

December 2, 2008

Phyllis K. Macleod, Presiding
Administrative Appeals Judge
Shorelines Hearings Board
Environmental Hearings Office
P. O. Box 40903
Olympia, WA 98504-0903

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Re: SHB No. 08-010 / 08-017
Taylor Resources, Inc. v. Pierce County

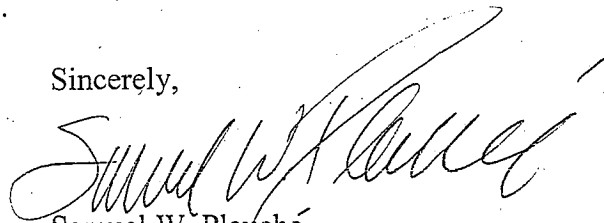
Dear Ms. MacLeod:

On behalf of Taylor Resources, Inc. ("Taylor"), we submit the enclosed Motion for Summary Judgment and Second Declaration of Duncan M. Greene for the Board's consideration.

The Board's procedural rules authorize the filing of dispositive motions and supportive documentation "not later than sixty days before the hearing date." WAC 461-08-475(4)(a). While the Board's original Pre-Hearing Order in this case set a deadline of September 8, 2008, for dispositive motions, the Board has since moved the hearing date from November 17-19, 2008 to February 17-19, 2009. With this new hearing date, Taylor's dispositive motion will be filed well in advance of the 60-day cutoff before the hearing.

Accordingly, Taylor respectfully requests that the Board consider the enclosed motion and declaration and, if necessary, modify the Pre-Hearing Order to change the deadline for dispositive motions to December 8, 2008.

Sincerely,



Samuel W. Plauche
Attorney for Taylor Shellfish Farms

DG:dg

Enclosures

cc: Jill Guernsey (w/encs.)
Jerry Kimball (w/encs.)
David Bricklin (w/encs.)

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TAYLOR RESOURCES, INC. a Washington
corporation, also known as TAYLOR
SHELLFISH FARMS, and NORTH BAY
PARTNERS LLC; M. LESLIE FOSS,

No. SHB No. 08-010
SHB No. 08-017

Petitioners/Intervenors,

TAYLOR RESOURCES, INC.'S
MOTION AND MEMORANDUM
IN SUPPORT OF SUMMARY
JUDGMENT

v.

PIERCE COUNTY, and COALITION TO
PROTECT PUGET SOUND HABITAT,

Respondent/Intervenor.

I. INTRODUCTION

Pursuant to WAC 461-08-300(2) and CR 56, Petitioner Taylor Resources, Inc. ("Taylor") respectfully requests that the Board grant summary judgment to Taylor and reverse Pierce County's rescission of Shoreline Substantial Development Permit SD 22-00 ("SD 22-00"). For the reasons discussed herein, there are no genuine issues of material fact and Taylor is entitled to judgment as a matter of law.

The sole basis for the County's rescission of SD 22-00 was its determination that the permit expired. In its Order Denying Intervenor's Motion to Dismiss, the Board correctly found that SD 22-00 did not expire. Because this finding provides a sufficient basis for granting Taylor's requested relief, a hearing in this matter is unnecessary. The County's attempt to retroactively apply a new interpretation limiting the duration of

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1 geoduck farming activities to Taylor's previously-issued permit was improper as a matter
2 of law and should be reversed.

3 II. STATEMENT OF FACTS

4 A. Factual Background

5 The relevant factual background for this dispute is set forth in the Board's Order
6 Denying Motion to Dismiss dated November 7, 2008 (the "Order"), as well as the
7 pleadings and other materials, including the Declaration of Duncan M. Greene ("Greene
8 Decl."), filed by Taylor on September 9, 2008, in response to the County's and the
9 Coalition's motions to dismiss.¹ Additional evidence cited herein in support of this motion
10 and the findings in the Order is attached to the Second Declaration of Duncan M. Greene
11 ("Second Greene Decl.") filed with this motion.

12 B. Procedural History

13 This is an appeal of the Pierce County Hearing Examiner's decision to affirm
14 Administrative Determination SD 22-00, issued August 7, 2008 (the "Administrative
15 Determination"). The Administrative Determination concluded that Taylor's permit "has
16 expired and further work at the site will require application for approval of a new
17 shoreline substantial development permit." See Greene Decl., Attachment 5, p. 1. The
18 Hearing Examiner issued a decision affirming the Administrative Determination on June
19 12, 2008. *Id.*, Attachment 13 (the "Examiner's Amended Decision").

20 The Examiner's Amended Decision was appealed both to this Board pursuant to
21 the SMA and to Thurston County Superior Court under the Land Use Petition Act
22 (LUPA). Second Greene Decl., Attachment 1. The LUPA appeal was stayed by stipulation
23 of the parties "until the Shorelines Hearings Board enters a final order or until a Superior
24

25 ¹ The Order Denying Motion to Dismiss and the materials filed by Taylor in response to the County's and
the Coalition's motions to dismiss are incorporated herein by this reference.

1 Court reverses a Shorelines Hearings Board decision that the Shorelines Hearings Board
2 has jurisdiction.” *Id.*, Attachment 2.

3 In its Petition to the Board, Taylor requested the following relief:

- 4 1. An order and judgment that the Examiner’s Decision is contrary to
5 law and not supported by evidence.
- 6 2. An order and judgment modifying the Examiner’s Order to find
7 that the authorization to operate a geoduck farm in SD 22-00 does
8 not expire.²

9 The County and the Coalition moved to dismiss Taylor’s appeal for lack of
10 jurisdiction. On November 7, 2008, the Board denied these motions, finding that it has
11 jurisdiction over this appeal because the County’s actions constitute the rescission of a
12 permit. *See Order at 12.*³

12 III. ARGUMENT

13 A. Legal Issues

14 The Pre-Hearing Order in this case identifies nine legal issues for resolution. For
15 the reasons discussed in this motion, however, the Board can fully resolve this appeal and
16 grant all the relief requested by Taylor by answering Issues 1 and 2 in the affirmative:

- 17 1. Whether the Hearing Examiner’s conclusion that SD 22-00 expired
18 is erroneous and inconsistent with applicable laws and regulations
19 including the Shoreline Management Act (SMA), state
20 implementing regulations, the Pierce County Shoreline Master
21 Program (SMP), case law, and the plain language of the permit,
22 itself.

23 ² See Petition for Review, p. 13. Taylor also provided alternative grounds for relief, but these grounds only
24 become relevant if this motion is denied.

25 ³ The Coalition has filed an interlocutory “Third Party Petition for Review” in the pending LUPA action
challenging the Board’s Order Denying Motion to Dismiss. Taylor has argued that the Coalition’s Petition is
not proper.

1 2. Whether a preponderance of the evidence presented to the Board
2 supports that SD 22-00 did not expire, contrary to the Examiner's
3 Decision.⁴

4 This motion, if granted, would fully resolve this controversy by finding SD 22-00
5 is still in effect and allows Taylor to continue to operate. Thus, if this motion is granted,
6 the Board need not address any other issues in the Pre-Hearing Order.⁵ The question the
7 Board reserved for hearing in its November 7 Order – “whether a permit rescission was
8 warranted in this case” – is a legal question that should be resolved on summary
9 judgment. *See* Order at 12.

10 **B. Standard for Rescission**

11 In its November 7 Order, the Board reserved a single issue for hearing: “whether a
12 permit rescission was warranted in this case.” *See*, Order at 12. The SMA is silent on the
13 burden of proof in appeals of decisions to rescind a permit.⁶

14 This Board has previously concluded, by analogy to the concept of *expressio*
15 *unius*, that in such cases the burden is on the rescinding authority.⁷ Thus, the County and

16 ⁴ *See* Pre-Hearing Order at 2.

17 ⁵ North Bay Partners and M. Leslie Foss (“North Bay”) has filed a separate motion for summary judgment
18 addressing Issue No. 3 (Whether the County is equitably estopped from finding that SD 22-00 has expired).
19 Taylor has joined in North Bay’s motion and believes that equitable estoppel provides an independent basis
20 for reversing the County’s rescission. However, Taylor believes that the Board may resolve this case on the
21 sole basis that Taylor’s permit did not expire.

22 ⁶ *See* RCW 90.58.140(7) (addressing burden in appeals of decisions to grant or deny a shoreline permit but
23 not in appeals of decisions to rescind a permit).

24 ⁷ *See* *Advance Resorts, Inc. v. Town of La Conner*, SHB No. 90-91, Findings of Fact, Conclusions of Law
25 and Order (March 30, 1992), (“*Advance Resorts Majority*”), p. 9 (“Since this is an appeal of a rescission
rather than the granting or denial of a shoreline permit, the burden of proof is on the respondent”); *see also*
id., Findings of Fact and Conclusions of Law, and Dissent (“*Advance Resorts Dissent*”), p. 14 (“Such an
approach is in harmony with viewing this as an appeal of an enforcement action, where the burden is on the
governmental agency”); WAC 173-27-240 (stating that the SMA “provides for a variety of means of
enforcement, including civil and criminal penalties, orders to cease and desist, orders to take corrective
action, and permit rescission” (emphasis added).) A copy of *Advance Resorts* is included as Attachment 9 to
the Second Declaration of Duncan M. Greene. As noted in the *Advance Resorts* Dissent, the majority
decision in *Advance Resorts* was “only agreed to by three Board Members, and therefore will not constitute
precedent in other cases.” *See* *Advance Resorts* Dissent, p. 1. However, both the Majority and the Dissent in

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1 the Respondent Intervenor in this case have the ultimate burden of proving that the
2 County's rescission is consistent with the SMA, which authorizes rescission of a permit
3 only "after a hearing . . . upon the finding that a permittee has not complied with
4 conditions of a permit." RCW 90.58.140(8).⁸

5 **C. Summary Judgment Standard**

6 "Summary judgment is a procedure available to avoid unnecessary trials on issues
7 that cannot be factually supported and could not lead to, or result in, a favorable outcome
8 to the opposing party." *Friends of the San Juans v. San Juan County, et al.*, SHB NO. 08-
9 005, Order on Summary Judgment (June 26, 2008) ("Friends"), at 9 (citing *Jacobsen v.*
10 *State*, 89 Wn.2d 104, 569 P.2d 1152 (1977)). The party moving for summary judgment
11 must show that (1) there are no genuine issues of material fact and (2) the moving party is
12 entitled to judgment as a matter of law. *Id.* at 9-10 (citing *Magula v. Benton Franklin Title*
13 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997)). A material fact is one that will
14 affect the outcome under the governing law. *Id.* (citing *Eriks v. Denver*, 118 Wn.2d 451,
15 456, 824 P.2d 1207 (1992)).

16 If the moving party meets the initial burden of showing the absence of an issue of
17 material fact, the burden shifts to the non-moving party. *Id.* (citing *Young v. Key*
18 *Pharmaceuticals, Inc.* 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). If the nonmoving party
19 then "fails to make a showing sufficient to establish the existence of an element essential
20 to that party's case, and on which that party will bear the burden of proof at trial," then the
21

22 *Advance Resorts* agreed that, in appeals of decisions to rescind a permit, the burden of proof is on the
23 respondent. See *Advance Resorts* Majority, p. 9; *Advance Resorts* Dissent, p. 14.

24 ⁸ See *Advance Resorts* Dissent, p. 14 (holding that rescinding authority has the burden of proving that "the
25 action of the local government is consistent with the applicable master program and the provisions of
chapter 90.58 RCW, and the department's implementing regulations"). See also WAC 461-08-505(1)(c).
The County's Master Program and the Department of Ecology's implementing regulations provide no
standards for rescission.

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1 trial court should grant the motion. *Young*, 112 Wn.2d at 225 (citing *Celotex Corp. v.*
2 *Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986)).

3 Therefore, once Taylor has met its initial burden of showing the absence of an
4 issue of material fact, the burden shifts to the County and Intervenor to prove that the
5 County's rescission of Taylor's permit is consistent with the SMA.⁹

6 **D. There Are No Genuine Issues of Material Fact.**

7 Because permit expiration was the County's only basis for its rescission of SD 22-
8 00, and the record supports the Board's contrary finding that Taylor's permit did not
9 expire, there are no genuine issues of material fact and the Board should grant summary
10 judgment in favor of Taylor finding that the County's rescission of Taylor's permit was
11 impermissible and Taylor's permit remains in effect.

12 **1. Expiration was the sole basis for the County's rescission.**

13 The County's Administrative Determination characterized the issue as follows:

14 The present issue involves whether the permit has expired. Planning
15 and Land Use Services has reviewed this matter and concludes that the
16 permit was issued for five years, and that a one-year extension was
17 granted, thereby extending the life of the permit to six years.
Accordingly, the permit has expired and further work at the site will
require application for and approval of a new shoreline substantial
development permit (SSDP).

18 Greene Decl., Attachment 5, p. 1.¹⁰ While the County offers various rationales for its
19 determination that the permit expired, it is clear that its conclusion that SD 22-00 expired
20 is the sole basis for the County's finding that "further work at the site will require
21 application for and approval of a new shoreline substantial development permit." *See id.*
22

23 ⁹ *See id.*; *Advance Resorts* Dissent, p. 14; WAC 461-08-505(1)(c).

24 ¹⁰ *See also id.* at 6 ("The permit that Taylor obtained in 2000 expired pursuant to the applicable RCW,
25 WAC, PCC provisions and the Hearing Examiner decision. To continue operation of its geoduck farm at this
location, Taylor must obtain a new SSDP from the Hearing Examiner").

1 2. **The record supports the Board's finding that Taylor's permit**
2 **did not expire.**

3 Based on its review of portions of the Hearing Examiner record submitted by
4 Taylor in response to the County's and Intervenor's motions to dismiss, the Board
5 correctly found that Taylor's permit did not expire. Order at 10 ("The County placed no
6 explicit time limitation on the ongoing nature of the operation in the permit conditions,
7 nor did it require a permit renewal at certain intervals"). As discussed in the following
8 sections, the evidence cited by the Board, and the additional evidence submitted with this
9 motion, demonstrates beyond any doubt that Taylor's permit did not expire.

10 a) **The language of SD 22-00 and the applicable statutory**
11 **provision, support the Board's finding that the permit**
12 **did not expire.**

13 The Board correctly found that Conditions 4 and 5 were included in SD 22-00 as
14 standard, "boilerplate" language and "do not establish an expiration date for SD 22-00."
15 Order at 3-4, 8-9, 10-11. Interpreting the language of Conditions 4 and 5, the Board
16 concluded that "[w]e do not read this boilerplate language to limit the on-going use of the
17 permitted geoduck development to five years." *Id.* at 11.

18 The Board's finding is supported by RCW 90.58.143(3), which Conditions 4 and 5
19 were intended to implement. Under the plain language of the statute and Board decisions
20 interpreting this provision, the five-year time limit in RCW 90.58.143(3) applies only to
21 construction activities, not on-going uses or activities associated with a constructed
22 project.¹¹ This is true even though Condition 5 uses slightly different terminology than the
23 statute. Consistent with the Board's decision in *Yale Estates*, because these variations in

24 ¹¹ See Taylor's Response to Intervenor's Motion to Dismiss at 10-12 (citing *Yale Estates Homeowners*
25 *Assoc. v. Cowlitz County*, SHB No. 03-012, Modified Order Granting Summary Judgment and Dismissal
(December 22, 2003), WL 22813855 ("Yale Estates") at *8 (holding that RCW 90.58.143(3) and related
permit conditions do not limit the duration of ongoing activities except those that constitute "construction"
activities)).

1 terminology cannot act to broaden the applicability of RCW 90.58.143(3), the Board's
2 inquiry should focus on the statutory language. *See Yale Estates* at *8.

3 Thus, the County's finding that Permit SD 22-00 expired is inconsistent with the
4 plain language of both Conditions 4 and 5, as well RCW 90.58.143(3), the statutory
5 provision on which these conditions are based.

6 **b) Taylor's permit application materials for SD 22-00**
7 **support the Board's finding that the permit did not**
8 **expire.**

9 The Board correctly found that "Taylor's application indicated the proposed
10 starting date for the project would be summer 2000 and the estimated duration of the
11 activity would be 'on-going.'" Order at 2. The Board further found that Taylor had
12 "specifically indicated the intent to engage in ongoing operations at the Foss Farm site" in
13 its application materials. *Id.* at 10.

14 This Board and the courts have made clear in numerous decisions that application
15 materials are highly relevant to the interpretation of a permit.¹² Under these authorities,
16 Taylor's clear statement in its application that it intended to engage in "on-going"
17 activities strongly supports the Board's finding that SD 22-00 did not expire.

18 **c) The County's Staff Report and testimony demonstrates**
19 **that the County did not intend the permit to expire.**

20 The Board correctly found that "[t]he Staff Report and testimony from staff
21 indicated the project would involve planting baby geoducks in PVC pipes for cultivation
22 and subsequent harvest after approximately five years" and that "[t]he company would
23 then 'repeat the process.'" Order at 3. The Board further found that [t]he testimony at
24 hearing acknowledged that Taylor's request was for on-going activity." *Id.* As a result of

25 ¹² *See Taylor's Response to Intervenor's Motion to Dismiss* at 7-8 (citing Board and court decisions holding
that permit interpretation is not limited to review of the permit document itself and includes review of
application materials and other documents).

1 this evidence, the Board concluded that “Pierce County fully understood the farming to
2 include planting, cultivating, and harvesting geoducks in 5-7 year cycles.” *Id.* at 10. The
3 County’s repeated acknowledgment that Taylor intended to engage in on-going activities
4 demonstrates that it did not intend SD 22-00, as originally issued, to expire.

5 **d) The County’s failure to take action five years after SD**
6 **22-00 was issued demonstrates that the County did not**
7 **intend the permit to expire.**

8 The Board correctly found that “Pierce County did not pursue the issue of permit
9 expiration at the end of five years (January 2006) or at the end of six years (January
10 2007)” and that “[g]eoduck farming continued unabated at the Foss Farm location well
11 past the alleged five or six year term of the permit with full knowledge of Pierce County.”
12 Order at 11-12. If the County had intended SD 22-00 to expire after five years, it should
13 have taken enforcement action when geoduck farming continued beyond the alleged
14 expiration date.

15 The Board further found that, at the time SD 22-00 was issued, Pierce County “had
16 no formal administrative position” regarding the duration of geoduck permits and that the
17 County did not engage in a formal review of its policy on geoduck farming permits until
18 2007 when “citizen opposition to geoduck farming became more intense.” *Id.* at 5, 12.¹³

19 _____
20 ¹³ As noted by the Board, the County’s changed interpretation regarding permit expiration is not entitled to
21 deference. Order at 12 (citing *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007)).
22 Furthermore, the County’s application of its changed interpretation “in a retroactive fashion to Taylor
23 Resources’ previously permitted geoduck operation” is contrary to the principle of “finality and certainty in
24 land use decisions.” See Order at 12; *Shawl et al. v. Stevens County*, SHB No. 96-21, Opinions and Order on
25 Motions to Dismiss (October 2, 1996), 1996 WL 660464 (stating that 1976 amendments to SMA
“demonstrate a conscious effort to balance the interests of the public in pursuing appeal of a shoreline
permit and the interests of applicants in achieving finality and certainty in land use decisions”); *Manza v.*
City of Lakewood, SHB Nos. 02-005 & 02-006, Concurrence and Dissent (January 31, 2003), 2003 WL
283760 (outlining four recent Washington Supreme Court decisions addressing finality in land use
decisions). See also *Skamania County v. Columbia River Gorge Com’n*, 144 Wn.2d 30, 26 P.3d 241 (2001)
(recognizing “a strong public policy supporting administrative finality in land use decisions”); *Deschenes v.*

1 Thus, the Board's finding that SD 22-00 did not expire is also supported by evidence
2 indicating that the impetus for the County's Administrative Determination was not the
3 permit itself but citizen opposition.

4 **e) Statements by County Staff with authority over the**
5 **project demonstrate that the County did not intend the**
6 **permit to expire.**

7 The Board correctly found that, while developing the farm, Taylor "had
8 conversations with Ty Booth, the assigned planner for Pierce County, in which he
9 indicated that once the farm was established within a five-year period, the farming could
10 continue on beyond the construction period." Order at 4. The Board found that "[t]his
11 view was also conveyed in writing to one of the project opponents by Vicki Diamond,
12 Supervisor of Current Planning for Pierce County, who indicated that there was no
13 expiration of a shoreline permit for geoduck cultivation once the use was initiated and
14 established." *Id.* These statements by County employees "in positions of authority over
15 the particular project" further demonstrate that the County did not originally intend SD
16 22-00 to expire. *See* Order at 11.

17 **f) The County's actions on other permits demonstrate that**
18 **the County did not intend SD 22-00 to expire**

19 That the County did not intend SD 22-00 to expire is also supported by evidence in
20 the record addressing County actions on other permits. For example, when the County
21 intended other shoreline permits to expire, it included clear language stating that "both the
22 Shoreline permit and the Unclassified Use Permit and a Shoreline Substantial
23 Development Permit shall automatically become null and void on September 15, 1982,"
24 or that "[a]pproval shall be for no more than five years from the effective date of this

25 *King County*, 83 Wn.2d 714, 521 P.2d 1181 (1974) ("If there were not finality, no owner of land would ever
be safe in proceeding with development of his property.")

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1 decision.” Second Greene Déclaration, Attachment 3, p. 7; *id.*, Attachment 4, p. 7. If the
2 County intended SD 22-00 to expire five years after it was issued on December 28, 2000,
3 it could have used similarly explicit condition language.

4 In fact, in a different Taylor geoduck permit, the County included express
5 condition language requiring a reexamination of the permit after a specified period of
6 time. *See* Order Denying Motion to Dismiss at 10-11. In that permit, in addition to the
7 boilerplate language of Conditions 4 and 5 in SD 22-00, the County included condition
8 language stating that “[t]his project shall be reviewed in five years from the effective date
9 of approval by the Hearing Examiner to examine the impacts of operations and each of
10 these conditions.” Second Greene Decl., Attachment 5, pp. 3-4; *id.*, Attachment 6, pp. 15-
11 16 (Conditions 1.A-B), p. 18 (Condition 24).¹⁴ The fact that the Examiner included both
12 the “boilerplate” condition language as well as a provision to reassess those permits every
13 five years demonstrates that the boilerplate language in Condition 5 of SD 22-00 was not
14 intended as a permit expiration provision. Otherwise, the permit condition giving the
15 County the opportunity to reassess the permit after five years would have been
16 superfluous.¹⁵

17 In its November 7 Order, the Board noted “the importance of clearly delineating in
18 the permit any conditions a local government believes are necessary to address valid
19 concerns associated with a permitted use.” Order at 11, n.2. In a recent deposition, Vicki
20 Diamond, Supervisor of Pierce County Current Planning, acknowledged that the language
21 of Conditions 4 and 5 in SD 22-00 was unclear and that, in the weeks leading up to the
22

23 ¹⁴ The permits referenced in the Second Greene Declaration were also appealed to the SHB. The SHB held
24 a hearing on those appeals on November 24, 2008. The only issues in those appeals related to a condition
25 addressing hours of operation.

¹⁵ The reference to “second” and “third planting cycles” in other conditions in that permit similarly
recognizes that the permit was for ongoing activities and did not expire. *Id.* at 6, 14 (Conditions 34 – 36).

1 County's issuance of the Administrative Determination, the County had developed clearer
2 language regarding expiration to be included in all future Shoreline Substantial
3 Development Permits:

4 Q: Was the concern that there was confusion with regard to that
5 language and the county needed to develop language that was clearer?

6 A: Yes.

7 Second Greene Declaration, Attachment 7, pp. 54-57; *id.*, Attachment 8.

8 In summary, the Board's finding that SD 22-00 did not expire is supported by
9 undisputed evidence in the record demonstrating that:

- 10 • The permit itself did not include an expiration provision;
- 11 • Taylor applied for a permit authorizing "ongoing" operations;
- 12 • The County, in recommending permit issuance, recognized Taylor's
13 request for a permit authorizing ongoing operations;
- 14 • The County took no action when Taylor continued farming after the
15 alleged expiration date;
- 16 • County staff told Taylor and the public that the permit did not
17 expire; and
- 18 • When the County intended permit expiration or reassessment, it
19 included clear permit language to achieve that result, none of which
20 was included in SD 22-00.

21 Based on this undisputed record, the Board should affirm its finding that SD 22-00
22 did not expire and rule that the rescission of Taylor's permit, which was based solely on
23 the County's conclusion that SD 22-00 expired, was not warranted.

24 **E. Taylor is Entitled to Judgment As a Matter of Law.**

25 As previously noted, the SMA authorizes issuance of a permit "upon the finding
that a permittee has not complied with conditions of a permit." RCW 90.58.140(8).

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1 Because Taylor is in compliance with all conditions of Permit SD 22-00, the County's
2 rescission was inconsistent with the SMA and should be reversed.¹⁶

3 The only conditions at issue in this appeal are Conditions 4 and 5. The Board
4 already found in its November 7 Order that Condition 4 "is directed to a permit holder's
5 responsibility to diligently initiate and pursue construction of any improvements approved
6 by the permit. It is not disputed that Taylor timely began construction of project
7 improvements in this case." Order Denying Motion to Dismiss at 8. The Board further
8 found that Condition 5 "addresses the topic of project completion" such that "[i]f a permit
9 holder has not completed the project within five years, the local government is charged
10 with reviewing the permit and extending it or terminating it," and that "[t]he language of
11 Condition 5 does not create [a] self-executing system for expiration of shoreline permits."
12 *Id.* at 8-9. The Board's findings confirm that Taylor completed the project, including
13 surveying and planting the entire farmable area and maintaining the farm with protective
14 netting, within five years. *Id.* at 4, 9. The Board's findings regarding the meaning of
15 Conditions 4 and 5, and its conclusion that "[t]he evidence is undisputed that the farm was
16 constructed and established during the first five years of the permit" provides an adequate
17 basis for a finding that Taylor remains in compliance with all conditions of Permit SD 22-
18 00. *Id.* at 11. Those findings are also supported by the additional evidence submitted with
19 this motion.

20 Thus, because the Board has already found Taylor to be in compliance with
21 Conditions 4 and 5, and the County has not alleged noncompliance with any other

22 _____
23 ¹⁶ The County's rescission was also inconsistent with the SMA because the County failed to hold a hearing,
24 as required by RCW 90.58.140(8), before rescinding Taylor's permit. While this procedural defect
25 underscores the impropriety of the County's rescission, a hearing would not cure the fundamental flaw in
the County's rescission – namely, that the rescission was based on the County's incorrect determination that
Taylor's permit expired. Thus, this motion requests that the Board reverse the County's determination
rather than remand this matter to the County for a hearing.

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1 conditions of SD 22-00, the County's attempted rescission of Taylor's permit is
2 unsupported and should be reversed.

3 **IV. REQUEST FOR RELIEF**

4 For the reasons discussed herein, Taylor asks the Board to issue an order finding
5 that SD 22-00 remains in effect and reversing the County's rescission of Taylor's permit.

6 Respectfully submitted this 1st day of December, 2008.

7 GORDONDERR LLP

8
9 By: 

10 Samuel W. Plauché, WSBA #25476

11 Duncan M. Greene, WSBA # 36718

12 Attorneys for Appellant, Taylor Shellfish Farms

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BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

TAYLOR RESOURCES, INC. a Washington
corporation, also known as TAYLOR
SHELLFISH FARMS, and NORTH BAY
PARTNERS LLC; M. LESLIE FOSS,

Petitioners/Intervenors,

v.

PIERCE COUNTY, and COALITION TO
PROTECT PUGET SOUND HABITAT,

Respondent/Intervenor.

No. SHB No. 08-010
SHB No. 08-017

SECOND DECLARATION OF
DUNCAN M. GREENE

I, DUNCAN M. GREENE, declare as follows:

1. That I am over the age of 18 years and make this declaration based upon my
personal knowledge.

2. I am one of the attorneys for Taylor Resources, Inc. in this matter.

3. Attached hereto are true and correct copies of the following documents:

Attachment 1: Petition for Review (Land Use Petition Act), filed in
Thurston County Superior Court under Cause No. 08-2-00904-9 (without
exhibits).¹

¹ Except where otherwise indicated, all references herein to exhibit numbers are to exhibits admitted by the
Hearing Examiner at the hearing below in Pierce County Administrative Appeal Case No. AA16-07,
Application No. 612676.

SECOND DECLARATION OF DUNCAN M. GREENE - 1

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2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

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Attachment 2: Stipulation and Agreed Order Regarding Intervention and Stay, Thurston County Cause No. 08-2-00904-9.

Attachment 3: Pierce County Hearing Examiner Consolidated Report and Decision, Case No. UP12-81 and SD20-81 (Corliss Company) dated January 18, 1982 – Exhibit 1Q.

Attachment 4: Pierce County Hearing Examiner Report and Decision, Case No. SD(C) 6-89 / UP4-89 (Mosby) dated August 3, 1989 – Exhibit 1O.

Attachment 5: Pierce County Hearing Examiner Decision on Reconsideration, No. SD53-05 (Meyer) and SD55-06 (Stratford), dated January 19, 2007 – Exhibit 69

Attachment 6: Pierce County Hearing Examiner Amended Report and Decision, No. SD53-05 (Meyer) and SD55-06 (Stratford), dated January 19, 2007– Exhibit 70

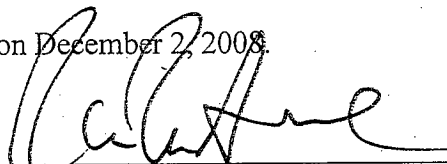
Attachment 7: Excerpt from Deposition Upon Oral Examination of Vicki M. Diamond, October 28, 2008.

Attachment 8: Exhibit 28 submitted at Deposition Upon Oral Examination of Vicki M. Diamond, October 28, 2008

Attachment 9: *Advance Resorts, Inc. v. Town of La Conner*, SHB No. 90-91, Final Findings of Fact, Conclusions of Law and Order (March 30, 1992)

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on December 2, 2008.


Duncan M. Greene, Declarant