

1 government's interpretation of language contained within its own shoreline master program. For
2 these reasons, I write this separate concurring opinion.

3 Standard of Review

4 [1]

5 In *Buechel v. Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994), the Washington Supreme
6 Court recognized that the Board hears matters de novo and the Board's review "accords the local
7 government's decision with no particular deference." *Buechel* at 202. The Court also stated that
8 "due deference will be given to the specialized knowledge and expertise of the Board." *Buechel*
9 at 203. Aside from citing to these premises from the *Buechel* case, the Board's decisions have
10 inconsistently stated the appropriate standard for evaluating a local government's interpretation
11 of its own shoreline master program.

12 [2]

13 In *Ackerson et al. v. King County et al.*, SHB No. 95-25 (1996), a divided Board
14 acknowledged that the while the Board is not required to give any particular deference to a local
15 government's interpretation of the law, its interpretation was still entitled to substantial weight in
16 the Board's deliberations. *Ackerson* at 7. In *McArthur v. City of Long Beach*, SHB No. 03-017,
17 the Board noted that *Ackerson* was a split opinion and that the Board's de novo review does not
18 require deference to local decision makers. *McArthur* at 4. In *Youde v. Ecology*, SHB No. 04-
19 006 (2004) (Order on Summary Judgment), the Board stated that the County was entitled to
20 substantial deference because it was interpreting its own shoreline master program. *Youde* at 9,
21 fn 8.

1 [3]

2 Courts review the construction of statutes de novo under the error of law standard. City
3 of Pasco v. Public Employees Relations Commission, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

4 The error of law standard allows the reviewing court to substitute its judgment for that of the
5 administrative body, though substantial weight is accorded the agency's view of the law.

6 Franklin County Sheriff's Office v. Sellars, 97 Wn.2d 317, 325, 646 P.2d 113 (1982); Regence

7 Blueshield v. Insurance Commissioner, 131 Wn.App. 639, 646 (2006). The same rules of

8 statutory construction apply to municipal ordinances as to state statutes. Sleasman v. City of

9 Lacey, 159 Wn.2d 639, 643 (2007). It logically follows therefore that a local government's

10 interpretation of its shoreline master program should be reviewed under the error of law

11 standard.

12 [4]

13 The de novo standard of review does not irreconcilably conflict with the error of law
14 standard. Under de novo review, the Board may take new evidence and is not limited to the

15 record below. Furthermore, in reviewing that record the Board is not required to find that the

16 local government's interpretation of its master program constitutes an abuse of discretion or is

17 somehow arbitrary or capricious. The Board is free to substitute its interpretation for that of the

18 local government. The error of law standard has been applied by courts in reviewing the

19 interpretation of a shoreline master program. Jefferson County v. Seattle Yacht Club, 73 Wn.

20 App. 576, 588-89, 870 P.2d 987 (1994).

21
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER - CONCURRENCE
SHB NO. 07-021 (3)

1 [5]

2 The Board previously described the concept of “substantial weight” in *Peterson, et al. v.*
3 *The Templin Foundation and Pacific County*, SHB No. 99-4 (1999) at 11, fn 4. The Board
4 stated:

5 “Substantial weight” does not equate to any particular degree of deference – the
6 board is not required to accord any deference to the legal conclusions of a local
7 government. The concept of substantial weight means only that an interpretation by a
8 local government of its own master program is relevant and important for the board to
9 consider in any appeal. The same concept would apply to interpretations by the
10 Department of Ecology of its own regulations including the adoption of master programs.

11 [6]

12 If an agency asserts that its interpretation of an ambiguous statute is entitled to great
13 weight, it is incumbent on that agency to show it has adopted and applied such interpretation as a
14 matter of preexisting agency policy. The construction need not be by formal adoption equivalent
15 to an agency rule, but the agency must prove an established practice of enforcement and not an
16 isolated action. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549
17 (1992); *Sleasman v. City of Lacey*, 159 Wn.2d 639 646-47 (2007).

18 [7]

19 My colleagues appropriately cite to *Gaines v. Employment Security*, 140 Wn. App. 791
20 (2007), for the standard in reaching their decision today. In *Gaines*, the Court of Appeals stated
21 that whether the law is correctly applied to the facts as found by the agency is a question of law

1 that the courts review de novo. The Court then proceeded to quote the Washington Supreme
2 Court's decision in *Overton v. Economic Assistance Authority*:²

3 Where an administrative agency is charged with administering a special field of
4 law and endowed with quasi-judicial functions because of its expertise in that field, the
5 agency's construction of statutory words and phrases and legislative intent should be
6 accorded substantial weight when undergoing judicial review. We also recognize the
7 countervailing principle that it is ultimately for the court to determine the purpose and
8 meaning of statutes, even when the court's interpretation is contrary to that of the agency
9 charged with carrying out the law.

10 In summing up this language, the *Gaines* Court stated, "In other words, courts retain the ultimate
11 responsibility for interpreting a statute or regulation." *Gaines* at 797.

12 [8]

13 After applying the standards outlined above, my colleagues afford the County's
14 interpretation of its shoreline master program little weight. I agree that under this standard the
15 County's interpretation is not entitled to much weight. For the reasons set forth below, I still
16 believe that the County's interpretation of whether a conditional use permit is required is correct.

17 [9]

18 Requirement for a Conditional Use Permit

19 The County required a shoreline conditional use permit because floating structures were
20 being used on the site and because the County found Mr. Marnin's wholesale sales of oysters to
21 distributors in Seattle and elsewhere to be commercial activity rather than aquaculture. (County

² 96 Wn.2d 552, 555, 637 P.2d 652 (1981) (citations omitted).

1 Ex. 1). Under the MSCMP, cottage industries are required to obtain a shoreline conditional use
2 permit. (MCC 17.50.060).

3 [10]

4 My colleagues point out that this case is apparently the first time Mason County has
5 imposed the commercial designation on an aquaculture operation within the County. They also
6 correctly state that in the absence of a long standing and consistent position on the interpretation
7 of its regulations governing aquaculture, the County's analysis is not entitled to the same
8 measure of weight that it would be given if the County had a well-established regulatory history
9 on the topic. *See, Gaines v. Employment Sec.*, 140 Wn. App. 791, 796, 166 P.3d 1257 (2007).
10 Although the County's interpretation should only be afforded limited weight, I believe that the
11 County's interpretation is still correct because it best gives effect to the intent and purpose of the
12 Mason County Shoreline Master Program. *See Morris v. Blaker*, 118 Wn.2d 133, 143, 821 P.2d
13 482 (1992) (holding that statutes shall be interpreted in a manner that best advances the
14 perceived legislative purpose.)

15 [11]

16 My colleagues cite to *Fisheries v. Mason County*, SHB 91-33 (1992), *Jamestown Klallam*
17 *Tribe et. al. v. State of Washington, Department of Natural Resources et. al.*, SHB Nos. 88-4/5
18 (1989) (Order on Motions for Summary Judgment), and *Cruver v. San Juan Cy., Webb*, SHB
19 202 (1976)³, to reach the conclusion that the activities on this site are properly governed by the
20 aquaculture regulations, rather than as commercial activities. "The activities Mr. Marnin

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³ Page 22, ¶ 9.

1 conducts on the property are aquaculture practices such as tending the live oysters growing on
2 the tidelands, tending those growing in constructed cages and tending those growing in mesh
3 bags. He also sorts the live oysters. *These activities do not lose their nature as aquaculture*
4 *practices based on the origin of the oysters or the length of time the oysters are present on his*
5 *tidelands.”* P. 21, ¶ 8. (emphasis added).

6 [12]

7 The *Cruver* decision, which the Board cites as the principle authority in the other two
8 decisions, involved the production of oysters on molded plastic trays that were moved to
9 different portions of a 28-acre site. The analogy has been made that aquaculture is like “growing
10 and harvesting a crop, akin to agriculture, the step before wholesale.” *Jamestown Klallam Tribe*
11 *at 5.* All of the oysters in the *Cruver* decision were raised and harvested on that particular tract.
12 In the present case, however, the oysters brought in for wet storage *have already been*
13 *harvested.*⁴

14 [13]

15 For state business and occupation tax purposes, an “agricultural product” is defined to
16 include aquaculture. A “farmer” is defined under that same statute to mean “any person engaged
17 in the business of growing, raising, or producing *upon the person’s own lands or upon the lands*
18 *in which the person has a present right of possession,* any agricultural product to be sold. RCW
19 82.04.213 (emphasis added). Mr. Marnin buys his shellfish for wet storage from *harvesters*, who
20 harvested the shellfish from other beaches. MCC 17.50.040 defines commercial development as:

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⁴ Both the *Fisheries* and the *Jamestown Klallam Tribe* decisions involved net pens and are not applicable here.

1 “The primary use is for retail or wholesale trade or other business activities.” Mr. Marnin is not
2 acquiring shellfish from other properties in order to further grow this shellfish; he acquires this
3 shellfish for the purpose of selling this as quickly as he is able. Indeed, the Hearing Examiner’s
4 restriction of wet storage to a single day was based on Mr. Marnin’s testimony at that level that
5 the outside product is frequently sold within 24 hours.

6 [14]

7 The argument that the oysters “are still growing” during the short time they are in wet
8 storage is not persuasive. A person who buys truckloads of apples from another source with the
9 intent of reselling them for consumption is not the grower of those apples – even if they are still
10 ripening in the bins.

11 [15]

12 My colleagues attempt to justify their decision regarding the commercial nature of this
13 enterprise by stating, “Mr. Marnin does not transact oyster sales at the site in question. He has
14 no retail outlet, and he does not provide oysters to wholesale customers at the property. Instead,
15 he transports all the oysters to off-site wholesale distributors in a truck” P. 21, ¶ 8. It is
16 irrelevant whether it is a buyer’s truck or Mr. Marnin’s truck that takes the product to its eventual
17 destination. The fact is that there are impacts to the neighbors from the shellfish sales, and much
18 of this shellfish is not raised and harvested by Mr. Marnin. Mr. Marnin insists that he does not
19 make retail sales. Under the tax code, a sale is either at retail or wholesale if not otherwise
20 exempted. RCW 82.04.060 (“Sale at wholesale” ... means: (1) Any sale ... which is not a sale at
21 retail.”) Mr. Marnin has a wholesale fish dealer license issued by the Washington Department of

1 Fish and Wildlife. County Ex. 24. He is clearly engaged in selling oysters not harvested from
2 his beach at wholesale.

3 [16]

4 A statute should be read to give each word and clause effect so no part is rendered
5 meaningless or superfluous. Hangartner v. Seattle, 151 Wn.2d 439, 451 90 P.3d 26 (2004). In
6 interpreting the definition of aquaculture under MCC 17.50.060, I don't believe my colleagues
7 adequately provide a meaning to the phrase "Excluded from this definition are related
8 commercial or industrial uses such as wholesale and retail sales, or final process and freezing."
9 This exclusion within the definition recognizes that commercial wholesale or retail sales, which
10 are related to the aquaculture activity, should nonetheless be excluded from the definition of
11 aquaculture. It is therefore inappropriate for the Board to rely upon the definition of aquaculture
12 practices that define certain aquaculture activities as a basis for its analysis. Mr. Marnin is
13 purchasing shellfish from commercial harvesters for the purpose of selling them to others. This
14 constitutes a commercial wholesale activity that triggers the exemption from the definition of
15 aquaculture. Because MCC 17.50.040 defines a cottage industry as "small scale commercial or
16 industrial activities on residential properties", I believe that this was correctly applied to Mr.
17 Marnin's operation. The County's decision to require a conditional use permit was therefore
18 appropriate in this case.⁵

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21 ⁵ My colleagues cite to Attorney General Opinion 2007, No.1. This AGO also stated that conditional use permits
may be used to manage aquaculture if the shoreline master program requires it. County Ex.23.

1 [17]

2 It may well be that the standards within the aquaculture industry have changed and that
3 successful businesses rely upon the delivery of product from other harvesters that needs to be
4 wet stored. Changed industry standards do not obviate the language in the Mason County
5 Shoreline Master Program. If wet storage of shellfish harvested from other beaches should be
6 exempt from obtaining a conditional use permit, that remedy should be provided by an
7 amendment to the shoreline master program rather than trying to interpret language out of its
8 provisions.

9 For these reasons, I respectfully CONCUR in this decision.

10 DATED this 14th day of January 2008.

11 **SHORELINES HEARINGS BOARD**

12 **WILLIAM H. LYNCH, MEMBER**
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