Pierce County
Office of the Prosecuting Attorney
CIVIL DIVISION
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98402
Phone Number (253) 798-6732
Fax Number (253) 798-6713

GERALD A. HORNE
Prosecuting Attorney

Fax

To:	1) Samuel "Billy" Plauché & Amanda Carr 2) Jerry R. Kimball 3) David A. Bricklin 4) Debbie Joblonski, Hearings Coordinator, SHB 5) Attorney General, Dept. of Ecology	**From:**	Jill A. Anderson (#798-6084), Legal Assistant to Jill Guernsey (#798-7742)
Fax:	1) (206) 626-0675 2) (206) 624-1361 3) (206) 264-9300 4) (360) 438-7699 5) (360) 586-6760	**Pages:**	23 (including this)
Phone:	1) (206) 382-9540 2) (206) 587 5701 3) (206) 264-8600 4) (360) 438-6328 5) (360) 586-6770	**Date:**	12/16/2008
Re:	Taylor Resources SHB No. 08-010 & SHB No. 08-017	**Cc:**	

☐ **Urgent** ☒ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

Comments:

Attached: RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT & DECLARATION OF JILL GUERNSEY (EXHIBITS TO FOLLOW BY MAIL)

BEFORE THE SHORELINES HEARING BOARD
STATE OF WASHINGTON

TAYLOR RESOURCES, INC., a Washington corporation, also known as TAYLOR SHELLFISH FARMS, Appellant, vs. PIERCE COUNTY, Respondent.	SHB NO. 08-010; 08-017 RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT

COMES NOW Pierce County, by and through its attorneys, Gerald A. Horne, Prosecuting Attorney, and Jill Guernsey, Deputy Prosecuting Attorney, and files this response to the motions for summary judgment filed by Petitioner Taylor Resources, Inc ("Taylor") and Intervenor North Bay Partners ("North Bay").

I. INTRODUCTION

Taylor Shellfish obtained a shoreline substantial development permit which authorized the following activities on North Bay's property in order to establish a geoduck farm:

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

1. Insertion of PVC tubes into the tidelands and placement of netting over the tubes secured with metal stakes;
2. Planting of geoduck seeds inside each tube;
3. Removal of the tubes, netting and stakes; and
4. Harvesting of mature geoducks approximately five years after planting.

In this case the Board must interpret RCW 90.58.143[1] and determine if the statute limits the time period in which any or all of the described activities must be completed.

The County's position is that the first activity authorized in Taylor's permit, insertion of the PVC tubes into the tidelands and placement of netting and metal stakes, (hereinafter referred to as "tubes/netting/stakes"), constitutes "construction," and therefore under RCW 90.58.143(3) must be completed within five years after permit approval. That is, approval to engage in "construction" expires five years after the permit is issued.

As to the remainder of the authorized activities (planting, tube removal and harvesting), the County's position is that these activities are not "construction" and therefore may continue.

II. FACTS RELEVANT TO TAYLOR'S MOTION FOR SUMMARY JUDGMENT

A. Taylor's Shoreline Permit and the Conditions at Issue.

This case involves a shoreline substantial development permit issued to Taylor for the establishment of an intertidal geoduck farm on tidelands owned North Bay on the west side of the Key Peninsula in unincorporated Pierce County.[2]

[1] Copies of all referenced statutes, WACs and County Code provisions are included as Attachments to the declaration of Jill Guernsey.
[2] See Attachment to dec. of Jill Guernsey.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

As described above, the activities which were authorized include (1) the initial placement of tubes/netting/stakes, (2) planting of geoduck seeds inside the tubes, (3) removal of the tubes, netting and stakes, and (4) harvest of mature geoduck approximately five years later. Taylor plans to repeat the process, starting with the placement of tubes/netting/stakes.

The Pierce County Hearing Examiner issued a shoreline substantial development permit to Taylor in late 2000, subject to conditions which implement RCW 90.58.143:

> 4. Construction or substantial progress toward construction of a project for which a permit has been granted pursuant to the Act must be undertaken within two (2) years after the approval of the permit. Substantial progress toward construction shall include, but not be limited to the letting of bids, making of contracts, purchase of materials involved in development, but shall not include development or uses which are inconsistent with the criteria set forth in WAC 173-14-100. Provided, that in determining the running of the two (2) year period hereof, there shall not be included the time during which a development was not actually pursued by construction and the pendency of litigation related thereto making it reasonable not to so pursue; provided further, that local government may, at its discretion extend the two (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.
>
> 5. 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:
>
> 1. Extend the permit for one (1) year; or
> 2. Terminate the permit; provided that nothing herein shall preclude local government from issuing Substantial Development Permits with a fixed termination date of less than five (5) years.[3]

[3] These conditions were taken almost verbatim from WAC 173-14-060 which was repealed in 1996.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

B. The Planning Department's Position on Expiration.

In 2007 the Pierce County Planning and Land Services Department issued an Administrative Determination stating that Taylor's permit had expired.[4] The basis for the Determination was RCW 90.58.143 and implementing regulations set forth in WAC 173-27-090 and PCC 20.76.030(G)(3). Taylor appealed the Planning Department's determination to the Hearing Examiner.[5]

C. The Hearing Examiner's Decision.

After a public hearing which lasted several days the Examiner ruled that Taylor's permit for a geoduck farm had expired:

> The law clearly sets out that permits are valid for five years and five years only. The decision previously entered in this case does not specifically point out as clearly as it could that the permit is good for five years, but the law very clearly sets out that it is good for five years only.[6]

Rescission of Taylor's permit was not an issue before the Examiner. Had rescission been an issue, evidence would have been presented regarding whether or not grounds for such had been met. While the Pierce County Code does not deal with "rescission" of a permit, it does provide for revocation of permits in PCC 18.140.060.[7] The grounds for revocation of a permit are:

1. That the approval or permit was obtained by fraud;
2. That the use for which such approval or permit was granted is not being exercised;
3. That the use for which such approval or permit was granted has ceased to exist or has been suspended for one year or more;

---

[4] See Attachment to dec. of Jill Guernsey.
[5] See Attachment 12 to Duncan Greene's 9/8/08 declaration.
[6] Hearing Examiner's June 12, 2008 decision, p. 30, FOF 31; Attachment 13 to Duncan Greene's 9/8/08 declaration.
[7] The procedure for revocation of permits applies to shoreline permits. See PCC 18.20.020, Attachment to dec. of Jill Guernsey.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

4. That the approval or permit granted is being, or recently has been, exercised contrary to the terms or conditions of such approval or permit, or in violation of any statute, resolution, code, law, or regulation.
5. That the use for which the approval or permit was granted was so exercised as to be detrimental to the public health or safety, or so as to constitute a nuisance.

D. The Issues on Appeal to the Board.

Taylor and North Bay appealed the Hearing Examiner's decision to the Shorelines Hearings Board ("Board"). The Board's Pre-Hearing Order (8/21/08) listed three issues relevant to Taylor's summary judgment motion:

> 1. Whether the Hearing Examiner's conclusion that SD 22-00 **expired** is erroneous and inconsistent with applicable laws and regulations including the Shoreline Management Act (SMA), state implementing regulations, the Pierce County Shoreline Master Program (SMP), case law, and the plain language of the permit, itself.
>
> 2. Whether a preponderance of the evidence presented to the board supports that SD 22-00 did not **expire**, contrary to the Examiner's Decision.
>
> . . .
>
> 8. Whether the Shorelines Hearings Board has jurisdiction to hear an appeal of an "administrative determination" that a shoreline substantial development permit has **expired** when the administrative determination does not involve the "granting, denying or rescinding" of a shorelines permit. RCW 90.58.180(1).

[Emphasis added] As the Pre-Hearing Order shows, the issue of whether Taylor's permit was "rescinded" was not an issue before the Board.

Issue No. 3 involved North Bay's motion for summary judgment:

> 3. Whether the County is equitably estopped from finding that SD 22 00 has expired.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

E. The Board's Ruling on the Motion to Dismiss.

Respondent Pierce County and Intervenor Coalition to Protect Puget Sound Habitat filed motions to dismiss, arguing that the Board lacked jurisdiction to hear this matter as it involved expiration of a permit, as opposed to the granting, denying, or rescinding of a shoreline permit.

In response to the motions to dismiss, Taylor argued that the Pierce County had "rescinded" Taylor's permit.[8] Without regard to the issues listed in the Pre-Hearing Order, the Board converted the issue of whether Taylor's permit had expired to whether the Planning Department had "rescinded" Taylor's permit.[9] The Board concluded that under the facts of this case, the Planning Department's Administrative Determination "constituted rescission of Taylor's on-going authorization to farm geoducks on this site."[10] Because the Board found that the County had rescinded the permit, the Board held that it had jurisdiction under RCW 90.58.180(1) to hear this appeal.

III. ADDITIONAL FACTS RELEVANT TO NORTH BAY'S MOTION FOR SUMMARY JUDGMENT.

North Bay has requested that the Board rule on summary judgment that "the Planning and Land Use Services is estopped from terminating or rescinding SD 22-00 as a result solely of the passage of time." The majority of North Bay's recitation of facts quotes the Board's Order Denying Motion to Dismiss.[11] The remainder of the so-called uncontested facts are

---

[8] See Taylor's response to Pierce County's motion to dismiss, dated 9/18/08, and Taylor's response to Intervenor's motion to dismiss, dated 9/8/08.

[9] Order Denying Motion to Dismiss, p. 7, lines 1 – 3: The issue before the Board for resolution in this motion is whether Pierce County's Administrative Determination regarding Taylor Resources permit SD 22-00 constituted rescission of a shoreline substantial development permit.

[10] Order Denying Motion to Dismiss, p. 11, lines 7 – 9. See also p. 12, lines 14 – 15.

[11] Numbered sections 1 through 12 of North Bay's motion at pp. 1 – 5 are similar to, if not identical with the Board's Order.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

self-serving statements made by North Bay and Taylor representatives at the hearing before the Examiner and in declarations.

It is not the Planning Department's decision that is at issue in this case; it is the Hearing Examiner's decision. Regardless of the personal opinions, views, or formal determination by the Department on any issues, the Hearing Examiner's findings and conclusions and decision constitute the final decision of the County in this case.

Even assuming North Bay's facts are correct, they fail to address the main issues in this case: whether Taylor's periodic placement of tubes/netting/stakes into the tidelands constitutes "construction" and, if so, whether RCW 90.58.143(3) limits the time period in which such activities must take place.

In addition, there are several material facts which are in dispute in this case which relate to North Bay's motion for summary judgment.

A. Planner Ty Booth's Statements to Taylor Representative Diane Cooper.

At the hearing before the Examiner and again in his deposition, Mr. Booth testified that when speaking with Ms. Cooper, Taylor's representative, about the expiration issue, he told her his "personal opinion" was that the permit did not expire:

12

[T. Booth] Diane Cooper and I worked on a--we've worked on a number of geoduck permits, and I just saw her generally around here a lot. She did a lot of permit activity. And although the five-year issue did not come up in this permit at the hearing, I don't recall exactly at what point it started to come onto the radar screen for the county in terms of, well, how do we handle this five-year issue in terms of geoduck farms. At some point it came on the radar to either the county or to myself, and there started to be internal discussions here as to how that was applied in terms of geoduck farms.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

13

15 But I always told her that was -- that in the
16 discussions, my personal opinion that once the farm was
17 established it could go on in perpetuity, but I said that
18 was not the county's official standpoint at that point,
19 there were ongoing discussions.[12]

B. Supervisor Vicki Diamond's Statements Regarding the Expiration Issue.

Ms. Diamond testified before the Examiner and in her deposition that her personal opinion was that Taylor's approved activities did not expire, and that because this was a new use, there was a lot of discussion by staff on this issue:

84

17 [V. Diamond] To my recall, there was a lot of discussion. I think it
18 was said here that we were kind of all over the place, and
19 I would say that that probably is true. There was
20 different opinions, by staff. In our numerous discussions
21 on this, we didn't -- it was a new use. We really didn't
22 know how to deal with it.
23 It was something that we were learning, basically,
24 along the way, of how to deal with geoduck harvesting and
25 aquaculture. So initially, there was a feeling that: Did

85

1 they have an expiration? Not sure. We didn't -- I did not
2 believe that there was. However, after further delving
3 into the issue, getting legal counsel to offer an opinion
4 on it, then a decision came out from the Department, which
5 was August 8th of 2007, with relationship to Taylor
6 Shellfish on the Foss property.[13]

North Bay mischaracterizes and oversimplifies the County's position and the testimony of Ms. Diamond and Mr. Booth. For example, North Bay states that Mr. Booth indicated that once the farm was established, farming could continue on an on-going basis.[14]

---

[12] Deposition of Ty Booth, 10/28/08, p. 12, line 9 – p. 13, line 19. The entire transcript is attached to the declaration of Jerry Kimball as Attachment 2.
[13] Testimony of V. Diamond before Hearing Examiner, 11/1/07, p. 84, line 17 through p. 85, line 6, included in Attachment 1 to dec. of Jerry Kimball.
[14] See No. 5 in North Bay's section entitled Uncontested and Established Facts.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

As shown above, Mr. Booth testified that his "personal opinion" was that the permit did not expire.

Similarly, North Bay references Ms. Diamond's email dated May of 2006 and describes them as "representations" of the County.[15] Yet, as Ms. Diamond testified, the County was "all over the place" on the issue until the Administrative Determination was issued in August of 2007. Again, there exists a genuine issue of material fact as to the County's position, not staff's personal opinion, on the expiration issue prior to issuance of the 2007 Administrative Determination.

In summary, North Bay attempts to put forth as "uncontested and established facts" the Factual Background section of the Board's Order Denying Motion to Dismiss. The Factual Background section of the Board's Order was issued to provide the background necessary to determine whether the Board had jurisdiction of this under the SMA. The Board should not summarily allow use of the Factual Background section in lieu of the facts as set forth in the testimony of the witnesses.

Furthermore, North Bay makes no allegations that the Examiner's actions or decisions meet any of the elements of equitable estoppel; therefore North Day's motion should be summarily dismissed.

IV. ARGUMENT

A. Summary Judgment Standard.

The County agrees with the standard for summary judgment set forth in Taylor's motion. That said, the County's position is that a genuine issue of material fact

[15] See North Bay's motion and memorandum for summary judgment, p. 3, No. 6.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax. (253) 798-6713

exists as to whether Taylor's tubes/netting/stakes activity constitutes "construction." Because the characterization of Taylor's activities presents a genuine issue of material fact, summary judgment is not appropriate in this case.

B. Taylor's Motion for Summary Judgment.

1. Summary of Argument.

If Taylor's tubes/netting/stakes activities constitute "construction," then "construction" takes place each time Taylor inserts tubes/netting/stakes into the tidelands. Under RCW 90.58.143(3) "construction" activities must be completed within five years of permit approval.

Taylor argues that under RCW 90.58.143 the five-year time limit applies only to those "construction activities" establishing the activity, and not to on-going operation of a geoduck farm.[16] Taylor's argument ignores the fact that re inserting PVC tubes into the tidelands before the second or subsequent round of planting constitutes "construction" and is therefore subject to the five-year time limitation in the statute.

The County interprets RCW 90.58.143 as imposing a five-year construction time period. All "construction" activities authorized in the permit must be completed within five years after the permit is issued. Taylor is therefore precluded from conducting new "construction" activities such as placement of tubes/netting/stakes in the tidelands after five-years. Support for the County's position is found in the language of RCW 90.58.143 and the Board's decision in *Yale Estates Homeowners Association v. Cowlitz County*, SHB 03-12 (2003).

[16] See Taylor's motion and memorandum, p. 7, lines 17 – 21.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

2. Insertion of PVC Tubes Into the Tidelands Constitutes "Construction."

The first question which must be addressed by the Board in this case is whether any of Taylor's activities constitute "construction." Taylor argues that an on-going geoduck farm is constructed once, at the time the farm is initially established.

The County's position is that "construction" takes place each time tubes/netting/stakes are inserted or placed into the tidelands. The process between insertion of the PVC tubes and harvesting of mature geoduck takes approximately five years. If Taylor "repeats the process," "construction" occurs with the next placement of tubes/netting/stakes into the tidelands.

"[T]he term "construction" is a common word in the English language and is not ambiguous nor susceptible to multiple interpretations." *Weyerhaeuser v. Health Dept.*, 123 Wn. App. 59, 69, 96 P.3d 460 (2004). Where the term is not defined by applicable statute or WAC, courts give the term its usual and ordinary meaning as defined by a standard dictionary.

The term "construction" is not defined in the SMA, however it is found within the definition of "development" in RCW 90.58.030(3)(d):

> (d) "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

"Construct" is defined in Webster's Online Dictionary as:

> 1: to make or form by combining or arranging parts or elements: build; also: contrive, devise;
> 2: to draw (a geometrical figure) with suitable instruments and under specified conditions;
> 3: to set in logical order.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

Consistent with these dictionary definitions, "construction" in this case would take place each time Taylor inserts tubes into the tidelands, places netting over the tubes and anchors the netting with metal stakes. In a geoduck farming operation, "construction" would take place periodically, approximately every five years.

The County's position is further supported by the Board's decision in *Yale Estates Homeowners Association v. Cowlitz County*, SHB 03-12 (2003). In *Yale Estates* the Board addressed the expiration issue set forth in RCW 90.58.143(3):

> Despite the fact the [substantial development] permit contains boiler-plate language stating: "This permit is valid for five years from the date of final approval," it is obvious from reading the SMA and its regulations, this language may only apply to the construction authorized under the permit. It does not and cannot limit the duration of the permit for the authorization of the use proposed. If it did, a new shoreline permit would have to be applied for every five years, to lawfully maintain a shoreline substantial development on the shorelines. Yale Estates has failed to cite to any authority for this proposition. In fact, it is contrary to the SMA, which contains no language regarding the duration of a shoreline permit, except that pertaining to construction under the permit. RCW 90.58.143(3) provides: "Authorization to conduct construction activities shall terminate five years after the effective date of a substantial development permit." [footnote omitted] This provision does not limit the life of the permit. The definition of development contained in RCW 90.58.030(3)(d), encompasses both one-time and on-going construction and use activities. An example of an on-going construction project would be a gravel extraction operation, which may last for decades. It is necessary to limit the duration of shoreline permits for such projects because of their continual physical disruption of the shorelines, which the SMA was enacted to protect. The construction of permanent structures, however, does not require this same sort of limitation. We presume this is because it is easier to accurately predict the long-term effects of a one-time structure, as opposed to ongoing construction, on the shoreline environment at the time the application, with its attendant site plan and other information, is reviewed.[17] [Emphasis added]

[17] *Yale Estates Homeowners Association v. Cowlitz County*, SHB 03-12 (2003), Modified Order Granting Summary Judgment and Dismissal, XXXVII at p. 21 23.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402 2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

The Board's decision in the *Yale Estates* case recognizes the difference between construction projects which take place once and remain in place over the years, and those on-going construction projects where "construction" takes place periodically over many years.

In the first type of construction project, where construction is completed at some specific point in time, the Board found that under RCW 90.58.143 the shoreline permit does not expire. An example of a project of this type would be a marina. Once the permit is issued and the marina has been constructed, the disruption to the shoreline is complete. Another project of this type would involve a commercial herring pen operation where pens are constructed once and used over and over again to store and grow herring.

The second type of construction permit referred to by the Board in the *Yale Estates* case is the type of activity conducted by Taylor. Construction takes place periodically over the years each time tubes are inserted into the tidelands and covered with netting and metal stakes. Under the *Yale Estates* case, per RCW 90.58.143(3) "construction" cannot take place after five years without obtaining another permit.

Because the issue of whether Taylor engages in "construction" each time it places tubes/netting/stakes into the tidelands is in dispute, a genuine issue of material fact exists.

3. RCW 90.58.143 Imposes A Five-Year Time Limit on "Construction."

The second question the Board must decide is a legal question: whether RCW 90.58.143(3) requires that all "construction" activities be completed within five years after approval of a shoreline permit.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office. (253) 798-6732
Fax: (253) 798-6713

Subsection (2) of RCW 90.58.143 requires those construction activities or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a shoreline permit.

> (2) Construction activities shall be commenced or, where no construction activities are involved, the use or activity shall be commenced within two years of the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record on the substantial development permit and to the department. [Emphasis added]

Subsection (3) provides that authorization for "construction" shall terminate five years after the effective date of the permit, with a possible one year extension:

> (3) Authorization to conduct construction activities shall terminate five years after the effective date of a substantial development permit. However, local government may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and to the department. [Emphasis added.]

It is clear that under RCW 90.58.143(3) authorized "construction" activities must be completed within five years of the effective date of a shoreline permit. Activities other than "construction" have no such time limitation under the statute. This conclusion is supported by the *Yale Estates* decision as well. The Hearing Examiner correctly found that Taylor's authority to engage in geodic farming starting with insertion of tubes/netting/stakes into the tidelands expired five years after its permit was issued.

C. North Bay's Motion for Summary Judgment on the Issue of Equitable Estoppel.

For estoppel to apply, the moving party must assert that: (1) an admission, statement, act inconsistent with a later claim; (2) an act by another person in reliance on the admission, statement or act; and (3) an injury to the other party resulting from the first party's contradiction or repudiation of the

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

> admission, statement or act. *Kramarevcky v. DSHS*, 64 Wn.App 14, 822 P.2d 1227 (1992). In addition, to assert equitable estoppel against the government, a party must also show that application of equitable estoppel (1) is necessary to prevent a manifest injustice and (2) will not impair the exercise of governmental powers. *Id.* Because equitable estoppel is disfavored in the law, a party seeking to invoke the doctrine must prove each of the five elements by clear, cogent, and convincing evidence.

Jacobs v. San Juan County, SHB No. 01-015, 2002 WA ENV LEXIS 14, 24-25 (2002).

Each element of equitable estoppel will be addressed separately in this brief.

1. Admission, Statement, Act Inconsistent With a Later Claim.

As previously stated, there is no evidence that the Hearing Examiner, the final decision-maker in this case, made any admissions, statements, or acts inconsistent with a later claim. All of North Bay's arguments regarding equitable estoppel are directed to Planning Department staff as opposed to the Hearing Examiner. For this reason alone North Bay's motion should be denied.

Even if the Board focuses on the actions and statements of Planning Department staff, North Bay's motion should be denied. Mr. Booth and Ms. Diamond both testified as to their personal opinions on the expiration issue. As North Bay points out, the Planning Department did not take an official position on the expiration issue until it issued the 2007 Administrative Determination. Simply because staff's personal opinion differed from the Department's subsequently adopted Administrative Determination does not satisfy the first element of equitable estoppel. An expression of a personal opinion by a Planning Department staff member to an applicant should not be found to establish the first element of equitable estoppel because it is not an official representation of the County.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office, (253) 798-6732
Fax: (253) 798-6713

Moreover, there is no evidence that any North Bay representative had conversations with either Mr. Booth or Ms. Diamond, or other Planning Department staff on this issue. North Bay relies on the May 2006 email from Vicki Diamond to Laura Hendricks, a waterfront resident. Yet there is no evidence that either Taylor or North Bay received this email before the Planning Department issued its 2007 Administrative Determination.

2. Act by Another Person in Reliance on the Admission, Statement or Act.

North Bay argues that the second element of equitable estoppel is met by Taylor's actions allegedly in reliance on the personal opinion of Mr. Booth. North Bay fails to explain how North Bay supposedly relied upon Mr. Booth's personal views when North Bay had no conversations or communication with Mr. Booth. Nor is there evidence that Mr. Booth expressed his personal opinion to Taylor's representative within the 30-day appeal period after Taylor's permit was issued in late 2000.

It is also speculation to suggest that Ms. Diamond's email expressing her personal opinion to Laura Hendricks in 2006 was relied upon by either Taylor or North Bay. Can North Bay or Taylor seriously argue that either would have timely appealed a permit that was issued in 2000 had they known Ms. Diamond would express her personal opinion to Laura Hendricks six years later?

3. An Injury to the Other Party Resulting From the First Party's Contradiction or Repudiation of the Admission, Statement or Act.

North Bay does not argue that it was injured, only that Taylor's plantings have been delayed thereby causing injury to Taylor. North Bay's allegations are speculation.

Taylor made its business decisions based upon its interpretation of the Examiner's decision. Had it been otherwise, Taylor would no doubt have requested something in writing

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402 2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

from the Planning Department; something more official than Mr. Booth's personal opinion on the expiration issue.

By Taylor's own admission they started planting geoducks in 2001.[18] They continued to plant yearly until the 2007 Administrative Determination was issued.[19] And they have continued to harvest geoducks as they mature. The only injury Taylor attributes to this matter is a delay in planting in 2007 or 2008, which they argue is based upon the County's actions. There is simply no solid evidence that Taylor would have planted seeds, that all the seeds would have matured, that other sites were not available to plant, etc. etc. All evidence in this regard is speculative as opposed to clear, cogent and convincing.

4. Equitable Estoppel Is Necessary to Prevent a Manifest Injustice.

The fourth element of equitable estoppel is not present in this case. The Hearing Examiner decision directed Taylor to apply for another shoreline permit to continue its farming activities. Taylor has done so. There is no reason to think that Taylor's permit will not be issued, particularly in light of the fact that Taylor has obtained other permits for this same activity in Pierce County.

5. Equitable Estoppel Will Not Impair the Exercise of Governmental Powers.

Pierce County, as well as cities and other counties, has an obligation to interpret and apply the law correctly. In this case the expiration issue was raised and has been addressed by the Planning Department and Hearing Examiner. The matter is now before the Board for interpretation of the applicable statute (RCW 90.58.143).

[18] See Attachment 1 to dec. of Jerry Kimball, p. 168, lines 3 - 5.
[19] See Attachment 5 to dec. of Jerry Kimball.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

It would be improper and irresponsible if, when citizens questioned the expiration date of Taylor's permit, the County had refused to formally address the issue. Although the expiration issue is not a simple one, the County had no choice but to research the issue and take an official position. A finding of equitable estoppel would have the effect of preventing the government from addressing such issues and would clearly impair the County from doing its duty owed to the public.

Under the facts of this case, equitable estoppel does not lie against Pierce County and North Bay's motion should be denied.

V. CONCLUSION

Pierce County respectfully submits that both motions for summary judgment should be denied. Regardless of conditions 4 and 5 of the Examiner's decision approving Taylor's substantial development permit, RCW 90.58.143(3) requires that authorized "construction" activities expire five years after the permit is issued. In this case, in order for Taylor to again place tubes/netting/stakes into the tidelands on North Bay's property, Taylor must obtain a new permit.

North Bay's motion for summary judgment based upon equitable estoppel should also be denied. The criteria for equitable estoppel have not been met by clear, cogent and convincing evidence.

As Ty Booth has testified, this was a "new venture" for Taylor and the first shoreline permit issued in Pierce County for intertidal geoduck farming.[20] As such it was a new activity

[20] See Attachment 1 to dec. of Jerry Kimball, p. 11, line 25 - p. 12, line 1, and p. 14, lines 10 - 13.

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

and, in hindsight, many issues including expiration and construction did not get fleshed out at the hearing before the Examiner in 2000.

All parties are now in the position of having the Board interpret RCW 90.58.143(3) and decide whether the statute requires Taylor to obtain a new permit for the placement of tubes/netting/stakes when it begins another crop cycle. This is a legal issue for the Board to decide; however, it is best made upon evidence presented to this Board at a public hearing. Accordingly, these motions should be denied so that the facts can be presented at the scheduled hearing.

Dated this 16th day of December, 2008.

GERALD A. HORNE
Prosecuting Attorney

By: _____
JILL GUERNSEY, WSBA #9443
Deputy Prosecuting Attorney
PH: (253)798-7742
Attorneys for Respondent Pierce County

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

I, Jill A. Anderson, declare that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. As a legal assistant in the Office of the Pierce County Prosecuting Attorney, I sent a true and correct copy of today by FAX and U.S. Mail and giving a copy to ABC Legal Services for delivery as follows:

Debbie Polanski (U.S. Mail)
Shorelines Hearing Coordinator
Environmental Hearings Office
4224 - 6th Avenue SE, Bldg. 2
Rowe Six, P.O. Box 40903
Lacey, WA 98504-0903
FAX(360) 438-7699

(206) 626-0675 FAX & ABC-LMI
Samuel "Billy Plauché &Amanda Carr
GordonDerr LLP
2025 First Avenue, Suite 500
Seattle, WA 98121-3140

(206)624-1361 FAX & ABC-LMI
Jerry R. Kimball
2020 IBM Bldg.
1200 Fifth Avenue
Seattle, WA 98101

FAX (206) 264-9300 & ABC-LMI
David A. Bricklin
BRICKLIN NEWMAN DOLD, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154

I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct. Dated at Tacoma, Pierce County, Washington, this 16th day of December, 2008.

Jill A. Anderson

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798 6732
Fax. (253) 798-6713

BEFORE THE SHORELINES HEARING BOARD
STATE OF WASHINGTON

TAYLOR RESOURCES, INC., a Washington corporation, also known as TAYLOR SHELLFISH FARMS, Appellant, vs. PIERCE COUNTY, Respondent.	SHB NO. 08-010; 08-017 DECLARATION OF JILL GUERNSEY RE MOTIONS FOR SUMMARY JUDGMENT

I, Jill Guernsey, declare that attached hereto are true and correct copies of the following documents which were referenced in the County's Response to Motions for Summary Judgment:

EXHIBIT DESCRIPTION

1. Pierce County Code 18.20.020, Applicability;
2. Pierce County Code 18.140.060, Revocation, Modification and Expiration;
3. Pierce County Code3 20.76.030, Permit Requirements;

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

4. RCW 90.58.030(3)(d), Definition of "Development";

5. RCW 90.58.143, Time requirements Substantial development permits, variances, conditional use permits;

6. RCW 90.58.180, Appeals from granting, denying, or rescinding permits – Board to act – Local government appeals to board – Grounds for declaring rule, regulation, or guideline invalid – Appeals to court;

7. Pierce County Hearing Examiner decision dated 12/28/00 approving Taylor's Shoreline Substantial Development Permit, SD22-00; and

8. August 8, 2007 Administrative Determination by Planning and Land Services Department.

Signed under penalty of perjury of the laws of the State of Washington at Tacoma, Washington, this 16th day of December, 2008.

JILL GUERNSEY

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713