BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE SAN JUANS, Petitioner, v. SAN JUAN COUNTY, and JOHN AND BARBARA WOODMAN Respondents.	SHB NO. 09-010 ORDER GRANTING MOTIONS TO DISMISS

This matter comes before the Shorelines Hearings Board (Board) on the Respondents' Motions to Dismiss this appeal filed by Petitioner Friends of the San Juans (FOSJ). FOSJ challenges a shoreline substantial development permit (SSDP) for a bulkhead extension issued by San Juan County (County) in accordance with a prior decision by the Board.

Attorney Kyle A. Loring represents Friends of the San Juans in this appeal. Attorney Stephanie Johnson O'Day represents the Woodmans. Deputy Prosecuting Attorney Jonathan W. Cain represents San Juan County. Board members Bill Lynch, presiding, Andrea McNamara Doyle, Chair, and D. E. "Skip" Chilberg, Member, reviewed and considered the pleadings and record pertinent to the motions in this case, including the following:

1. Woodman's Motion to Dismiss, with attached Exhibits A – G;
2. Declaration of Lee McEnery;
3. Declaration of Stephanie O'Day, with attached Exhibits A – C;
4. Petitioners Friends of the San Juans' Memorandum in Opposition to Respondent Woodman's Motion to Dismiss

5. San Juan County's Joinder and Motion to Dismiss;

6. Declaration of Lynda Guernsey, with attached Exhibits A & B;

7. Petitioner Friends of the San Juans' Motion to Strike San Juan County's Motion to Dismiss;

8. Woodmans' Reply to Friends of the San Juans' Response to Motion to Dismiss;

9. Petitioner Friends of the San Juans' Memorandum in Opposition to Respondent San Juan County's Joinder and Motion to Dismiss;

10. Declaration of Kyle A. Loring in Support of Petitioner Friends of the San Juans' Opposition to Respondent San Juan County's Joinder and Motion to Dismiss;

11. San Juan County's Reply on Motion to Dismiss.

BACKGROUND

On April 15 and 16, 2009, the Shorelines Hearings Board[1] held a hearing in the matter of *Woodman v. San Juan County*, SHB No. 08-032, in Friday Harbor, Washington *(Woodman I)*. On May 13, 2009, the Board issued its decision on the merits, which reversed the County's denial of the Woodmans' application for a shoreline substantial development permit (SSDP), and remanded the Woodmans' application to the County for issuance of an SSDP consistent with the Board's decision. The Board required the addition of two conditions to the Woodmans' SSDP as part of its Order. *Woodman, SHB No. 08-32 at 18-19.*

The San Juan County Hearing Examiner issued a decision on July 2, 2009, approving the Woodmans' SSDP with conditions, including the conditions set forth in the Board's Order. The Hearing Examiner's decision incorporates the Board's Order by reference. On July 22, 2009, the

[1] Pursuant to the authority of RCW 90.58.185, this case was heard by a three-member panel of the Board.

new permit with the Hearing Examiner's decision was sent to the Department of Ecology. *Guernsey Decl., Exs. A & B.* FOSJ filed a petition for review with the Board on July 7, 2009, challenging the County's issuance of the SSDP to the Woodmans. FOSJ asserts that the permit does not comply with either the Shoreline Management Act or the San Juan County Master Program. Counsel for the Petitioner stated during the Pre-Hearing Conference[2] that FOSJ is making no assertion that the SSDP issued by the County does not conform to the Board's May 13, 2009 Order. Both the Woodmans and San Juan County filed Motions to Dismiss this appeal.

ANALYSIS

The Woodmans and San Juan County both filed motions for dismissal, which were accompanied by exhibits. If the Board considers matters outside the pleadings, the motion is treated as one for summary judgment. CR 12(c). Accordingly, we address these motions as being for summary judgment. Summary judgment is a procedure available to avoid unnecessary trials where formal issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State,* 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution.

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*

[2] The pre-hearing conference in this matter was held on July 30, 2009, was limited to establishing a briefing schedule for the motions to dismiss.

Denver, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating that material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), *reconsideration denied* (1991).

The Board has jurisdiction over the subject matter and the parties. RCW 43.21B.110. The Board reviews the issues raised *de novo* and the burden of proof is on the appealing party. WAC 371-08-485.

Appeals of Board decisions are to superior court. Reissued permits are subject to the law of the case doctrine.

The Woodmans and San Juan County request the Board to grant their motions for dismissal. They contend that if FOSJ disagrees with the Board's decision in *Woodman I*, the proper remedy is to appeal that decision to superior court. WAC 461-08-570 requires a petition for review of a final order to be filed in superior court within 30 days of the date of the Board's issuance of the final order.

FOSJ contends that the Shorelines Management Act provides that any person aggrieved by a decision granting, denying, or rescinding a shoreline permit may appeal that decision to the Shorelines Hearings Board. *See* RCW 90.58.180(1). FOSJ asserts that its members are aggrieved by the reissued permit, and that the Shorelines Management Act is supposed to be construed liberally to meet its objectives and purposes. *Buechel v. Department of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994). FOSJ also asserts that it must be afforded a full and fair opportunity to present its case, and that failure to provide this opportunity violates public policy. FOSJ contends that the County omitted several key pieces of evidence in presenting its defense

of the County's denial of the permit in *Woodman I*, and that the FOSJ should have an opportunity to remedy these omissions and avoid substantial impacts to local marine ecosystems. *FOSJ's Memorandum in Opposition to San Juan County's Joinder and Motion to Dismiss, at 3-4.* FOSJ also insists that it was not required to intervene in the prior proceeding before the Board.

The law of the case doctrine generally prohibits the reconsideration of issues which have been decided by the same court, or a higher court, in the same case. This doctrine is applicable if there was a hearing on the merits, and there are no material changes in the facts since the prior appeal. The purpose of this doctrine is to promote the finality and efficiency of the judicial process. It also operates to protect the settled expectations of the parties, to insure the uniformity of decisions, and to maintain consistency during the course of a single case. 5 Am. Jur. 2d *Appellate Review* §§ 566-574 (2007); 2A Washington Practice, *Rules Practice*, §§ 25-27 (6th ed. 2004); 14A Washington Practice, *Civil Procedure*, § 35.55 (1st ed. 2003).

The law of the case doctrine is a discretionary, rather than a mandatory, doctrine. *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988) (citing *Greene v. Rothschild*, 68 Wn.2d 1, 402 P.2d 356, 414 P.2d 1013 (1965). Reconsideration of an identical legal issue is appropriate when the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice. *Folsom*, 111 Wn.2d at 263-264. The doctrine applies only to those questions that were actually decided in the initial holding, but may include those decisions made both explicitly and implicitly. *Greene*, 68 Wn.2d at 3. Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Washington Law Review 805 (1985). Subsequent to the *Greene* decision, the law of the case doctrine was

adopted as a Rule of Appellate Procedure (RAP) that set forth the principles which may affect the scope of appellate review. RAP 2.5(c). Trautman, *supra*.

In *Woodman I*, after weighing the testimony and evidence from the hearing, the Board made specific findings and conclusions regarding the impact of the bulkhead to surf spawning habitat and to coastal processes, as well as the feasibility of alternatives to extension of the bulkhead. The Board concluded that based on the facts present in this case, the proposed bulkhead extension is consistent with County policies. The findings included a determination that the installation of soft armoring could have negative impacts to the beach because it would require a mechanical anchoring system to be installed in the substrate of the beach. The Board also concluded that because the Woodmans' beach is a pocket beach protected on both ends by natural rock outcroppings, the concern regarding potential negative impacts of a bulkhead on other beaches due to wave reflection or sediment transport is not a factor. The Board found, based on expert testimony, that the existing bulkhead had not changed the substrate of the beach since it was installed in 2004, so the extension of the bulkhead was not likely to have a negative effect on the beach itself or on the natural coastal processes in the vicinity. In addition, the Board found that the extension of the existing bulkhead will be located landward of both the OHWM and the MHHW, and therefore will not be built on smelt spawning habitat or impact smelt spawning. *Woodman,* SHB No. 08-032 at FOF 18-23.

With the exception of the issue of cumulative effects, FOSJ would have the Board revisit the same findings and conclusions listed above on the basis that additional evidence could have been introduced on these points. A full and fair opportunity to litigate these issues was provided to the parties in the prior case, and there are no material changes in the facts since the prior

appeal. FOSJ raises the issue of cumulative effects emanating from the Board's prior decision. Although cumulative effects were not specifically addressed by the Board in the prior decision, cumulative effects are not a specifically listed factor that must be met for the issuance of a SSDP. *Roller v. Pierce Co.*, SHB No. 06-016 (2006) at COL 9. When certain factors are present, the Board will look at the potential cumulative effects arising from the granting of a SSDP. *May v. Robertson*, SHB No. 06-031 (2007); *Fladseth v. Mason County*, SHB No. 05-026 (2007); *McCauley v. Mason County*, SHB No. 06-033 (2007). One of the key factors listed in the Board's decision in *Fladseth* for when a cumulative effects analysis could be triggered by a SSDP, is whether shorelines are able to provide their natural functions as shorelines. In *Woodman I*, the Board expressly found the extension of the bulkhead was not likely to have a negative effect on the beach itself or on the natural coastal processes in the vicinity. *Woodman*, SHB No. 08-032 at 6. The factors listed in the *Fladseth* decision are not present in this case. Furthermore, the findings and conclusions in the prior case emphasized specific aspects of the Woodmans' pocket beach, and do not lend themselves to a broad interpretation of that decision. Therefore, the Board does not believe that the lack of specific findings regarding cumulative effects in the prior decision should prevent application of the law of the case doctrine to this appeal.

Although the law of the case doctrine generally applies only against those who were parties to the same case when the prior decision was rendered,[3] the Washington Supreme Court has recognized that this common law doctrine is flexible. *Greene, supra*. The FOSJ participated

[3] 5 Am. Jur. 2d § 571.

in the prior appeal at the County level, and had actual notice of the County's decision and the Woodmans' appeal to the SHB. But FOSJ chose not to participate in the appeal before the Board, either as a party or an intervenor. Members of FOSJ were also present during the course of the Board's hearing. *Woodmans' Reply to FOSJ Response*. This is not a situation where FOSJ was unaware of the proceeding or unaware of the legal and factual case being presented by the County in defense of the permit denial. WAC 461-08-435(2) authorizes the presiding officer to grant a petition for intervention by any person *at any time*, and the Board routinely grants requests to intervene by individuals and groups demonstrating an interest in the action consistent with CR 24 (providing the standards for intervention as a matter of right and permissive intervention).

In 1995, the Legislature reduced the appeal period for shoreline appeals from 30 days to 21 days and imposed a 180-day deadline from the date of filing an appeal for the Board to issue its decision.[4] Through this action the Legislature strongly indicated its desire for finality and efficiency in the shorelines hearings process. Application of the law of the case doctrine in this case is consistent with the strong public policy in favor of finality in land use decisions. Individuals or groups who fail to intervene in a shoreline appeal to protect their interests do so at their own risk. FOSJ was certainly not required to intervene in *Woodman I*, but they relied on the County to protect their interest in the denial of the permit at their peril, and cannot be heard now to complain that the County failed to present the right quality or amount of evidence.

[4] *See Eagles Roost, Inc. v. San Juan County*, SHB No. 96-47 (1997) (Concurrence) (Discussing changes to RCW 90.58.180.)

The Board does not find its prior decision to be clearly erroneous, or that a manifest injustice would result if its prior decision stands. The Board also concludes that the application of this doctrine to this case will also protect the settled expectations of the other parties and will help maintain consistency during the course of this case. In addition, this doctrine is consistent with previous Board decisions barring review of successive permit applications unless there is a substantial change in circumstances. These decisions were based upon the failure to appeal a final judgment. *Yale Estates Homeowners Association v. Cowlitz County*, SHB 03-012 (2003) (Order Denying Reconsideration and Modifying Opinion); *Rossellini v. City of Bellingham*, SHB No. 08-003 (2008) (Findings of Fact, Conclusions of Law, and Order) at 22-24. The Board applies the law of the case doctrine to this appeal.

No new appeal right was created by the re-issuance of the permit decision.

FOSJ asserts that it is aggrieved by the County's re-issuance of the permit decision, and that it may therefore appeal under RCW 90.58.180(1). Respondents counter that WAC 173-27-130(10), coupled with the Board's decision in *Save a Valuable Environment v. City of Bothell*, SHB No. 85-39 (1986) (Findings of Fact, Conclusions of Law, and Order) (SAVE), precludes FOSJ's appeal on the basis that the re-issuance of a shoreline permit is a clerical act and not a substantive decision subject to appeal. In essence, they argue that FOSJ is aggrieved by the Board's decision in *Woodman I*, not the clerical act of carrying out the Board's order.

WAC 173-27-130(10) provides that when a project has been modified in the course of review proceedings, the local government is required to reissue the permit accordingly and submit a copy of the reissued permit and supporting documents to the Department of Ecology for completion of the file on the permit. It further states "*The purpose of this provision is to assure*

that the local and department files on the permit are complete and accurate and not to provide a new opportunity for the appeal of the permit."

In *SAVE*, the Board concluded that the re-issuance of a permit is legally distinct from the granting of the permit in the first place. The Board determined that the re-issuance of a permit is a clerical act, and that the appeal right granted under RCW 90.58.180 does not apply to re-issued permits. Under these circumstances, the Board determined that its review power is limited to the sole issue of whether a re-issued shoreline permit is consistent with the Board's final order.

The Board agrees with the Respondents' position. The plain language of WAC 173-27-130(10) clearly articulates the reason for local governments to re-issue a permit decision, and it specifically states that no new appeals are authorized through this action. It would be inappropriate for the Board to read an exception into this rule where none exists and there is no ambiguity in its language. In an unambiguous statute, words are given their plain and obvious meaning. *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002). The Board likewise rejects FOSJ's attempts to distinguish *SAVE*. Although Petitioners in *SAVE* were parties to the original action that granted the permit, FOSJ could have intervened in this case. FOSJ's failure to intervene before the Board when it participated in the underlying appeal is contrary to public policy encouraging finality in land use decisions. If the Board accepted FOSJ's appeal and rendered a decision contrary to its decision in *Woodman I*, what would prevent a neighbor who was not a party to either appeal from initiating yet another appeal on the basis that they had additional factual evidence they believed the Board should consider demonstrating that the bulkhead would somehow provide a benefit to their property?

Petitioner has presented no basis on which the Board must revisit its findings or conclusions in *Woodman I* regarding the Woodman bulkhead application's consistency with the Shoreline Management Act and the San Juan County Master Program, and we decline to do so. The Board's prior decision may only be reviewed by a superior court pursuant to RCW 90.58.180(3) and the Administrative Procedures Act, RCW 34.05. The Motions to Dismiss this appeal are appropriately granted.

ORDER

The Board GRANTS the Woodmans' and San Juan County's Motion to Dismiss this appeal.

SO ORDERED this 29th day of September, 2009.

SHORELINES HEARINGS BOARD

WILLIAM H. LYNCH, Presiding
ANDREA McNAMARA DOYLE, Chair
D.E. "Skip" CHILBERG, Member