BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	SHB NO. 93-73
Appellant,	)	
v.	)	
CITY OF WESTPORT; WESTPORT BY THE SEA DEVELOPERS, INC.; WILLIAM CUNNINGHAM; NICK BELTRANO; and PAUL SCHAEFER;	)	ORDER ON SUMMARY JUDGMENT
Respondents.	)	

This matter came on for hearing before the Shorelines Hearings Board ("Board") on a joint motion for summary judgment submitted by Appellant Department of Ecology ("Ecology") and Respondent Westport-By-The-Sea Developers, Inc. ("Westport-By-The-Sea"). A hearing was held on March 2, 1994, at the Board's office in Lacey. Present for the Board were Richard Kelley, Presiding, Robert Jensen, Bobbi Krebs-McMullen, Annette McGee, and Richard Gidley. Ecology was represented by Steven Theile, Assistant Attorney General; City of Westport ("City") by Wayne Hagen, City Attorney; and Westport-By-The-Sea by Polly McNeil and Nina Mendelsohn, attorneys, Heller Ehrman, Seattle. The

proceedings were recorded by Lenore Schatz of Gene Barker and Associates, Olympia.

After considering the briefs and exhibits submitted, the facts stipulated, and the arguments at hearing, the Board makes the following

FINDINGS OF FACT

I.

The City approved Substantial Development Permit #4-93 on July 6, 1993, to permit Westport-By-The-Sea to construct a motel and commercial development on a site of approximately 28.6 acres near the Pacific Ocean. The complete permit package was filed with Ecology on October 7, 1993. On November 8, 1993, Ecology filed a Request for Review with the Board.

II.

The site of the proposed development lies approximately 300 to 400 feet landward from the Ordinary High Water Mark (OHWM). The site is in the interdunal area, and is partially covered by freshwater wetlands overlaying a large aquifer.

III.

The aquifer under the site discharges into the Pacific Ocean at one or more points.

IV.

The site was included in the original 1974 Westport Shoreline Master Program ("SMP"), in an area designated as Urban Environment.

V.

In 1983, the City adopted a revised SMP which changed some and codified all of its designations for the various areas in its shoreline zone. The Urban Environment designation for the area of the current project site was eliminated, the jurisdictional boundary of the area was moved shoreward to a line 200 feet landward from OHWM, and the remainder of the former Urban Environment area, including the current project site, was shown as outside the shoreline zone and therefore left undesignated by the City.

VI.

When the City submitted the 1983 SMP revision to Ecology, Ecology Director Donald Moos responded with a letter to the City on October 6, 1983, approving most of the revision but saying:

> *Our chief concern is that the primary dune be protected. Therefore, a line drawn at the upland toe of the primary dune would appear to be approvable, providing that associated wetlands behind the dune are identified and included in the jurisdiction on a selective basis. The Ocean Beach environment* <u>*should*</u> *apply to this jurisdictional area. Until such a line is ultimately approved by this department, the jurisdictional line along the Pacific Ocean* <u>*shall*</u> *remain as adopted by the department on November 7, 1974.* (emphasis added)

Ecology then filed the revision and the letter with the Code Reviser under WAC 173-19-2208 as an amendment to the City of Westport SMP.

VII.

The permit for a Shoreline Substantial Development permit approved by the City on July 6, 1993 listed the relevant shoreline zone environment as "urban (ocean beach environment)".

VIII.

Any conclusion of law deemed to be a finding of fact is hereby adopted as such.

Based on the above findings, the Board makes these

CONCLUSIONS OF LAW

I.

The Board has jurisdiction under RCW 90.58.

II.

The Shoreline Management Act at RCW 90.58.030(2)(d) defines "shorelines" to include wetlands that are "associated" with the shorelines. Associated wetlands are further defined by regulation as

> *Those marches, bogs and swamps which are in proximity to and either influence or are influenced by the tidal water. This influence includes but is not limited to one or more of the following: Periodic tidal inundation; hydraulic continuity; formation by tidally influenced geohydraulic processes; or a surface connection through a culvert or tide gate.*

WAC 173-22-040(1)(b).

We conclude that the freshwater wetlands in the interdunal area overlaying the aquifer, because they discharge through the aquifer into the Pacific Ocean, are in hydraulic continuity with the Pacific, and so they are associated wetlands of the Pacific, and thus subject to Shoreline Management Act jurisdiction.

III.

We conclude that the City intended in 1983 to codify all of its shoreline environment designations, and thus it eliminated the Urban Environment designation from the site of this current permit application.

IV.

We find that Ecology, by the use of the word "shall", denied the jurisdictional boundary change proposed by the City in 1983. We also find, however, that Ecology, by the use of the word "should", did not apply the Ocean Beach Environment to the area which includes the current project site, but merely proposed that designation to the City, as "modifications to the program to make it consistent with said policy and guidelines", as required by RCW 90.58.090. The City, however, never took the next step under RCW 90.58.090 by submitting a modified program to Ecology for approval.

We therefore conclude that the area which the City attempted to remove from its SMP in 1983 remains within the jurisdictional

boundary, that the City repealed its previous Urban Environment designation for that area, and that no other designation has ever become effective for that area. The area remains undesignated.

V.

The SMA restricts local government's authority to issue shoreline permits:

> *A permit shall be granted:*
> ...
> *(b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and the provisions of chapter 90.58 RCW.*

We conclude that in an area within the jurisdiction of the SMA, which area has not been assigned any environment designation by the local government, that local government has no authority to issue any permit under the SMA and the local Master Program.

VI.

The Board addressed a somewhat similar situation in Welchko, SAVE FLOUNDER BAY, et. al. v. City of Anacortes and Skyline Marina, Inc., SHB Nos. 79-45, 79-47, 79-49, 79-51 (1980). In Welchko, the Board remanded a permit which had been approved in an undesignated area, with instruction to the City to consider it again under either the policy of RCW 90.58.020 and Ecology's Guidelines and regulations, or an amended City Master Program which provided a designation for the area. In Welchko, however,

the area had never been designated. Thus, the option of applying Ecology's pre-Master Program guidelines made sense.

In our present case, Westport has previously designated the area. It is not virgin territory to the SMA, and the provisions governing areas not yet designated under a Master Program are not relevant.

VII.

Any finding of fact deemed a conclusion of law is hereby adopted as such.

Based on the above findings and conclusions, the Board makes the following

ORDER

1. The first question of law in the joint motion for summary judgment is answered in the affirmative: the freshwater wetlands on the site are associated wetlands of the Pacific.

2. The second question of law in the joint motion is answered in the affirmative: the City of Westport is barred from issuing a substantial development permit, or any other shoreline permit, in the undesignated area.

3. The third question of law in the joint motion is moot.

4. The permit for the Westport-By-The-Sea development is denied.

5. The City of Westport shall remain barred from approving any shoreline permit in the undesignated area until such time as it has revised its Master Program to designate the area, and such revision has been adopted or approved by Ecology, as appropriate per the process prescribed by RCW 90.58.090.

DONE this 22nd day of March, 1994, in Lacey, Washington.

SHORELINES HEARINGS BOARD

RICHARD C. KELLEY, Presiding

ROBERT V. JENSEN, Chairman

BOBBI KREBS-McMULLEN, Member

ANNETTE S. McGEE, Member

RICHARD GIDLEY, Member

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