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BRICKLIN NEWMAN DOLD, LLP

SUPERIOR COURT OF WASHINGTON  
IN AND FOR THURSTON COUNTY

TAYLOR RESOURCES, INC., a Washington  
corporation, also known as TAYLOR  
SHELLFISH FARMS

Petitioners,

v.

PIERCE COUNTY, a political subdivision of  
the State of Washington,

Respondent.

and

NORTH BAY PARTNERS, a family  
partnership; FOSS M. LESLIE ETAL,  
Taxpayers of record for the property at issue,

Additional Parties.

No. 08-2 00904 9  
PETITION FOR REVIEW  
(LAND USE PETITION ACT)

Comes now Petitioner Taylor Resources, Inc., also known as Taylor Shellfish  
Farms, by and through its undersigned attorneys, and petitions this Court for review of a  
Pierce County land use decision pursuant to the Land Use Petition Act, Ch. 36.70C RCW.

1 **I. Parties.**

2 1.1 Identity of Petitioner. Petitioner Taylor Resources, Inc., a Washington  
3 corporation, also known as Taylor Shellfish Farms (“Taylor”) is the owner and operator of  
4 commercial geoduck operation to whom the land use decision is directed. Taylor is also  
5 the applicant for the Shoreline Substantial Development Permit that was effectively  
6 cancelled by the County’s Administrative Interpretation at issue in this appeal.

7 Taylor’s mailing address is:

8 SE 130 Lynch Road  
9 Shelton, WA 98584

10 Taylor’s attorneys are:

11 Samuel W. Plauché, WSBA #25476  
12 Amanda M. Carr, WSBA #38025  
13 GordonDerr LLP  
2025 First Avenue, Suite 500  
Seattle, WA 98121

14 1.2 Identity of Local Jurisdiction. Pierce County (“the County”), a political  
15 subdivision of the State of Washington, is the local jurisdiction whose land use decision is  
16 at issue.

17 The mailing address for the County is:

18 Annex (Public Services Building)  
19 2401 South 35th Street  
Tacoma, 98409

20 1.3 Identity of Persons To Be Made Parties. The following persons are made  
21 parties under RCW 36.70C.040(2)(b) through (d):

22 1.3.1 North Bay Partners is a family partnership. North Bay Partners is  
23 the owner of the property at issue. Additionally, North Bay Partners appeared through its  
24 managing partner, M. Leslie Foss, as an Intervenor in the proceedings before the Pierce  
25

1 County Hearing Examiner that are the subject of this appeal. The mailing address for  
2 North Bay Partners is:

3 North Bay Partners  
4 M. Leslie Foss, Managing Partner  
5 211 S. 6<sup>th</sup> Street  
Mount Vernon, WA 98274-3906.

6 North Bay Partners' attorney is:

7 Jerry R. Kimball, WSBA No. 864  
8 1200 5th Avenue, Suite 2020  
Seattle, WA 98101-3132

9 1.3.2 The records of the County Assessor identify the following persons,  
10 by name and address, as the taxpayer for the property at issue as described in the  
11 application:

12 FOSS M LESLIE ET AL  
13 211 S 6<sup>th</sup> ST  
MOUNT VERNON WA 98274-3906

14 DEMILLE MICHAEL<sup>1</sup>  
15 P O BOX 804  
LAKE BAY WA 98349-0804

16 1.4 Identity of other Intervenor Below: The following persons intervened in  
17 the proceedings below after the filing of Taylor's administrative appeal and, pursuant to  
18 RCW 36.70C.040(2)(d), are listed for identification purposes only and are not made  
19 parties to this appeal:

20 1.4.1 Coalition to Preserve Puget Sound Habitat appeared as an  
21 Intervenor in the proceedings before the Pierce County Hearing Examiner that are the  
22 subject of this appeal. The Coalition to Preserve Puget Sound Habitat appeared in the  
23 Hearing Examiner proceedings only through its attorney. The Coalition to Preserve Puget

24 \_\_\_\_\_  
25 <sup>1</sup> This person is named because he is identified as the taxpayer for a parcel that was erroneously included in  
the application. Because the parcel was included in the application in error and has no relation to the Foss  
Farm, Petitioner intends to move to dismiss the taxpayer from the case at the earliest possible opportunity.

1 Sound Habitat did not provide its address nor the name or address of any representative.  
2 An internet search of the Secretary of State records revealed no records for Coalition to  
3 Preserve Puget Sound Habitat. Inquiries regarding the Coalition to Preserve Puget Sound  
4 Habitat's contact information directed to counsel for Coalition to Preserve Puget Sound  
5 Habitat have gone unanswered.

6 Coalition to Preserve Puget Sound Habitat's attorney is:

7 David A. Bricklin, WSBA No. 7583  
8 Bricklin Newman Dold, LLP  
9 1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154

10 1.4.2 Case Inlet Shoreline Association appeared as an Intervenor in the  
11 proceedings before the Pierce County Hearing Examiner that are the subject of this  
12 appeal. Case Inlet Shoreline Association appeared in the Hearing Examiner proceedings  
13 only through its attorney. Case Inlet Shoreline Association did not provide its address nor  
14 the name and address of a representative. An internet search of the records of the Office  
15 of the Secretary of State indicated that Case Inlet Shoreline Association is a Washington  
16 Nonprofit Corporation, whose registered agent is Craig Olson. The mailing address for  
17 Case Inlet Shoreline Association is:

18 5314 187<sup>th</sup> Avenue KPN  
19 Vaughn, WA 98394

20 Case Inlet Shoreline Association's attorney is:

21 David A. Bricklin, WSBA No. 7583  
22 Bricklin Newman Dold, LLP  
1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154

23 1.4.3 Henderson Bay Shoreline Association appeared as an Intervenor in  
24 the proceedings before the Pierce County Hearing Examiner that are the subject of this  
25 appeal. Henderson Bay Shoreline Association appeared in the Hearing Examiner

1 proceedings only through its attorney. Henderson Bay Shoreline Association did not  
2 provide its address nor the name and address of a representative. An internet search of the  
3 records of the Office of the Secretary of State indicated that Henderson Bay Shoreline  
4 Association is a Washington Nonprofit Corporation, whose registered agent is Laura  
5 Hendricks. The mailing address for Henderson Bay Shoreline Association is:

6 6723 Sunset View Drive  
7 Gig Harbor, WA 98335

8 Henderson Bay Shoreline Association's attorney is:

9 David A. Bricklin, WSBA No. 7583  
10 Bricklin Newman Dold, LLP  
11 1001 Fourth Avenue, Suite 3303  
12 Seattle, WA 98154

13 1.4.4 Case Inlet Beach Association appeared as an Intervenor in the  
14 proceedings before the Pierce County Hearing Examiner that are the subject of this  
15 appeal. The Case Inlet Beach Association appeared in the Hearing Examiner proceedings  
16 only through its attorney. The Case Inlet Beach Association did not provide its address  
17 nor the name or address of any representative. An internet search of the Secretary of  
18 State records revealed no records for Case Inlet Beach Association. Inquiries regarding  
19 the Case Inlet Beach Association's contact information directed to counsel for Case Inlet  
20 Beach Association have gone unanswered.

21 Case Inlet Beach Association's attorney is:

22 David A. Bricklin, WSBA No. 7583  
23 Bricklin Newman Dold, LLP  
24 1001 Fourth Avenue, Suite 3303  
25 Seattle, WA 98154

1.4.5 Protect Our Shorelines appeared as an Intervenor in the  
proceedings before the Pierce County Hearing Examiner that are the subject of this  
appeal. Protect Our Shoreline appeared in the Hearing Examiner proceedings only through

1 its attorney. Protect Our Shorelines did not provide its address nor the name and address  
2 of a representative. An internet search of the records of the Office of the Secretary of  
3 State indicated that Protect Our Shorelines is a Washington Nonprofit Corporation, whose  
4 registered agent is Patrick Townsend. The mailing address for Protect Our Shoreline is:

5  
6 7700 Earling St. NE  
Olympia, WA 98506

7 Protect Our Shoreline's attorney is:

8 David A. Bricklin, WSBA No. 7583  
9 Bricklin Newman Dold, LLP  
10 1001 Fourth Avenue, Suite 3303  
Seattle, WA 98154

## 11 **II. Decision to Be Reviewed, Jurisdiction, Venue, and Standing**

12 2.1 The land use decision at issue is the Report and Decision of the Pierce  
13 County Hearing Examiner ("Examiner") in Administrative Appeal: Case No. AA16-07,  
14 Application No. 612676 ("Examiner's Decision"). A true and correct copy of the  
15 Examiner's Decision is attached hereto as Exhibit A. In the Examiner's Decision, the  
16 Examiner concludes that Taylor's geoduck operation is development that is subject to the  
17 Shoreline Management Act, ch. 90.58 RCW ("SMA") and that Taylor's Shoreline  
18 Substantial Development Permit, SD 22-00, has expired such that a new permit is required  
19 to continue geoduck farming operations. The County mailed the Examiner's Decision on  
20 March 26, 2008. The decision-making officer for the Examiner's Decision is Terrence F.  
21 McCarthy, the County's Deputy Hearing Examiner. The Examiner's Decision is the  
22 culmination of Taylor's administrative appeal of an "Administrative Determination,  
23 SD22-00, Taylor Shellfish (Foss Property)" ("Administrative Determination") issued by  
24 the Assistant Director of Pierce County's Department of Planning and Land Services on  
25

1 August 8, 2007. A copy of the Administrative Determination is attached hereto as Exhibit  
2 B.

3 2.2 The Court has jurisdiction over this action under RCW ch. 36.70C.

4 2.3 Venue is proper under RCW 36.01.050 because Thurston County Superior  
5 Court is one of the two nearest judicial districts to Respondent Pierce County.

6 2.4 Taylor has standing as the applicant to which the land use decision is  
7 directed. Taylor owns and operates the commercial geoduck operation that is the subject  
8 of the land use decision. Taylor filed the administrative appeal that requested the  
9 Examiner's review of the County's Administrative Determination and resulted in the land  
10 use decision. Taylor is also the applicant and permittee of the Shoreline Substantial  
11 Development Permit SD 22-00 that was effectively cancelled by the County's decision at  
12 issue in this appeal.

13 **III. Statement of Facts.**

14 3.1 Taylor operates a geoduck farm known as the "Foss Farm" on 12 acres of  
15 private tidelands. The Foss Farm is located on the east shore of Case Inlet/North Bay and  
16 is located north of Whitman Cove, approximately 1/2 mile northwest of Joemma State  
17 Park. North Bay Partners owns both the farmed tidelands and the adjacent undeveloped  
18 uplands. Taylor entered into a lease with North Bay Partners in 2000 with the express  
19 purpose of establishing a commercial geoduck farm.

20 3.2 Geoduck are a type of clam native to the Pacific Northwest. Geoduck are  
21 large clams that burrow below the surface such that only their long siphons protrude out of  
22 the substrate. In the wild, geoduck are found in both the intertidal and subtidal zones up  
23 to depths of 360 feet. Wild geoduck are harvested commercially and recreationally  
24 throughout the Puget Sound region. In addition, the shellfish industry cultivates geoduck  
25

1 in the intertidal zone, typically between the -2 and +3 feet tidal elevations, for commercial  
2 harvest. The Foss Farm is such an intertidal commercial geoduck operation.

3       3.3     The process of cultivating a geoduck takes approximately 4-7 years from  
4 planting to harvest and consists of several phases. First, Taylor plants the geoduck in  
5 short segments of PVC pipe that are stomped upright into the substrate at even intervals.  
6 The tubes are used to protect the vulnerable juvenile geoduck from predation and from  
7 drying out at low tide. After the geoduck are planted into the tubes, Taylor covers the  
8 tubes with large canopy nets, which provide additional protection from predation. The  
9 nets are staked into the ground using bent rebar. The nets and tubes remain for  
10 approximately 1-2 years until the geoduck have burrowed sufficiently to avoid predation  
11 and drying out at low tide. At that time, Taylor's crew pulls back the nets, removes the  
12 tubes and reinstalls the nets. Several months later, Taylor removes the nets. The geoduck  
13 remain in the ground until they grow to approximately 2 pounds in size and are ready for  
14 harvest. It takes approximately four to seven years from the time of planting for the  
15 geoducks to reach that size. During harvest, Taylor employees make their way through a  
16 geoduck bed in rows, using a low-pressure, high volume hose to loosen substrate around  
17 the geoduck and extract it from the tideland. The water is emitted at a pressure similar to  
18 that emitted from a garden hose, but with considerably more volume. Most of the work at  
19 the Foss Farm, including planting, removal of tubes and a majority of the harvests occurs  
20 at extremely low tide, when the privately owned tidelands are exposed and dry.

21       3.4     At the Foss Farm, Taylor does not plant the entire 12-acre site at one time,  
22 but instead plants the farm in segments, such that different portions of the farm are in  
23 different phases of cultivation at any given time. The crop on each individual segment is  
24 referred to as an "age class." Upon the harvest of a particular age class on a segment of  
25



1 the farm, Taylor replants the segment with a new crop of juvenile geoduck such that the  
2 different segments of the Foss Farm are in a continual cycle of cultivation.

3 3.5 Taylor applied for an SDP to construct and operate the Foss Farm on April  
4 11, 2000, prior to commencing farming activities.

5 3.6 Taylor's intent was to create the Foss Farm and operate that farm on an  
6 ongoing basis. Specifically, in its application Taylor made clear its intention of farming  
7 the property in segments on different cycles. The County's review and approval of the  
8 permit took into consideration the ongoing nature of the operation.

9 3.7 On December 6, 2000, the Pierce County Hearing Examiner held a hearing  
10 to consider the permit application. The Pierce County Hearing Examiner granted  
11 Shoreline Substantial Development Permit SD 22-00 on December 28, 2000. The Permit  
12 authorizes Taylor to "cultivate the intertidal zone of private tidelands for the commercial  
13 production of geoduck clams along the east shore of Case Inlet/North Bay." After issuing  
14 SD 22-00, the County repeatedly confirmed, to both Taylor and the general public, that  
15 the permit did not expire and allowed both establishment and continued operation of the  
16 Foss Farm.

17 3.8 After the Foss Farm had been operating for several years, the County faced  
18 increasing pressure from several vocal citizens (some of whom appeared in the  
19 proceedings before the Examiner) who are opposed to commercial geoduck aquaculture.  
20 In response to this pressure, in the summer of 2007, the County revisited its interpretation  
21 of SD 22-00. On August 8, 2007, the Assistant Director of Pierce County's Department  
22 of Planning and Land Services issued the Administrative Determination. In the  
23 Administrative Determination, the County concluded that: (a) Taylor was required to  
24 obtain a Shoreline Substantial Development Permit ("SSDP") for its activities at the Foss  
25 Farm; (b) the SSDP that Taylor obtained in 2000 expired pursuant to RCW 90.58.143,

1 WAC 173-27-090, PCC 20.76.030, and the terms of the SSDP itself; and (c) Taylor must  
2 obtain a new SSDP to continue operation of its farm.

3 3.9 Taylor timely appealed the Administrative Determination to the Pierce  
4 County Hearing Examiner. North Bay Partners, the property owner, intervened and also  
5 challenged the County's determination. Several neighborhood interest groups opposed to  
6 commercial geoduck farming also intervened. The Examiner held a public hearing on  
7 November 1 and 2, and December 13 and 14, 2007.

8 3.10 The Examiner mailed the Decision that is the subject of this appeal on  
9 March 26, 2008. In his Decision, the Examiner concludes that permit SD 22-00 expired  
10 after five years. Additionally, the Examiner concludes that geoduck farming operations,  
11 generally, and Taylor's Foss Farm, specifically, constitute development such that a permit  
12 is required. Finally, the Examiner reaches several conclusions regarding the standards the  
13 County should apply upon Taylor's application for a new permit and implies that the  
14 County may be prohibited from issuing a new permit under existing and draft regulations.

15 **IV. Statement of Errors**

16 4.1 Taylor re-alleges and incorporates by reference the preceding paragraphs.

17 4.2 The Examiner's conclusion that Shoreline Substantial Development Permit  
18 SD 22-00 expired is an erroneous interpretation of law, is a clearly erroneous application  
19 of law to fact and is not supported by substantial evidence for reasons that include the  
20 following:

21 4.2.1 The Examiner erroneously concludes that all shoreline substantial  
22 development permits expire after five years, indicating that "the law clearly sets out that  
23 permits are valid for five years and five years only." The Examiner's conclusion is  
24 inconsistent with the plain language of the SMA (including RCW 90.58.143), the State's  
25 implementing regulations (including WAC 173-27-090), the County's Shoreline

1 Regulations (including PCC 20.76.030(G)(3)), and case law interpreting the SMA,  
2 including decisions of the Shoreline Hearings Board. Contrary to the Examiner's  
3 conclusion, the cited provisions of the statute, regulations, and the PCC regarding  
4 expiration of authorization apply only to authorization for construction activities. They do  
5 not apply to all activities authorized under SDPs issued pursuant to the SMA.

6 Accordingly, the Examiner's Decision, including Findings 29, 30, and 31 and Conclusions  
7 2 and 3, is an erroneous interpretation of law and a clearly erroneous application of law to  
8 fact.

9  
10 4.2.2 The Examiner's conclusion that SD 22-00, expired is an erroneous  
11 interpretation of the law, a clearly erroneous application of law to fact, and is not  
12 supported by substantial evidence. The conclusion is inconsistent with the plain language  
13 of the permit and with the provisions of the SMA (including RCW 90.58.143), the State's  
14 implementing regulations (including WAC 173-27-090), and the PCC (including PCC  
15 20.76.030(G)(3)) upon which the relevant permit conditions are based. The Examiner's  
16 conclusion that the permit expired is based, in part, on comparisons to permits for ongoing  
17 development and construction activities that are not comparable to geoduck farming  
18 operations. Evidence presented at the hearing was insufficient to persuade a fair-minded  
19 person that the farming activities at the Foss Farm are comparable to construction  
20 activities or ongoing development that are subject to the expiration provision of the permit  
21 and in the SMA. Nor was there sufficient evidence to persuade a fair-minded person that  
22 the County adopted the permit condition at issue for the purpose of subjecting the  
23 authorized activities to expiration and re-application. Accordingly, the Examiner's  
24 Decision, including the description of testimony, Findings 13, 29, 30 and 31 and  
25 Conclusions 2 and 3, is an erroneous interpretation of the law, a clearly erroneous  
interpretation of law to fact, and is not supported by substantial evidence.

1           4.3     The doctrine of equitable estoppel precludes the County from finding that  
2 SD 22-00 expired.

3           4.3.1   Prior to the Administrative Determination and the Examiner's  
4 Decision upholding the Administrative Determination, the County repeatedly represented  
5 to Taylor and to the public that the farming and harvesting activities at the Foss Farm  
6 were not subject to the expiration provisions of SD 22-00, or of the comparable provisions  
7 in the SMA (including RCW 90.58.143), state implementing regulations (including WAC  
8 173-27-090), and the County's Shoreline regulations (including PCC 20.76.030(G)(3)).  
9 The County's more recent Administrative Determination and the Examiner's Decision are  
10 inconsistent with these prior representations even though they are based on the same  
11 information that was before the County at the time staff made its earlier representations.

12           4.3.2   Taylor has continued its operations at the Foss Farm in reliance on  
13 the County's prior interpretations and its reliance on those prior interpretations was  
14 reasonable. As a result of its reliance on the County's representations, the Foss Farm is  
15 currently planted with multiple age classes of geoduck that must be harvested or will be  
16 lost. The Examiner's Decision precludes that harvest and the resulting financial loss will  
17 be significant. Allowing the Examiner's Decision to stand will therefore result in  
18 "manifest injustice" to Taylor. Reversal of the Examiner's Decision will not impair the  
19 County's exercise of governmental functions.

20           4.3.3   The Examiner's complete failure to address Taylor's claims of  
21 equitable estoppel in the Decision is an erroneous interpretation of law and a clearly  
22 erroneous application of the law to the facts. The Examiner's description of witness  
23 testimony and the conclusion in Finding 8 that the County staff made their prior  
24 representations and statements "outside of their official capacity" is a clearly erroneous  
25 application of the law to the facts and is not supported by substantial evidence. In fact,

1 County staff were approached for guidance and interpretation in their official capacity and  
2 purported to convey the County's position on the issue.

3 4.4 The Examiner's conclusion that Taylor's geoduck farming operations  
4 constitute development that is subject to the SMA is an erroneous interpretation of law, is  
5 a clearly erroneous application of law to fact and is not supported by substantial evidence  
6 for reasons that include the following:

7 4.4.1 Pursuant to case law and to a recent Opinion of the Attorney  
8 General, AGO 2007 No. 1, the question of whether a geoduck farm constitutes  
9 "development" is a fact-specific inquiry that requires determining whether a particular  
10 farm interferes with the normal public use of surface waters. The AGO specifically  
11 concludes that "nothing in the description of geoduck aquaculture necessitates such  
12 interference [with surface waters]." AGO 2007 No. 1 at 8. However, the Examiner's  
13 conclusions that geoduck aquaculture methods, generally, constitute development and  
14 require a shoreline substantial development permit are not fact specific and are  
15 inconsistent with the AGO. The Examiner's Decision should have been based solely on a  
16 factual inquiry of whether the Foss Farm, specifically, interferes with normal public use  
17 of the surface waters, rather than based on generalized conclusions about geoduck  
18 aquaculture. The Examiner's failure to rely on a fact-specific inquiry in his Decision,  
19 including Findings 10, 14, 15, 16, 17, 18, 22, 23, 24, 26, 31, and 33, and Conclusions 2  
20 and 3, is an erroneous interpretation of the law and clearly erroneous application of law  
21 to fact. In addition, the Examiner failed to consider or give sufficient deference to AGO  
22 2007 No. 1 such that the Examiner's Decision is an erroneous interpretation of the law  
23 and a clearly erroneous application of law to fact.

24 4.4.2 The Examiner erred when he concluded that geoduck operations  
25 generally and the Foss Farm, specifically, constitute any of the activities specifically

1 listed in the definition of development in RCW 90.58.030(3)(d), WAC 173-27-030(6),  
2 and PCC 20.04.130, including construction of structures, dredging, or removal of sand.  
3 The Examiner's conclusion is inconsistent with a plain reading of the SMA and  
4 implementing regulations. The Examiner's decision is also inconsistent with AGO 2007  
5 No. 1, which concludes that geoduck farming activities do not constitute any of the  
6 activities specifically listed in the definition of development. The Examiner failed to  
7 consider or give sufficient deference to AGO 2007 No. 1. Finally, the Examiner's  
8 decision is inconsistent with the County's own interpretation as indicated in the  
9 Administrative Determination and in witness testimony, in which the County indicates  
10 that the geoduck activities do not constitute construction of structures or dredging,  
11 specifically. Accordingly, the Examiner's decision, including Findings 22, 23, 24, 26,  
12 28, 31 and 33, and Conclusions 2 and 3 are an erroneous interpretation of law and a  
13 clearly erroneous application of law to fact.

14           4.4.3 The Examiner's conclusion that geoduck operations, generally, and  
15 the Foss Farm, specifically, constitute any of the activities specifically listed in the  
16 definition of development (including construction of structures, dredging, or removal of  
17 sand) is not supported by evidence that is substantial when viewed in light of the whole  
18 record. The Examiner failed to give sufficient weight to credible testimony and evidence.  
19 For example,<sup>2</sup> the Examiner rejected the testimony of scientific expert witnesses, whose  
20 testimony was based on scientific studies and research, including studies conducted at the  
21 specific site. The Examiner instead relied on speculative lay testimony, the basis of  
22 which had been discredited.

23  
24  
25 

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<sup>2</sup> Taylor cites to these specific examples, and other examples included in this Petition, for illustrative purposes. The use of this and other specific examples in this Petition does not limit Taylor's ability to raise other similar objections during the hearing or in the briefing.

1                   With respect to the question of whether the activities at the Foss Farm  
2 constitute “removal of sand” the Examiner ignored the testimony of all of the experts,  
3 including that of Intervenors’ own expert witness, none of whom could find evidence of  
4 sediment transport as alleged by several of the neighbor witnesses. Instead, the Examiner  
5 relied on the anecdotal allegations and speculative concerns of the neighboring property  
6 owners and intervening neighborhood associations. The Examiner relied on witnesses’  
7 caricatures and generalizations that were not supported by evidence in the record.  
8

9                   Additionally, the Examiner’s conclusions are based on errors in  
10 characterization of testimony. For example, the Examiner indicates that Dr. Fisher  
11 conceded that the “tubes and the nets and the tying down of the same” constitute a  
12 “structure” as the term is used in the SMA. Examiner’s Decision at p. 15. See also  
13 Finding 23 (indicating that Dr. Fisher testified that “tubes and netting are structures for  
14 geoducks”). The record is clear that Dr. Fisher made no such concession.

15                   Similarly, in the instance of whether geoduck harvesting constitutes  
16 dredging, the Examiner indicated in Finding 31, that the “scientific community” at large  
17 considered geoduck harvesting to be a form of dredging. No such evidence was offered at  
18 the hearing, and the Examiner’s finding lacks support in the record.

19                   Accordingly, the portions of the Examiner’s Decision finding that geoduck  
20 operations at the Foss Farm constitute any of the activities specifically listed in the  
21 definition of development, including Findings 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31,  
22 and 33, and Conclusions 2 and 3, are not supported by substantial evidence because a fair-  
23 minded person could not be persuaded of the Examiner’s conclusion.

24                   4.4.4 The Examiner’s conclusion that geoduck operations at the Foss  
25 Farm, including use of tubes and nets, and harvesting activities, interfere with normal  
public use of the surface waters is not supported by substantial evidence and is a clearly

1 erroneous application of law to fact. The Examiner failed to give any weight to credible  
2 testimony and evidence such that a fair-minded person could not be persuaded of the  
3 Examiner's conclusion. The Examiner ignored the testimony and evidence of the various  
4 methods and practices Taylor employs to ensure that there is no interference with normal  
5 public use. The Examiner ignored the significance of the private ownership of the tide  
6 lands and adjacent uplands and the impact such private ownership has on both the  
7 characterization of the "normal public use" and the assessment of whether an activity  
8 constitutes interference with normal public use.

9  
10 Instead, the Examiner relied on testimony of alleged interference that was  
11 purely speculative and insufficient to support the Examiner's conclusion of interference.  
12 For example, the Examiner's statement in Finding 21, that recreational users of the park  
13 "could be carried by the current" to the farm and that it "would be dangerous to those who  
14 ended in the area of this 12 acre site and needed assistance" is not supported by any  
15 testimony or evidence of actual harm to recreational users at the Foss Farm. Similarly,  
16 there is no support in the record for the Examiner's conclusion that:

17 there is little to no doubt that kayaking in shallow waters in this area  
18 would be a problem for kayakers particular when loose nets and  
19 tubes are floating. It also appears that this would be very dangerous  
20 to windsurfers and unsuspecting people viewing the beach area with  
21 boats to [sic.] happen on to this 12 acre site.

22 Finding 22. In fact, the only testimony presented demonstrates that kayakers, including  
23 members of the opposing Intervenor neighborhood associations, were able to kayak over  
24 the tube fields without incident. In addition, there was no testimony from anyone who  
25 actually windsurfed at or near the site, nor was there any testimony from anyone that had  
experienced actual problems in their recreational activities at the site.

Additionally, the Examiner relied on speculative evidence of alleged  
interference that was not attributed to activities at the Foss Farm. For example, in Finding



1 23, the Examiner presumes that turbidity north of the Foss Farm is attributable to  
2 harvesting activities, despite the uncontroverted evidence showing that the turbidity was  
3 seen at a time when no harvesting activities had occurred for three and a half weeks. The  
4 Examiner's Decision, including the description of testimony, Findings 8, 20, 21, 22, 23,  
5 24, 25, 26, 27, 28, 31, and 33, and Conclusions 2 and 3, that the activities at the Foss  
6 Farm interfere with normal public use of the surface waters is therefore not supported by  
7 substantial evidence and is a clearly erroneous application of law to fact.

8 4.5 The Examiner's Decision is in error because he relied on irrelevant  
9 information, legal analysis and conclusions in reaching the conclusion that the permit has  
10 expired and that the operations at the Foss Farm constitute development.

11 4.5.1 The Examiner considered aesthetic issues and concerns of the  
12 neighbors in reaching his conclusions. Similarly, the Examiner considered evidence and  
13 argument related to the alleged evidence of environmental impact of the geoduck farming  
14 activities. The only two issues presented to the Hearing Examiner on appeal were whether  
15 the permit had expired or whether the geoduck farming activities at the site constitute  
16 development subject to the SMA. These aesthetic and environmental concerns are not  
17 relevant to either of these issues. Accordingly, the Examiner's findings and conclusions  
18 constitute an erroneous interpretation of law and a clearly erroneous application of law to  
19 fact.

20 4.5.2 Additionally, and significantly, even if the aesthetic and  
21 environmental impacts of the operation were appropriately within the scope of the  
22 Examiner's review, the Examiner's conclusions regarding aesthetic and environmental  
23 impacts are not supported by substantial evidence in the record. The Examiner ignored  
24 credible testimony and evidence. For example, the Examiner: (i) mischaracterized the  
25 testimony and conclusions of the various experts regarding the extent of scientific

1 information available to assess environmental impacts of the operation; (ii) ignored  
2 specific studies conducted at the Foss Farm that measured the alleged impacts of the  
3 activities; (iii) relied on lay testimony of speculative harm over testimony from experts  
4 regarding environmental impacts; and, (iv) with respect to alleged impacts of harvest,  
5 relied on testimony of Intervenor's lay and expert witnesses, despite the fact that it was  
6 shown conclusively that those witnesses' testimony was based on mistaken information  
7 about the location of the harvest areas. Accordingly, the Examiner's Decision, including  
8 Findings 7, 9, 14, 15, 17, 18, 22, 23, 24, 25, 26, 27, 30, 31, and Conclusions 1, 2, and 3  
9 consists of erroneous interpretations of law, a clearly erroneous applications of law to fact,  
10 and is not supported by substantial evidence.

11 4.6 The Examiner's Decision is in error because it is based on evidence that  
12 was not admitted into the record or discussed by any of the parties at the hearing.

13 4.6.1 The list of exhibits that were "made part of the record" on pages 3-9  
14 includes many exhibits that were not admitted into evidence or otherwise discussed at the  
15 hearing by witnesses or in the parties' briefs. The list on pages 3-9 is the comprehensive  
16 exhibit list of all the parties' potential exhibits; the Examiner made clear at the onset of  
17 the hearing that he was not admitting all potential exhibits, instead ruling on requests to  
18 admit individual exhibits when each request was made. The vast majority of the exhibits  
19 listed on pages 3-9 were never admitted into the record. Similarly, the description of  
20 testimony that follows the list also erroneously indicates that several specific exhibits  
21 were entered into evidence despite the fact that they were not.

22 4.6.2 The Examiner considered the documents in reaching his substantive  
23 decision despite the fact that the documents were not properly admitted and despite the  
24 fact that the parties were not given any opportunity to object to the admissibility or  
25 relevance of the evidence or substantively rebut the evidence or the conclusions that the

1 Examiner drew from the documents. By considering documents that were not properly  
2 admitted into evidence, the Examiner engaged in unlawful procedure and failed to follow  
3 a prescribed process. The error was not harmless because the Examiner considered the  
4 evidence and it substantively impacted his decision. Because the Examiner relied on  
5 documents that were never admitted into evidence, his substantive Decision is not  
6 supported by substantial evidence. Finally, the use of evidence outside of the record  
7 violates the Taylors' constitutional rights of due process under the law.

8 4.7 The Examiner's decision that a permit is required is an erroneous  
9 interpretation of the law and a clearly erroneous application of law to fact because it is  
10 based on inapplicable provisions of the PCC. For example, the Examiner based his  
11 decision on the County's Code provisions regarding use regulations under the SMA. The  
12 County's authority to regulate uses under the SMA is irrelevant to the question of whether  
13 the activity under review constitutes development such that it requires a shoreline  
14 substantial development permit. Additionally, in Finding 32, the Examiner relied on  
15 interim shoreline regulations that have not yet been approved by the Department of  
16 Ecology and therefore have no legal effect. None of the parties offered argument or  
17 analysis with respect to these inapplicable provisions of the PCC or ineffective regulations  
18 such that there is no record supporting the Examiner's Decision. Therefore, the  
19 Examiner's reliance on unrelated provisions of the PCC and regulations that have not been  
20 adopted, including Findings 1, 14, 15, 16, 17, 18, 32, and 33 and Conclusions 1, 2, and 3  
21 are erroneous interpretations of law, clearly erroneous applications of law to fact and are  
22 not supported by substantial evidence. The Examiner was without jurisdiction to rule on  
23 these issues.

24 4.8 The Examiner reaches legal conclusions regarding whether the County  
25 should issue a new permit to Taylor. These conclusions exceed the scope of the

1 Examiner's jurisdiction and the limited issues that were presented for his review. None of  
2 the parties to the proceeding offered arguments, evidence or analysis related to future  
3 requests for authorization under the SMA. The Examiner's Decision on issues related to  
4 subsequent permit decisions is outside his authority and jurisdiction. Additionally, and  
5 significantly, the Examiner's findings with respect to the County's consideration of  
6 subsequent applications are an erroneous interpretation of law and a clearly erroneous  
7 application of law to fact. Because no party provided any testimony, evidence or  
8 arguments regarding the subject of future authorization of activities, the Examiner's  
9 Decision is completely without evidentiary support. The Examiner's Decision, including  
10 Findings 14, 15, 16, 17, 18, 19, 32, and 33 and Conclusions 1, 2, and 3, is an erroneous  
11 interpretation of law, a clearly erroneous application of law to fact, not supported by  
12 substantial evidence, and outside of his authority and jurisdiction.

13           4.9     The Examiner's Decision contains numerous mischaracterizations of  
14 testimony, factual inaccuracies and errors, only several of which are described in detail in  
15 the preceding paragraphs. The Examiner mischaracterizes testimony and, in several  
16 places, attributes the questions raised on cross-examination, or the Examiner's own  
17 statements on *voir dire*, to the witnesses to whom the questions were directed, even when  
18 the witness did not offer the testimony. The Examiner's Decision confuses the sources of  
19 various testimony. The Examiner's description of testimony and findings contains  
20 significant inaccuracies and inconsistencies with the actual testimony. Because of these  
21 inaccuracies, the Examiner's decision is not supported by substantial evidence and is a  
22 clearly erroneous application of law to fact.

23 **V.     Prayer for Relief.**

24           Wherefore, the Taylor prays for relief as follows:  
25

1 A. For an Order under the Land Use Petition Act reversing the Examiner's  
2 Decision that Permit SD 22-00 expired and remanding it for modification consistent with  
3 the Court's conclusions;

4 B. For an Order finding that the doctrine of equitable estoppel precludes the  
5 County from determining that Taylor's permit SD 22-00 expired;

6 C. In the event the Court determines that SD 22-00 expired, for an Order  
7 under the Land Use Petition Act reversing the Examiner's Decision that the activities at  
8 the Foss Farm constitute development such that a new permit is necessary;

9 D. For an Order striking the Examiner's conclusions related to future permit  
10 applications;

11 E. For an award of the Taylors' attorneys' fees and costs to the extent allowed  
12 by applicable law; and

13 F. For such other relief as the Court determines to be just and equitable.

14 DATED this 16<sup>th</sup> day of April, 2008.

15 GORDONDERR LLP

16  
17 By 

18 Samuel W. Plauché, WSBA #25476

19 Amanda M. Carr, WSBA #38025

20 Attorneys for Petitioner, Taylor Shellfish Farms  
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