

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

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

RULING OF THE COURT

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

Pamela R. Jones, Official Court Reporter
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A P P E A R A N C E S

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1 October 21, 2011

Olympia, Washington

2 AFTERNOON SESSION

3 Department 4

Hon. Gary R. Tabor, Presiding

4 APPEARANCES:

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

8 Pamela R. Jones, Official Reporter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. FANCHER: Thank you, Your Honor.

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

17 MS. KISIELIUS: Thank you, Your Honor.

18 (A recess was had.)
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CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

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

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

Dated this the 28th day of October, 2011.

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