

EXPEDITE
 No hearing set
 Hearing is set
Date: July 18, 2008
Time: 9:00 a.m.
Judge/Calendar: Judge Chris Wickham

RECEIVED

JUL 17 2008

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.

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

Petitioners/Plaintiff,

and

No. 08-2-00904-9

TAYLOR RESOURCES INC.'S
REPLY IN SUPPORT OF
MOTION TO ENTER SETTLEMENT
AGREEMENT ORDER

No. 08-2-01571-5

TAYLOR RESOURCES INC.'S REPLY IN SUPPORT OF
MOTION TO ENTER SETTLEMENT . . . - 1

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1 NORTH BAY PARTNERS LLC, a limited
liability corporation,

2 Additional Party/Co-Plaintiff,

3 v.

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

6 Respondent/Defendant.)

7 and

8 FOSS M. LESLIE ETAL, Taxpayers of record
9 for the property at issue,

10 Additional Party.
11

12 I. INTRODUCTION

13 Taylor Resources, Inc. ("Taylor") submits this reply to the Intervenor Coalition to
14 Protect Puget Sound Habitat's ("CPPSH") Response to Motions to Consolidate and for
15 Entry of Settlement Agreement Order. CPPSH's Response Brief dramatically overstates
16 the scope and effect of the Settlement Agreement and proposed order that are the subject
17 of the present motion.¹ The Settlement Agreement between Taylor, Pierce County, and
18 North Bay Partners LLC ("North Bay") addresses a very limited aspect of the current
19 dispute. The Settlement Agreement is fully within the County's authority to execute, and
20 the proposed order is fully within the Court's authority to enter.
21
22

23 ¹ The misstatements in CPPSH's Response Brief begin with the first sentence. This case is not a dispute
24 between Taylor and waterfront property owners about the impact of geoduck aquaculture. This is a dispute
25 between Taylor and North Bay Partnership, on the one hand, and Pierce County, on the other, about the
interpretation of a permit Pierce County issued to Taylor in 2000. In fact, CPPSH was not an original party
in these proceedings, but has been allowed to intervene by stipulated order.

TAYLOR RESOURCES INC.'S REPLY IN SUPPORT OF
MOTION TO ENTER SETTLEMENT . . . - 2

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II. FACTS

A. Background.

This case involves an Administrative Determination issued by Pierce County on August 8, 2007. Amended Petition for Review and Complaint for Damages Pursuant to RCW 64.40 (“Amended Petition”) ¶ 3.8. In that Administrative Determination, Pierce County determined that Taylor was required to obtain a new Shoreline Substantial Development Permit for a geoduck farm Taylor operates on tidelands in Pierce County. *Id.* The tidelands in question are owned by North Bay. *Id.* ¶ 1.3.1. The County went on to find that the Shoreline Substantial Development Permit the County previously issued to Taylor for that farm had expired. *Id.* ¶ 3.8. At the time of the August 8, 2007 Administrative Determination, Taylor had planted, but not yet harvested, a significant number geoducks in the North Bay tidelands. *Id.* ¶ 4.3.2. The County’s Administrative Determination did not address whether Taylor was authorized to harvest the geoduck it had already planted, and, in fact, Taylor continued to harvest previously planted geoduck after the County issued its Administrative Determination. Joint Motion for Consolidation and Entry of Settlement Agreement (“Joint Motion”), Attachment 1 at 2, ¶ 6.

Taylor appealed the County’s Administrative Determination to the Pierce County Hearing Examiner (“Examiner”). The Examiner’s Decision, issued on March 26, 2008, upheld the County’s Administrative Determination. Joint Motion, Attachment 1 at 2, ¶ 9. While that Decision did not specifically address the harvest of the geoduck previously planted geoduck, parts of that the Decision created uncertainty as to whether that harvest

1 was authorized. *Id.* Because of that uncertainty, Taylor has refrained from harvesting
2 geoduck from the North Bay tidelands since the Examiner's March 26, 2008 Decision.

3 Taylor appealed the March 26, 2008 Examiner's Decision to this Court. *See* Amended
4 Petition ¶ 3.10.² As part of this appeal, Taylor contends that the doctrine of equitable
5 estoppel prohibits the County from restricting Taylor's harvest of crops already planted in
6 the North Bay Tidelands. *Id.* ¶ 4.3. Taylor's Amended Petition also includes a claim for
7 damages under Ch. 64.40 RCW. *Id.* ¶¶ 5.1-5.5. Taylor's equitable estoppel and damages
8 claims are based in large part on the fact that Taylor planted the geoduck in question in
9 reliance on the County's repeated statements, to Taylor and to the general public, that
10 Taylor's permit did not expire. *Id.* ¶ 3.7.

11
12 At the time of the Hearing Examiner proceeding, Taylor estimated that the value of the
13 geoduck currently planted in the North Bay tidelands (and, consequently, the estimated
14 damages if Taylor is not able to harvest those clams) is between \$15 to 20 million.

15 Amended Petition, Exhibit A at 13.

16 **B. The Settlement Agreement**

17 On June 27, 2008, Pierce County, Taylor, and North Bay entered into the
18 Settlement Agreement that is attached to their Joint Motion. Joint Motion, Attachment 1.
19
20

21 ² Simultaneous with Taylor's appeal, the County filed a motion for reconsideration of the Examiner's March
22 26, 2008, Decision. In response to the County's motion, the Examiner issued an amended decision
23 ("Examiner's Amended Decision") on June 12, 2008. Taylor then appealed the Examiner's Amended
24 Decision to this Court, and Taylor, Pierce County, and North Bay jointly moved to consolidate that appeal
25 with Taylor's prior appeal of the March 26, 2008, Examiner's Decision. *See* Joint Motion at 3. The
26 Examiner's Amended Decision does not change the uncertainty created by the Examiner's March 28, 2008
27 decision regarding Taylor's ability to harvest the geoduck previously planted in North Bay tidelands. *Id.* at
28 Attachment 1 at 2, ¶ 12.

1 In that Settlement Agreement, Taylor and North Bay agree to dismiss their equitable
2 estoppel and damages claims in exchange for Pierce County agreeing to join with Taylor
3 and North Bay in moving this Court to enter an order authorizing Taylor to harvest the
4 geoduck presently planted in the North Bay Tidelands. *Id.*, Attachment 1 at 3-4. The
5 Settlement Agreement is not effective unless this Joint Motion is granted by the Court.
6

7 CPPSH's Response significantly misconstrues two critical aspects of the
8 Settlement Agreement. First, contrary to CPPSH's's claims, the Settlement Agreement
9 does not circumvent the regular permit process. As CPPSH points out, Taylor has applied
10 for a permit to continue farming geoduck on the North Bay tidelands. The Settlement
11 Agreement makes clear that nothing in the Settlement Agreement constrains the County's
12 discretion in processing that permit application. *Id.*, Attachment 1 at 3, ¶ I.b. The
13 Settlement Agreement does not address continued farming of the North Bay tidelands; it
14 only addresses the disposition of the geoducks already planted in those tidelands pursuant
15 to Taylor's prior Shoreline Substantial Development permit.
16

17 Second, CPPSH is incorrect in its claim that the County, pursuant to the
18 Settlement Agreement, has authorized Taylor to continue its farming activities on the
19 North Bay tidelands. The Settlement Agreement only requires that the County join with
20 Taylor and North Bay in this Motion; the Settlement Agreement, in and of itself, does not
21 authorize anything. *Id.*, Attachment 1 at 3, ¶ I.a. If the harvest of the previously planted
22 geoducks is authorized, it will be authorized by this Court, not by the County. As
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TAYLOR RESOURCES INC.'S REPLY IN SUPPORT OF
MOTION TO ENTER SETTLEMENT . . . - 5

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1 explained below, the Court is fully empowered to enter such an order, and the record
2 before the Court supports its entry.

3 Finally, it bears emphasizing that the Settlement Agreement and proposed order do
4 not affect the status of the Examiner's substantive conclusions. The appeals of the
5 substantive aspects of the Examiner's decision remain in place and will move forward.
6 This settlement only addresses the equitable estoppel and damages claims in the appeals.
7

8 III. ARGUMENT

9 CPPSH's sole support for its claim that the County is not authorized to enter into
10 the Settlement Agreement is the United States Court of Appeals for the Ninth Circuit's
11 decision in *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498
12 F.3d 1052 (9th Cir. 2007). *League of Residential Neighborhood Advocates* is readily
13 distinguishable on at least two bases.
14

15 First, in *League of Residential Neighborhood Advocates*, the City of Los Angeles's
16 Settlement Agreement actually contravened its previous administrative decision (which
17 had been upheld by the courts) denying the Conditional Use application for the activity in
18 question. Here, the Examiner's March 26, 2008 decision does not specifically address the
19 use that is the subject of the Settlement Agreement—the harvest of the geoducks
20 previously planted in the North Bay tidelands. While the Examiner held that continued
21 farming of North Bay tidelands for geoduck requires a new Shoreline Substantial
22 Development permit, that holding does not necessarily address the disposition of the
23 geoducks planted on the North Bay tidelands pursuant to Taylor's previous permit. The
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1 harvest of previously planted geoduck is more akin to completing the previous farming
2 activities than continuing farming operations into the future. Thus, harvest of those
3 geoducks is not necessarily precluded by the Examiner's decision.

4 Second, in *League of Residential Neighborhood Advocates*, the City attempted to
5 actually authorize the use in question as part of its Settlement Agreement. Here, by
6 contrast, the County has not authorized anything as part of the Settlement Agreement.
7 Rather, the County has agreed to join in moving this Court to enter an order authorizing
8 the harvest. Thus, the question in this case is whether the Court, not the County, has the
9 authority to allow Taylor to harvest the geoduck currently planted in the North Bay
10 tidelands.

11 The Court clearly has such authority. As noted in Section II, above, the Amended
12 Petition in this action includes a claim based on the doctrine of equitable estoppel. *See*
13 Amended Petition ¶ 4.3. The elements of equitable estoppel are: (1) a party's admission,
14 statement or act that is inconsistent with its later claim; (2) action by another party in
15 reliance on the first party's act, statement or admission; and (3) injury that would result to
16 the relying party from allowing first party to contradict or repudiate prior act, statement or
17 admission. *See Kramarevcky v. Dept. of Social and Health Services*, 122 Wn.2d 738, 743,
18 863 P.2d 535 (1993) (citing *Robinson v. Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert.*
19 *denied*, 506 U.S. 1028, 113 S. Ct. 676, 121 L. Ed. 2d 598 (1992)). *See also Board of*
20 *Regents of the Univ. of Washington v. Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).
21 To establish injury, Taylor must establish its justifiable reliance worked to its detriment.
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1 In addition, a party asserting an equitable estoppel claim against a governmental entity
2 must show that equitable estoppel “must be necessary to prevent a manifest injustice” and
3 that “the exercise of governmental functions must not be impaired as a result of the
4 estoppel.” *See Kramarevcky*, 122 Wn.2d at 743.

5
6 Taylor’s complaint in this action alleges facts sufficient to carry an equitable
7 estoppel claim. First, Taylor alleges that prior to the decision on appeal the County
8 repeatedly indicated to Taylor that the permit allowed ongoing geoduck aquaculture,
9 without expiration. Amended Petition ¶ 3.7. Taylor also alleges that it planted the
10 geoduck currently located in the North Bay Tidelands in reliance on those prior County
11 interpretations. *Id.* at 4.3.2. Because the interpretation came from all levels of the
12 Department of Planning and Land Services, Taylor’s reliance on those statements is
13 justifiable. *Id.* Moreover, Taylor alleges that it was injured by its reliance on County
14 interpretation. *Id.* Failure to grant relief will result in “manifest injustice” to Taylor, as
15 the injury is based solely on the fault of the County. *Id.* Finally, equitable estoppel
16 against the County will not impair its exercise of governmental functions, as the
17 application of the doctrine relates to facts and representations unique to Taylor’s geoduck
18 farm. *Id.*

19
20 If Taylor successfully litigated its claim of equitable estoppel, the appropriate
21 remedy would be an order from this Court that the County is estopped from prohibiting
22 Taylor’s harvest of the geoduck currently planted in the North Bay Tidelands and,
23 therefore, authorizing Taylor to commence such harvest. Here, rather than litigate that
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1 issue, Taylor, North Bay and the County have jointly moved that the Court enter such an
2 order in exchange for resolving the equitable estoppel and damages claims currently
3 pending before this court. The Court clearly has authority to enter such an order.

4 IV. CONCLUSION

5 The original parties to this proceeding—Pierce County, Taylor, and North Bay—
6 have entered into a Settlement Agreement that resolves the significant damages and
7 equitable estoppel issues currently pending before the Court. The validity of that
8 Settlement Agreement is dependent upon this Court entering an order authorizing Taylor
9 to harvest the geoduck currently planted in the North Bay tidelands. This Court is fully
10 authorized to enter such an order, and the interests of justice support such an action.

11 Taylor therefore requests that the Court enter an order that accomplishes the
12 following:
13

- 14 1. Consolidates this matter with the pending Cause Number 08-2-01571-5, which
15 challenges substantially the same actions at issue in this petition.³
- 16 2. Authorizes Petitioner/Plaintiff Taylor Resources, Inc., to harvest the geoduck
17 clams currently planted in the tidelands owned by North Bay Partners LLC.
- 18 3. Dismisses from these consolidated cases Petitioner/Plaintiff Taylor Resources,
19 Inc.'s, claims based on the doctrine of equitable estoppel.
- 20 4. Dismisses from these consolidated cases Petitioner/Plaintiff Taylor Resources, Inc.
21 and North Bay Partners LLC's claims for damages pursuant to Ch. 64.40 RCW.⁴
- 22 5. Continues in these consolidated cases the stay order that is currently in effect in
23 this matter.⁵

23 ³ No party has objected to consolidation of these two matters.

24 ⁴ As noted in the Joint Motion, entry of paragraphs 3 and 4 of the proposed order is conditioned on entry of
25 paragraph 2 of the proposed order. In other words, if the Court does not enter paragraph 2, the Court should
not enter paragraphs 3 or 4.

⁵ No party has opposed continued stay of these proceedings.

TAYLOR RESOURCES INC.'S REPLY IN SUPPORT OF
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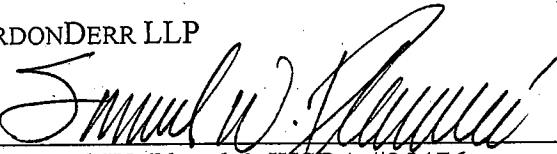
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DATED this 17th day of July, 2008.

GORDONDERR LLP

By: 

Samuel W. Plauché, WSBA #25476

Amanda M. Carr, WSBA #38025

Attorneys for Petitioner, Taylor Shellfish Farms

TAYLOR RESOURCES INC.'S REPLY IN SUPPORT OF
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<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input checked="" type="checkbox"/> Hearing is set Date: <u>July 18, 2008</u> Time: <u>9:00 a.m.</u> Judge/Calendar: <u>Judge Chris Wickham</u>
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SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

TAYLOR RESOURCES, INC., a Washington
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Petitioners,

v.

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

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and

NORTH BAY PARTNERS, a family
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Taxpayers of record for the property at issue,

Additional Parties.

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

Petitioners/Plaintiff,

and

No. 08-2-00904-9

DECLARATION OF DELIVERY

No. 08-2-01571-5

DECLARATION OF DELIVERY - 1

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1 NORTH BAY PARTNERS LLC, a limited
liability corporation,
2 Additional Party/Co-Plaintiff,
3
4 v.
5 PIERCE COUNTY, a political subdivision of
the State of Washington,
6 Respondent/Defendant.
7 and
8 FOSS M. LESLIE ETAL, Taxpayers of record
for the property at issue,
9 Additional Party.
10
11

12 I, Terri A. Tyni, declare as follows:

13 That I am over the age of 18 years, not a party to this action, and competent to be a
14 witness herein;

15 That I, as a legal assistant in the office of GordonDerr LLP, caused true and correct
16 copies of the following documents to be delivered as set forth below:

- 17 1. Taylor Resources Inc.'s Reply In Support of Motion to Enter Settlement
- 18 Agreement Order; and
- 19 2. Declaration of Delivery

20 and that on July 17, 2008, I addressed said documents and deposited them for delivery as
21 follows:
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Ms. Jill Guernsey
Pierce County Prosecuting Attorney
955 Tacoma Avenue S. #301
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Jerry R. Kimball
Law Office of Jerry R. Kimball
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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 July 17, 2008.



Terri A. Tyni, Declarant