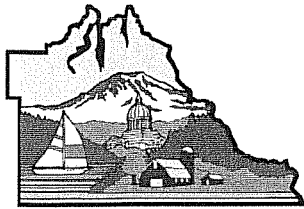


COUNTY COMMISSIONERS

Cathy Wolfe  
District One  
Sandra Romero  
District Two  
Karen Valenzuela  
District Three



**THURSTON COUNTY**  
WASHINGTON  
SINCE 1852


**RESOURCE STEWARDSHIP DEPARTMENT**

*Creating Solutions for Our Future*

Cliff Moore  
Director

**MEMORANDUM**

TO: Parties of Record

FROM: Cami Petersen   
Land Use Clerk

DATE: April 13, 2011

SUBJECT: **Project Nos. 2010100420/421/540, Sequence Nos. 11-101201/202/203  
VE, Blind Dog Enterprises Ltd. & Taylor Shellfish Company, Inc.**

Attached is a copy of the Decision of the Board of Thurston County Commissioners relating to the above-mentioned case.

Please contact me at (360) 754-3355 extension 6348 if you have questions regarding this Decision.

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
THURSTON COUNTY, WASHINGTON

In Re the Matter of,

Taylor Shellfish Co., Inc., d/b/a Taylor  
Shellfish Farms; and Blind Dog Enterprises  
LTD, d/b/a Arcadia Point Seafood

Project No. 2010100540, 2010100420, and  
2010100421 Appeal of Three Administrative  
Determinations by Resource Stewardship  
Department

DECISION

**THIS MATTER came before the Board of County Commissioners (Board) on March 31, 2011 as a result of appeals** filed by Taylor Shellfish Farms and Arcadia Point Seafood (Appellants) of the hearing examiner's Order on Cross Motions for Summary Judgment, dated January 21, 2011. The hearing examiner's Order (1) granted Resource Stewardship Department's (Department) summary judgment motion that the Appellants' proposed geoduck operations are a "development" under the Shoreline Management Act (SMA) because they involve "construction of a structure;" (2) denied the parties' motions on whether the proposed geoduck operations are a "development" because they involve "removal of any sand, gravel or minerals" due to the presence of genuine issues of material fact; and (3) declined to enter summary judgment on whether or not the proposed operations are a "development" because they serve as obstructions on the beach due to the need for further examination of the public trust doctrine and other Shoreline Hearing Board decisions.

The Board reviewed the hearing examiner's decision, and the record of evidence, including the stipulated facts, presented to the hearing examiner. In addition, each Board member made a declaration pursuant to the Appearance of Fairness Doctrine that since the time this appeal was filed with the Board, that they have had no ex-parte contact with any of the parties and that they could fairly and impartially judge this case on the record and pursuant to applicable law. No party challenged any of the Board members' participation in this case.

The Appellants want to establish shellfish farms on tidelands along Henderson Inlet in unincorporated Thurston County. Their proposed method for planting and harvesting geoducks generally consists of pushing PVC tubes up to six inches in diameter and ten inches in length into the beach substrate at a density of one tube per square foot, with 4-6" exposed above the ground. Juvenile geoduck clams will be inserted into each tube, and the tubes will be covered with area netting to contain the tubes and protect the geoducks against predators. Approximately 24 months after insertion, the tubes and area netting will be removed entirely. Between five and seven years after planting, the geoducks will be removed. Harvesting will take place by loosening the sand around the geoducks using a pressurized hose and nozzle and a vessel mounted high volume, low pressure water pump. The clams would be extracted one at a time by hand.

The issue presented in this case is whether or not the geoduck operations, as described in more detail in the stipulated facts, are a “development” under RCW 90.58.030(3) of the SMA. The hearing examiner employed the rules of statutory construction, engaged in a detailed analysis, and concluded that Appellants’ proposed geoduck operations do constitute “development” and therefore the Appellants would be required to apply for a substantial development permit.

The Appellants’ fundamental argument on appeal is that the hearing examiner’s statutory interpretation of the term “development” is contrary to the Attorney General Opinion issued on January 4, 2007 (AGO 2007 No. 1). This AGO opinion, according to the Appellants, resolves all of the issues that are raised in this appeal. AGO 2007 No. 1 determined that geoduck aquaculture is not a “development” under the SMA unless the proposed geoduck operation “interferes with the normal public use of the surface waters.” The AGO 2007 No. 1 concluded that geoduck operations are not a “development” because they do not involve “construction of a structure.” The Appellants argue that both the Legislature and the Department of Ecology have acquiesced in AGO 2007 No. 1. Therefore, the Board’s decision should be guided by this AGO, and the hearing examiner’s decision should be reversed.

The Board declines to follow the 2007 AGO No. 1 for the following reasons.

- An AGO is not a controlling opinion especially when the opinion involves a matter of statutory construction.
- AGO 2007 No. 1 does not analyze the applicable language of the SMA or the Washington Administrative Code, but instead merely concludes that PVC tubes “do not fall within the ordinary meaning of the word ‘structures’ referred to in the definition of development.”
- AGO 2007 No. 1 failed to address the specific provision in the definition of structure that the hearing examiner found to apply in this case. Structure is defined to include “any piece of work artificially built.” The AGO did not address this aspect of the definition. However, the hearing examiner did and determined that PVC tubes and netting are pieces of work artificially built and constructed on the shoreline. The hearing examiner in this instance did not disagree with the AGO, but filled in what the AGO left out.
- The Board disagrees with the Appellants’ assertion that the Legislature acquiesced in the AGO’s opinion because it passed 2007 Wa HB 2220 (House Bill 2220) a couple of months after the AGO opinion was issued. This bill specifically acknowledges that PVC tubes and netting currently used in the aquaculture industry to protect juvenile geoducks from predation are “structures” contrary to the AGO’s conclusion. The Legislature’s adoption of House Bill 2220 reflects its concern about the potential environmental effects of geoduck aquaculture, and the need for a comprehensive regulatory system or permit process. The actions taken by the Legislature in House Bill 2220 clearly did not acquiesce in the AGO’s narrow

conclusion that geoduck aquaculture only needs regulatory oversight in very limited circumstances.

The Board finds that the hearing examiner's detailed statutory interpretation of the term "development," as it applies to Appellants' proposed geoduck operations, is consistent with the plain language of Shoreline Management Act and Washington Administrative Code. The hearing examiner's interpretation also implements the fundamental policies of the SMA to fully protect our fragile shorelines.

**IT IS HEREBY ORDERED AS FOLLOWS:**

The hearing examiner's Order on Cross-Motions for Summary Judgment is affirmed.

DATE:

4-13-11

ATTEST:

Cami Stetelsen  
Clerk of the Board

BOARD OF COUNTY COMMISSIONERS  
Thurston County, Washington

Karen Valenzuela  
Chair

Andrew Romero  
Vice-Chair

Cathy Wolfe  
Commissioner