

1  EXPEDITE  
 2  No hearing set  
 3  Hearing is set  
 4 Date: July 18, 2008  
 5 Time: 9:00 am \_\_\_\_\_  
 6 Judge/Calendar: Hon. Chris Wickham  
 7 \_\_\_\_\_  
 8

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

11 TAYLOR RESOURCES, INC., )  
 12 a Washington corporation, also known as )  
 13 TAYLOR SHELLFISH FARMS )  
 14 )  
 15 ) Petitioners, )  
 16 )  
 17 ) v. )  
 18 ) PIERCE COUNTY, a political subdivision of )  
 19 ) the State of Washington, )  
 20 ) Respondent. )  
 21 )  
 22 ) and )  
 23 ) NORTH BAY PARTNERS, a family )  
 24 ) partnership; M. LESLIE FOSS ET AL, )  
 25 ) taxpayers of record for the property at issue, )  
 Additional Parties. )

NO. 08-2-00904-9  
NO. 08-2-01571-5

REPLY OF NORTH BAY PARTNERS,  
LLC IN SUPPORT OF APPROVAL  
OF SETTLEMENT AGREEMENT  
AND CONSOLIDATION

INTRODUCTION

North Bay Partners, LLC offers this reply in support of their joint motion to consolidate and to approve the settlement agreement entered into by Taylor Shellfish, Pierce County and North Bay. North Bay is the owner of the uplands and tidelands leased to Taylor Shellfish and on which geoduck has been cultivated pursuant to Pierce County SD 22-00 granted on December

REPLY IN SUPPORT OF  
CONSOLIDATION AND APPROVAL OF  
SETTLEMENT - 1

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**BACKGROUND FACTS**

North Bay Partners is an LLC owned by a pioneering Northwest family for the purpose of owning 123 acres and uplands and approximately one mile of beach on Case Inlet in Pierce County, Washington. The property was acquired by Henry Foss in the early 1930s and has been maintained in an undeveloped state, other than one small one room cabin, since that time. The one mile of private beach is bordered on the south by Joemma State Park and on the north by a dense development of approximately 15 homes on small narrow lots originally consisting of beach cabins and now expanded or being expanded to full time residence type structures.

The Foss family ownership is spread through three generations via a partnership structure that has now been converted to an LLC. Alternative means of owning the property would more readily facilitate its division (i.e. tenancy in common leading to partition). To avoid that possibility and consistent with the families overall goal of preserving this property, largely unchanged, the more formal ownership structure was adopted.<sup>1</sup>

The Foss family also owns the adjoining tidelands. Their predecessor in interest acquired title to the uplands and tidelands through federal patent before Washington Statehood. The tideland grant goes from the meander line of high water to lowest extreme low water. More simply described, any tideland adjoining their property that is ever exposed, even at the most extreme of low tides, is owned by the family. There is no public right of access to the uplands or tidelands.<sup>2</sup>

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<sup>1</sup> The attachment to this property was poignantly described by the managing member in her testimony before the hearing examiner when she described the scattering of her father's ashes here and near Day Island in Tacoma, the two places he grew up loving.

<sup>2</sup> This is an important point to understand in light of the composition of the intervenors "Coalition to Protect Puget Sound". Its more vocal members in this dispute come from the packed in neighborhood to the north of the Foss property. These individuals seem to believe that although they don't own the beach, the uplands or the tidelands, they should have a right to trespass at will and as if they did have ownership. See email from Sheri Leudtke attached as Exhibit 1. "Some of our members have been chased off the beach while relaxing with their beach chairs, in a [place they believed to be another CIBA's member's property. Once Pierce County has determined and properly marked these boundaries we can exercise our rights of access on to state tidelands under the public trust doctrine."

1 In 1999 the Foss family was approached about leasing the tidelands to Taylor for an  
2 attempt at geoduck aquaculture. A lease was executed which requires Taylor to obtain all  
3 necessary permits and Taylor did so. Taylor planted successive crops of geoduck in 2001  
4 through 2006 for harvest in 2005 or 2006 and annually thereafter. In 2007, bowing to threats  
5 from environmental groups that were politically well connected to County Councilmember Terry  
6 Lee, the county planning department made a 180 degree change in position. The county  
7 suddenly claimed that the permit was required for each step of the farming operation, not just  
8 establishment of the farm. Despite emails and public expressions that the permit would allow  
9 farming in perpetuity, the county moved to curtail the operation.<sup>3</sup>

10 After hearing, a departmental decision that contains admitted outright falsehoods (see  
11 footnote re extension of SSD permit for good cause), the county decided the county was right  
12 and the counties long time hearing officer, a beach owner without tidelands whose property is  
13 fronted by another aquaculture project, decided that the county deciding the county was right  
14 was a good thing. As often happens when decisions are made in this fashion this lawsuit  
15 ensured.

16 North Bay has an economic interest in approximately \$20,000,000 worth of geoduck  
17 planted in its tidelands by Taylor. The willingness of the county planning department to make  
18 false claims about extension requests and good cause for extension under the Shoreline  
19 Management Act in order to hide their official but not published policy that the permit allowed  
20 establishing a farm that could operate in perpetuity severely harmed North Bay. Having seen the  
21 inner workings of the counties administrative process, North Bay turned to this court and filed  
22 claims based on RCW 64.40 (if you have to lie about what you did, it is arbitrary and  
23 capricious), estoppel and sought substantial damages (the claim is \$10,000,000 for North Bay's  
24 damages separate form Taylor's damages).

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25 <sup>3</sup> One of the more interesting aspects of the Hearing Examiner's ruling and the county's  
administrative decision is the claim that the permit had been extended for one year as allowed by  
the Shoreline Management Act for good cause shown. When queried about this in the hearing,  
the county admitted that there had never been a request to extend the permit, that there had never  
been a review of the permit to determine if the "good cause" required by the statute existed. Yet,  
although everyone knows that the claim is factually untrue, the story continues as cover for the  
counties arbitrary actions.

**FALSE STATEMENTS OF COALITION TO PROTECT PUGET SOUND**

1           Apparently taking the lead of the county planning department, Coalition to Protect  
2 Puget Sound (“Coalition”) seems to have determined that the best way to prevent a settlement of  
3 the claims against the county is to simply lie about what has happened. Falsehoods from the  
4 intervenors are no less offensive than the prior falsehoods of the county.

5           At page 2 of its brief<sup>4</sup>, the Coalition states the county agreed that the proper course of  
6 action would be to shut down Taylor’s operation if the county’s administrated decision was  
7 upheld. First, the county denies any such agreement existed. See Reply of Pierce County.  
8 Second, Taylor has not conducted any operations on the site since the county administrative  
9 decision; no harvest has occurred. No planting has occurred. The Coalition’s statement as to the  
10 agreement existing, and if it had existed, it being violated is false. That the claim is made in an  
11 unsigned memorandum also makes it subject to being stricken under CR 11.

12           That Pierce County’s administrative decision caused cessation of operations is a  
13 substantial basis of the monetary claims being settled. The crops in the beach mature in 4 to 5  
14 years and are then harvested. Annually a new crop is planted so that a crop is ready to harvest 4  
15 or 5 years later. Because of the counties arbitrary and capricious actions in creating a false  
16 record of a permit extension and of repudiating its official but unpublished policy, no planting  
17 occurred in 2007 or 2008. The settlement agreement does not allow planting in any future year;  
18 future planting is subject to a decision in this matter and/or a new permit being issued. For each  
19 year of planting that is missed, North Bay loses hundreds of thousands of dollars. North Bay  
20 will not be compensated in any way for that loss by this settlement. That Coalition attempts to  
21 mislead this court about this important point in an unsigned memorandum is reprehensible.

22           The permit application remains in process. The appeal of the LUPA decision continues  
23 before this court and in a companion proceeding before the Shoreline Hearings Board. The  
24 settlement agreement resolves only the orderly harvest according to standard industry practices  
25 of geoduck planted under the permit issued by Pierce County in December 2000, nothing more.  
Coalition’s statements to the contrary are false.

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<sup>4</sup> That the copy received by the undersigned bears no signature line, but instead simply ends  
unsigned may be more related to counsel’s obligations under CR 11 than to oversight.

**A DIFFICULT COMPROMISE**

1 This settlement is the result of hard negotiations. Although the county has never  
2 acknowledged it, the county's lawyers must be deeply concerned about the actions of the County  
3 Planning Department in faking an extension of the SSD permit for one additional year upon  
4 showing of good cause when the testimony from the county personnel involved in that ruse  
5 acknowledges it never, ever happened. North Bay's position has been consistent. If the county  
6 relies upon an action that it made up (faked) and knows did not occur (knows was faked) in  
7 making a subsequent land use decision, the subsequent decision is arbitrary and capricious as a  
8 matter of law.

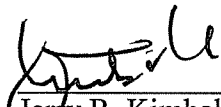
9 North Bay also believes that the record fully supports the county being estopped from  
10 denying that Taylor and North Bay were told by the county that the permit allowed farming in  
11 perpetuity. Vicki Diamond, the head of this unit of the county planning said so in an email from  
12 her official email. Ty Booth did so also. The county's attempt to back track and make these out  
13 to be expressions of only personal opinion, not policy is transparent. These are aspects of this  
14 lawsuit that North Bay feels strongly support its claims.

**SUMMARY**

15 But, North Bay also realizes there is uncertainty in litigation. The compromise allows  
16 the harvest and minimizes the loss to the two presently unplanted years of lost crops.  
17 Differences in growth rates may minimize disruption to the annual harvest and consequently to  
18 North Bay's cash flow. While North Bay was reluctant to accept the compromise (and was the  
19 last party to do so), it is a compromise that has both benefits and detriments. Although the  
20 counties actions were clearly not fair, viewed separately as a compromise this hard negotiated  
21 settlement is acceptable to North Bay and should be approved.

22 Dated this 17<sup>th</sup> day of July, 2008.

23 LAW OFFICE OF JERRY R. KIMBALL

24 By:   
25 \_\_\_\_\_  
26 Jerry R. Kimball, WSBA No. 8641  
27 Attorney for North Bay Partners LLC and  
28 M. Leslie Foss, as managing partner

# Exhibit 1

## **Jerry Kimball**

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**From:** Sheri Luedtke [smluedtke@mlr-law.com]  
**Sent:** Saturday, July 12, 2008 1:38 PM  
**To:** JGUERNS@co.pierce.wa.us  
**Cc:** bricklin@bnd-law.com  
**Subject:** settlement with Taylor

Jill,

Please send me the proposed settlement document re: the harvest of geoducks on or near the Foss tidelands. Is the hearing still on for July 18?

The members of the Case Inlet Beach Association have these concerns about the harvest settlement. We want harvesting to be done by divers, not using the high pressure water jets. As demonstrated in last year's hearing, and accepted by the hearing examiner in his findings of fact, there are legitimate concerns about the drift of sediment onto our tidelands and the probable detrimental environmental impacts of pressure jet harvesting. Also, we have concerns about the erosion and undercutting of the bluff at the adjacent property (McCormick/Xitco's). In light of Taylor's illegal activities in Totten Inlet (see today's article in the Seattle P-I) we want the County to obtain a survey of the Foss property and mark it with buoys before harvesting to be sure no geoducks are harvested from state tidelands or our neighbor's tidelands. We also want to know where the state tidelands begin, as we have a right under the public trust doctrine to walk on public tidelands. The Foss family attorney sent us letters warning us not to trespass on their tidelands, then posted a new permit notice beyond the "keep out" sign, forcing us to trespass if we wanted to read the notice. That is not effective notice to the public. They should have to start their new permit process again.

As for the harvest, we want the County have an inspector on site to observe the boundaries and record the harvest activity. Harvest days and times should comply with the Interim Regs, which I understand are currently "under review" (?) by the Dept of Ecology.

Some of our members have been chased off the beach while relaxing with their beach chairs, in a place they believed to be on another CIBA's member's property. Once Pierce County has determined and properly marked these boundaries we can exercise our rights of access onto state tidelands under the public trust doctrine. Hopefully this will reduce the conflict between our community members and those speaking for the North Bay Partners.

Thank you,

Sherilee M. Luedtke

Margullis, Luedtke & Ray, PLLC  
Attorneys at Law

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