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BEFORE THE PIERCE COUNTY HEARINGS EXAMINER

Taylor Shellfish Farms,  
  
Appellant,  
  
North Bay Partners, a family partnership  
through its managing partner, M. Leslie Foss;  
  
Intervener  
  
Coalition to Preserve Puget Sound Habitat;  
Case Inlet Shoreline Association;  
Henderson Bay Shoreline Association;  
Case Inlet Beach Association; and  
Protect Our Shoreline.  
  
Intervenors

NO. AA 16-07

**POST-HEARING BRIEF OF  
NORTH BAY PARTNERS,  
INTERVENER**

**INTRODUCTION**

Two legal issues are before the hearing examiner. First, did the Shoreline Substantial Development permit granted in 2000 to allow the construction of a geoduck farm on the property "Foss Farm") leased by Taylor Shellfish Company ("Taylor") from North Bay Partners (Foss family) expire despite construction being completed. And, second, if the permit did expire, do the ongoing farm activities constitute "development" under the Shoreline Management Act ("SMA"). The Foss family intervened in this appeal as the owners of the uplands, beachfront and tidelands directly affected by the farming activity. The Foss family has an economic interest in the farm activity continuing. But as the record fully indicates, they have a more important

1 interest in preserving their legacy from untoward development. In this post-hearing brief, the  
2 family addresses the issues from that perspective.

3 **STATEMENT OF FACTS**

4 North Bay Partners is a family partnership that was formed to facilitate the  
5 preservation of a unique piece of undeveloped property in southern Puget Sound. The property  
6 consists of approximately 600 acres of uplands, beachfront on Case inlet approximately one mile  
7 in length and all of the tidelands fronting the beach. The property was acquired by the  
8 grandfather and great grandfather of the current partners, Henry Foss, who was a pioneer in  
9 preserving southern Puget Sound for future generations. He was a prominent civic leader who  
10 instilled in his children and grandchildren the value of preserving this piece of property  
11 unchanged for future generations. He understood that once development of the property  
12 occurred, it would never be the same for future generations to enjoy. The current managing  
13 partner takes the charge given to her by her grandfather seriously. The only improvement the  
14 family has on the property is a rudimentary one-room cabin without running water or power.  
15 Rules of conduct – no motorized vehicles, no cell phones, and others – are enforced.

16 Ownership of property, even inherited property, is not free. The access road needs to  
17 be maintained. The gate needs to be constantly repaired to counter vandalism. The taxes need to  
18 be paid. Where, as here, the ownership is fractionalized through several generations, meeting the  
19 costs of ownership is a problem. There is no “use” of the property by the owners that can be  
20 subjected to a fee. The mature second growth forest can be selectively logged, but logging of  
21 itself is a threat to the preservation of the property in a natural state. When Taylor sought out the  
22 Foss family property as a potential site for a geoduck farm, a way to economically sustain  
23 ownership of the property in as close to its natural state as possible became available.<sup>1</sup>

24 The family evaluated the proposal in detail. They had concerns that the proposed farm  
25 would be disruptive to the environment. The lease they executed provided for limitations on  
26 days and hours of harvest on the amount of noise that could be generated. The lease was subject  
27 to Taylor obtaining all required approvals. If there was a problem that could not be remedied,

28 <sup>1</sup> Certainly development of the mile of beachfront to the same density as the complaining neighbors to  
29 the north would be a far bigger threat to preservation than the limited impact of the geoduck farm.,  
30 POST HEARING BRIEF OF NORTH BAY  
31 PARTNERS - 2

1 the lease could be cancelled. The family acted with caution reflecting generations of concern  
2 over the preservation of this property.

3 Once the lease was concluded, the Foss family was able to look away from other  
4 development alternatives that would have threatened the preservation of the property. Consistent  
5 with this they filed an "open space taxation agreement." In the agreement Pierce County  
6 recognized that public access to this property was not appropriate. See "Open Space Taxation  
7 Agreement," RCW 84.34 recorded under Pierce County Auditor number 200010250722. The  
8 examiner is free to take notice of this county record. Detailed findings of fact addressing the  
9 ownership and preservation of this property by the Foss family are being provided with this brief.

10 As noted, the Foss family property includes the uplands, the beach and the tidelands.  
11 The testimony was clear that there is no public right of access to any of these aspects of the  
12 property. Each end of the beach abutting other's property is posted with "No Trespassing" signs.  
13 Transcript November 2, 2007 page 22, lines 5-23. While one neighbor testified she had been  
14 told by the person she bought her property from that it was okay to trespass, certainly this creates  
15 no legal right to do so. *State v. Finley*, 97 Wash.App. 129, 982 P.2d 681 (1999). Certainly this  
16 was recognized by the clandestine manner in which experts for other interveners entered the  
17 property and by Ms. Luedtke's testimony about going on to the property "several times" which  
18 could "mean a dozen" times to take pictures that were submitted by the other interveners.  
19 Transcript November 2, 2007, page 116, lines 15 to page 117, line 2. Regardless of these  
20 incursions and fabrications, the Foss family property is private and there is no authority for the  
21 public to enter on to it. AGO 2007 No. 1; *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256  
22 (2000). Certainly the authority is that the public can be excluded, *Sequim Bay Canning Co.*  
23 *Bugge*, 49 Wash. 127, 94 P. 922(1908); RCW 9A.52.080; *United Food and Commercial*  
24 *Workers Union Local 367 v. Canned Foods, Inc.*, 79 Wash.App. 54, 900 P.2d 569 (1995).

### 21 LEGAL ARGUMENT

22 Intervener North Bay Partners adopts the legal argument submitted by Taylor Shellfish.  
23 In addition, the Foss family supplements that argument as follows.

24 ***The Foss Farm is a Paradigm for Puget Sound Aquaculture.*** The premise of the  
25 county's "termination" of the Shoreline Substantial Development Permit ("SSDP") granted in

1 2000 is a direct result of the political fallout of the county's mismanagement of the shorelines  
2 adjacent to its parks in *Washington Shellfish Inc. v. Pierce County*, 132 Wash.App. 239, 131 P.3d  
3 326 (2006). Here, unlike in *Washington Shellfish* the property, both tidelands and uplands, is  
4 private property with owners dedicated to preserving it in a substantially natural state. Until the  
5 political fallout of *Washington Shellfish* landed on its heads, the Pierce County Planning and  
6 Land Services Department publicly communicated the position that a SSDP for a geoduck farm  
7 did not expire. Transcript November 1, 2007, page 87, line 18 to page 88 line 9, Exhibit 66.  
8 Now, the county wants the Foss family to bear the brunt of the county's mistakes in stewardship  
9 its own property.

10 There are numerous fundamental differences between this case and *Washington*  
11 *Shellfish*. *Washington Shellfish* involved public tidelands adjoining a public park. The park and  
12 tidelands were used by members of the public for diverse activities. *Washington Shellfish* did  
13 not attempt to obtain a permit to establish its geoduck farming operations. The county, as lessor,  
14 apparently did not condition the lease on an SSDP being obtained. The county leased tidelands  
15 adjacent to one of its most popular parks immediately accessible from a major highway. The  
16 farm operators in *Washington Shellfish* conducted its operations in a manner that can only be  
17 described as designed to actively inhibit and discourage the public's use of a very popular  
18 recreation area. *Washington Shellfish* is a poster child for how not to conduct aquaculture. And  
19 it was an operation that Pierce County, as a landowner, facilitated occurring.

20 The Foss family owns a unique piece of Puget Sound real estate. It is now in the hands  
21 of the third and fourth generation to own it. During that time it has not been cleared, developed  
22 or otherwise changed other than logging to thin and improve the stand. The family owns a mile  
23 of beachfront. They post it at each end as private property. They own the tidelands from  
24 ordinary high water to extreme low tide. RCW 79.105.010(18). Anyone walking on the beach is  
25 trespassing. They made a detailed investigation before deciding to lease to Taylor Shellfish.  
They conditioned the lease on compliance with all required permitting activity. They monitored  
the activity and when there was a problem, they brought it to Taylor's attention and had it  
remedied.

The aquaculture on their property is separated from the adjoining public park by 800  
yards of beach posted by them and by the State of Washington Department of Parks as "No

1 Trespassing". Transcript November 2, 2007, page 21, line 18 to page 22, line 23. No  
2 aquaculture is conducted in front of property belonging to others.

3 There is no upland development. A cluster of approximately 15 houses borders the  
4 property to the north, but aquaculture does not extend in front of these homes.<sup>2</sup> There are no  
5 floating ropes or mooring buoys on the Foss property. Only the neighbors to the north and the  
6 Washington State Parks Department to the south have placed this type of obstruction in the  
7 water. To the same extent that *Washington Shellfish* and Pierce County as a land owner were  
8 terrible stewards of Henderson Bay, the Foss family has been and continues to be an excellent  
9 steward of Case Inlet. If a geoduck farm cannot operate on the Foss property as conducted by  
10 Taylor, then one cannot operate anywhere in Puget Sound. That is the irony in county's position.  
11 Rather than investigate the facts, the administrator bowed to the political winds and suddenly  
12 terminated the operation of the Foss farm.

13 ***The Foss Family Relied on the County's Representations.*** The Foss family has  
14 contractual rights in the operation of the farm that are being adversely affected by Pierce  
15 County's assertion that the operation of the farm was limited to a term of six years by the SSDP.  
16 Ty Booth's testimony in this regard was filled with contradictions. November 1, 2007, page 50,  
17 line 10 to page 51 line 24. He admitted the permit was based on the SMA which allows a permit  
18 to complete construction within five years with a one year extension if application is made and  
19 good cause shown. He admitted that no application was made for a one year extension, and that  
20 no review was conducted to determine whether good cause was shown. These last admissions  
21 lead only to the conclusion that there was no extension. Yet he insisted there was one as that  
22 would allow the department's action in initiating termination in June of 2007 to only be six  
23 months after the last date the permit could have "expired" rather than 18 months as a five year  
24 permit would imply. Where, as here, the administrator has acted inconsistent with its prior  
25 representations and positions and has attempted to distort the timeliness of its actions by  
claiming a non-existent extension of the original permit, that action is entitled to criticism, not

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24 <sup>2</sup> Certainly one can argue that the neighbors to the north are poor stewards of the beach overloading it  
25 with dense housing, the routine failing or partially failing septic systems, pet waste on the beach and all of  
the maladies that come with wall to wall door beach front cabins.

1 deference. The hearing examiner should be deeply troubled by the manner in which the  
2 department acted in this case.

3 *If the Permit Expired a New Permit is Not Needed.* AGO 2007, No. 1 is substantial  
4 authority that all geoduck farms do not require an SSDP under the SMA. As noted above, the  
5 Foss Farm is a paradigm for where and how this activity can be conducted in southern Puget  
6 Sound. All uplands are private. No one has to look at the farm other than by choice. The  
7 separation between the farming activity and the adjoining park is nearly one half mile. There is  
8 no public right of access to the beach or the uplands. What better setting is there for aquaculture  
9 to exist?

10 The neighbors to the north complain that when they look to the south they can see the  
11 operation at low tide. When the Foss family comes out to their beach and look to the north they  
12 see the neighbor's boats moored on buoys, the crowded together homes and contend with their  
13 trespassing on foot, on horseback and on four wheel-drive-vehicles. The impact of the  
14 neighbor's high density beach housing is certainly a negative impact to the Foss' goal of  
15 maintaining the area in a natural state. Despite this, a small group of neighbors complain loudly  
16 that they don't want to see tubes in their neighbor's beach, and they don't want to see nets even  
17 though they can only see them only when there is a daylight low tide. They moor one or two  
18 boats per household from Spring through to the Fall, but they complain about a barge moored  
19 forty days a year several hundred yards south of their properties.

20 The evidence shows several things. First, there is no **substantial interference** with the  
21 public's use of the surface water. One neighbor was told by her husband that she has to kayak  
22 close to the shoreline and because of that she is afraid she might tangle her paddle in a net. Her  
23 concern does not arise to a **substantial interference** with the public's use of the surface waters.  
24 The feared event has never occurred. Second, if she were to strike the bottom with her paddle  
25 she would be trespassing. Third, striking the bottom where there is a net with a mesh that is less  
than one inch is no more risky than striking a rock on any other sub-surface obstruction. For  
there to be a **substantial interference**, the event or limitation imposed must be much more  
certain and have much more impact than her fears.

Mr. Daley testified that he might hang up his fly on the netting. Any fly fisherman that  
has not been hung up frequently is not putting his line in the water. Again, the chance that one

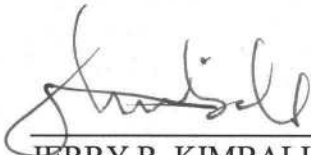
1 would get their wet fly hung up on the bottom does not rise to a **substantial interference** with  
2 the public's use of the surface water.

3 The geoduck farm is on privately owned tidelands adjacent to privately owned uplands.  
4 There is nothing about the way this activity is conducted that substantially interferes with the  
5 public's rights to use the surface waters. The SMA does not require a permit under these  
6 circumstances.

7 SUMMARY

8 The SSDP granted in 2000 was fulfilled and the project completed long before it  
9 expired. Pierce County's claim that the permit was extended is not supported by any evidence.  
10 A permit is not required for the ongoing operation of the Foss farm. The ongoing operation does  
11 not substantially interfere with the public's right to use the surface waters.

12 Dated this 22<sup>nd</sup> day of January, 2008.

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14 JERRY R. KIMBALL, WSBA # 8641  
15 Attorney for North Bay Partners