal to the City Council that the application was inadequate for failing to show accurate setbacks, and that the project violated setback requirements by placing the condominiums, road, and utilities within 200 feet of the marram grass line. The City Council dismissed these claims based upon collateral estoppel, claiming that the Planning Commission's approval of the shoreline permits had decided these issues.

b. Collateral estoppel did not apply because there was no final decision.

The Environmental Hearings Office has considered this exact issue and determined that a local decision on a shorelines permit does not constitute a final judgment for the purposes of collateral estoppel. In *Cassinelli v. Ecology*, SHB 93-46, there was a question of whether a previous local decision relating to the location of the ordinary high water mark collaterally estopped a later challenge to the OHWM. The Shorelines Hearings Board determined that it was not subject to collateral estoppel in part because a local shorelines decision is not a final decision:

> **Another reason for rejecting application of the doctrine of collateral estoppel in this case is that the City hearing did not represent a final judgment on the merits. The SMA provides that final decisions on the merits are appealable to this board. RCW 90.58.180.** An appeal to superior court of preliminary shoreline decisions on a project, insofar as they ultimately affect a specific permit, is not provided for in the statute. To the extent such appeal rights exist, they cannot be read to vitiate the right of appeal of the merits of a shoreline permit decision to this board. **The SMA is a statute of general application, and to the extent of any conflict between it and a local ordinance, the former must govern**.
>
> **Finally, to apply collateral estoppel in this case would work a manifest injustice against the appellants. Appellants, as aggrieved parties have a statutory right to appeal local governmental shoreline permit decisions. That right must include the right to appeal legal interpretations as well as factual determinations made at the local level. …**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Cassinelli, Findings XV, XVI. (emphasis added; citations removed).

The SHB recognized that the ordinary high water mark is the vegetation line "as of June 1, 1971, or as that location may change naturally thereafter. RCW 90.58.030(2)(b)." Moreover, the SHB in *Cassinelli* recognized that the decision-maker had not located the vegetation line, but instead relied upon inaccurate data supplied to him. The SHB granted summary judgment to the appellants on the inapplicability of collateral estoppel.

Cassinelli and its reasoning are controlling. Jim Mankin, Chairman of the Planning Commission and a member of the SPRB, admitted that the Commission's decision on the shorelines permit was not a final decision -- it was on appeal to this Board. *April 8th Transcript*, p. 50.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

c. Collateral estoppel did not apply because the issues were not identical due to changed circumstances, including the unappealed findings of the Hearing Examiner.

In *Jacobs v. San Juan County*, SHB 01-015, the Shoreline Hearings Board recognized that seven criteria must be met to utilize collateral estoppel in an administrative context:

> In order for collateral estoppel to apply, four elements must be proven. First, the issues must be identical. Second, a final judgment on the merits must have occurred. Third, the party against whom the doctrine is asserted must have been a party to the prior adjudication or in privity with a party to the prior adjudication. Fourth, the application of the doctrine must not work an injustice against the party to whom the doctrine is to be applied. In addition, if collateral estoppel is applied to an administrative decision, the following additional factors must be proven:
>
> (1) the agency acted within its competence to make a factual decision; (2) agency and court procedural differences are minimal; and (3) policy considerations support application of the doctrine.
>
> The person asserting collateral estoppel carries the burden to prove all elements.

Id. (citations omitted)

A change in circumstances is sufficient to negate the identity between two causes of action. *Malland v. Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985). The concept of changed circumstances is also applicable to the doctrine of res judicata, or claim preclusion. *Hilltop Terrace Ass'n v. Island County*, 126 Wn.2d 22, 891 P.2d 29 (1995); *Advance Resorts of America v. LaConner*, Modified Order Granting Summary Judgment and Dismissal, SHB 94-12 (1995).

i. The unappealed findings of the Hearing Examiner established changed circumstances.

The Hearing Examiner confirmed the existence of a changed circumstance in Section II of his decision. He held as follows: ***"The evidence shows that the ordinary high water mark and/or marram grass line … continued to move after the Master Plan and Shoreline Substantial***

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Development Permit with Conditional Use approvals. ... The movement is greatest between transect lines 2 and 4 (Exhibit C4). ***Between transect line 4 and 5 the evidence showed erosion to the west and relative stability to the east. The evidence shows the condominiums located south of the shoreline lying between transects 4 and 5."*** BSP 01071 (emphasis added). This finding was never appealed.

By finding that the marram grass line had moved since the Planning Commission issued its decision, the Examiner acknowledged the changed circumstances. The Planning Commission's decision showed the condominiums exactly 200 feet behind the August 2000 marram grass line. *See* JARPA, **TAB D.** Thus, *any movement* of the marram grass line constituted a sufficient change of circumstances to avoid collateral estoppel because *any movement* would bring into question compliance with the 200-foot setback.

Even movement of the marram grass line between transects 2 and 4 -- which the Examiner found was "greatest"—was a critical change in circumstances. As discussed below, setbacks for the condominiums are measured 200 feet on either side of the proposed structure. WMC 17.32.050(1)(H). Thus, erosion between transects 2 and 4 directly impacts the setback analysis for the condominiums. Moreover, the applicant proposes to build a massive "irrigation lake" only a few feet from the August 2000 setback line west of the condominiums, between transects 3 and 4. BSP 1049 (site plan). It is likely that erosion in 2003 brought this lake within the setback.

The City Council based its decision upon improper methodology, reasoning in its decision that collateral estoppel applies because the 2003 emergency "did not address the area immediately affronting the condominiums." BSP 1159. This was error.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

ii. FOGH proved that the changed circumstances resulted in new setback violations.

The ultimate evidence of change of circumstances is evidence that the setbacks were now violated. The Examiner admitted FOGH's evidence establishing that the shoreline directly north and west of the proposed condominiums had retreated and that, as a result, the condominiums now violated the 200-foot setback. Neither the City nor Mox Chehalis provided rebuttal evidence.

d. Collateral estoppel does not apply because the setback issue was not actually litigated before the Planning Commission.

For collateral estoppel to be available as a bar to the subsequent action, it must be clear the same issues were litigated in the prior action. *Roper v. Mabry,* 15 Wn. App. 819, 551 P.2d 1381 (1976). The doctrine will preclude relitigating only those issues which have *actually been tried and determined*. If there is uncertainty whether a matter was previously litigated, collateral estoppel is inappropriate. *Davis v. Nielson,* 9 Wn. App. 864, 515 P.2d 995 (1973).

FOGH had no reason to litigate the setback issue before the Planning Commission because it was clear that erosion was ongoing and the issue of setbacks would be ultimately decided during the binding site plan process. FOGH had been told repeatedly that the final site plan would be determined in the binding site plan process, and the clear language of the ordinance stated that setback compliance would be determined during that process. WMC 17.36B.040(9)(c), WMC 17.36B.050, WMC 17.36B.060(3). *See* discussion below.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The Planning Commission's decision recognizes that FOGH did not actually litigate the setback issue. The Commission stated that "FOGH presented no expert testimony to contradict the delineation of Ordinary High Water Mark and marram grass line provided by the applicant's consultants, Economic and Engineering Services (EES) or to offer an alternative delineation showing that the proposal is within 200 feet of the marram grass line ... Absent any expert testimony to support FOGH's assertion that the EES delineation is erroneous, the delineation of the OHWM and Marram grass line are found to be accurate." *Planning Commission Decision, Finding 31,* BSP 971A.[7]

e. The Planning Commission's decision did not depend upon a finding that the marram grass line was correct or that the development was over 200 feet from the marram grass line.

Only facts and issues "actually litigated and essential to the judgment in the earlier action" may be precluded by collateral estoppel. *Noel v. King County,* 48 Wn.App. 227, 234 (1987); *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925, 930, 610 P.2d 962 (1980).

The Planning Commission's decision on the setback issue was based upon (1) FOGH's failure to litigate the issue, and (2) its conclusion that "the setback line requirement in WMC 17.32.050(8) applies to 'buildings', not to infiltration ponds, roads, or utilities." BSP 971A; WSH 3082 *et seq*. **TAB O.** Because the Planning Commission's decision did not depend upon a precise evaluation of setback compliance, collateral estoppel could not apply.

f. The SPRB admitted that it determined setback compliance as a requirement for issuing the binding site plan.

[7] Page 8 of the Planning Commission's Decision is omitted from the record.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Finally, the City Council ignored the fact that the SPRB issued the binding site plan based upon *their own* finding that setbacks were met – not because it was decided by the Planning Commission. Jim Menkin, a member of the SPRB, testified:

> KL: **[D]id you evaluate whether or not the setback was met, uh, in deciding to approve the Binding Site Plan?**
>
> Jim: **Yes.**
>
> KL: **OK. And it was your opinion …the setback was met?**
>
> Jim: **Correct.**
>
> KL: **And, and that is the basis for, one of the bases for approving the Binding Site Plan?**
>
> Jim: **Yes.**
>
> KL: **OK. And …would you agree that the Binding Site, that the setback is 200 feet?**
>
> Jim: **Yes.**
>
> **…**
>
> KL: Yes. And, and, and is measured from marram grass line?
>
> Jim: Correct.

4/9/04 Transcript, p. 49 (emphasis added). This necessary finding was made and appealed, and such appeal could not thereafter be avoided by collateral estoppel.

C. THE CITY ERRED IN BOTH DECISIONS BECAUSE BUILDING A MAJOR RESORT RIGHT BEHIND A RAPIDLY ERODING BEACH IS CONTRARY TO THE PUBLIC INTEREST.

In the binding site plan hearing, the Hearing Examiner allowed FOGH to introduce evidence showing that Half Moon Bay was rapidly eroding towards the proposed Links development and that

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

setbacks were violated, but then the City Council improperly avoided these issues based upon collateral estoppel. This Board should now apply the facts to the law and find that the Links project is contrary to the public interest and violates setback requirements.

1 Extensive government studies and a 30 year history have proven that the Links project site is in the path of erosion.

It is beyond question that the site is located in a dynamic zone where coastal erosion is ongoing. In fact, this was a main objection to the project raised by Department of Ecology, Department of Fish and Wildlife, and the U.S. Army Corps of Engineers. **TAB A.** The Corps of Engineers has had to take emergency action every winter for the past four years to stabilize the shoreline of Half Moon Bay and prevent a loss of Jetty Access Road and other public infrastructure. 2004 EA. **TAB K.**

The coastal engineers at the Department of Ecology and Corps of Engineers have rejected the opinions of Westport and Mox Chehalis that there is no erosion threat. As discussed above, these parties have no credibility on this subject. Because the government has thoroughly documented the erosion risk, Appellants did not need to hire a coastal engineer. Moreover, having declared erosion emergencies on an annual basis, the City was wrong to ignore the erosion threat merely <u>because</u> Appellants did not hire their own coastal erosion expert.

The only voice stating that the erosion has ceased is that of Respondents' experts. BSP 460 (January, 2001 letter from PIE opining that "erosion of Half Moon Bay is highly unlikely in the future.") **TAB P.**

Respondents' rosy opinions are flatly contradicted by the Department of Ecology and the U.S. Army Corps of Engineers, BSP 458 (Corps letter and report finding that project site is threatened by

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

erosion and rejecting contention that erosion at site has reached "state of equilibrium"). One memorandum from the Corps stated: "***All of the studies done to day suggest that erosion in Half Moon Bay (and the south beach area) will continue. Suggesting that there is an 'equilibrium shoreline position' may encourage development in areas that are subject to large shoreline changes.***"

The Shoreline Record contains two detailed peer review studies conducted by Ecology and the Corps of Respondents' experts' analysis that Half Moon Bay reached dynamic equilibrium, both criticizing PIE's methodologies and conclusions.

The Corps' peer review concluded:

> **[T]he historical record of erosion of the South Beach shoreline for approximately the last 30 years does not allow the conclusion to be made, as the report does, that the shoreline adjacent to the jetty has reached a state of dynamic equilibrium** based on limited recent measurements. … The PIE/Pharos report omits consideration of or discounts several significant coastal processes, as well as contains some apparent misinterpretation of the data.

Corps' January 27, 1999 Peer Review, p. 23 (emphasis added).

Ecology's peer review came to a similar conclusion:

> There are many incorrect conclusions drawn from the data presented in the report. In particular, there are numerous statements regarding trends of shoreline or bluff change that are either unsupported or contradicted by the data … **We find insufficient or contradictory evidence in the report to support its principal conclusion, i.e., that the South Beach shoreline has reached dynamic stability**."

Ecology's February 5, 1999 Peer Review, p. 1-2 (underlined in original). **TAB FF.**

Factually, Respondents argue that when erosion occurs, protection measures would be required to protect other public facilities, not merely the golf course and condominiums. However, Parks has

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

publicly stated that it would move its facilities rather than armor the shoreline, as it did in 1987. Obviously, a multi-million dollar golf course and condominium complex could not be so easily relocated.

2. Placing a development in the erosion zone will leave us with only two bad choices: (1) either allow the project to be destroyed or (2) armor the beach to protect the development.

Permitting development within the path of erosion will result in one of two consequences. Either erosion will destroy the development or shoreline armoring will be required to save it.

a. Erosion can destroy a major resort – and has.

This is not the first time that developers have been willing to ignore the risks of erosion. In the early 1900s, a major resort was built in the erosion zone in Tillamuk Oregon, in the erroneous belief that the government would come to its rescue before allowing it to succumb to erosion. By 1940, the entire hotel and resort were washed into the Pacific. (WSH 3701): **TAB Q.**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

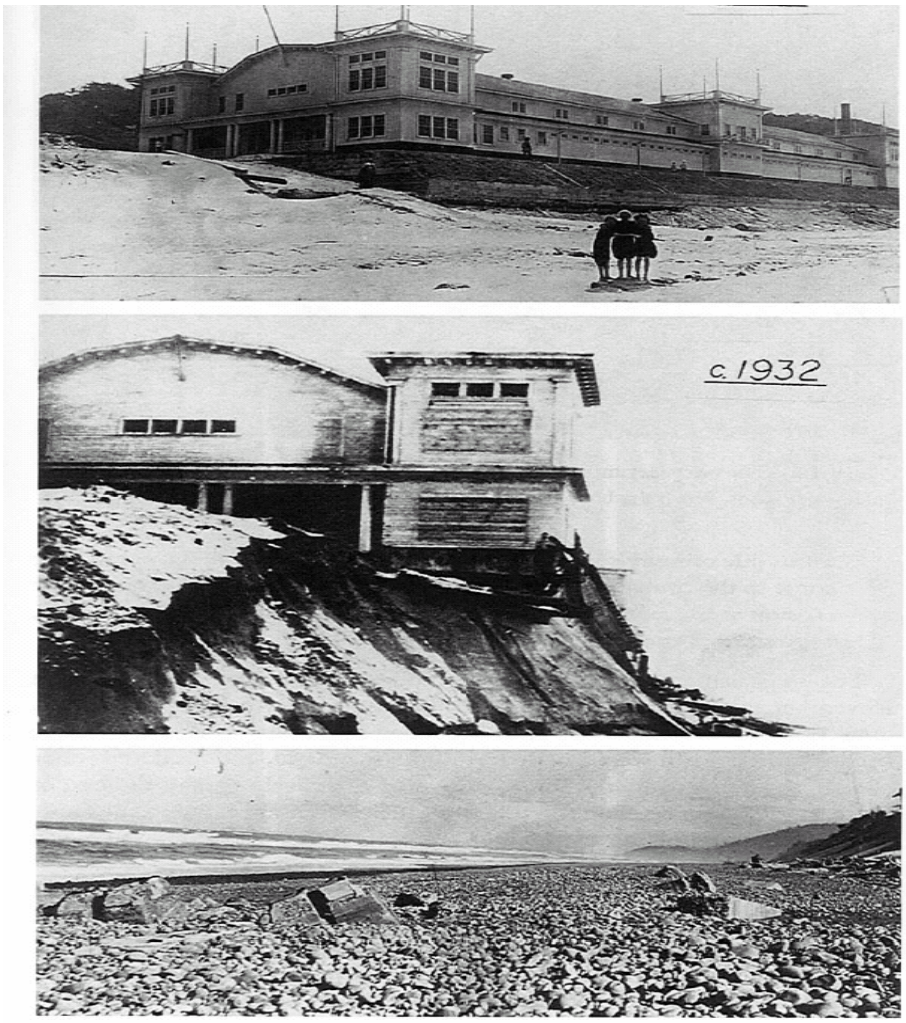


Figure 5.7 The natatorium on Bayocean Spit in 1910 (*top*), c. 1932 (*middle*), and 1940 (*bottom*). By 1940 only its foundation remained. From the Pioneer Museum, Tillamook, Oregon.

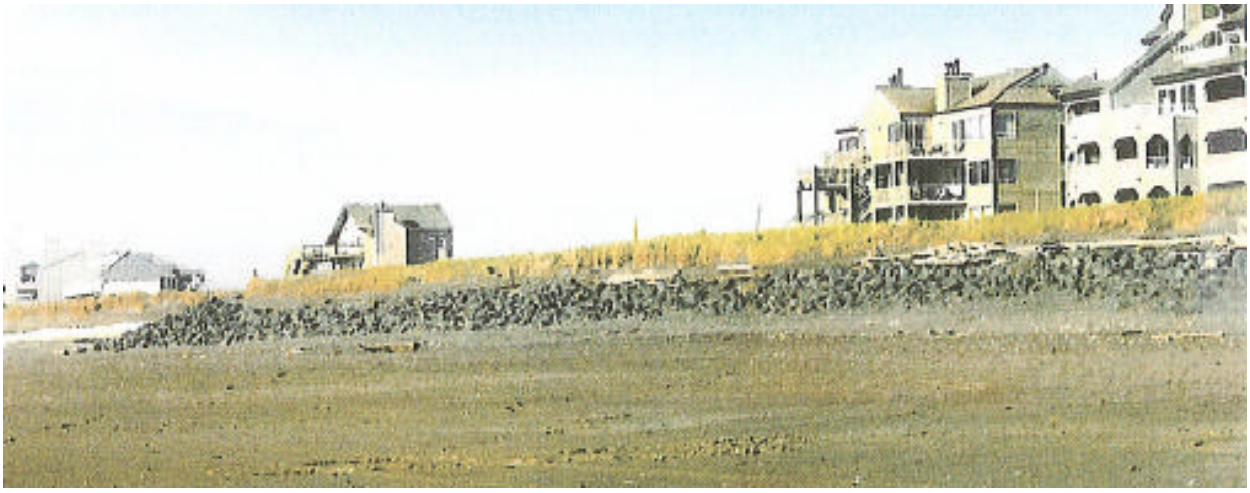
The Development and Destruction of Bayocean Spit **83**

b. Protecting development from erosion carries dramatic environmental consequences.

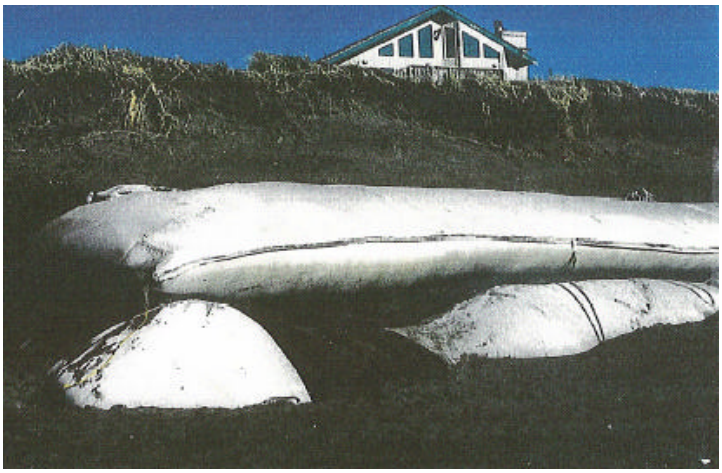
As this Board knows, armoring the coast to protect development carries severe environmental consequences. For example, when condominiums were placed in the erosion zone in Ocean Shores –

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

just north of Westport – there was unstoppable momentum to protect the development, with the following obvious impacts:



Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883



BSP 761, 762. **TAB R.**

In addition to the environmental impacts, coastal armoring eventually results in the complete loss of the public shoreline, as the scientific reports in the record show. Rather than having a gradually sloping beach, armoring causes the beach to steepen. When erosion eventually meets the armoring, there remains no beach at all.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Appellants ask the Board to take judicial notice of this fact, since it is within the Board's expertise.

3. The SHB has held that building in an erosion zone is contrary to the public interest.

The SHB's precedents confirm that building in an erosion zone is contrary to the public interest. In *Hutchings and Snohomish County v. Ecology*, SHB 97-46, a property owner proposed to build a cabin in the proximity of Deer Creek. The Board noted that "During flood events, its channels are quite capable of migration," and that "Erosion in this stretch of Deer Creek is not a continual process, but rather is driven by the high energy of the river during flood stages." Findings VII, X. The Board found that "the river dynamics are in the process of change. … The historical evidence persuades the Board that Mr. Hutchings' property faces a substantial threat of erosion from flood events, whether or not he builds a home on the property." Finding XIII. Notably, the board found no evidence that the project would increase the likelihood of erosion on the property. Finding XIV.

The Board concluded:

> **We have found that the project will not, itself pose a threat of erosion to the riparian environment of Deer Creek. However, because we found that the size of Mr. Hutchings' property is insufficient to support a home, garage and septic system for the long-term, against the forces of Deer Creek, we have found that these improvements likely either would be washed away in to the river, or require armoring of the bank for their protection. As we have previously found, adverse environmental consequences would result in either event, contrary to the requirements of WAC 173-27-170(2)(c)** .

Conclusion V (emphasis added).

Because possible future erosion would likely either destroy the improvements or require armoring, the Board found that the permit (in that case a variance) was contrary to the public interest. Conclusion

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

VI. The application of the public interest standard, which applies also in this case, demands a similar result.[8]

Like the applicant here, Hutchings was willing to take the risk to his improvements, and was willing to covenant that he would not install armoring if and when erosion occurs. However, after a lengthy discussion, the Board concluded that such a covenant would likely be unenforceable and ineffective at preventing a new owner from constructing "whatever defense works were necessary to salvage the home and improvements." Conclusion VII, XI.

The Board found that "such a covenant would not be in the public interest." Conclusion XIII. If a covenant not to armor was ineffective at protecting shoreline interests, certainly the "warning" proposed by Respondents also violates the public interest.

Other cases have led to similar results. In *Morasch and Clark County v. Ecology*, SHB 94-10, the Board found that the applicant proposed a house within an area that was "presumably unstable over the long term." Finding VII. ***"This erosion would be very likely to force, at some time in the future, a hard choice between tearing down or relocating the house, on the one hand, or building a bulkhead on the shoreline, on the other. This Hobson's choice is preventable."*** Finding VII (emphasis added). The Board denied the permit on that shoreline of statewide significance.

In *Millie and Pierce County v. Ecology*, SHB 86-9, the Board similarly denied a permit where a previous flood of the White River had caused destruction of improvements close to the project site. The permit was denied after the Board found that "Both the original cabin of Mr. and Mrs. Millie and the

[8] Noting that "The problem … is not with Mr. Hutchings, it is with the property and the dynamic forces of

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

proposed addition would be in direct danger of destruction by floods and thereby causing further damage through collision or channel blockage which expands the flooding. There is inherent in this a significant danger to lives and property." Finding X.

These types of cases, including those denying permits due to flooding or steep and/or unstable slopes, amply demonstrate that a project does not need to *cause* the environmental condition for the condition to be cognizable under the SMA. Like the erosion cases discussed above, the SMA is also concerned with the environmental *condition's impact on the project*. The foreseeable destruction of property and/or future requirement to bulkhead requires denial of the permit.

Here, one consultant's "draft" study, especially one contradicted by the agencies and recent history, cannot rebut the danger inherent in building a multi-million dollar resort along this rapidly eroding shoreline of statewide significance. This is a very different situation than what was dealt with in *Seaview Coast Conservation Coalition v. Pacific County*, SHB 99-020.

First, in that case there was no solid evidence on coastal erosion. Here, in contrast, the project site is one of the most studied erosion hot spots in the nation, and literally millions of dollars have been spent by government agencies documenting the threat. Moreover, the permitting agency, the City of Westport, has routinely noted this erosion threat and sought emergency powers to protect its municipal improvements from this threat.

Second, *Seaview* involved a single home. Here, the applicant proposes a multi-million dollar facility and hundreds of residential units as a conditional use. Unlike in *Seaview*, the developer intends to

---

Deer Creek," the Board concluded that the denial would not constitute a takings. Conclusion VI, fn 5.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

sell these units to hundreds of retirees. Thus, this project has a lower priority under the SMA, and is much more likely to lead to bulkheading when erosion occurs.

Finally, the home in *Seaview* was 600 feet from the foredune, whereas the applicant here proposes to build parts of its development (road, utilities, stormwater system) *on the foredune*.

4. Building the Links project will narrow the alternatives available for responding to erosion in Half Moon Bay and add momentum to a pending proposal to hard rock the entire Half Moon Bay shoreline.

The Corps of Engineers has proposed to hard rock the entire Half Moon Bay shoreline to address erosion in Half Moon Bay. The Corps has completed half of the project. A buried revetment was installed in 1998 along the eastern shore of Half Moon Bay, in front of the proposed hotels, clubhouse and conference center. The Corps has proposed to armor the remaining shoreline of Half Moon Bay – including the entire shoreline in front of the golf course and condominiums -- with an unburied Jetty Extension. WSH 4036; BSP 651. **TAB S.** This massive rock wall would separate the Half Moon Bay shoreline from Grays Harbor, destroying the habitat of Half Moon Bay and its current recreational uses, including surfing. *See* BSP 586 (comments of USFW)

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

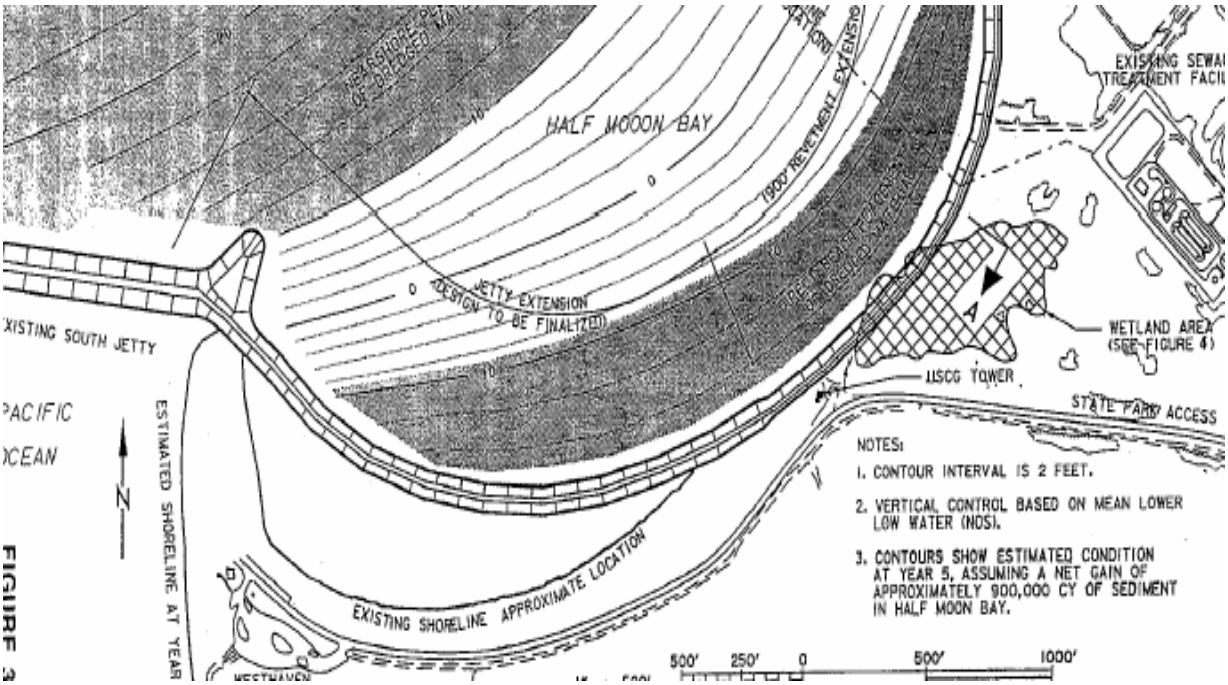


FIGURE 3

The Jetty Extension project has been placed on hold but continues to be an option for addressing erosion in Half Moon Bay. The Corps is also considering the option of letting nature take its course. In a January 2004 letter to the Corps, the U.S. Fish and Wildlife Service stated "the limited or lack of success of various shoreline protection measures that have been implemented since 1993 … warrants the full consideration and evaluation of a wide range of alternatives." BSP 905. **TAB V.** The Corps agreed that the complexity of the system requires "the full consideration of a wide range of alternatives." *Id.*

The preferred policy for avoiding conflicts between erosion and development is to avoid new development within the erosion zone. This policy was established by the Governor's Coastal Erosion Task Force. WSH 3732; BSP 189. **TAB U.** For example, State Parks noted that its contingency planning is to remove its infrastructure from Westhaven State Park and "relocate them and its parking lot

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

in the event erosion again threatens, rather than seek 'coastal armoring' solutions" BSP 667, 913. **TAB T, V.**

If the Links project is built, the option of stepping back development will no longer be available. Continued erosion would result in property destruction or the need for additional armoring.

As we saw in 2003, Westport installed coastal armoring simply to protect the public trail, a road and a water line. It is simply inconceivable that one would now place a major sewage trunk, an expanded road, and additional infrastructure in this same area.

5. Even the applicant's experts admit that erosion could take out the golf course.

In his testimony to the Planning Commission, the Applicant's coastal engineer Jeffrey Bradley testified stated that erosion would continue but that "it is unlikely that such erosion would go shoreward beyond the first golf hole running parallel to the beach." WSH 4107. Amazingly, ***Bradley's confidence was contradicted by his own technical report attached to his testimony***. In that report, he admitted "***Erosion of South Beach will continue to occur in the future … There is a possibility that the future erosion could threaten the golf holes closest to the shore, but it is highly unlikely that any other part of the project could be threatened***." WSH 4122. **TAB W.**

Erosion threatening even one golf hole is contrary to the public interest. Between the ocean and the "golf holes" that may be destroyed lies the public beach and the interdunal trail linking the two State Parks. The public's access to the shoreline will be eliminated before the golf holes are destroyed. There will be no place for the shoreline and trail to retreat. Moreover, bulkheading has been used to protect golf courses before, and that pressure would certainly be felt here.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

6. The SHB found that there was a question of fact as to whether building the Links project in the erosion zone is contrary to the public interest.

In SHB 01-023 *et seq,* the Shorelines Hearings Board rejected Respondents' motion for summary judgment which claimed that the erosion threat was not a legitimate shorelines issue. The SHB found that there is a material issue of fact as to whether building the Links project behind a rapidly eroding shoreline is contrary to the public interest.

> **The Washington Coastline is one of the most important environmental resources in the state. The stability of the shoreline in proximity to the proposed destination resort and golf course is a matter within the jurisdiction of the Board, particularly as it relates to the protection of the public interest.** Neither party has shown that there is no dispute as to any material fact. Whether the proposal is placed in harm's way or may result in future impacts to the shoreline is a mixed question of fact and law.

Summary Judgment Order, p. 14, SHB 01-023 *et seq.* (emphasis added; citations omitted).

Now this Board must review the public interest issue on the binding site plan and shoreline records created by the City of Westport.[9] This Board should hold that placing a major resort

---

[9] There have been attempts to resolve the conflicts of coastal erosion without litigation. The Governor convened a coastal erosion task force, on which most of the parties here participated. After eight months of meetings, the task force generally recommended that in order to resolve the land use conflicts caused by the ongoing erosion, development should be moved out of the erosion zone. This would have meant that developments such as the one proposed here would be prohibited. The Department of Ecology, Environmental Protection Agency, Washington Parks Department, Washington Fish & Wildlife, the Governor's Office, the Army Corps of Engineers, and US Geological Service all signed on to this report. In addition, FOGH participated and signed on to the report.

After negotiating the final language of the report, both Westport and the Port of Grays Harbor refused to sign on to the final document. Instead of supporting further efforts to map erosion dangers and to regulate development in the erosion zone, Westport and the Port argued that "Responsible decision-making will consider an environmental impact that can be appropriately mitigated in balance with a full range of socio-economic interests." They specifically rejected the consensus that development should be discouraged in the coastal erosion hazard area.

These positions are contrary to the consensus that was built among all of the resource agencies. More importantly, when Westport and the Port and other coastal communities rejected the consensus process that resulted in the Task Force Report, and objected to any further regulation of erosion hazards,

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

development only feet behind the rapidly eroding shoreline is contrary to the public interest and the policies of the Shoreline Management Act.

D. THE CITY ERRED IN RELYING UPON INACCURATE DATA AND IMPROPER METHODOLOGY IN CALCULATING THE SETBACK.

1. The Planning Commission and City Council erred in relying upon the August 2000 marram grass line in issuing the shoreline permits.

The Shorelines Hearings Board has repeatedly recognized the need for accurate and up to date OHWM delineations. "The Board has previously held, when the OHWM has changed, the OHWM at the time when the activity commenced is the appropriate benchmark to use in a shoreline case." *Manza v. City of Lakewood*, SHB 02-005 (citing *Osborne v. Mason Co.*, SHB No. 88-37 (1989)).[10]

Here, the Planning Commission knew that the marram grass line had moved since August 2000 and erred in failing to independently evaluate this evidence. It held that FOGH failed to produce evidence showing that the setbacks were violated, but this was neither FOGH's role nor responsibility. WMC 17.32.080 provides that "the City shall *only* grant a substantial development permit when the proposed development is consistent with" the SMA, its implementing regulations and the Master Program. (Emphasis added.) It could not rely upon patently inaccurate delineation merely because citizens did not produce "expert testimony" refuting it.

2. The binding site plan process established that the August 2000 marram grass line was unreliable.

---

they derailed the process that was to culminate in the mapping and regulation of erosion hazards. As a result, this Board will serve as the critical protection for our coastal resources.

[10] In *Manza*, the SHB held that movement of the OHWM was irrelevant only because the evidence showed that the septic tank *did intrude* into the setback by four to six feet.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

As the Hearing Examiner confirmed in its unappealed finding, the marram grass line had moved since August 2000. BSP 380. The City had produced significant testimony to this effect to the federal court and this was in evidence. In addition, FOGH presented unrebutted expert and lay testimony that the marram grass line had moved. Westport violated the requirements that a Binding Site Plan application must contain "All proposed and existing setback lines sufficiently accurate to ensure compliance with setback requirements," WMC 17.36B.040, and cannot be approved unless the Board finds compliance with the zoning ordinance and all development regulations, WMC 17.36B.050, .060(3).

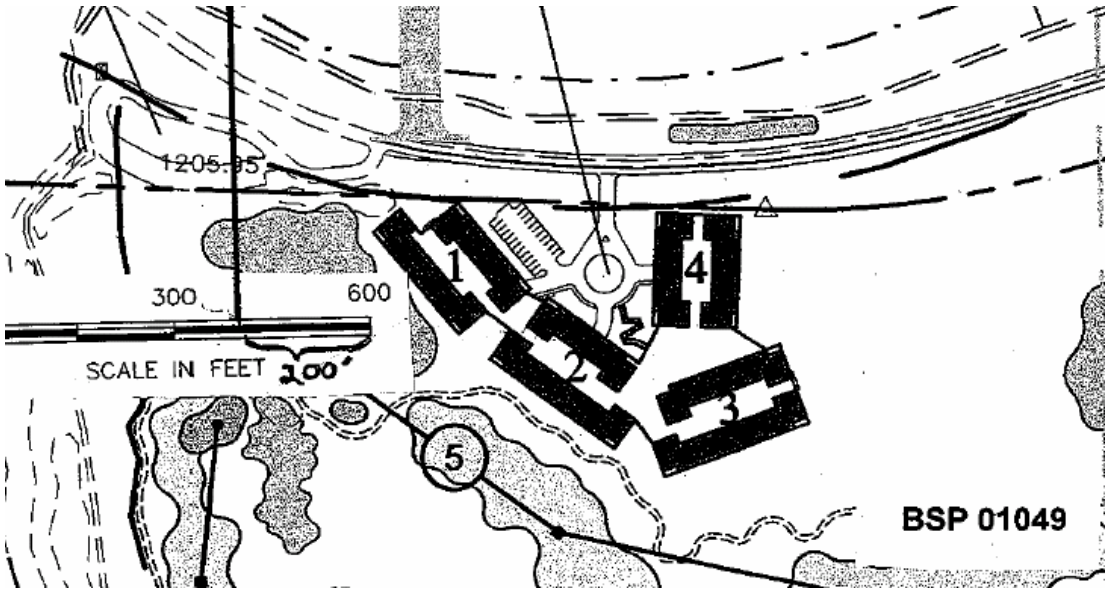
Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

3. The City used the wrong methodology to determine the setback by failing to measure the marram grass 200 feet on either side of the proposed structure.

The setback in the urban shoreline is to be measured from the marram grass line. "The line shall be determined as the average of the marram grass line measured 200 feet on either side of the structure to be constructed." WMC 17.32.050.

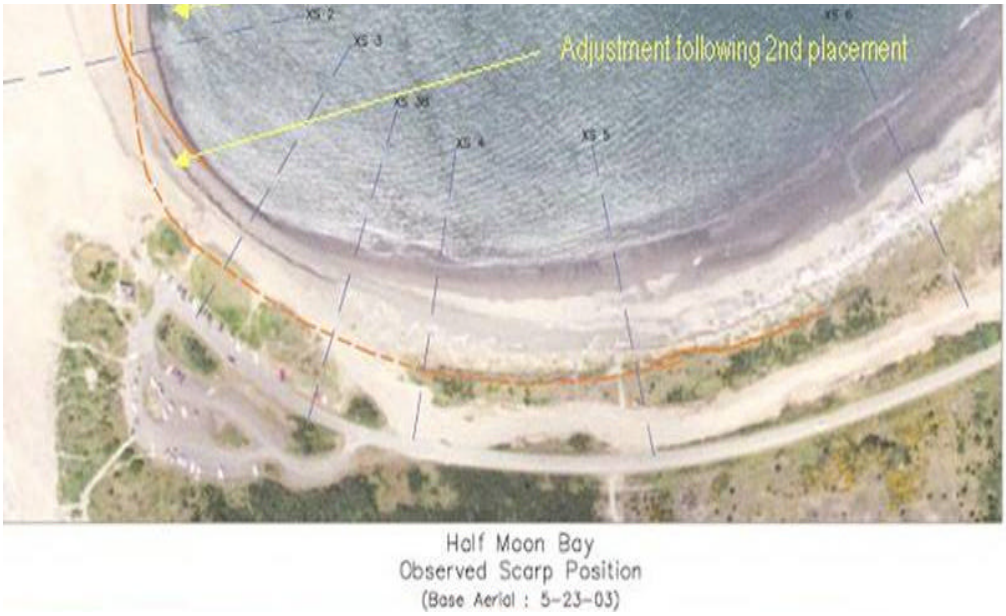
Thus, to determine the condominium's compliance with the setback, the marram grass line needed to be measured 200 feet west of the condominiums. The City failed to do so. Jim Mankin, Chairman of the Planning Commission and member of the Site Plan Review Board, testified that the City measured the marram grass directly north of the proposed condominiums – not 200 feet on either side. *April 4th Transcript,* p. 45-46.

200 feet from the western edge of the condominiums is in the middle of the parking lot, as the following excerpt from the site plan shows:



Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

There was no question that the marram grass line significantly retreated in this area during the 2003 erosion emergency. Indeed, this point (200 feet west of the condominiums) is between transects 3 and 4, at approximately transect 3.5. *See* BSP 320, BSP 987 (Showing identical transects used by Westport and Corps of Engineers).



Westport's expert testimony in the Binding Site Plan review showed significant erosion at both Line 3 and Line 4. A study conducted by the Corps and Westport's coastal engineer found that the "**Scarp has receded between 60 to 100 ft between Transects 3 and 4**" between year 2000 and 2003. BSP 319. The correct methodology would have revealed setbacks violations.

E. THE CITY ERRED IN APPROVING A PROJECT THAT VIOLATED SETBACK REQUIREMENTS.

1. The Planning Commission erroneously concluded that the "building setback" prohibited only "buildings" when the clear language of the ordinance regulates "structures."

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The shoreline permit allows numerous project features less than 200-feet from the eroding shoreline. The applicant proposes to build a major expansion to Jetty Access Road to serve the condominium complex, underneath which will run a new utility corridor to serve the complex. An irrigation pond is just west of the condos and stormwater ponds are proposed waterward of Jetty Access Road in front of the condominiums.

The Planning Commission held that "the setback line required in WMC 17.32.050(8) applies to 'buildings,' not to infiltration ponds, road, or utilities." *Planning Commission Decision, Finding 31,* WSH 4393. **TAB O.** This was error.

WMC 17.32.050(1)(H) provides:

> Setbacks. In OBR and TC zones the building setback shall be 200 feet from the edge of the marram grass line. **The line shall be determined as the average of the marram grass line measured 200 feet on either side of the structure to be constructed.** In all other zones, the setback shall be shoreward of the line of ordinary high water …

The Planning Commission erred in holding that the setback line applies to "buildings" rather than to "structures." The term "building setback" is undefined under the Westport Master Program, but it clearly refers to *a **line in front of which you cannot build**.*

It is clear that the Master Program's "building setback" in the urban environmental zone regulates "structures"— not just buildings. It states that for applying the setback the marram grass "line shall be determined as the average of the marram grass line measured 200 feet on either side of the ***structure to be constructed***." One cannot ignore the use of the term "structure" in this sentence, as the Planning Commission does, especially since the Master Program defines "structure" but does not define "buildings."

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

. The term "building setback" is used because in the urban zone the setback regulates *building* (construction), whereas in other zones the setback regulates both *building and uses*. *See* WMC 17.30.040 (Ocean Beach Protection Setback regulates uses and building); 17.32.050(8) (conservancy environment setback regulates uses and building).

The SHB has repeatedly recognized that the term "building setback" is a generic term meaning development setback. See, e.g., *Seaview Coast Conservation Coalition v. Pacific County*, SHB 99-020 (January 28, 2000) (home and road); *Peterson v. Templin Fdn*., SHB 99-4 (Nov. 10, 1999) (same); *Slater v. Ecology*, SHB 87-15 (Nov. 6, 1987) (deck*); Schall v. Ecology*, SHB 78-26 (Nov. 21, 1978) (deck).

Moreover, the setback would be virtually meaningless if it only regulated "structures" deemed to be a "building." This would allow almost unfettered development of the beach, allowing parking lots, swimming pools, tennis courts and utilities right up to the shoreline. Moreover, the Planning Commission confirmed that the 200-foot setback was adopted partly in response to the 1993 erosion emergency. *Planning Commission Decision, Finding 61, WSH 4393.* **TAB O.** It only makes sense that the City would want to keep all "structures"—not just buildings—out of harm's way.

2. The challenged project components fit within the definition of the "structures" excluded from the setback.

The expansion of Jetty Access Road, the new utility corridor, the stormwater ponds, etc. are all "structures" that must meet the 200 foot setback. The Master Program adopts the extremely broad definition of "structures" from WAC 173-27-030(15).

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

> "Structure" means 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.

WMC 17.32.020(27); WAC 173-27-030(15). *Accord* WMC 17.32.065(2) (buffers shall be maintained between wetlands and "structure, including stormwater treatment and detention facilities"). The Planning Commission also confirmed that boardwalks and oyster shell cart paths meet the definition of "structure." Finding 51, WSH 4393. **TAB O.**

In *Manza v. Lakewood*, SHB 02-005, the SHB held that a septic holding tank met the definition of a "structure" under WAC 173-27-030(15), and therefore a variance should have been obtained for its placement within the 50-foot setback. Certainly, then, a stormwater pond, utility corridor (sewage pipes, etc.), roadbed, etc. also are "structures" that must meet setbacks.

Like in *Manza*, if the City wishes to permit structures or expand Jetty Access Road in the setback, it would need to go through a variance process and obtain approval by the Department of Ecology pursuant to RCW 90.58.140(10) and WMC 17.32.080(3)(c). [12]

The City erred in approving a shoreline permit and binding site plan showing structures violating the setback. *See* WMC 17.32.080 (City may only grant substantial development permit that complies with Master Program.); WMC 17.36B.040, .060.

3. The Hearing Examiner admitted unrebutted evidence that the erosion in 2003 brought the Condominiums, irrigation lake, cart paths and golf course into the setback.

---

[12] In this case, Ecology's oversight was limited to the wetland fill. *See* CUP.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Unlike the City Council, the Hearing Examiner admitted overwhelming and undeniable evidence proving the marram grass line had moved shoreward bringing the condominiums and irrigation lake into the setbacks. This testimony went unchallenged, and has since been confirmed by professional survey.

Respondents submitted to the federal court—admitted to the record—showed significant shoreward movement of the marram grass line directly in front of the irrigation lake. **TAB H.** The Examiner's findings acknowledged this was the area of "greatest movement." This movement brought the *lake and the condominiums* into the setback. *See* WMC 17.32.050(1)(H) (marram grass line measured 200 feet on either side of the proposed structure).

The site plan also shows that the applicant proposes to build cart paths and the golf course (hole 4) *directly behind* the August 2000 setback line along the Pacific Ocean. The Examiner admitted evidence that this ocean beach had also significantly retreated since August 2000, and the ongoing retreat of this shoreline is admitted by the Applicant. **TAB W.** Again, the City erred in approving a shorelines permit and binding site plan for a project that violated setbacks.

IV. ARGUMENT EXCLUSIVE TO BINDING SITE PLAN APPEAL.

The binding site plan appeal reveals that the City has blatantly ignored the law and even misled judges and decision-makers to support this ill conceived development proposal. Whereas the Superior Court formerly policed such conduct, RCW 43.21L now gives that role to this Board.

A. THE CITY COUNCIL OVERTURNED THE HEARING EXAMINER BASED UPON AN ERRONEOUS DECISION THAT THE LINKS PROJECT DID NOT REQUIRE A BINDING SITE PLAN NOR COMPLIANCE WITH THE STANDARDS OF 17.36B.060.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Section IV of the Hearing Examiner Decision found that the Site Plan Review Board failed to adopt findings required by WMC 17.36B.060. This deficiency is clear on the face of the SPRB's decision. BSP 1061. The City Council erred in reversing this decision based upon its erroneous legal conclusion that the Links site did not require a binding site plan and did not have to comply with WMC 17.36B.060. **TAB N.**

To overturn the City Council's decision, the ELUHB only needs to find an error of law. RCW 43.21L.130(1)(b). the City Council's decision cannot stand when compared to the City's ordinances, its prior decisions, and its inconsistent arguments to the Superior Court.

1. Respondents are estopped from arguing that no binding site plan was required because they previously took the exact opposite position in Thurston County Superior Court.

In the appeal of the master plan approval to the Superior Court, FOGH argued that the City failed to sufficiently scrutinize the proposal during the master planning process. Respondents Mox Chehalis, Westport and Port of Grays Harbor submitted a joint response brief in which they defended the land use appeal by specifically arguing that the Links project would require a binding site plan and that WMC 17.36B.060 would apply:

> The City of Westport regulates the subject property through a master plan process which requires a series of land use approvals tailored for consideration of large scale projects, such as the Links project. **The process is set forth in Ch. 17.36A WMC and establishes a two-step approval process**. ...
>
> **After approval of a master plan, the proposal must obtain further approval of specific building configuration through the binding site plan or subdivision process, as appropriate.** WMC 17.36.070. **Site plan review is provided for in Ch. 17.36B WMC, which sets forth specific requirements for binding site plans. ...**
>
> Binding site plan review is more specific than master plan review. **Approval of a binding site plan requires findings that appropriate provisions are made for public health, safety and**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

> **welfare, including the same elements necessary to approve a preliminary plat. WMC 17.36B.060(1). Proposed dedications must be shown on the binding site plan. WMC 17.36B.060. The board must also make findings that public facilities impacted by the proposal will be adequate ... WMC 17.36B.060(4). Binding site plan review also requires a finding that adequate capacity for sewer service exists or is planned with funding sources in place. WMC 17.36B.060(5).** Development permits, including shorelines, grading and building permits, may be issued concurrently with site plan approval." WMC 17.36B.090.

Respondents' Joint Response Brief, at 8-9, dated February 12, 2003, *Thurston Co. Cause No. 02-2-01892-8.* **TAB X.** Respondents argued that FOGH's issues would be addressed "*When* this project comes for binding site plan review". *Id.* at p. 11, lines 9-11 (emphasis added). The Superior Court affirmed the master plan based in part upon these arguments.[13]

2. The City's Zoning Code unambiguously requires all development in the Tourist Commercial Zone to obtain a binding site plan.

The ELUHB need only to look at the underlying zoning to find that the City's Council erred in holding that the Links does not require a "binding site plan." The Links project is proposed within the Tourist Commercial Zone, which is governed by WMC 17.21. WMC 17.21.030 explains that the entire zone shall be planned as a whole through the master plan development process. ***"The City shall process individual building projects through the binding site plan process"***.[14]

3. The Master Plan Ordinance and Master Plan for the site require the Links to obtain a binding site plan.

---

[13] The Court's decision approving the master plan held that "An approved master plan sets the general development standards, but the process then requires additional steps, including additional public process, to specifically address, and permit if appropriate, additional constructions features designed to meet the standards in the master plan. The standards in the master plan may be broad standards." *April 24, 2003, Oral Opinion, p, 8, Thurston Co. Cause No. 02-2-01892-8.*

[14] Although this section makes reference to WMC Ch. 14.10, the binding site plan process was ultimately codified at WMC 17.36B.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The Master Plan Development ordinance, WMC 17.36A, contains a section titled "Approval of specific development proposals," which states that "Specific development proposals, when consistent with the provisions of the master plan, may be approved according to binding site plan process or subdivision process, as appropriate." WMC 17.36A.070.

In Ordinance 1277 adopting the master program for the Links project, the City Council repeatedly stated that a binding site plan would be required. **TAB Y.** For example, Condition Condition 1 stated: "***Prior to construction of the golf course, a final golf course layout shall be prepared for binding site plan review***." *Id (emphasis added).* Condition 8 requires "Details of the required [street] improvements will be determined during Binding Site Plan review for the Budget Motel." *Ordinance 1277, adopted October 8, 2002*, page 12. Similarly, Condition 21 stated a groundwater monitoring plan "shall be submitted upon application for binding site plan approval." *Id at p. 14.*

Ordinance 1277 is also determinative because once approved by the Council, the "council ordinance adopting the [master plan] map and text shall be the zoning standards for the site." WMC 17.36A.070.

4. The Planning Commission and City Administrator repeatedly confirmed that the Links requires a "binding site plan."

The Planning Commission's approval of the shoreline permit confirmed that "The shoreline substantial development permit with conditional use does not authorize construction until other permits are issued. ***It requires a binding site plan approval under Westport Municipal Code chapter 17.36B***." *Planning Commission Decision, September 30, 2003, Finding C13,* WSH 4393. **TAB O.** The City Council affirmed this Planning Commission decision on October 30, 2003. WSH 4452. **TAB N.**

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

On September 5, 2002, City Administrator Randy Lewis advised the City Council that after master plan approval, "specific and detailed applications are required to implement all or a portion of the master plan under either Chapter 17.36B, 'Binding Site Plans' or Title 14, 'Subdivisions.' It is during these processes that the very specific details of a proposal are reviewed by the City for compliance with both the master plan and all other requirements of the City." September 5, 2002 Memorandum from R. Lewis to City Council. **TAB Z.**[15] He summarized that "approval and implementation of a master plan undergoes three separate but closely related processes: (1) Review of the master plan by the Hearing Examiner and City Council; (2) Review of specific development proposals by the City either as a Binding Site Plan or a Subdivision; (3) Review of detailed architectural and engineering plans and specifications by City staff."*Id.*, p. 2. Even as late as April 8, 2004, Lewis testified that "***it was always known that this project would go through the Binding Site Plan approval process***." *April 8th Transcript*, p, 108.

5. The City Council's decision must be reversed.

The City Council's decision approving the binding site plan is not just incorrect, it is frivolous. If the City had made these arguments to a court, FOGH would have moved for sanctions under Civil Rule 11. This Board should not allow the City's decision to stand.

B. THE CITY COUNCIL ERRED IN HOLDING THAT THE FINDINGS OF SMC 17.36B.060 WERE NOT REQUIRED.

The Hearing Examiner found that the Commission erred in not entering the mandatory findings of WMC 17.36B.060. The City Council overturned this decision, holding that these standards did not apply to the project. This is completely inconsistent with the City's position in Thurston County Superior Court,

[15] Appellants have been unable to locate the page number for this document from Westport's indices.

Smith & Downey, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

as quoted above. It is also inconsistent with WMC 17.36B.110, which states, "The decision of the site plan review board shall be in a written format that clearly indicates findings required by Section 17.36[B].060."[16] This applies to all decisions of the SPRB.

C. THE CITY COUNCIL ERRED IN IGNORING THE REQUIREMENT FOR CONCURRENT DEDICATION PURSUANT TO WMC 17.36B.080.

WMC 17.36B.080 requires that "A site plan shall not be finally approved until or concurrent with a dedication of required rights-of-way, easements, and land." The Hearing Examiner agreed with FOGH that the binding site plan should not have been issued without requiring the dedications required by the approvals. Numerous easements and dedications are required in the various approvals issued to the Links project.[17]

The City Council decided that although this language was clear, it did not need to be complied with in this instance. It held that compliance was inconvenient because the Applicant would still have to conduct improvements on the land to be dedicated and therefore the dedication should happen at some later – unspecified – time. BSP 1162. Inconvenience is not a reason to ignore the law. Developers are required to make improvements on public lands *all the time.* RCW 17.36B.080 unambiguously requires that the lands become public at the time of binding site plan approval.

V. ARGUMENT EXCLUSIVE TO SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT.

---

[16] This reference should read WMC 17.36B.060 but suffers from a typographical error. There is no WMC 17.36.060.

[17] *See e.g.*, BSP 1032 (utility easements "shall be granted to the city of Westport."); *April 8-9thTranscript*, p. 113 (Randy Lewis, member of Site Plan Review Committee admits that master plan approval required dedications sometime in the future).

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

A. WESTPORT ERRED IN APPROVING A PROJECT THAT IS CONTRARY TO THE PUBLIC INTEREST AND REGULATIONS REGARDING SHORELINES OF STATEWIDE SIGNIFICANCE.

The SMA and WSMP defined the shorelines containing the Links site, Westhaven State Park, and Westport Light State Park as shorelines of statewide significance. Any development within these shorelines must be consistent with the applicable policies contained in RCW 90.58.020, which are incorporated into the WSMP:

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. 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.
>
> **In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline**. …(emphasis added).

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

The Links project is simply inconsistent with these preferences and mandates.

1. The project places local interests over statewide interests.

The first preference for shorelines of statewide significance is to "Recognize and protect the statewide interest over local interest". RCW 90.58.020. The fifth preference is to "Increase public access to ***publicly owned*** areas of the shorelines." *Id.*

These preferences are triggered because the site is the heart of a State Parks complex that contains "the most frequently visited ocean beaches in the State of Washington." BSP 410 (WDFW comments). The Parks Department has recognized that: "Visitors to these sites are interested primarily in the natural environment and the recreational amenities it offers". *Id.*

In its comments on the project, Washington Parks noted that

> **The placement of condos adjacent to Westhaven State Park, two one-half million gallon water storage tanks, and an extensive golf course would drastically change the aesthetics of the park areas. Visitors to both State Parks presently enjoy the aesthetics of a secluded dunal wilderness area.**
>
> ...
>
> **Visitors to Westport Light State Park and Westhaven State Park enjoy the unique wildlife, vegetation and habitat of the dunal wetlands.**

BSP 416-17 (emphasis added).

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

Currently, there are no buildings over two stories anywhere in Westport, and no significant development at all in the area of the State Parks. *See* photos attached to Declaration of Arthur Grunbaum. **Exhibit AA.**[18]

The project proposes massive buildings directly adjacent to the public shoreline in Westhaven State Park. These buildings will tower over the public shorelines and State Parks. The Applicant's view simulations show the dramatic impact on the State Park, although they minimize those impacts by showing the views from the waters edge where the development is partially blocked by the primary dune. JARPA, **TAB BB.** In truth, Park visitors will view the development from all over the beach, from the parking lot, and from the public trails on top of the primary dune. Thus, they will be unable to escape the development's imposition. As the Department of Ecology stated in its November 7, 2001 letter to Respondents: "the structures and lighting will affect habitat values, views, and people's experience of walking along publicly owned beaches and walkways."

The proposed resort will have building heights over 85 feet. The golf course clubhouse will be 60 feet. The four condominium towers will be 65 feet tall, each containing fifty (50!) condominiums. *See* JARPA.

A University of Washington professor modeled the shadows cast from the proposed development and found that the buildings will cast shadows over the public shorelines and Westhaven State Park. *Declaration of Joel Loveland. WSH 2049.* **TAB CC.** Shadows are also cast on the Westhaven State Park parking lot, the staging area for the State's most active surfing beach. *Id.*

---

[18] Appellants have been unable to locate the page number for this document and those referenced at CC,

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

In addition, the development will convert lands that have been held by the public for public use into a private development. The Links site has served as a de facto public park for decades, being used for birding, hiking, and other public recreation. *See* Declarations of Brady Engvall, Gil Krigbaum, Steve Ashby, David Mascarenas, Robert Williams. **TAB DD.** Until recently, there were never any gates or no trespassing signs. The Port of Grays Harbor placed no limits on the public use of the property. *Id.*

The project will fill a wetland system and individual wetlands that extend onto Westport Light State Park. These wetlands are an important amenity of the Park, and any degradation of them will *decrease* public access to publicly owned areas of the shorelines.

DD, and EE from Westport's indices, but they were submitted to the record.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

2. The project does not preserve the natural character of the shoreline or the resources and ecology of the shoreline.

The shoreline is currently in a natural state. The project will change all this, converting an undeveloped interdunal area to a resort complex with golf resort. Large buildings, parking lots, and a golf course will dominate the landscape. Wetlands will be filled and developed with cart paths, "water hazards," intensive recreational use, and intensive application of fertilizers and pesticides.

This is directly contrary to the preferences established by the Shoreline Management Act.

3. The project favors short term benefit over long term benefit.

While Westport may feel that it needs economic development *now*, wetlands and State Parks are irreplaceable resources that should be stewarded for future generations. The SMA requires us to prioritize the long term in making critical and irreversible choices on the shoreline. Indeed, this project is *highly speculative* and proposed by an anonymous group of investors. The Applicant has publicly stated that the recreational aspects of this project are designed as "loss leaders" for the sale of 60 to 80 million dollars of condominium units. The benefits advanced by this project are short term.

The epitome of short term thinking is the Applicant's insistence on placing the development in the erosion zone. It is not clear that the Applicant will even get the condominiums sold before they are threatened by erosion, setting off a Hobson's choice between letting the condominiums fall into the sea or destroying the public shoreline to save them.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

4. Local economic development is not a preferred use of shorelines of statewide significance.

The primary justification for the Links project is local economic development, which is not a preferred use of a shoreline of statewide significance. RCW 90.58.020. The preferred uses described above cannot be subjugated for local economic development. Although RCW Chapter 43.21L creates streamlined appeals for rural economic development project, it did not decrease the substantive protections afforded our shorelines of statewide significance.

5. This project will not provide long term public recreation and in any event recreation is given a lower preference.

Recreation – another arguable justification – is given almost the lowest priority of preferred uses. Current preferred uses cannot be jeopardized for recreation on private lands.

In addition, it is not at all clear that the project will provide recreational opportunities for the "public."[19] The Applicant's "market analysis" tells a different story:

> To a large extent the nature of demand at the *Links* is a function of the market absorption of the hotel and townhouse components. … At the time the golf course is opened however, almost 75% of demand will be sourced from local daily golfers, ie., those domiciled within the *Primary Market* (denoted PM if Fig 4.2). **With time, as hotel operations mature and townhomes are sold, the daily golfer is squeezed down to just 16%, as demand from the hotel and townhomes takes priority. Within just three years, the *Links* becomes a place where the casual local visitor simply cannot even reserve a tee time.**

June 2001, Market Analysis, p. 4.7 (emphasis added). **TAB EE.**

While the Applicant will claim that it does not know how priority will be given, the most current market analysis for the project states that local visitors will not be able to get tee times. Moreover, it

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

states that a primary selling point for the condominiums and hotels will be that owners/guests will be given priority for the golf course.

6. The project is a non-water dependent use.

The proposed degradation of the shoreline environment is even more troubling because the Links project is not a water dependent use. The resort could be located in one of countless upland locations, thereby minimizing shoreline impacts.

B. THE CITY ERRED IN ALLOWING BUILDINGS OVER 50 FEET AND FAILING TO APPLY YARD REQUIREMENTS.

The City erred in not applying the limitations of WMC 17.36.050 to the development. Under WMC 17.36.050, a "country club" is permitted in the TC zone only if it is limited to 50 feet and only with a front side and rear setback equal to the building height. *See* WSM 17.32.050 (in the urban shoreline zone, development shall be consistent with the underlying zoning designation).

Neither the WSMP nor the Zoning Code define "country club," so the Board must interpret the provision. As the PCHB stated in *Black Diamond Association v. Ecology*, PCHB 96-90:

> The Board looks to the plain and ordinary meaning of the words used, where statutory terms are undefined. *State v. Talley*, 122 Wn.2d 192, 213, 858 P.2d 217 (1993). The Board thus gives careful consideration to the subject matter, the context and the statutory purpose, to adopt a meaning which is consistent with the overall purpose of the act. *PUD of Lewis County v. WPPSS*, 104 Wn.2d 353, 369, 705 P.2d 1195 (1985). The Board also may refer to a dictionary or to common law for a definition. *State v. Pacheco*, 125 Wn.2d 150, 154, P.2d (1994).

[19] The question of whether the project satisfies a "public use need" for recreation is a distinct issue that will be addressed in the *de novo* hearing in evaluating the CUP.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

See also WMC 17.32.015(2) ("the terms of [the WSMP] shall be interpreted to be consistent with the State Shorelines Management Act, Chapter 90.58 RCW and the implementing regulations").

In *Stanislaus Audubon Society v. Stanislaus County,* 33 Cal.App. 4th 144, 39 Cal. Rptr.2d 54 (Fifth Appellate District 1995), the Court opined that a project consisting of a 27-hole golf course, putting greens, driving range, 4 tennis courts, swimming pool and cabana, maintenance building and a clubhouse, meeting facilities, offices, pro shop, lounge and a restaurant met the definition of a "country club." The Appeals Court held:

> The term "country club" is defined as "a social club, usually in the outskirts of a city, equipped with a clubhouse, golf course, etc." (Webster's New World Dict. (2d college ed. 1982) p. 325.) Appellant refers to the proposed project as a "resort." The County and Williams characterize it as a "golf course project." Neither term correctly describes the proposed project. The proposed project is accurately defined as a "country club" and therefore will be referred to as such throughout this opinion. The term "country club" has been selected only because it most fully and correctly describes the proposed project; no value judgments are intended by the use of this term.

Previous litigation has determined that a golf course project meets the definition of a "country club" even if open to the public. *Hayfields Inc. v. Valleys Planning Council et al*., 716 A.2d 311 (Md. App. 1998).

"The Board must construe statutes to avoid rendering meaningless any word or provision. Likewise, we must avoid a construction which would produce unlikely, absurd, or strange consequences. … The spirit of purpose of an enactment should prevail over inept wording." *Black Diamond Association v. Ecology,* PCHB 96-90 (citing *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) and *State v. Conteras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994))

The height and yard limitations for "country clubs" must be applied to the Links project to comply these basic rules of construction. It would be "unlikely, absurd, and strange" for these limitations to apply

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

to some golf course developments in the TC zone but not the Links project. There is no logical rationale for such distinctions. Moreover, since these limitations are incorporated into the WSMP, they must be interpreted to further the SMA. WMC 17.32.015(2).

The 50 foot height limit is consistent with other height requirements in the shoreline area. *See* WMC 17.18A.080, 18B.040 (maximum height limited to 30 feet in Ocean Beach Residential zones); WMC 17.20A.060 (building height limited to 30 feet in Mixed Use Tourist Commercial Zone 1 "MUTC-1" and 50 feet in MUTC-2).

The Board should reject the SSDP because the development is well over 50 feet and does not provide front, back, and side yards equal to building height. Department of Ecology notified the Applicants of this fact as early as November 7, 2001. *Letter from Gale Blomstrom, November 7, 2001.*

C. NO 5 YEAR TIME PERIOD AS REQUIRED.

RCW 90.58.143 requires construction to begin within two years and for the permit to terminate within five years. The challenged shorelines permit fails to include those limits.

D. WETLAND ISSUES ARE RESERVED.

The wetland issues in this case (fill, buffers, mitigation) are subject to *de novo* review through the CUP, although they arguably could fall within the scope of both the SSDP and CUP appeals. To avoid duplication, Appellants will present evidence and argument relating to wetlands only once -- during the *de*

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

novo hearing and briefing. The Board can then decide whether its decision on wetlands should be applied also to the SSDP appeal.[20]

VI. CONCLUSION

For the reasons stated herein, Appellants respectfully request that the decisions of the Westport City Council be reversed and the Binding Site Plan and Shorelines Substantial Development Permit be denied.

Respectfully submitted this 24th day of June, 2005.

SMITH & LOWNEY, P.L.L.C.

By:_ _____
Knoll D. Lowney, WSBA # 23457
Attorneys for Petitioner
Friends of Grays Harbor

_____***JPJ***_____
Jennifer P. Joseph, WSBA #35042
Attorney for Appellant
Washington Environmental Council

___
_ ***JH***_____
Jennifer Harris, WSBA # 34435
Attorney for Appellant
Washington Environmental Council

AFFIDAVIT OF SERVICE

[20] As Appellants stated in its motion for *de novo* review, much if not all of the evidence to be relied upon in the *de novo* CUP review is within the closed record or the scope of the 401 appeal.

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883

I, Matt Fontaine, hereby certify under penalty of perjury under the laws of the State of Washington that on June 24, 2005, I caused this document to be served on all parties to this action by e-mail and first class mail.

Dated this 24th day of June, 2005.

/MF

Matt Fontaine

Smith & Lowney, p.l.l.c.
2317 east john street
Seattle, Washington 98112
(206) 860-2883