BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE CONDITIONAL USE PERMIT GRANTED BY ISLAND COUNTY AND DISAPPROVED BY STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, JILL R. REED and ALICE G. NEWLIN as CO-TRUSTEES OF THE CLARENCE J. NEWLIN FAMILY TRUST and ISLAND COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	SHB NO. 87-34 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

This matter, the Request for Review of Department of Ecology's disapproval of a conditional use permit, came on for hearing before the Shoreline Hearings Board, Wick Dufford, Chairman and Judith A. Bendor, Nancy Burnett, William E. Derry and Mary Lou Block, Members, convened at Coupeville, Washington, on March 30 and 31, 1988.

William A. Harrison, Administrative Appeals Judge, presided.

Appellants Reed and Newlin appeared by J. Richard Aramburu, Attorney at Law. Island County appeared by David L. Jamieson, Jr., Deputy Prosecuting Attorney. Respondent Washington State Department of Ecology appeared by Allen T. Miller, Jr., Assistant Attorney General. Reporter Lettie Hylarides recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter arises on the shore of Useless Bay in the vicinity of Double Bluff in Island County.

II

The site in question is adjacent to and generally west of the end of Double Bluff Road. It is part of lands originally patented by the United States to one William T. Johnson in 1875. We take official notice of the case of Wilson v. Howard, 5 Wn. App. 169, 486 P.2d 1172 (1971) and cases cited therein, in which it was held that the boundary between uplands and tidelands in such patents is fixed at the line of mean high tide. Tidelands at and near the site in question have remained in public ownership to the present day.

III

By 1942, the site had been acquired by Mr. and Mrs. Chris Jensen who, in that year, established a sports-fishing resort on the

property. The improvements comprising the resort included a log-pile bulkhead. This was placed slightly upland of the mean high tide line and roughly parallel to it. It was some 187 feet in length along its face. It also had log-pile "tie-backs" at the ends to protect its flanks. Fill material was placed behind the log-pile bulkhead. Eight guest cabins were placed on the fill adjacent to the bulkhead. Elsewhere on the site there was boat storage, a marine railway extending into the water, a restaurant and other facilities.

IV

About 1947, the site was acquired by Mr. and Mrs. Crawford Johnston. By a written conveyance executed and recorded in 1947, an easement was established across the site for a roadway serving properties further to the west of the site.

V

In 1960, the site was acquired by Mr. and Mrs. Newlin. By this time the fishing resort was out of business. In approximately 1965, fire swept the resort. Those of the eight guest cabins which survived were removed from the site for use elsewhere. The remaining buildings either burned completely or were later re-kindled for fire department practice.

VI

By 1968, the log pile bulkhead had fallen into a state of neglect which allowed tidal waters to wash out the fill behind it. The

presence of tidal waters in the intervening years has established a distinct vegetation line 20 to 28 feet upland of the wooden bulkhead line. The wooden bulkhead now lacks 23 of its front pile and the pile tie-backs are gone. There are 123 remaining pile, yet these neither staunch the flow of tide nor prevent the washing up of driftwood upland of them.

VII

The site is presently held by a testamentary trust for Mrs. Newlin for life and then to her daughter, Mrs. Reed. While the trust holds some 700-800 feet of waterfront, the site in question is only 200 feet (approximately) of frontage, corresponding in location to the remnant bulkhead. The trust established the site as a separate lot by boundary line adjustment in 1985. The 200 foot site contains the largest measure of level ground within the 700-800 foot total.

VIII

Mr. and Mrs. Reed and Mrs. Newlin wish to place a single family dwelling on the site for their use as a vacation home. Such a home would require a septic tank and drainfield. Island County and state health regulations require a septic tank drainfield to be set back 100 feet from the ordinary high water mark of marine beaches. The ordinary high water mark is regarded to be either 1) the vegetation line or 2) the line of a functional bulkhead. The setback may be administratively reduced by Island County to 75 feet. Even the lesser, 75 foot setback

is unavailable using the vegetation line. If a functional bulkhead existed at the location of the remnant log pile bulkhead, then the 75 foot setback could be met.

IX

In April, 1986, Mr. and Mrs. Reed applied to Island County for a shoreline substantial development and conditional use permit. The proposed development consisted of 185 feet of concrete bulkhead parallel to the water on the same alignment as the remnant log pile bulkhead, and 40 feet of tie-back. There would also be 240 cubic yards of fill placed behind the concrete bulkhead. If such a bulkhead were constructed, it is probable that Island County would grant the waiver to allow a 75' septic setback and measure to the proposed bulkhead, thereby allowing a septic system that would be denied without the proposed bulkhead.

X

The Reeds have not explored either the location of a septic drainfield on neighboring upland property or the design of a septic system which might qualify for setback of less than 75 feet with state approval.

XI

The end of Double Bluff road, which is adjacent to the site, has been developed into public parking by Island County. Although this parking was developed for the apparent purpose of providing public

access to public tidelands, there is no clear pathway on County property from the parking to the tidelands. Rather, the road end has been armored with boulders which discourage crossing over County property to the beach. Consequently, many visitors now trespass across the adjacent Reed-Newlin site to get to the beach.

XII

The following provisions of the Island County Shoreline Master Program (ICSMP) are pertinent to this matter:

1. The proposed development is within the "aquatic" environment. ICSMP Section 16.21.035(F), page 6

2. Bulkheads and filling are conditional uses within the aquatic environment. Id.

The following provisions of the ICSMP must also be considered:

1. "Landfills are the creation of a dry upland area by the deposition of materials into water, or onto shoreline or wetland areas." ICSMP Section 16.21.075(A)

2. "Landfill shall not be permitted in estuaries, tidelands, marshes, ponds, swamps, or similar water retention areas." ICSMP Section 16.21.075(B)(2) Emphasis added.

3. "Shore defense works such as bulkheads and dikes shall not be used for the indirect purpose of creating landfills. When landfill is required behind an already existing structure, it may be permitted in compliance with this Ordinance." ICSMP Section 16.21.120(B)(3).

XIII

On June 15, 1987, the Board of Island County Commissioners, by 2-1 vote, overturned the decision of the Island County Hearing Examiner

and approved the Reed-Newlin application. The conditional use portion of the application was disapproved by the State Department of Ecology (DOE) by letter dated July 16, 1987. The DOE letter cited inconsistency with the DOE criteria for conditional uses at WAC 173-14-140. By Request for Review received August 13, 1987, Mr. and Mrs. Reed and Mrs. Newlin sought review by this Board.

XIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

We review the proposed development for consistency with the Shoreline Management Act and Island County Shoreline Master Program (ICSMP) See RCW 90.58.140(2)(b).

II

The proposed concrete bulkhead and fill are not "normal maintenance or repair of existing structures or developments" so as to come within the exemption of RCW 90.58.030(3)(e). This exemption, in any event, merely establishes that a development is not "substantial", and therefore would not require a substantial development permit. See RCW 90.58.140(2).

However, we draw a broader conclusion, as well, that the remnant

log pile bulkhead was not sufficiently maintained so as to be functional at the enactment of the Shoreline Management Act. Thus, it cannot be upgraded from a remnant to a fully functional bulkhead under the premise of "retention and maintenance" as afforded to non-conforming structures by the Act at RCW 90.58.270. Rather, the degree of change from remnant to functional bulkhead, either log pile or concrete, is subject to the permit and regulatory provisions of the Act and ICSMP.

III

The proposed bulkhead is not a "normal protective bulkhead" within the exemption of RCW 90.58.030(3)(e)(ii). A normal protective bulkhead would not, as here, involve the creation of dry upland by the placement of fill 20 to 28 feet landward of the bulkhead. See also WAC 173-14-040(C).

IV

The "ordinary high water mark" is defined as follows, under the Act at RCW 90.58.030(2)(b):

> "Ordinary high water mark" on all lakes, streams and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: Provided, that in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide . . .

In this matter, the vegetation line is distinct, and that line constitutes the "ordinary high water mark."

V

We conclude that the proposed filling is "landfill" as that term is used at ICSMP Section 16.21.075(A). (See Finding of Fact XII, above). The filling would be waterward of the ordinary high water mark (vegetation line) and therefore create dry upland area from area now washed by the tides.

VI

Landfill, as here, which is just waterward of the ordinary high water mark on marine waters is on tidelands. Such landfill is prohibited by ICSMP Section 16.21.075(B)(2). (See Finding of Fact XII, above).[1]

VII

Bulkheads, such as this one, may not be used for the indirect purpose of creating landfills. Moreover, bulkheads which require landfill behind them may only have such landfill "in compliance with this Ordinance." ICSMP Section 16.21.120(B)(3). (See Finding of Fact

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[1] As in Hastings v. DOE, SHB No. 86-27 (1988), which cited this regulation, ICSMP Section 16.21.075(B)(2), regarding a marsh, we see no conflict between the regulation and the Shoreline Management Act. However, residential development which is outside the ambit of 16.21.075(B)(2), cannot be prohibited solely by ICSMP Section 16.21.075(B)(1) purporting to allow only shoreline dependent uses. Hastings at pp. 16-18.

XII, above). The "Ordinance" cited there is Chapter 16.21 of the ICSMP which includes the prohibition against tideland landfill at Section 16.21.075(B)(2). (See Conclusion of Law VI, above). The proposed development is prohibited by ICSMP Section 16.21.120(B)(3).

VIII

Finally, the rules of the DOE relating to conditional uses provide at WAC 173-14-140(3):

> Uses which are specifically prohibited by the master program may not be authorized.

The DOE disapproval of the proposed bulkhead and landfill was therefore correct, and should be sustained.

IX

Appellants suggest that the property ownership of the lot at issue may extend waterward of the vegetation line to the line of mean high tide due to the origins of the property in government patent. (See Finding of Fact II, above.) However, we do not resolve this because we conclude that the boundary of ownership does not affect the Shoreline Management Act's designation of ordinary high water at the vegetation line. The prohibition against tideland filling within the ICSMP relates to the vegetation line designated by the Act, which the ICSMP implements, and not to a proprietary boundary which may differ from the vegetation line.

X

We decline to resolve the constitutional taking questions raised by appellants as constitutional questions are beyond our jurisdiction. See Yakima County Clean Air Authority v. Glascam Builders, 85 Wn. 2d 255, 534 P.2d 33 (1975). However, the evidence in this matter has revealed that alternative septic systems for the site have not been fully investigated.

XI

We have carefully reviewed the other contentions raised by appellants and find them to be without merit.

XII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The disapproval by Department of Ecology of this conditional use permit is hereby affirmed.

DONE at Lacey, WA, this 10th day of May, 1988.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Chairman

(See Concurring Opinion)
JUDITH A. BENDOR, Member

NANCY BURNETT, Member

WILLIAM E. DERRY, Member

MARY LOU BLOCK, Member

WILLIAM A. HARRISON
Administrative Appeals Judge

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Concurring Opinion

I concur with my colleagues, and add the following: The Board correctly concludes that it does not have jurisdiction to adjudicate constitutional issues, including the alleged taking. Conclusion of Law X. But then the Board somewhat mysteriously states what is an undisputed fact: an alternative sewer system has not fully been investigated. If, by such dicta, the Board intends to provide prospective engineering guidance to appellants, then little harm is done other than the Board's percolating beyond its mandate. If, however, the intent is to provide a fact relative to taking, then the Board might more completely recite other undisputed facts in the record, i.e. appellant's statement that they have recreational use of the property, and could park a trailer overnight. More wisely, Conclusions of Law X should have been left unadorned by accreting dicta.

Nontheless, its inclusion does not alter the shores of our judgment. And any alleged taking issue necessarily awaits adjudication in a different legal arena.

The following ICSMP provision is included for convenience:

> 1. Landfills shall be permitted only in conjunction with shoreline dependent uses. ICSMP 16.21.075(B)(1); See Conclusion of Law VI and footnote 1.

SHORELINES HEARINGS BOARD

JUDITH A. BENDOR, Member

Bender

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE CONDITIONAL USE PERMIT GRANTED BY ISLAND COUNTY and DISAPPROVED BY DOE, JILL R. REED and ALICE G. NEWLIN AS CO-TRUSTEES OF THE CLARENCE J. NEWLIN FAMILY TRUST, and ISLAND COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	SHB No. 87-34 ORDER DENYING SUMMARY JUDGMENT

On January 21, 1988, Respondent moved for Summary Judgment herein. Having considered the same together with attached memorandum, affidavit and other documents and having also considered:

1. Memorandum in Opposition to Motion Summary Judgment filed February 11, 1988, by Appellants Reed and Newlin, together with attachments and

2. Island County's Memorandum of Authorities in Opposition to Department of Ecology filed February 26, 1988, with attachments and

3. Reply Brief of the Department of Ecology filed February 17, 1988, and

4. Letter of counsel for Appellants Reed and Newlin dated February 11, 1988, and being fully advised, the Board now reaches the following:

CONCLUSIONS

The disapproval of the conditional use permit at issue here proceeds from the rationale set forth in the affidavit of Mr. Hartley dated January 19, 1988 (page 3, lines 3-7):

> "The crux of my review of this permit came down to two subsections of the master program which state that landfill shall be permitted only in conjunction with shoreline dependent use and landfill is prohibited in tidelands. Island County Shoreline Master Program (ICSMP) §16.21.075(b)(1) and (2)."

After the present case was commenced, the Board had occasion to examine the two provisions cited above in Hastings v. DOE and Island County, SHB No. 86-27 (1988). A copy of the decision in Hastings is attached. That decision will bear upon the application of the same master program provisions, Sections 16.21.075(b)(1) and (2), in this case, provided that those provisions are found applicable. However, there are genuine issues of material fact which must be resolved prior to concluding that these landfill provisions apply. These relate to

both tideland boundaries and whether the proposal involves landfill or only development which is incidential to a bulkhead, as well as other issues set forth in the Pre-Hearing Order.

NOW THEREFORE IT IS ORDERED that there being genuine issues of material fact, the Motion for Summary Judgment is denied.

DONE at Lacey, Washington, this 14th day of March, 1988.

SHORELINES HEARINGS BOARD

WICK DUFFORD, Chairman

3/14/88

LAWRENCE J. FAULK, Member

JUDITH A. BENDOR, Member

NANCY BURNETT, Member

WILLIAM A. HARRISON
Administrative Appeals Judge