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8 SUPERIOR COURT OF WASHINGTON
9 IN AND FOR THURSTON COUNTY

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

12 Petitioners,)

13 v.)

14 PIERCE COUNTY, a political subdivision of)
15 the State of Washington,)

16 Respondent.)

17 and)

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

20 Additional Parties.)
21

No.
PETITION FOR REVIEW
(LAND USE PETITION ACT)

22 Comes now Petitioner Taylor Resources, Inc., also known as Taylor Shellfish
23 Farms, by and through its undersigned attorneys, and petitions this Court for review of a
24 Pierce County land use decision pursuant to the Land Use Petition Act, Ch. 36.70C RCW.
25

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. 6th Street
6 Mount Vernon, WA 98274-3906.

7 North Bay Partners' attorney is:

8 Jerry R. Kimball, WSBA No. 864
9 1200 5th Avenue, Suite 2020
10 Seattle, WA 98101-3132

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

14 FOSS M LESLIE ET AL
15 211 S 6th ST
16 MOUNT VERNON WA 98274-3906

17 DEMILLE MICHAEL¹
18 P O BOX 804
19 LAKE BAY WA 98349-0804

20 1.4 Identity of other Intervenor Below: The following persons intervened in
21 the proceedings below after the filing of Taylor's administrative appeal and, pursuant to
22 RCW 36.70C.040(2)(d), are listed for identification purposes only and are not made
23 parties to this appeal:

24 1.4.1 Coalition to Preserve Puget Sound Habitat appeared as an
25 Intervenor in the proceedings before the Pierce County Hearing Examiner that are the
subject of this appeal. The Coalition to Preserve Puget Sound Habitat appeared in the
Hearing Examiner proceedings only through its attorney. The Coalition to Preserve Puget

¹ 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 187th 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
7 6723 Sunset View Drive
Gig Harbor, WA 98335

8 Henderson Bay Shoreline Association's attorney is:

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

12 1.4.4 Case Inlet Beach Association appeared as an Intervenor in the
13 proceedings before the Pierce County Hearing Examiner that are the subject of this
14 appeal. The Case Inlet Beach Association appeared in the Hearing Examiner proceedings
15 only through its attorney. The Case Inlet Beach Association did not provide its address
16 nor the name or address of any representative. An internet search of the Secretary of
17 State records revealed no records for Case Inlet Beach Association. Inquiries regarding
18 the Case Inlet Beach Association's contact information directed to counsel for Case Inlet
19 Beach Association have gone unanswered.

20 Case Inlet Beach 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 1.4.5 Protect Our Shorelines appeared as an Intervenor in the
24 proceedings before the Pierce County Hearing Examiner that are the subject of this
25 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 ½ 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
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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 4.2.2 The Examiner's conclusion that SD 22-00, expired is an erroneous
10 interpretation of the law, a clearly erroneous application of law to fact, and is not
11 supported by substantial evidence. The conclusion is inconsistent with the plain language
12 of the permit and with the provisions of the SMA (including RCW 90.58.143), the State's
13 implementing regulations (including WAC 173-27-090), and the PCC (including PCC
14 20.76.030(G)(3)) upon which the relevant permit conditions are based. The Examiner's
15 conclusion that the permit expired is based, in part, on comparisons to permits for ongoing
16 development and construction activities that are not comparable to geoduck farming
17 operations. Evidence presented at the hearing was insufficient to persuade a fair-minded
18 person that the farming activities at the Foss Farm are comparable to construction
19 activities or ongoing development that are subject to the expiration provision of the permit
20 and in the SMA. Nor was there sufficient evidence to persuade a fair-minded person that
21 the County adopted the permit condition at issue for the purpose of subjecting the
22 authorized activities to expiration and re-application. Accordingly, the Examiner's
23 Decision, including the description of testimony, Findings 13, 29, 30 and 31 and
24 Conclusions 2 and 3, is an erroneous interpretation of the law, a clearly erroneous
25 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,² 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.

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² 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 Additionally, the Examiner’s conclusions are based on errors in
9 characterization of testimony. For example, the Examiner indicates that Dr. Fisher
10 conceded that the “tubes and the nets and the tying down of the same” constitute a
11 “structure” as the term is used in the SMA. Examiner’s Decision at p. 15. See also
12 Finding 23 (indicating that Dr. Fisher testified that “tubes and netting are structures for
13 geoducks”). The record is clear that Dr. Fisher made no such concession.

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

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

23 4.4.4 The Examiner’s conclusion that geoduck operations at the Foss
24 Farm, including use of tubes and nets, and harvesting activities, interfere with normal
25 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 Instead, the Examiner relied on testimony of alleged interference that was
10 purely speculative and insufficient to support the Examiner's conclusion of interference.
11 For example, the Examiner's statement in Finding 21, that recreational users of the park
12 "could be carried by the current" to the farm and that it "would be dangerous to those who
13 ended in the area of this 12 acre site and needed assistance" is not supported by any
14 testimony or evidence of actual harm to recreational users at the Foss Farm. Similarly,
15 there is no support in the record for the Examiner's conclusion that:

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

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

