

EXPEDITE
 No Hearing set
 Hearing is set
 Date October 21, 2011
 Time: 1:30 p.m.
 Judge: Gary R. Tabor
 Calendar: Bench Trial

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

TAYLOR SHELLFISH COMPANY,
 INC, a Washington corporation, d/b/a
 TAYLOR SHELLFISH FARMS and
 BLIND DOG ENTERPRISES LTD, a
 Washington corporation, d/b/a
 ARCADIA POINT SEAFOOD,

No. 11-2-01019-5

THURSTON COUNTY'S RESPONSE
 BRIEF

Petitioners,

vs.

THURSTON COUNTY, a political
 subdivision of Washington State,

Respondent.

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I. INTRODUCTION

Taylor Shellfish Company, Inc. and Arcadia Point Seafood (collectively “the Growers”) would like this Court to blindly follow an Attorney General Opinion and allow three commercial geoduck operations on/in the shoreline of the Puget Sound, each of which is approximately the size of a football field or larger,¹ *without any local permit review*. The law does not require a court to treat an attorney general opinion as binding precedent. Additionally, the Growers’ reliance on newly adopted WAC provisions is misplaced as the WAC provisions themselves state that they do not currently apply to Thurston County. Finally, the Growers bring arguments that are outside the scope of the land use decision made by the Hearing Examiner (“Examiner”) and affirmed by the Thurston County Board of County Commissioners (“BOCC”). The County asks this Court to dismiss the Growers’ Petition.

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II. FACTS

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A. The Proposed Commercial Geoduck Operations.²

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4. The McClure Property. Arcadia Point leases the McClure Property...The plantable area of the farm site would be between approximately 0.60 acres and 0.75 acres in size...During planting, PVC tubes 4-inches in diameter and 10-inches in length will be pushed vertically into the beach substrate at a density not to exceed one tube per square foot. Approximately 4 to 6 inches of each tube will be exposed at the surface of the sand when the tide is out. Juvenile geoduck clams will be placed into the tubes and a mesh cap placed over each tube, secured with a rubber band... The mesh caps will be removed no later than 12 months following the initial planting. The tubes then will be covered with area netting (3-inch stretched mesh or larger) to contain the tubes as the geoducks grow and push the tubes from the sand. The net is secured by the use of rebar placed approximately

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¹ A football field with the dimensions of 300 feet by 160 feet is approximately 1 acre. The plantable areas of the three commercial operations are proposed to be up to 1.5, .9 and .75 acres of PVC tubes at a density of approximately one tube for each square foot. AR 920-922.

² The facts in this section come directly from the Stipulated Facts found at AR 918-923.

1 six feet apart...No later than 24 months following planting, the tubes and
2 area netting will be removed entirely. Depending on the proliferation of
3 benthic predators, the area netting may be placed back on the sand...

4 Harvesting of mature geoduck clams will take place between 5 and 7
5 years after planting. Harvesting will be accomplished by means of a vessel-
6 mounted high volume, low pressure water pump with the clams extracted
7 one at a time by hand. Harvest will occur by diving with surface-supplied
8 air, or from the beach during periods of low tides. All equipment will be
9 brought to the farm by vessel. During harvest periods, the vessel will be
10 removed from the site when harvesting is not taking place...

11 5. The Thiesen Property. Arcadia Point leases the Thiesen Property...
12 Arcadia Point proposes to establish a geoduck clam farm on the Thiesen
13 Property. The plantable area would be between approximately 1.0 to 1.5
14 acres in size. The plantable area will be located between the +2.0' and -4.5'
15 tidal elevations. The farm would be operated in the manner described for
16 the McClure Property.

17 6. The Lockhart Property. Taylor Shellfish leases the Lockhart
18 Property...Taylor Shellfish proposes to establish a geoduck clam farm on the
19 Lockhart Property. The total farmed geoduck site would be between
20 approximately 0.12 and 0.9 acres in size. The geoduck farming activities
21 would be operated in the manner described for the McClure and Thiesen
22 Properties, except for the following: Taylor Shellfish will use PVC tubes
23 that are 6 inches in diameter and 9 inches long (compared with 4-inch
24 diameter tubes that are 10 inches long). The tubes will be placed at a density
25 of one tube per 1.2 square feet. The tubes will be covered with area net
immediately after planting, rather than with individual mesh caps and bands.
The tubes will be removed after approximately 12 to 15 months, rather than
after 20 to 24 months. After removing the tubes, the geoducks will be
temporarily re-netted...

AR 920-922.

B. Procedural Facts.

Issues surrounding commercial geoduck operations within the shoreline
were relatively unknown to the Thurston County Resource Stewardship
Department (“Department”) until June of 2006. Transcript of Deposition of Mike
Kain, July 11, 2011 (“Kain Trans.”) at p. 7, lines 13-20; Exhibit (“Ex.”) 1, p. 2. At

1 that time, the Department determined that a shoreline substantial development
2 permit was required for commercial geoduck operations within the shoreline of the
3 state. Kain Trans., Ex. 1, p. 1.

4 In early 2008, the County put in place a new policy to review commercial
5 geoduck operations on a case by case basis. Kain Trans. p. 12, lines 16-22; p. 13,
6 lines 1-13; p. 16, lines 9-13; Ex. 3 and 4. This policy information was provided
7 from Mike Kain to Cliff Moore on March 19, 2009, in an email of potential items
8 for the weekly management report for the BOCC. Kain Trans, Ex. 4.

9 In February 2010, the Growers submitted three master applications for
10 commercial geoduck operations in order for the County to make a determination
11 on whether the three proposals needed a shoreline substantial development permit
12 to operate. AR 750, AR 817, AR 871. After the applications were submitted, the
13 Growers agreed to place the applications on hold pending the outcome of State of
14 Washington activity. Kain Trans. p. 55, lines 21-25; p. 56, lines 1-16. Also,
15 following the submission of the applications, Bill Taylor, a representative of one of
16 the Growers, set up a private meeting with at least one of the Thurston County
17 Commissioners (Commissioner Valenzuela) for 4:30 PM on April 28, 2010. Kain
18 Trans. p. 49, lines 8-18; Ex. 9.

19 Just minutes following the meeting on April 28, 2010 with Bill Taylor of
20 Taylor Shellfish, Commissioner Valenzuela sent an email requesting a meeting on
21 the topic of geoduck applications. Kain Trans. p. 48, Lines 10-22; Ex. 5. Around
22 that same time, Mike Kain had told at least one commissioner's aid that Taylor
23 Shellfish would consider leaving Thurston County if the County required a
24 substantial development permit for geoduck operations. Kain Trans. p. 53, lines 2-
25 25; p. 54, lines 1-16. Furthermore, this was the first time that this BOCC with its
two new commissioners were briefed on geoduck operations by the Department.

Kain Trans. at p. 50, lines 22-25; p. 51, lines 1-5; Moore Trans. p. 25, lines 5-11.

1 Two informational meetings (May 10, 2010 and May 17, 2010) were held
2 between the Department and the BOCC regarding geoduck operations and permits.
3 Kain Trans., Ex. 10. At the time of the meetings, there were no quasi-judicial
4 hearings pending before the BOCC related to geoduck applications. Kain Trans. p.
5 51, lines 17-21. The meetings were informational only and did not discuss the
6 specifics of the Growers' three applications other than to indicate that there were
7 three pending applications and the Department was most likely going to require a
8 shoreline substantial development permit for them. Kain Trans. p. 30, lines 3-11; p.
9 31, lines 21-25; p. 32, lines 1-17; Transcript of Deposition of Cliff Moore, July 11,
10 2011 ("Moore Trans.") at p. 17, lines 3-11; p. 24, lines 11-25; p. 25, line 1; p 31,
11 lines 3-21. At no point during the meetings did the BOCC direct the Department on
12 how to handle the three pending applications. Moore Trans. p. 24, lines 7-14; Kain
13 Trans. p. 51, lines 6-16. At the May 17, 2010 public meeting, the BOCC did
14 concur with the Department's policy that a shoreline substantial development
15 permit be required for tideland geoduck aquaculture. Moore Trans., Ex. 9.

16 Ultimately, the Growers did not withdraw the three applications and the
17 Department issued its decisions on or about June 30, 2010. Kain Trans. p. 56, lines
18 1-2. AR 745, AR 812, AR 866. The Department found that the proposed geoduck
19 operations constituted development and, thus, required substantial development
20 permits for four specific reasons: (1) the placement of tubes and netting on the
21 beach constituted construction of a structure; (2) The method of harvest would
22 remove some amount of sand and other minerals from the seabed; (3) The tubes
23 and netting would be an obstruction on the beach; (4) The tubes and netting, even
24 though temporary, would potentially interfere with the normal public use of the
25 surface waters, particularly during low tides. AR 746, AR 813, AR 867. The
Growers timely appealed the Department's decisions to the Hearing Examiner. AR
733, AR 801, AR 855.

1 Following the appeal, the Growers brought a motion in limine to limit the
2 scope of the appeal hearing to the fourth issue: whether any of the three farms will
3 interfere with the normal public use of the surface of the waters. AR 926. In other
4 words, the Growers wished to extinguish the first three issues based on the
5 conclusions found in AGO 2007 No. 1 (“AGO”). AR 928-932. In response, the
6 Department asked for summary judgment since the Department’s decision to
7 require a shoreline substantial development permit would stand if any of the other
8 three reasons provided in the decision were upheld. AR 956, AR 968. The Hearing
9 Examiner and the Growers agreed to this proposition. AR 1181, AR 1183. In
10 addressing the issues, the Growers stated:

11 Appellants agree that summary judgment is appropriate as to those three
12 grounds to the extent the Examiner can issue a decision based only on
13 those facts to which the parties have expressly stipulated. However, if the
14 examiner considers it necessary to go beyond the stipulated facts to issue
15 a decision as to any of these three grounds, *Appellants request that a*
16 *hearing be held on any ground that cannot be decided based on the*
17 *stipulated facts alone...* Again, if the Examiner considers it necessary to
18 go beyond the stipulated facts to issue a decision as to any of these three
19 grounds, *Appellants request that a hearing be held on any ground that*
20 *cannot be decided based on the stipulated facts alone.*

21 AR 1181 (emphasis added).

22 On January 21, 2011, the Hearing Examiner issued an Order on Cross-
23 Motions for Summary Judgment. AR 1185-1204. The Hearing Examiner
24 summarized the order as follows:

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

1 been committed.” *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d
2 277 (1999).

3 IV. LEGAL ARGUMENT

4 A. The Shoreline Management Act.

5 The citizens of Washington State adopted the Shoreline Management Act
6 (“SMA”), ch. 90.58 RCW, through citizen initiative, finding that “the shorelines of
7 the state are among the most valuable and fragile of its natural resources and . . .
8 there is great concern throughout the state relating to their utilization, protection,
9 restoration, and preservation.” RCW 90.58.020.

10 The State policy enunciated in the Act calls for restricting construction on
11 privately owned and publicly owned shorelines of the State to protect against adverse
12 effects to the public health, the land and its vegetation and wildlife, and the waters of
13 the state and their aquatic life. *Id.* That section further states “[i]n the implementation
14 of this policy the public's opportunity to enjoy the physical and aesthetic qualities of
15 natural shorelines of the state shall be preserved to the greatest extent feasible
16 consistent with the overall best interest of the state and the people generally.” *Id.*

17 The Shoreline Management Act explicitly requires that its provisions be
18 broadly construed to protect the State's shorelines as fully as possible. *See* RCW
19 90.58.900. When doubt exists, the courts repeatedly have required and employed a
20 broad reading of the Act to assure that its environmental protection purposes are
21 served. *Bellevue Farm v. Shorelines Bd.*, 100 Wn. App. 341, 351, 997 P.2d 380
22 (2000); *Buechel v. Department of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910
23 (1994); *Hunt v. Anderson*, 30 Wn. App. 437, 439, 635 P.2d 156 (1981).

24 The Supreme Court has directed that “analysis of the SMA must be made
25 with [this] legislative mandate in mind: “This chapter is exempted from the rule of
strict construction, and it shall be liberally construed to give full effect to the

1 objectives and purposes for which it was enacted.” *Clam Shacks v. Skagit County*,
2 109 Wn.2d 91, 93, 743 P.2d 265 (1987) (*quoting* RCW 90.58.900).

3 All “development” within the shorelines of the State of Washington must be
4 consistent with the policies of the Shoreline Management Act and regulations
5 adopted pursuant to the Act. RCW 90.58.140. If such development is a
6 "substantial development," as that term is defined by the Act, then the developer
7 must obtain a shoreline substantial development permit. *Id.* Specifically, the
8 Shoreline Management Act states:

9 (1) A development shall not be undertaken on the shorelines of the
10 state unless it is consistent with the policy of this chapter and, after
11 adoption or approval, as appropriate, the applicable guidelines, rules,
12 or master program.

13 (2) A substantial development shall not be undertaken on shorelines of
14 the state without first obtaining a permit from the government entity
15 having administrative jurisdiction under this chapter.

16 RCW 90.58.140.

17 The SMA broadly defines "development" as:

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

24 RCW 90.58.030(3)(a).

25 Substantial development means any development of which the total cost or
fair market value exceeds \$5,000 (as adjusted for inflation) or any development,
which materially interferes with the normal public use of the water or shorelines of
the State. RCW 90.58.030(3)(e). Under the Shoreline Management Act "no

'substantial development' exists if there is no 'development' within the meaning of
RCW 90.58.030(3)(d), because for there to be a 'substantial development,' there

1 must first be a “development.” *Cowiche Canyon Conservancy v. Bosley*, 118
2 Wn.2d 801, 812, 828 P.2d 549 (1992). In this case, there is no dispute that the
3 \$5,000 threshold in the substantial development definition is met. This appeal
4 raises only the issue of whether the proposed activities constitute “development.”

5 **B. The BOCC And The Hearing Examiner Correctly Determined**
6 **That The Geoduck Facilities Are “Any Piece Of Work Artificially**
7 **Built Or Composed Of Parts Joined Together In Some Definite**
8 **Manner.”**

8 The SMA defines “development” to include “the construction . . . of
9 structures.” RCW 90.58.030(3)(a). The state rules define “structure” as:

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

13 WAC 173-27-030(15). The BOCC and the Hearing Examiner properly recognized
14 that this definition includes two separate parts. The use of the word “or” indicates
15 that an object that satisfies either part is a “structure.”

16 One part of the definition specifies that a structure is “any piece of work
17 artificially built.” The BOCC and the Hearing Examiner determined that the array
18 of PVC pipes inserted into the beach one foot apart from each other and then
19 covered with a net secured by rebar was a “piece of work artificially built.” The
20 Examiner stated:

21 [A] use involves a structure if it involves a "piece of work artificially built".
22 Under customary definitions, the PVC tubes are pieces of work and are
23 artificially built. This seems plainly to classify them as structures under
24 WAC 173-27-030(15).

25 AR 1194.

The Hearing Examiner’s conclusion, as affirmed by the BOCC, on this point
is unassailable. The PVC tubes, the attached netting, the rubber bands, rebar and

1 the area netting do not naturally occur in the Puget Sound. The PVC tubes, the
2 attached netting, the rubber bands, rebar and the area netting constitute a “piece of
3 work artificially built.” This Court could stop its analysis right here and have
4 sufficient grounds for sustaining the BOCC and Hearing Examiner.

5 The Growers argue that it is not enough that the piece of work is artificially
6 built. Rather, they argue, the artificial parts must be joined together. Leaving aside
7 for a moment that the area net does join them together, the argument is based on a
8 misreading of the definition. The Growers ignore the word “or.” A structure is a
9 “piece of work artificially built **or** composed of parts joined together in some
10 definite manner.” The “joined together” requirement in the second part of this
11 definition cannot be read into the first part of the definition. The BOCC and Hearing
12 Examiner correctly concluded that it would be legal error to treat the word “or” as if
13 it were “and.” The Examiner correctly construed this part of the definition.

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

25 Under this argument, a use could consist of different structures
(pieces of work artificially built), but would not itself be a structure
unless the constituent structures were "joined systematically". This
position taxes logic with the result that a use consisting exclusively of
structures would itself not be a structure unless the constituent
structures were satisfactorily joined. Similarly, it contradicts the
definition of structure as "any piece of work artificially built". (Emph.
mine.) It also would effectively remove the "or" from the definition of

1 structure by requiring that constituent structures also be joined
2 systematically. For these reasons, I don't believe this argument is
3 consistent either with the text of the definitions or the purposes they
serve. The proposed geoduck operations involve structures.

4 AR 1194-1195.

5 Even though the Hearing Examiner could have stopped at this point, he went
6 on to consider alternative grounds that had been discussed by the parties.

7 Likewise, this Court could choose to stop at this point and affirm the BOCC and
8 Hearing Examiner on this ground alone; but there are additional grounds available
9 for supporting the Board's decision.

10 The Hearing Examiner next addressed the second part of the disjunctive
11 definition: a structure is "any piece of work . . . composed of parts joined
12 together in some definite manner." He said it was "less certain" that the geoduck
13 farm would meet this part of the definition (AR 1195), but after a long analysis, he
14 concluded that it would. AR 1197.

15 The Hearing Examiner, as affirmed by the BOCC, reasoned that treating the
16 net as something that "joins" the tubes together would mean that a tarp thrown over
17 a pile a leaves "joins" the leaves together and makes the leaf pile a "structure." AR
18 1195. On the other hand, the Hearing Examiner noted that one definition of "join"
19 is "to put or bring into close contact, association or relationship." AR 1196 (*quoting*
20 Webster's Third New International Dictionary (1976)). He explained that "the facts
21 that the net is anchored so as to close the area of the tubes to predators and that it is
22 placed to contain the tubes as they are pushed from the sand suggests that it brings
23 the parts into association or relationship," thus falling within this dictionary
24 definition of "join." AR 1196. Confronted with two plausible but opposite results,
25 he opted the result that would best serve the purposes of the SMA. AR 1197. He
reasoned that the environmental protection purposes of the SMA would best be

1 served by assuring that a geoduck farm proposal was reviewed pursuant to the
2 SMA's permitting system and, therefore, he concluded "the PVC tubes should be
3 deemed 'joined' for purposes of the definition of 'structure.'" AR 1197. The
4 BOCC affirmed the Hearing Examiner's decision. AR 4.

5 The Hearing Examiner's analysis of this issue is beyond reproach. He
6 carefully dissected the definition; examined the dictionary definition of undefined
7 terms; considered the applicants' argument in detail; and, ultimately, concluded
8 that the geoduck farms also satisfy this alternative definition of "structure." His
9 conclusion on this point, as affirmed by the BOCC, should be sustained.

10 The Hearing Examiner also addressed the Growers' claim that none of the
11 constituent parts of the piece of work would be constructed in the shoreline. AR
12 1197-1198. He rejected this argument which was affirmed by the BOCC. There
13 simply is nothing that requires the construction of, for instance, the PVC pipes to
14 occur within the shoreline in order for the overall facility to constitute "a piece of
15 work artificially constructed." The Hearing Examiner noted, for instance, that the
16 placement of buoys in shorelines constitutes the construction of a structure, even
17 though the buoys themselves are not constructed within the shoreline. AR 1197.
18 (*This is similar to the use of the term vessel in WAC 173-27-030(15)*). The same
19 reasoning applies to the array of PVC tubes. The BOCC and Hearing Examiner
20 correctly held that the three geoduck operations involved the construction of
21 structures in the shoreline and, therefore, met the definition of development
necessitating a shoreline substantial development permit.

22 **C. The Remaining Issues On Appeal Were Not Decided By The**
23 **Hearing Examiner Nor The BOCC.**

24 The Growers also challenge that the BOCC and the Hearing Examiner
25 should have found as a matter of law that the proposals did not involve (1) removal
of "any" sand, gravel, or minerals; or (2) the placement of obstructions. The

1 Hearing Examiner properly found that these issues could not be decided based on
2 the facts and arguments presented in the cross-motions for summary judgment. AR
3 1203-1204. Accordingly, neither the Hearing Examiner nor the BOCC issued a
4 final decision on those issues and they should not be considered by this Court until
5 a final decision on those issues is made. The Hearing Examiner provided:

6 The effect of the above decisions is that the proposed operations are deemed
7 “developments” under the SMA under the first ground of the administrative
8 determinations, requiring a substantial development permit for the proposals.
9 Thus, unless this determination is reversed, a hearing on a substantial
development permit is required for the proposed operations, and the appeals
of the other grounds of the administrative determinations are moot...

10 AR 1204. Other than the issue regarding “construction of structures,” the Hearing
11 Examiner did not ultimately decide the other issues contained in the Growers’
12 Petition. If the Growers wished to have those issues brought on appeal, they
13 should have brought a motion for reconsideration to the Hearing Examiner to allow
14 those issues to go to hearing so that the decision could encompass all of the issues.
15 Only final decisions of the Hearing Examiner are appealable to the BOCC.
16 Thurston County Code 2.06.070 (“The final decision by the examiner may be
17 appealed to the board by any aggrieved person or agency...”). Also, chapter 36.70C
18 RCW, the Land Use Petition Act (“LUPA”), only applies to “a final determination
19 by a local jurisdiction’s body or officer with the highest level of authority to make
20 the determination, including those with authority to hear appeals...” RCW
21 36.70C.020; see also RCW 36.70C.030 (LUPA is “the exclusive means of judicial
22 review of land use decisions...”). The only relief that this Court could provide with
23 regard to the undecided issues would be to remand the issues back to the Hearing
24 Examiner for consideration. The County asks this Court not to consider any of the
25 issues that were found to be moot by the Examiner.

Additionally, It must be remembered that the Growers agreed to this process.

1 Appellants agree that summary judgment is appropriate as to those three
2 grounds to the extent the Examiner can issue a decision based only on
3 those facts to which the parties have expressly stipulated. However, if the
4 examiner considers it necessary to go beyond the stipulated facts to issue
5 a decision as to any of these three grounds, *Appellants request that a*
6 *hearing be held on any ground that cannot be decided based on the*
7 *stipulated facts alone...* Again, if the Examiner considers it necessary to
8 go beyond the stipulated facts to issue a decision as to any of these three
9 grounds, *Appellants request that a hearing be held on any ground that*
10 *cannot be decided based on the stipulated facts alone.*

11 AR 1181 (emphasis added). Furthermore, the Growers agreed that the fourth issue
12 regarding “interference with the normal public use of the surface of the waters”
13 was not subject to summary judgment and would need a hearing. “Each party
14 agrees that the fourth ground would be decided through an evidentiary hearing.”
15 AR 1183. In other words, only issues *ultimately decided* on summary judgment
16 became final decisions; and the rest of the issues require a hearing and/or
17 additional argument in front of the Hearing Examiner.

18 If this Court does consider the additional two issues put forward by the
19 Growers, the County would like the Court to consider the following arguments and
20 evidence presented to the hearing examiner by the Department for the SJ motion:
21

22 1. *All Three Geoduck Operations Involve The Removal Of Materials.*

23 In his opinion, the Attorney General states: “...if sediment is disrupted
24 during harvest, only a minimal amount of sediment is actually removed with the
25 clam. This minimal amount of materials removed does not comport with a
reasonable interpretation of the statutory language concerning ‘removal of
materials.’ See Black’s Law Dictionary 464 (8th ed. 2004), ‘*de minimis non curat*
lex’ (the law does not concern itself with trifles).” 2007 Op. Att’y Gen. No. 1, pg.
9. The AGO does not state where his information about the amount of sediment
removed comes from nor does he back up his claim that it is a minimal amount.

1 On the other hand, the County provided expert testimony that sand is
2 removed from the site by the proposed geoduck removal process. The County's
3 experts, based on their review of the site and the three applications, have stated that
4 during geoduck harvest, a turbid plume is produced which leads to sediment being
5 transported off-site. Also, the experts state that there is a loss in elevation of a site
6 after the harvest of geoducks due to sand being removed from the site. Finally, the
7 experts provide that due to high pore pressure of the harvested site, erosion will
8 occur during storm events. AR 975-976.

9 Additionally, the *Washington State Geoduck Growers Environmental Codes*
10 *of Practice 12* (rev. 6/2005) ("ECOP") states that "the beach level will be lowered
11 about 1-2 inches by the harvest." AR 1024. Thus, based on the statements of the
12 geoduck growers themselves, the amount of material lost or displaced to another
13 area of the beach amount to some 134 to 268 cubic yards of material per acre, the
14 equivalent of 13 to 26 dump trucks of material.

15 It must be remembered that the SMA explicitly requires its provisions to be
16 broadly construed in order to protect the state shoreline as fully as possible. RCW
17 90.58.900; *Bellevue Farm v. Shorelines Bd.*, 100 Wn. App. 341, 351, 997 P.2d 380,
18 *rev. denied*, 142 Wn.2d 1014 (2000); *Buechel v. Department of Ecology*, 125 Wn.2d
19 196, 203, 884 P.2d 910 (1994); *Hunt v. Anderson*, 30 Wn. App. 437, 439, 635 P.2d
20 156 (1981). The AGO ignores this as the language in the SMA defines development
21 as the "removal of any sand, gravel or minerals..." RCW 90.58.030(3)(a) (emphasis
22 added). To define this to mean something different than what the words clearly state
23 to the benefit of commercial development in the shoreline violates the requirement
24 to broadly construe the SMA to protect the state's shorelines. All words of a statute
25 are important.

In that regard, we are duty-bound to give meaning to every word that
the Legislature chose to include in a statute and to avoid rendering any

1 language superfluous. *Wright v. Engum*, 124 Wn.2d 343, 352, 878 P.2d
2 1198 (1994) ("We do not interpret statutes so as to render any language
3 superfluous.") (citing *Yakima County (West Valley) Fire Protection*
4 *Dist. 12 v. Yakima*, 122 Wn.2d 371, 858 P.2d 245 (1993)). *See also City*
5 *of Seattle v. McCready*, 123 Wn.2d 260, 280, 868 P.2d 134 (1994)
6 (stating that it is "the settled practice of construing statutes to avoid
7 superfluous language"). Where a statute does not define a nontechnical,
8 but vitally important word, we may look to the dictionary for guidance.
9 *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994).

10 *Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995). Looking again to
11 the dictionary for guidance, the word "any" is defined as "one or some, regardless
12 of sort, quantity, or number; any quantity or part." *Webster's II New Riverside*
13 *University Dictionary* 115 (1984). The legislature could have stated, "significant
14 amount." They did not and chose the word "any," a term that is protective of the
15 environment. Clearly, we are not talking about activities that are *exempt* from
16 permitting under the SMA or that are *not* considered substantial like recreational
17 uses. Instead, the three permits are for large commercial operations that
18 install/construct artificial structures meant to keep marine life out of the area.
19 Thousands of tubes will be installed in areas that are as large as football fields and
20 nets placed over the entire area to keep out marine animals. When the sites are
21 liquefied to remove the geoducks, sand, gravel and minerals will be removed from
22 the site. This meets the definition of development under the SMA.

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2. *All Three Geoduck Operations Involve The Placement Of
Obstructions.*

The proposed commercial geoduck operations involve the placement of obstructions on the shoreline of Thurston County. The PVC tubes and netting create a physical obstruction to not only the public's use of the area (fishing, walking), but also to native plant, animal and fish species. They occupy large swaths of tidelands excluding other uses. For anyone who, or anything that,

1 encounters a geoduck tube planting, it is an obvious obstruction to the use of the
2 area. The public loses water access at low tide. Commercial barges, rafts, boats,
3 hoses, equipment and workers obstruct boaters and recreational users.

4 Predator exclusion tubes and nets obstruct aquatic animals. Indeed, as the
5 Parties have stipulated to, it is the *very purpose* of the predator exclusion devices to
6 obstruct predators, e.g., marine life, from occupying their normal habitat. AR 922.
7 Native species are also inadvertently trapped under predator exclusion netting. The
8 entire structure is one large obstruction to native species in the tidelands. AR 976.

9 The AGO improperly places its focus regarding obstruction on whether
10 members of the public are obstructed. 2007 Op. Att’y Gen. No. 1, pg. 10. The
11 issue here is not only obstruction to the public use, it is also obstruction to the fish
12 and other marine life using the tidelands. There can be no question that the netting
13 and tubes installed in such operations places an obstruction, when that is their very
14 purpose. There is no support in the SMA that the obstruction analysis is solely
15 limited to public obstruction. As provided above, the SMA explicitly requires its
16 provisions to be broadly construed in order to protect the state’s shorelines as fully
17 as possible. RCW 90.58.900; *Bellevue Farm v. Shorelines Bd.*, 100 Wn. App. 341,
18 351, 997 P.2d 380, *rev. denied*, 142 Wn.2d 1014 (2000); *Buechel v. Department of*
19 *Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994); *Hunt v. Anderson*, 30 Wn.
20 App. 437, 439, 635 P.2d 156 (1981). Ignoring that placement of large areas of
21 tubes and netting in the shoreline can obstruct marine life does not comport with
22 this requirement. The definition of obstruction is “one that obstructs...the act of
23 impeding or an attempt to impede...” *Webster’s II New Riverside University*
24 *Dictionary* 812 (1984). The definition of obstruct is to “clog or block (a passage)
25 with obstacles...to impede, retard, or interfere with...” *Webster’s II New Riverside*
University Dictionary 812 (1984). The placement of approximately five inch
diameter tubes every square foot over a large area (.75 acres, 1.5 acres .9 acres)

1 and then placing a net over the entire site would clog, block, impede, retard and
2 interfere with the movement of marine life in that area.

3 In this case, not only have the Growers stated that the purpose of the nets and
4 tubes are to obstruct predators from getting within the nets and tubes, the County's
5 experts have provided other evidence of obstruction. The experts have stated: (1)
6 marine life will be trapped under the netting when it is placed over the tubes; (2)
7 slow moving benthic organisms will experience an obstruction if they encounter the
8 PVC tubes and nettings when moving from subtidal areas to the intertidal areas
9 located within and at higher elevations from that of the proposed aquaculture farms.
10 AR 976-977. It is also quite obvious that fish that normally would swim in the areas
11 of the nets and tubes would be obstructed from doing so in the future. Those fish
12 and marine animals would be forced to move around that area. The three
13 applications for geoduck operations involve the placement of obstructions in the
14 shoreline and in the water of the Puget Sound, both above and below the ground.

15 **D. The BOCC And Hearing Examiner Gave Appropriate Weight To**
16 **2007 Op. Att'y Gen. No. 1.**

17 The BOCC and Hearing Examiner clearly considered 2007 Op. Att'y Gen.
18 No. 1 and provided appropriate weight to the decision. The Growers see the AGO as
19 controlling precedent which must be followed by this Court. That is incorrect.

20 On this point, the Hearing Examiner made it clear that he was considering
21 the AGO. The Hearing Examiner noted that the formal AGO had reached the
22 opposite conclusion, but he pointed out that Mr. McKenna's opinion (like the
23 Growers) ignored the word "or" in the definition and that he never analyzed the
24 word "join" which was critical to understanding the scope of the second definition.
25 *AR 1197-1199. Because an AGO is not controlling, Thurston County. v. City of*
Olympia, 151 Wn.2d 171, 177, 86 P.3d 151 (2004), the oversights in Mr.

McKenna's opinion provided ample room for the Examiner to reach his own,

1 independent conclusion. Additionally, AGOs “are entitled to less deference when
2 statutory interpretation is at issue.” *In Re Electric Lightwave, Inc.*, 123 Wn.2d 530,
3 542, 869 P.2d 1045 (1994). Considering the lower level of deference, the clear
4 misinterpretation of the definition, and the lack of meaningful analysis, the BOCC
5 and Hearing Examiner were not required to “blindly” follow the misguided
6 Attorney General Opinion. The Hearing Examiner stated:

7 These rules, I believe, mean that an Attorney General opinion is
8 something more than a tiebreaker if a decision cannot be made on
9 other grounds. They mean, at least, that an AGO must play a
10 prominent role in making the decision. It is not, however, conclusive.
11 Here the AGO failed to consider part of the definition which it was
12 construing...Nor did it offer any analysis construing the definition to
13 exclude that element.

14 AR 1198. There is no question that the Hearing Examiner provided the weight the
15 AGO deserved. He did not ignore the decision.

16 Following the appeal of the Hearing Examiner’s decision, the BOCC
17 affirmed the Hearing Examiner’s treatment of the AGO. AR 3-4. They, too,
18 determined the AGO misinterpreted the WAC provision and found the AGO
19 lacking in any meaningful analysis; the AGO only made brief, conclusory
20 statements on complex issues. AR 3. This is an accurate depiction of the AGO. It
21 only takes a brief review of the AGO to see the lack of analysis.

22 For purposes of the first issue regarding the definition of a structure, the
23 AGO provides six sentences without any meaningful analysis of the issue and
24 relies on a case that has no application to the *placement* of structures. 2007 Op.
25 Att’y Gen. No. 1, pg. 9. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801,
828 P.2d 549 (1992), mentioned without analysis in the AGO, was concerned with
whether the *removal* of a structure constituted development. *Id.* at 814-815. This
has no relevance to the case at hand which involves the *placement* of structures.

1 The Court concluded that, “removal of the railroad trestles was not a
2 ‘development’ within the meaning of RCW 90.58.030(3)(d). *Id.* at 815. The court
3 in *Cowiche Canyon* never found that placement of the trestles would not be
4 considered development.

5 The lack of any meaningful analysis in the AGO regarding “structures” is
6 also found in the AGO section involving removal of sand/gravel/minerals (two
7 conclusory sentences) and the placement of obstructions (five sentences that
8 conclude that the local government should make the determination). 2007 Op.
9 Att’y Gen. No. 1, pg. 9-10. The lack of analysis should be considered by this court
10 when determining how much weight to give 2007 Op. Att’y Gen. No. 1.

11 Finally, contrary to what the Growers have stated, the legislature did not
12 acquiesce in 2007 Op. Att’y Gen. No. 1. Less than two months after the AGO was
13 issued (January 4, 2007), House Bill 2220 was proposed. CP 3; See Attachment A
14 to this Brief. The Bill was signed by the Governor on April 27, 2007. Attachment
15 A, pg. 7. The legislative enactment provided several pertinent directives. First, the
16 Act directed the sea grant program to “commission a series of scientific research
17 studies that examines the possible effects ... of the current prevalent geoduck
18 aquaculture techniques and practices on the natural environment in and around
19 Puget Sound...” RCW 28B.20.475(1). Second, the legislature specifically
20 recognized that geoduck operations involve “structures” which needed to be
21 studied and assessed; as well as other important issues that needed assessment.

22 (5) To satisfy the minimum requirements of subsection (1) of this section, the
23 sea grant program shall review all scientific research that is existing or in
24 progress that examines the possible effect of currently prevalent geoduck
25 practices, on the natural environment, and prioritize and conduct new studies
as needed, to measure and assess the following:

(a) The environmental effects of structures commonly used in the
aquaculture industry to protect juvenile geoducks from predation; . . .

1 RCW 28B.20.475(5) (emphasis added) (signed by the Governor less than four
2 months after the AGO was issued; this new section became effective July 22, 2007).

3 Recognizing the need to protect the Puget Sound from potential harms from
4 geoduck operations, House Bill 2220 also (1) limited leases of state-owned aquatic
5 lands for geoduck operations. (Attachment A, pg. 4; RCW 79.135.100); (2)
6 established an aquaculture regulatory committee to develop recommendations on
7 shellfish aquaculture projects including “requirements for establishing new
8 geoduck aquaculture farms.” (Attachment A, pg. 4-6); (3) required the department
9 of ecology to “develop *guidelines* for the appropriate siting and operation of
10 geoduck aquaculture operations...” (emphasis added) (Attachment A, pg. 6; RCW
11 43.21A.681(1)). This is a far cry from the legislature remaining silent in face of
12 2007 Op. Att’y Gen. No. 1. The BOCC and Hearing Examiner gave appropriate
13 weight to 2007 Op. Att’y Gen. No. 1.

14 **E. The New WAC Guidelines.**

15 Pursuant to the above mentioned House Bill 2220, the Department of
16 Ecology did adopt new WAC guidelines. The new guidelines became effective
17 after the Hearing Examiner decision in this matter. While the new WAC guidelines
18 do not yet apply to Thurston County, the new WAC guidelines do require more
19 local review than what the County is currently requiring. However, the Growers
20 are attempting to use the guidelines to allow it to establish three large commercial
21 operations without any local review. This flies in the face of public policy.

22 While the Growers make it sound as if the County is required to currently
23 follow the guidelines as if they are law, that suggestion is incorrect. First, the WAC
24 guidelines became effective after the Growers submitted their applications and
25 after the County Department and the Hearing Examiner issued their decisions. AR
630; AR 746; AR 750; AR 1204. The BOCC was not required to consider WAC

1 provisions that were not in effect or considered when the underlying decision was
2 made. The Growers have not cited to any case suggesting such a proposition.
3 Second, the WAC provisions are only guidelines and are not yet applicable to
4 Thurston County. Since Thurston County already has an approved Shoreline
5 Master Program, the guidelines are to be used by the County to assist in the
6 development of amendments to its Master Program when updates are required in
7 the future.

8 (2) *Purpose.* The general purpose of the guidelines is to implement the
9 "cooperative program of shoreline management between local government
10 and the state." ... In keeping with the relationship between state and local
11 governments prescribed by the act, the guidelines have three specific
12 purposes: ***To assist local governments in developing master programs***; to
13 serve as standards for the regulation of shoreline development in the
14 absence of a master program along with the policy and provisions of the
15 act and, to be used along with the policy of RCW 90.58.020, as criteria for
16 state review of local master programs under RCW 90.58.090.

17 WAC 173-26-171(2) (emphasis added). It is very clear that the new guidelines do not
18 apply to Thurston County since it has a Master Program in place. **“The guidelines do
19 not regulate development on shorelines of the state in counties and cities where
20 approved master programs are in effect.”** WAC 173-26-171(3)(c). Pursuant to
21 RCW 90.58.080(2)(a)(iii), Thurston County’s *existing* Shoreline Master Program is
22 not due to be updated until December 1, 2011 (with possible one year extensions
23 under RCW 90.58.080(8)).

24 Additionally, the Department of Ecology’s mention of the AGO opinion in
25 the WAC does not trump the Shoreline Management Act. WAC 173-26-186(1)
26 (“The guidelines are subordinate to the act. Any inconsistency between the
27 guidelines and the act must be resolved in accordance with the act.”); *Kitsap-*
28 *Mason Dairymen v. Tax Comm’n*, 77 Wn.2d 812, 815, 467 P.2d 312 (1970)
29 (“[Administrative rules] may not amend or change enactments of the legislature.”).

1 Finally, one must look at what the WAC’s purpose was and how the Growers
2 are trying to use the WAC provisions. The new WAC provisions require new geoduck
3 operations to go through a county conditional use permit process. AR 706; WAC 173-
4 26-241(3)(b)(iv)(A). The WAC provisions require extensive local review. AR 706-
5 707; WAC 173-26-241(3)(b)(iv)(A-L); see also AR 705. Further, a conditional use
6 permit process requires *more review* than the substantial development permit process.
7 “After local government approval of a conditional use or variance permit, local
8 government shall submit the permit to the department [of ecology] for the department’s
9 approval, approval with conditions, or denial.” WAC 173-27-200.

10 With this in mind, one must consider what the Growers are arguing. Because
11 new WAC provisions mention an AGO, the Growers are attempting to use WAC
12 *guidelines* that are not applicable to Thurston County, and that require more
13 review than what Thurston County is asking for, to argue that three large,
14 commercial geoduck operations should have no local review at all. This argument
15 flies in the face of the Shoreline Management Act³ and must be rejected. The
16 Growers believe that because the County has not yet amended its Shoreline Master
17 Program to require a conditional use permit for geoduck operations as suggested
18 by the AGO and WAC, it can escape any and all local review by relying on an
19 AGO. However, the Department, Hearing Examiner and BOCC determined under
20 the *current* Thurston County Shoreline Master Program that the three commercial
21 geoduck proposals do meet the definition of development and require a shoreline
22 substantial development permit. The County asks this Court to reject the Growers’
23 Petition. By doing so, the policies of the Shoreline Management Act will be
24 followed. As stated above, the Shoreline Management Act explicitly requires that

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³ See section IV(A), above, regarding the strong policies for protecting shorelines. It is imperative that this Court consider the SMA policies provided above when considering the Growers’ argument asking for no local review.
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1 its provisions be broadly construed to protect the state's shorelines as fully as
2 possible. *See* RCW 90.58.900. When doubt exists, the courts repeatedly have
3 required and employed a broad reading of the Act to assure that its *environmental*
4 *protection purposes* are served. *Bellevue Farm v. Shorelines Bd.*, 100 Wn. App.
5 341, 351, 997 P.2d 380 (2000); *Buechel v. Department of Ecology*, 125 Wn.2d
6 196, 203, 884 P.2d 910 (1994); *Hunt v. Anderson*, 30 Wn. App. 437, 439, 635 P.2d
7 156 (1981).

8 **F. The BOCC Did Not Violate The Growers' Constitutional Rights.**

9 First, for all of the reasons provided above, by the Hearing Examiner in his
10 decision and by the BOCC in its decision, the BOCC did not act arbitrary and
11 capricious. To say that the BOCC decision affirming the Hearing Examiner's 20 page
12 decision is unreasoning and a disregard of facts/circumstances must be rejected based
13 on the arguments provided above. Even the legislature called the anti-predation devices
14 "structures" and required studies to determine if review was needed. The WAC and
15 SMA provisions require a shoreline permit and significant review. Just because the
16 BOCC did not follow an AGO does not make its action arbitrary and capricious.

17 Second, the BOCC did not violate the Growers' constitutional rights by
18 meeting with department staff regarding an important issue brought to the BOCC's
19 attention by one of the Growers' representatives. The Appearance of Fairness
20 Doctrine does limit ex parte contacts by the BOCC when an action is *pending*
21 before the BOCC. RCW 42.36.060. Here, there was no appeal pending before the
22 BOCC involving geoduck proposals when they called the informational meetings.
23 *Kain Trans.* p. 51, lines 17-21. Additionally, even if the BOCC provided an
24 advisory recommendation to County staff, the BOCC would not be violating the
25 law. The legislature directly provides that, "[p]articipation by a member of a
decision making body in earlier proceedings that result in an advisory

recommendation to a decision-making body shall not disqualify that person from

1 participating in any subsequent quasi-judicial proceedings.” RCW 42.36.070. Here,
2 the BOCC was provided information generally about geoduck aquaculture in
3 Thurston County with no specifics regarding the geoduck proposals under
4 consideration by County staff. Kain Trans. p. 30, lines 3-11; p. 31, lines 21-25; p.
5 32, lines 1-17; Transcript of Deposition of Cliff Moore, July 11, 2011 (“Moore
6 Trans.”) at p. 17, lines 3-11; p. 24, lines 11-25; p. 25, line 1; p 31, lines 3-21. It
7 must be noted that when the BOCC gave the Growers an opportunity to object to
8 the BOCC during the appeal hearing, the Growers remained silent. AR 7-8.

9 Finally, even if the BOCC somehow acted unfairly in this situation, since all
10 commissioners were involved, the BOCC would still have been allowed to hear the
11 matter because it is the only tribunal with the power to hear appeals from the
12 Hearing Examiner. Thurston County Code 2.06.070; *Kennett v. Levine*, 50 Wn.2d
13 212, 219, 310 P.2d 244 (1957).

14 It is established by the great weight of authority that where ... an
15 administrative board, or a legislative body ... is given exclusive
16 jurisdiction to conduct a hearing ... disqualification will not be
17 permitted to destroy the only tribunal with power in the premises. This
18 is known as the doctrine or rule of necessity.

19 *Id.* at 219. Clearly, there is no violation of the Growers’ Constitutional rights
20 requiring reversal of the BOCC decision.

21 V. CONCLUSION

22 For the reasons provided above, Thurston County asks this Court to reject
23 the Growers’ Petition.

24 DATED this ____ day of October 2011.

25 JON TUNHEIM
PROSECUTING ATTORNEY

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1 A copy of this document was emailed as per agreement of the attorneys of record to the following individual(s) on October ____,
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6 I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
Olympia, Washington.

7 Signature: _____
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