❒ EXPEDITE
❒ No Hearing set
XX 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, Petitioners, vs. THURSTON COUNTY, a political subdivision of Washington State, Respondent.	No. 11-2-01019-5 THURSTON COUNTY'S RESPONSE BRIEF

TABLE OF CONTENTS

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

TABLE OF AUTHORITIES

CASES

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

STATUTES AND CODES

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

OTHER AUTHORITIES

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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.

II. FACTS

A. The Proposed Commercial Geoduck Operations.[2]

> 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

[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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

6. The Lockhart Property. Taylor Shellfish leases the Lockhart Property...Taylor Shellfish proposes to establish a geoduck clam farm on the Lockhart Property. The total farmed geoduck site would be between approximately 0.12 and 0.9 acres in size. The geoduck farming activities would be operated in the manner described for the McClure and Thiesen Properties, except for the following: Taylor Shellfish will use PVC tubes that are 6 inches in diameter and 9 inches long (compared with 4-inch diameter tubes that are 10 inches long). The tubes will be placed at a density 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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

Just minutes following the meeting on April 28, 2010 with Bill Taylor of Taylor Shellfish, Commissioner Valenzuela sent an email requesting a meeting on the topic of geoduck applications. Kain Trans. p. 48, Lines 10-22; Ex. 5. Around that same time, Mike Kain had told at least one commissioner's aid that Taylor Shellfish would consider leaving Thurston County if the County required a substantial development permit for geoduck operations. Kain Trans. p. 53, lines 2-25; 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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

Ultimately, the Growers did not withdraw the three applications and the Department issued its decisions on or about June 30, 2010. Kain Trans. p. 56, lines 1-2. AR 745, AR 812, AR 866. The Department found that the proposed geoduck operations constituted development and, thus, required substantial development permits for four specific reasons: (1) the placement of tubes and netting on the beach constituted construction of a structure; (2) The method of harvest would remove some amount of sand and other minerals from the seabed; (3) The tubes and netting would be an obstruction on the beach; (4) The tubes and netting, even though temporary, would potentially interfere with the normal public use of the 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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

AR 1181 (emphasis added).

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

> 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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

> 2. The summary judgment motions by the parties on whether the proposed operations are a "development" under the SMA because they involve "removal of any sand, gravel, or minerals" are denied due to the presence of genuine issues of material fact.
>
> 3. On the third ground of the administrative determinations, whether the tubes and netting serve as an obstruction on the beach, summary judgment is granted in favor of the Appellants on the issue of sediment movement: the proposed operations are not developments due to their effect on the movement of sediment. Summary judgment is not entered at this time on the other issues relating to this third ground, due to the need for further examination of the public trust doctrine and review of whether any Shoreline Hearings Board decisions address whether the "placing of obstructions" includes obstructions to marine life.
>
> 4. The effect of the above decisions is that the proposed operations are deemed "developments" under the SMA under the first ground of the administrative determinations, requiring a substantial development permit for the proposals. Thus, unless this determination is reversed, a hearing on a substantial development permit is required for the proposed operations, and the appeals of the other grounds of the administrative determinations are mooted, as well as the motion in limine.

AR 1203-1204.

The Growers timely appealed the Hearing Examiner's decision to the BOCC. AR 57, AR 244, AR 418. The BOCC unanimously affirmed the Hearing Examiner's Order on Cross-Motions for Summary Judgment. AR 2-4. The Growers now appeal to this Court.

III. STANDARD OF REVIEW

The County agrees with the Growers that RCW 36.70C.130(1) contains the "Standards for granting relief" in a Land Use Petition Act (LUPA) appeal. The appellate courts have interpreted the provisions found in RCW 36.70C.130(1) and provide helpful analysis. A party challenging an action under RCW 36.70C.130(1)(d) is required to meet the heavy burden of proving the application of the law to the facts was "clearly erroneous." This test is only met when the reviewing court is left with "the definite and firm conviction that a mistake has

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

IV. LEGAL ARGUMENT

A. The Shoreline Management Act.

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

The State policy enunciated in the Act calls for restricting construction on privately owned and publicly owned shorelines of the State to protect against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life. *Id.* That section further states "[i]n 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." *Id.*

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

The Supreme Court has directed that "analysis of the SMA must be made 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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

> (1) A development shall not be undertaken on the shorelines of the state unless it is consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, rules, or master program.
> (2) A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

RCW 90.58.140.

The SMA broadly defines "development" as:

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

RCW 90.58.030(3)(a).

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

B. The BOCC And The Hearing Examiner Correctly Determined That The Geoduck Facilities Are "Any Piece Of Work Artificially Built Or Composed Of Parts Joined Together In Some Definite Manner."

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

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

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

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

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

> The second element is disjunctive: "any piece of work artificially built or composed of parts joined together in some definite manner . . ." Under this, a use involves a structure if it involves a "piece of work artificially built". Under customary definitions, the PVC tubes are pieces of work and are artificially built. This seems plainly to classify them as structures under WAC 173-27-030 (15). The Appellants argue to the contrary that although the tubes are artificial, the tubes and netting together are not a piece of work artificially built, since "built" is defined as "composed of pieces or parts joined systematically". Ex. 13, p. 10. Since the tubes are not joined together by the net, the Appellants argue, the use is not "built" under applicable definitions. Id.
>
> Under this argument, a use could consist of different structures (pieces of work artificially built), but would not itself be a structure unless the constituent structures were "joined systematically". This position taxes logic with the result that a use consisting exclusively of structures would itself not be a structure unless the constituent structures were satisfactorily joined. Similarly, it contradicts the definition of structure as "any piece of work artificially built". (Emph. mine.) It also would effectively remove the "or" from the definition of

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

AR 1194-1195.

Even though the Hearing Examiner could have stopped at this point, he went on to consider alternative grounds that had been discussed by the parties. Likewise, this Court could choose to stop at this point and affirm the BOCC and Hearing Examiner on this ground alone; but there are additional grounds available for supporting the Board's decision.

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

C. <u>The Remaining Issues On Appeal Were Not Decided By The Hearing Examiner Nor The BOCC.</u>

The Growers also challenge that the BOCC and the Hearing Examiner 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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

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

In his opinion, the Attorney General states: "...if sediment is disrupted during harvest, only a minimal amount of sediment is actually removed with the 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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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,

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

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

On this point, the Hearing Examiner made it clear that he was considering the AGO. The Hearing Examiner noted that the formal AGO had reached the opposite conclusion, but he pointed out that Mr. McKenna's opinion (like the Growers) ignored the word "or" in the definition and that he never analyzed the word "join" which was critical to understanding the scope of the second definition. *AR 1197-1199. B*ecause 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,

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

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

For purposes of the first issue regarding the definition of a structure, the AGO provides six sentences without any meaningful analysis of the issue and relies on a case that has no application to the *placement* of structures. 2007 Op. 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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

> (5) To satisfy the minimum requirements of subsection (1) of this section, the sea grant program shall review all scientific research that is existing or in progress that examines the possible effect of currently prevalent geoduck 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; . . .

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

E. <u>The New WAC Guidelines.</u>

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

While the Growers make it sound as if the County is required to currently follow the guidelines as if they are law, that suggestion is incorrect. First, the WAC guidelines became effective after the Growers submitted their applications and 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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

With this in mind, one must consider what the Growers are arguing. Because new WAC provisions mention an AGO, the Growers are attempting to use WAC ***guidelines*** that are not applicable to Thurston County, and that require more review than what Thurston County is asking for, to argue that three large, commercial geoduck operations should have no local review at all. This argument flies in the face of the Shoreline Management Act[3] and must be rejected. The Growers believe that because the County has not yet amended its Shoreline Master Program to require a conditional use permit for geoduck operations as suggested by the AGO and WAC, it can escape any and all local review by relying on an AGO. However, the Department, Hearing Examiner and BOCC determined under the ***current*** Thurston County Shoreline Master Program that the three commercial geoduck proposals do meet the definition of development and require a shoreline substantial development permit. The County asks this Court to reject the Growers' Petition. By doing so, the policies of the Shoreline Management Act will be followed. As stated above, the Shoreline Management Act explicitly requires that

[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.

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

F. <u>The BOCC Did Not Violate The Growers' Constitutional Rights.</u>

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

Second, the BOCC did not violate the Growers' constitutional rights by meeting with department staff regarding an important issue brought to the BOCC's attention by one of the Growers' representatives. The Appearance of Fairness Doctrine does limit ex parte contacts by the BOCC when an action is ***pending*** before the BOCC. RCW 42.36.060. Here, there was no appeal pending before the BOCC involving geoduck proposals when they called the informational meetings. Kain Trans. p. 51, lines 17-21. Additionally, even if the BOCC provided an advisory recommendation to County staff, the BOCC would not be violating the 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

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

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

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

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

Id. at 219. Clearly, there is no violation of the Growers' Constitutional rights requiring reversal of the BOCC decision.

V. CONCLUSION

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

DATED this ____ day of October 2011.

JON TUNHEIM
PROSECUTING ATTORNEY

_____
JEFFREY G. FANCHER, WSBA #22550
Deputy Prosecuting Attorney

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006

A copy of this document was emailed as per agreement of the attorneys of record to the following individual(s) on October ___, 2011.

Samuel W. Plauché, WSBA #25476
Amanda M. Stock, WSBA #38025
Laura C. Kisielius, WSBA #28255
Plauché & Stock LLP
811 First Avenue, Ste 630
Seattle, WA 98104
Attorneys for Petitioner

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.

Signature: _____

Jon Tunehim
Thurston County Prosecuting Attorney
Civil Division – Glenn Building
2000 Lakeridge Dr SW
Olympia, WA 98502
360/786-5574 FAX: 360/709-3006