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DEC 01 2008

BRICKLIN NEWMAN DOLD, LLP

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

PIERCE COUNTY,

Respondent.

NO. 08-010; 08-017

INTERVENOR NORTH BAY
PARTNERS' MOTION FOR
SUMMARY JUDGMENT

RELIEF REQUESTED

North Bay Partners requests the Board to grant Summary Judgment pursuant to WAC 461-08-300(2) and CR 56 that based upon uncontested and established material facts:

1. The Pierce County Planning and Land Use Services is estopped from terminating or rescinding SD 22-00 as a result solely of the passage of time.

UNCONTESTED AND ESTABLISHED FACTS

The following facts are established and cannot be contested:

1. Taylor Resources Inc. applied for a shoreline substantial development permit in 2000 to conduct commercial geoduck cultivation on private tidelands in Pierce County known as the "Foss Farm." The application indicated the proposed starting date for the project would be summer 2000 and the estimated duration of the activity would

INTERVENOR NORTH BAY PARTNERS'
MOTION FOR SUMMARY JUDGMENT

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1 be "on-going." (Order Denying Motion to Dismiss dated November 7, 2008, page 2,
2 lines 16-20).

- 3 2. A public hearing on the proposal was conducted by the Pierce County Hearing
4 Examiner in December 2000. (Order Denying Motion to Dismiss dated November 7,
5 2008, page 2, lines 20-21.) The Staff Report and testimony from staff indicated the
6 project would involve planting baby geoducks in PVC pipes for cultivation and
7 subsequent harvest after approximately five years. The company would then "repeat
8 the process." The testimony at hearing acknowledged that Taylor's request was for
9 on-going activity. The staff recommended approval of the application. (Order
10 Denying Motion to Dismiss dated November 7, 2008, page 2, lines 2, page 3, line 4).
- 11 3. In 2000, the Pierce County Hearing Examiner found the geoduck project consistent
12 with governing regulations and granted the permit subject to several conditions
13 including the following language regarding timing:

14 Construction or substantial progress toward construction of a project for
15 which a permit has been granted pursuant to the Act must be undertaken
16 within two (2) years after the approval of the permit. Substantial progress
17 toward construction shall include, but not be limited to the letting of bids,
18 making of contracts, purchase of materials involved in development, but shall
19 not include development or uses which are inconsistent with the criteria set
20 forth in WAC 173-14-100. Provided, that in determining the running of the
21 two (2) year period hereof, there shall not be included the time during which
22 a development was not actually pursued by construction and the tendency of
23 litigation reasonably related thereto made it reasonable not to so pursue;
24 provided further, that local government may, at its discretion extend the two
25 (2) year time period for a reasonable time based on factors, including the
inability to expeditiously obtain other governmental permits which are
required prior to the commencement of construction.

If a project for which a permit has been granted pursuant to the Act has not
been completed within five (5) years after the approval of the permit by local
government, the local government that granted the permit shall, at the
expiration of the five (5) year period; review the permit, and upon a showing
of good cause, do either of the following:

Extend the permit for one (1) year; or

1 Terminate the permit; provided that nothing herein shall preclude local
2 government from issuing Substantial Development Permits with a fixed
3 termination date of less than five (5) years. (Greene Declaration, Attachment
4 2).

5 The County included this language as a standard permit condition. The Pierce
6 County planner assigned to the project indicated this language was "boilerplate."
7 (Order Denying Motion to Dismiss dated November 7, 2008, page 3, line 5 through
8 page 4, line 3; Declaration of Jerry R. Kimball, Attachment 1, page 15).

9 4. After the permit was granted, Taylor Resources began activities necessary to
10 establish the geoduck farm. They surveyed the area, notified necessary Tribes, and
11 registered with Washington Department of Fish and Wildlife and the Washington
12 Department of Health. They then began planting young geoduck in PVC pipes and
13 maintaining the farm with protective netting. They planted portions of the property
14 with young geoduck each year and by the end of five years they had completed an
15 initial planting of geoduck over the entire farm area. (Order Denying Motion to
16 Dismiss dated November 7, 2008, page 3, line 5 through page 4, line 3; Declaration
17 of Jerry R. Kimball, Attachment 1, page 136, 139).

18 5. While they were developing the farm, Taylor Resources had conversations with Ty
19 Booth, the assigned planner for Pierce County, in which he indicated that once the
20 farm was established within a five-year period, the farming could continue on an
21 ongoing basis. (Order Denying Motion to Dismiss dated November 7, 2008, page 4,
22 line 5 through page 4, lines 11-14; Declaration of Jerry R. Kimball, Attachment 1,
23 page 17).

24 6. Pierce County also made representations adopting this view which were conveyed in
25 writing to Laura Hendricks of Coalition to Protect Puget Sound, one of the project
opponents, by Vicki Diamond, Supervisor of Current Planning for Pierce County.
Ms. Diamond indicated that there was no expiration of a shoreline permit for

1 geoduck cultivation once the use was initiated and established. (Order Denying
2 Motion to Dismiss dated November 7, 2008, page 4, lines 14-17 through page 4, line
3 3; Declaration of Jerry R. Kimball, Attachment 1, page 84).

- 4 7. Ms. Diamond also responded to written questions from Coalition to Protect Puget
5 Sound. In answer to the question, "Once these geoduck permits are issued, how long
6 do they run?" she responded:

7
8 "We have not placed any expirations of this particular activity for several
9 reasons. The aquaculture is to be an ongoing activity and once the seeds are
10 planted, it would take up to approximately 7 years for the geoduck to reach a
11 size to harvest for market. In a Conditional Use Permit, there are time limits
12 for expiration of the approval, which is usually directed at development to be
13 substantially completed within a two year time period and finish within a 5
14 year window. If the activity is aquaculture, then the activity would not be
15 allowed to start if applicant did not proceed with the harvest or planting with
16 the time periods listed above. This had not been the case of the geoduck
17 applications. (Order Denying Motion to Dismiss dated November 7, 2008,
18 page 4, line 18 through page 5, line 5).

- 14 8. Until Pierce County notified Taylor Resources that SD 22-00 had expired, Pierce
15 County had never published or otherwise promulgated a formal administrative
16 position regarding the need to obtain successive permit approvals to conduct ongoing
17 geoduck farming operations. (Order Denying Motion to Dismiss dated November 7,
18 2008, page 5, lines 5-7).

- 19 9. After the geoduck farm had been in full operation for a number of years, neighbors
20 and others began to express growing dissatisfaction with geoduck farming as a use
21 on the shoreline. Many opponents contacted the County and ultimately filed a
22 petition in June 2007, requesting that the County revoke Taylor Resources' shoreline
23 permit for the Foss Farm. (Order Denying Motion to Dismiss dated November 7,
24 2008, page 5, lines 8-12).

1 10. Pierce County held a number of internal meetings in the process of developing an
2 administrative policy on permit coverage for geoduck farming. The majority of staff
3 believed the five-year timeframe for “establishing” the farm should also limit the
4 length of time it could operate. (Order Denying Motion to Dismiss dated November
5 7, 2008, page 5, lines 5-7; Declaration of Jerry R. Kimball, Attachment 1, pages 17-
6 19, 84).

7 11. In August 2007, Pierce County for the first time finalized a formal position on the
8 length of time a shoreline substantial development permit authorized geoduck
9 cultivation and issued an Administrative Determination on August 8, 2007,
10 informing Taylor Resources that its shoreline permit had expired at the end of six
11 years. (Order Denying Motion to Dismiss dated November 7, 2008, page 5, lines
12 515-19).

13 12. The Determination indicated that further work at the site would have to be authorized
14 by a new permit. Taylor Resources appealed the County’s Determination to the
15 Pierce County Hearing Examiner, who upheld the County’s decision. (Order
16 Denying Motion to Dismiss dated November 7, 2008, page 5, line 19 through page 6,
17 line 2). The Hearing Examiner refused to consider Taylor Resources’ claim that
18 Pierce County was estopped from terminating the permit.

19 13. Taylor Resources leases the property on which the Foss Farm is operated from North
20 Bay Partners, LLC, a Washington Limited Liability Company whose members are
21 descendants of Henry Foss. The family has owned the tidelands leased to Taylor
22 Resources and all of the 123 acres of adjoining uplands for over 70 years. The
23 family has preserved the property in a largely undeveloped condition permitting only
24 one, one-room cabin without electricity or running water. (Declaration of Jerry R.
25 Kimball, Attachment 4, pages 61-67).

1 14. North Bay Partners has an economic interest in the success of the aquaculture
2 activities on its property as North Bay receives a percentage of the gross value of the
3 geoduck crop harvested as well a minimum lease payment. (Declaration of Jerry
4 R. Kimball, Attachment 4, pages 61-67).

5 15. Taylor Resources has invested over tens of thousands of dollars in the development
6 of the Foss Farm, the planting and nurturing of the geoduck crop, the harvest of
7 geoduck as they mature, and the maintenance and monitoring of the farm on an
8 ongoing basis. (Declaration of Jerry R. Kimball, Attachment 5).

9 16. Taylor Resources would not have invested the very substantial sums of money
10 necessary to the development and planting of the Foss Farm but for Pierce County's
11 representations that SD 22-00 allowed farming of geoduck on the site on an ongoing
12 basis. (Declaration of Jerry R. Kimball, Attachment 5).

13 17. Taylor Resources applied for a permit to develop an ongoing farm operation. Taylor
14 Resources' reliance on the staff report of the Pierce County Planning and Land Use
15 Services and the later representations both to them and to the public that SD 22-00
16 allowed ongoing farming activity not subject to the five-year construction time limit
17 was reasonable. But for the County's affirmative representations that the permit
18 authorized ongoing activities, Taylor would have timely appealed the Hearing
19 Examiner's decision approving the permit. (Declaration of Jerry R. Kimball,
20 Attachment 5).

21 18. Taylor Resources planted a portion of the available tidelands in successive years to
22 create an ongoing supply of harvestable geoduck from the Foss Farm at maturation
23 of each crop which takes five or more years. Taylor Resources would not have
24 planted the farm in this manner but for the representations of Pierce County that
25

1 SD 22-00 allowed farming on an ongoing basis. (Declaration of Jerry R. Kimball,
2 Attachment 5).

3 19. At the time that Pierce County finalized a formal position on the length of time a
4 shoreline substantial development permit authorized geoduck cultivation and issued
5 an Administrative Determination on August 8, 2007, Taylor Resources had planted
6 geoduck valued at approximately \$20,000,000 (at maturation) in the tidelands at the
7 Foss Farm. (Declaration of Jerry R. Kimball, Attachment 5).

8 **LEGAL ARGUMENT**

9 **Summary Judgment Generally.** The purpose of the Summary Judgment Rule is to
10 avoid a needless hearing on the merits or, if that is not possible, to narrow the issues to be heard.
11 Summary Judgment is appropriate where no material question of facts exists. *Fahan v. Cowlitz*
12 *County*, 93 Wn.2d 328, 610 P.2d 857 (1980). When no material issue of fact exists, the court
13 must render summary judgment as a matter of law. Only where a genuine issue of fact remains
14 may the court deny summary judgment. *Peterson v. Pacific First Federal Savings and Loan*
15 *Association*, 23 Wn. App. 688, 598 P.2d 407 (1979).

16 The summary judgment procedure is equally applicable to all civil actions. *Hoagland v.*
17 *Mount Vernon School District No. 320*, 23 Wn. App. 650, 597 P.2d 1376 (1979); *Hoffman v.*
18 *Hoffman*, 57 Wn.2d 684, 359 P.2d 153 (1961). Board practice is governed by WAC 461-08-
19 300(2) which incorporate by reference the Civil Rules for Superior Courts where those rules are
20 not inconsistent with WAC 461-08. WAC 461-08 makes no separate provision for Motions for
21 Summary Judgment.

22 The following rules apply to summary judgment motions:

23 1. Only a material question of fact, one upon which the outcome of the case
24 depends, may defeat a motion for summary judgment. *Capital Hill Methodist Church v. Seattle*,
25 52 Wn.2d 359, 324 P.2d 1113 (1958).

1 2. If there is a question of the credibility of the witnesses or the weight to be
2 accorded to the evidence, summary judgment should ordinarily be denied. *Colby v. Klune*, 178
3 F.2d 872 (2nd Cir. 1949). However where the factual opposition is too incredible to be
4 accepted, the motion should be granted. *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940).

5 3. The moving party has the burden of demonstrating the absence of a genuine issue
6 of fact. *F.A.R. Liquidated Corp. v. Brownell*, 209 F.2d 375 (1995). Once the moving party does
7 so, the burden shifts to the nonmoving party to establish the existence of a material fact
8 regarding an element essential to that burdened party's case. In so doing, the nonmoving party
9 must set forth specific facts which otherwise comply with the requirements of Civil Rule 56.
10 *Young v. Key Pharmeceuticals*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989).

11 4. The nonmoving party must support all elements of his claim with testimonial
12 facts, not merely conclusive statements, statements of belief or information or lay opinion. *Kirk*
13 *v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).

14 5. In ruling on a motion for summary judgment the court does not make Findings of
15 Fact, but instead finds that no genuine issue of fact exists and the judgment should be rendered
16 as a matter of law. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 91978).

17 Based upon the applicable legal considerations, this case is ripe for summary judgment
18 to be granted on the basis of estoppel. The facts set forth are not or cannot be seriously
19 challenged. The truth of many of those facts previously has been determined by the Board.
20 Based upon the uncontested or previously ruled upon facts, Pierce County is estopped from
21 rescinding SD 22-00.

22 ***Doctrine of Estoppel.*** Under the doctrine of equitable estoppel, Pierce County is barred
23 from revoking Taylor Resources' permit based on its interpretation that the permit expired. The
24 elements of equitable estoppel are: (1) a party's admission, statement or act that is inconsistent
25 with its later claim; (2) action by another party in reliance on the first party's act, statement or

1 admission; and (3) injury that would result to the relying party from allowing the other party to
2 contradict or repudiate prior act, statement or admission. See *Kramarevcky v. Dept. of Social*
3 *and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (citing *Robinson v. Seattle*, 119
4 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S.1028, 113 S. Ct. 676, 121 L. Ed. 2d 598
5 (1992). See, also *Board of Regents of the Univ. of Washington v. Seattle*, 108 Wn.2d 545, 551,
6 741 P.2d 11 (1987).

7 Because a claim of equitable estoppel against the government is not favored, a party
8 asserting the claim against a governmental entity must meet two additional standards. See
9 *Kramarevcky*, 122 Wn.2d at 743. First, equitable estoppel “must be necessary to prevent a
10 manifest injustice.” *Id.* Second, “the exercise of governmental functions must not be impaired
11 as a result of the estoppel.” *Id.* The record demonstrates that all elements for estoppel have
12 been met and these two additional standards are satisfied.

13 **“(1) A party’s admission, statement or act that is inconsistent with its later claim.”**

14 Both Ms. Diamond and Mr. Booth acknowledged that their earlier statements were inconsistent
15 with the County’s administrative determination. (Declaration of Jerry R. Kimball, Attachment 1,
16 page 17). Specifically, both Ms. Diamond and Mr. Booth indicated that the permit did not
17 expire. *Id.* and (Declaration of Jerry R. Kimball, Attachment 1, page 84). The statements are
18 inconsistent with Pierce County’s later claim that the permit has expired.

19 ~~Certainly Mr. Booth and Ms. Diamond had apparent authority to make these~~
20 representations on behalf of the county. The Board has already found that Mr. Booth and Ms.
21 Diamond were “in positions with authority over the particular project.” (Order Denying Motion
22 to Dismiss dated November 7, 2008 at page 11). Mr. Booth was the planner in charge of the
23 permit SD 22-00 (“once you touch it you’re stuck with it for life”). (Declaration of Jerry R.
24 Kimball, Attachment 2, Deposition of Ty Booth, page 7, line 8). Ms. Diamond was his
25 supervisor. (Declaration of Jerry R. Kimball, Attachment 3, Deposition of Vicki Diamond, page

1 4, line 25). The apparent authority of both Mr. Booth and Ms. Diamond to bind the County was
2 objectively manifested to Taylor Resources and Pierce County is bound by the statements of Mr.
3 Booth and Ms. Diamond. *State v. French*, 88 Wash.App. 586, 595, 945 P.2d 752 (1997) (citing
4 *King v. Riveland*, 125 Wash.2d 500, 507, 886 P.2d 160 (1994)). That a public entity can only
5 speak through its agents buttresses this conclusion. Pierce County through Mr. Booth and Ms.
6 Diamond made representations which are directly inconsistent with the later action of the
7 County in rescinding the SD 22-00.

8 **(2) Action by another party in reliance on the first party's act, statement or**
9 **admission.** The evidence that Taylor Resources made the decision to establish the Foss Farm
10 and to plant and cultivate geoduck and continue to plant and cultivate geoduck at the Foss Farm
11 in reliance on those prior County interpretations and representations cannot be contested.
12 (Declaration of Jerry R. Kimball, Attachment 1, page 105, line 11 through page 106, line 3).
13 Taylor Resources maintained ongoing contact with the county over the years and was repeatedly
14 reassured. (Declaration of Jerry R. Kimball, Attachment 1, pages 15-17). Taylor Resources
15 continued to rely on those representations by actively investing time, money and continuing to
16 plant and cultivate geoduck at the Foss Farm. (Declaration of Jerry R. Kimball, Attachment 5).
17 But for those representations Taylor Resources would have appealed the Hearing Examiner's
18 issuance of a permit that did not authorize ongoing activities and would not have incurred the
19 considerable expense of establishing the Foss farm and then continuing to plant geoduck each
20 year. Each geoduck crop requires five to seven years to mature and without the ability to pursue
21 the Foss Farm on an ongoing basis, it would have made no sense for the Foss Farm to be
22 established and cultivated. *Id.* Because the interpretation came from both the staff person in
23 charge of administering Taylor Resources' permit and the Supervisor of the County's Current
24 Planning Department, Taylor Resources' reliance on those statements is justifiable.

1 (3) **Injury that would result to the relying party from allowing first party to**
2 **contradict or repudiate prior act, statement or admission.** The evidence at hearing also
3 demonstrated that Taylor Resources was injured by its reliance on County interpretation. Mr.
4 Phipps testified that if Taylor Resources is unable to continue its operations at the Foss Farm, it
5 will leave over \$20 million in unharvested geoduck in the ground. (Declaration of Jerry R.
6 Kimball, Attachment 1, pages 171, line 17 through 172, line 6). Even though Pierce County
7 later determined harvest could occur under the rescinded permit for geoducks planted prior to it
8 being rescinded, Taylor Resources' farming operation was suspended for over a year.
9 (Declaration of Jerry R. Kimball, Attachment 5). Taylor Resources was not able to plant the
10 rotational crop of geoduck in 2007 or 2008 as a result of the county's action. (Declaration of
11 Jerry R. Kimball, Attachment 5). All of the elements of estoppel are clearly present in this
12 case.

13 **Public Entity Standards.** As noted above, because Pierce County is a public entity, two
14 additional standards must be satisfied before it will be applied in this situation. First, estoppel
15 "must be necessary to prevent a manifest injustice." Second, "[t]he exercise of governmental
16 functions must not be impaired as a result of the estoppel." *Kramarevcky v. Dept. of Social and*
17 *Health Services, supra.* Both of these standards support estoppel being applied in this case.

18 Allowing Pierce County to rescind SD 22-00 will result in "manifest injustice" to Taylor
19 Resources and to North Bay Partners, as Taylor Resources has invested tens of thousands of
20 dollars and seven years of effort into developing the Foss Farm. See *Silverstreak, Inc. v.*
21 *Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007)
22 ("This court will not sanction a government agency's arbitrary decision to change its
23 interpretation of rules and enforce such change against small businesses that have performed
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1 under their contract.”)¹ The right to plant future crops will be lost in addition to the two years of
2 planting that can now never be recovered. The ability to harvest the \$20,000,000 of geoduck
3 now planted at the Foss Farm will remain in jeopardy. The deprivation of an owner of a
4 multimillion dollar investment made in reliance on the county’s representations is a manifest
5 injustice that cannot be left uncorrected. *Ruland v. State, Dept. of Social and Health Services*,
6 144 Wash.App. 263, 182 P.3d 470 (2008).

7 Pierce County’s exercise of governmental functions is not in any way impaired by application of
8 the estoppel doctrine in these circumstances. What Pierce County did in the instant case is
9 fundamentally wrong. The county made representations that it knew would result in private
10 citizens investing substantial sums. The county then, because of a change in the political winds,
11 decided that it was expedient to change course, regardless of whether it resulted in the citizens
12 losing the money invested in reliance on its representations. That is not a legitimate government
13 function, but it is the only function that would be impaired by applying estoppel here. In
14 contrast, proper government functions would remain unimpaired. Even if the County’s
15 Administrative Determination was substantively correct, a reversal of the County’s
16 Administrative Determination with respect to the Foss Farm does not impair or prohibit the
17 County from enforcing its interpretation against other parties and new farms where it has not
18 made contrary representations.

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22 ¹ In *Silverstreak*, the court held that an attempt by the Department of Labor and Industries to
23 retroactively apply a new interpretation of regulations defining the applicability of the prevailing
24 wage act was “manifestly unjust” in part because “[i]f the Department were allowed to change its
25 interpretation of a regulation after contractors had performed, it would have the effect of
impairing the obligations of those contracts—an effect forbidden by article I, section 23 of our
state constitution.” *Silverstreak*, 159 Wn.2d at 890. Similarly, allowing the County to
retroactively apply its new interpretation of the duration of geoduck permits would have the
effect of impairing the obligations of North Bay Partners’ lease to Taylor Resources.

1 SUMMARY

2 Taylor Resources is the lessee of North Bay Partners' property and pays a fee to North
3 Bay Partners based in part on the market value of geoduck grown on North Bay Partners'
4 tidelands. On behalf of North Bay Partners and others, Taylor Resources applied for and
5 obtained SD 22-00 from Pierce County. Pierce County represented through the responsible
6 officials that the permit as issued would allow farming of the beach on an ongoing basis. Taylor
7 Resources did not appeal the permit based upon this representation.

8 What Taylor Resources did do was invest thousands of dollars developing, planting,
9 cultivating, harvesting and replanting the harvested portions of the leased North Bay Partners
10 tidelands. Taylor Resources did this in reliance on the representations of the responsible Pierce
11 County officials that the farming would be allowed on an ongoing basis.

12 In August 2007, Pierce County formulated a formal policy on geoduck aquaculture and
13 as part of that policy determined that geoduck aquaculture permits should be limited to a five or
14 six-year duration. Pierce County then applied that new policy retroactively to SD 22-00 despite
15 its prior representations and Taylor Resources' reliance on those representations. Then, Pierce
16 County rescinded and terminated SD 22-00.

17 No important government function would be impaired by requiring Pierce County to
18 apply its newly formed policy prospectively only and, to the contrary, manifest injustice would
19 result if Taylor and North Bay were deprived of the millions of dollars of geoducks and the right
20 to conduct an ongoing farm. The doctrine of estoppel bars Pierce County from rescinding
21 SD 22-00.

22 Dated this 28th day of November, 2008.

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24 
25 JERRY R. KIMBALL, WSBA #8641
 Attorney for North Bay Partners

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BRICKLIN NEWMAN DOLD, LLP

BEFORE THE SHORELINES HEARINGS BOARD
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TAYLOR RESOURCES, INC., a
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NO. 08-010; 08-017

DECLARATION OF JERRY R.
KIMBALL IN SUPPORT OF NORTH
BAY'S MOTION FOR SUMMARY
JUDGMENT

I, JERRY KIMBALL, declare as follows:

1. That I am over the age of 18 years and make this declaration based upon my personal knowledge of facts I am competent to testify to. I am the attorney for North Bay Partners, LLC and make this declaration in support of North Bay's Motion for Summary Judgment.

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

Attachment 1: Transcript of Proceeding before Terrence F. McCarthy,
Thursday, November 2, 2007;

Attachment 2: Deposition of Ty Booth, October 28, 2008;

Attachment 3: Deposition of Vicki Diamond, October 28, 2008;

Attachment 4: Partial Transcript of Proceeding before Terrence F. McCarthy,
Thursday, November 1, 2007, Testimony of Leslie Foss;

Attachment 5: Declaration of Diane Cooper;

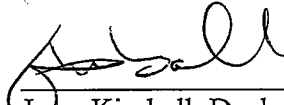
DECLARATION OF JERRY R. KIMBALL IN
SUPPORT OF NORTH BAY'S MOTION FOR
SUMMARY JUDGMENT - 1

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

2 EXECUTED at Seattle, Washington on November 28, 2008.

3
4 
5 _____
6 Jerry Kimball, Declarant