BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

JEANNE BABBITT;	**SHB NO. 93-5**
MOSES LAKE CITIZENS CONCERNED ABOUT THE ENVIRONMENT; and	**SHB NO. 93-6**
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY;	**SHB NO. 93-23**
Appellants;	**ORDER DENYING SUMMARY JUDGMENT**
v.	
GRANT COUNTY and M. H. MOORE PROPERTIES,	
Respondents.	

I

Motions for Summary Judgment were filed by appellant, Jeanne Babbitt (""Babbitt") and respondent, M. H. Moore Properties ("Moore"). The Shorelines Hearings Board ("Board") heard oral argument on December 22, 1993, and considered the record. The Board was comprised of: Robert V. Jensen, attorney member, presiding; and Richard C. Kelley, Bobbi Krebs-Mcmullen and O'Dean Williamson, members.

II

Babbitt was represented by David S Mann and Mickey Gendler, attorneys; Moore was represented by Curt Smelser and Dennis D. Reynolds, attorneys. Moses Lake Citizens Concerned About the Environment ("Citizens"), withdrew on December 21, 1993, and therefore, did not participate in the argument. The Department of Ecology ("Ecology") signed a Stipulation and Agreed Order of Dismissal, on November 29, 1993, and likewise did not participate in the argument. Grant County ("County") did not take part in the argument as well.

III

Babbitt originally raised an issue regarding compliance with the State Environmental Policy Act ("SEPA"); however, it abandoned that challenge during the summary judgment proceedings.

IV

Moore challenged the appeal brought by the Citizens, alleging that Moore had not been properly served. The Citizens' withdrawal rendered this issue moot.

V

Moore challenged the timeliness of the appeal by Ecology. That issue became moot as a result of the settlement agreement between Moore, the County and Ecology.

VI

The issues remaining for summary judgment are whether: 1) Babbitt's appeal must be dismissed because Ecology allegedly certified that appeal in an untimely fashion; 2) a shoreline conditional use permit is required for the Moses Pointe project because of the configuration and use of the parking lot adjacent to and serving the public boat launch; and 3) Moore adequately demonstrated to the County, the suitability of the soils for pressurized sand filter drain fields.

VII

The Presiding Officer orally granted Moore's motion, as a preliminary matter, at the end of oral argument, to Amend Pre-Hearing Order to Allow Introduction of Additional Exhibits. This motion was granted over the objection of Babbitt, on the grounds that the materials offered had been seen by all parties, including Babbitt, and would not cause prejudice.

VIII

The Board, in reaching its decision, considered the following pleadings:

1) Appellant Babbitt's Motion and Memorandum in Support of Summary Judgment, filed 10/22/93;

2) Declaration of David S. Mann in Support of Appellant Babbitt's Motion for Summary Judgment, filed 10/22/93;

3) Respondent M. H. Moore Properties' Motion for Summary Judgment and Dismissal Re: Timeliness of Department of Ecology's Appeal and Certification, filed 10/22/93;

4) Respondent M. H. Moore Properties Memorandum in Support of Summary Judgment, filed 10/22/93;

5) Respondent M. H. Moore Properties' Motion for Summary Judgment Re: Appeal of Jeanne Babbitt's Contentions as to Whether a Conditional Use Permit is Required or SEPA has been Violated, filed 10/22/93;

6) M. H. Moore Properties' Memorandum in Support of Motion for Summary Judgment Re: Conditional Use Permit/SEPA Allegations (Appeal of Jeanne Babbitt), filed 10/22/93;

7) Declaration of Dennis D. Reynolds, filed 10/22/93;

8) Declaration of Len Zickler, filed 10/22/93;

9) Respondent M. H. Moore Properties' Memorandum in Opposition to Appellant Babbit's Motion for Summary Judgment, filed 11/1/93;

10) Supplemental Declaration of Dennis D. Reynolds in Opposition to Appellant Babbitt's Motion for Summary Judgment, filed 11/1/93;

11) Declaration of George J. Lindsay in Opposition to Appellant Babbitt's Motion for Summary Judgment, filed 11/1/93;

12) Appellant Jeanne Babbitt's Response to M. H. Moore Properties' Motions for Summary Judgment Re: Conditional Use Permit; SEPA Allegations, and Date of Filing, filed 11/1/93;

13) Declaration of David S. Mann in Support of Appellant Jeanne Babbitt's Response to M. H. Moore Properties' Motions for Summary Judgment Re: Conditional Use Permit; SEPA Allegations; and Date of Filing, filed 11/1/93;

14) State of Washington, Department of Ecology's Response to Motion for Summary Judgment, filed 11/1/93;

15) Respondent M. H. Moore's Reply to Department of Ecology's and Jeanne Babbitt's Response to Motion for Summary Judgment Re: Date of Filing, filed 11/8/93;

16) M. H. Moore Properties' Reply to Response of Jeanne Babbitt Re Conditional Use Permit, filed 11/8/93;

17) Supplemental Declaration of Len Zickler, filed 11/8/93;

18) Appellant Babbitt's Reply Memorandum in Support of Summary Judgment, filed 11/8/93.

IX

The Board denies the motions for summary judgment. The first motion is premised on a date of filing of December 30, 1992. We conclude that the date of complete filing with the Department of Ecology ("Ecology") was March 24, 1993. Therefore, the certification by Ecology and the Attorney General of the appeal of Babbitt, on April 6, 1993, was timely.

X

RCW 90.58.140(6) defines the date of filing of a shoreline permit with Ecology, is the "date of actual receipt by the department". The statute also requires Ecology to notify in writing the local government and the applicant of the date of filing. Id. Ecology, as the agency which administers the receipt of such permit, requires, in WAC 173-14-090, a complete filing by local government, before it notifies local government and the applicant in writing of the date of filing. The Board has affirmed this requirement. Newlin v. Island County and Costello, SHB No. 79-31 (1980).

XI

Ecology regulations require detailed site plans, to facilitate review of shoreline projects (for consistency with the SMA and the master programs). by itself, the Attorney General,

other agencies, and the public. WAC 173-14-110. The importance of this requirement frequently has been recognized by the Board. Friends of the Earth v. City of Westport, Port of Grays Harbor and Department of Ecology, SHB No. 84-63 (1985) (a permit for fill and a water dependent barge loading facility should be approved only as to those sections that specifically describe the permitee's plans in detail); Department of Ecology v. City of Tacoma and Barden, SHB No. 84-27 (1985) (to delay both final design of a marina breakwater and the decision as to the appropriateness of that design until after a shoreline permit is issued means that the permit is premature and should be reversed); Department of Natural Resources v. Mason County, SHB No. 83-17 (1983) (where an application fails to describe spoils material with sufficient specificity to allow the county of the Board to evaluate the proposal, consistency with the master program cannot be determined); SAVE v. City of Bothell; the Kroll Company and Department of Ecology, SHB No. 82-29 (1983) (design guidelines, a verbal composition from which only building envelopes may be derived, are inconsistent with WAC 173-14-110 relating to shoreline application, which requires a scale drawing showing dimensions and locations of structures); Concerned Citizens of South Whidbey, et al. v. Island County and Milby, SHB No. 77-11 (1979) (a proposed storm drainage system, which differs from the design described in the permit, cannot be adequately evaluated. The proposed substantial development should be consistent with the description in the permit application).

XII

The County issued Moore the substantial development for Moses Pointe, on December 22, 1992. Ecology received the permit application, including the site plan, on December 30, 1993. The site plan was drawn to scale and showed a road in the shorelines, as well as six docks, which when measured, appeared to be about 50 feet in length. The application also contained the following language:

There shall be from the high water mark a 50 ft. horizontal buffer of all lake front, in which there shall be no construction, except the approved boat docks. The first 20 ft. shall remain in its natural state, intermingled with wildlife habitat plantings, watered and maintained with a drip irrigation system to allow year around feed and protection for wildlife.

XIII

The GCSMP requires shoreline conditional use permits for roads in the shoreline and for docks over 20 feet in length. GCSMP, sections 8.06; 11.06 and 11.07. It also requires a conditional use permit for utility and irrigation functions, as follows:

structures and land uses necessary for utility and irrigation functions will be judged independently, based on their capability to support such an activity.

GCSMP, section 9.04.

XIV

Ecology, on January 8, 1993, wrote to the County expressing its opinion that, based on the documents provided by the County and the Grant County Shoreline Master Program ("GCSMP"), the project required a shoreline conditional use permit. Ecology asked the County for its analysis. Consistent with WAC 173-14-090, Ecology requested the County's response within 30 days of the date of Ecology's letter. This request was consistent with WAC 173-14-090, which requires as follows:

When a substantial development permit and a conditional use or variance permit are required for a development, the filing of local government's rulings on the permits shall be made concurrently.

XV

Ecology's request was also consistent with the SMA's strong call for coordinated management of the state's shorelines:

There is, therefor, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

RCW 90.58.020.

XVI

Ecology, on January 19, 1993, met with Moore's attorney, and gave him a list of the items causing Ecology problems with review of the application. On January 21, Ecology called the County and relayed these concerns with the permit.

XVII

The County, on January 22, 1993, wrote Ecology requesting written comments from Ecology regarding the additional items upon which Ecology sought clarification. On February 3, 1993, the County wrote Ecology, explaining the County's interpretation of the master program provision pertaining to conditional use permits for utility and irrigation functions. That letter also informed Ecology that the County had, on January 27, 1993, received clarification from Moore regarding Ecology's concerns.

XVIII

Ecology, before receiving the County's February 3 letter, wrote to the County on February 5, 1993, specifying 15 items which were unclear from the site plan and the text of the permit file.

XIX

On March 17, the County confirmed to Ecology that it agreed with the clarifications set forth in Moore's January 27 correspondence. Subsequently, Ecology reviewed that information, and notified Moore, the County and the other parties, in writing, that the date of filing was March 24, 1993.

XX

A complete filing means one that complies with the requirements of WAC 173-14, including a site plan that conforms to WAC 173-14-110. A site plan which is inaccurate, to

the point that its dimensions would trigger the requirement for a conditional use or variance permit, is not a complete site plan. Ecology rightfully requested clarification of a site plan, which it turns out, did exactly that. Moore, on November 8, 1993, filed with the Board a site plan, dated August 31, 1993, which had not been reviewed by the County prior to the issuance of the permit. That plan deleted the road in the shoreline, shown on the site plan filed with Ecology. It also limited the docks to five in number, with a maximum length of 20 feet. This was obviously done to defeat Babbitt's motion for summary judgment on the conditional use permit issue.

XXI

Moore cannot have it both ways. On the one hand it alleges that the County is under no duty to submit an accurate site plan to Ecology, in order to complete the filing requirement. If this argument were accepted, we should anticipate an increase in procedural appeals, and more decisions like those previously cited, for failure to provide adequate, detailed plans of the project. We believe Ecology performs a valuable service in attempting to filter out procedural error, prior to appeals coming to the Board. The delays inherent in such appeals are of no benefit to the permit applicant, especially considering the automatic stay provisions of the SMA.

XXII

On the other hand, Moore wishes to clarify its project, in order to avoid a time-wasting remand to local government. We concur that this may be appropriate, where Ecology has an opportunity to require a complete and accurate filing, prior to accepting shoreline permits for review. If Ecology were without this authority, we would not be likely to deem Moore's and the County's belated compliance with the basic requirements of an application, to be appropriate.

XXIII

If Moore's argument about the date of filing were accepted, that would nonetheless not defeat Babbitt's appeal. Moore apparently would require Babbitt to file a mandamus action against Ecology, because the latter refused to accept the County's filing of this permit, as it was sent. The Catch-22 with Moore's argument, is that the certification period, under Moore's reasoning has expired; therefore it is too late for Babbitt to file such an action. We reject this notion. Ecology, in asking for a completed application, was only requesting what the law required. The SMA is to be liberally construed on behalf of its goals and objectives. RCW 90.58.900. One of those objectives is broad public participation in both the development and implementation of master programs RCW 90.58.130. Review of a project by the citizens, for consistency with a local master program is part and parcel of that implementation. Ecology, in requiring clear documentation of a shoreline proposal, carries out its statutory role of reviewer of shoreline actions, on behalf of the applicant, the local government and the public. RCW 90.58.050. The prejudice, if any to Moore, is only the result of its own failure to supply adequate documentation. The prejudice to Babbitt, if Moore's argument were accepted, would be total, and not of its own doing.

XXIV

Babbitt requests summary judgment on the issue of compliance with section 1.02 of the GCSMP, which requires the applicant to demonstrate that the soils are suitable for the proposed use. This issue does not appear in the list of issues from the pre-hearing orders. No objection, however having been raised to our consideration of that issue on summary judgment, we conclude that Moore adequately demonstrated the suitability of the underlying soils for pressurized sand filter drain fields. Moore submitted information as to the permeability of the soils of the site, and as to alternatives to conventional septic tank drain

fields. Moore contends that its interim system is "state-of-the art". Whether it is or not, the County obviously recognized it as a measure that would mitigate the impacts from a conventional system. This does not mean, however, that at the hearing there will be no issue as to the suitability of the soils. Babbitt contends and has the burden of proving that the pressurized system will not protect against adverse effects to the surface and ground waters in the shorelines, as well as the public health.

XXV

Finally, we conclude that there are genuine issues of material fact as to whether the parking lot adjacent to the public boat launch constitutes a road, under the GCSMP, so as to require a shoreline conditional use permit. For this reason we deny summary judgment on this issue.

XXVI

Based on the foregoing, the Board issues the following:

ORDER

1) Moore's Motion for Summary Judgment requesting dismissal of the Babbitt appeal, based on an allegedly untimely certification by Ecology, is denied.

2) Babbitt's Motion for Summary Judgment on the issue of compliance with section 1.02 of the GCSMP, is denied.

3) Babbitt's Motion for Summary Judgment on the issue of requiring a shoreline conditional use permit for the parking lot adjacent to and serving the public boat launch, is denied, on the grounds that there are genuine disputed issues of material fact which must be resolved by the Board at the hearing.

4) As a consequence of these rulings and the above analysis, issues 8 through 11 are no longer part of this case.

5) Issue 9 was misstated in the Pre-Hearing Order, and was intended to refer to the Citizens, not to Babbitt. As such, due to the Citizens' withdrawal, this issue is also no longer under consideration.

6) Issue 1 is limited to the issue of whether a conditional use permit is required for the parking lot, adjacent to and serving the public boat launch.

DONE this 29th day of December, 1993.

SHORELINES HEARINGS BOARD

Robert V. Jensen RCK
ROBERT V. JENSEN, Presiding Officer

— see dissent —
RICHARD C. KELLEY, Member

Bobbi Krebs-McMullen RCK
BOBBI KREBS-MCMULLEN, Member

O'Dean Williamson
O'DEAN WILLIAMSON, Member

S93-5SJ

OPINION DISSENTING IN PART
AND CONCURRING IN PART

I concur in the opinion of the majority on numbers 2 and 3 of the proposed Order, denying Babbitt's motions for summary judgment, and I agree with the majority conclusion in numbers 5 and 6. I dissent from the opinion of the majority in the matter of proposed number 1, and consequently also dissent from proposed number 4.

The majority opinion, under its proposed Order number 1, would deny summary judgment to Moore on the basis of an untimely certification of the Babbitt appeal by Ecology, and would therefore dismiss issues 8, 10 and 11. The majority errs for the following reasons:

It is undisputed that Grant County filed the permit with Ecology on December 30, 1992, accompanied by every one of the documents required by law. It is likewise undisputed that the Ecology employee assigned to receiving and initially processing permit filings informed the County by telephone that the date of filing was December 30. It is also undisputed that Ecology informed the County by letter dated January 8, 1993, that "We have concluded that the above referenced shoreline permit should have been processed as a shoreline substantial development <u>and</u> shoreline conditional use permit..." (emphasis in the original). Yet, inexplicably, Ecology then failed to take the next logical step and appeal the permit timely.

Months later, Ecology purported to establish as its date of filing March 22, 1993, thus conveniently making its certification of the Babbitt appeal timely. This is a deception, and it claims authority for Ecology which does not exist in law.

Since by January 8, the responsible official at Ecology had **"concluded"**, and reported in writing to the County, that the permit could not be approved as issued, Ecology had already made its decision. Apparently there was no lack of information in the documents filed at that time. Ecology cannot later disavow the content of that letter. Under the thin cover of their own failure to confirm in writing their verbal report of the date of filing, Ecology then proceeded to attempt to massage the content and the quality of the permit so as to make it more to its liking. This is an activity which, while perhaps positive in itself, does not in any way affect the deadlines in RCW 90.58.

In addition to the above specific dissent, a broader problem with the majority opinion concerns the manner in which it was considered by the Board. Only four members participated in the hearing on the motions, and of those, only three agreed to sign an order. RCW 90.58.170 reads, "A decision must be agreed to by at least four members of the board to be final." This is a hard rule, but is unambiguous in the statute, and we are bound by it, as we have been in other cases. Unless and until the four-vote requirement has been met, the three members signing the majority opinion are without authority to dismiss issues 8, 10 and 11. If another member of the Board should consider the record and sign the majority opinion, it would become a decision of the Board.

Richard C. Kelley, Member